



Kenya Human Rights Commission v County Government of Makueni & 21 others; Council of Governors & 3 others (Interested Parties) (Constitutional Petition E006 of 2024) [2025] KEHC 2196 (KLR) (23 January 2025) (Judgment)

Neutral citation: [2025] KEHC 2196 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CONSTITUTIONAL PETITION E006 OF 2024
RK LIMO, TM MATHEKA & FR OLEL, JJ
JANUARY 23, 2025**

BETWEEN

KENYA HUMAN RIGHTS COMMISSION PETITIONER

AND

COUNTY GOVERNMENT OF MAKUENI 1ST RESPONDENT
COUNTY GOVERNMENT OF MACHAKOS 2ND RESPONDENT
COUNTY GOVERNMENT OF KISII 3RD RESPONDENT
COUNTY GOVERNMENT OF NAIROBI 4TH RESPONDENT
COUNTY GOVERNMENT OF WEST POKOT 5TH RESPONDENT
COUNTY GOVERNMENT OF NYANDARUA 6TH RESPONDENT
COUNTY GOVERNMENT OF NYERI 7TH RESPONDENT
COUNTY GOVERNMENT OF SAMBURU 8TH RESPONDENT
COUNTY GOVERNMENT OF TAITA TAVETA 9TH RESPONDENT
COUNTY GOVERNMENT OF NAROK 10TH RESPONDENT
COUNTY GOVERNMENT OF MERU 11TH RESPONDENT
COUNTY GOVERNMENT OF KERICHO 12TH RESPONDENT
COUNTY GOVERNMENT OF BARINGO 13TH RESPONDENT
COUNTY GOVERNMENT OF LAMU 14TH RESPONDENT
COUNTY GOVERNMENT OF ISIOLO 15TH RESPONDENT
COUNTY GOVERNMENT OF KAJIADO 16TH RESPONDENT



COUNTY GOVERNMENT OF UASIN GISHU	17 TH RESPONDENT
COUNTY GOVERNMENT OF BOMET	18 TH RESPONDENT
COUNTY GOVERNMENT OF LAIKIPIA	19 TH RESPONDENT
COUNTY GOVERNMENT OF MARSABIT	20 TH RESPONDENT
ATTORNEY GENERAL	21 ST RESPONDENT
NATIONAL TREASURY AND PLANNING	22 ND RESPONDENT

AND

COUNCIL OF GOVERNORS	INTERESTED PARTY
CONTROLLER OF BUDGET	INTERESTED PARTY
LAW SOCIETY OF KENYA	INTERESTED PARTY
AFRICA CENTRE FOR OPEN GOVERNANCE	INTERESTED PARTY

Failure by county governments to allocate and or spend at least 30% of their budgets on development declared unconstitutional for infringing on the right to development

The petition challenged the failure of the National and County Governments to allocate at least 30% of their budgets to development. The court held that it was mandatory for the National Government and the County Governments to allocate in their annual budgets and over the medium term, a minimum of 30% of the budget to development expenditure. The court further held that the failure by county governments to allocate, and or spend at least 30% of their budgets on development expenditure was unconstitutional as it infringed the rights of citizens to development and violated the county governments obligation to allocate the maximum of available resources to realise the Bill of Rights.

Reported by Kakai Toili

Constitutional Law – fundamental rights and freedoms – right to development – requirement to allocate 30% of the National and County Governments annual budgets to development - whether failure by the National and County Governments to allocate 30% of their annual budgets to development was unconstitutional for infringing citizens’ rights to development – Constitution of Kenya, 2(1), 19(1) and (3)(b), 24, 43 and 201; Public Finance Management Act (Cap. 412A), sections 107(1) and (2), and 196(7).

Constitutional Law – constitutional petitions – justiciability of constitutional petitions - whether a challenge to the fiscal management of the National and County Governments’ budgetary allocation to development expenditure was justiciable - Constitution of Kenya, articles 23(1) and 165(3)(b).

Statutes – interpretation of statutory provisions – interpretation of section 2 of the Public Finance Management Act - when did the medium-term period referred to in section 2 of the Public Finance Management Act begin to run with respect to county governments – Public Finance Management Act (Cap. 412A), sections 1(2), 2 and 107.

Words and Phrases – justiciability – definition of justiciability - a matter proper to be examined in courts of justice or a question as may properly come before a tribunal for decision - Black’s Law Dictionary 9th Edition.

Brief facts

The petitioner’s case was that the National and County Governments listed therein had failed to allocate or spend the requisite 30% of their budgets on development expenditure as required of them under the Public Finance Management Act (Cap. 412A). The petitioner argued that the trend of non-compliance with fiscal responsibility had been on the rise in total violation of articles 10, 21, 27, 175, 201 and 225 of the Constitution of Kenya. Consequently, the petitioner prayed that the respondents be found culpable for constitutional



violations and be compelled to allocate and spend at least 30% of their budgets on development expenditure over the medium term in the financial year 2024/2025 going forward.

Issues

- i. Whether failure by the National and County Governments to allocate 30% of their annual budgets to development was unconstitutional for infringing citizens' rights to development.
- ii. When did the medium-term period referred to in section 2 of the Public Finance Management Act begin to run with respect to county governments?
- iii. Whether a challenge to the fiscal management of the National and County Governments' budgetary allocation to development expenditure was justiciable.

Relevant provisions of the Law

Public Finance Management Act (Cap. 412A)

Section 1 - Short title and commencement

Subject to Article 116(3) of the Constitution, all provisions relating to county governments under this Act shall come into operation upon the final announcement of the results of the first elections under the Constitution.

Section 107 - County Treasury to enforce fiscal responsibility principles

(1) A County Treasury shall manage its public finances in accordance with the principles of fiscal responsibility set out in subsection (2), and shall not exceed the limits stated in the regulations.

(2) In managing the county government's public finances, the County Treasury shall enforce the following fiscal responsibility principles—

(a) the county government's recurrent expenditure shall not exceed the county government's total revenue;

(b) over the medium term a minimum of thirty percent of the county government's budget shall be allocated to the development expenditure;

Held

1. The term "medium term" was defined by section 2 of the Public Finance Management Act as a period of not less than three years but not more than five years. Section 2 was silent on when that term began so it must be read with provisions of sections 1(2) and 107 of the Act. From the statute, the medium term referred to a period between three and five years. The statute was silent on when that period began to run but the purpose intent by Legislature could be construed from the provisions of section 1(2).
2. The 1st general elections in Kenya under the Constitution of Kenya was held on March 4, 2013. The Public Finance Management Act was enacted in 2012 which meant that going by section 1(2) of the Act, all provisions relating to county governments financial operations as specified under the Act came into operation after the 2013 general elections and upon the attendant establishment of county governments. The medium term referred to under section 2 of the Act implied the period between 2013 to 2018.
3. The medium term with respect to county governments commenced in 2013 and upon their establishment, their first medium term was the 2013 to 2018 period. Upon their establishment, the respective county governments were required by the law to onboard the already existing medium term, which according to the 2nd interested party, Controller of Budget (COB) aligned with Kenya's Vision 2030.
4. The court was prevented from determining an issue when it was too early or simply out of apprehension, hence the doctrine of ripeness. An issue before the court must be ripe through factual perspective. The respondents' contention that the petition filed therein was not ripe or justiciable held no water because the issues raised were pertinent and required determination.
5. The court was obligated to conform to its constitutional mandate beginning at the preamble. The court must also pay homage to the first article which declared the sovereignty of the people and that all sovereign power belonged to the people of Kenya and shall be exercised only in accordance with



- the Constitution. In addition, State organs, in the exercise of delegated power, shall perform their functions in accordance with the Constitution at the national level and at the county level. It was in that spirit that the people delegated the power to manage public resources to specific State agencies in accordance with the Constitution through an Act of Parliament made under article 225 of the Constitution providing for financial control of public funds.
6. In managing the resources, State agencies were required to apply the principles of public finance set out at article 201 of the Constitution which included; openness and accountability, including public participation in financial matters; that the public finance system shall promote an equitable society, the burden and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations, public money shall be used in a prudent and responsible way; and financial management shall be responsible, and fiscal reporting shall be clear.
 7. Parliament passed the Public Finance Management Act as an Act of Parliament to provide for the effective management of public finances by the National and County Governments; the oversight responsibility of Parliament and county assemblies; the different responsibilities of government entities and other bodies, and for connected purposes.
 8. Development expenditure was defined as the expenditure for the creation or renewal of assets. In addition, the UN Declaration on Right to development recognized that development was a comprehensive economic, social, cultural and political process, which aimed at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.
 9. The basis of the petition being failure to comply with the statutory and constitutional imperatives by National and County Governments on the management of public finances and in particular the giving to effect of the requirement for development expenditure, the National and County Governments had violated/threatened to violate the right to development. It was a threat to the fulfilment of the spectrum of rights in the Bill of Rights. That was because development or *maendeleo* as it was known in Kenya affected every aspect of the people's lives.
 10. The constitutional and statutory framework for the management of public finances to enable development must be read in the light of the Bill of Rights. The petition was addressing a real live issue affecting the people and could not be said to be unripe. The issue of development touched upon the spectrum of the Bill of rights, articles 23(1) and 165(3)(b) of Constitution, granted the court the express jurisdiction to interrogate the allegations of those acts that violated or threatened to infringe on the Bill of Rights codified under the Constitution.
 11. The respondents could not shield themselves under the doctrine of justiciability and the political question because the issues raised were justiciable. The respondents' contention, that the issues raised were political and therefore not properly before the court, was unfounded. That was because the petitioner faulted the fiscal management of the respondents' budgetary allocation to development expenditure in violation of mandatory constitutional and statutory provisions.
 12. Based on the reports filed by the petitioner and the 2nd interested party, the contention by the respondents that the petition was premature was unfounded. The court was seized with the jurisdiction to interrogate and determine the issues raised by the petitioner in the petition.
 13. Save for the 1st, 17th and 20th respondents, all the other respondents were at fault for failure to comply with the statutory requirement to not only allocate but expend not less than 30% of their budgets on development. Although the petitioner had faulted the National Government for non-compliance, no evidence was presented to prove that fact.
 14. In interpreting the Constitution, the court must capture the aspirations of the Kenyan people in realization of their rights as encapsulated in the Bill of Rights. The Constitution established two distinct levels of Government, the National Government and 47 devolved units, each with its mandate



- to manage its affairs and resources. The primary objective of devolution was to bring service delivery closer to the people and to promote equitable allocation and efficient unitization of national revenue for public service, thereby enhancing local, social, and economic development.
15. The right to development was not expressly stated *per se* in the Bill of Rights but article 19(1) of the Constitution provided that the Bill of Rights was central to Kenya's democratic state and shall form the framework for social, economic and cultural policies. Further the Constitution, under article 19(3)(b) mandated the court to recognize and promote other rights and fundamental freedoms conferred by law except to the extent that the law was inconsistent with the Constitution. Article 43 of the Constitution also championed for highest attainment of social and economic rights. Therefore, any limitation to the right to development could not be arbitrary and must comply with the standards set out under article 24 of the Constitution.
 16. Kenya was a signatory to international instruments that provided for right to development. To achieve the ideals, Kenyans set rules and principles of management of public finances in the Public Finance Management Act, Cap. 412A and the Constitution article 201 provided the principles that shall guide all aspects of public finance in the Republic. The Public Finance Management Act, Cap. 412A was enacted by Parliament after the promulgation of the Constitution in 2010, pursuant to the provisions of articles 225 and 226 of the Constitution.
 17. To achieve the economic, social, cultural and extent of the Bill of Rights, the people needed to have the public resources managed in the manner envisaged by the Constitution. That was reflected in the objectives set out at section 3 of Public Finance Management Act. Those objectives were expounded under section 15(1) and (2) of the Public Finance Management Act which provided for National Government obligations by stating that the National Treasury had the mandate to enforce fiscal responsibility principles.
 18. Section 107(1) and (2) of the Public Finance Management Act provided for the manner in which county governments were to manage public finances. To reinforce the provisions concerning county governments, Public Finance Management (County Governments) Regulations, 2015 were passed. Those Regulations provided direction that development expenditure by the county government shall not be less than 30% of the total budget.
 19. The failure by the respondents to allocate and expend the requisite minimum 30% of the annual budget to development was both unlawful and unconstitutional.
 20. Article 2(1) of the Constitution declared its supremacy and the fact that it bound all persons and the State at both levels of Government, and no person may claim or exercise State authority except as authorized under the Constitution. The respondents who failed to act in accordance with the law had been exercising State authority outside the Constitution. That was because it was the Constitution that gave the mandate for Parliament to pass the law. That law had been in force and had consistently not been complied with and that was where the violation and threat to violation of constitutional rights stood out. The respondents, save for 1st, 17th and 20th respondents, had consistently failed to uphold the statutory and mandatory provisions of Public Finance Management Act.
 21. There were provisions of the law for dealing with violations. The Public Finance Management Act took the compliance with those provisions seriously. That was why the Legislature found it wise to create a provision to ensure compliance. During the hearing of the petition, there was no case where those particular provisions of the law had been adhered to and in view of the history of the non-compliance, it was unlikely that any report with regard to section 196(7) of the Act had, so far, been made to the relevant authority yet non-compliance clearly amounted to consistent engagement in actions that were prohibited through failure to comply with obligations imposed by the Act. Failure to act by the State officers had consequences clearly set out by the Act. If the requisite actions were taken by the relevant State officers, the blatant violations would be stemmed.



22. With respect to compliance with the law on development, none had the luxury of choosing what parts of the law to comply with and which parts to ignore. To do so was to threaten the Kenyan dream set on the power and impact of devolution.
23. Articles 22 and 23 of the Constitution provided *inter alia* that in court proceedings claiming that a right or fundamental freedom in the Bill of Rights had been denied, violated, infringed or was threatened, the court had jurisdiction, in accordance with article 165 of the Constitution, to hear and determine the claim for redress of that denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Right and may as per article 23(3) grant appropriate relief.
24. Appropriate relief must be relief that was not only suitable to address the constitutional infringement but was just in the circumstances of the cases. The relief must uphold the Constitution and ultimately must uphold the human rights of those involved and the rule of law. The relief must also bear in mind that the Constitution was a living document whose life was dependent on the realities of the Kenya people. It was a transformative document carrying in its veins, and its spirit, the transformative power to transform those who interpreted it, the court. In the event that the court had to fashion a new relief, then it must be specific, appropriate, clear, and effective.
25. Effectiveness of a relief would mean that the parties were able to not only have their rights declared, but that they get to experience the actual remedy because the infringement was corrected in their lifetime. That had been done through the structural interdicts.

Petition allowed.

Orders

- i. *A declaration was issued that it was mandatory for the National Government and the County Governments to allocate in their annual budgets and over the medium term, a minimum of 30% of the budget to development expenditure as provided for by the Public Finance Management Act sections 15(2)(a) and 107(2)(b). Any public officer who failed to comply would be held liable in accordance with section 196(7) of the Act.*
- ii. *A declaration was issued that the failure by respective county governments to allocate, and or spend at least 30% of their budgets on development expenditure was unconstitutional and unlawful as it infringed the rights of citizens to development and violated the county governments obligation to allocate the maximum of available resources to realise the Bill of Rights.*
- iii. *An order was issued compelling the respondents to allocate and spend at least 30% of their budgets on development expenditure as required by sections 15(2)(a) and 107(2)(b) of the Public Finance Management Act, (2012) Cap 412A of the Laws of Kenya, regulation 25 of the Public Finance Management County Government Regulations, 2015 in the financial year 2024/25, moving forward.*
- iv. *A structural interdict was issued in the following terms:*
 1. *That the county governments, through the respective county executive committee member for finance, do each file a report with the Controller of Budget within three months from the date of the judgment stating the steps they had taken to comply with the judgment.*
 2. *That each of the reports be accompanied by a sworn affidavit by the respective county executive committee member for finance to the facts in the report.*
- v. *No order as to costs.*

Citations

Cases

1. *Ayuma & 11 others (Suing on their own Behalf and on Behalf of Muthurwa Residents) v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 others; Kothari (Interested Party) (Petition 65 of 2010; [2013] KEHC 6003 (KLR)) — Explained*
2. *Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another (Petition 628 & 630 of 2014; [2015] KEHC 6984 (KLR)) — Explained*



3. Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2014] KESC 53 (KLR)) — Explained
4. Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2015] KESC 13 (KLR)) — Explained
5. Council of Governors & 47 others v Attorney General & 6 others (Reference 3 of 2019; [2019] KESC 65 (KLR)) — Explained
6. County Government of Kitui v Ethics & Anti-Corruption Commission (Petition 3 of 2019; [2019] KEHC 7424 (KLR)) — Explained
7. Gikonyo, Wanjiru & 2 others v National Assembly of Kenya & 4 others (Petition 453 of 2015; [2015] KEHC 630 (KLR)) — Explained
8. In the Matter of the Interim Independent Electoral Commission (Applicant) (Constitutional Application 2 of 2011; [2011] KESC 1 (KLR); [2011] 2 KLR 32) — Explained
9. In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (Advisory Opinions Application 2 of 2012; [2012] KESC 5 (KLR)) — Explained
10. KKB v SCM & 5 others (Constitutional Petition 014 of 2020; [2022] KEHC 289 (KLR)) — Explained
11. Law Society of Kenya v Attorney General & another; Warsame & another (Interested Parties) (Petition 307 of 2018; [2019] KEHC 10881 (KLR)) — Explained
12. Maya Duty-free Limited v Hon. Attorney General & 3 others (Petition 45 of 2017) — Explained
13. Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018; [2021] KESC 34 (KLR)) — Explained
14. National Assembly of Kenya & another v Institute for Social Accountability & 8 others (Civil Appeal 92 & 97 of 2015 (Consolidated); [2017] KECA 170 (KLR)) — Explained
15. National Environment Management Authority & another v KM (Minor suing through Mother and Best friend SKS) & 17 others (Civil Appeal E004 of 2020 & E032 of 2021 (Consolidated); [2023] KECA 775 (KLR)) — Explained
16. Njeru, Anarita Karimi v Republic (Miscellaneous Criminal Application 4 of 1979; [1979] KEHC 30 (KLR)) — Explained
17. Njeru v Republic (Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR); (1976 – 1980) KLR 1272) — Explained
18. Nyinkuri, Julia Mwenje v Kenya County Government Workers Union (Petition E046 of 2021; [2021] KEELRC 1492 (KLR)) — Explained
19. Okoiti & another v National Treasury & 2 others (Constitutional Petition E217 of 2021; [2023] KEHC 22367 (KLR)) — Explained
20. Okoiti & another v Public Service Commission & 73 others; Law Society of Kenya & another (Interested Parties) (Petition 33 & 42 of 2018 (Consolidated); [2021] KEHC 464 (KLR)) — Explained
21. Onyango & 11 others v Attorney General & 4 others (Miscellaneous Civil Application 677 of 2005; [2005] KEHC 3204 (KLR); KLR (EP) Vol. 3. 94) — Explained
22. Republic v Kenya National Examinations Council Ex Parte Gathenji & 8 others (Civil Appeal No 234 of 1996) — Explained
23. Senate & 48 others v Council of County Governors & 54 others (Civil Appeal 200 of 2015; [2019] KECA 705 (KLR)) — Explained
24. Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 others (Petition 368 of 2014; [2015] KEHC 6974 (KLR)) — Explained
25. Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 others (Civil Appeal 196, 195 & 203 of 2015; [2015] KECA 239 (KLR)) — Explained
26. Thiong'o, Eliezar Kamau & 2 others v Kenya Airports Authority & another Interested party Doshi Iron Mongers Limited & 2 others (Petition 42 of 2014; [2015] KEHC 647 (KLR)) — Explained



