



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS APPLICATION NO. 344 OF 2010**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW**

**IN THE MATTER OF: CONSTITUENCY DEVELOPMENT FUND ALLOCATION**

**IN THE MATTER OF: SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA**

**IN THE MATTER OF: ORDER LIII OF THE CIVIL PROCEDURE RULES UNDER THE CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA**

**IN THE MATTER OF: SECTIONS 4, 9 & 19 THE CONSTITUENCY DEVELOPMENT FUND ACT NO. 10 OF 2003**

**ONSANDO**

**OSIEMO.....APPL  
ICANT**

**VERSUS**

**THE ATTORNEY**

**GENERAL.....1<sup>ST</sup>  
RESPONDENT**

**THE MINISTER OF STATE FOR PLANNING, NATIONAL DEVELOPMENT AND VISION  
2030.....2<sup>ND</sup> RESPONDENT**

**THE MINISTER FOR  
FINANCE.....3<sup>RD</sup> RESPONDENT  
THE CONSTITUENCY DEVELOPMENT FUND**

Ex-parte

RULING

**Onsando Osiemo**, the ex parte applicant, hereinafter referred to as “**the applicant**”, filed an application dated 8<sup>th</sup> December, 2010 by way of a Notice of Motion brought under **Sections 8 and 9** of the **Law Reform Act**, **Sections 4, 9 and 19** of the **Constituency Development Fund Act Number 10 of 2003**, **Sections 201, 202 and 203** of the **Constitution**, **Order LIII** of the **Civil Procedure Rules** and **Section 1A and 3A** of the **Civil Procedure Act Cap 21 Laws of Kenya**. The applicant seeks the following orders:

“(a) An order of certiorari do issue to bring to this court the respondent’s decision dated 5<sup>th</sup> November, 2010 directing the 4<sup>th</sup> respondent to apportion the Constituency Development Fund in the sum of Kshs.14.283 Billion for the financial year 2010/2011 in terms of the breakdown annexed thereto using the 2005/2006 constituency poverty estimates against the 2009 population census for purposes of being quashed.

(b) An order be granted to the applicant to apply for an order of prohibition directed to the 3<sup>rd</sup> and 4<sup>th</sup> respondents not to proceed with the disbursement of the sum of Kshs.14.283 Billion for the present quarter or any future disbursements towards CDF for the financial year 2010/2011 on the basis of the apportionment by the 2<sup>nd</sup> respondent in his decision dated 5<sup>th</sup> November, 2010 annexing a breakdown using the 2005/2006 constituency poverty estimates against the 2009 population census.

(c) An order mandamus do issue directed to the 2<sup>nd</sup> respondent to issue a fresh apportionment for the implementation by the 4<sup>th</sup> respondent of the sum of Kshs.14.283 Billion already set aside for the CDF by the 3<sup>rd</sup> respondent for the financial year 2010/2011 on the basis of the Kenya Integrated Household Budget Survey produced in 1997 as has been applied in the preceding financial years unless until a fresh and more objective survey in terms has been carried out through the Kenya National Bureau of Statistics on the current Constituency Poverty Indices both at the national and constituency levels.

(d) That the costs of this application be provided for.”

The application was supported by a statutory statement and an affidavit sworn by the applicant.

In his affidavit the applicant stated, *inter alia*, that it is the responsibility of the 2<sup>nd</sup> respondent to allocate the Constituency Development Fund, hereinafter referred to as “**CDF**”, for each constituency and the allocation should be in compliance with **Section 19(1)** of the **Constituency Development Fund Act No. 10 of 2003**, hereinafter referred to as “**the Act**” which states as follows:

“**19(1) The budget ceiling for each constituency shall be –**

(a) three quarters of the amount specified in Section 4(2) (a) divided equally among all

constituencies; and

**(b) an amount equal to quarter the amount specified in Section 4(2) (a) divided by the national poverty index multiplied by the constituency poverty index.”**

The applicant further stated that the parameters for the allocation of CDF by the 2<sup>nd</sup> respondent must therefore be determined by mandatory surveys to be carried out by the Kenya National Bureau of Statistics under the auspices of the 2<sup>nd</sup> respondent to establish:

**(a) the population of the constituencies vis a vis the overall national population, which data must be contained in the Kenya population and housing census;**

**(b) the constituency poverty index vis a vis the national poverty index which is a measure of living standards based on a head count of poor people per constituency and nationally.**

He stated that the last population census was carried out in the year 2009 and the last poverty index survey in the year 2005. To ascertain the poverty index either at the national or constituency level, the actual head count of the people must be carried out which is then divided by the conclusive and actual population, the applicant stated.

