Chamao & 4 others v National Assembly of Kenya & 7 others; Commission on Revenue Allocation & 2 others (Interested Parties) (Petition E423 of 2024) [2025] KEHC 7992 (KLR) (Civ) (5 June 2025) (Judgment)

Neutral citation: [2025] KEHC 7992 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

PETITION E423 OF 2024

LN MUGAMBI, J

JUNE 5, 2025

BETWEEN

ISSA ELANYI CHAMAO ..... 1ST PETITIONER

PATRICK KARANI EKIRAPA ..... 2ND PETITIONER

PAUL NGWENYWO KIRUI ..... 3RD PETITIONER

INTERNATIONAL LEGAL CONSULTANCY GROUP LTD ..... 4TH PETITIONER

COUNCIL OF COUNTY GOVERNORS ..... 5TH PETITIONER

AND

NATIONAL ASSEMBLY OF KENYA ..... 1ST RESPONDENT

KENYA ROADS BOARD ..... 2ND RESPONDENT

CABINET SECRETARY, NATIONAL TREASURY AND ECONOMIC PLANNING ..... 3RD RESPONDENT

CABINET SECRETARY, ROADS & TRANSPORT ..... 4TH RESPONDENT

MINISTRY OF ROADS & TRANSPORT ..... 5TH RESPONDENT

KENYA URBAN ROADS AUTHORITY ..... 6TH RESPONDENT

KENYA RURAL ROADS AUTHORITY ..... 7TH RESPONDENT

ATTORNEY-GENERAL ..... 8TH RESPONDENT

AND

COMMISSION ON REVENUE ALLOCATION ..... INTERESTED PARTY

THE SENATE ..... INTERESTED PARTY

INTERGOVERNMENTAL RELATIONS TECHNICAL COMMITTEE ..... INTERESTED PARTY

JUDGMENT

Introduction

1. The Petition dated 16th August 2024 is supported by the 5th petitioner's Chief Executive Officer, Mary Mwiti's affidavit in support of similar date.

2. The Petition assails the 1st respondent's decision dated 28th September 2023 and 13th August 2024, that unilaterally excluded county governments from the Road Maintenance Levy Fund (RMLF) allocations for road maintenance in their respective counties. The Petitioners contend that the respondents action runs afoul the constitutional principles of devolution and equitable allocation of resources in respect of the county governments.

3. In addition, the Petition contests the constitutionality of the *Kenya Roads Act* and *Kenya Roads Board Act* on the basis that it does not conform to the *Constitution*, in particular, the Fourth Schedule of the *Constitution*.

4. The petitioners thus instituted this Petition against the respondents for violating various Constitutional provisions, namely, Articles 6 (1), 10, 118, 186 and also Section 18 of the Part 1 of the Fourth Schedule of the *Constitution*, and thus sought the following reliefs:

    i. A declaration that given the territorial boundaries of county governments as provided in Article 6 (1) of the *Constitution* as read with the division of functions in Article 186 and the Fourth Schedule of the *Constitution*, the classification of public roads as national roads, rural and urban roads under Section 47 of the *Kenya Roads Act*, No. 2 of 2007-undermines the objectives of the devolution and the Fourth Schedule of Constitution.

    ii. A declaration that Section 47 of the *Kenya Roads Act*, No. 2 of 2007 as read with the First Schedule of the *Kenya Roads Act*, No. 2 of 2007 is unconstitutional for violating Article 186 and Section 18 of Part I of Fourth Schedule of the *Constitution*.

    iii. A declaration that Section 6 of the *Kenya Roads Board Act*, 1999 is unconstitutional for violating the provisions of Articles 6, 10, 186 and Section 18 of Part I of Fourth Schedule of the *Constitution*.

    iv. A declaration that the decision of the National Assembly dated 28th September 2023 to unilaterally remove or fail to recognize County Governments as beneficiaries of funds of the Road Maintenance Levy Fund ('RMLF') in the financial year 2024/2025 and 2025/2026 and another decision of 13th August 2024 to further remove County Governments as beneficiaries of Kshs. 10,522,211,853.00 conditional grants from funds derived from Road Maintenance Levy Fund ('RMLF' in the financial year 2024-2025-are illegal and unconstitutional for violating Article 10, 118, 186 and Section 18 of Part I of Fourth Schedule of the *Constitution*.

    v. An order of Certiorari be issued to quash the decision of the National Assembly of 28th September 2023 that unilaterally removed and/or failed to recognize County Governments as beneficiaries of funds of the Road Maintenance Levy Fund ('RMLF') in the financial year 2024-2025 and another decision of 13th August 2024 to further remove County Governments

as beneficiaries of Kshs. 10,522,211,853.00 conditional grants from funds derived from Road Maintenance Levy Fund ('RMLF') in the financial year 2024-2025.

vi. A mandatory order be issued directing the Kenya Roads Board to the Cabinet Secretary National Treasury and Economic Planning, Cabinet Secretary, Roads and Transport and Parliament to take appropriate budgetary measures to include County Governments as beneficiaries of funds of the Road Maintenance Levy Fund ('RMLF') in the financial year 2024/2025, 2025/2026, and all subsequent years.

vii. A mandatory order be issued directing the Kenya Roads Board to disburse to the county governments the sum of Kshs. 10.522,221,853.00 due to them for the financial year 2024/2025.

viii. A mandatory order be issued directing the Kenya Roads Board, and Cabinet Secretary Roads and Transport, Attorney General, and Parliament to take appropriate measures to amend the *Kenya Roads Board Act* of 1999 to include County Governments as beneficiaries of funds of the Road Maintenance Levy Fund ('RMLF') forthwith.

ix. An Order be issued directing the Cabinet Secretary of Roads and Transport and the Attorney General to take appropriate measures within 12 months to reclassify all roads in Kenya to accord to the constitutionally permissible framework, that is to say (national trunk roads and county roads).

x. An order be issued directing the Cabinet Secretary, Ministry of Roads and Transport, Attorney General, and Parliament to take appropriate measures within 12 months to amend the *Kenya Roads Act* No. 2 of 2007, *Kenya Roads Board Act*, No. 7 of 1999 and the *Road Maintenance Levy Fund Act* to align with the *Constitution* relating to the functions of County Governments in the Transport and Roads sector.

xi. A permanent injunction be issued against the respondents from removing county governments as beneficiaries of funds of the Road Maintenance Levy Fund ('RMLF').

xii. A permanent injunction be issued against Kenya Roads Board stopping it from funding Kenya Urban Roads Authority and Kenya Rural Roads Authority from the Road Maintenance Levy Fund ('RMLF').

xiii. Costs of the petition.

Petitioners' Case

5. One of the fundamental features introduced with the promulgation of the *Constitution* is devolved government system that has the national and county governments. The petitioners allege this system has had its fair of challenges in implementation mostly because of the national government's resistance to implement the devolved government system especially in distribution of monies that are required to finance devolved functions.

6. It is against this background that the Petitioner through the deponent, Mary Mwiti impugns the 1st respondent's two major decisions. The two decisions that the Petitioners complain about are first, the decision on 28th September 2023 in which the 1st Respondent removed county governments as beneficiaries of funds of the RMLF and the second was the one made on 13th August 2024 that removed county governments from benefiting from Kshs. 10,522,211,853.00 conditional grant raised through RMLF in the financial year 2024/2025.

7. The Petitioners assert that the source of all this is Section 4 and 6 of the *Kenya Roads Board Act* which provides that the 2nd respondent is the one mandated to administer the RMLF.

8. This Fund established under Section 7 of the *Road Maintenance Levy Fund Act* comprises of taxes collected when one purchases fuel and is used to maintain Kenyan roads.

9. These funds under Section 20 of the Act are to be made out to the road agencies being Kenya National Highways Authority (KENHA), Kenya Rural Roads Authority (KeRRA), Kenya Urban Roads Authority (KURA) and the Kenya Wildlife Service (KWS).

10. It is averred that the *Constitution* under Section 18 (b) and (c) of the Fourth Schedule as read with Articles 186 (1) and 187 (2) provides that county governments are responsible for construction and maintenance of county roads. To implement this, it is asserted that the national government was required to amend the *Kenya Roads Boards Act* including the *Kenya Roads Act* to provide for the maintenance of county roads from the RMLF.

11. It is underscored that this was not done and thus the *Kenya Roads Act* is not in harmony with the *Constitution*. Moreover, the petitioners aver KeRRA and KURA continue to exist and perform the functions of the county governments even as county governments continue to push for the funds from the RMLF to maintain roads.

12. In this regard, she depones that in the 2013 to 2022 financial years, the county governments received funds from the RMLF in the form of either conditional grants or equitable shares. Moreover, it is stated that *vide Legal Notice No. 2 of 2016* dated 22nd January 2016, the roads were classified into national trunk roads (Class A, B, C and S) and county roads (Class D, E, F, and G) making counties direct beneficiaries of the RMLF. Similarly, on 11th February 2023, a resolution was passed to the effect that County Governments should receive funds from the RMFL for the 2024/2025 financial year as conditional grants.

