

**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT BUSIA**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NUMBER E001 OF 2024**

**IN THE MATTER OF ARTICLES 3(1), 22(1) & (2) (c), 23, 48, 50(1)  
AND 258(1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 1,  
2, 3(1), 10, 19, 20, 21, 24, 73, 75, 96, 174, 175(a), 179(4) & (6),  
201(a), 227(1), 232(1) (a), (b), (c), (d), (e), (f) & 2(a) & (b) AND  
259(1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE ALLEGED VIOLATION OF THE RIGHTS AND  
FUNDAMENTAL FREEDOMS UNDER ARTICLES 27, 35, AND 47(1) OF  
THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE  
PARLIAMENTARY SERVICE (SENATE MONITORING AND  
EVALUATION PROCEEDURE FOR MANAGEMENT OF FUNDS)  
REGULATIONS, 2016**

**AND**

**IN THE MATTER OF THE CONTRAVENTION OF SECTION 65 OF THE  
PUBLIC SERVICE ACT, NO 10 OF 2017**

**AND**

**IN THE MATTER OF SECTIONS 7 AND 9(6) OF THE ACCESS TO  
INFORMATION ACT, 2016 AND THE ALLEGED CONTRAVENTION OF  
SECTIONS 3, 4, 5, 6 AND 9(1) THEREOF**

**AND**

**IN THE MATTER OF SECTION 7 OF THE FAIR ADMINISTRATIVE  
ACTION ACT, 2015 AND THE ALLEGED CONTRAVENTION OF  
SECTIONS 3, 4, 5 AND 6 THEREOF**

**AND**

**IN THE MATTER OF SECTION 9 OF THE LEADERSHIP AND  
INTEGRITY ACT, 2012 AND THE ALLEGED VIOLATION OF SECTIONS  
3, 4(1), 6, 7, 8, 10, 11 AND 13(1) (a), (b) & (c) THEREOF**

**AND**

**IN THE MATTER OF THE ALLEGED VIOLATION OF SETIONS 7, 8, 9  
AND 10 OF THE PUBLIC OFFICER ETHICS ACT (CAP 185 B),  
SECTION 166(4) (c) OF THE PUBLIC FINANCE MANAGEMENT ACT  
(CAP 412A) AND SECTION 96(1) OF THE COUNTY GOVERNMENTS  
ACT (CAP 265)**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLE  
19(1) OF THE INTERNATIONAL CONVENTION ON CIVIL AND  
POLITICAL RIGHTS (ICCPR), ARTICLE 19 OF THE UNITED NATIONS  
UNIVERSAL DECLARATION ON HUMAN RIGHTS (UNDHR), AND  
ARTICLE 9 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S  
RIGHTS**

**AND**

**IN THE MATTER OF SECTIONS 44 OF THE PUBLIC PROCUREMENT  
AND ASSET DISPOSAL ACT (CAP 412C) (PPADA) AS READ  
TOGETHER WITH SECTIONS 45(2) (b) & (c) AND 46 OF THE ANTI-  
CORRUPTION AND ECONOMIC CRIMES ACT, AND SECTION 121 OF  
THE PUBLIC FINANCE MANAGEMENT ACT (CAP 412A), AND THE  
ALLEGED VIOLATION OF SECTIONS 3, 4(1), 83, 84, 85, 86, 87(3)  
AND 96 OF THE PPADA**

**AND**

**IN THE MATTER OF THE CONSTITUTIONAL AND LEGAL VALIDITY OF  
THE PROCUREMENT OF THE CONSTRUCTION OF BUSIA TRAILER  
PARK BY A PRIVATE DEVELOPER, AND OF THE PROCUREMENT OF  
NEW KIOSKS AND THEIR DISTRIBUTION TO SMALL SCALE TRADERS  
IN BUSIA TOWN**

**AND**

**IN THE MATTER OF THE ALLEGED GROSS VIOLATION OF THE  
CONSTITUTION AND THE LAW, GROSS MISCONDUCT, GROSS  
ABUSE OF OFFICE AND GROSS INCOMPETENCE BY H.E. DR PAUL  
NYONGESA OTUOMA, THE GOVERNOR OF BUSIA COUNTY**

**AND**

**IN THE MATTER OF THE OBLIGATION AND THE MANDATE EACH  
SENATOR HAS IN THEIR PERSONAL CAPACITY AS  
DEMOCRATICALLY ELECTED REPRESENTATIVES OF THE PEOPLE  
PURSUANT TO ARTICLE 1(2) OF THE CONSTITUTION TO  
REPRESENT THE SOVEREIGN PEOPLE IN THEIR COUNTIES BY  
DIRECTLY OVERSIGHTING COUNTY GOVERNMENTS WITHOUT**

**GOING THROUGH THE INSTITUTION OF THE SENATE AS A**

**CORPORATE ENTITY**

**AND**

**IN THE MATTER OF THE DOCTRINES OF GOOD GOVERNANCE, RULE**

**OF LAW AND LEGITIMATE EXPECTATIONS**

**BETWEEN**

**OKIYA OKOITI OMTATAH .....PETITIONER**

**VERSUS**

**H.E DR PAUL NYONGESA OTUOMA**

**THE GOVERNOR, BUSIA COUNTY.....1<sup>ST</sup>**

**RESPONDENT**

**THE COUNTY EXECUTIVE OF BUSIA.....2<sup>ND</sup>**

**RESPONDENT**

**AND**

**ATHI LIMITED.....1<sup>ST</sup> INTERESTED**

**PARTY**

**THE ETHICS & ANTI-CORRUPTION**

**COMMISSION.....2<sup>ND</sup> INTERESTED**

**PARTY**

**THE BUSIA BUSINESS OWNERS ASSOCIATION.....3<sup>RD</sup> INTERESTED**

**PARTY**

**ABDIKADIR HASSAN HUSSEIN.....4<sup>TH</sup> INTERESTED**

**PARTY**

**FATUMA BILLE.....5<sup>TH</sup> INTERESTED**

**PARTY**

**RULING**

**INTRODUCTION**

1. In his Amended Petition dated 19<sup>th</sup> of April 2024, the Petitioner, who is the Senator of Busia County contended that the Respondents had declined and/or refused to provide him information on the operations and the activities of the County Government of Busia, including information on the financial expenditure of the County, the procurement of County Government services and information on the ongoing projects in the County.
2. He stated that as the Senator of Busia County, he had individual oversight mandate in his electoral unit, using Senate oversight funds to monitor and evaluate the ongoing projects in the County away from the institution of the Senate as a corporate entity.
3. He sought several orders which this court summarised pursuant to the questions it had been called to determine. His prayers included a declaration that he and other Senators were entitled to personally access all information and documents held by county governments at all times and that the failure by the 1<sup>st</sup> Respondent to provide information sought under Article 35(1) of the Constitution of Kenya, 2010 violated his rights, and an order of *mandamus* compelling the Respondents to give him, within a period not exceeding twenty-one (21) days from the judgment date, all the information he or his office sought from the 1<sup>st</sup> Respondent or his officers.