27. Wabwire, Christian Juma v Attorney General (Petition 50 of 2013; [2019] KEHC 1049 (KLR)) — Explained
28. Waithaka, Lucy Njoki v Tribunal appointed to investigate the conduct of Lucy Njoki Waithaka & another; Kenya Magistrates and Judges Association (Interested Party) (Cause 205 of 2019; [2019] KEELRC 10 (KLR)) — Explained
29. Wambora, Martin Nyaga v Speaker County Assembly of Embu & 6 others (Petition 3 of 2014; [2014] KEHC 6715 (KLR)) — Explained
30. S. v Acheson (1991 (2) S.A. 805) — Explained
31. Fose v Minister of Safety and Security ((CCT14/96) [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786) — Explained
32. Hoffmann v South African Airways ((CCT17/00) [2000] ZACC 17) — Explained
33. Killbourn v Thompson (103 US 168 (1880)) — Explained
34. Marbury v Madison (5 U.S. 137 (1803)) — Explained

Statutes

1. Civil Procedure Act (cap 21) — In general — Cited
2. Constitution of Kenya — article 1 (2), 2, 6, 10, 19, 20, 21, 22, 23, 24, 25, 27, 43, 165, 174, 175, 201, 219, 220(2), 222, 225, 226, 228. 259 — Cited
3. Controller of Budget Act (cap 429) — In general — Cited
4. County Governments Act (cap 265) — section 104; 107; 115; part XI — Cited
5. Ethics And Anti-Corruption Commission Act (cap 7H) — In general — Cited
6. Public Finance Management Act (cap 412A) — section 2; 3; 11; 15; 16; 17; 107; 108, 117, 118, 125, 126, 128, 129, 130, 131, 133, 136, 166, 167, 168, 196, 200, 201 — Cited
7. Public Finance Management (County Governments) Regulations 2015 (cap 412A Sub Leg) — regulation 25; 26; 27 — Cited

Texts

1. Hogg, QM., (Lord Hailsham) et al (Eds) (1995), Halsbury's Laws England (London: Butterworth 4th Edn Vol 17)
2. Tribe, LH., (Ed) (1989), American Constitutional Law (University of Minnesota Law School 2nd Edn p 92)

International Instruments

1. African Charter on Peoples' and Human Rights (ACPHR) (Banjul Charter) — article 22
2. International Covenant on Civil and Political Rights (ICCPR), 1966 — article 2
3. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 — article 2
4. United Nations Declaration on the Right to Development, 1986 — article 1(1)

Advocates

None mentioned

JUDGMENT

Introduction

1. The Petitioner's case is that the National Government and County Governments listed herein have failed to allocate or spend the requisite 30% of their budgets on development expenditure as required of them under the *Public Finance Management Act (PFMA)*. That this trend of non-compliance with fiscal responsibility has been on the rise in total violation of Articles 10, 21, 27, 175, 201 and 225 of the *Constitution* of Kenya. Consequently, the Petitioner prays that the Respondents be found culpable



for Constitutional violations and be compelled to allocate and spend at least 30% of their budgets on development expenditure over the medium term in the financial year 2024/2025 going forward.

The Petitioner's Case

2. The Petitioner has approached this Court and seeks the following reliefs:
 - a. A declaration be issued that the failure by National and County Governments to allocate or spend at least 30% of their budgets on development expenditure over the medium term is unconstitutional and unlawful. That the omission infringes the rights of citizens to development and violates the Respondents' obligation to allocate the maximum of available resources to realize the Bill of Rights.
 - b. A declaration that corruption, inefficiency, and under expenditure is a failure to "make maximum use of available resources" violating Article 20 and 21 of the Constitution and Kenya's international law obligations.
 - c. An order compelling the Respondents to allocate and spend at least 30% of their budgets on development expenditure over the medium term under sections 15(2)(a) and 107(2)(b) of the Public Finance Management Act, 2012, in the financial year 2024/25, going forward.
 - d. A structural interdict directing the Respondents to each file a report before Court, within 6 and 12 months, respectively, of the judgment stating the steps they have taken to comply with this Court's order in (b) above.
 - e. There be no costs order considering the public interest in this matter.
3. The Petition is supported by the affidavit of its Executive Director, Davis Malombe, sworn on 28/04/2024. The Petitioner deposes that Article 228(6) of the Constitution authorizes the Controller of Budget (the 2nd Interested Party herein) to monitor the implementation of National and County Budgets and recently reported that the National Government allocated only 17% of the revised gross budget to development expenditure in the first six months of the Financial Year (FY) 2023/24. They have exhibited a copy of the National Government Budget Implementation Review Report for the first six months of the financial year 2023/24 dated February 2024 as DM-1 to support this contention.
4. He deposes that in the same period from, 01/07/ 2023 to 31/ 12/ 2023, the 20 County Governments, some being the Respondents in this Petition had spent less than 10% of their budget on development expenditure as follows; Kisii County 2.9%, Nairobi County 3.3%, Machakos County 3.5%, West Pokot 8.7%, Nyandarua 7.0%, Nyeri 6.4%, Samburu 5.2%, Taita Taveta 4.4%, Makueni 7.1%, Meru 9.8%, Kericho 7.6%, Baringo 5.8%, Lamu 7.5%, Isiolo 9.7%, Kajiado 8.7%, Narok 52.4%, Bomet 27.1%, Uasin Gishu 27%, Laikipia 22.5% and Marsabit 21.7%. (A copy of the County Governments Budget Implementation Review Report for the first six months of the financial year 2023/24, February 2024, is exhibited as DM-2. to support this contention).
5. He points out that the Controller of Budget's findings, on lack of adequate resource allocation for "development expenditure" corroborated their own recent study on the same issue and did prove that the 1st to 20th Respondents' habit of failing to allocate and expend less than 30% of the National and County Government budget on development projects violates the right to development and was a regressive measure that violates the States' obligation "to take steps" or to "allocate the maximum available resources" towards realizing the Bill of Rights.



6. The Petitioner's fear was that the 1st to 20th Respondents will continue to violate the Constitution and the law by continuing to allocate less than 30% of their budgets to development to the detriment of the citizens, and hence it is necessary for this Court to grant the reliefs sought.

The Petitioner's Submissions

7. In their written submissions dated 05/08/2024, the Petitioner identifies the following issues for determination;
- a. Whether the failure by the National and County Governments to allocate or spend at least 30% of their budgets on development expenditure over the medium term is unconstitutional and unlawful.
 - b. Whether the failure by National and County Governments to allocate or spend at least 30% of their budgets on development expenditure over the medium term infringes on the citizens' right to development.
 - c. Whether the failure by the National and County Governments to allocate or spend at least 30% of their budgets on development expenditure is in violation of Kenya's interNational law obligations.
 - d. What are the appropriate remedies?

Whether the failure by the National and County Governments to allocate or spend at least 30% of their budgets on development expenditure over the medium term is unconstitutional and unlawful.

8. On this issue the Petitioner submits that as per Article 2, the Constitution is the Supreme law which binds all persons and all state organs at both levels of Government and that no person may claim or exercise state authority except as authorized under the Constitution.
9. The Petitioner submits that Article 10(2) of the Constitution of Kenya gives prominence to National values and principles of governance which are binding on all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions. The Petitioner relies on the Supreme Court of Kenya decision in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2015] eKLR to buttress that submission. They highlight that the Supreme Court stated that the Constitution reconstituted and, or reconfigured the Kenyan State from its former vertical, imperial, authoritative, non-accountable state under the former Constitution, to a state that is accountable, horizontal, decentralized, democratized, and responsive to the principles and values enshrined in Article 10 and the transformative vision of the Constitution.
10. The Petitioner submits that the PFMA was enacted with the purpose of assisting Governments at both levels to manage public finances with the aim of achieving Constitutional standards of governance established under Article 10. That under Section (2)(a) and 15(1) thereof, the National Treasury is mandated to manage the National Government's public finances in accordance with the Constitution and the principles of fiscal responsibility; one of which is that; 'over the medium term a minimum of thirty percent of the National and County Governments budget shall be allocated to the development expenditure.'
11. The Petitioner further submits that Section 107 of the PFMA directs the County Governments to allocate at least 30% of their budgets to development expenditure which requirement aligns with



Article 27 of the Constitution which ensures equitable development throughout the 47 Counties. The Petitioner contends that the failure by the National and County Governments to allocate or spend at least 30% of their budgets on development expenditure over the medium term is unlawful and illegal for violating the statutory requirement under Section 15 and Section 107 of the PFMA. That by virtue of going against Article 10 of the Constitution, the Respondents' inaction flouts the rule of law and is unconstitutional.

Whether the failure by National and County Governments to allocate or spend at least 30% of their budgets on development expenditure over the medium term infringes on the citizens' right to development

12. The Petitioner submits that although the right to development is not expressly contained in the Bill of Rights, Article 19(3)(b) states that the Bill of Rights includes the rights and fundamental freedoms not in the Bill of Rights but recognized or conferred by law unless inconsistent with the Constitution. That consequently, any limitation to the right to development cannot be arbitrary and must comply with the standards set out in Article 24 of the Constitution.
13. It is further submitted that the failure to allocate or spend 30% of budgets on development violates the objects of devolution under Article 175 of the Constitution which recognizes the right of communities to manage their own affairs and promote equitable sharing of National and local resources throughout the Republic. The Petitioner relies on Advisory Opinion Reference 3 of 2019 (Council of Governors & 47 others v Attorney General & 6 others) Reference 3 of 2019 [2019] KESC 65 (KLR) where David K. Maraga, SCJ had the following to say;

“The four issues identified as the basis of our Advisory Opinion in this Reference revolve around the interpretation, implementation and enforcement of the Kenya Constitution, 2010. They revolve around the realization of the devolution dream in the 2010 Constitution. In a nutshell, they revolve around the perennial issue of the inequitable distribution of the National cake. Sadly, as was the case with the independence Constitution, the implementation of the 2010 Kenyan Constitution is starting to be lopsided. Those upon whom the Kenyans people have bestowed the power and authority to implement the 2010 Constitution and the political elite, safeguarding their personal and often sectarian interests, are cherry picking what to implement...On the sharing of the National cake, soon after independence, the Executive embarked on a skewed discriminative and exclusionary developmental agenda premised on Sessional Paper No 10 of 1965 on African Socialism and its Application to Planning in Kenya. That created widespread disenchantment among the Kenyan people. (To remedy this, the Constitution of Kenya, 2010 introduced) devolution, which, from its objects in Article 174 of Constitution, would recognize and protect, inter alia, the rights of minorities and marginalized communities; promote social and economic development; and, most importantly, ensure equitable sharing of the National and local resources.”
14. It is the Petitioner's case that the Chief Justice Emeritus pointed out that, in promulgating the 2010 Constitution, especially with elaborate provisions on devolution, the people of Kenya were optimistic that they had put in place institutions, processes and procedures that would facilitate a just and effective governance mechanism for the realization of their hopes and aspirations for a just and equitable society. It was submitted further that the principles of public finance are set out in Article 201 of the Constitution and by failing to act in accordance with the provisions of the PFMA to promote equitable development, both levels of Government violate the Constitution and the right of the Kenyan people to development.



15. Referring to Section 16 and 108 of the PFMA, the Petitioner submits that the violation of the citizens' right to development by the respective County Governments and the National Government is against the PFMA, which bars deviation of Governments from their fiscal and financial responsibilities. That consequently, the Respondents ought to prove that deviation from the requirements of Sections 15 and 107 of the PFMA was necessitated by occurrence of major disasters or unforeseen events in the financial years they deviated.
16. The Petitioner submits that according to the Budget Policy Statement (BPS) published in February 2024, the approved budgets of 8 Counties in the 2022/23 financial year did not conform with the requirements of Section 107(2)(b) of the PFMA. That, from the BPS, it emerges that while most Counties allocated the required 30% of their budgets towards development, the actual development expenditure is less over the medium term. That, the implication is that the County Governments' development agenda is compromised with higher allocations going towards recurrent expenditure.
17. The Petitioner submits that the failure by both levels of Government to allocate or spend 30% of their budgets on development expenditure over the medium term does not align with the spirit of the PFMA and is in violation of the citizens' right to development.

c. Whether the failure by the National and County Governments to allocate or spend at least 30% of their budgets on development expenditure is in violation of Kenya's international law obligations.

18. On this issue, the Petitioner submits that the failure by the Governments at both levels to allocate or spend 30% of their budgets on development expenditure violates the State's positive obligation under Article 21(1) and (4) of the Constitution, which obligates the Government to respect, promote, fulfil and fully protect the rights and fundamental freedoms in the Bill of Rights. They rely on the case of Ayuma & 11 others (suing on their own behalf and on behalf of Muthurwa Residents) v Registered Trustee of the Kenya Railways Staff Retirement Benefits Scheme & 2 others; Kotbari (Interested Party) (Petition 65 of 2010) [2013] KEHC 6003 (KLR) where the Court stated;

“The obligations of the state and its organs were clear cut; to observe, respect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. The very raison d'être of the state was the welfare of the people and the protection of the people's rights. It was its obligation under interNational and National laws, to ensure that Human Rights were observed, respected and fulfilled; not only by itself but also by other actors in the country”

19. Reliance is also placed on the case of Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR), where the Court held that;

“Articles 2(5) and 2(6) of the Constitution of Kenya are outward looking in the sense that they committed Kenya to conduct its interNational relations in accordance with its obligations under interNational law. On the other hand, they were inward looking because they required Kenyan Courts to apply interNational law in resolving disputes before them as long as the same were relevant, and not in conflict with the Constitution, local statutes or a final judicial pronouncement. InterNational Law could be applied to fill a lacuna in domestic law before a domestic Court because interNational law is part of the laws of Kenya.”



20. The Petitioner submits that Articles 2(5) and 2(6) of the Constitution appropriates obligations under International Treaties or Conventions as ratified by Kenya and the obligations are set out in the General Rules of International Law. That the failure by both levels of Government to allocate the requisite percentage of their budgets to development expenditure is inconsistent with these obligations. The Petitioner cited Article 21(4) of the Constitution, which requires the State to not only enact, but implement legislation to fulfil its international obligations in respect to human rights and fundamental freedoms.
21. The Petitioner submits that the skewed budgetary allocations violate Kenya's obligation under the UN Declaration on the Right to Development and Article 22 of the Banjul Charter guaranteeing all persons the right to economic, social and cultural development.
22. The Petitioner further submits that the skewed allocations also violate Article 2 of the International Covenant on Civil and Political Rights and Article 2 of the International Covenant on Economic, Social and Cultural Rights.

d. What are the appropriate remedies?

23. The Petitioner invokes Article 23(1) as read with Article 165 of the Constitution which gives this Court the jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights. Reliance was placed on Law Society of Kenya v Attorney General & another; Mohamed Abdullahi Warsame & another (Interested Parties) Petition 307 of 2018 [2019] KEHC 10 881 (KLR) where the Court held that an appropriate relief should be an effective remedy for purposes of enforcing the Constitution, human rights and the rule of law.
24. Further reliance was placed on Hoffmann v South African Airways (CCT17/00) [2000] ZACC 17 where the South African Constitutional Court drew the following conclusion;

“The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, “we must carefully analyze the nature of the constitutional infringement, and strike effectively at its source.”

25. The Petitioner asserts that Articles 10, 27, 175, 201 and 225 of the Constitution have been contravened and infringed upon by the Respondents hence the declaratory orders should be given. The Petitioner cites Republic v Kenya National Examinations Council Ex Parte Gathenji & 8 others Civil Appeal No 234 of 1996, where the Court of Appeal cited with approval, Halsbury's Law of England, 4th Edition. Vol. 7 p. 111 para 89 thus:

“The order of *mandamus* is of most extensive remedial nature and is in form, of a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all



cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”

26. The Petitioner submits that an order compelling the Respondents to allocate and spend at least 30% of their budgets on development expenditure over the medium term is appropriate in the circumstances as it would compel the performance of a public duty which is imposed on the Governments by the *PFMA*. That the duty has been ignored by the Respondents to the detriment of the Kenyan citizens and prays for inter alia the relief of structural interdict. The Petitioner cites the case of *County Government of Kitui v Ethics & Anti-Corruption Commission* (2019) eKLR where the Court discussed the doctrine of structural interdicts as a remedy and observed as follows;

“ 100. One of the remedies which is now recognized in jurisdictions with similar constitutional provisions as our Article 23 is what is called structural interdict. In essence, structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under Court supervision. Five elements common to structural interdicts have been isolated in this respect. First the Court issues a declaration identifying how the Government has infringed an individual or group’s constitutional rights or otherwise failed to comply with its constitutional obligations. Second, the Court mandates Government compliance with constitutional responsibilities. Third, the Government is ordered to prepare and submit a comprehensive report, usually under oath, to the Court on a pre-set date. This report, which should explicate the Government’s action plan for remedying the challenged violations, gives the responsible state agency the opportunity to choose the means of compliance with the constitutional rights in question, rather than the Court itself developing or dictating a solution. The submitted plan is typically expected to be tied to a period within which it is to be implemented or a series of deadlines by which identified milestones have to be reached. Fourth, once the required report is presented, the Court evaluates whether the proposed plan in fact remedies the conditional infringement and whether it brings the Government into compliance with its constitutional obligations. As a consequence, through the exercise of supervisory jurisdiction, a dynamic dialogue between the judiciary and the other branches of Government in the intricacies of implementation may be initiated. This stage of structural interdict may involve multiple Government presentations at several ‘check in’ hearings, depending on how the litigants respond to the proposed plan and, more significantly, whether the Court finds the plan to be constitutionally sound. Structural interdicts thus provide an important opportunity for litigants to return to Court and follow up on declaratory or mandatory orders.

The chance to assess a specific plan, complete with deadlines, is especially valuable in cases involving the rights of ‘poorest of the poor,’ who must make the most of rare and costly opportunities to litigate. After Court approval, a final order (integrating the Government plan and any Court ordered amendments) is issued. Following this fifth step, the Government’s failure to



adhere to its plan (or any associated requirements) essentially amount(s) to contempt of Court.”

27. The Petitioner also cites the case of *Mitu-Bell Welfare Society (supra)* where the Supreme Court of Kenya also addressed the relief. The Court stated;

“... a close examination of these provisions (article 23(3) and 165(3)(d) of the *Constitution*) shows that the *Constitution* requires the Court to go even further than the US Supreme Court did in the Marbury , and that article 23(3) grants the High Court powers to grant appropriate relief “ including” meaning that this is not an exhaustive list.....Interim reliefs, structural interdicts, supervisory orders or any other orders that could be issued by the Courts, had to be specific, appropriate, clear, effective, and directed at the parties to the suit or any other State agency vested with a constitutional or statutory mandate to enforce the order.”

28. The Petitioner also cites Civil Appeal No E004 of 2020 as consolidated with Civil Appeal E032 of 2021, *National Environment Management Authority & another v KM (Minor suing through Mother and Best friend SKS) & 17 others* where the Court of Appeal in Mombasa issued the following order;

“We hereby order and direct the National Environmental Management Agency, within 12 months from the date of this judgment, and in consultation with all the relevant agencies and private actors and in appropriate exercise of its functions and powers to.”

- a. identify the extent of contamination and pollution caused by the operations of Metal Refinery EPZ Ltd as the Owino- Uhuru Settlement,
- b. remove any contamination and pollution in the affected areas of Owino-Uhuru Settlement, and
- c. restore the environment of Owino Uhuru Settlement and its ecosystem;
- d. periodically report every 3 months to the Environment and Land Court at Mombasa on the progress made in this regard, and for any consequent directions, until the satisfactory completion of the restoration.