13. In a surprise move, a decision was made on 28th September 2023 that unilaterally removed county governments as beneficiaries of monies from the RMLF in the 2024/2025 and 2025/2026 financial year.

14. The petitioners contend that the 1st respondent's impugned decision adversely affects the financing of the devolved government system and was made without public participation and arbitrarily and amounts to abuse of the 1st respondent's powers under Article 94 and 95 of the *Constitution*.

15. The petitioners' averred that they a challenge was made on the constitutionality of the impugned decision in Nairobi Constitutional Petition No. E456 of 2023: *Issa Elanyi Chamao & 4 Others v the National Assembly of Kenya, & 8 Others* wherein they were granted conservatory orders. The 1st respondent in a bid to extend an olive branch requested the petitioners that they settle the matter out of Court.

16. It is alleged that withdrawal of the petition was on the understanding that the funds that county governments were to lose through removal as beneficiaries of the RMLF would be compensated through allocations of conditional grant in the sum of Kshs 10.522,221,853 as broken down in the affidavit per County, through the County Governments Additional Allocations Bill, 2024. Amenable to the proposal, the petitioners proceeded to withdraw the petition on 8th February 2024.

17. It is alleged that going against its undertaking, the 1st respondent on 13th August 2024, ensued to remove the entire sum of Kshs 10,522,221,853 from the County Governments Additional Allocations Bill, 2024.In effect this denied all the County governments funds to maintain county roads whilst the

roads agencies continue to receive the RMLF which as stressed goes against the county governments constitutional mandate to maintain county roads.

18. Accordingly, the petitioners bring this petition against the respondents challenging the constitutionality of the 1st respondent's impugned decisions, the continued disbursement of the RMLF to the road agencies which is also argued to be discriminative and unconstitutional, equally whether the establishment of KURA and KeRRA are in line with the *Constitution* and whether the provisions of Section 6 of the *Kenya Roads Board Act* 1999, Section 47 of the *Kenya Roads Act* 2007 and Section 7 of the *Road Maintenance Levy Fund Act*, 1993 are constitutional to the extent that they do not recognize county governments.

1st Respondent's Case

19. In response to the petitioners' case, the 1st respondent filed grounds of opposition dated 28th August 2024 and a replying affidavit by the Clerk of the National Assembly, Samuel Njoroge sworn on 6th March 2025.

20. The grounds of opposition are on the basis that:

    i. The petition herein is premature to the extent that it seeks to pre-empt the decision of Parliament on the County Government Additional Allocations Bill, Senate Bill No. 19 of 2024 in violation of the doctrine of ripeness.

    ii. The application and petition herein are premised on material non-disclosure of the fact that the impugned decision of the National Assembly is a proposed amendment to the Bill which is still undergoing the legislative process.

    iii. The petitioners are inviting the Court to usurp the exclusive legislative mandate of Parliament by asking the Court to amend the Bill that is before Parliament.

    iv. The orders sought by the petitioners in the application are final orders which will prejudice the respondents if granted before Parliament concludes its deliberations on the Bill.

    v. The application and petition herein violate the provisions of Articles 112 and 113 of the *Constitution* which provide the procedure for deliberation on an ordinary Bill concerning County Governments.

    vi. The petition and application are based on the misguided assumption that Kshs. 10.552 Billion has already been set aside and allocated to County Governments from the Roads Maintenance Levy Fund.

    vii. The petitioners are inviting the Court to appropriate Kshs. 10.552 Billion. The power to appropriate funds is a preserve of Parliament.

    viii. The orders sought by the petitioners are pre-emptive in nature as the Bill is not guaranteed to pass in the Senate. If the Senate rejects the Bill as amended, the Bill shall be referred to mediation as contemplated under Article 113 of the *Constitution*.

    ix. The petitioners' are seeking to interfere with a legitimate legislative process in utter violation of the principle of separation of powers and has failed to provide any cogent reasons for the grant of the orders sought in the application and petition before this Court.

    x. The petitioners failed to disclose that the impugned amount was arrived at during deliberations between the National Government executive and the Counties. Such an agreement is not

binding on Parliament which has the power to determine revenue sharing between the two arms of government.

xi. The petitioners are inviting the Court to determine quantum of revenue allocation. This amounts to inviting the Court to determine a political question which requires determination by parliament when considering revenue allocation between the two levels of government.

xii. The petitioners are using the Courts to determine a revenue allocation process which is an entirely political process under Article 95, 96 203, 217, 218, 95 and 96 of the *Constitution*. If the Courts permit this, they will be opening the door for various sectors to leverage the judicial system to influence how revenue allocation, a responsibility of Parliament, is carried out. This would effectively be the Courts assuming the role of determining revenue allocation and appropriation.

xiii. The Kenya Urban Roads Authority (KURA) and the Kenya Rural Roads Authority (KeRRA) are national government agencies established under the *Kenya Roads Act*, 2007 and the agencies carry out their mandate within the scope of national government functions provided for in Part 1 of the Fourth Schedule of the *Constitution*.

21. Mr. Samuel Njoroge on behalf of the 1st Respondent swore that Article 202 of the *Constitution* provides that revenue raised nationally is to be shared equitably between the national and county governments. In addition, the county governments can get additional allocations either conditionally or unconditionally. Moreover, county governments are entitled to the equalization fund which is primarily used to cater for water, roads, health facilities and electricity. Consequently, he asserted that other than the monies provided for in law, county governments are not entitled to demand additional funds as there is no legal basis.

22. He stated that the RMLF is a special fund that is provided under the *Roads Maintenance Levy Fund Act* administered by the 2nd respondent and allocated to the designated road agencies.

23. For context, he stated that county governments first became beneficiaries of the RMLF as a conditional grant from the national government in the 2015/2016 Financial Year. This was based on the need to support counties maintain their local roads as contained in the *County Allocation of Revenue Act*. On this premise, the 2nd respondent allocated 15% of the RMLF for 6 years from that financial year until the 2020/2021 financial year.

24. He notes however that during consideration and approval of the Third Generation Revenue Sharing Formula as envisaged under Article 217 of the *Constitution*, the conditional grant drawn from RMLF was stopped because the maintenance of county roads was incorporated into the equitable revenue share.

25. Considering this, during the 2021/2022 and 2022/2023 financial years, county governments were not issued with any conditional grants from the RMLF and have not since. He informs that to do so, the national government dropped the conditional share from the RMLF and increased the county equitable share from Kshs. 316.5 billion to Kshs. 370 billion as can be gleaned from the *Division of Revenue Act* and the *County Allocation of Revenue Act*.

26. He states that this decision was guided by the need to ensure that no county would get less funds in the 2021/2022 financial year than what they had been allocated in the 2020/2021 financial year. The basis of this decision is stated to have stemmed from the fact that the new revenue sharing formula (the Third Generation Revenue Sharing Formula) was discovered to be disadvantageous to certain counties especially those with a large land area.

27. Therefore, to attain the 17% increase without interfering with other government operations, a decision was made to absorb the granted RMLF into the equitable revenue share as part of the Ksh.53.5 billion increase. Following this, each county government was required to inter alia utilize their allocated share to maintain their roads.

28. He avers thus that contrary to the petitioners' allegations, county governments continue to receive adequate funds as allocated through the *Division of Revenue Act* and subsequently apportioned through the *County Allocation of Revenue Act*.

29. It is also noted that the national government despite its own financial constraints has consistently allocated to county governments, revenue exceeding the minimum 15% stipulated in Article 203(2) of the *Constitution*, including supplementary funds from the national government's revenue share under Article 202 of the *Constitution*, and financial support in the form of loans and grants from development partners.

30. Equally, the petitioners' allegation of discrimination in allocation of the RMLF is opposed since this fund maintains all the roads across the country for the benefit of all people.

31. Turning to the County Government Additional Allocation Bill, 2024, he depones that the 2nd interested party published this Bill on 28th March 2024 and passed the same on 11th June 2024. Thereafter the Bill was submitted to the 1st respondent for consideration.

32. Essentially, the Bill sought to make provisions for transfer of the national government's share of revenue as well as monies from development partners to the county governments for the 2024/2025 financial year at the rate of Kshs. 61.9 Billion.

33. The Bill was committed to the 1st respondent's Budget and Appropriations Committee. The Committee considered it and tabled its report on 13th August 2024. It was recommended that in light of budget rationalization, the proposed additional allocations to county governments be reduced from Kshs. 61.9 Billion to Kshs. 46.6 Billion for the 2024/2025 Financial Year. Additionally, the Report noted that the allocation for maintenance of county roads was Kshs. 10.522 Billion from RMLF for the 2024/2025 Financial Year despite the money having been incorporated into the equitable share for county governments. On this premise, the Committee declined the proposal as the allocation to county governments was noted as already forming part of the *Division of Revenue Act*, 2023.

34. In the end, the Committee recommended that the 1st respondent pass the Bill with the cited amendments. The 1st respondent considered the Bill on 13th and 14th August 2024 and passed it with the amendments on 14th August 2024.