The applicant further stated that the quantum of the annual CDF allocation in any financial year for each of the 210 constituencies primarily depends upon the latest and actual study of each constituency's poverty index vis-a-vis the national poverty index which indices are not static and consequently must be reflective of and dependent upon the current statistics. The 3<sup>rd</sup> respondent had allocated a sum of **Kshs.14.283 Billion** towards the CDF and has directed the 4<sup>th</sup> respondent, vide a letter dated 5<sup>th</sup> November, 2010 to implement the apportionment of the said sum to each of the constituencies in terms of a breakdown annexed thereto using the 2005 constituency poverty indexes against the 2009 population census.

The applicant contended that in deciding the quantum of CDF to be disbursed to each constituency for the current year 2010/2011, the 2<sup>nd</sup> respondent ought to have carried out through the Kenya National Bureau of Statistics, independently or together with its 2009 population census, a survey establishing the constituency poverty indices so as to comply with the mandatory stipulation of **Section 19(1)** of the **Act**. That despite carrying the 2009 population census the 2<sup>nd</sup> respondent failed, ignored and refused to carry out a survey to establish the current constituency poverty indices that would be reflective of the latest poverty indices both at the constituency and national level for the purposes of distribution of CDF as per the requirements of **Section 19(1)** of the **Act**.

The applicant took issue with the 2009 population census in respect of which the 2<sup>nd</sup> respondent had stated, *inter alia*, that:

**“Data from eight (8) Districts, namely Mandera Central, Mandera East, Mandera West, Lagdera, Wajir East, Turkana Central, Turkana South and Turkana North, are anomalous, and exhibit population growth rate that deviate significantly from the patterns portrayed not only by the rest of the country but by their respective neighbouring Districts as well”.**

In the applicant's view, as regards the eight Districts aforesaid, there can be no suitable data for purposes of determining the quantum of the CDF allocation.

The applicant stated that in failing to carry out a current survey to establish the poverty indices reflective of the latest and current indices on poverty both at the constituency and national levels, the 2<sup>nd</sup> respondent had failed to carry out his public duty as required by **Section 19(2)** of the **Act** which provides as follows:

**“(2) The Minister shall table in parliament a schedule showing the ceiling for each constituency, which shall be determined in accordance with subsection (1)”.**

The applicant stated that the 2<sup>nd</sup> respondent is merely required to table the schedule before parliament for it to note but there is no provision for debate by parliament on the same.

Regarding the 2005 constituency poverty indices, the applicant said that they are not only outdated but also not reflective of the current national and constituency poverty levels and therefore cannot be used as a parameter for disbursements of CDF. He added that the 2005/2006 constituency poverty indices have previously never formed a basis for allocation of CDF by the 2<sup>nd</sup> respondent and were not used for the financial years 2007-2008, 2008-2009, 2009-2010 as they reflected very remarkable changes in the poverty indices of some constituencies without any intervention and which was not reflective of the actual situation on the ground, hence the 1997 constituency poverty indices were used for the aforesaid years.

In light of the foregoing, the applicant added, it is mischievous on the part of the 2<sup>nd</sup> respondent and an abuse of its responsibility to purport to use the skewed 2005 constituency poverty indices which have never been used over the preceding financial years against the anomalous 2009 population census results as a basis for the distribution of CDF to the 210 constituencies for the 2010/2011 financial year.

Apart from the aforesaid issues relating to distribution of the CDF, the applicant was also concerned that the skewed allocation is likely to form the basis of allocation of other devolved funds as envisaged under the current constitution. The applicant verily believes the actions of the 2<sup>nd</sup> respondent is a violation of the provision of the constitution which gives every citizen a right to equitable sharing of national revenue based on Chapter 12 of the Constitution.