4. He also sought that a declaration be made that an individual Senator had the mandate to oversee his/her county government on behalf of the people by monitoring and evaluating its policies, operations and activities and that the said mandate was limited to the Chamber's corporate mandate, and did not extend to the work done by an individual Senator, exercising his/her oversight mandate, in his/her electoral unit, using Senate Oversight Funds to 'monitor and evaluate,' in real time, ongoing projects being implemented by the County Government.
5. The Petition herein was initially handled by Musyoka J. The Petitioner filed a Motion dated 15<sup>th</sup> April 2024 seeking transfer of this matter from the High Court at Busia to Milimani, Nairobi and for empanelment of a bench of an uneven number of Judges. In a Ruling delivered and dated 31<sup>st</sup> May 2024, the learned Judge declined to grant the transfer prayer but sought directions from the Honourable Chief Justice on the empanelment of a bench of an uneven number of Judges bench to hear and determine the matter herein and to specifically address the questions framed in the said Ruling pursuant to Article 165(4) of the Constitution..
6. Pursuant to the orders of 31<sup>st</sup> May 2024, on 12<sup>th</sup> August, 2024, the Honourable Chief Justice empanelled a three (3) judge bench consisting of the learned Judge, Kamau and Bett JJ to hear and determine the issues that had been identified in the aforesaid Ruling. The expanded bench gave directions on 22<sup>nd</sup> November

2024 for the filing of Written Submissions and on 28<sup>th</sup> May 2025, it reserved the Judgment herein.

### **ISSUES FOR DETERMINATION**

7. In Paragraph 10 of the Ruling dated 31<sup>st</sup> May 2024, the questions that were identified for determination by the court were as follows:-

**1. Whether the mandate of the Senate to oversight County Governments, under Article 96, as read with Article 1(1), of the Constitution is, as argued by the Respondents, limited to the corporate mandate of the Chamber, the House relies on annual audit reports of the Auditor-General, carries out annual post-mortems on the operations and activities of the County Government; or, as argued by the Petitioner, whether it extends to the work done by an individual Senator, exercising his individual oversight mandate, in his electoral unit, using Senate oversight funds, to monitor and evaluate ongoing projects being implemented by the County Government;**

**2. Whether, in his official capacity, as a County leader, with obligations and a mandate to represent the people of the County, pursuant to Article 1(2) of the Constitution, the individual Senator:-**

- i. has an obligation and mandate, in his personal capacity, to directly oversight the County Government away from the institution of the Senate as a corporate entity;**
- ii. is entitled, in the discharge of his oversight obligation and mandate over the County Government, to access official information and documents on the operations and activities of the County Government; and**
- iii. loses his right as a citizen, under Article 35 of the Constitution, to access information from the County Government.**

**3. Whether, as the Chief Executive of a County, pursuant to Article 179(4) of the Constitution, a County Governor is the officer:**

- i. responsible for releasing information to the public as the information access officer of the County Executive, under Section 7(1) of the Access to Information Act, 2016; and**
  - ii. primarily responsible for ensuring that the County Executive complies with the Public Procurement and Asset Disposal Act, pursuant to Section 44(1) of the Act.**
-

8. The said issues have been dealt with under distinct and separate headings shown hereinbelow.

### **OVERSIGHT OF COUNTY GOVERNMENTS**

9. Oversight of County Governments is vested in the Senate pursuant to the provisions of Article 96(3) of the Constitution.

10. In his Petition and submissions on this issue, the Petitioner contended that elected Senators had clear and distinct functions as individuals within their counties as well as in their capacity as county representatives of the people under Article 1(2) of the Constitution. He averred that Senators had the mandate to oversight their county governments on behalf of the people by monitoring and evaluating their policies, operations and activities and that the said role was mutually exclusive to that of the Senate as a corporate entity.

11. In support of this assertion, the Petitioner relied on Article 96 and Article 229(7) and (8) of the Constitution and stated that Members of Parliament, Senators, Members of the County Assembly (MCAs) were representatives of constituents in their electoral units and they had a wide range of responsibilities.

12. In response to the Petition, the 1<sup>st</sup> Respondent swore a Replying Affidavit on 28<sup>th</sup> February 2024, wherein he protested that the Petitioner had filed this suit against him in *person am* despite the fact that the issues raised in the Petition concerned the County Government of Busia, which, by dint of Article 176 of the

Constitution as read with Section 6 of the County Government Act 265 (Laws of Kenya) , was a juristic person.

13. He acknowledged that the Petitioner was the Senator for Busia County and equally doubled up as a member of the Senate Public Accounts Committee (hereinafter referred to as "CPAC"), which had the express mandate to exercise oversight over the County Governments and further to summon witnesses, receive evidence and request and receive papers and documents from the Government and the Public.

14. He was emphatic that the CPAC played a pivotal role in overseeing public bodies by studying public audits, inviting Governors, Cabinet Secretaries, and other government officials for questioning and reporting on their findings after the government budget audit.

15. He pointed out that consequent to the aforesaid mandate, he was summoned to appear before the CPAC on 28<sup>th</sup> October 2023 vide a letter dated 26<sup>th</sup> September 2023 where he appeared with the information sought but was turned away. He was scheduled to re-appear before CPAC on 18<sup>th</sup> March 2024 following an invitation letter dated 15<sup>th</sup> March 2024 in which he was directed to submit to the oversight authority of the Senate.

16. He further cited Article 195 of the Constitution and quoted the case of **Senate vs Council of County Governors & 6 Others(Petition No 24 & 27(Consolidated)[2022] KESC 57 (KLR)** where it was held that the County Assemblies exercised first-

tier oversight over County Governments while the Senate exercised second-tier oversight over the Counties.