35. Soon after on 20th August 2024, the Bill was transmitted to the 2nd interested party for consideration on the raised amendments. These amendments were considered and rejected on 23rd October 2024. As a result, a Mediation Committee was appointed by the Speakers of both Houses in line with Article 113 of the *Constitution* so as to develop a version of the Bill for consideration by both Houses.

36. He depones that during the legislative process, the petitioners instituted this suit and were granted conservatory orders on 19th August 2024.The orders suspended the 1st respondent's impugned decision dated 13th August 2024; also suspended its decision to remove the Ksh.10, 522,211,853 as the conditional grant from the RMLF and froze the funds held by the 2nd respondent to the extent of Ksh.10,522,211,853.

37. This in effect stopped the Mediation Committee's proceedings which are required to be complete within 30 days and curtailed the legislative process. It is stressed that this fact, was not disclosed by the

petitioners in a bid to mislead to the Court. Issuance of the conservatory orders is said to be in breach of the doctrine of separation of powers and against public interest.

38. He avers as well that direction by this Court to the 1st respondent to enact legislation in this regard and classification of roads would be in violation of the doctrine of separation of powers. For these reasons, the petitioners' assertions in this regard are termed as premature.

39. Additionally, it was argued that the petitioners had failed to demonstrate the prejudice that would be occasioned by KURA and KeRRA exercising their legislative mandate as envisaged in the *Kenya Roads Act*. Equally, it is underscored that the petitioners' allegations of unconstitutionality of Section 47 of the *Kenya Roads Act*, 2007 and Section 6 of the *Kenya Roads Board Act* is unfounded. Lastly, he asserts that the petitioners have failed to utilize their right under Article 119 of the *Constitution* before petitioning this Court.

2nd Respondent's Case

40. In response to the petition, the 2nd respondent filed a replying affidavit through its Deputy Director, Legal and Board Services, Catherine Kassim sworn on 6th March 2025.

41. She avers that the RMLF is a special fund and is not part of the consolidated fund provided under Article 206(1) of the *Constitution*. It is stated that Section 7 of the *Road Maintenance Levy Fund Act* excludes proceeds from the fuel levy imposed under Section 3 of the Act, from being paid into the consolidated fund.

42. It is further asserted that the 2nd respondent is required under Section 6(2)(c) of the *Kenya Roads Board Act* to allocate 50% of the monies to the RMLF for the maintenance, rehabilitation and development of the road network. The other 50% as guided under Section 32A (2) of the *Kenya Roads Act* is set aside as security where necessary to meet financial demands for these objectives.

43. She informs that the *Constitution* classifies roads into two categories being national trunk roads (Class S, A, B and C) maintained by the national government and the county trunk roads (Class D, E, F and G) maintained by the respective county governments.

44. She avers that following the passing of the County Allocation Revenue Act in 2015, counties became beneficiaries of the RMLF through conditional grants issued by the 2nd respondent from 2015 - 2021. This constituted 15% of the funds paid into the RMLF.

45. It is noted that these funds were eventually incorporated into the counties equitable revenue share in the 2021/2022 financial year bringing to an end the conditional grant under the RMLF. Owing to this, she asserts that the 2nd respondent carried out its mandate as provided in law.

3rd to 8th Respondents' Case

46. These respondents in reaction to the petition filed a Notice of Preliminary Objection dated 30th August 2024 on the grounds that:

    i. The petition offends the doctrine of constitutional avoidance and the doctrine of exhaustion that demand that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion.

    ii. In effect, this Court lacks the requisite jurisdiction to take cognizance, hear and determine the application and petition, as per Section 20 of the *Intergovernmental Relations Act*. No. 2 of 2012.

iii. The application and petition are premature and gross abuse of the court process for want of compliance with Article 189(3) of the *Constitution* as read together with Sections 30, 31, 32, 33 and 34 of the *Intergovernmental Relations Act*. No.2 of 2012.

iv. For the reasons above the application and petition should be dismissed.

47. These respondents are said to have filed a replying affidavit dated 11th December 2023 by Engineer Silas Kinoti. This is however not available in the Court file or Court Online Platform (CTS).

Interested Parties Case

48. These parties' responses and submissions to the petition are not in the Court file or Court Online Platform (CTS).

Petitioners' Submissions

49. Manyonge Wanyama and Associates LLP for the petitioners filed submissions dated 5th February 2025. Counsel identified the issues for determination as: whether the National Assembly's decision of 28th September 2023 and 13th August 2024 to remove County Governments as beneficiaries of the RMLF is unconstitutional for violating the principles of devolution and equitable resource allocation; whether the *Kenya Roads Act* No. 2 of 2007, *Kenya Roads Board Act*, No. 7 of 1999 and the *Road Maintenance Levy Fund Act* align with the principles of devolution in the *Constitution* and whether the petitioners are entitled to the reliefs sought.

50. On the first issue, Counsel stated that the 1st respondent on 28th September 2023 adopted the proposal for reduction of the RMLF without consulting the 2nd interested party and the counties. As a result, county governments were in the end excluded as beneficiaries from the RMLF for the financial years from 2024 to 2026.

51. Additionally, the 1st respondent on 13th August 2024 proceeded to further remove county governments as beneficiaries of the conditional grant of Ksh.10, 522,211,853 in the 2024/2025 financial year. On this premise, Counsel asserted that these decisions ought to be quashed as the same were unlawful. This is because the 1st respondent failed to pay regard to the constitutional principles set out under Article 6, 186 and the Fourth Schedule of the *Constitution*.

52. Counsel stressed that the *Constitution* is clear that the relationship between the two levels which are both autonomous is mutual and thus all decisions must be based on consultation and co-operation. Unfortunately, this was not the case in this matter. It is argued that the 1st respondent overlooked the 2nd interested party's role as envisaged under Article 96(1) and (3) of the *Constitution* while making the impugned decisions.

53. The 1st respondent in making the impugned decisions is also said to have failed to adhere to the principle of public participation under Article 10(2) and 118 of the *Constitution*. Additionally, the principles of public finance under Article 201 and equitable sharing of national revenue under Article 202, 203 and 205 of the *Constitution* were also contravened. It is argued that the 1st respondent unilaterally made the impugned decisions without consulting the public, relevant stakeholders and also the 2nd interested party.

54. Reliance was placed in *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control*

Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party) (2019] eKLR where the Supreme Court outlined the principles of public participation as:

> " Guiding Principles for public participation
>
> (i) As a constitutional principle under article 10(2) of the *Constitution*, public participation applies to all aspects of governance.
>
> (ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
>
> (iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
>
> (iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
>
> (v) Public participation is not an abstract notion; it must be purposive and meaningful.
>
> (vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
>
> (vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
>
> (viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
>
> (ix) Components of meaningful public participation include the following:
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> a. clarity of the subject matter for the public to understand;
>
> b. structures and processes (medium of engagement) of participation that are clear and simple;
>
> c. opportunity for balanced influence from the public in general;
>
> d. commitment to the process;
>
> e. inclusive and effective representation;
>
> f. integrity and transparency of the process;
>
> g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter."

55. Like dependence was placed in *Apollo Mboya v Attorney General & 2 others* [2018]eKLR.

56. Furthermore, in this issue, Counsel submitted that the impugned decisions effectively excluded county governments from the RMLF. This exclusion is argued to be both procedurally and substantively flawed as was an unjust decision given their constitutional mandate on county roads management. Counsel stressed that the RMLF is collected from all public roads in Kenya thus counties are entitled to these funds so as to maintain their roads.

57. Counsel opposed the 1st respondent's averment that the RMLF was incorporated into the equitable share terming it as misleading. Counsel submitted that this goes against the deliberations that were had in the 9th Summit as between the National and County Governments. Counsel on this basis questioned the transparency of the 1st respondent's decision making process.

58. Turning to the second issue, Counsel submitted that the impugned Sections are unconstitutional for their failure to comply and align with Article 186 and the Fourth Schedule of the *Constitution*. Counsel submitted moreover that, Section 47 of the *Kenya Roads Act* is in breach of Legal Notice No. 2 of 2016 which classified the National Trunk Roads and County Roads.

59. Counsel further submitted that Section 6 of the *Kenya Roads Board Act* is unconstitutional for excluding counties from allocation of financial resources apportioned to the road agencies for road maintenance. Counsel added that despite the county governments having received funds to maintain their roads, this Section is yet to be amended to reflect the constitutional position.

60. Section 2 and 8A of the *Road Maintenance Levy Fund Act* are argued to still recognize local authorities instead of amending it to county governments so as to be in harmony with the *Constitution*.

61. In light of the stated arguments, Counsel in the final issue was certain that the petitioners are entitled to the reliefs sought.