On 30<sup>th</sup> November, 2010 the court granted leave to the applicant to apply for the orders sought in his application. Although in the application for leave the applicant had urged the court to order that grant of the leave do operate as a stay of the 2<sup>nd</sup> respondent's decision dated 5<sup>th</sup> November, 2010 directing the 4<sup>th</sup> respondent to apportion and disburse the Constituency Development Fund in the sum of Kshs.14.283 Billion in terms of the breakdown provided by the 2<sup>nd</sup> respondent, the court held that it was not in the interest of justice to order stay of distribution of the entire CDF when the dispute regarding the mode of distribution was in respect of one quarter of the fund. The court therefore directed that in view of the issues raised by the applicant, pending hearing and determination of the application distribution of 25% of the Kenya Shillings 14.283 Billion be stayed. The court further directed that all parties be served forthwith and the matter be mentioned on 14<sup>th</sup> December, 2010 for purposes of fixing hearing dates and/or issuing further directions.

All the respondents were duly served with the applicant's application. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not enter appearance and neither did they file any affidavit in response to the applicant's affidavit. On 30<sup>th</sup> of March 2011 Messrs Rachier & Amollo Advocates filed a notice of appointment of advocates for the 4<sup>th</sup> respondent. On 5<sup>th</sup> May, 2011 the 4<sup>th</sup> respondent filed a replying affidavit as well as a notice of preliminary objection. The replying affidavit was sworn by **Agnes Odhiambo**, the 4<sup>th</sup> respondent's Chief Executive Officer.

In the said affidavit the 4<sup>th</sup> respondent stated, *inter alia*, that whilst **Section 19(2)** of the **Act** provides for the national and constituency poverty index it does not mandate that the same be current or otherwise. The section does not also state that it is the Kenya Bureau of Statistics that is charged with the responsibility of conducting the population survey. The Act is silent on who should conduct the same. The 4<sup>th</sup> respondent further stated that the complaints made by the applicant are of a political and policy nature and therefore not justiciable. Further, the 4<sup>th</sup> respondent contended that the matters raised by the applicant are the subject of constitutional interpretation but had improperly been brought as a judicial review obligation.

The 4<sup>th</sup> respondent further contended that **Section 52** of the **Act** precludes this court's jurisdiction in matters of this nature by providing for arbitration in the first instance. That is also in line with **Article 159(2) (c)** of the **Constitution** which promotes alternative dispute resolution. Further **Article 215(1)** of the **Constitution** creates the Commission on revenue allocation to which the issues before the court ought to have been referred, the 4<sup>th</sup> respondent added. The deponent further stated that the issues raised by the applicant are for legislative and parliamentary determination as opposed to judicial interpretation.

Regarding the methodology for allocation of the CDF, the 4<sup>th</sup> respondent stated that it is justified in using the 2005/2006 integrated household survey and not the 1997 survey because the former is the most current, relies on modern methods of sampling and covered a wider scope as opposed to the latter which is obsolete and based on levels of gross domestic products which had changed by 2005. Ms Odhiambo further stated that the carrying out of a survey is an expensive exercise that requires billions of shillings and the respondents have to date not carried out any further survey as there has been no budgetary allocation for the same. With respect to the census issue, she stated that the cancellation of the results of eight districts was not meant to isolate or prejudice their inhabitants in any way. As far as the 4<sup>th</sup> respondent is concerned, the results of the census are still effective and have not been cancelled. They are therefore the only basis applicable for allocation of the CDF.

The 4<sup>th</sup> respondent further stated that failure to disburse the CDF will greatly prejudice and adversely affect service delivery and development in the constituencies.

The notice of preliminary objection raised four grounds which are as follows:

**“1. The application before this court offends the doctrine of separation of powers and does not lie.**

**2. The entire application is premature and is barred by the provisions of Section 52 of the Constituency Development Fund Act, No. 10 of 2003. Consequently, this honourable court lacks jurisdiction to entertain the suit.**

**3. The application seeks constitutional interpretation without invoking the appropriate procedures for moving the court.**

**4. The application raises and relies on social-political views and aspirations which are not justiciable”.**

On 11<sup>th</sup> May, 2011 when this application came up for hearing the advocate for the parties told the court that they were pursuing a out of court settlement and requested that the matter be mentioned on 20<sup>th</sup> May, 2011 with a view to recording a settlement. Come that day the court was informed that the negotiations had collapsed and counsel requested for a hearing date on priority basis. Mr. Mwendwa for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents sought leave to file his clients' replying affidavits as well as submissions. Leave was granted and the same were to be filed within seven (7) days from 20<sup>th</sup> May, 2011. However, by 31<sup>st</sup> May, 2011 when the application was heard the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents had not filed anything.