29. The Petitioner submits that they are therefore justified is seeking the remedy of a structural interdict to direct each of the Respondents to file a report before this Court, within 6 and 12 months, respectively, of the judgment stating the steps they have taken to comply with this Court’s order and the law.

30. The Petitioner concludes by submitting that it is important to establish that Kenya’s current Constitutional dispensation was tailored with the country’s past in mind and that a study of historical experiences of financial devolution in Kenya will demonstrate a pattern of poor economic and financial planning, which has contributed to the marginalization of various regions in development. The Petitioner cites the Advisory Opinion in the matter of an Application by the Council of Governors for an Advisory Opinion under Article 163(6), where the Supreme Court stated;

“It is trite law that the *Constitution* is a living document in which life should constantly be breathed into.”

31. The Petitioner thus urges this Court to grant the prayers sought for in this petition.



Responses And Submissions by the County Governments

32. The County Governments of Kisii, Nyeri, Meru, Isiolo, Bomet, Laikipia, and Marsabit had a common response to wit; That in line with Article 228 (6) of the Constitution of Kenya and Sections 166 167 and 168 of the PFMA the Office of the Controller of Budget is mandated to prepare reports on quarterly basis to examine the levels of budget implementation in both the National and County Governments for the relevant financial year. The findings of the said reports were limited to the utilization of resources allocated in the financial year budget and the percentages derived therefrom which are limited to one financial year.
33. That this Petition was premised entirely on the ‘County Governments Budget Implementation Review Report for The First Six Months of the Financial Year 2023/2024’ (hereinafter ‘the report’) which report ideally was limited to examining half-year performance by the County Governments with a view to helping Counties in complying with budgetary directions under the Constitution and the PFMA.
34. That Sections 15 and 107 of the PFMA provides that National and County Governments have to allocate 30% of their budgetary allocation to development expenditure over the medium term, which term is defined under Section 2 of the PFMA to mean ‘a period of not less than three years but not more than five years’. They assert that the Petitioner was therefore wrong and misguided to rely on the half-year report, by the Controller of Budget, not pegged on the “medium-term period” to allege that they were not complying with the statutorily provided manner of allocation.
35. Consequently, this common responses by Respondents will not be repeated in this judgement under the respective County responses for the interest of time.

Response by the 1st Respondent- Makueni County

36. Their Replying Affidavit was sworn on 26/06/2024 by Damaris Mumo Kavoi, the County Executive Committee (CEC) Member in the department of Finance, Planning, Budget and Revenue of Makueni County Government.
37. She deposed that Section 128(2) of the PFMA provides that ‘not later than 30th August in each year, the CEC Member for Finance shall issue a circular setting out guidelines to be followed by all the County Government Entities in the budget process.’ That the County Budget Circular provides for policy guidelines and procedures for preparing the medium-term budget including the requirements by all County Government Entities in the process of identifying and selecting spending priorities over a Medium-Term Expenditure Framework period.
38. She deposed that over the years, Makueni County has enhanced its revenue generation both internally and externally with total revenues mobilized annually increasing from Kshs 4,555,477,247.00 in FY 2013/14 to Kshs 9,160, 186,902.00 in FY 2021/22 representing 101% increase. That cumulatively, Makueni County has spent Kshs 64,698,005, 050.47 on various programs and activities out of which Kshs 20,510, 784,540.62 (32%) was spent on development and Kshs 44,187,220,509.86 (68%) on recurrent. Page 2 of the County Treasury Circular No 1/2022/2023 is exhibited as DMK 1.
39. She deposed that in order to ensure that 30% of the budget is allocated to development, Makueni County has adopted program-based budgeting which ensures resources are aligned to deliver specific outcomes that are in line with the County development agenda. Page 9 of the County Treasury Circular No 1/2022/2023 is exhibited as DMK 2.



40. She deposed that over the years, Makueni County, guided by the [PFMA](#), has ensured adequate engagement of all stake holders in the whole budget process. The annual public participation plan for FY 2022/23 is exhibited as DMK 3.
41. She deposed that for the first half of the fiscal year 2023/24, the County Budget Implementation Review Report shows that Makueni County had allocated 32% of its budget towards development expenditure which is a demonstration of its commitment to exceed the mandated threshold. Copies of the County Annual Implementation Reports for Financial Years 20/21, 21/22 and 22/23 were exhibited as DMK 4.
42. She deposed that as highlighted in the County Budget Implementation Review Report, over the medium term (FY 20/21-22/23), Makueni County allocated a total of Kshs 12,584, 836, 780 out of Kshs 34,014, 682,925 on development activities representing 37% of the total budget.
43. She deposed that in the Financial Years 20/21, 21/22, 22/23 & 23/24 Makueni County allocated 43%, 37%, 30% and 32% respectively of its total budget towards development expenditure. That by allocating over 30% of its budget in the previous three Financial Years to development expenditure, Makueni County continues to affirm its positive obligations under Article 43 of the [Constitution](#) of Kenya which is to guarantee and further the economic and social rights of the people of Makueni County.
44. She deposed that over the medium-term (FY 20/21-22/23) Makueni County spent a total of Kshs 8,417, 418, 955 out of 27,530, 597, 291 on development activities representing 31%. That Makueni County remains dedicated to maintaining transparency, accountability and adherence to legal mandates concerning budget allocations in future and will continue to ensure that its budgetary processes align with the [PFMA](#).
45. She deposed that the allegation that Makueni County had failed to allocate or spend 30% of its total budget on development expenditure was unfounded and false as they had consistently procured and processed payments for all recurrent and development activities in full compliance with the law as evidenced by the qualified audit opinions in the annual reports by the office of the Auditor General. A copy of the qualified audit opinion is exhibited as DMK 5.

Submissions by the 1st Respondent-makueni County

46. The 1st Respondent identifies the main issue for determination to be; whether there is failure to allocate the requisite 30% to development violating citizens' rights to development.
47. The County submits that Section 128(2) of the [PFMA](#) requires the County Executive Committee Member for Finance to issue a circular setting out guidelines to be followed by all of the County Government entities in the budget process, not later than 30th August each year. That the County Budget Circular provides for policy guidelines and procedures for preparing the medium-term budget including the requirements by all County Government entities in the process of identifying and selecting spending priorities over a Medium-Term Expenditure Framework period.
48. It is submitted that over the years, Makueni County has enhanced its revenue generation both internally and externally with total revenues mobilized annually increasing from Kshs 4,555,477,247.00 in FY 2013/14 to Kshs 9,160,186,902.00 in FY 2021/22 representing 101 % increase. That cumulatively, Makueni County has spent Kshs 64,698,005,050.47 on various programs and activities out of which Kshs 20,510,784,540.62 (32%) was spent on development and Kshs 44,187,220,509.86 (68%) on recurrent.



49. It is further submitted that in order to ensure that 30 % of the budget is allocated to development, Makueni County has adopted Program Based Budgeting which ensures resources are aligned to deliver specific outcomes that are in line with the County Development agenda. That over the years, the County, guided by the PFMA has ensured adequate engagement of all stakeholders in the whole budget process.
50. The County submits that for the first half of the fiscal year 2023/2024, it allocated 32% of its budget towards development expenditure which is a demonstration of its commitment to exceeding the mandated threshold.
51. It is submitted that from the half year County Budget Implementation Report, over the medium term (FY 2020/21-2022/23), Makueni County allocated a total of Kshs 12,584,836,780 out of Kshs 34,014,682,925 on development activities representing 37% of the total budget. That over the years, the allocation of resources for development by Makueni County has surpassed the statutory minimum of 30% as follows;
 - a. FY 2020-2021-43%
 - b. FY 2021-2022-37%
 - c. FY 2022-2023- 30.5%
 - d. FY 2023-2024- 32%
52. It further submits that by allocating over 30% of its budget in the previous three (3) Financial Years to development expenditure, Makueni County continues to affirm its positive obligations under Article 43 of the Constitution of Kenya which is to guarantee and further the economic and social rights of the people of Makueni County;
53. It further submits that over the medium term (FY 2020/2021 to FY 2022/2023), Makueni County spent a total of Kshs 8,417,418,955 out of Kshs 27,530,597,291 on development activities representing 31% of the total budget. That the allegation that Makueni County has failed to allocate or spend 30% of its total budget on development expenditure is unfounded and false.
54. It submits that in 2023, the Petitioner in collaboration with OXFAM International, prepared a report dubbed 'The Status of the 70:30 Budget Allocation and Spending Rule in Kenya: A Case of the 47 County Governments'. That Page 40 of the said report highlights that in the FY, 2022-2023, Makueni County had a total budget of Kshs 10,764.75 million where Kshs 3,278.76 million was allocated for development hence translating to 30.46% of the total budget allocated for development. Consequently, it was contended that the Petition against Makueni County is untruthful and flawed.
55. It submits that page 34 of the said report further highlights that in the FY 2020-2021, Makueni County had a total budget of Kshs 11,705.11 million where Kshs 5,031.13 million was allocated towards development hence translating to 42.98%.
56. It contends that the Petition generalizes the non-compliance of County Governments without specifying the alleged violations in detail. That, from the Controller of Budget's report on the County Governments Budget Implementation for FY 2023/24, 45 out of 47 Counties allocated a minimum of 30% to development expenditure and out of the Counties cited in the Petition, only two fell below this threshold, which contradicts the Petitioner's claim that widespread violations have occurred.
57. It submits that the Petition is flawed in its analysis of the fiscal responsibilities of National and County Governments. That it lacks sufficient reference to regulatory documents including the County Budget



Review and Outlook Paper and ignores the broader fiscal framework that governs budgetary practices. That, it prematurely assesses County budget performance based on incomplete data from in-year reports, leading to misleading conclusions.

Response by the 3rd Respondent- Kisii County

58. The Replying Affidavit was sworn on 25/07/2024 by Kennedy Abincha, the Finance, Economic Planning and ICT minister of Kisii County, where he deposed that each and every allegation and deposition set out in the Petition and Supporting Affidavit is denied in toto save for what is expressly admitted in the said Affidavit.
59. He deposed that Section 130(1)(a) of the [PFMA](#) requires the budget estimates to be in tandem with the fiscal principles outlined under Section 107 of the [PFMA](#) and that the budget estimates of Kisii County have always been compliant to the fiscal principle that the County Government's recurrent expenditure should not exceed the County Government's total revenue.
60. He deposed that according to the Auditor General's Report relied on by the Petitioner, the development budget of Kisii County speaks only to half-year development expenditure and was not a complete reflection of the financial year 2023/2024. That, the Auditor General's report observes that Kisii County had a huge wage bill for the first half of the financial year 2023/24 which was a constraining factor to funding other development projects. The said report further gave out suggestions that they develop an optimal staffing structure to address the issues raised and were in the process of doing so.
61. He deposed that Kisii County formulated its Annual Development Plan (ADP) for the financial year 2024/25 with a view of implementing the second financial year of the County Integrated Development plan (CIPD) 2023-2027 which plan was prepared in accordance with Section 126 of the [PFMA](#) and Section 104 of the [County Government Act](#) and at all times being guided by Article 220(2) of the [Constitution](#).
- The said plan also adhered to the principles contained in the vision 2030 agenda, actualized through five-year Medium-Term Plans and implemented through annual budgets and plans. A copy of the CIPD report for 2023-2027 was exhibited as KA1.
62. He further deposed that the programs and proposed projects of Kisii County under the ADP for the financial year 2024/2025 require a total of Kshs 17.43 billion out of which 7.705 billion, representing 44%, would be used to finance development activities in the County, which ratio is compliant with the fiscal responsibilities as provided for under Section 107 of the [County Government Act](#).
63. Additionally, he deposed that the sources of funding for the aforementioned sum would be derived from the National Government to a tune of 73% with the remaining 27% being funded by the private sector and development partners either directly or through Government agencies.
64. He deposed that in preparing the County ADP 2024/2025, Kisii County was keen to observe a participatory approach as required under Section 115 of the [County Government Act](#) in fulfillment of the requirements of the [Constitution](#) of Kenya. That Kisii County continues to conduct a participatory approach in all its affairs concerning the budget allocated to development of the County to date.
65. He deposed that the Petition does not meet the threshold and desire to assist the Honorable Court achieve the overriding objectives contained in the [Civil Procedure Act](#) where precious judicial time ought not to be wasted in frivolous suits filed by a litigant. That the Petition has been filed prematurely and is an abuse of section 15 of the [PFMA](#).



66. It is their case that from the onset, it is manifestly clear that the Petitioner has come to Court prematurely and with unclean hands and is only trying to create an impasse and ensure that the projects, vision and goals of Kisii County that are underway are halted or delayed for an extended period of time as the matter is litigated upon to the disadvantage of the residents of Kisii County. That, Kisii County has been operating and abiding by the Constitution of Kenya and all the relevant statutory laws and there has been no illegality in the running of its affairs.
67. The Petition, in their view, is not ripe for determination having been prematurely brought before this Honorable Court and prays that the same be dismissed with costs.

Submissions by the 3rd Respondent-kisii County

68. Kisii County submits that the Petitioner is inviting this Honorable Court to make a substantive determination on the Petition based on a preliminary report which was only meant to highlight the progress that has been made thus far by the Counties and was in no way a final report on the budget utilization. It argues that the half-year report by the Controller of Budget cannot be relied upon as the sole basis for the Petitioner to come to this Honorable Court as the said report was inconclusive and only focuses on the first six months of the budget implementation period of the year 2023/2024.
69. It identifies the issues for determination to be;
- a. Whether the Petition meets the threshold of a proper Petition?
 - b. Whether the Report by the Office of controller of Budget for the first six months for financial year 2023/2024 established that the 3rd Respondent violated the Constitution of Kenya and the Public Finance Management Act?
 - c. Whether the 3rd Respondent has complied with fiscal principles on allocation of development expenditure in 2024/2025?
 - d. Whether the Petitioner has proven his allegations?
 - e. Whether the Petitioner should be granted the reliefs sought in the Petition before this Honorable Court?
70. As to whether the Petition meets the threshold of a proper Petition, Kisii County submits that it fails in merit on the account of lack of specificity and precision. That the Petitioner has listed various articles of the Constitution that have allegedly been infringed by Kisii County but has by and large failed to demonstrate which article has been infringed as well as how the same has been infringed. Reliance was placed on the case of Anarita Karimi Njeru v Republic (1976 – 1980) KLR 1272.
71. Reliance was also placed on the case of Eliezar Kamau Thiong'o & 2 others v Kenya Airports Authority & another Interested party Dosbi Iron Mongers Limited & 2 others [2015] eKLR where the Court expressed itself thus;

- “ 18. It is our finding that the Petition before the High Court was not pleaded with precision as required in constitutional Petitions. Having reviewed the Petition and supporting affidavit we have concluded that way did not provide adequate particulars of the claims relating to the alleged violations of the Constitution of Kenya and the Ethics and anti-Corruption Commission Act, 2011. Accordingly, the Petition did not meet the standard enunciated in the Anarita Karimi Njeru case.



25. Having alleged that their rights had been contravened or threatened with violations, the Petitioners were under a duty, firstly to demonstrate that they had a right to occupy the land restricted for exclusive use by the First Respondent and that such right is capable of being protected, and secondly demonstrate how that right was violated or threatened with violation. As the Petitioners failed to establish the existence of any right whatsoever as against the First Respondent the Petition must fail as against the First Respondent. Would the position be different in relation to the Second Respondent" With respect, I do not think so."

72. Further reliance was placed on the case of *Christian Juma Wabwire v Attorney General* [2019] eKLR where the Court held that: -

"9. The Petitioner's amended petition is dated 27th May 2015. The Respondent contend, that the petition as drawn and filed fails to meet the irreducible minimum expected for a Court to determine the dispute to be decided in a constitutional matter. The Petitioner in support of this proposition has referred to the case of *Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others* (2017) eKLR, in which the Court cited with approval the case of *Thorp v Holdswirtg* [1876] 3 Ch. D. 637 at 639 where it was held that:-

"Pleadings are not just a formality: they are essential in order to frame issues for the determination by the Court and to enable the parties know exactly what case they are expected to meet."

10. In the instant petition, and looking at the petition, it is clear that the Petitioner has stated in the title of the amended petition, that the petition is brought under Article 25 and 22 of the *Constitution* of Kenya 2010. Upon a very careful perusal and consideration of the body of the petition, the Petitioner has failed to demonstrate how the said Article 25 and 22 have or were violated against him by the state. The Petitioner is required to have set out with reasonable degree of precision, that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to be infringed. This is lacking in the petition. The Petitioner in the petition alleges to have been denied accessing legal counsel and that he was treated in a cruel, inhuman and indignified manner. That apart from such a statement the Petitioner has not set out the allegations with a reasonable degree of precision, nor the manner in which the alleged infringement occurred and who was the perpetrator.

11. From the pleadings and as drawn and filed, I find that the Petitioner's pleadings do not meet the standard or the required threshold to give fair notice to the Respondent's on the case the Respondent is expected to meet. It should not be ignored that pleadings are tenet of substantive justice, as they give fair notice to the other party and enables the other party know the case they are about to meet. It is trite that reasonable precision in framing of issues in constitutional petitions is necessary as it gives fair notice to the other party and ensures the other party knows exactly what case it expects to deal with. From the above the Petitioner has failed to satisfy the conditions set out in the *Mumo Matemo v Trusted Society of Human Rights Alliance and 5 others* (2014) eKLR, (*supra*).



I therefore find the Petitioner has not sufficiently set out a case for the reliefs sought.”

73. The 3rd Respondent also relies on the case of *Julia Mwenje Nyikuri v Kenya County Government Workers Union (2021) eKLR* the Court held that;

“In this case, the Petitioner has relied on Article 22 and 258 of the *Constitution*, 2010 to urge the Petition, save that there are no particularized breaches, violations or nay matter of alleged threat to the *Constitution* outlined as such or said to have been violated. What is sought to stop the participation of water sector/water companies’ employees from participating in the elections of the Respondent scheduled for 30th April, 2021. Without any identified constitutional provisions being alleged to have been violated or threatened to be violated and the manner of the violation, the Petitioner fails in a material way and a memorandum of Claim should have sufficed to address the issues in dispute. Failure to conform to the required principles of a constitutional Petition is simple. The Petition must be struck out.”

74. As to whether the report by the Controller of Budget has established that Kisii County has violated the *Constitution* and the *PFMA*, it is submitted that the Petitioner is inviting the Court to make final orders based on a half year report that is neither conclusive nor final but has merely been tabled to assess the County on the progress made and shortcomings noted in the budget implementation process. That the report is further intended to assist the County to comply with the *Constitution* and *PFMA*. It submits that the report does not represent an accurate representation of a financial year expenditure and medium-term expenditure in the long run.

75. The 3rd Respondent submits that the fiscal principle of 30% minimum budgetary allocation to development expenditure under *PFMA* is over a medium term as prescribed by statute and not in a period of six months or a financial year as the Petitioner would like this Court to find and hold. That Section 2 of the *PFMA* defines “Medium Term” to mean; ‘a period of not less than three years but not more than five years.’

76. It submits that it developed a County Integrated Development plan (CIPD) 2023-2027 which points out a clear fact that the County has been starved of its annual budget estimates and the National Government has only managed to allocate a fraction of the estimated expenditure. That this has had catastrophic consequences in the priorities of the County with recurrent expenditure taking up a huge chunk of the allocated funds.

77. As to whether Kisii County has complied with fiscal principles on allocation of development expenditure in 2024/2025, it is submitted that the County has adhered to the law and in particular the fiscal principles under Sections 15(2)(a) and 107(2)(b) of the *PFMA* for the Financial Year 2024/2025. That this can be ascertained in its Annual Development Plan (ADP) where its development and recurrent expenditure stands at 44% and 56% respectively of the total expenditure under the budget estimates thereby meeting the 30% development expenditure to 70% recurrent expenditure threshold as envisioned in the *Constitution* and *PFMA*.