1st Respondent's Submissions

62. On 6th March 2025, the 1st respondent's Counsel, Mbarak Awadh Ahmed filed submissions and underscored the issues for discussion as follows: whether this Court has jurisdiction to determine this matter, if the answer is yes, whether this Court should exercise its jurisdiction, whether the National Assembly Resolutions in question should have been considered by the Senate; whether Section 47 of the *Kenya Roads Act* and Section 7 of the *Kenya Roads Board Act* are unconstitutional and whether the petitioners are guilty of material non-disclosure and abuse of process by deliberately failing to disclose essential facts.

63. Counsel on the first issue, submitted that this Court does not have jurisdiction to entertain this matter as the petition was filed while the County Governments Additional Allocation Bill, 2024 was actively being legislated in Parliament. Particularly, this is in relation to non-inclusion of the RMLF as one of the components of additional allocations to county governments. For this reason, the petition is adjudged as premature and unripe for determination. Counsel noted that this position was affirmed by this Court in *Chamao & 2 others v Ichung'wah & 13 others; Independent Electoral and Boundaries Commission & 2 others (Interested Parties)* [2024] KEHC 15727 (KLR) where a similar matter was determined.

64. Reliance was placed in *Ferreira v Levin NO & others; Vryenhoek v Powell NO & others* 1996 (1) SA 984 (CC) where it was held that:

> "The essential flaw in the applicants' cases is one of timing or, as the Americans and, occasionally the Canadians call it, "ripeness" ... Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally

retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. Although, as Professor Sharpe points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. ...The time of this court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered."

65. Comparable reliance was placed in *Texas v United States*, 523, US 296 [1998], *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 Others* [2016] eKLR, *Abbott Laboratories v Gardner* 387 U.S. 136 (1967) and *Saggaf & 3 others v Departmental Committee on Lands & 2 others; Mwashetani (Interested Party)* (Constitutional Petition E065 of 2021) [2022] KEHC 10728 (KLR).

66. That said, Counsel further submitted that the issues raised in the petition are not fit for judicial determination as Parliament is in the process of considering the substantive Bill. Counsel stressed that the petitioners had deliberately failed to disclose this fact in an attempt to mislead the Court that an actual decision had been made. As such, Counsel stressed that the petitioners would not suffer any prejudice if the petition is not heard at this juncture. This is since they still have the right to approach the Court after Parliament has concluded its mandate.

67. Reliance was placed in *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) where it was held that:

> "Counsel for the applicant contended that by its nature the duty to facilitate public involvement in the law-making process requires that it be enforced there and then. Its delay is its denial. The argument does not take sufficient account of the role of Parliament and the President in the law-making process. As pointed out earlier, the President has a constitutional duty to uphold, defend and respect the *Constitution*. The role of the President in the law-making process is to guard against unconstitutional legislation. To this end, the President is given the power to challenge the constitutionality of the bill. The President represents the people in this process. The members of the National Assembly perform a similar task and have a similar obligation. Thus during the entire process, the rights of the public are protected. The public can always exercise their rights once the legislative process is completed. If Parliament and the President allow an unconstitutional law to pass through, they run the risk of having the law set aside and the law-making process commence afresh at great cost. The rights of the public are therefore delayed while the political process is underway. They are not taken away."

68. Equal dependence was placed in *Minister of Finance and Another v Paper Manufacturers Association of South Africa* (567/07) [2008] ZASCA 86; 2008 (6) SA 540 (SCA); [2008] 4 All SA 509 (SCA).

69. Turning to the second issue, Counsel submitted that the requirement for consultation as between the 1st respondent and the 2nd interested party only applies to Bills not resolutions of either House of Parliament. Counsel stated that this is underscored under Article 110 (3) of the *Constitution*.

70. On the third issue, Counsel submitted that the *Kenya Roads Act* and the *Kenya Roads Board Act* were enacted prior to the promulgation of the *Constitution*. As such, Counsel contended that these two Acts ought to be read with the necessary modifications to bring them into conformity with the *Constitution*. According to Counsel, the petitioners had failed to demonstrated any unconstitutionality of the two provisions with regard to the roads' function as classified by *Legal Notice No.2 of 2016*.

71. On the constitutionality of the *Road Maintenance Levy Fund Act*, Counsel asserted that this issue was not pleaded in the petition but the submissions. Counsel submitted that this was legally improper as guided by the Court of Appeal in *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR.

72. Owing to the facts of this case, Counsel argued in the next issue that the petitioners were guilty of material non-disclosure a matter this Court should not entertain. Counsel submitted that this Court as a consequence should not only set aside the issued conservatory orders, but also dismiss the petition as such conduct demonstrates a lack of good faith.

73. Reliance was placed in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR where it was held that:

> "It is perfectly well settled that a person who makes an ex parte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make fullest possible disclosure, then he cannot obtain any advantage from the proceedings, he will be deprived of any advantage he may have already obtained by him. That is perfectly plain and requires no authority to justify it."

74. Like dependence was placed in *Pevans East Africa Limited & anor. v Chairman, Betting Control & Licensing Board & ors.* Nairobi Civil Appeal Number 11 of 2018).

2nd Respondent's Submissions

75. Issa and Company Advocates for the 2nd respondent filed submissions dated 6th March 2025 and highlighted the issues for determination as: whether the instant petition is premature; whether the impugned Acts are unconstitutional and what reliefs should issue.

76. Counsel affirming that the petition is premature submitted that the key dispute arises from the national and county governments. Relying on Article 189(3) & (4) of the *Constitution*, Counsel contended that it was evident that the matter ought to have first been resolved through the dispute resolution mechanisms set out under Section 31, 33, 34 and 35 of the *Intergovernmental Relations Act*. Counsel stressed that these mechanisms are mandatory and that there was no attempt to resolve the matter amicably through these means before filing of this suit.

77. Counsel likewise argued that the issue of the Ksh.10,522,211,853 with reference to the RMLF, is premature as the funds subject matter are contained in the County Governments Additional Allocation Bill, 2024. This is a subject matter of debate before the 1st respondent and the 3rd interested party.

78. Counsel relying on the averments in the 2nd respondent's affidavit submitted that while the 3rd interested party had passed the Bill approving the sum of Ksh.10, 522, 211, 853, the 1st respondent rejected the proposal causing an impasse between the two house over the Bill. Consequently, Counsel stressed that this matter cannot be determined by this Court until the legislative process is concluded.

79. Reliance was placed in *Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 Others* [2013] KEHC 6919 (KLR) where it was held that:

> "By the time the present Petition was filed and heard, there was still time for it to do so and yet that opportunity was not taken. The above notwithstanding, I have agonized over

the matter and to my mind, although this Court can stop Parliament on its tracks at this stage of the legislative process, there is one question that has lingered in my mind; since the Bill is incomplete and its language yet to be settled, what then am I being asked to strike down? Had the Petitioner waited until the same is passed and within the Thirty days before Presidential assent, this Court would have had something tangible to work with. I am reluctant to pass a judgment on the hypothetical issues framed by Mr. Nyamodi and which I have reproduced above."

80. Comparable reliance was placed in *Minister of Finance v Paper Manufacturers Association* (567/07) [2008] ZASCA 86, *Robert N Gakuru & Another v Governor Kiambu County & 3 Others* [2013] KEHC 6014 (KLR).

81. On the second issue, Counsel submitted that the impugned Acts and Sections were enacted prior to the commencement of the *Constitution*. Counsel accentuated that Section 7 of the Sixth Schedule of the *Constitution* is clear that all existing laws prior to commencement of the *Constitution* shall be construed and adapted to bring them into conformity with the *Constitution*. Considering this, the impugned constitutionality of these Acts is argued to lack merit.

82. To buttress this point reliance was placed in *Republic v Cabinet Secretary for Internal Security ex parte Gragory Oriaro Nyauchi & 4 Others* 2017] KEHC 2485 (KLR) where it was held that:

> " Therefore, all legislation in existence prior to the date of promulgation of the *Constitution* are to remain in force save that they are to be construed with the alterations, adaptations, qualifications and exceptions necessary to bring them in conformity with the *Constitution*. In other words in interpreting the existing legislation, the Court must consider whether such interpretation is in conformity with the *Constitution*. !fit is then the legislation survives as it is. !fit is not then it must be considered as ifit was in fact amended pursuant to the constitutional provisions."

83. In light of the foregoing, Counsel submitted that being that the petitioners had failed to exhaust the available mechanisms, the orders sought are premature and the reliefs sought not merited.

3rd to 8th Respondents' Submissions

84. On 3rd March 2025, Senior State Counsel, Dan Weche filed submissions for these respondents'. Counsel highlighted the single issue for determination as: whether these respondents' Notice of Preliminary Objection is merited.

85. Counsel submitted on a preliminary note that a Court cannot determine a matter without jurisdiction. Reliance was placed in *Samuel Kamau Macharia & another v Kenya Commercial Bank limited & 2 others* (2012) eKLR where it was held that:

> " A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law ... the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceeding."

86. Like dependence was placed in *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] KECA 761 (KLR) and *Owners 'Lilian' S* (*supra*).