In his submissions, Mr. Tiego for the applicant stated that the poverty index survey is supposed to be conducted after every five years. The last survey was conducted in 2006 and the 2010/2011 survey was not conducted because Treasury did not provide funds for the exercise. That submission was based on minutes of the Parliamentary Constituencies Fund Committee held on 7<sup>th</sup> July, 2010, a copy whereof was annexed to the applicant's affidavit. For lack of the current poverty index report, the 2<sup>nd</sup> respondent had to rely on the 2005/2006 survey which does not contain up to date information, counsel stated.

Counsel further submitted that the 2009 population census results were not conclusive as the 2<sup>nd</sup> respondent had raised issues regarding the population figures of eight Districts. That population census cannot therefore form the basis for CDF allocation, he stated. He pointed out that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, having failed to file a replying affidavit, cannot challenge the factual position taken by the applicant in his affidavit.

Regarding the 4<sup>th</sup> respondent's contention that **section 19(2)** of the **Act** does not require allocation of the CDF to be based on the current poverty index, Mr. Tiego submitted that the Chairman of the Constituencies Fund Committee had indicated in his report for the 2010 financial year that poverty indices are not static and there was need to take into account changes in poverty levels from time to time. He further submitted that contrary to the averments of Ms Odhiambo, the same report had made it clear that it is the Kenya Bureau of Statistics that conducts the poverty index surveys.

Regarding the 2<sup>nd</sup> respondent's directive as to how the CDF was to be allocated amongst the constituencies, Mr. Tiego again referred to the report on CDF allocations by the Parliamentary Constituencies Fund Committee to the effect that according to **Standing Order 181** the report had been tabled before parliament for noting and the same was not subject to any debate.

Responding to the 4<sup>th</sup> respondent's objection that this application is a constitutional reference disguised as a judicial review application, the applicant's counsel submitted that the applicant had not cited the bill of rights at all. All the applicant desires is intervention of the court by way of quashing the 2<sup>nd</sup> respondent's decision dated 5<sup>th</sup> November, 2010 which was directing the 4<sup>th</sup> respondent to apportion the CDF fund in an improper manner.

Regarding the provisions of **Section 52** of the **Act** that requires all disputes to be referred to the board in the first instance so that where necessary an arbitration panel is appointed by the Minister to consider and determine the same before a party can move to court, Mr. Tiego submitted that it was never the intention of parliament that where the act of the Minister with regard to CDF is being challenged that the complaint be referred to the same Minister, saying that would be tantamount to the Minister being a judge in his own case. In his view, where a person is challenging the Minister's decision the matter can only be handled by the court.

Responding to the 4<sup>th</sup> respondent's argument that the issue raised by the applicant ought to have been referred to the commission on revenue allocation counsel submitted that the proceedings were instituted before that commission was constituted. I agree.

Mr. Mwendwa for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents submitted that the consequences of granting the orders sought by the applicant are very serious as Kenyans will be denied a substantial amount of money which they are entitled to. He further submitted that the respondents had not acted *ultra vires* in any way. He also supported the 4<sup>th</sup> respondent's contention regarding **Section 19(2)** of the **Act** saying that it does not stipulate the kind of index to be applied in allocating the CDF funds.

Mr. Amollo for the 4<sup>th</sup> respondent argued the aforesaid preliminary grounds of objection. He cited, *inter alia*, **Article 94(1)** and **(5)** of the Constitution which grants parliament exclusive authority to deal with the complaints raised by the applicant and he submitted that it is not for the court to determine whether what parliament passed was fair or not. He also referred to **Article 20(5) (c)** of the **Constitution** which states that the court, tribunal or other authority may not interfere with a decision by a state organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion. However, this reference to **Article 20(5) (c)** was not, in my view, made within the context of the application under consideration. That argument can only be raised if the court is considering an application under **Article 43** of the **Constitution** where an applicant is seeking enforcement of any of the economic and social rights guaranteed by the said section and the state claims that it does not have resources to implement the right.