17. The 3<sup>rd</sup> Respondent did not submit on this issue. The 6<sup>th</sup> Interested Party herein supported the Petitioner's position. In its submissions dated 9<sup>th</sup> May 2025, it asserted that in line with Articles 96 & 98 of the Constitution, that being representatives of the people at the counties, individual Senators exercised oversight over the county governments so as to ensure the county governments were accountable to the people at the counties.
18. It pointed out that the oversight role of the Senate was thus not limited to Senate Plenary or the Senate Committees as individual Senators could seek information and/or documentation from County Governments to curb misappropriation of public resources at the counties to the detriment of the people. In support of the foregoing, the 6<sup>th</sup> Respondent relied on the decision of the court in the case of **Mwinzagu & 5 Others vs Parliamentary service Commission; Onderi (interested party) (petition E340 & E 363 of 2023 (consolidated) (2024) KEHC 4073 (KLR) (Constitutional and Human Rights) (26 April 2024 ) (Judgment)**.
19. Since this court was tasked with determining whether an individual Senator could undertake oversight of a County without invoking the structures of Senate, it was imperative to consider the relevant constitutional architecture on this issue.

20. It was noteworthy the Petitioner predicated his proposition for exercise of powers of oversight on counties by individual Senators on the provisions of Article 1(2) of the Constitution which provides:-

**2. The people may exercise their sovereign power either directly or through their democratically elected representatives.**

21. Notably, Article 1(3) of the Constitution delegates sovereign power to the three arms/organs of government namely, legislature, executive and the judiciary and stipulates thus:

**3. 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.**

22. Article 1(4) of the Constitution on the hand states that the sovereign power of the people is exercised at the national and county levels.

23. Article 96 of the Constitution provides for the role of the Senate as follows:-

1. **The Senate represents the counties, and serves to protect the interests of the counties and their governments.**
2. **The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113.**
3. **The Senate determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments.**
4. **The Senate participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article 145.**

24. The Senate's oversight role was highlighted in the case of **Council of Governors & 3 Others vs Senate & 53 Others [2015] eKLR** where a three (3) judge bench observed that the Senate's role, as was evident from the provisions of Article 96 included exercising oversight over county governments.

25. The court, however, noted that while the Senate had an oversight role over the county government, the issue in that regard was the scope, extent and nature of the said oversight role. In the

case **Council of Governors and Others vs The Senate** (Supra), the three (3) judge bench adopted the plain English meaning of the word “oversight” as defined in the concise **Oxford English Dictionary, 10th Edition** as; “the action of overseeing” and that “oversee” had then been defined by the same dictionary as to, “supervise” or “look at from above”.

26. In the same vein, the Supreme Court in **Senate & 2 Others vs Council of County Governors & 8 Others [2022] KESC 7**

**(KLR)** was very clear on the corporate mandate of the Senate. It stated that to discharge its oversight responsibilities, the Senate was not expected to relocate to the counties to exercise supervisory powers at that level as that would be intrusive into the functional and institutional integrity of the county government and unacceptable overreach.

27. The court further added that the Senate must not be involved in the administrative nitty-gritty details of the counties and further that its oversight and legislative roles, were to be exercised in accordance with the Constitution and the law.

28. We appreciate that the meaning, scope, nature and extent of oversight was

already settled in the decisions cited above. We find no reason to depart from the findings of the courts above. In as much as the Public Finance Management (Senate Monitoring and Evaluation) Regulations Legal Notice 71 of 2018 empowered individual Senators to recruit an Evaluation and Monitoring Officer to carry out functions

necessary to give effect of its objectives and created a fund for purposes, we are of the view that the functions carried out by the Monitoring and Evaluation Officer and the Senator in this regard utilizing the Senate Monitoring and Evaluation Fund could only be exercised under the Corporate oversight mandate of the Senate and not that of the individual Senator owing to our nature of our constitutional architecture. While we acknowledge that pursuant to clause 7 of the said Regulations the object of the Fund is to facilitate a Senator to carry out monitoring and evaluation activities in exercise of the Senate's oversight role over county governments in accordance with Article 96 of the Constitution, we are of the view that the Fund was only conceived to expand the Senate's oversight role and not necessarily vest oversight powers on individual senators.

29. In this regard, we are of the view that oversight power can only be conferred and exercised within the dictates of the Constitution. Needless to state the decision of the Supreme Court in *Senate & 2 Others vs Council of County Governors & 8 Others* (Petition 25 of 2019) (Supra) was binding to this court.
30. A cursory look at the provisions of Article 96 (3) of the Constitution and the decisions cited above leaves no doubt that the Senate was vested with power to oversight county governments. Pursuant to Article 98(1) of the Constitution, the Senate consists of 67 members excluding the Speaker.

31. Comparatively, in other jurisdictions such as the United States of America, which had a Federal and State Government system, the State Government was headed by a Governor and State Senators represented their individual States in the United States Senate and Congress.
32. As could be seen in ***Understanding State Senators: A Comprehensive Guide*** <https://www.officialoffices.com/legislative-branch-state-senators, in the United States of America>, Senators did not have any individual oversight powers over the State Government as their oversight mandate was merged with the corporate Senate which focused on the federal government, its operations and policies.
33. On the other hand, a pertinent question that arose was whether under the Kenya Constitution, the oversight powers vested upon the Senate could be exercised individually by a member of the Senate as proposed by the Petitioner? The court thinks not.
34. Under Article 1(3) of the Constitution, sovereign power was delegated to state organs namely, parliament and the legislative assemblies in the county governments, the national executive the executive structures in the county governments, and the judiciary and independent tribunals. The Oxford Dictionary 12<sup>th</sup> Edition defines the word “organ” as **“a department or organization that performs a specified function”**. The Cambridge Dictionary defines it as **“an organization that works as part of a larger organization, for example, a government”**. The Merriam-

Webster Dictionary refers to it as **“a subordinate group or organization that performs specialized functions -the various arms of government”**. By no stretch of imagination could the term “organ” in Article 1 of the Constitution be construed to refer to an individual. A simple interpretation of Article 1(3) of the Constitution could only mean that the Senate as an organ was the corporate or collective body of Senators and not to individual Senators.

35. This power had to be exercised within the structures of Senate as prescribed by the Constitution. In any event, Article 2(2) of the Constitution provides that no person may claim or exercise State authority except as authorised under the Constitution.