87. In this matter, Counsel submitted that the petitioners had failed to exhaust the available mechanisms provided in law before petitioning this Court. Counsel likened this doctrine to the doctrine of constitutional avoidance where the Court is urged to refrain from answering constitutional questions where the matter can be resolved through another mechanism as held in *Mkaya v County Governmet of Taita Taveta and another* [2025] KEELRC 594 (KLR).

88. Counsel submitted that Article 189 (3) and (4) of the *Constitution* provides that where a dispute arises between the national and county governments, the procedure set out in Act of Parliament should be utilized. In this regard, Counsel submitted that this mechanism is provided in the *Intergovernmental Relations Act* under Section 31, 32, 33 and 34. It is stressed that Court proceedings are recommended as a last resort once the alternative dispute resolution processes fail.

89. Counsel submitted that exhaustion of available mechanism is underscored as follows in *Justin Karionji Nyaga v Attorney General & 2 others* [2021] KEELC 1575 (KLR) as follows:

> "The tenor and import of the doctrine of exhaustion of remedies is that, where a dispute resolution mechanism has been established by a statute outside the mainstreams courts, that mechanism should be exhausted before the jurisdiction of the mainstream courts is invoked."

90. Like dependence was placed in *Benard Murage v Fine Serve Africa Limited & 3 others* [2015] eKLR, *Secretary, County Public Service Board & another v Hulbhai Cedi Abdille* [2017] KECA 613 (KLR) and *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others*[2015]KECA 304(KLR).

91. According to Counsel this dispute falls within the ambit of the *Intergovernmental Relations Act* as concerns the decision of the 1st respondent to remove county governments as beneficiaries of the RMLF. As such, the dispute ought to have been referred to the 3rd interested party for an alternative form of dispute resolution. Moreover, it was argued that the matter meets the requirements set out in *County Government of Nyeri v Cabinet secretary, Ministry of Education Science & Technology & Another* [2014] eKLR. The Court in this matter stated that for a dispute to fall within the ambit of the Act, it must fulfill the following requirements:

> "a) The dispute must involve a specific disagreement concerning a matter of fact, law or denial of another.
>
> b) Must be of a legal nature. That it is a dispute capable of being the subject of judicial proceedings.
>
> c) Must be an intergovernmental one in that it involves various organs of state and arises from the exercise of powers of function assigned by the *Constitution*, a statute or an agreement or instrument entered into pursuant to the *Constitution* or statute.
>
> d) The dispute may not be subject to any of the previously enumerated exceptions."

92. Counsel in view of this debated that the matter is not ripe for determination. Reliance was placed in Civil Appeal No. II of 2018: *Pevans East Africa Limited* (*supra*) where it was held that:

> " Court, must give these institutions or organs sufficient leeway to discharge their mandates and only accept an invitation to intervene when those bodies are demonstrably shown to have acted in contravention of the *Constitution*."

Analysis and Determination

93. It is my considered take that the issues that arise for determination in this matter are as follows:

i. Whether this Court has jurisdiction to entertain this Petition.

ii. Whether the 1st respondents' impugned decisions dated 28th September 2023 and 13th August 2024 constitute threats to devolution hence unconstitutional.

iii. Whether Section 6 of the *Kenya Roads Board Act* 1999, Section 47 of the *Kenya Roads Act* 2007 and Section 7 of the *Road Maintenance Levy Fund Act* are unconstitutional.

iv. Whether the petitioners are entitled to the reliefs sought.

Whether this Court has jurisdiction to entertain this Petition.

94. The objection to the jurisdiction of this Court was raised by the respondents on two main principles, the doctrine of ripeness and the doctrine of exhaustion.

95. It was the 1st Respondent's position that this Court lacks jurisdiction to entertain this matter for offending the doctrine of ripeness. It was contended that the the petition was filed while the County Governments Additional Allocation Bill, 2024 was still being processed in Parliament and the Petitioners' complaint was the resolution was passed removing RMLF as one of the components of additional allocations to county governments. It was argued that the Petitioners' ought to have waited for the actual decision to be made mount any challenge instead of doing so prematurely when the Bill was still being considered.

96. On the doctrine of exhaustion, it was argued by the Respondents that the issue before this Court is a dispute between the national and county governments whereby Article 189(3) & (4) of the *Constitution* ought to have first been invoked to resolve the dispute in the manner set out under Section 31, 33, 34 and 35 of the *Intergovernmental Relations Act* prior to institution of this Petition.

97. A Court's jurisdiction must be exercised within the parameters set out under the *Constitution*, legislation or principles set out through judicial precedents as enunciated by the Supreme Court in *in the Matter of the Interim Independent Electoral Commission* [2011] KESC 1 (KLR) where it stated:

> " Assumption of jurisdiction by Courts in Kenya is a subject regulated by the *Constitution*, by statute law, and by principles laid out in judicial precedent."

98. One of the ways through which a Constitutional Court may decline to exercise jurisdiction despite the matter falling within its scope is if the dispute is not a justiciable controversy, for instance, where it offends the doctrine of ripeness. The other would be where it finds that it offends the doctrine of exhaustion of remedies. Ripeness refers to a dispute that has not matured into legal controversy capable of being adjudged in a Court of law. In the present case, it was argued that the County Additional Allocation Bill was work in progress before the 1st Respondent hence it was premature for the Petitioner to mount a challenge alleging unconstitutionality in respect of a process that had not been concluded.

99. The Supreme Court in *Attorney-General & 2 others v Ndii & 79 others; Prof. Rosalind Dixon & 7 others (Amicus Curiae)* (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent) explained the principle of ripeness as follows:

> "61. The doctrine of ripeness focused on when a dispute had matured into an existing substantial controversy deserving of judicial intervention. The doctrine of ripeness prevented a party from approaching a court before that party had been subject to prejudice, or the real threat of prejudice, as a result of the legislation or conduct challenged.....
>
> 63. Ripeness discouraged a court from deciding an issue too early. It therefore required a litigant to wait until an action was taken against which a judicial decision could be grounded and a court was able to issue a concrete relief. That approach shielded a court from dealing with hypothetical issues that had not crystalized."

100. The Court went on to state as follows:

> "325. Justiciability was the quality or state of being appropriate or suitable for adjudication by a court. For a matter to be justiciable, it had to be ripe for it to be properly before the court. Ripeness was the state that a dispute had reached, but had not passed, when facts had developed sufficiently to permit an intelligent and useful decision to be made."

101. The Supreme Court was clear that the doctrine of ripeness doctrine of ripeness prevented a party from approaching a court before that party had been subject to prejudice, or the real threat of prejudice, as a result of the legislation or conduct challenged. The words 'real threat of prejudice' must be emphasized for it is not every time that a party must wait for harm to occur to seek Court's intervention. Where there is demonstrable threat that harm is most highly likely to occur, nothing would stop a Party that is facing such an impending threat from approaching the Court for a relief. The question of ripeness is thus a matter of fact to be decided on the merits of each case, if the risk of harm is demonstrably factual to the extent that it deserves immediate remedial attention or redress by the court, a Party need not wait until the materializing of the event complained of in order to seek Court intervention, such a Party can take preventive action instead of waiting to take restorative or curative action after the fact.

102. On the issue of doctrine of exhaustion, it asserts that a Party must first exhaust all the available statutory or other possible mechanisms provided for in law before approaching the Court for a remedy. This finds Constitutional anchor in Article 159 of the *Constitution* which requires that in exercising judicial authority, the Court be guided by the principles specified therein which include use of 'alternative forms of dispute resolution.'

103. The Supreme Court has incorporated the principle in its decisions. In *Waity v Independent Electoral & Boundaries Commission & 3 others* [2019] KESC 54 (KLR) the Supreme Court held:

> "(63) Where the *Constitution* or the law, consciously confers jurisdiction to resolve a dispute, on an organ other than a court of law, it is imperative that such dispute resolution mechanism, be exhausted before approaching the latter. Were it not so, parties would bide their time, overlooking the recognized forums, and later springing a complaint at the courts. Such a scenario would be a clear recipe for forum shopping, an undertaking that must never be allowed to fester in

the administration of justice. We are fortified in this regard, by the persuasive authority by the Court of Appeal, in *Geoffrey Muthinja Kabiru & 2 Others*; [2015] eKLR; wherein the Appellate Court observed:

> "It is imperative that where a dispute resolution mechanism exists outside the Courts, the same be exhausted before the jurisdiction of the Courts be invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts."

104. Correspondingly, the Supreme Court in *Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* [2019] KESC 83 (KLR) stated as follows:

> "...We hold that if indeed the appellant had any dispute with the RBA, he ought to have followed the route prescribed by the RBA, before proceeding to the High Court. We hold like the court below, and for the reasons we have given, that the appellant's petition lacked merit and was for dismissal."

> (118) In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.