78. On the reliefs sought, it submits that this Petition should not see the light of day for the reasons enumerated in the replying affidavit. It submits that the County has not failed to allocate 30% of its Budget on development expenditure and that the Petitioner has not pleaded or tabled any evidence to prove the allegations contained in the second prayer. It submits that the third and fourth prayers are untenable for the reason that the County has aptly demonstrated through its pleadings that it has complied with the law to the letter.



Response by the 7th Respondent- Nyeri County

79. The 7th Respondent has opposed this Petition through a Replying Affidavit sworn on 17/07/2024 by Benjamin Gachichio, the County Secretary of Nyeri County.
80. He deposed that the Petition is incompetent, premature and devoid of merit as it fails to satisfy the legal and factual threshold for grant of the reliefs sought. That the Petition is inviting this Honorable Bench to make conclusive and final determinative findings based on a report that is neither conclusive nor final but merely indicative of the progress being made in a budgetary utilization cycle of half a year.
81. He deposed that the report was limited to examining the half year performance by the Respondents with a view to helping unlock bottlenecks in budgetary implementation process.
82. He deposed that the State Department for Planning, a department under the National Treasury & Planning, is responsible for the formulation, monitoring and evaluation of economic development plans, policies and strategies towards achieving the National development agenda. That the department provides leadership in preparation of the country's blueprints, Medium-Term Plans and sector plans. That it is through this responsibility that the State Department of Planning is mandated with the production of Medium-Term plans that guide the development of the country for five successive years. That it is through this Medium-Term Plans that Counties then formulate the County Integrated Development Plans (CIDPs) that guide economic development at the County level.
83. He deposed that the financial period referenced in the Petition does not meet the threshold of the period referred to as 'medium term' under the provisions of the PFMA, and in particular, the period referenced is the first half year of the financial year 2023/24, which speaks to 6 months out of the three to five years envisaged by the PFMA.
84. He deposed that the manner in which the Petition is framed, paints a skewed picture on the question of how development plans are developed, implemented and monitored. That a proper appreciation of how County development plans are formulated, implemented, monitored and assessed is paramount if this Honorable Bench is to render a judicious and jurisprudentially sound judgment as to the status of development allocation and spending by Nyeri County. That it is only through a breakdown of the development based statutory provisions in relation to County Governments that a proper comprehension of the 30% margin over a medium-term can be best assessed.
85. He deposed that under Part XI of the County Government Act, all County Governments are mandated to undertake County planning wherein it is mandatorily stipulated that no public funds can be appropriated outside a planning framework developed by the County Executive Committee and approved by the County Assembly. That under the Act, amongst the mandatory plans required to guide, harmonize and facilitate development within each County is the County Integrated Development Plan, which is a five-year plan that provides clear outcomes, provisions for monitoring and evaluation, and clear reporting mechanisms.
86. He deposed that there exists the Nyeri County Integrated Development Plan (CIDP III) 2023-2027, which provides the framework for development within Nyeri County specifying on development priorities, budgetary allocation and monitoring and evaluation. That it is anchored on three pillars of economic, social and political and is aligned to the fourth Medium-Term, Bottom-Up Economic Model, and international commitments like the Sustainable Development Goals (SDGs). A copy of the Nyeri County Integrated Development Plan (CIDP)III 2023-2027 is exhibited as BG-1. That the Act further requires the CIDP to have, within it, a resource mobilization and management framework that shall include the budget projection, the financial resources that are available for



- capital project developments and operational expenditure, and a financial strategy that defines sound financial management and expenditure control. That it is therefore anticipated that any contemplated monitoring and implementation evaluation shall be on the basis of these metrics in order to ascertain the status as to the allocation and actual spending.
87. He deposed that under the PFMA, County Governments are required to develop a development plan that includes strategic priorities for the Medium-Term that reflect the County Government's priorities and plans. That consequently, the assessment of development allocation and spending of Nyeri County can only be within the stipulated period being the Medium-Term focusing on the priorities stipulated under the CIDP.
 88. He deposed that the CIDP is the single point of reference for the coordination of all arms and entities of Government to achieve immediate, medium- and long-term development progress and provides for a five-year rolling roadmap and implementation work plan of the County's service delivery and development priorities of the County.
 89. He deposed that the Nyeri County CIDP covering the five-year period of 2023-2027, provides a roadmap of key priority programs for implementation and focuses on ensuring prosperity for its citizenry through inclusive and sustainable development programs. That the Plan is split into six different chapters that provide comprehensive development projects, strategies, sector players and monitoring and evaluation aspects.
 90. He deposed that Nyeri County has been earmarked for its medium-term evaluation assessment from July 2025 to September 2025 and as such, no reliable, accurate assessment can be made with respect to its development allocation prior to this evaluation.
 91. He deposed that during the period in question –the financial year 2023/24 – as highlighted in the County Governments Budget Implementation Review Report, Nyeri County was operating on the first supplementary budget amounting to Kshs 9.06 billion and comprising Kshs 2.88 billion (31.8%) and Kshs 6.18 billion (68.2%) allocation for Development and Recurrent Expenditure respectively, which budget was duly approved by the County Assembly Treasury. A copy of the approved first supplementary budget of the Financial Year 2023/24 is exhibited as BG-2. That the purpose of the first supplementary budget was to appropriate the balance that accrued from the financial year 2022/2023 thus facilitating the payment of pending bills and commitments that rolled over to the financial year 2023/2024.
 92. He deposed that a second supplementary budget has since been approved by the County Assembly Treasury for the financial year 2023/24 which amounts to a total of Kshs 8.98 billion and comprising of Kshs 2.76 billion (30.7%) and 6.22 billion (69.3%) allocation for Development and Recurrent Expenditure respectively. A copy of the approved second supplementary budget estimates for the Financial Year 2023/24 was exhibited as BG-3. That the second supplementary budget was necessitated by the emerging needs and changing economic trends to enable the County Government to meet the expectations of the residents of Nyeri County.
 93. He deposed that from the first and second supplementary budgets Sections 15(2)(a) and 107(2)(b) of the PFMA by allocating 30% of its budget to Development. approved by the County Assembly Treasury, it is evident that Nyeri County complied with the provisions of the Constitution of Kenya and
 94. He deposed that most development expenditures for Nyeri County are offset by the end of each financial year, once all expected revenues have been realized. That the annexed County Governments Budget Implementation Review Report (DM-2) only speaks to Nyeri County's expenditure in the first half of the financial year 2023/24, and does not give a clear picture on its expenditure on development



throughout the financial year 2023/24 at the time of filing this Petition. That the development agenda of Nyeri County is guided by the County's five-year Integrated Development Plan, which is implemented through Annual Development Plans which are prepared through a consultative and all-inclusive approach where the views of all stakeholders are collected and incorporated. That this framework governs the development expenditure according to the budget, realized revenue and funds released by the exchequer.

95. He deposed that the expenditure on development both annually and over the medium term of 2023/2024–2025/2026 is guided by the approved County Fiscal Strategy Paper, 2023 and the Annual Development Plan for the Financial Year 2023/2024. Copies of the Fiscal Strategy Paper and ADP were exhibited as BG-4 & 5 respectively. That during the first 6 months of the financial year 2023/24, Nyeri County had only received a total of Kshs 2.67 billion which comprised Kshs 162.87 million (6.1%) for development programs and Kshs 2.51 billion (93.9%) for recurrent programs as correctly noted in the annexed report – on page 473, paragraph 3.36.3.
96. He deposed that delay in release of funds by the exchequer affects implementation of the budget by Nyeri County and necessitates the need to prioritize payments of the non-discretion expenditures such as employee compensation and operational costs. That the development items captured in Nyeri County's budget for the financial year 2023/24 have had to go through the procurement process which occurs in the first few months of the financial year. That upon completion of the procurement process, implementation of the development projects spans a few months and the expenditure only reflects once final payment for work done is initiated. Consequently, he deposed that, the actual development expenditure for Nyeri County can only be ascertained after the closure of the financial year 2023/24 and not as misconstrued by the Petitioner's misinterpretation of the report.
97. He deposed that in the previous financial years highlighted in the Petition, Nyeri County had satisfied the provisions of the Constitution and Sections 15 and 107(2)(b) of the PFMA. That in the fiscal years (FY 2018/19 – FY 2022/23) Nyeri County ensured that 30% of its annual budget was allocated to the development expenditure and this fact has been ascertained by the Petitioner in paragraphs 51 to 56 of the Petition.
98. He deposed that in the financial year 2018/2019, Nyeri County allocated Kshs 2.86 billion being 32.4%, of its total approved Supplementary Budget of Kshs 8.84 billion, on development expenditure. Copies of the approved supplementary budget and Annual County Governments Budget Implementation Review Report for FY 2018/19 were exhibited as BG-6(a) & (b) respectively.
99. That in the financial year 2019/2020, Nyeri County allocated Kshs 3.06 billion being 34.1%, of its approved Supplementary Budget of Kshs 8.97 billion, on development expenditure. Copies of the approved supplementary budget and Annual County Governments Budget Implementation Review Report for FY 2019/20 were exhibited as BG-7(a) & (b) respectively.
100. That in the financial year 2020/2021, Nyeri County allocated Kshs 3.20 billion being 35.3%, of its approved Supplementary Budget of Kshs 9.09 billion, on development expenditure. Copies of the approved supplementary budget and Annual County Governments Budget Implementation Review Report for FY 2020/21 were exhibited as BG-8(a) & (b) respectively.
101. That in the financial year 2021/2022, Nyeri County allocated Kshs 2.64 billion being 30.2%, of its approved Supplementary Budget of Kshs 8.74 billion, on development expenditure. Copies of the approved supplementary budget and Annual County Governments Budget Implementation Review Report for FY 2021/22 were exhibited as BG-9(a) & (b) respectively.



102. That in the financial year 2022/2023, Nyeri County allocated Kshs 2.29 billion being 30.1%, of its approved Supplementary Budget of Kshs 7.61 billion, on development expenditure. Copies of the approved supplementary budget and Annual County Governments Budget Implementation Review Report for FY 2022/23 were exhibited as BG-10(a) & (b) respectively.

Submissions by the 7th Respondent-Nyeri County

103. The 7th Respondent identifies the issues for determination to be;
- a. Whether the 7th Respondent complied with the 30% budgetary allocation requirement on development projects?
 - b. Whether the 7th Respondent has complied with the requirement of 30% expenditure on development?
 - c. Whether the Petitioners should be granted the reliefs sought in their Petition dated.
104. In its written submissions the 7th Respondent takes issue with the term medium term and places reliance the description given in the case of *Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 others* [2015] eKLR, where the Court of Appeal stated that;
- “The *Public Finance Management Act* in section 15 establishes the National Treasury to manage Public Finances. By section 15 of the Act, the National Treasury is required to enforce fiscal responsibility principles. The principles include a requirement that over the medium term, a minimum of thirty percent of the National budget shall be allocated to development expenditure...”
105. It submits that the report relied on by the Petitioner is not a medium-term report as contemplated under *PFMA* and its findings are inconclusive in reaching a determination as to whether Nyeri County complied with the 30% budgetary requirement on development expenditure.
106. It is submitted that the period in question for the development expenditure is the financial year 2023/2024 and that during the said FY, the County Assembly Treasury approved two supplementary budgets. That the first supplementary budget was aimed at appropriating the balance that had accrued from the 2022/2023 financial year thus facilitating the payment of pending bills. That the purpose of the second supplementary budget was to tackle emerging needs and changing economic trends in the Nyeri County.
107. It was submitted that in the first supplementary budget, Nyeri County was operating on a budget amounting to Kshs 9.06 billion out of which Kshs 2.88 billion (31.8%) was allocated for development expenditure and Kshs 6.18 billion (68.2%) for recurrent expenditure. That in the second supplementary budget, Nyeri County was operating on a budget Kshs 8.98 billion out of which Kshs 2.76 billion (30.7%) was allocated for development expenditure and 6.22 billion (69.3%) was allocated for recurrent expenditure. Reliance was placed on the case of *Okoti & another v National Treasury & 2 others* (Constitutional Petition E217 of 2021) [2023] KEHC 22367 (KLR) where the Court stated that;

“There was another contention on the budget estimates presented to the House. It was argued that given that National budget estimates stood at the Kshs 3.03 trillion, then pursuant to Section 15(2)(a) of the *PFMA*, Kshs 900.9 billion, being at least 30% of the National budget ought to have been allocated as development expenditure. However, the sum of Kshs 669.6 billion was instead allocated. Responding to the issue, the



Respondents faulted the Petitioners for not clearly understanding the estimates at hand. It was explained that the National Treasury allocated Kshs 668.4 billion for the Development Expenditure out of a gross total estimate of 1.942 trillion for National Government, a total of 34.4% of the expenditure. Further, that the foregoing figure did not include development expenditures from the Consolidated Fund and the Contingency Fund for reasons among others that; the interest payment for Development loans is paid out of the Consolidated Fund, that the purpose and usage of monies in Equalization Fund is to enhance development for the provision of basic services and is exclusive for development and no recurrent expenditure if catered for.”

108. It submits that if any assessment of Nyeri County’s allocation and development expenditure was to take place within a financial year, the same should be analyzed using the Nyeri County Budget Review and Outlook Paper which is provided for under Section 118 of the [PFMA](#). That the actual development expenditure for Nyeri County can only be ascertained after the closure of the financial year 2023/24 and not anticipated as misconstrued by the Petitioner’s misinterpretation of the report.
109. On the reliefs sought by the Petitioner, it submits that prayer (a) is untenable since the report supporting the Petition speaks to a period of 6 months and not a medium-term period. With regard to prayer (b), it submits that the Petitioner has not pleaded with specificity how corruption, inefficiency and under expenditure is a failure to “make maximum use of available resources” violating Article 20 and 21 of the [Constitution](#) of Kenya. That the Petitioner has breached the principles set out in [Anarita Karimi Njeru v Republic](#) (1976 – 1980) KLR 1272. With regard to prayer (c), it submits that the same is untenable since the medium-term period defined by the [PFMA](#) is a period of not less than 3 years and not more than 5 years.
110. It further submits that the Petitioner has failed to prove that Nyeri County failed to allocate and spend at least 30% of its budget within the medium-term period. With regard to the prayer for a structural interdict, it is submitted that Nyeri County has complied with the provisions of the [Constitution](#) of Kenya as has been evidenced in these submissions and the Replying Affidavit dated 17/07/2024.
111. The 7th Respondent, in conclusion therefore, submits that the Petitioner has not proved its case as against Nyeri County and urges this Court to dismiss this petition.

Response by the 11th Respondent- Meru County

112. The 11th Respondent has also opposed this Petition through the Replying Affidavit sworn on 20/07/2024 by Dr. Kiambi J.T Atheru, the County Secretary and head of Public Service of Meru County.
113. He deposed that the Petition is incompetent, premature and devoid of merit as Meru County has over the years progressively allocated funds towards the realization of the 30% budgetary allocation towards the development expenditure and in strict compliance of the applicable laws.
114. He deposed that the findings in the report are inconclusive in reaching a determination as to whether Meru County complied and the same is not a medium-term report as contemplated under the [PFMA](#). That the financial period referred in the Petition does not meet the threshold of the period referred to as medium term under the provisions of [PFMA](#) and particularly the period referenced to is the first half of the financial year 2023/2024.
115. He asserted that the development expenditure and recurrent expenditure of Meru County stands at 32% and 68 % respectively of the total expenditure under the budget estimates thereby meeting the 30% development expenditure to 70% recurrent expenditure threshold.



116. He deposed that the County Assembly of Meru resolved to adopt the report of the Select Committee on the County Budget and Appropriations on the Budget Estimates for the financial year 2024/2025 without amendments and after the debates on the County Appropriations Bill and adoption by the County Assembly of Meru the said bill was forwarded to the Governor for Assent and signing into law.
117. He deposed that Meru County Government budget estimates are and have always been compliant with fiscal principle that County Government's recurrent expenditure should not exceed the County Government's total revenue.
118. He deposed that Meru County Government has in the previous financial years satisfied the provisions of the Constitution and Section 15 and 107(2)(b) of the PFMA (FY 2018/19 – FY 2022/23).
119. He deposed that the Petitioner misapprehended critical provisions of the law as well as material facts that have informed the framing of the Petition making the same to be premature and unable to attract the orders sought. That the Petitioner has not discharged its burden of proof for grant of the reliefs sought and thus the Petition ought to be dismissed.

Submissions By 11th Respondent -meru County

120. Via submissions dated 19/09/2024, the County Government of Meru submits that the issues arising for determination are;
 - a. Whether the Petition meets the competency threshold?
 - b. Whether the Report by the Office of controller of Budget for the first six months for Financial year 2023/2024 is conclusive and in tandem with the dictates prescribed under Section 15, 107 of the Public Management Finance Act?
 - c. Whether the 11th Respondent has complied with fiscal principles on allocation of development expenditure in 2024/2025?
 - d. Whether the 11th Respondent has complied with fiscal principles on allocation of development expenditure in 2023/2024?
 - e. Whether there is habitual non-compliance on the part of the 11th Respondent?
 - f. Whether the Petitioner should be granted the reliefs sought in their Petition dated 28th April 2024?
121. On whether the Petition meets the competency threshold, the County submits that it is a fundamental principle of the law that a claim of violation of a Constitutional right instituted via a Constitutional Petition must be pleaded with reasonable precision to enable the Court as well as the Respondents to understand and appreciate the complainant's Constitutional issues. That the Petitioner must, with reasonable precision, state the specific provision of the Constitution and the rights allegedly violated. That this position is encapsulated in the locus classicus case of Anarita Karimi Njeru v Republic (1976 – 1980) KLR 1272.
122. It submits that in this case, the Petitioner has merely cited Article 201 and 225(2) of the Constitution under paragraph 58 and adds that, without any particularization, the petition fails on the prescriptions in the Anarita Karimi case. Reliance is also placed on the case of Julia Mwenje Nyikuri v Kenya County Government Workers Union (2021) eKLR where the Court stated that;

“In this case, the Petitioner has relied on Article 22 and 258 of the Constitution, 2010 to urge the Petition, save that there are no particularized breaches, violations or nay matter of alleged



threat to the Constitution outlined as such or said to have been violated. What is sought to stop the participation of water sector/water companies' employees from participating in the elections of the Respondent scheduled for 30th April, 2021. Without any identified constitutional provisions being alleged to have been violated or threatened to be violated and the manner of the violation, the Petitioner fails in a material way and a memorandum of Claim should have sufficed to address the issues in dispute. Failure to conform to the required principles of a constitutional Petition is simple. The Petition must be struck out."