36. This position aligned with the decision of the court in **Mwizagu & 5 Others vs Parliamentary service Commission; Onderi (Interested Party) (2024) KEHC 4073 (KLR)** where the court therein held that from a constitutional view point, oversight was exercised by the Senate **collectively and indivisibly by the Senators [Emphasis added]**.

37. This court found that the use of the term, “collectively and indivisibly” in simple terms meant that power of oversight could not be distributed to each individual Senator but had to be exercised by Senate as a whole through its plenary sessions or committees. In fact, the use of the word “Senate” in Article 96 of the Constitution was intentional as that was an organ that consisted of several Senators.

38. It must be appreciated that the Senate as a Constitutional Organ had been vested with mechanisms to execute its oversight role. Under Article 124 of the Constitution, the Senate was empowered to establish committees to assist it in the exercise of the oversight mandate.

39. Moreover, pursuant to Article 125 of the Constitution, the Senate had also been vested with a “coercive” power to ensure the attendance of witnesses as well as compel the production of documents.

40. Article 125 of the Constitution provides :-

**1. Either House of Parliament, and any of its committees, has power to summon any person to appear before it for the purpose of giving evidence or providing information.**

**2. For the purposes of clause (1), a House of Parliament and any of its committees has the same powers as the High Court -**

**a. to enforce the attendance of witnesses and examine them on oath, affirmation or otherwise;**

**b. to compel the production of documents; and**

**c. to issue a commission or request to examine witnesses abroad.**

41. Without such powers the Senate could not be able to execute its oversight role. Needless to state, such role could not in any way

be construed to be exercisable by the individual Senators in their personal capacities for they have not been enabled to do so by the Constitution.

42. Without the specific powers expressly set out under Articles 124 and 125 of the Constitution, individual Senator's quest to oversight County Governments in their personal capacities would face headwinds.

43. Courts were enjoined by the provisions of Article 259 of the Constitution of to interpret the Constitution in a manner that promotes its purposes, values, and principles and contributes to good governance.

44. In this regard, the court took the view that when the people of Kenya adopted the Constitution they intended to "institutionalise" exercise of delegated sovereign power rather than "individualise" it. In reaching this conclusion, this court was alive to the holding of the Supreme Court in **Senate & 2 Others vs Council of Governors & 8 Others** (Supra) where the court therein held thus :-

**"The above limitations must be borne in mind even as the special role of the Senate in the devolved governance system is acknowledged. Under article 96(1), the Senate represents the counties and serves to protect their interests. The Senate participates in the law-making function of Parliament by considering and approving Bills concerning counties. It has the power to determine the allocation of national revenue among counties, and to**

**oversight over the use of those resources. To discharge these responsibilities, the Senate is not expected to relocate to the counties to exercise supervisory powers at that level. That would be intrusive into the functional and institutional integrity of the county government and unacceptable overreach. It must not be involved in the administrative nitty-gritty details of the counties. Its oversight as indeed its legislative roles, are to be exercised in accordance with the Constitution and the law” [Emphasis added]**

45. It may well be true that there were many well-meaning State Officers but this court was of the considered view that vesting delegated sovereign power within the purview of Article 1(3) of the Constitution on individuals acting outside the structures of state organs posed the hazard of perpetrating unchecked individual power and the attendant excesses of tyranny. Were a Senator to be allowed to exercise individual oversight over the County Government, there would be a breach of the doctrine of separation of powers, more so in light of the fact that the County Assemblies were vested with first tier oversight powers over the same government.

46. It follows therefore that exercise of sovereign power by the people through their democratically elected representatives contemplated under Article 1(2) of the Constitution could only be realised through their representation in the Senate.

47. In the circumstances, this court did not find merit in the Petitioner's assertion that Senators acting individually could exercise their role of overseeing County Governments.

### **RIGHT TO ACCESS OF INFORMATION**

48. The second broad question, that the Petitioner called upon this court to answer, was with relation to his right to access information from the Respondents, as a private citizen and as a Senator elected to represent Busia County at the Senate of the Republic of Kenya. With regard to that, the Petitioner submitted that the 1<sup>st</sup> Respondent had an obligation to uphold the rule of law, including by giving him the information that he had requested for. He disputed the assertions by the Respondents that they denied him access to the information sought due to public interest, asserting that there was no public interest in denying an elected representative of the people access to information he required to discharge his mandate under the law.

49. In response to that, the 1<sup>st</sup> Respondent averred that the information, allegedly in issue herein, as requested by the Petitioner, was available to any person who requested for it, including the persons stationed at the office of the Petitioner. He further averred that, as for the information and documents sought by the Petitioner, in his official capacity, as Senator of Busia County, in exercise of his oversight mandate over the County Government, to monitor and evaluate the use of public funds and resources in the

County, the same had been provided to him through the Office of the Clerk of the Senate, and also through the Senate Public Accounts Committee, of which he was a member.

50. On its part, the 2<sup>nd</sup> Respondent stated that accounting officers were appointed by the County Executive Committee Member for Finance, in accordance with the provisions of Section 148(1) of the Public Finance Management Act, Cap 412A, Laws of Kenya. It was claimed that it, the 2<sup>nd</sup> Respondent, had made it easier for citizens, to access the sort of information requested by the Petitioner, by publishing the said information in its website and various notice boards, although some information was too sensitive and confidential to be published. It was further averred that although the right to access information and fair administrative action were constitutional rights, the same were not absolute, as per Article 24 of the Constitution of Kenya and Section 4 of the Access to Information Act, Cap 7M, Laws of Kenya.

51. It was acknowledged, by the 2<sup>nd</sup> Respondent, that the Petitioner had written several letters, to a number of its departments, seeking information, to facilitate his oversight role over the Respondents, but it was argued that that information was available to the Petitioner, through the Senate, of which he was a member. It was averred that the Senate was seized of authority to call for more information, in case clarification was necessary.

52. The 2<sup>nd</sup> Respondent further argued that the Petitioner had prematurely approached the court, for he had not exhausted the

other alternative mechanisms, dedicated by the law, for deliberation on the issues that he was raising. It was contended that the legal recourse, open to the Petitioner, if he felt that he had been denied access to information, by the Respondents, was to seek a review before the Commission on Administrative Justice, as provided under Section 14 of the Access to Information Act.

53. In conclusion, the 2<sup>nd</sup> respondent denied the allegations of failure to disclose the information sought, terming the allegations as baseless, and emphasising that the reports sought by the Petitioner were available in the public domain, in that they could be accessed through the Senate Public Accounts Committee.

54. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents had raised a Preliminary Objection, on a point of law, with respect to the petition being premature, on the aspect of access to information, on grounds that there had been no exhaustion of alternative modes of dispute resolution. They contended, relying on **Owners of Motor Vessel "Lillian S" vs Caltex Oil Kenya Limited [1989] KLR 1653 [1989] eKLR [1989] KECA 48 (KLR)**, that there was no jurisdiction, on the part of this court, as the Petitioner had failed to invoke and exhaust the requisite statutory remedies, yet jurisdiction was everything. They submitted that the doctrines of exhaustion and constitutional avoidance were important in determining the issues before us. They asserted that the doctrines required a party to exhaust any alternative dispute resolution mechanism provided

by statute or the law, before resorting to the courts, and frowned on the practice of bringing ordinary disputes to the constitutional court.

55. They relied on **Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others [2014] KESC 53 (KLR)** and **Geoffrey Muthinja & Another vs Samuel Henry & 1756 Others [2015] eKLR**, where it had been held that where a dispute resolution mechanism existed outside the courts, the same ought to be exhausted first, before the jurisdiction of the courts was invoked. They cited **Speaker of the National Assembly vs Karume [1992] KECA 42 (KLR)**, for the argument that where there was a clear procedure, for the redress of any particular grievance, prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. **Waity vs Independent Electoral & Boundaries Commission & 3 others [2019] KESC 54 (KLR) [2019] eKLR** was also cited, where it had been held that where the Constitution or the law consciously conferred jurisdiction to resolve a dispute on an organ, other than a court of law, such dispute resolution mechanism needed to be exhausted before approaching the latter.

56. They invoked Section 9(2)(3)(4) of the Fair Administrative Action Act, Cap 7L, Laws of Kenya, and relied on **Republic vs Kenya Revenue Authority, Commissioner Ex parte Keycorp Real Advisory Limited [2019] eKLR [2019] KEHC 11050 (KLR)**, where it was held that the provisions of Section 9(2) of the Fair Administrative Action Act, were in

mandatory terms, and that for a litigant to claim exemption, under the proviso to Section 9(4), they had to first establish that there existed exceptional circumstances to warrant exemption.

57. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contended that the request for information, by the Petitioner, had been met, as the information had been made available to him, through the Clerk of the Senate and the Public Accounts Committee, of which he was a member. They asserted that information relating to procurement processes was not provided to the Petitioner, for the reason that the same was either privileged or qualified, under the dictates of Section 67 of the Public Procurement and Assets Disposal Act, Cap 412C, Laws of Kenya, and Section 6(1)(e) of the Access to Information Act.

58. They reiterated that, as a consequence of the Petitioner's several requests for information from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the requisite information was made available to the Petitioner, through the Senate Public Accounts Committee, and, subsequently, the 1<sup>st</sup> Respondent was summoned, by the Committee, and had since appeared before it, for the purpose of making clarifications, and to respond to further inquiries, on the information requested for by the Petitioner. They asserted that the Petitioner enjoyed the benefit of power, through the Committee and the 6<sup>th</sup> Interested Party, to compel the Respondents to produce the documents and information, sought through the Petition herein, by dint of Article 125(2)(b) of the Constitution of Kenya, 2010. They further contended that it was trite that courts ought not interfere with

matters which other arms of the Government were seized of, as was held in **Madzayo & 22 Others vs. Attorney General & 2 Others [2023] KEHC 24980 (KLR)**.

59. They argued that the Petitioner had enumerated constitutional provisions, such as Articles 4, 10, and 35 of the Constitution of Kenya, as having been violated, without particularizing, to a reasonable degree how the same were violated. They added that it was unfortunate, as the Petitioner appeared to have thrown the Constitution of Kenya to this court, for it to find for itself a specific right or freedom in the Bill of Rights, and the correlation in the instant Petition, as was held in **Daniel Chacha Muriri vs Attorney General KEHC 2279 (KLR)**.

60. On its part, the 3<sup>rd</sup> Interested Party submitted that the right to access to information could never be violated, because it was neither granted nor grantable by the State, as was held in **Nairobi Law Monthly Company Limited vs Kenya Electricity Generating Company & 2 Others [2013] KEHC 6054 (KLR)** and **Trusted Society of Human Rights Alliance & 3 Others vs Judicial Service Commission & others [2016] KEHC 3581 (KLR)**. It contended that the right to access information was a basis for accountability, responsiveness and openness, as emphasized in **Brummer vs Minister for Social Development & Others** (eKLR citation not given). It pointed out that, in compliance with Section 7 of the Access to Information Act, the Petitioner had annexed several letters, to show that he

requested to access information, but his requests were ignored by the Respondents, despite them acknowledging receipt of the letters. It asserted that Section 9 mandated the State or State organs to give information within twenty-one (21) days.

61. It argued that the Respondents were under both a constitutional and a legal obligation to allow the Petitioner to access information in their possession, held on behalf of the public, in compliance with Article 35 of the Constitution, citing **Attorney General vs Kituo Cha Sheria & 7 Others [2017] eKLR [2017] KECA 773 (KLR)**, where it had been held that rights have inherent value attached to all persons by virtue of their being human, and respecting rights was not a favour done by the State or those in authority. It cited **Tinyefuze vs Attorney General of Uganda [1997] UGCC3**, for the argument that where a petitioner succeeded in establishing breach of a fundamental right, he became entitled to the relief sought, in exercise of constitutional jurisdiction, as a matter of course.

62. On its part, the 6<sup>th</sup> Interested Party relied on Article 35 of the Constitution of Kenya, on access to information and Section 4 of the Access to Information Act. It quoted Section 6 on the limitation to access information, and submitted that the information sought by the Petitioner did not fall under the categories listed under Section 6 of the Access to Information Act. It further submitted that the information sought, by the Petitioner, on the construction of the Busia Trailer Park, at the Mundika area, and the distribution of the

new kiosks, related to the public interest of the people of Busia County. It was emphatic that the Petitioner was entitled to the information sought, in light of Article 35 of the Constitution and Section 4 of the Access to Information Act.