> (119) Such a deferred jurisdiction and the postponement of judicial intervention and reliefs until the mandated statutory or constitutional bodies take action rests, not alone on the disinclination of the judiciary to interfere with the exercise of the statutory or any administrative powers, but on the fact of a legal presumption that no harm can result if the decision maker acts upon a claim or grievance. Such formulation underlies the analogous cases, frequently cited for the exhaustion doctrine, in which the court refuses to enjoin an administrative official from performing his statutory duties on the ground that until he has acted the complainant can show no more than an apprehension that he will perform his duty wrongly, a fear that courts will not allay. Such cases may be expressed in the formula that judicial intervention is premature in the absence of administrative action."

105. The question therefore is whether the factual circumstances disclosed in petition this offend the doctrines of ripeness and exhaustion of remedies? That is the jurisdictional question that the Court must answer.

106. The Petitioners' key contention is that the 1st Respondent in its impugned decision dated 13th August 2024 removed County Governments as beneficiaries of the Ksh.10,522,211,853 and failed to recognize

them as beneficiaries of the RMFL. As such, the County Governments Additional Allocations Bill did not provide a share of RMLF funds as conditional grant to Counties. The Petitioners cited the fact that on 11th February, 2023; in a meeting at Naivasha, the National and County Government Coordinating Summit that comprises the President and all 47 County Governors passed a resolution that County Governments should receive funds from Road Maintenance levy for 2024/2025 financial year as conditional grants.

107. The respondents argued that this matter cannot be discussed at this juncture as the same is being considered in Parliament. In fact, the 1st Respondent deponed that at the time of filing this petition the Bill had been referred to the Mediation Committee by the Speakers of both Houses due to the 1st Respondent's and Senate's impasse on the matter.

108. It was contended that the petitioners are seeking to interfere with a legitimate legislative process in utter violation of the principle of separation of powers.

109. To fully appreciate the issue, the Court has to look into the factual account surrounding this matter holistically so as to answer the question of whether there is demonstrable real imminent danger that that may necessitate this Court's intervention. It is not disputed that on 11/2/2023; a resolution resolving that County Governors representing Counties and the National Government represented by the President, that County Governments would receive RMLF funds for the year 2024/2025 as conditional grants. It is also not disputed that in January, 2024; the National Assembly reached out to the Petitioners to withdraw Petition E456 of 2023 to give room for an informal out of Court settlement to the effect that the funds the Counties were to lose from being removed as beneficiaries of Road Maintenance levy Fund (RMLF) would be compensated through allocations of conditional grant to the tune of Kshs. 10,522,221, 853 through County Additional Allocations Bill, 2024. As a result, the previous petition was withdrawn on 8/2/2024.

110. Things however changed on 28/9/2023 when the allotted sum of RMLF funds was withdrawn from 2024/2025 and 2025/2026 Financial Year. On 13/8/2024; the entire sum constituting RMLF was wholly removed from Bill.

111. Despite the aforesaid agreements, the 1st respondent went ahead to renege on the same. These actions on the part of the 1st Respondent constitute actual threat that is certain to negatively affect a fundamental Constitutional objective relating to devolution for its execution will effectively deprive County Governments funds to undertake a vital constitutional function, maintenance of county roads hence preventive action can be taken to arrest the looming violation of a constitutional objective. In the circumstances of this case, I find the doctrine of ripeness does not apply.

112. On the issue of the doctrine of exhaustion of remedies, it must be appreciated that this dispute is just a dispute between two levels of Government, it also includes Petitioners who have come to Court under Article 258 (2) (c) claiming that the *Constitution* has been contravened, or is threatened with contravention and thus have right to have this dispute adjudicated by the Court. The provisions of Article 189 (3) & 4 of the *Constitution* as well as Sections 31, 33, 34 and 35 would thus not apply in the circumstances as they will exclude the 1st to 4th Petitioners from the negotiation table, hence the appropriate place to hear their grievances is before this Court.

113. Furthermore, as is discernable from the foregoing facts, the parties withdrew the previous Petition E456 of 2023 ostensibly to resolve the matter out of Court but that mechanism failed and have now returned to the Court. Moreover, even in the instant Petition, the parties came to this Court on 23/4/2025 and recorded a consent that judgment be arrested to give a chance to negotiations but this too has failed.

114. Clearly, the alternative mechanisms have failed hence it is the finding of this Court that the parties are now properly before the Court for the resolution of the dispute.

115. In any case, even in the present proceedings, the record will bear witness that the Parties came and applied to this Court to arrest judgment to give negotiations a chance but again, they kept on squabbling without making any progress.

116. The twin-jurisdictional issues raised against the petition premised on the doctrine of ripeness and the doctrine of exhaustion of remedies must inevitably collapse.

> Whether the 1st respondents' impugned decisions dated 28th September 2023 and 13th August 2024 constitutes a threat to devolution hence unconstitutional

117. Article 259 (1) provides that the *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.

118. The Supreme Court *in the Matter of the Interim Independent Electoral* [2011] KESC 1 (KLR) provided the following guide in Constitutional Interpretation:

> "(86) .....The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). the *Constitution* has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. the *Constitution* has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.
>
> (87) In Article 259(1) the *Constitution* lays down the rule of interpretation as follows: "This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance." Article 20 requires the Courts, in interpreting the Bill of Rights, to 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.
>
> (88) These constitutional imperatives must be implemented in interpreting the provisions of Article 163(6) and (7), on Advisory Opinions. Article 10 states clearly the values and principles of the *Constitution*, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice,

inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.

(89) It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting the *Constitution*, is a task distinct from interpreting the ordinary law. The very style of the *Constitution* compels a broad and flexible approach to interpretation."

119. Article 1 (3) and (4) of the *Constitution* provides for devolution of power as follows:

> Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—
>
> a. Parliament and the legislative assemblies in the county governments;
>
> b. the national executive and the executive structures in the county governments; and
>
> c. the Judiciary and independent tribunals.
>
> (4) The sovereign power of the people is exercised at—
>
> a. the national level; and
>
> b. the county level.

120. Devolution is also given prominence in Articles 6 (1) and (2) of the *Constitution* which stipulates as follows:

1. The territory of Kenya is divided into the counties specified in the First Schedule.
2. The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation.

121. Chapter Eleven and the First Schedule and Fourth Schedule of the *Constitution* as well as Article 189 of the *Constitution* further provide for devolution as follows:

Article 189: Cooperation between national and county governments

1. Government at either level shall—
   a. perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level;
   b. assist, support and consult and, as appropriate, implement the legislation of the other level of government; and
   c. liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.
2. Government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities.

3. In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.

4. National legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.

122. Article 174 sets out the objects of devolution, which at 174 (f) and (g) include the following:

f) to promote social and economic development and provision of proximate, easily accessible services throughout Kenya.

g) to ensure equitable sharing of national and local resources throughout Kenya

123. The Supreme Court in *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* [2013] KESC 7 (KLR) underscored the Constitutional significance of devolution as follows:

> " 183. Devolution is the core promise of the new Constitution. It reverses the system of control and authority established by the colonial powers and continued by successive Presidents. The large panoply of institutions that play a role in devolution-matters, evidences the central place of devolution in the deconstruction-reconstruction of the Kenyan state. Thus, a "Chapter 11-Only" approach would wrongly obscure the interlocking nature of devolution with other aspects and institutions of the *Constitution*, an element which is critical to its success. These other elements include Treasury, which plays a significant role in public finance matters; Parliament, which requires a functional Senate to provide sufficient protection to the devolved governments, and ensure that there is no gridlock in the budgetary or legislative processes; Judiciary, particularly the Supreme Court, whose mandate under Article 163(6) is to give 'advisory opinion... on any matter concerning county government',and which is an arena for arbitrating conflicts between the National Government and County Governments; Independent Commissions and Offices, such as Controller of Budget and Auditor General, which are crucial in ensuring probity and accountability.
>
> 184. If an interpretive framework were required to buttress this position, it would be the one reflected in the Ugandan case, *Tinyefuza v Attorney-General Const*. Pet. No 1 of 1996 (1997 UGCC 3). The Court of Appeal thus stated:
>
> > " [T]he entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution." Cited also in, *Commission for The Implementation of the Constitution v Parliament of Kenya & Another* [2013]eKLR.
>
> 185. This is the same rule of interpretation that I previously alluded to in the Advisory Opinion on Gender, in stating that a Constitution does not subvert itself. I therefore reiterate what the majority opinion has stated – that it would be completely out of order for the Speaker of the National Assembly to interpret the powers of the National Assembly by only looking at Article

95 of the *Constitution*, without paying regard to Articles 96 and 110 of the *Constitution* which unequivocally incorporate the role of the Senate and of its Speaker.

186. Given Kenya's history, which shows the central government to have previously starved decentralized units of resources, the extent to which the *Constitution* endeavours to guarantee a financial lifeline for the devolved units is a reflection of this experience and, more specifically, an insurance against recurrence. Indeed, in practically all its eighteen Chapters, only in Chapter Twelve (on public finance with respect to devolution) does the *Constitution* express itself in the most precise mathematical language. This is not in vain. It affirms the "constitutional commitment to protect"; and it acknowledges an inherent need to assure sufficient resources for the devolved units."