123. On the reliability of the Report by the Office of controller of Budget for the first six months for financial year 2023/2024, it submits that the Petitioner has invited this Court to make conclusive and final determinative finding based on the report which is neither conclusive nor final but merely indicative of the progress being made in a budgetary utilization cycle of half a year. Reliance is placed on the case of Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 others [2015] eKLR, where the Court of Appeal stated that;
- “The Public Finance Management Act in section 15 establishes the National Treasury to manage Public Finances. By section 15 of the Act, the National Treasury is required to enforce fiscal responsibility principles. The principles include a requirement that over the medium term, a minimum of thirty percent of the National budget shall be allocated to development expenditure...”
124. On compliance with fiscal principles on allocation of development expenditure in 2024/2025, it submits that Meru County is in full compliance with the fiscal principles under Sections 15(2)(a) and Section 107(2)(b) of the PFMA for the Financial Year 2024/2025. That, Meru County's development and recurrent expenditure stands at 32% and 68% respectively of the total expenditure thereby meeting the threshold.
125. On the issue of Whether Meru County has complied with fiscal principles on allocation of development expenditure in 2023/24, it submits that the Petitioner's allegation, that Meru County has failed to allocate and spend at least 30% of its budget on development projects is a misinterpretation of the County's activities and findings in the annexed County Governments Budget Implementation Report.
126. It submits that the Petitioner has misapprehended critical provisions of the law as well as material facts that have informed the framing of the Petition making the same to be premature and unable to attract the orders sought. That the Petition collapses on all fronts and none of the prayers is awardable for the following reasons: The first prayer is misinformed since Meru County had demonstrated through evidence that it is fully compliant in terms of Section 15 and 107 of the PFMA, 2012. That the Report relied upon by the Petition was inconclusive and therefore cannot form a basis of making a determinative finding that Meru County is at fault.
127. It submits that the second prayer cannot be granted since Meru County has demonstrated full compliance in allocating 30% as prescribed by law. That the Petitioner has also not pleaded any issue about corruption in the entire Petition thereby the prayer cannot be awarded if in the first place it was never pleaded.
128. On the third and fourth prayers requiring the Court to issue an order compelling Meru County to spend at least 30% on development in the financial year 2024/25 going forward, it contends that the same cannot be awarded since Meru County has already demonstrated compliance with the law by exhibiting a report of the Select Committee on the County Budget and Appropriations on the Budget Estimates for the County Government of Meru for the Financial Year 2024/2025.



129. It thus submits that this Petition is premature and incapable of attracting the orders sought.

Response by the 15th Respondent -Isiolo County

130. The 15th Respondent has also opposed the Petition through the Replying Affidavit sworn on 01/08/2024 by Abdullahi Banticha, the County Executive Committee Member in the Department of Finance, Planning, Budget & Revenue of Isiolo County.
131. He deposed that Isiolo County has complied with Section 107 of the PFMA and has spent more than 30% on development expenditure.
132. He deposed that the Petition does not meet the threshold of the period of medium term as defined in Section 2 of the PFMA as it is pegged on the report of the first half year of FY 2023/24 which is 6 months out of the three to five years envisaged by the PFMA.
133. He deposed that in order to ensure that 30% of the budget is allocated to development, Isiolo County adopted program-based budgeting which ensures that resources are aligned to deliver specific outcomes that are in line with the County Development agenda. A copy of the County Treasury Circular No 1 of 2022 dated 30/08/2022 is exhibited as AB-1.
134. He deposed that Isiolo County has ensured adequate engagement of all stake holders in the whole budget process which is done in collaboration with the department of devolution, public participation, County administration and special programs which formulates an annual public participation plan.
135. He deposed that through the annual public participation plan, Isiolo County has ensured that the residents at the village cluster, sub-ward, ward, sub-County and County levels are effectively engaged in the entire budget process.
136. He deposed that the County Budget Implementation Review Report for the first half of the fiscal year 2023/2024 shows that Isiolo County allocated 33% of its budget towards development expenditure. Copies of the County Annual Budget Implementation Reports for FY 2020/2021, 2021/2022, 2022/2023 are exhibited as AB-2. That, as highlighted in the report, Isiolo County allocated a total of Kshs 6,318,789,886 out of Kshs 18,620,170,027 on development activities representing more than 30% of the total budget.
137. He deposed that the percentage of funds allocated to development expenditure for FY 2020/2021, 2021/2022, 2022/2023 is 35%, 35% & 32% respectively. That by allocating over 30% of its budget in the 3rd medium term to development expenditure, Isiolo County continues to affirm its positive obligations of the PFMA.
138. He deposed that Isiolo County remains dedicated to maintaining transparency, accountability and adherence to legal mandate concerning budget allocations in future and will continue to ensure that its budgetary processes align with the PFMA thereby promoting sustainable development within the County.
139. He deposed that Isiolo County continuously procured and processed payments for all recurrent and development activities in full compliance with the law as evidenced by the qualified audit opinions provided in the annual reports by the office of the Auditor general.

Submissions by the 15th Respondent - Isiolo County

140. The 15th Respondent identifies the issues for determination to be as follows;
- a. Whether the Petition discloses any cause of action that has been violated;



- b. Whether the 15th Respondent complied with 30% budgetary allocation and 30% requirement expenditure on development; and
 - c. Whether the Petitioner should be granted the reliefs sought in their Petition.
141. It submits that the report used by the Petitioner to approach this Court cannot be used to conclusively hold that Isiolo County has not complied with the dictates that 30% of the budget shall be allocated to the development expenditure. That, one cannot use a wrong question to get a correct answer.
 142. It further submits that, guided by the PFMA, Isiolo County has ensured adequate engagement of all stakeholders in the whole budget process which is done in collaboration with the department of devolution, public participation, County administration and special programs which formulates an Annual public participation plan. That through the annual public participation plan, Isiolo County has ensured that the residents at the village, village cluster, sub-ward, ward, Sub-County and County levels are effectively engaged in the entire budget process.
 143. It submits that in the fiscal year 2023/2024, the County budget implementation review report for the first half of the fiscal year shows that Isiolo County allocated 33% of its budget towards development expenditure which is a demonstration of its commitment to exceeding the mandated threshold.
 144. It submits that the County has fully complied with the provisions of the Section 107(2)(b) of the PFMA and the Petition should be dismissed for lack of merit.

Response by the 17th Respondent -Uasin Gishu County

145. The 17th Respondent has opposed this Petition through the Replying Affidavit sworn on 10/07/2024 by Hon. Micah Kipkosgei Rogony, the County Executive Committee Member for Finance and Economic Planning of Uasin Gishu County.
146. He deposed that the facts and matters in the affidavit are derived partly from his own knowledge, partly from information obtained from records and documents belonging to and in possession of Uasin Gishu County.
147. He deposed that the Petition is based on inaccurate facts and theories as it relates to Uasin Gishu County and is couched upon prima facie misrepresentation, without any basis in law or in fact, based on abstract legal theories, presumptive and speculative claims and that the same ought to be dismissed with costs.
148. He deposed that Uasin Gishu County has at all material times been compliant with Sections 107 of the PFMA and has at all times ensured that a County Fiscal Strategy Paper is in line with Section 117 of the PFMA. That the County has also complied with Section 118 of the PFMA.
149. He deposed that under Regulation 25 of the Public Finance Management (County Governments) Regulations, 2015 Uasin Gishu County is required to adhere to fiscal responsibility principles and that under Regulation 26 as read together with the PFMA, the County Fiscal Strategy Paper must contain an assessment of the current state of the County Economic Environment. That under Regulation 26 (4) and (5), once the County Fiscal Strategy Paper is adopted by the County Assembly, it serves as the basis of expenditure ceilings specified in the fiscal framework and the County Executive Committee Member shall submit a copy of the adopted County Fiscal Strategy paper to the National Treasury.
150. He deposed that in the year 2018, the County prepared and published its County Fiscal Strategy Paper on February 2018 showing that in the financial year 2016/2017, the budget was Kshs 7,719,087,215 out of which Kshs 2,676,148,397 was used for development accounting to 36%.



151. He deposed that in the projections for the financial year 2017/2018, the County allocated 31% of its budget amounting to Kshs 2,320,498,540 but was later revised to Kshs 3,049,035,194 from a budget of Kshs 8,042,144,047 for development accounting to 34.59% of its budget. The County Fiscal Strategy Plan for the year 2018 is exhibited as 'A'.
152. That in the projections for the financial year 2018/2019, the County planned to spend Kshs 3,207,765,346 out of 8,249,483,870 being 30.06% of its budget. That the County revised the development budget to Kshs 4,574,041,093 out of its total budget of Kshs 9,930,551,268 being 40.03% of the budget. The County Fiscal Strategy Plan for the year 2019 is exhibited as 'B'.
153. That for the financial year 2019/2020, the County projected to spend Kshs 6,152,294,327 on development out of its projected budget of 11,369,638,524 being 54.11%. That the County revised the development budget to Kshs 5,796,656,668 out of its total budget of Kshs 11,567,607,793 being 50.11% of the budget. The County Fiscal Strategy Plan for the year 2020 is exhibited as 'C'.
154. That for the financial year 2020/2021, the County projected to spend Kshs 6,274,639,213 on development out of its projected budget 11,727,087,098 being 53.50%. That the County revised the development budget to Kshs 5,892,972,806 out of its total budget of Kshs 12,011,937,098 being 49% of the budget. The County Fiscal Strategy Plan for the year 2021 is exhibited as 'D'.
155. That for the financial year 2021/2022, the County projected to spend Kshs 3,190,335,497 on development out of its projected budget 9,677,712,285 being 33%. That the County revised the development budget to Kshs 6,110,635,324 out of its total budget of Kshs 13,213,659,493 being 46% of the budget. The County Fiscal Strategy Plan for the year 2022 is exhibited as 'E'.
156. That for the financial year 2022/2023, the County projected to spend Kshs 3,762,253,379 on development out of its projected budget 10,170,995,230 being 36.99%. That the County revised the development budget to Kshs 5,118,749,997 out of its total budget of Kshs 12,051,908,369 being 42.47% of the budget. The County Fiscal Strategy Plan for the year 2023 is exhibited as 'F'.
157. That for the financial year 2023/2024, the County projected to spend Kshs 3,190,155,012 on development out of its projected budget of 10,247,307,488 being 31.13%. That the County revised the development budget to Kshs 4,059,681,572 out of its total budget of Kshs 12,148,194,531 being 33.42% of the budget. That as of 31st December 2023, and based on the revised budgetary estimates contained in the County Fiscal Strategy Paper, Uasin Gishu County had received total revenues and grants of Kshs 5,428,966,688 out of which Kshs 1,259,826,371 was channeled for development thereby accounting for 31% of the received budgetary allocation. The County Fiscal Strategy Plan for the year 2024 is exhibited as 'G'.
158. Additionally, he deposed that, the projected development budget for the financial year 2024/2025 and 2025/2026 is set at Kshs 4,352,510,382 and Kshs 4,461,323,142 out of the projected budgets of Kshs 11,400,955,520 and Kshs 11,685,979,408 both being 38.18% of the projected budgets for the years 2024/2025 and 2025/2026 respectively.
159. He deposed that based on the foregoing, Uasin Gishu County has complied with the PFMA and Regulations and has not violated any Constitutional provision in relation to allocation and spending at least 30% of its budget on development matters. A copy of the National Treasury and Economic Planning 2023 Budget Review & Outlook Paper is exhibited as 'F'.
160. He deposed that the County Strategy Fiscal Paper together with the Budget Review Outlook prepared in each year by Uasin Gishu County have consistently set out the development plans to its



constituents. That in particular, the 2023/2024 is based upon the “nguzo kumi” (ten pillars) economic transformation agenda.

161. He deposed that the prayers sought in the Petition cannot be granted against Uasin Gishu County for the reasons that:
- a. The reports relied by the Petition have not shown any default on the part of Uasin Gishu to comply with the requirement to allocate at least 30% of its budget; and
 - b. The Reports by the controller of Budget show that as of 31st December 2023, Uasin Gishu County is on course to meet its projected expenditures progressively.
 - c. The Reports by the controller of Budget do not indicate that Uasin Gishu County has failed to meet its projected budgetary allocations. That it refers to absorption rate which relates to the share of the actual expenditure out of the budgeted expenditure (the target). A higher absorption rate is preferred since it means that a County Government is close to their target.

Submissions By 17th Respondent-Uasin Gishu County

162. The 17th Respondent identifies the issues for determination to be;
- a. Whether the Petition seeking the reliefs sought is justiciable;
 - b. If so, whether the 17th Respondent has complied with the provisions of the *Public Finance Management Act* with respect to Budget making;
 - c. Whether the 17th Respondent has complied with the requirement to allocate and spend 30% of its budget on development; and spend 30% of its budget on development.
163. As to whether the reliefs sought in the Petition are justiciable, it submits that the Petition offends the doctrine of ripeness and political question. Reliance was placed on the case of *National Assembly of Kenya & another v Institute for Social Accountability & 6 others* (2017) eKLR [Nairobi Civil Appeal No 92 of 2015] where the Constitutional Court was faulted for adjudicating upon hypothetical matters that:

“(72) The broad questions which were raised in the consolidated petitions, namely, – division of functions, powers and authority; the equitable sharing of revenue of national government, whether the Amendment Bill concerned County government and the role of the Senate in the legislative process, are questions which relate to inter-governmental relations and which should have been raised by either government in the appropriate forum and in case of a dispute such a dispute should have been resolved by the designated institutions through the prescribed mechanism. This is one peculiar case where the *Constitution* stipulates that a dispute should be in essence be resolved by other institutions through a prescribed mechanism before the jurisdiction of the High Court can be invoked.

(74) Furthermore, questions such as division of functions, division of revenue, legislative process and budget process are essentially political questions which fall within the political question doctrine; and which the *Constitution* has assigned to other political institutions for resolution and created institutions and mechanisms for such resolution. [Emphasis Ours]”



164. Reliance is also placed on the case of *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* (2016) eKLR [Constitutional Petition No 453 of 2015] where the Court stated that:

“(27) 27] Effectively, the justiciability dogma prohibits the Court from entertaining hypothetical or academic interest cases..... The Court is prevented from determining an issue when it is too early or is simply out of apprehension, hence the principle of ripeness. An issue before Court must be ripe, through a factual matrix for determination.”

165. It submits that the issue as framed by the Petitioner is that; based on the six (6) months absorption rate of the budget, there is an apprehension that Uasin Gishu County will not meet the 30% development budgetary allocation. To that extent, it submits that, the Petitioner is asking this Court to determine a hypothetical issue which in their view, is not ripe for adjudication.

166. It submits that the Petition as framed offends the political question doctrine as it relates to the budgets of the Respondents. That, the *Constitution*, the *PFMA* and Regulations 25, 26 and 27 of the *Public Finance Management (County Government) Regulations* have provided means of resolution of the political question as to what is to happen where the budget of a devolved unit does not comply with the provisions of the law.

167. As to whether Uasin Gishu County has complied with the Provisions of the *PFMA* with respect to Budget Making Process, reliance was placed on the case of *Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 others* [2015] KEHC 6974 (KLR) [Petition No 368 of 2014] where it was held that:

“

“70. The County Government budget process therefore consists of the following stages as stipulated under Section 125(1) of the *Public Finance Management Act*;

(1) ...

- (a) Integrated development planning process which shall include both long term and medium-term planning;
- (b) Planning and establishing financial and economic priorities for the County over the medium term;
- (c) Making an overall estimation of the County Government’s revenues and expenditures;
- (d) Adoption of County Fiscal Strategy Paper;
- (e) Preparing budget estimates for the County Government and submitting estimates to the County Assembly;
- (f) Approving of the estimates by the County Assembly;



- (g) Enacting an appropriation law and any other laws required to implement the County Government's budget;
- (h) Implementing the County Government's budget; and
- (i) Accounting for, and evaluating, the County Government's budget revenues and expenditures.

(2) The County Executive Committee member for Finance shall ensure that there is public participation in the budget process.”

Before I conclude on this issue, I recall that Prof. Ojienda submitted that there are strict timelines and systems of checks and balances required to be observed by County Assemblies in enacting County budgets. In that regard, under the provisions of Sections 117, 125, 129 and 133 of the *Public Finance Management Act*, the following instruments must be passed during the budgetary process in each financial year;

- (i) A County Fiscal Strategy Paper, which, pursuant to the provisions of Sections 117(1) and (6) of the *Public Finance Management Act* must be submitted to a County Assembly by the County Treasury by 28th February each year, and adopted by the County Assembly by 14th March each year. It is the County Fiscal Strategy Paper that presents the financial outlook of a County with respect to County Government revenues, expenditures and borrowing for the coming financial year and over the medium term;
- (ii) A County Budget Estimates of Revenue and Expenditure, which, pursuant to the provisions of Sections 125(2) (a), 129(6) and 131(1) of the *Public Finance Management Act*, must be presented to a County Assembly by the County Executive Committee Member for Finance by 30th April each year and approved by the County Assembly promptly and in any event before 30th June each year;
- (iii) A County Appropriations Act which the County Assembly must consider and enact by 30th June each year; and
- (iv) A County Finance Act, which pursuant to the provisions of Section 133 of the *Public Finance Management Act*, a County Assembly must consider and enact by 30th September each year.”

168. It submits that at the time the Petition was filed on 28/04/2024, Uasin Gishu County had already published its County Fiscal Strategy Paper for the 2024/2025. This Court was invited to take judicial notice that as at the time of arguing this Petition, Uasin Gishu County had published the County Budget Estimates of Revenue and Expenditure, its Appropriations Act and the Finance Act.

169. As to whether Uasin Gishu County has complied with the requirement to allocate and spend 30% of its budget on development, the County submits that it has provided evidence of having consistently published its County Fiscal Strategy paper for the years 2018, 2019, 2020, 2021, 2022, 2023 and 2024. That in all those County Fiscal Strategy Papers, the County allocated and/or projected at least 30% of its budget.



170. It submits that from the documents availed by Uasin Gishu County, it is clear that each County Fiscal Strategy Paper gave the County's actual expenditure in the previous financial year and the projections for the next four years being the medium-term. That in all the financial years from 2016/2017, 2017/2018, 2018/2019, 2019/2020, 2020/2021, 2021/2022, 2022/2023, the County allocated and spent at least 30% of its budget on development activities.
171. It submits that even the Petitioner's own documents being the Petitioner's Publication on the Status of the Budget Allocation confirms that Uasin Gishu County allocated and spent at least 30% of its budget on development activities.
172. It submits that in the Petitioner's own documents, Uasin Gishu County is listed among the best performing Counties in the allocation and spending of at least 30% of its budget in the financial years 2021/2022 and 2022/2023 where it spent 37.10% and 31.18% respectively of its budget on development.
173. With regard to FY 2023/2024, reference is made to page 235 of the Petitioner's report and the County submits that the Petitioner's major flaw is confusion between allocation of at least 30% of the budget and absorption rate. It contends that the two concepts should not be conflated or confused. It submits that according to the Institute of Economic Affairs, absorption rate refers to the share of actual expenditure out of the budgeted expenditure (the target).
174. It submits that a higher absorption rate is preferred since it means that Counties are close to their target while a lower absorption rate implies that Counties are performing below in terms of utilization of the intended expenditure.
175. It submits that according to the Petitioner's documents, the annual budget of Uasin Gishu County's for the financial year is Kshs 10,247,307,488.00. That the total funds available for budget implementation during the first six (6) months of the financial year 2023/2024 was Kshs 5,253,005,051.00.
176. It further submits that out of Kshs 5,253,005,051.00 available for the first six months, the Controller of Budget approved withdrawals of Kshs 4.38 Billion from the CRF of which Kshs 860.71 Million was used for development and Kshs 3.02 Billion was used on recurrent program. It contends that the withdrawn amount and the disbursements made are not indicative of Uasin Gishu's failure to comply with the 30% development budget threshold for the reason that the six months under review do not amount to a medium term.

Response by the 18th Respondent- Bomet County

177. The Replying Affidavit was sworn on 24/07/2024 by Milca Chepkoech, the County Chief Officer responsible for Economic Planning and Budget matters in Bomet County Government.
178. She deposed that the County Government has progressively allocated funds towards the realization of 30% budgetary allocation towards development expenditure. That the instant Petition is not a true reflection of the budget implementation as it is premised on a mid-year review.
179. She deposed that in the current Financial Year 2024/2025, the County Government allocated Kshs 2,995,869,451/= for development representing 30% of the budget. A copy of the submitted Budget Estimates Summary for FY 24/25 is exhibited as MC1.
180. She deposed that despite the cross-cutting challenges militating against effective and efficient budget implementation, Bomet County has demonstrated that it has complied with the Constitution and statutory provisions with regard to budgetary allocation to development expenditure.