63. The right of access to information is constitutional, prescribed in Article 35(1) of the Constitution, which provides that:

- 1. Every citizen has the right of access to-**
  - a. information held by the State; and**
  - b. information held by another person and required for the exercise or protection of any right or fundamental freedom.**

64. Article 9 of the African Charter on Human and Peoples' Rights, also known as the Banjul Charter, states that:

**“Every individual shall have the right to receive information.”**

65. The Petition before us was hinged on an alleged denial of the right of access to information. The Petitioner contended that he had requested for information from the Respondents, on various projects that the Respondents were undertaking within Busia County, but the information had not been availed.

66. The Respondents submitted that they were not obligated to provide the information sought by the Petitioner because they had already submitted the said information to the County Assembly and the Senate, the bodies

constitutionally enabled or empowered to carry out oversight functions of County Governments in Kenya. They argued that the Petitioner, being a member of the Senate and of the Senate Public Accounts Committee, was privy to all the information he sought from them. They also stated that the information sought could be accessed on the website of the County Government, while the rest of the information was lost and burnt during a fire at the Office of the Governor, at the former Busia Town Hall.

67. **Njonjo Mue & Another vs Chairperson of Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR [2017] KESC 28 (KLR)** interpreted Article 35(1)(a)(b) of the Constitution, read with Section 3 of the Access to Information Act, as stating that all citizens had the right to access information held by the State or public agencies. In **Timothy Njoya vs Attorney General & Another [2014] KEHC 8340 (KLR) [2014] eKLR**, it was said that the right to information implied the entitlement by the citizen to information, but it also imposed a duty on the State with regard to provision of information. The courts, however, stated that the right to access of information was not absolute, as there might be circumstances under which particular information might be withheld.

68. The State, therefore, had a duty, to not only proactively publish information in the public interest, but also to provide open access to such specific information as the people may require from the State. Although the Petitioner was entitled to access information

held by the Respondents, that right was not absolute, for there could have been aspects of it that would not be available for disclosure. The State, therefore, had a duty, to not only proactively publish information in the public interest, but also to provide open access to such specific information as the people may require from the State.

69. Section 5 of the Access to Information Act lists the classes of information that a party could seek to be disclosed or accessed. The said provision states that:

**1. Subject to section 6, a public entity shall—**

**a. facilitate access to information held by such entity and which information may include—**

- i. the particulars of its organization, functions and duties;**
- ii. the powers and duties of its officers and employees;**
- iii. the procedure followed in the decision-making process, including channels of supervision and accountability;**
- iv. salary scales of its officers by grade;**
- v. the norms set by it for the discharge of its functions;**

- vi. guidelines used by the entity in its dealings with the public or with corporate bodies, including the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions; and**
- vii. a guide sufficient to enable any person wishing to apply for information under this Act to identify the classes of information held by it, the subjects to which they relate, the location of any indexes to be inspected by any person.**

70. The Access to Information Act also provides that the information should be given without delay and at no fee, regardless of the purpose for which the citizen seeks to access it. Section 9 of the Access to Information Act states that a decision on the request to access information should be made and communicated within twenty-one (21) days. The communication should include whether the public entity had the information and whether it would provide access to the same.

71. Section 6 of the Access to Information Act provides exceptions to the right to access information, in the following terms:

**1. Pursuant to Article 24 of the Constitution, the right of access to information under article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to—**

- a. undermine the national security of Kenya;**
- b. impede the due process of law;**
- c. endanger the safety, health or life of any person;**
- d. involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;**
- e. substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;**
- f. cause substantial harm to the ability of the Government to manage the economy of Kenya;**
- g. significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;**
- h. damage a public entity's position in any actual or contemplated legal proceedings; or**

**i. infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.**

72. In **Nairobi Law Monthly Company Limited vs Kenya Electricity Generating Company & 2 Others**

**[2013] KEHC 6054 (KLR) [2013] eKLR**, it was held that national security, defence, public or individual safety, commercial interests and the integrity of Government decision making processes were legitimate aims which might justify non-disclosure of information.

73. Was the information sought by the Petitioner available for disclosure or accessibility by him, or did it fall within the categories that could not be accessed or disclosed?

74. The letters from the Petitioner sought information into the expenditure by the County Government of Busia, tendering and procurement processes of various County government services, the processes of the County government, demolition of old stalls and designs for new stalls, all of which fell within the ambit of Section 5(1) of the Access to Information Act. The information, as sought by the Petitioner, was for the benefit and the protection of the public. It was said, in **Famy Care Limited vs Public Procurement Administrative Review Board & Another & 4 Others** **[2012] KEHC 5194 (KLR) [2012] eKLR**, that the right of access to information is one of the rights that underpin the values of good

governance, integrity, transparency and accountability, and the other values set out in Article 10 of the Constitution.

75. The reasons, the Respondents advanced, for not supplying the said information, at the time of the filing of the instant Petition, were not among those listed in Section 6 of the Access to Information Act. Whether as a Senator or as a private citizen, the Petitioner had a right to inquire into the dealings of the County Government and the Respondents had a legal obligation to supply the information requested. The information that he had sought ought to have been availed to him. The issue, of the purpose for which he was seeking the information, would be neither here nor there. Whether he was entitled to oversight the Respondents, and that he required information for that purpose, ought not be a factor in denying him that which he would be entitled to in law.

76. This court did not see how it would be interfering with the functions of other State entities, in evaluating whether the Petitioner had a constitutional right to access certain information from State actors, and upon finding that he was, ordering that such information be availed to him. The court is constitutionally mandated to do just that.

77. There were arguments around the doctrines of exhaustion and avoidance, and form. To our minds these proceedings are founded on the Constitution. A grievant has approached a constitutional court, seeking interpretation of the Constitution, with respect to his rights, within certain contexts. Article 159(2)(d) of the Constitution

enjoins courts to eschew technicalities of procedure, whose effect would be to limit access to justice, and urges courts, instead, to facilitate parties to access justice, by going into the merits or substance of the matter. **Anarita Karimi Njeru vs Republic [1979] KEHC 30 (KLR)** preceded Article 159 of the Constitution, and it turned on technicalities around the crafting of a constitutional petition. The spirit of **Anarita Karimi Njeru vs Republic** (Supra) in our view, runs counter to that of Article 159(2)(d) of the 2010 Constitution. The court was of the view that it could determine the issues that had been placed before it on merits.

### **THE ROLE OF THE GOVERNOR**

78. A question that the Petitioner wished this court to answer was whether, in his capacity as the Chief Executive of the County of Busia, the 1<sup>st</sup> Respondent was responsible for releasing information to the public as the information access officer of the County Executive, under Section 7(1) of the Access to Information Act.