Mr. Amollo further submitted that under **Section 52** of the **Act** the applicant ought to have made his complaint to the 4<sup>th</sup> respondent for its consideration and the Board would then have referred the matter to the Minister to constitute an arbitration panel. It is only if the applicant was dissatisfied with the decision taken that he could have moved the court. Counsel cited the decision of Nyamu J. (as he then was) in **REPUBLIC vs HON. ABDIRAHIM ALI HASSAN & OTHERS, Miscellaneous Civil Application No. 113 of 2008**. In that application the learned judge held that the application violated the statutory dispute resolution provided by the Act and proceeded to strike it out.

The 4<sup>th</sup> respondent's counsel further submitted that the application ought to have been brought as a constitutional reference rather than a judicial review application. Alternatively, the matter ought to have been referred to the Commission on Resource Allocation created by **Article 215** of the **Constitution**. **Article 216** states that the principle function of the commission is to make recommendations concerning the basis for the equitable sharing of revenue raised by the government between the national government and county governments and among the county governments.

Lastly, counsel submitted that the applicant is raising socio-political issues which are not justiciable. He reiterated that parliament was the only institution that can determine issues such as those raised by the applicant. He urged the court to dismiss the application, saying that if the matter is not determined before the end of 2010/2011 financial year the 25% of the CDF will be lost since the Minister for Finance will allocate only 75% of the sum that is supposed to go to the constituencies during the 2011/2012 financial year.

Responding to the last submission, Mr. Tiego for the applicant said that according to **section 10(2)** of the **Act**, all funds allocated to a constituency are cumulative and are carried forward from one financial year to the next one including funds retained in the account or funds which are not utilized for whatever reasons. Such unutilized funds are not returned to the consolidated fund. Counsel further submitted that the applicant did not seek to bar the Minister from releasing the remaining one quarter of the funds to the

4<sup>th</sup> respondent. What the court barred was distribution of that remaining one quarter among the constituencies and as long as the money was with the 4<sup>th</sup> respondent it can be distributed at a later date once the issues raised by the applicant have been properly addressed.

Mr. Tiego added that the applicant was not challenging the role of parliament in approving allocation of CDF. What the applicant is challenging is the executive decision of the Minister to determine the mode of distribution of the 25% of the CDF using unreliable population figures as well as poverty index figures.

This matter was certified urgent way back on 25<sup>th</sup> November, 2010. It was hoped that it would be finalized within one or two months of the said date. Although Mr. Tiego told the court that shortly after grant of leave to commence these judicial review proceedings on 30<sup>th</sup> November, 2010 the court file could not be traced, there is no evidence to that effect. The court had directed that the matter be mentioned on 14<sup>th</sup> December, 2010 but it appears that the mention did not take place. On 5<sup>th</sup> January, 2011 the applicant's advocate wrote to the Deputy registrar and requested that the matter be mentioned for purposes of taking directions. The mention date was fixed for 10<sup>th</sup> March, 2011. I am raising the issue of delay because the matter, having been certified as urgent, and given the public interest involved, the same ought to have been disposed of expeditiously.

This application raises issues of allocation of public finance. **Article 201** of the **Constitution** sets out the principles that guide all aspects of public finance in the Republic. They are as follows:

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

**Section 19** of the **Constituencies Development Fund Act, 2003** stipulates how the CDF is allocated among the constituencies. It is clear that three quarters of an amount of money equal to not less than 2.5%

of all the Government ordinary revenue collected in every financial year is divided equally among all constituencies and the remaining one quarter is divided in accordance with national poverty index multiplied by the constituency poverty index. Once the Minister concerned has complied with the requirements of **Section 19(2) (b)** that is by dividing the one quarter among the constituencies as hereinabove stated, he is required to table in parliament the schedule showing the ceiling for each constituency.