181. She deposed that as reported in the first half County Budget Implementation Report for FY 2023/24, the delay by the National Treasury to disburse the equitable share of revenue raised Nationally has hampered the timely implementation of the budget which is beyond the control of Bomet County.
182. She deposed that notwithstanding the delay from the National Treasury, Bomet County recorded the second highest proportion of development expenditure to the annual development budget which stood at 27.1% during the period under review.
183. She deposed that Bomet County has instituted a revenue enhancement program in order to improve on the development budget which includes but is not limited to automation of revenue collection to ensure that the approved budget is fully financed.
184. She deposed that the County Budget Implementation Review Reports should be interpreted in the context of continuous budget implementation for the whole financial year given unpredictability in exchequer releases to the County Governments. Arising from the foregoing, the County contends that the Petitioner has not established any special circumstances meriting the grant of the prayers sought in this petition.
185. For the record there were no submissions filed by Bomet County.

Response by the 19th Respondent-Laikipia County

186. The 19th Respondent has opposed this Petition through a Replying Affidavit sworn on 17/07/2024 by Samuel Wachira Gachigi, the County Executive Committee Member for Finance, Economic Planning and County Development for the County Government of Laikipia.
187. He deposed that the two major sources of revenue for Counties are the equitable share from the National Government and Own Source Revenue. That, they also receive conditional and donor grants.
188. He deposed that Laikipia County has complied in ensuring allocation of 30% of its budget on development expenditure both in its current and previous budget. The Laikipia County Appropriation Act 2024 & 2023 are exhibited as SWG 1& 2 and an extract of the budget is exhibited as SWG 3.
189. He deposed that the report cannot be relied upon to evaluate an annual target.
190. He deposed that the Petition is an abuse of Court process as it is an invitation for the Court to encroach into policy issues which are an exclusive preserve of the National and County Governments. That the Petitioners apprehensions are unfounded, unmerited and have not been pleaded with precision and stipulated in *Anarita Karimi Njeru v Republic*, 1978. That a violation of any fundamental right in the Bill of Rights has not been demonstrated.
191. He deposed that the provision and expenditure of Laikipia County is affected by the constant delays of disbursements by the National Treasury among other factors and as such, Laikipia County cannot be blamed for failure to undertake development.
192. He deposed that further compliance on budget expenditure depends on various factors beyond the control of Laikipia County such as career growth i.e. promotions, negotiated CBAs, review of taxes that contribute to a huge percentage in the wage bill, ongoing projects among other factors that may influence the County into meeting the required threshold.
193. He deposed that unsteady revenue to County Governments plays a major role on adherence to budget ceilings but Laikipia has shown a gradual improvement over the years in its compliance on the 30% budget implementation on development expenditure.



194. He deposed that the Petition is incurably defective, bad in law and an abuse of the Court process as the Petitioner is seeking the Court to usurp Parliamentary and Executive roles. That the Senate and County Assembly which oversight the budget implementation of the Counties have not been cited to have failed in their oversight role and are not even parties to this suit. That the grant of the orders sought would be an affront to the doctrine of separation of powers.
185. The 19th Respondent, for the record also, did not file any submissions in this matter.

Response by the 20th Respondent-Marsabit County

196. The 20th Respondent has opposed this Petition through a Replying Affidavit sworn on 24/10/2024 by Hussein Tarry Sasura, the County Secretary of the County Government of Marsabit.
197. He deposed that the report that forms the basis of the Petition is merely indicative of the progress made by the County Governments in a span of six months and cannot be used as a basis for finding that the Respondents are in violation of the Right to Development as the provisions of the PFMA require the budgetary allocation of 30% towards development to be done over a medium – term. That the Petitioner has failed to provide a Medium - Term Report and hence the evidence presented before this Honorable Court is inconclusive and therefore misleading.
198. He deposed that most development expenditures of Marsabit County are offset at the end of the financial year and hence the Report tabled by the Petitioner does not clearly depict Marsabit County’s budgetary allocation towards its development expenditure. That the provision and expenditure is dependent on the budgetary allocation from the National Treasury every financial year which directly affects the implementation of the County Government Budget and hence Marsabit County cannot be faulted in any way for failure to undertake development.
199. He deposed that unsteady revenue to County Governments among other factors also play a role in the adherence of budgetary ceilings in any given financial year. That this Petition is an abuse of Court process as it aims to usurp the parliamentary powers of the Senate to oversight County Governments’ expenditure which would greatly violate the doctrine of separation of powers.
200. The 20th Respondent-Marsabit County did not file any written submissions.

Response by the 22nd Respondent- National Treasury

201. The State has on its part weighed in and opposed this petition through a Replying Affidavit sworn on 09/09/2024 by Samson P. Wangusi, the Principal Administrative Secretary in the State Department of National Treasury, at the Ministry of National Treasury and Economic Planning.
202. He deposed that the National Treasury is established pursuant to Section 11 of the PFMA to perform certain functions in relation to County Governments and that Section 103 of the PFMA has established County Treasuries for each of the 47 County Governments to perform certain functions.
203. He deposed that it is necessary to appreciate that the attainment of fiscal responsibility principles is significantly broader beyond the allocation of minimum 30% to development expenditure by County Governments. That other fiscal responsibility principles envisaged under Section 107 of the PFMA include limits for wages and salaries, borrowing requirements for County Governments, predictability in tax policy among others.
204. He deposed that the National Treasury has formulated a policy to wit the Own Source Revenues (OSR) whose goal is to support County Governments fiscal sustainability. That the realization of OSR’s objective- that includes increased OSR as a percent of total County Revenue has a direct bearing



in determination of County Government fiscal framework as well as management of cash flows. That each County Government is individually responsible for determining its fiscal framework of enforcing fiscal responsibility principles in line with Section 107 of the [PFMA](#).

205. He deposed that from the published report titled 'County Governments Budget Implementation Review Report for the first 9 months FY 2023/2024' by the Controller of Budget, 45 out of 47 County Governments allocated a minimum of 30% of their total budgets to development expenditure. That out of the 21 County Governments cited as Respondents, only Bomet and West Pokot are below the minimum 30% threshold in development budget allocation.
206. He deposed that the Petitioner has mixed up the legal question in budget allocation and budget spending. That while the [PFMA](#) is clear on minimum allocation to development budget, it does not explicitly provide for minimum budget spending but it is expected that each County Government would achieve 100% budget performance.
207. He deposed that prompt budget spending may be affected by factors such as; underperformance in County Government OSR, delays in transfer of Nationally raised revenue, administrative inefficiencies in budget execution and cash flow constraints.
208. He deposed that the conclusions made on overall performance of County Government budget implementation based on in-year performance reports such as those quoted for the FY 2023/2024 are not only pre-mature but also factually misleading. That in order to obtain sufficient information on County budget spending, each County Government is required to prepare and publish a County budget and outlook paper pursuant to Section 118 of the [PFMA](#).
209. He deposed that a review of the published approved program-based budget books indicates that ministerial budget estimates for the four-year period referred to by the Petitioner from FY 2020/2021 to 2023/2024 indicates that over the last four years, the National Government has cumulatively allocated 32% of its ministerial expenditure to the development budget.
210. He deposed that the Government adopted a medium-term expenditure framework (MTEF) approach to budgeting which is a three-year rolling period and an analysis of the published Approved Program Based Budget Books indicates that the allocation to the development budget over the referred medium-term period was 31% of the National Government budget in compliance with Section 15 of the [PFMA](#).
211. He deposed that the Petition does not disclose any Constitutional or Statutory violations or any case against the National Treasury to warrant the intervention of the Court.
212. He deposed that bearing in mind the nature of the competing claims against the background of the public cause, the conscientious sense of proportions stands in favor of declining grant of any relief sought in this Petition.

Submissions by the 22nd Respondent- National Treasury

213. Vide submissions dated 11/09/2024 by the Principal State Counsel on behalf of the National Treasury and the Attorney General, the State submits that the issue for determination in this matter is; whether there was failure by the National Government to allocate the requisite 30% to development thus violating citizens' rights to development.
214. It submits that section 11 of the [PFMA](#) establishes the National Treasury which is tasked with some key responsibilities related to County Governments.



215. Reliance is placed on the case of *In The matter of Interim Independent Electoral Commission* [2011] eKLR Constitutional Application No 2 of 2011 which buttressed the limb that County Governments are not independent but semi-autonomous.
216. It further submits that the National Treasury has the role, in addition to allocation, of assisting County Governments with budget preparation, ensuring fiscal sustainability and managing cash flows in accordance with Article 6 of the *Constitution*.
217. That the Petition does not take into consideration that each County Government is constituted with its own County treasury with a responsibility of managing fiscal framework and budget execution.
218. Reliance is placed on the case of *Senate & 48 others v Council of County Governors & 54 others* [2019]eKLR where it was held that Devolution is a political arrangement where political administrative and fiscal power is distributed to semi-autonomous sub-national units.
219. Further reliance is placed on the case of *Killbourn v Thompson* 103 US 168 (1880) where it was held that under the doctrine of separation of powers, persons entrusted with power in any arm of Government should not be permitted to encroach upon powers conferred to another arm of Government.
220. It submits that the Petition is non-justiciable, vexatious, without reasonable or probable base whose intention is to harass the Respondents. Reliance is placed on the case of Petition No 45 of 2017- *Maya Duty-free Limited v Hon. Attorney General & 3 others* which stated that parties should pursue remedies available to them instead of pursuing constitutional Petitions.
221. It takes the position that there is ambiguity presented to this Court through the Petition because the Petitioner has failed to demonstrate that the 21st Respondent failed to fulfill its fiscal duties and responsibilities under Section 15 and 107 of the *PFMA*. It submits that the allegations against it are unsubstantiated and relies on *Jesse Kamau & 25 others v Attorney General Misc. Application 890 of 2004*.
222. It submits that the Petition overlooks the decentralization of responsibility and erroneously places blame on the National Government on issues that are within the purview of individual County Governments and adds that, fiscal responsibility goes beyond the simple allocation of 30% to development expenditure. That the National Treasury formulated the Own Sources Revenue (OSR) policy in 2018 to support County Governments' fiscal sustainability.
223. It further submits that the Petition generalizes the non-compliances of County Governments without specifying the alleged violations in detail. It points out that in the Controller of Budget's report on the County Governments Budget Implementation for FY2023/24, 45 out of the 47 Counties cited in the Petition allocated a minimum of 30% development expenditure. It relies on the case of *Anarita Karimi Njeru v The Republic* (1976-1980) to buttress the position that, if a person is seeking redress from a matter which involves reference to a Constitution, it is important to set out, with a reasonable degree of precision, that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.
224. Reference is also made to Section 136 of the *PFMA* which guides the management of unspent appropriations and that the Petition fails to account for the procedural handling of unspent funds and the impact of fiscal forecasting challenges. It places reliance on *the matter of the principle of Gender Representation in the National Assembly and the senate* Advisory Opinions Application 2 of 2012 [2012] eKLR on progressive realization of social economic goals.



225. It is their final submission that the Court dismisses the Petition as it is insufficiently supported by factual evidence and fails to provide a comprehensive view of the County budget performance in relation to their legal obligations under the PFMA.

Response by the 1st Interested Party-Council of Governors

226. The 1st Interested Party has opposed this Petition through a Replying Affidavit sworn on 11/07/2024 by Mary Mwiti, the Chief Executive Officer of the Council of Governors.

227. She deposed that pursuant to Article 228(5) of the Constitution, compliance by the County Governments with the PFMA is verified by the Controller of Budget at the beginning of every financial year, ensuring no withdrawal of funds unless the 30% allocation requirement is met.

228. She deposed that over the years, County Governments have been continuously faced with inadequate resources and constrained budgets to implement their various mandates including service delivery and development. That the disbursement of funds from National Government to County Governments has been consistently delayed, severely impacting the Counties ability to implement their budgets and planned development projects timely notwithstanding the fact that; disbursement of the equitable share of revenue to the Counties should be undertaken strictly within the confines of Article 219 of the Constitution as read together with Section 17(6) of the PFMA.

229. She deposed that whereas the 1st to 20th Respondents raise revenue from several other sources including own source revenue, loans and donations, only the equitable share is determined with certainty at the time of budgeting while the other sources depend on external factors beyond their control.

230. She deposed that whereas County Governments may allocate 30% development expenditure during budget making, implementation poses a great challenge as the actual revenues received are often less than the projected revenues due to various factors beyond the Counties control. That this includes the disbursement schedules and delays from the National Treasury and Planning.

231. She deposed that the Petitioner has erred in law and fact by using the first half of the 23/2024 financial year to assess the Respondents failure to allocate 30% of their budget to development expenditure. That the reliance on the half-year budget implementation report is misleading as it does not represent the end of year financial status which includes the total actual revenues received and expenditures made.

232. She deposed that the County Budget Implementation Review Reports should be interpreted in the context of continuous budget implementation throughout the financial year. That the Petitioner has not demonstrated and established any special circumstances to warrant the issuance of the prayers sought.

Submissions by the 1st Interested Party -council Of Governors

233. Via submissions dated 23/10/2024, the 1st Interested Party submits that the budget making process by County Governments is governed by a comprehensive legal framework, including the Constitution of Kenya, the PFMA, Public Financial Management (County Governments) Regulations, 2015 among other legal and regulatory frameworks.

234. It submits that the Petitioner erred in law and in fact by averring that the Respondents have failed to allocate 30% for development expenditure. Reference was made to section 125 of the PFMA which provides stages in the County Government budget process.



235. It submits that the Respondents have complied with the requisite budget making process and allocated 30% for development expenditure as required in law and that the budget implementation is dependent on the disbursement of funds to the County Governments from the exchequer.
236. It further submits that County Governments are heavily reliant on the equitable share of revenue to meet their budgetary obligations but the National Treasury has frequently delayed disbursements which significantly affects the ability of Counties to implement their budgets including the development projects.
237. It submits that the delayed disbursement of funds has materially affected their ability to implement the planned development projects as reflected in the mid- year reports but this does not amount to non-compliance with the law.
238. It relies on the case of *National assembly of Kenya & another v Institute for social Accountability & 6 others*; Appeal No 92 of 2015 on the principle that; Public Finance shall promote an equitable society by ensuring that revenue raised nationally is shared equitably between the National and County Governments.
239. It submits that the half-year budget implementation report provides an interim snapshot of budget execution and that the Petitioner’s reliance on this report is premature. That the absorptions of funds, particularly for development projects is dependent on several factors including revenue collection, disbursement schedules and expenditure planning.
240. It submits that the Petitioner failed to establish that the Respondents acted unlawfully or failed to comply with their statutory obligations and that the Petitioner did not plead the case with the required level of precision as enumerated in the case of *Anarita Karimi Njeru v Republic*; Miscellaneous Criminal application No 4 of 1979 in the High Court at Nairobi and the case of *Communication Commissions of Kenya & 5 others v Royal Media Services Limited & 5 others*; Petition 14 of 2014 in the Supreme Court of Kenya.
241. The Council of Governors urged the Court to dismiss the Petition with costs for lack of merit.

Response by the 2nd Interested Party-controller Of Budget

242. The 2nd Interested Party has added her voice to this Petition via a Replying Affidavit sworn on 20/08/2024 by FCPA Dr. Margaret Nyakang’o CBS, the Controller of Budget.
243. She deposed that the Controller of Budget is an independent office as envisaged by Article 228 of the *Constitution* and the *Controller of Budget Act*. That the Controller of Budget is charged with the roles of oversight, control, reporting, advisory, investigation, dispute resolution, public sensitization, monitoring and enforcement of budget ceilings.
244. She deposed that in discharging its mandate, the Controller of Budget is guided inter alia by the *Constitution*, the *Controller of Budget Act*, the *PFMA* and attendant regulations as well as other laws of Kenya.
245. She deposed that Section 107(2)(a) of the *PFMA* refers to recurrent expenditure while Section 107(2) (b) relates to development expenditure where ‘over the medium term, a minimum of 30% of the County Governments budget shall be allocated to the development expenditure’.
246. She deposed that the phrase ‘over the medium term’ has been used for both National and County Governments in regards to development expenditure and allocation and the upshot is that they ought to enforce the fiscal principles over three to five years.



247. She deposed that in outlining a road map for Kenya's economy, Kenya Vision 2030 highlighted the four medium term plans as follows;

1st Medium Term Plan 2008/2009, 2009/2010, 2010/2011, 2011/2012, 2012/2013

2nd Medium Term Plan 2013/2014, 2014/2015, 2015/2016, 2016/2017, 2017/2018

3rd Medium Term Plan 2018/2019, 2019/2020, 2020/2021, 2021/2022, 2022/2023

4th Medium Term Plan 2023/2024, 2024/2025, 2025/2026, 2026/2027, 2027/2028

248. She deposed that an analysis of development expenditure and allocation for the 1st to 20th Respondents during the 3rd Medium Term indicates that although most Counties allocated more than 30% of their budgets to development, their actual development expenditure fell below the required threshold except for the County Governments of Makeni, Marsabit and Uasin Gishu. The relevant Table is exhibited as MN1.

249. She deposed that on average, the allocation and expenditure for development should be 30% of the budget in each Financial year throughout the medium term for both the National and County Governments. That practically, it follows that both the National and County Governments should allocate and spend 30% of the budget towards development in each financial year.

250. She deposed that the Petitioner's allegation, that the 1st to 20th Respondents spent less than 10% of their budgets on development expenditure, is erroneous as it is only based on 6 months of the FY 2023/2024 i.e the period between 1st July 2023 to 31st December 2023. That to properly evaluate the performance of the County Governments, the assessment should be based on allocation and expenditure as at the end of the FY 2023/2024.

251. She deposed that a comparison of the 1st to 20th Respondents' development expenditure for the first nine months of FY 2023/2024 is shown in the Table exhibited as MN2. That the Controller of Budget is currently in the process of finalizing the annual report of FY 2023/2024 which will provide the conclusive assessment on compliance with the 30% fiscal principles. The report for the first nine months of FY 2023/2024 is exhibited as MN3.

252. She deposed that the Table (MN2) further indicates that most County Governments allocated more than 30% of their budgets to development in accordance with the fiscal principles set out in Section 107(2)(b) of the PFMA with the exception of the County Governments of West Pokot and Bomet.

253. She deposed that, in relation to the National Government's allocation of only 17% of its budget to development expenditure in the first six months of the 2023/2024 fiscal year, it is important to note that this figure is not definitive. That the reported development allocation for this period includes only Supplementary I, which was passed in November 2023. That it does not yet reflect Supplementary II which was passed in June 2024. That consequently, the development allocation is subject to change.

254. She deposed that in compliance with the fiscal principles, both the National and County Governments are required to allocate and spend at least 30% of their budgets on development expenditure in each financial year.

255. There were no submissions from the Controller of Budget.



Respondents & Interested Parties That Did Not Respond

256. There were no responses from the County Governments of Machakos, Nairobi, West Pokot, Nyandarua, Samburu, Taita Taveta, Narok, Kericho, Baringo, Lamu and Kajiado. There were also no responses from the Attorney General, Law Society of Kenya and Africa Centre for Open Governance.

Issues For Determination

257. The issues for determination are;

- I. Whether the Petition filed herein is competent or justiciable.
- II. Whether there was failure by the National Government and listed County Governments to allocate and expend at least 30% of their medium term/annual budget to Development?
- III. Whether Failure by the National and County Governments to allocate and spend 30% of their budget on Development Expenditure is unconstitutional and/or Unlawful.