79. In his Further Affidavit that was sworn on 25<sup>th</sup> November 2024 and filed on 27<sup>th</sup> November 2024, the Petitioner averred that the Report of the Auditor General for the Year ended 30<sup>th</sup> June 2023 was availed to him after he filed the Petition herein. He pointed out that the County Executive of Busia did not avail the source documents which it had contended that it had forwarded to the Auditor General, as the Auditor General denied having been given the same.

80. He asserted that in his aforesaid report, the Auditor General confirmed that the procurement of Integrated Revenue Collection and Management System, Hospital Management System and renovation of the Governor's Lounge were unsupported and hence the regularity of the awarded contracts in line with the Constitution and the law could not be confirmed.

81. The 1<sup>st</sup> Respondent filed a Replying Affidavit on his own behalf and that of the 2<sup>nd</sup> Respondent herein. The same was sworn and filed on 28<sup>th</sup> February 2025. The Respondents were emphatic that information relating to the information the Petitioner wanted had been supplied to him and to any other person who had requested for the same. They added that as the Petitioner was acting in his official capacity, he was required to confine himself to the provisions of the law in his quest to access information.

82. Article 179(4) of the Constitution provides that the County Governor and the Deputy County Governor are the Chief Executive Officer and the Deputy Chief Executive Officer of the County respectively. Article 179(5) of the Constitution stipulates that the deputy county governor shall act as the county governor when the county governor was absent.

83. The functions of the governor are listed in Section 30 (2) of the County Government Acts. The said Section provides that:

**1. ...**

**2. Subject to the Constitution, the governor shall—**

- a. diligently execute the functions and exercise the authority provided for in the Constitution and legislation;**
- b. perform such State functions within the county as the President may from time to time assign on the basis of mutual consultations;**
- c. represent the county in national and international fora and events;**
- d. appoint, with the approval of the county assembly, the county executive committee in accordance with Article 179(2)(b) of the Constitution;**
- e. constitute the county executive committee portfolio structure to respond to the functions and competencies assigned to and transferred to each county;**
- f. submit the county plans and policies to the county assembly for approval;**
- g. consider, approve and assent to bills passed by the county assembly;**
- h. chair meetings of the county executive committee;**
- i. by a decision notified in the county Gazette, assign to every member of the county executive committee, responsibility to ensure the discharge of any function within the county and the provision of related services to the people;**

- j. submit to the county assembly an annual report on the implementation status of the county policies and plans;**
- k. deliver annual state of the county address containing such matters as may be specified in county legislation; and**
- l. sign and cause to be published in the county Gazette, notice of all important formal decisions made by the governor or by the county executive committee.**

84. By virtue of being a chief executive officer under Article 179(4) of Constitution, the Governor had additional functions set out in the Access to Information Act which he could delegate to any another officer in the County. Indeed, Section 7 of the Access to Information Act stipulates that:-

- 1. A chief executive officer of a public entity shall be an information access officer for purposes of this Act.**
- 2. A chief executive officer of a public entity may delegate the performance of his or her duties as an information access officer under this Act to any officer of the public entity.**

85. In his capacity of an Information Access Officer, the duties of the Governor were well expounded in Regulation 8 of the Access to Information (General) Regulations (Legal Notice 161 of 2023)

(hereinafter referred to as the Regulations) and included the following:-

- a. ensuring information is proactively disclosed;**
- b. receiving and acting on requests for access to information, including—**

- i. reducing oral requests into writing; or**
- ii. reviewing all requests to identify the information requested and seeking clarification from the requester, where necessary;**

- c. determining whether the requested information —**

- i. is already publicly available;**
- ii. requires to be transferred to another information holder as provided under regulation 18;**
- iii. requires to be deferred as provided under regulation 19; or**
- iv. is to be granted or denied, and communication made to the requester of the determination;**

- d. reviewing the information requested to identify if it is subject to any of the limitations set out in section 6 of the Act, and redacting or withholding information that may be limited in accordance with that section;**

- e. informing an aggrieved requester of their right of review of the decision by the Commission and the timelines within which a request for review may be submitted;**
- f. establishing and maintaining an access to information register, to record all requests for information received by the respective public entity or private body;**
- g. ensuring that all requests for information received by the public entity or private body, and actions taken in relation to each request are recorded in the web-based information management portal provided under regulation 28;**
- h. ensuring that any personal information held by the public entity or private body is accurate and up to date, and requests made are in compliance with the Data Protection Act (Cap.411C);**
- i. formulating and implementing the organization's policies and procedures on access to information and sensitize the officers and employees in the implementation thereof;**
- m. submitting annual reports to the Commission as required by section 27 of the Act and regulation 31; and**
- n. perform any other duty as may be necessary to implement the provisions of the Act.**

86. It was clear that the role of the Governor of a County was both direct and indirect under the Access Information Act. Being the Chief Executive Officer of the County of Busia, the 1<sup>st</sup> Respondent or any person he delegated such function to, was for all purposes and intent, the Access Information Officer of the County of Busia. He was mandated and had an obligation to fully comply with the provisions of Regulation 8 of the Regulations irrespective, through directly or indirectly.

87. From the aforesaid provisions of the Constitution, legislation and Regulations, the role of a Governor could therefore be understood in the context of the following functions:-

- a. Executing functions and authority as stipulated in the Constitutional legislation and regulations;**
- b. Performing functions that may be assigned to him or her by the President of the Republic of Kenya;**
- c. Representing the County in international and national *fora*;**
- d. Appointing the CEC and ensuring that the appointments correspond to the functions and competencies of the County;**
- e. Assigning duties and responsibilities to CEC members;**
- f. Submitting County Plans and policies to the County Assembly for approval;**
- g. Chairing CEC meetings;**

- h. Assenting to Bills that have been passed by the County Assembly;**
- i. Communicating his formal decisions and those of the CEC by publishing the same in the Kenya Gazette;**
- j. Facilitating access to information to third parties upon request;**
- k. Maintaining a registry to record requests for information;**
- l. Implementing and formulating policies of the County;**
- m. Sensitising others on the process of access to justice;**
- n. Supervising the process of procuring goods and services in a County; and**
- o. Any other duty that may be necessary to implement the provisions of the relevant legislation.**

88. The second question the Petitioner wanted answered was whether the 1<sup>st</sup> Respondent was primarily responsible for ensuring that the County Executive complied with Section 44 (1) of the Public Procurement and Asset Disposal (PPDA) Act.