124. The Court went on to settle as follows:

> "226. The Court, in the circumstances, should adopt a holistic approach to interpretation, with a view to protecting and promoting the purpose, effect, intent and principles of the *Constitution*.
>
> 227. The majority opinion has fully dealt with the provisions of Articles 10 and 174 of the *Constitution*, regarding the values, purposes and objectives of the system of devolved government. Article 175, in particular, deals with the principles of devolved government; and Article 189 enshrines the principle of co-operation between the national and county governments.
>
> 228. I wish to add, in light of the foregoing provisions, that the core value of devolution is hinged upon the twin principles of co-operation and interdependence. The beads in a chain may have different appearances; however, when joined by a thread, they all become part of one ring; one cannot stand without the other. It is clearly articulated in Article 6(2) of our Constitution: "The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and co-operation".
>
> 229. It is well to remember that the revenue collected is from and for the people, for whose benefit the three arms of the government have been entrusted with power and authority, under the *Constitution*. Further, the wisdom of our Constitution is its categorical rejection of exclusionary claims to powers of governance: its letter and spirit is suffused with the call for accountability, co-operation, responsiveness and openness.
>
> 230. I reiterate the vitality of appropriate remedial action by making coherent and decisive provisions on the process of enactment of the two Bills which have a special operational role, in the conduct of two levels of government."

125. Besides the above provisions, the importance of ensuring any decisions made takes into account the principle of devolution cannot be overemphasized as devolution is part and parcel of our national values and principles of governance which the *Constitution* decrees at Article 10 (1) to be mandatory.

Article 10 (2) provides:

(2) The national values and principles of governance include –

patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

126. Article 10 (1) provides that the national values and principles of governance bind all State organs, State Officers, Public Officers and all persons whenever any of them 10 (1) (b) enacts, applies or interprets any law or 10 (1) (c) makes or implements public policy decisions. It thus follows that even in the process of making any law, including laws on sharing of resources, the 1st Respondent is duty bound to ensure such laws take into account the principle of devolution.

127. As already alluded to, Article 6 (2) of the *Constitution*

> " The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation"

128. Prof. Christian Roschmann, Mr. Peter Wendoh and Mr. Steve Ogolla in Human Rights, Separation Of Powers And Devolution In The Kenyan Constitution, 2010: Comparison And Lessons For EAC Member States noted that, the *Constitution* describes the government at the two levels as being distinct and inter-dependent and which are required to conduct their mutual relations on the basis of consultation and cooperation. Kenya's system of devolution is therefore not one of absolute autonomy but rather, one based on inter-dependence and cooperation. The end result of this combination is what may be called a Cooperative System of Devolved Government founded upon three relational principles namely: the principle of distinctness; the principle of inter-dependence and the principle of oversight.

129. It is thus evident that although the 1st respondent has the legislative authority to make laws under Article 92, the decisions taken must reflect that a supportive and collaborative approach that embraces devolution as opposed to one that directly poses a threat to devolution.

130. To claim that consultation made between the National Government and the Counties on sharing of national resources are not binding on Parliament which has the power to determine revenue sharing between the two arms of government and thus can do as it wishes is to miss the point. That is the message the 1st Respondent is giving when in the grounds of opposition it states: "The Petitioners failed to disclose that the impugned amount was arrived at during deliberations between the National Government executive and the Counties. Such agreement is not binding on Parliament which has the power to determine revenue sharing between the two arms of Government."

131. Such an attitude has no place in our present Constitutional dispensation which requires a collaborative approach. Article 6 (1) require national and county levels to conduct their mutual relations on the basis of consultation and cooperation. The 1st respondent stance that that the allocation of additional funds to county governments is its sole preserve that does need require consultations is untenable under the current constitutional framework. That position not only undermines but is also a real threat to devolution especially execution of county governments' functions under the Fourth Schedule that promote social and economic development and the provision of proximate, easily accessible services by the counties.

132. As was held in *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* [2013] KESC 7 (KLR)

> " 229. It is well to remember that the revenue collected is from and for the people, for whose benefit the three arms of the government have been entrusted with power and authority, under the *Constitution*. Further, the wisdom of our

Constitution is its categorical rejection of exclusionary claims to powers of governance: its letter and spirit is suffused with the call for accountability, co-operation, responsiveness and openness..."

133. It is acknowledged that under the principle of separation of powers, Courts must guard against interfering with the operations of other Constitutional organs by giving them the latitude to perform their constitutional mandates. However, this only possible if they do not violate the *Constitution*. Article 2 (1) provides the *Constitution* is the supreme law of the Republic and binds all persons and all state organs at both levels of government and Article 2 (2) further provides that no person may claim or exercise state authority except as authorized under the *Constitution*.

134. The Constitutional Court of South Africa discussed the principle of separation of powers in *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11 holding as follows:

> "The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle 'has important consequences for the way in which and the institutions by which power can be exercised'.. .....
>
> But under our constitutional democracy, the *Constitution* is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament 'must act in accordance with, and within the limits of, the *Constitution*', and the supremacy of the *Constitution* requires that 'the obligations imposed by it must be fulfilled'. Courts are required by the *Constitution* 'to ensure that all branches of government act within the law' and fulfil their constitutional obligations. This Court 'has been given the responsibility of being the ultimate guardian of the *Constitution* and its values."

135. The Supreme Court in *Speaker of National Assembly v Attorney General and 3 Others* (2013) eKLR affirmed this principle by stating thus

> "Parliament must operate under the *Constitution* which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours.... Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signaled in the *Constitution*, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the *Constitution* itself. It is our perception that all reading of the *Constitution* indicates that the ultimate judge of "right" and "wrong" in such cases, short of are solution in plebiscite, is only the Courts."

136. The spot on was the South African decision in *Hugh Glenister v President of the Republic of South Africa & Others* Case CCT 41/08; [2008] ZACC 19 where the Court held as follows:

> "In our constitutional democracy, the courts are the ultimate guardians of the *Constitution*. They not only have the right to intervene in order to prevent the violation of the *Constitution*, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other

branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds."

137. I am persuaded by the position taken by the 1st respondent in this case is not in conformity with the Constitutional objectives of devolution. The 1st Respondent just like all Constitutional organs is bound by the *Constitution*. Unconstitutional decisions by the 1st Respondent cannot be shielded from the Court scrutiny under the doctrine of separation of powers. It is unacceptable for the legislative arm of the national government to exercise absolute power that threatens to deprive funding to constitutionally assigned county function of road by appropriating all the revenue that is collected nationally and set aside for this specific purpose to the national government.

138. It is my humble view therefore that the impugned decision dated 28th September 2023 and 13/8/2024 not only threatens but actually undermines devolution hence is unconstitutional and any further action arising therefrom is illegal, null and void.

Whether Section 6 of the *Kenya Roads Board Act* 1999, Section 47 of the *Kenya Roads Act* 2007 and Section 7 of the *Road Maintenance Levy Fund Act* are unconstitutional

139. The Petitioners assailed the impugned provisions as unconstitutional for failing to be in accord with the principles of devolution under Article 186 and county governments function under the Fourth Schedule.

140. The Petitioners argued that Section 47 of the *Kenya Roads Act* undermines the objectives of devolution while Section 6 of the *Kenya Roads Board Act* violates Articles 6, 10,186, and Part I of the Fourth Schedule. The Petitioners further complained that the scheme of said Statutes that ensures funds for the roads are disbursed to the agencies instead of county governments is a violation of the *Constitution*.

141. Section 47 of the *Kenya Roads Act* (as read with the First Schedule of the Act on classification of roads) provides that:

Roads to be classified

1. All public roads under the management of an Authority shall be classified in the manner set out in the First Schedule.

2. In addition to the classification under subsection (1), each public road shall have such number, name or description as to uniquely identify it among all other roads of its class within the country.

3. All existing road categorisations and classifications and associated identity numbers defined by the Roads Department of the Ministry responsible for roads prior to the commencement of this Act shall, for the time being, be maintained after the commencement of this Act.

4. All existing road categorisations and classifications and associated identity numbers defined by the roads section of the Urban Development Department of the Ministry responsible for Local Government or a local Authority prior to the commencement of this Act shall be maintained for the time being after the date of commencement of this Act, save for such amendments as may be necessary to ensure consistency and compliance with the need for unique identity numbers.

5. An Authority may with the authority of the Cabinet Secretary published in the Gazette, add, modify or remove the category of a road.

142. The preamble to the *Kenya Roads Act* declares that it is an 'Act of Parliament to provide for the establishment of the Kenya National Highways Authority, the Kenya Urban Roads Authority and the Kenya Rural Roads Authority, to provide for the powers and functions of the authorities and for connected purposes'.

143. The *Kenya Roads Board Act* states that it is 'an Act of Parliament to provide for the establishment, powers and functions of the Kenya Roads Board and for connected purposes' provides under Section 6 as follows:

Object and purpose of the Board.