Analysis & Determination

ISSUE No I Whether the Petition filed herein is competent or justiciable

258. The Respondents contend that this Petition is pre-mature and/or non-justiciable. It is their position that the fiscal principle of 30% of the budget going towards development allocation and expenditure applies over a 'medium term' and in their view, the medium term as defined under Section 2 of the [PFMA](#) is a "period of not less than three (3) years but not more than five (5) years." All the Respondents contend that the Petition herein hinges only on the 2nd interested party's County Government Budget Implementation Review Report on the first six (6) months of the financial year 2023/2024 issued in 2023/24 (hereinafter referred to as (OCOB's report).

259. The above contention raises two questions for determination;

- i. Whether the Petition is hinged only on the OCOB's Report?
- ii. What is the meaning of the term "medium term?"

260. On the 1st issue, while it is true that the Petitioner has cited the OCOB's half year report and attached the entire report in its' Petition, the Petitioner also refers to the non-compliance by the 1st to 20th Respondents in the financial years 2018 to 2023.

261. This is supported by the Petitioner's own report titled "The status of the 70:30 budget allocation and spending Rule in Kenya, a case of the 47 County Government." The report analyzed the development budget and spending for the financial years 2018 to 2023. The record shows that this report was not challenged by the Respondents.

262. In addition to the above, the OCOB, who is the 2nd Interested Party swore an affidavit on 20/08/2024 and exhibited a report as annexure MN1 containing the Office of the Controller of Budget's analysis of the development expenditure and allocation by the 1st to 20th Respondent during the 3rd Medium term Period (2017/2018 to 2021/2022). This report confirms the Petitioner's case that there has been consistent non-compliance with the statutory requirement to allocate and spend at least 30% of their budgets on development. We note that the 1st to 20th Respondents did not contest the contents of this report and have avoided commenting on it in their respective responses and submissions in this Petition.



263. We have perused and considered the three reports as evidenced in our summary of the pleadings and it is clear that the Petition is not only hinged on the half-year OCOB's Report.
264. Clearly therefor this Petition stands on these three reports.
265. On the question of the meaning of the term "medium term," the term is defined by Section 2 of the PFMA as "a period of not less than 3 years but not more than 5 years".
266. The section 2 is silent on when this term begins so it must be read with provisions of Sections 1(2) and 107 of PFMA.
267. The provisions of Section 107 (2) (b) provides that;
- "Over a medium term a minimum of 30% of the County Government budget shall be allocated to the development expenditure."
268. There is no doubt reading from the statute that the medium term refers to a period between 3 and 5 years. The question that begs an answer is; when does that period begin to run? The statute is silent but the purpose intent by legislature can be construed from the provisions of Section 1 (2) of the PFMA, 2012 which provides as follows;
- "Subject to Article 116 (3) of the Constitution, all provisions relating to County Governments under this Act shall come into operation upon the final announcement of the results of the 1st elections under this Constitution."
269. The 1st General Elections in Kenya under the Constitution of Kenya 2010 was held on 4th March 2013. The PFMA was enacted in 2012 which means that going by the above statutory provision, all provisions relating to County Governments financial operations as specified under PFMA came into operation after the 2013 General Elections and upon the attendant establishment of County Governments. From the foregoing the medium term referred to under Section 2 implies the period between 2013 to 2018.
270. Our above finding is also supported by the averments made by the 2nd interested party (OCOB) in her affidavit of 20/08/2024 where she has highlighted Kenya's Vision 2030 to comprise four medium term plans the 1st one beginning from 2008 to 2013, the 2nd one, 2013 to 2018, the 3rd one , 2018 to 2023 and the last one 2023 to 2028. It follows therefore that the medium term with respect to County Governments commenced in 2013 and that upon their establishment, their first medium term was the 2013 to 2018 period.
271. It means therefore that upon their establishment, the respective County Governments were required by the law to onboard the already existing medium term, which according to OCOB aligns with Kenya's Vision 2030.
272. We now turn to the issue as to whether the Petition is premature, justiciable or ripe for determination.
273. The Respondents contend that this Petition is premature, unripe or not justiciable. The Black's Law Dictionary 9th Edition defines justiciability to mean a matter "proper to be examined in Courts of justice or a question as may properly come before a tribunal for decision." In other words, Courts should only decide matters that require to be decided.
274. The Court is prevented from determining an issue when it is too early or simply out of apprehension, hence the doctrine of ripeness.



275. An issue before the Court must be ripe through factual perspective. In *Hon. Martin Nyaga Wambora v Speaker of County Assembly of Embu and 5 others* HCCP No 3 of 2014, the Court observed as follows:

“It is clear from the above definition that whether a matter before a Court is justiciable or not depends on the facts and circumstances of each particular case but the Court must first satisfy itself that it has jurisdiction to entertain the matter before it can resolve the issue of justiciability.”

276. The Respondents’ contention that the Petition filed herein is not ripe or justiciable, in our view, holds no water because the issues raised therein are pertinent and require determination. The Petitioner has cited the Constitutional and statutory provisions that it asserts have been violated. In *Coalition for Reform and Democracy (CORD) & another; 2 others v Republic of Kenya & another*; HCCP 628 of 2014 [2015] eKLR, the Court cited the case of *Patrick Ouma Onyango & 12 others v AG & 2 others*; Misc. Appl No 677 of 2005 wherein the Court had endorsed the doctrine of justiciability as stated by Lawrence H. Tribe in his treatise *American Constitutional Law*, 2nd Ed. Page 92 as follows:

“In order for a claim to be justiciable as an article III matter, it must “present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted.” In part, the extent to which there is a real and substantial controversy is determined under the doctrine of standing; by an examination of the sufficiency of the stake of the person making the claim, to ensure the litigant has suffered an actual injury which is fairly traceable to challenged action and likely to be redressed by the judicial relief requested. The substantiality of the controversy is also in part a feature of the controversy itself—an aspect of ‘the appropriateness of the issues for judicial decision...and the actual hardship of denying litigants the relief sought. Examination of the contours of the controversy is regarded as necessary to ensure that Courts do not overstep their constitutional authority by issuing advisory opinions. The ban on advisory opinion is further articulated and reinforced by judicial consideration of two supplementary doctrines: that of; ripeness; which requires that the factual claims underlying the litigation be concretely presented and not based on speculative future contingencies and of; mootness; which reflects the complementary concern of ensuring that the passage of time or succession of events has not destroyed the previously live nature of the controversy. Finally, related to the nature of the controversy is the; political question; doctrine, barring decision of certain disputes best suited to resolution by other Governmental actors.”

277. In *KKB v SCM & 5 others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling); The Court stated;

“The doctrine of ripeness and constitutional avoidance gives credence to the concept that the *Constitution* does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable legislation together with other available legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to the *Constitution*. The possibility of the elevation of any dispute to a constitutional issue is what is sought to be averted by the doctrines of ripeness and constitutional avoidance. It is borne out of a realization that all legislative or common-law remedies are part of the legal system.”

278. It is important to point out that this Court is obligated to conform to its Constitutional mandate beginning at the preamble where We the People of Kenya adopt this Constitution and state, among



other things that we are committed to nurturing and protecting the well-being of the individual, the family, communities and the nation, and recognizing the aspirations of all Kenyans for a Government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.

279. We must also pay homage to the first Article which declares the sovereignty of the people and that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution. In addition, State organs, in the exercise of delegated power, shall perform their functions in accordance with this Constitution—at the National level and at the County level.
280. It is in that spirit that We the People delegated the power to manage public resources to specific state agencies in accordance with the Constitution through an Act of Parliament made under Article 225 providing for financial control of public funds. The Article states;
1. An Act of Parliament shall provide for the establishment, functions and responsibilities of the national Treasury.
 2. Parliament shall enact legislation to ensure both expenditure control and transparency in all governments and establish mechanisms to ensure their implementation.
281. In managing those resources, these agencies are required to apply the principles of public finance set out at Article 201 which include; openness and accountability, including public participation in financial matters; that the public finance system shall promote an equitable society, the burden and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations, public money shall be used in a prudent and responsible way; and financial management shall be responsible, and fiscal reporting shall be clear.
282. To that end, Parliament passed the Public Finance Management Act as an Act of Parliament to provide for the effective management of public finances by the National and County governments; the oversight responsibility of Parliament and County assemblies; the different responsibilities of government entities and other bodies, and for connected purposes.
283. In this Petition, the issue is the implementation of two clearly mandatory provisions in the Act viz;
- s.15 The National Treasury to enforce fiscal responsibility principles
- (1) The National Treasury shall manage the National Government’s public finances in accordance with the Constitution, and the principles of fiscal responsibility set out in subsection (2).
 - (2) In managing the national government’s public finances, the National Treasury shall enforce the following fiscal responsibility principles—
 - (a) over the medium term a minimum of thirty percent of the national and county governments budget shall be allocated to the development expenditure.
107. County Treasury to enforce fiscal responsibility principles
- (1) A County Treasury shall manage its public finances in accordance with the principles of fiscal responsibility set out in subsection (2), and shall not exceed the limits stated in the regulations.
 - (2) In managing the County Government’s public finances, the County Treasury shall enforce the following fiscal responsibility principles—



- (a) the County Government's recurrent expenditure shall not exceed the County Government's total revenue;
- (b) over the medium term a minimum of thirty percent of the county government's budget shall be allocated to the development expenditure;

284. Development expenditure is defined as the expenditure for the creation or renewal of assets; The OCOB with respect to Counties says;

Development expenditure plays a pivotal role in the growth of your County. This expenditure relates to costs incurred in order to create assets that will provide long-term public goods, including roads, hospitals, schools and airports. Such expenditure tends to cover the construction of buildings, both residential and for office purposes; purchase of durable and long-term equipment, such as power generators and telecommunications equipment; establishment of water/sewer treatment plants, stadiums, recreational facilities and historical monuments, and installation of information technology equipment and other long-term equipment. (OCOB)

285. In addition, The [UN Declaration on Right to development](#) recognizes that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom. Article 1(1) states;

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized. (Declaration on the Right to Development Adopted by General Assembly resolution 41/128 of 4 December 1986)

286. It therefore goes without saying that the basis of the Petition being failure to comply with the statutory and Constitutional imperatives by National and County Governments on the management of public finances and in particular the giving to effect of the requirement for development expenditure, the National and County Governments have violated/threatened to violate the right to development. In our considered view, it is a threat to the fulfilment of the spectrum of rights in the Bill of Rights. This is because development or maendeleo as we know it in Kenya affects every aspect of the people's lives. In fact, this is what Article 19 speaks to when it states:

1. The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.
2. The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.

287. The Constitutional and statutory framework for the management of public finances to enable development must be read in the light of the Bill of Rights.

288. The foregoing clearly demonstrates that the Petition is addressing a real live issue affecting the People and cannot be said to be unripe.



289. Does this Court have the jurisdiction to deal with this issue? Having asserted that the issue of development touches upon the spectrum of the Bill of rights, Articles 23 (1) & 165 (3) (b) of Constitution, grant this Court the express jurisdiction to interrogate the allegations of these acts that violate or threaten to infringe on the Bill of Rights codified under the Constitution.
290. The Petitioner alleges that the rights of the citizens to development have been infringed by the Respondents and has cited inter alia the provisions of Articles 10, 19, 27, 28, 43, 175 of the Constitution. The nexus of the allegations made and the cited rights are that; owing to failure by the Respondents to allocate and spend at least 30% of their budget on development in accordance with the law, the residents of the non-compliant cited Counties in this Petition are unable to realize their rights under Article 43 of the Constitution.
291. That issue, in our view, requires interrogation and determination. The Respondents cannot shield themselves under the doctrine of justiciability and the political question because the issues raised are justiciable. In Lucy Njoki Waitbaka v Tribunal Appointed to investigate the conduct of Lucy Njoki Waitbaka & another : Kenya Magistrate and Judges Association (Interested Party) 2019 (eKLR); Petition No 205 of 2019. The Court stated;
- “In broad terms, justiciability governs the limitations on the constitutional arguments that the Courts will entertain. It encompasses three main principles which are standing, ripeness and mootness.
- Justiciability was the concept in law that concerned itself with whether the Court was the most appropriate organ of the state or Government (Government in the wider sense including the three arms of Government and other public agencies or bodies) to deal with the dispute. The case could not be suitable for adjudication by the Court due to a number of reasons such as under mootness doctrine where the real dispute had ceased.”
292. This Court finds that the Respondents’ contention, that the issues raised are political and therefore not properly before the Court, is unfounded. This is because the Petitioner faults the fiscal management of the Respondents budgetary allocation to development expenditure in violation of mandatory Constitutional and Statutory provisions.
293. We also find that, based on the reports filed by the Petitioner and the 2nd Interested Party in this Petition, the contention by the Respondents that the Petition is premature is unfounded.
294. We find therefore that this Court is seized with the jurisdiction to interrogate and determine the issues raised by the Petitioner in this Petition.

Issue No II; Whether there was failure by National Government and County Government to allocate and expend at least 30% of their medium term/annual budget to Development?

295. It was the Petitioner's contention that under Section 15(1) and 107(2), (b) of the PFMA as read with Rule 25 (1) of the Public Finance Management (County Government) Regulations, 2015, both the National and County Governments, were required to manage public finances in accordance with the principles of fiscal responsibility set out in the said statutes as anchored under Articles 201, 202, and 225(1) & (2) of the Constitution. The Petitioner further emphasized that the National and County Governments had a statutory obligation to ensure that a minimum of thirty percent (30%) of the budget was consistently allocated and expended under development expenditure.
296. The Petitioner’s case is that the Controller of Budget (COB) had, pursuant to Article 228 of the Constitution, the mandate to oversee the implementation of both the National and County



- Government budgets and had recently reported that the National Government had only allocated 17% of the revised gross budget to “development expenditure” in the first six months of the financial year (FY) 2023/2024 and likewise the 21 Counties sued in this Petition had also spent less than 10% of their budget on development expenditure, which omission was unlawful.
297. In filing this Petition, the Petitioner expressed the apprehension that the threshold required by law would not be attained at the end of the financial year under reference. This apprehension by the Petitioner was explained to be informed by the previous failure by the Respondents to adhere to the legal requirements on development allocation and expenditure.
298. The Petitioner also relied on their report (Publication on the status of budget allocation on the spending rule in Kenya-A case of the 47c County Governments Annexure- DM3) which comprehensively reviewed and analyzed the development budget spending of all the Counties spanning the period of 2018 to 2022, concluding that on average, allocations for development expenditure were consistently less than 30% of the budgeted sum.
299. Further, they submitted that the 1st to 20th Respondent's continuous habit of failing to allocate and/or spend a minimum of 30% of their budget on development over the medium term was a regressive measure that violated State obligations “to take steps” or to “allocate the maximum available resources” towards the realization of the bill of rights, especially Article 43 of the *Constitution* which provided for “Economic and Social Rights”. That the skewed allocations also violated the state's positive obligation under Article 21(1) of the *Constitution*, Article 1 of the Banjul charter, and Article 2 of the *International Covenant on Civil and Political Rights* (ICCPR), all of which also call for the respect, observation, protection, fulfillment, and promotion of the rights and fundamental freedoms under the bill of rights. This unsavory situation called for appropriate judicial intervention and they urged the Court to grant the orders sought.
300. The Petitioner relied upon the Controller of Budget review report for the first half of FY 2023/24, which concluded that the total expenditure by County Governments in the first half of FY 2023/2024 was Kshs 168.52 billion, representing an absorption rate of 30.2% of the total County Government Budgets. Recurrent expenditure was Kshs 143.72 billion, while development expenditure was Kshs 24.81 billion. Considering the above ratios, on expenditure, on the 1st half of the FY 2023/2024, there is apprehension that most Counties will not achieve the development expenditure threshold. This is because the 1st half year report shows that only 14.7 % has been expended for development. The Petitioner's fears are not unfounded because of the documented past failures by County Governments to fulfil the legal requirement to set aside and expend at least 30% of their total annual budget.
301. An analysis of the Petitioner's report (DM3) indicated that the total expenditure by the County Governments grew to Kshs 428,896.08 billion in FY 2022/23 from Kshs 376,434.73 billion in FY 2018/19, reflecting a 13.9% increase over the five years. When considering the proportion of total expenditure, recurrent usage consistently occupied the largest share of the available resources. In FY 2022/2023, out of the total spending, Kshs330,915.80 billion (equivalent to 77.2% of the expenditure) was allocated to meet the recurrent needs of County Governments, while Kshs 97,980.28 billion (representing 22.8 % of the costs) was assigned to development. However, over the period 2018 to 2023, Makeni, Marsabit and Uasin Gishu Counties are the only ones who were compliant.
302. The evidence presented, especially the second report “ A case study of the 70:30 budget allocation and spending rule in Kenya, A case of the 47c County Governments- Exhibit DM3” was empirical as it was compiled using data of budget estimates and expenditures, (total, recurrent, and development), for the 47-County Government over the last financial years (FY 2022/23, FY 2021/22; FY 2020/21, FY 2019/20 and FY 2018/19). The study coincided with the implementation of the second County



Integrated Development Plans (CIDPs) and also analyzed the County budget trends, including revenue performance in terms of appropriation in aid, budget absorption, and utilization rates. The report using the afore-stated parameters established the trends in budgetary performance on development spending across all 47 County Governments for the period under review and proved a violation of the law given that the County Governments were not taking steps to allocate the maximum available resources towards development expenditure.

303. The Petitioner's findings were also supported by the report produced by the Controller of Budget, the 1st interested party herein, who also filed her report (MN1). In the said report, the 1st Interested Party emphasized that the roadmap of the Kenyan economy was highlighted in Kenya Vision 2030, which had four medium-term plans for the years; 2008 -2013, 2013 – 2018, 2018 – 2023, and 2023 -2028. Based on their analysis of the data picked therefrom, development expenditure and allocation for the 1st to 20th Respondents during the 3rd Medium Term indicates that although most Counties allocated more than 30% of their budgets to development, their actual development expenditure fell below the required threshold except for the County Governments of Makueni, Marsabit and Uasin Gishu.
304. In response, the 1st, 17th, and 20th Respondents demonstrated that they had complied with the provisions of Section 107(1) & (2) of the PFMA medium term as demonstrated by the OCOB's report (MN1). The said report however also empirically confirms that all the other Respondents failed to comply with this provision of the law.
305. For avoidance of doubt the data from OCOB is reproduced hereunder. It demonstrates, at a glance, each of the Respondents' attempts to comply with the law. The first column sets out the names of the Counties and first row sets out the financial years over the medium term 2018 to 2023. The second row sets out each County's percentage expenditure on development and percentage allocation for development expenditure respectively. The final Column shows the average expenditure and allocation on development in the medium term (KEY: E- Expenditure, A- Allocation, FY- Financial Year, MT- Medium Term).