89. The Petitioner submitted that the Respondents had failed to demonstrate that they procured the trailer park and the new look kiosks in a manner that was consistent with the law on procurement of goods and services by public entities like the 2<sup>nd</sup> Respondent by failing to advertise for the opportunity to lease out the trailer.

90. He argued that the leasing of the trailer park was tantamount to disposing of a public asset to private hands for the lease period

hence the need for public participation as required under Article 10 of the Constitution.

91. On their part, the Respondents were emphatic that there was no opaqueness in the construction of the Busia Trailer Park or allocation of kiosks as the same was done through public participation.

92. Notably, the functions of a county government are set out in Section 5 of the County Governments Act as follows:-

- 1. A county government shall be responsible for any function assigned to it under the Constitution or by an Act of Parliament.**
- 2. Without prejudice to the generality of subsection (1), a county government shall be responsible for—**
  - a. county legislation in accordance with Article 185 of the Constitution;**
  - b. exercising executive functions in accordance with Article 183 of the Constitution;**
  - c. functions provided for in Article 186 and assigned in the Fourth Schedule of the Constitution;**
  - d. any other function that may be transferred to county governments from the national government under Article 187 of the Constitution;**
  - e. any functions agreed upon with other county governments under Article 189(2) of the Constitution; and**

**f. establishing and staffing its public service as contemplated under Article 235 of the Constitution.**

93. Section 6 of the County Governments Act stipulates that:-

**1. As an entity exercising constitutional authority, a county government shall be a body corporate with perpetual succession and shall have all the powers necessary for the discharge of its functions.**

**2. Without prejudice to the generality of subsection (1), a county government may—**

**a. enter into a contract;**

**b. acquire, purchase or lease any land; or**

**c. delegate any of its functions to its officers, decentralised units or other entities within the county.**

**3. A county government may enter into partnerships with any public or private organization in accordance with the provisions of any law relating to public or private partnerships for any work, service or function for which it is responsible within its area of jurisdiction.**

**4. All contracts lawfully entered into under this section shall be valid and binding on the county government, its successors and assigns.**

**5. To ensure efficiency in the delivery of service or carrying out of a function for which the county**

**government is responsible, the county government may—**

**a. establish a company, firm or other body for the delivery of a particular service or carrying on of a particular function; or**

**b. contract any person, company, firm or other body for the delivery of a particular service or carrying on a particular function.**

**6. In exercising its powers or performing any of its functions a county government shall ensure efficiency, effectiveness, inclusivity and participation of the people.**

94. Article 183 of the Constitution of Kenya further states that:-

**1. A county executive committee shall:-**

**a. implement county legislation;**

**b. implement, within the county, national legislation to the extent that the legislation so requires;**

**c. manage and coordinate the functions of the county administration and its departments; and**

**d. perform any other functions conferred on it by this Constitution or national legislation.**

**2. A county executive committee may prepare proposed legislation for consideration by the county assembly.**

**3. The county executive committee shall provide the county assembly with full and regular reports on matters relating to the county.**

95. Section 36 of the County Governments Act states as follows:-

**1. In addition to the functions provided under Article 183 of the Constitution, a county executive committee shall**

—

- a. supervise the administration and delivery of services in the county and all decentralized units and agencies in the county;**
- b. perform any other functions conferred on it by the Constitution or national legislation; and**
- c. carry out any function incidental to any of the assigned functions.**

96. In procuring goods or services either for use or for the use by third parties, Article 227(1) of the Constitution placed an obligation on a State Organ or any other public entity to ensure that contracts for goods and services were done in accordance with a system that was fair, equitable, transparent, competitive and cost-effective.

97. Section 33(1) of the Public Procurement and Asset Disposal Act (PPDA) provides that the County Treasury was responsible for the implementation of public procurement and asset disposal policy in the county. The duties of the County Treasury listed under Section 33 (2) of the PPDA are as follows:-

- a. implement public procurement and asset disposal procedures;**
- b. coordinate administration of procurement and asset disposal contracts;**
- c. coordinate consultations with county stakeholders of the public procurement and asset disposal system in liaison with the National Treasury and the Authority;**
- d. advise the accounting officers of county government entities on public procurement and asset disposal matters;**
- e. co-ordinate county government monitoring and evaluation of the supply chain function of county government entities including ensuring compliance;**
- f. promote preference and reservations schemes for small and micro enterprises and other disadvantaged groups, citizen contractors, women, youth, persons with disabilities, minorities and marginalized groups in public procurement at the county;**
- g. promote preference and reservation schemes for residents of the county to ensure a minimum of twenty percent in public procurement at the county;**

**h. administer the scheme of service for county government procurement and supply chain management officers and capacity building.**

98. Under the aforesaid provisions of the law, the County Treasury was required to report to the County Executive Committee (CEC) according to Article 179(2) of the Constitution which consists of the following:-

**a. the county governor and the deputy county governor; and**

**b. members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly.**

99. By virtue of being accountable to the Governor under Article 179(6) of the Constitution for the performance of their functions and exercise of their powers, the CEC was mandated to report to the Governor. In this regard, therefore, the members of the 2<sup>nd</sup> Respondent were accountable to the 1<sup>st</sup> Respondent for the performance of their functions as stipulated in Article 179(6) of the Constitution.

The answer to the second question as to whether the 1<sup>st</sup> Respondent was primarily responsible for ensuring that the County Executive complied with the PPDA Act was in the affirmative. Indeed, in his capacity as the County Governor of Busia, the 1<sup>st</sup> Respondent was responsible for ensuring that county financial resources were managed effectively and efficiently. He retained the mandate to

ensure that the procurement services by the County Treasury and verified by the CEC, were carried out in accordance with the PPAD Act. He had supervisory powers over the CEC and hence, he was accountable to the entire process of procuring goods and services in the County.

**DISPOSITION**

100.As this Bench has now answered the questions that were placed before it, it is hereby directed that this matter be placed before Musyoka J on 28<sup>th</sup> October 2025 for further orders and/or directions.

101.It is so ordered.

**DATED** and **DELIVERED ONLINE** this **19<sup>TH</sup>** day of **SEPTEMBER**  
2025

**J. KAMAU**  
**JUDGE**

**W. MUSYOKA**  
**JUDGE**

**A. BETT**  
**JUDGE**