5. The object and purpose for which the Board is established is to oversee the road network in Kenya and coordinate the maintenance, rehabilitation and development funded by the Fund and to advise the Cabinet Secretary on all matters related thereto.

6. Without prejudice to the generality of subsection (1), the Board shall—

a. co-ordinate the optimal utilisation of the Fund in implementation of programmes relating to the maintenance, rehabilitation and development of the road network;

b. seek to achieve optimal efficiency and cost effectiveness in roadworks funded by the Fund;

c. manage the Fund and allocate monies from the Fund in the following manner—

d. fifty per cent of the Fund shall be allocated in accordance with paragraph (d); and

e. (ii) fifty per cent of the Fund shall be allocated for the purposes of section 32A(2);

f. based on a five year road investment programme approved by the Cabinet Secretary and the Cabinet Secretary for Finance, determine the allocation of financial resources required by road agencies for the maintenance, rehabilitation and development of the road network to ensure that the allocation of funds is pegged to specific categories of roads and that not less than—

(i) twenty-two percent, which shall be deposited into a special bank account to be called Constituency Roads Fund Account to be maintained by every Constituency of the allocated funds is allocated equally to all constituencies in the country to be administered by the Rural Roads Authority;

(ii) ten percent of the allocated funds is allocated for the maintenance or development of link roads between constituencies and to serve as Government counterpart funds in funding works on rural roads, to be administered by the Kenya Rural Roads Authority and that the said percentum shall be equally distributed to the Constituencies where Kenya Rural Roads Authority has the mandate;

(iii) forty percent of the allocated funds is allocated in respect of the national roads to be administered by the National Highways Authority;

(iv) fifteen percent of the allocated funds is allocated in respect of the urban roads to be administered by the Urban Roads Authority; and

(v) one percent of the allocated funds is allocated in respect of roads in national parks and reserves to be administered by the Kenya Wildlife Service; and

(vi) a maximum of two percent of the allocated funds is allocated in respect of the recurrent expenditure of the Board under section 31(5);

ensure that the remainder of the monies from the Fund described in paragraph (d) shall be allocated annually by the Board with the approval of the Cabinet Secretary to road authorities based on an annual work programme derived from the five-year road investment programme approved by the Cabinet Secretary responsible for roads and the Cabinet Secretary for Finance;

a. ensure that a maximum of ten percent of all monies allocated to each road agency is utilized for development purposes by the said agency;

b. monitor and evaluate, by means of technical, financial and performance audits, the delivery of goods, works and services funded by the Fund;

c. in implementing paragraph (g), pay due regard to public procurement and disposal regulations and additional guidelines issued or approved by the Cabinet Secretary;

d. recommend to the Cabinet Secretary appropriate levels of road user charges, fines, penalties, levies or any sums required to be collected under the *Road Maintenance Levy Fund Act* (Cap. 427) and paid into the Fund;

e. recommend to the Cabinet Secretary such periodic reviews of the fuel levy as are necessary for the purposes of the Fund;

f. identify, quantify and recommend to the Cabinet Secretary such other potential sources of revenue as may be available to the Fund for the development, rehabilitation and maintenance of roads; and

g. The Highways Authority, the Rural Roads Authority and the Urban Roads Authority may utilize such portion of monies received from the Fund for operational and administrative expenses as may be approved by the Cabinet Secretary on the advice of the Board:

h. Provided that such expenditure shall not in any year exceed, as a proportion of the projected annual expenditure of the Fund—

(i) in the case of the Highways Authority, four percent;

(ii) in the case of the Rural Roads Authority, five and half percent; and

(iii) in the case of the Urban Roads Authority, five and a half percent.

144. The impugned fund under Section 7 of the *Road Maintenance Levy Fund Act* provides as follows:

Establishment of Road Maintenance Levy Fund

(1) There is thereby established a fund to be known as the Road Maintenance Levy Fund (in this Act referred to as the "Fund") which shall be administered by the officer administering the Fund.

(2) The Fund shall consist of the proceeds from the levy and the transit tolls levied under the *Public Roads Toll Act* (Cap. 407).

(3) All monies accruing to the Fund from the levy and transit tolls shall be paid into two special accounts to be established by the Kenya Roads Board namely, a general account and a local authority account.

(3A) The monies accruing to the Fund from the levy shall be paid into the accounts established under subsection (3) in the following amounts—

b. in the 1998/1999 financial year, thirty percent of the printed estimates of the 1997/1998 road maintenance levy collections into the local authority account, and the balance into the general account;

c. in the 1999/2000 financial year, forty percent of the printed estimates of the 1997/1998 road maintenance levy collections into the local authority account, and the balance into the general account;

d. in the 2000/2001 and subsequent financial year, fifty percent of the printed estimates of the 1997/1998 road maintenance levy collections into the local authority account, and the balance into the general account;

e. in any financial year such amount as may be determined by objective estimates of the annual road maintenance costs of unclassified roads reduced by any annual expenditures by local authorities on the maintenance of such roads.

(4)

(a) There shall be paid out of the general account of the Fund, such monies as are approved for repair and maintenance of public roads.

(b) There shall be paid out of the local authority's account of the Fund, such monies as may be approved by the Advisory Committee for the repair and maintenance of unclassified roads.

(5) All receipts, savings and accruals to the Fund and the balance of the Fund at the end of each financial year shall be retained for the purposes for which the Fund is established.

145. Section 47 of the *Kenya Roads Act*, is explicit, it states that the funds to maintain the roads are to be channeled to the Kenya National Highways Authority, Kenya Urban Roads Authority, Kenya Rural Roads Authority and Kenya Wildfire Service. There is no mention whatsoever of county governments as key beneficiaries of funds yet they have a constitutional function to maintain county roads under the fourth Schedule. The provisions of the Act have remained intact even with present Constitution that only provides for national trunk roads and county roads.

146. It is ostensible to me that Section 6 of the *Kenya Roads Board Act*, was established to oversee the road network in Kenya and maintenance of the roads as funded by the Fund. Additionally, the 2nd Respondent is responsible for maintenance of the RMFL.

147. It thus crystal clear that none of these Statutes acknowledges county governments and their function of maintenance of roads or the need to facilitate this constitutional function through RMFL as primary stakeholder of roads within the counties. Instead, this function as per this Act is exclusively assigned to the 2nd Respondent, which is a National Government body to the exclusion of county governments.

148. Having regard to Article 259 of the *Constitution*, I am not convinced that these statutes advance the values and principles of the *Constitution*. These provisions are certainly not aligned with the constitutional values and principles of devolution and the devolved government system. They are centralized.

149. The upshot is that the impugned provisions are unconstitutional for undermining devolution as envisaged under Articles 6 and 186 of the *Constitution*.

150. In granting appropriate reliefs, I am conscious of the scope the Court can go in view of the separation of powers doctrine. The Court may not compel Parliament to legislate in particular way but can declare and assert what the legal position is by way of declaration as held in *Bitange Ndemo v Director of Public Prosecutions & 4 others* [2016] eKLR where the Court laid out the scope of a declaratory order as follows:

> "A declaration is a formal statement by the court pronouncing upon the existence or non-existence of a legal constitutional state of affairs. It declares what the legal position is and what are the rights of the parties. It does not contain an order which can be enforced against the respondents, as it only declares what is the legal position. It is not a coercive remedy and can be carefully couched or tailored so as not to interfere with the activities of public authorities more than is necessary to ensure that those public authorities comply with the law."

151. In light of above, I grant the following reliefs:

a. A declaration is hereby issued the classification of public roads as national roads, rural and urban roads under Section 47 of the *Kenya Roads Act*, No. 2 of 2007 as read with First Schedule of the *Kenya Roads Act* No. 2 of 2007 – not only undermines the objectives of the devolution but is also unconstitutional for violating Article 186 and Section 18 of Part I of Fourth Schedule of the *Constitution*.

b. A declaration is hereby issued that Section 6 of the *Kenya Roads Board Act*, 1999 is unconstitutional for violating the provisions of Articles 6, 10, 186 and Section 18 of Part I of Fourth Schedule of the *Constitution*.

c. A declaration that the decision of the National Assembly dated 28th September 2023 to unilaterally remove and/or fail to provide for the County Governments as beneficiaries of funds of the Road Maintenance Levy Fund ('RMLF') in the financial year 2024/2025 and 2025/2026 and its further decision of 13th August 2024 to further remove County Governments as beneficiaries of Kshs. 10,522,211,853.00 conditional grants from funds derived from Road Maintenance Levy Fund ('RMLF' in the financial year 2024-2025- amounts to a threat to undermine devolution and is thus unconstitutional for violating Article 10, 118, 186 and Section 18 of Part I of Fourth Schedule of the *Constitution*.

d. A declaration that any appropriation of funds from Road Maintenance Levy Fund (RMLF) by the 1st respondent that does not provide for the county governments as beneficiaries of

the RMLF undermines the principles of devolution, is unconstitutional, unenforceable, illegal null and void.

e. I make no orders as to Costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF JUNE, 2025.

.....

L N MUGAMBI

JUDGE