**Section 27(1)** of the **Constituencies Development Fund (Amendment) Act, 2007**, establishes the Constituencies Fund Committee consisting of a Chairman and not more than ten other members of parliament who are not Minister or Assistant Ministers. The functions of the committee are as follows:

**“(a) to determine the allocation and distribution to each constituency, of the amounts collected under Section 4(2) and the utilization of any unspent funds for use by the board under this Act;**

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

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

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

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

**(f) to continually review the framework set out for the efficient delivery of development programmes finances through the Fund; and**

**(g) to carry out other functions relevant to the work of the Fund”.**

From the foregoing, it is clear that under **Section 19(2)** as read with **Section 27(1)** of the **Act**, the Minister is required to table a schedule showing the ceiling for each constituency. The task of allocating the actual amount to each of the 210 constituencies is given to the Minister but he acts with the concurrence of the Constituencies Fund Committee.

The constituency poverty index figures are prepared by the Kenya National Bureau of Statistics, which according to the **Statistics Act, 2006** is the sole custodian of Government statistics.

According to the report of the Constituencies Fund Committee tabled before parliament in November, 2010, the distribution of the 25% was based on the 2005/2006 poverty index survey and the results of the 2009 population and housing census. The committee noted that the 1997 poverty index survey and the 1999 population census which was published in 2005 was not realistic in view of the fact that the figures

therein were prepared many years ago and would be considered discriminatory in light of the new Constitution.

But according to the applicant, the 2009 population and housing census is inconclusive and did not determine the actual population of the country as the data was said to be subject to further verification. He also took issue with the 2005/2006 poverty index survey which he said was skewed. The applicant did not provide details as to how that survey was skewed. His further contention is that the Minister should have used a current survey since the law requires that the poverty index survey be carried out every five years. He blamed the 3<sup>rd</sup> respondent for failing to provide funds for conducting the survey in 2010.

This court must reiterate that in judicial review proceedings its function is not to pronounce itself on the merits of a decision but the decision making process. The applicant stated that the figures that were relied upon by the Minister in allocating the 25% among the 210 constituencies are unreliable for the reasons as stated. Although the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not file a reply to the applicant's affidavit, from the annexures to the applicant's affidavit the court is able to tell how the allocations were made.

But before I say much on the merits or otherwise of the application, I need to consider the preliminary objections that were raised by the 4<sup>th</sup> respondent.

It was argued that the application offends the doctrine of separation of powers and therefore this court ought not to exercise its discretion to determine the same. **Article 1(1)** of the **Constitution** states that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution. **Subsection (2)** thereof recognizes that the people may exercise their sovereign power either directly or through their democratically elected representatives. That sovereign power is delegated to the following State organs:

- (a) **Parliament and legislative assemblies in the county governments**
- (b) **The national executive and the executive structures in the county governments; and**
- (c) **The Judiciary and independent tribunals**

The roles of Parliament and the National Assembly are set out under **Articles 94** and **95**. One of the roles of the National Assembly is to determine the allocation of national revenue between the different levels of government as provided in **Part IV** of **Chapter 12**.

On the other hand, **Article 159** of the **Constitution** states that judicial authority is derived from the people and vests in and shall be exercised by the courts and tribunals established by or under the Constitution. In the exercise of judicial authority the judiciary is subject only to the constitution and the law, it is not subject to the control or direction of any person or authority. See **Article 160(1)**.

It is the function of the judiciary to check administrative excesses of executive decisions by officers of central Government or public authorities which may affect the rights or liberties of citizens. Where any decision is made arbitrarily or without jurisdiction the High Court has power to quash the same. In this case the applicant's contention is that the decision of the 2<sup>nd</sup> respondent directing the 4<sup>th</sup> respondent to

apportion the Constituency Development Fund for the year 2010/2011 using the 2005/2006 constituency poverty estimates and 2009 population census is improper and ought to be quashed. The court has therefore to consider whether the application has any merits. That *per se* cannot be said to be an infringement on the doctrine of separation of powers. In **SSEMWONGERERE & OTHERS vs ATTORNEY-GENERAL [2004] 2 EA**, the applicant petitioned the constitutional court seeking a declaration that the referendum and Other Provisions Act of 1999 was null and void on the ground that parliament had passed it without a quorum. The constitutional court dismissed the petition as incompetent and decided that it had no jurisdiction to entertain the petition. The petitioners appealed to the Supreme Court which allowed the appeal and held that the constitutional court had jurisdiction to decide whether or not the Referendum and Other Provisions Act was passed in accordance with the provisions of the constitution. The petition was referred back to the constitutional court for hearing.