Comparative Analysis



County	FY 18/19		FY 19/20		FY 20/21		FY 21/22		FY 22/23		MT AVERAGE	
	%Development	%Development	%Development	%Development	%Development	%Development	%Development	%Development	%Development	%Development	%Development	%Development
E	A	E	A	E	A	E	A	E	A	E	A	
Makueni	31.5	41.5	30.83	43.0	35.8	43.0	30.4	37.0	25.8	30.5	30.86	39.0
Machakos	26.6	36.1	20.7	35.2	23.6	35.2	13.2	30.9	16.8	30.0	20.18	32.88
Kisii	23.9	33.3	26.9	33.7	26.5	32.4	19.7	32.5	5.7	29.7	20.54	32.32
Nairobi	20.1	22.4	8.5	21.9	18.7	22.4	10.7	26.1	13.9	23.3	14.38	23.22
West Pokot	29.3	35.0	20.6	31.6	32.0	37.1	24.4	32.9	30.0	32.1	27.26	33.74
Nyandarua	28.0	41.3	28.8	36.1	30.7	37.0	19.0	35.0	25.1	30.0	26.5	35.88
Nyeri	26.7	32.2	22.3	34.1	28.1	35.2	19.4	30.2	25.2	30.1	24.34	32.36
Samburu	17.8	34.2	18.7	32.1	26.3	37.2	31.5	36.9	29.0	31.3	24.66	34.44
Taita Taveta	25.7	33.9	18.1	30.1	33.2	33.6	15.5	34.8	20.6	30.5	22.62	32.2
Narok	30.2	30.9	27.5	32.9	13.1	31.1	12.6	30.0	24.6	32.2	21.6	31.42
Meru	27.0	37.4	22.9	29.8	26.1	31.7	25.8	33.1	23.1	29.4	24.98	32.28
Kericho	23.1	43.3	27.3	44.1	30.3	42.4	26.5	36.9	28.7	31.1	27.18	39.56
Baringo	20.9	44.3	27.4	41.8	19.3	41.2	26.4	43.7	31.2	42.0	25.04	42.6
Lamu	23.9	47.1	27.6	43.9	27.4	41.3	27.9	37.7	21.7	31.3	25.7	40.26
Isiolo	23.3	33.9	38.1	42.1	23.5	35.4	23.8	34.5	26.6	32.2	27.06	35.62
Kajiado	30.9	39.2	25.7	38.2	32.1	35.8	27.6	32.4	25.3	29.9	28.32	35.1
Uasin Gishu	24.2	45.1	33.0	50.1	31.0	49.1	37.1	46.2	31.0	38.8	31.26	45.86
Bomet	30.0	36.2	27.5	34.9	26.5	35.2	25.0	33.6	21.7	29.4	26.14	33.86
Laikipia	31.3	40.4	19.0	46.3	24.9	35.8	30.0	44.1	18.7	25.5	24.78	38.36



Marsabit	48.3	50.7	44.1	47.9	47.7	53.3	41.8	49.1	35.4	43.0	43.46	48.6
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306. The above analysis speaks for itself. Evidently, save for the 1st, 17th and 20th Respondents, all the other Respondents are at fault for failure to comply with the statutory requirement to not only allocate but expend not less than 30% of their budgets on development.
307. It is necessary to state here that although the Petitioner has faulted the National Government for non-compliance, no evidence was presented before us to prove that fact. The half year report filed from OCOB and exhibited as DM-1, reported that the National Government only allocated 17% of the revised gross budget to development expenditure for the first 6 months of the FY 2023/2024. No other evidence was placed before this Court to support the claim of non-compliance, unlike the case of the County Governments. It is also noteworthy that the Petitioner did not, in the body of the Petition, particularize the financial years the National Government violated this law. In the circumstances, and on the evidence before us, we answer the question at hand in the negative.

Issue No III Whether Failure by the National and County Governments to allocate and spend 30% of their budget on Development Expenditure is unconstitutional and/or Unlawful

308. In determining this pertinent issue, we turn to Article 259 (1) of the *Constitution* which guides the Court in interpreting the *Constitution*. It states that;
1. This Constitution shall be interpreted in a manner that—
 - (a) promotes its purposes, values and principles;
 - (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
 - (c) permits the development of the law; and
 - (d) contributes to good governance.
- 309.. We take guidance from views expressed by Mohamed A J, In the Namibian case of *S. v Acheson*, 1991 (2) S.A. 805 (at p.813) where he stated as follows;
- “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 and...aspirations 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.”
310. It is not about the letter of the law. In interpreting the *Constitution*, we must capture the aspirations of the Kenyan people in realization of their rights as encapsulated in the Bill of Rights.
311. We find emphasis of this position in Nairobi High Court Constitutional Petitions No 33 and 42 of 2018 (Consolidated) *Okiya Omtatah Okoiti v Public Service Commission & 73 others* [2021] eKLR where the Court observed as follows;
- “As regards the interpretation of the *Constitution*, suffice to say that the *Constitution* itself gives guidelines on how it ought to be interpreted. That is in articles 20(4) and 259(1).



Article 20(4) requires Courts while interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and the objects of the Bill of Rights. Article 259(1) command Courts to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.”

312. Further guidance in capturing the aspirations of the people of Kenya is provided under Article 10 as read with Article 19 of the said Constitution which provides that the Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic, and cultural policies. The rights enshrined in the Constitution must therefore be observed to uphold the dignity of individuals, communities and also to promote social justice, inclusiveness, equality, non-discrimination, good governance accountability, and sustainable development. See Communications Commission of Kenya & 5 others v Royal Media services limited & 5 others (2015) eKLR.
313. the Constitution establishes two distinct levels of Government, the National Government and 47 devolved units, each with its mandate to manage its affairs and resources. The primary objective of devolution was to bring service delivery closer to the people and to promote equitable allocation and efficient unitization of National revenue for public service, thereby enhancing local, social, and economic development.
314. The right to development is not expressly stated per se in the Bill of Rights but Article 19(1) of the Constitution provides that the Bill of Rights is central to Kenya’s democratic state and shall form the framework for social, economic and cultural policies. Further the Constitution, under Article 19(3) (b) mandates the Court to recognize and promote other rights and fundamental freedoms conferred by law except to the extent that the law is inconsistent with the Constitution.
315. Article 43 of the Constitution also champions for highest attainment of social and economic rights. It therefore follows, that any limitation to the right to development cannot be arbitrary and must comply with the standards set out under Article 24 of the Constitution.
316. Kenya is a signatory to International Instruments that provide for right to development. For example, Article 22 of the Banjul Charter, Article 2 of the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESR) and UN Declaration on the Right to Development, in light of Section 2(5) and 2(6) of the Constitution.
317. To achieve the above ideals, Kenyans set rules and principles of management of public finances in PFMA and the Constitution Article 201 provides the principles that shall guide all aspects of public finance in the Republic in the following terms; that;
- 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 Nationally shall be shared equitably amongst National and County Governments; and
 - iii. Expenditure shall promote the equitable development of the country, including by making special provisions of marginalized groups and areas;



- c. The burden 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.
318. It is noted that the *Public Finance Management Act*, Cap 412A of the Laws of Kenya was enacted by Parliament after the promulgation of the *Constitution* in 2010, pursuant to the provisions of Articles 225 and 226 of the *Constitution*.
319. To achieve the Economic, Social, Cultural and extent of the Bill of Rights, the people needed to have the public resources managed in the manner envisaged by the *Constitution*. This is reflected in the objectives set out at section 3 of *PFMA* thus;
- a. Public finances are managed at both the National and the County levels of Government in accordance with the principles set out in the *Constitution*; and
 - b. Public officers who are given the responsibility for managing the finances are accountable to the public for the management of those finances through parliament and County assemblies.
320. As stated herein above, these objectives are expounded under Section 15(1) & (2) of *PFMA* (*supra*) which provides for National Government obligations by stating that the National Treasury has the mandate to enforce fiscal responsibility principles.
321. Section 107(1) & (2) (*supra*) of the *PFMA* provides for the manner in which County Governments are to manage public finances.
322. To reinforce the above provisions concerning County Governments, *Public Finance Management (County Governments) Regulations, 2015* were passed. These Regulations provide direction that development expenditure by the County Government shall not be less than 30% of the total budget. This is stated at section 25 (1), (g) thus;
- (i) In addition to the fiscal responsibility principles set out in section 107 of the Act, the following fiscal responsibility principles shall apply in the management of public finances—
 - (a)
 - (b)
 - (c)
 - (d)
 - (e)
 - (f)
 - (g) ... pursuant to section 107(5) of the Act, if the *County Government Act* expenditure on development shall be at least thirty percent in conformity with the requirement under section 107(2)(a) of the Act;
323. The Petitioner averred that there was a violation of these provisions of law by the 1st to 22nd Respondents and therefore had the burden of proving the propositions as to whether or not a violation of a public right had occurred. As already discussed above, We do reiterate that the Petition raises justiciable issues and the legal fulcrum underpinning this Petition is Constitutionally and statutorily



sound based on the clear and unequivocal provisions of Articles 225, and 226 of the Constitution of Kenya as read together with Section 15(1) & (2), 107 (1) &(2) of the PFMA and Section 25 (1),(e) of the Public Finance Management (County Governments) Regulations, 2015, (all of which provide that over the medium term, a minimum of thirty (30%) of the County Government’s budget shall be allocated to development expenditure.

324. We find and hold that the failure by the Respondents to allocate and expend the requisite minimum 30% of the annual budget to development is both unlawful and unconstitutional as clearly demonstrated above.
325. Article 2(1) of the Constitution declares its Supremacy and the fact that it binds all persons and the State at both levels of Government, and no person may claim or exercise state authority except as authorized under the said constitution.
326. The Respondents who failed to act in accordance with the law have been exercising state authority outside the Constitution. This is because it is the Constitution that gave the mandate for Parliament to pass the law. That law has been in force and has consistently not been complied with and that is where the violation and threat to violation of Constitutional Rights stand out. In that event, having found that the Respondents, save for 1st, 17th and 20th Respondents, have consistently failed to uphold the statutory and mandatory provisions of PFMA, we find merit in this Petition.

Reliefs

327. Having determined the issues in this Petition, we find and hold that this Petition is founded and we allow it. We will now consider appropriate reliefs.
328. In considering the reliefs, it is important to address an issue that was raised by some of the Respondents; that there are provisions of the law for dealing with violations. It is true.
329. The PFMA takes the compliance with these provisions seriously. That is why the legislature found it wise to create a provision to ensure compliance. Section 196 (7) of the PFMA provides;
- Where a national government entity or a county government entity—
- (a) engages in an action that it is prohibited from doing by this Act; or
 - (b) fails to comply with an obligation imposed on it by this Act, a public officer who assisted or facilitated the act, or who was a party to, or contributed to, the failure, commits an offence and on conviction is liable to a term of imprisonment not exceeding two years or to a fine not exceeding one million shillings, or to both, in addition to provisions under Article 226(5) of the Constitution.
330. Article 226 (5) provides;
- If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not.
331. According to section 200 of the PFMA, the Principal Secretary shall take all practicable steps to report the matter to the relevant law enforcement authority to enable that authority to investigate the suspected offence and, if evidence of the offence is discovered, institute proceedings to prosecute any person who is alleged to have committed it.



332. For County Governments, it is Section 201 of *PFMA* read with Rule 25 of the Regulations. The Onus is on the County Chief Officer “where there is suspicion that an offence may have been committed under this Act, he or she shall notify the County Executive Committee member for finance and take all practicable steps to report the matter to the relevant law enforcement authority to enable that authority to investigate the suspected offence and, if evidence of the offence is discovered, to institute proceedings to prosecute any person who is alleged to have committed it.”
333. During the hearing of the Petition, we did not hear of any case where these particular provisions of the law have been adhered to and it would be safe to conclude that in view of the history of the non-compliance, it is unlikely that any report with regard to s. 196(7) has, so far, been made to the relevant authority yet non-compliance clearly amounts to consistent engagement in actions that are prohibited through failure to comply with obligations imposed by the Act.
334. We must emphasize that failure to act by these State officers have consequences clearly set out by the Act. It is our view that if the requisite actions were taken by the relevant State officers, the blatant violations would be stemmed.
335. We remind the Respondents that with respect to compliance with the law on development, none has the luxury of choosing what parts of the law to comply with and which parts to ignore. To do so is to threaten the Kenyan dream set on the power and impact of devolution. This was well said by David K. Maraga, SCJ, in his concurring opinion in *Advisory Opinion Reference 3 of 2019* thus;
- “The four issues identified as the basis of our Advisory Opinion in this Reference revolve around the interpretation, implementation and enforcement of the Kenya *Constitution*, 2010. They revolve around the realization of the devolution dream in the 2010 *Constitution*. In a nutshell, they revolve around the perennial issue of the inequitable distribution of the National cake. Sadly, as was the case with the independence Constitution, the implementation of the 2010 Kenyan Constitution is starting to be lopsided. Those upon whom the Kenyans people have bestowed the power and authority to implement the 2010 *Constitution* and the political elite, safeguarding their personal and often sectarian interests, are cherry picking what to implement...On the sharing of the National cake, soon after independence, the Executive embarked on a skewed discriminative and exclusionary developmental agenda premised on Sessional Paper No 10 of 1965 on African Socialism and its Application to Planning in Kenya. That created widespread disenchantment among the Kenyan people. (To remedy this, the *Constitution* of Kenya, 2010 introduced) devolution, which, from its objects in Article 174 of *Constitution*, would recognize and protect, inter alia, the rights of minorities and marginalized communities; promote social and economic development; and, most importantly, ensure equitable sharing of the National and local resources.”
336. We have demonstrated that save for the 1st, 17th and 20th Respondents, the others are guilty of infringing the right to development of the Kenyan people and violating their Constitutional, and statutory obligations by failing to allocate and or spend 30% of their budgets towards development.
337. Articles 22 and 23 of the *Constitution* provide inter alia that in Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened, the Court has jurisdiction, in accordance with Article 165, to hear and determine the claim for redress of that denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Right and may as per Article 23(3) grant Appropriate Relief, Including;
- (a) a declaration of rights;



- (b) an injunction;
 - (c) a conservatory order;
 - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
 - (e) an order for compensation; and
 - (f) an order of judicial review.
338. What amounts to appropriate relief has been the subject of discussions in Constitutional litigation. From our reading of the numerous authorities placed before the Court by the Petitioner, it emerges that appropriate relief must be relief that is not only suitable to address the Constitutional infringement but is just in the circumstances of the cases. The relief must uphold the *Constitution* and ultimately must uphold the human rights of those involved and the rule of law. The relief must also bear in mind that our Constitution is a living document whose life is dependent on the realities of the Kenya people. It is a transformative document carrying in its veins, and its spirit, the transformative power to transform those who interpret it, the Court.
339. The Bill of Rights specifically states at Article 23 that:
- 2. In applying a provision of the Bill of Rights, a Court shall—
 - (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and
 - (b)) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.
 - (4) In interpreting the Bill of Rights, a Court, tribunal or other authority shall promote—
 - (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and
 - (b) the spirit, purport and objects of the Bill of Rights.
340. Our jurisprudence has borrowed from South Africa. For instance, in *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17; the Judge while discussing the issue of appropriate relief and citing another case *Fose v Minister of Safety and Security* (CCT 14/96) [1997] ZACC 6 stated;
- (45) The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, “we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source.” [40] (emphasis added)
341. In the cited case (Fosa), the Judge had pointed out that an appropriate relief was relief that was required to protect & enforce the *Constitution*. This could be a declaration, an interdict or a mandamus. He noted that at some other time the Court may be required to fashion new remedy to secure the



protection and the enforcement of the Constitution. Essentially, that the relief must address the impact of the right infringed through vindicating the Constitution and deterring any further violation.

342. The Supreme Court, in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR) (29 September 2014) (Judgment), cited at paragraph [359] the famous United States Supreme Court case of Marbury v Madison, 5 U.S. 137 (1803) on inter alia the key place of the Courts in the upholding of the U.S. Constitution. The Supreme Court affirmed that the principle, that the Courts have the jurisdiction to uphold our Constitution, is enshrined in our Constitution at Articles 23(3)(d) and 165(3) (d), and that these provisions show that our Constitution requires us to go even further than the U.S. Supreme Court did in Marbury because by contrast, Article 23(3) in granting the High Court powers to grant the list of appropriate relief uses the term ‘including’ to mean that that list is not an exhaustive list out of the known reliefs which include ... Interim reliefs, structural interdicts, supervisory orders or any other orders that could be issued by the Courts, [for as long as they are] ‘specific, appropriate, clear, effective, and directed at the parties to the suit or any other State agency vested with a constitutional or statutory mandate to enforce the order.’
343. Evidently, in the event that the Court has to fashion a new relief, then it must ‘be specific, appropriate, clear, and effective,
344. Effectiveness of a relief would mean that the parties are able to not only have their rights declared, but that they get to experience the actual remedy because the infringement is corrected in their lifetime. This has been done through the structural interdicts.
345. In County Government of Kitui v Ethics & Anti-Corruption Commission (2019) eKLR, the Court stated as follows with regards to structural interdicts as an available remedy;

“ 100. One of the remedies which is now recognized in jurisdictions with similar constitutional provisions as our Article 23 is what is called structural interdict. In essence, structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under Court supervision. Five elements common to structural interdicts have been isolated in this respect. First the Court issues a declaration identifying how the Government has infringed an individual or group’s constitutional rights or otherwise failed to comply with its constitutional obligations. Second, the Court mandates Government compliance with constitutional responsibilities. Third, the Government is ordered to prepare and submit a comprehensive report, usually under oath, to the Court on a pre-set date. This report, which should explicate the Government’s action plan for remedying the challenged violations, gives the responsible state agency the opportunity to choose the means of compliance with the constitutional rights in question, rather than the Court itself developing or dictating a solution. The submitted plan is typically expected to be tied to a period within which it is to be implemented or a series of deadlines by which identified milestones have to be reached. Fourth, once the required report is presented, the Court evaluates whether the proposed plan in fact remedies the conditional infringement and whether it brings the Government into compliance with its constitutional obligations. As a consequence, through the exercise of supervisory jurisdiction, a dynamic dialogue between the judiciary and the other branches of Government in the intricacies of implementation may be initiated. This stage of structural



interdict may involve multiple Government presentations at several ‘check in’ hearings, depending on how the litigants respond to the proposed plan and, more significantly, whether the Court finds the plan to be constitutionally sound. Structural interdicts thus provide an important opportunity for litigants to return to Court and follow up on declaratory or mandatory orders.

The chance to assess a specific plan, complete with deadlines, is especially valuable in cases involving the rights of ‘poorest of the poor,’ who must make the most of rare and costly opportunities to litigate. After Court approval, a final order (integrating the Government plan and any Court ordered amendments) is issued. Following this fifth step, the Government’s failure to adhere to its plan (or any associated requirements) essentially amount(s) to contempt of Court”.

What Are The Appropriate Remedies?

346. There are Respondents who did not file any responses to the Petition. They are deemed to have conceded the Petition.
347. Otherwise, we have found in favor of the Petitioner and hereby enter judgement and declare as follows;
- a. A declaration be and is hereby issued that it is mandatory for the National Government and the County Governments to allocate in their annual budgets and over the medium term, a minimum of 30% of the budget to development expenditure as provided for by the *PFMA* s. 15(2) (a) and s. 107 (2) (b). Any public officer who fails to comply will be held liable in accordance with s. 196(7) of the *PFMA*.
 - b. A declaration be and is hereby issued that the failure by respective County Governments to allocate, and or spend at least 30% of their budgets on development expenditure is unconstitutional and unlawful as it infringes the rights of citizens to development and violates the County Governments obligation to allocate the maximum of available resources to realise the Bill of Rights.
 - c. An order be and is hereby issued compelling the Respondents to allocate and spend at least 30% of their budgets on development expenditure as required by Sections 15(2)(a) and 107(2)(b) of the *Public Finance Management Act*, (2012) Cap 412A of the Laws of Kenya, Regulation 25 of the *Public Finance Management County Government Regulations, 2015* in the financial year 2024/25, moving forward.
 - d. A structural interdict be and is hereby issued in the following terms:
 - i. That the County Governments, through the respective County Executive Committee Member for Finance, do each file a report with the Controller of Budget within three months from the date of this judgment stating the steps they have taken to comply with this Court’s judgment.
 - ii. That each of the reports be accompanied by a sworn affidavit by the respective CEC Finance to the facts in the report.
 - e. This being a public interest matter, there is no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON 23rd JANUARY 2025

HON. R. K. LIMO (PRESIDING JUDGE)



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HON. LADY JUSTICE MUMBUA T. MATHEKA (HIGH COURT JUDGE)

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HON. JUSTICE FRANCIS RAYOLA OLEL (HIGH COURT JUDGE)

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