Likewise, this court has a constitutional mandate to determine whether the applicant's complaint is properly premised on law and if so, whether it is the court or parliament which should deal with the complaint.

The second ground of the 4<sup>th</sup> respondent's objection relates to **Section 52** of the **Act**. While I agree that ordinarily all complaints under the Act should first be forwarded to the board so that where necessary an arbitration panel is appointed by the Minister, if the complaint relates to the Minister's decision it is not practical that the matter be handled by the same Minister. It is against the rules of natural justice for a person to appoint judges in his own cause. Given the nature of the matter the applicant was right in filing these proceedings before the court. If it were a dispute or a complaint relating to the operations of a specific Constituency Development Fund Committee or such related issue then the dispute resolution mechanism spelt out by **Section 52** of the **Act** would have to be adopted.

Thirdly, I do not agree with the 4<sup>th</sup> respondent that this application seeks constitutional interpretation without invoking the appropriate procedure for moving the court. If that was the case, the applicant would have been obliged to bring a constitutional reference supported by an appropriate affidavit and perhaps file an application seeking conservatory orders. However, the applicant's view was that orders of certiorari, prohibition and mandamus were the most appropriate given the facts of the matter. Furthermore, **Article 159 (2) (d)** of the **Constitution** requires the court to administer justice without undue regard to procedural technicalities.

Lastly, it is true that the application raises socio-political issues. That *per se* does not mean they are not justiciable. Economic, social and political issues and/or decisions that affect a person's rights as stipulated within the constitution or other laws may be justiciable, depending on the facts of each case. In this matter the applicant's contention is that the mode of allocation of the 25% of the said funds is improper and the reasons for so stating have been advanced. It is for the court to determine whether an issue is justiciable or not. I am of the view that the issues raised are justiciable. It would be a sad day if our courts were to take the position being advocated by the 4<sup>th</sup> respondent that any matter that raises socio-political issues is not justiciable and ought to be thrown out at the earliest opportunity. The Constitution of Kenya, being the supreme law of the land, addresses itself to all manner of issues, including socio-political and economic ones and the same applies to many of our Acts of Parliament. The judiciary is well able to determine the nature of matters that it ought to handle.

I do not find any merit in the preliminary objections raised by the 4<sup>th</sup> respondent and will therefore proceed to consider the propriety of the applicant's application.

I will first consider the issue raised by the applicant regarding the 2009 Kenya Population and Housing

Census. According to a statement issued by the 2<sup>nd</sup> respondent, the 2009 Population Census was the seventh one to be conducted since 1948 and the fifth since independence. It was conducted from the night of 24<sup>th</sup>/25<sup>th</sup> to 31<sup>st</sup> August, 2009. The planning and execution of the exercise was headed by the Kenya Bureau of Statistics on behalf of the Government of Kenya. The theme of the census was “**counting our people for the implementation of Vision 2030**”. The Minister stated:

**“This theme was deemed pertinent in order to respond to the greater demands for statistical information for monitoring the implementation of Kenya’s current development goals and other global initiatives such as the Millennium Development Goals (MDGs). Thus, planning of 2009 KPHC took cognizance of the need to collect a variety of information for monitoring in the achievement of these goals”.**

The cost of the exercise was nearly Kshs.8.4 billion. The population of each constituency was noted. The exercise was generally successful and there is no indication that it was conducted in a sloppy manner. However, the Minister noted that the data from the eight districts aforesaid had certain anomalies. The Minister merely advised that caution be exercised while using the results for the affected districts. That did not in any way imply that the 2009 national population census was altogether unreliable. I do not agree with the applicant’s contention that the data is doubtful and/or worthless as he put it. The fact that the data was said to be subject to further verification in respect of just a few districts does not necessarily imply that it cannot be relied upon in allocation of national resources among the 210 constituencies. There is therefore no basis of quashing the 2<sup>nd</sup> respondent’s decision directing the 4<sup>th</sup> respondent to apportion the constituency development fund using the 2005/2006 constituency poverty estimates against the 2009 population census. Taking all factors into consideration, the 2<sup>nd</sup> respondent was justified in relying on the 2009 population figures.

Turning to the national and constituency poverty indices, it is not in dispute that this is an exercise that is supposed to be undertaken every five years. The last poverty index survey was conducted in the 2005/2006 financial year. A fresh one was supposed to be conducted in the year 2010. That was not done for the reason that Treasury did not remit funds to the Kenya National Bureau of Statistics for purposes of carrying out the exercise. It is not the function of this court to query why the funds were not remitted. The issue for determination is whether using the 2005/2006 poverty index survey and the 2009 population census the 2<sup>nd</sup> respondent together with the Constituencies Fund Committee adopted the right methodology in allocating funds among the 210 constituencies.

The Constituencies Fund Committee stated in its report that the issue was discussed at length with the Minister and all available options were considered. The following scenarios were considered:

- (i) Allocation based on 1997 poverty index survey and 1999 census published in 2005.**
- (ii) Allocation based on 2005/2006 poverty index survey published in 2007 and 2009 population and housing census.**
- (iii) Formula as proposed by the CDF Review Task Force.**

After lengthy discussions the committee unanimously adopted scenario (ii) which was based on allocations using 2005/06 poverty index survey and the results of 2009 population and housing census. The committee gave two reasons for rejecting the other scenarios.

The applicant now prays for, *inter alia*, an order of mandamus to compel the 2<sup>nd</sup> respondent to issue a fresh apportionment of the CDF for 2010/2011 financial year on the basis of the 1997 poverty index survey and not the one conducted in 2005/2006 financial year. The Constituencies Fund Committee had deliberated on that proposal and rejected it because it rightly stated that by doing so it would be “living in the past” and would be considered discriminatory in the light of the new Constitution.

The **Supreme Court Practice, 1997** Volume 53/1-14/16 states that:

**“The court will not however, on a judicial review application act as a “court of appeal” from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body’s jurisdiction, or the decision is wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law the court would, under the guise of preventing the abuse of power be guilty itself of usurping power”.**

I adopt that position in this matter. I have earlier stated that the 2<sup>nd</sup> respondent with the concurrence of Constituencies Fund Committee have the exclusive mandate of allocating constituency development funds among all the 210 constituencies. The court cannot usurp that power. The court can only interfere if it is shown to its satisfaction that the exercise of the said power was done in a way which was contra statute. That was not sufficiently demonstrated by the applicant. Although it is preferable to use the most current national and constituency poverty index, in this case such survey was not conducted in the year 2010 and the Minister was justified in adopting the 2005/2006 poverty index survey since it was the latest. The proposed allocation of the funds is equitable and transparent and I am satisfied that the Minister and the Constituencies Fund Committee did a good job, in the absence of poverty index survey for the year 2010.

In view of what I have stated hereinabove, I find and hold that the orders of certiorari, prohibition and mandamus sought by the applicant are not merited. But having so stated, I must add that if indeed the 3<sup>rd</sup> respondent has not provided the necessary funds to the Kenya National Bureau of Statistics to enable it undertake the current national and constituency poverty index survey he ought to do so as soon as possible because the resultant statistics are necessary in determining the allocation of national resources among all the constituencies in line with the requirements of **Section 19** of the **Constituencies Development Fund Act, 2003**.

The orders which this court had granted on 30<sup>th</sup> November, 2010 are hereby vacated. The 4<sup>th</sup> respondent should proceed to distribute the remaining one quarter of the Kshs.14.283 Billion for the 2010/2011 financial year among the 210 constituencies as allocated by the 2<sup>nd</sup> respondent and the Constituencies Fund Committee.

This being public interest litigation in which the applicant brought to the fore important legal issues it would not be appropriate to condemn him to pay the costs of the proceedings. I order that each party bears its own costs of the application.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF JUNE, 2011.**

**D. MUSINGA**

**JUDGE**

**In the presence of:**

**Nazi – Court Clerk**

**Mr. Ogola for Mr. Tiego for the Applicant**

**Mr. Mwendwa for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents**

**Mr. Amolo for the 4<sup>th</sup> Respondent**