



**Tunza Mtoto Coalition Kenya & another v Sakaja & 4 others; Office of the  
Controller of Budget & 5 others (Interested Parties) (Petition E246 of 2023)  
[2024] KEHC 7571 (KLR) (Constitutional and Human Rights) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7571 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E246 OF 2023**

**EC MWITA, J**

**JUNE 21, 2024**

**BETWEEN**

**TUNZA MTOTO COALITION KENYA ..... 1<sup>ST</sup> PETITIONER  
JANET MUTHONI OUKO ..... 2<sup>ND</sup> PETITIONER**

**AND**

**HON JOHNSON ARTHUR SAKAJA ..... 1<sup>ST</sup> RESPONDENT  
THE NAIROBI CITY COUNTY ..... 2<sup>ND</sup> RESPONDENT  
THE NAIROBI CITY COUNTY ASSEMBLY ..... 3<sup>RD</sup> RESPONDENT  
THE CLERK, NAIROBI CITY COUNTY ASSEMBLY ..... 4<sup>TH</sup> RESPONDENT  
THE SPEAKER, NAIROBI CITY COUNTY ASSEMBLY ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**OFFICE OF THE CONTROLLER OF BUDGET ..... INTERESTED PARTY  
CABINET SECRETARY MINISTRY OF EDUCATION ..... INTERESTED PARTY  
THE LAW SOCIETY OF KENYA ..... INTERESTED PARTY  
HON JATESO PETER IMWATOK ..... INTERESTED PARTY  
HON ANTHONY KIRAGU KARANJA ..... INTERESTED PARTY  
INTERGOVERNMENTAL RELATIONS TECHNICAL  
COMMITTEE ..... INTERESTED PARTY**



## **Nairobi County Government 's school feeding programme not a transfer of function from the National to County Government.**

Reported by John Ribia

**Devolution** – functions of the National Government vis-à-vis the functions of county governments – education – school feeding programme - whether the school feeding programme by the County Government of Nairobi was a transfer of function to the county from the National Government as the County governments' functions in so far as education was concerned, was limited to pre-primary education, village polytechnics, home craft centres and childcare facilities – Constitution of Kenya articles 1(4), 2, 6, 10, 21(2), 35, 43, 53(1)(b), 174, 185(2), 186(1), 187(2), 189, 196, 201, 226(5) and Schedule 4 part 2; Intergovernmental Relations Act (cap 265F) sections 23(a) and 26(5); County Assemblies Powers And Privileges Act (cap 265C) section 11(2); County Government Act (cap 265) section 87 and 115.

**Constitutional Law** – fundamental rights and freedoms – rights of the child – best interests of the child - right of the child to basic nutrition, shelter and health care - school feeding programme – petition seeking to halt a school feeding programme – whether an order that would stop a school feeding programme, would be acting against the best interests of the child and would violate the right of children to basic nutrition – Constitution of Kenya, articles 52 and 53; Children Act (cap 141) sections 4(3), 5, 7(1), (2); 8(1), and 10.

**Constitutional Law** – national values and principles – public participation – school feeding programme by Nairobi City County – where meetings with the public were held before the programme was launched - whether the school feeding programme of the County Government of the Nairobi City County was subjected to public participation – Constitution of Kenya, articles 10, 174, 196 and 201.

### **Brief facts**

On June 20, 2023, the Governor of Nairobi City County launched a school feeding program, "Dishi Na County," allocating Kshs. 1.224 billion for meals and Kshs. 500 million for kitchen construction in the County's 2023/2024 budget. Tunza Mtoto Coalition Kenya and Janet Muthoni Ouko challenged the program's constitutionality, arguing it improperly transferred a National function to the County without public participation or a legal framework. The program's proponents claimed it was a collaborative effort to benefit over 250,000 children in public schools.

### **Issues**

- i. Whether the school feeding programme by the County Government of Nairobi was a transfer of functions to the County from the National Government as the County governments' function in so far as education was concerned, was limited to pre-primary education, village polytechnics, home craft centres and childcare facilities.
- ii. Whether the school feeding programme of the County Government of the Nairobi City County was subjected to public participation.
- iii. Whether an order that would stop a school feeding programme, would be acting against the best interests of the child and would violate the right of children to basic nutrition.

### **Held**

1. The National Government was responsible for education at all levels, except pre-primary education, village polytechnics, home craft centres and childcare facilities which fell under the responsibility of County governments. Article 6(2) of the Constitution provided that the governments at the national and county levels were distinct and interdependent and shall conduct their mutual relations on the basis of consultation and cooperation. The article recognised that although the governments at the two levels were distinct, they were interdependent and should, when conducting their affairs, do so mutually and in consultation. Interdependence and mutual consultation was a constitutional imperative in the discharge of the mandate and performance of functions at the two levels.



2. There was an intergovernmental partnership agreement entered into between the National Government through the Ministry of Education, and the 2<sup>nd</sup> respondent, through the 1<sup>st</sup> respondent. The agreement was in relation to implementing the school meals programme in public primary schools within the county. The agreement did not intend to transfer any functions. Rather, the mutual arrangement between the two levels of governments was for the benefit of learners in the 2<sup>nd</sup> respondent County with the funding to be shared equally.
3. The petitioners had not placed evidence to demonstrate that children from informal schools and poor families had been denied the opportunity to enroll in government learning centres to benefit from the programme. The petitioners had also not shown that there were no children from informal settlements or poor families attending government learning institutions who benefited from the programme. The petitioners had merely made an assertion without proof.
4. The impugned programme was not a transfer of functions as contemplated under article 187 of the Constitution.
5. Public participation, as a national value, was central in the legislative or policy formulation processes. The respondents provided evidence to demonstrate that public participation was conducted. The petitioners had not demonstrated that there were no such meetings, or that they attended the meetings but nothing happened. There was no reason to persuade the court that there was insufficient public participation. There was sufficient public participation on the programme.
6. The programme related to children and was for the welfare of children. Article 53(1)(c) of the Constitution provided that every child had the right to basic nutrition, shelter and health care; while article 53(2) provided that a child's best interests were of paramount importance in every matter concerning the child. The right was replicated in section 8(1) of the Children Act. Since the programme was for the welfare of children, it was in the best interest of children that the programme was initiated and could not be faulted.

*Petition dismissed.*

### **Orders**

*Each party to bear its own costs.*

### **Citations**

#### **Cases**

#### **Kenya**

1. *British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Ltd (Affected Party)* Petition 5 of 2017; [2019] KESC 15 (KLR) - (Mentioned)
2. *Council of County Governors v Attorney General & 4 others; Controller of Budget (Interested Party)* Petition 252 of 2016; [2020] KEHC 10361 (KLR) - (Applied)
3. *Gakuru, Robert & others v Governor Kiambu County & 3 others* Petition 532 of 2014; [2014] KEHC 7516 (KLR) - (Mentioned)
4. *Havi, Nelson Andayi v Law Society of Kenya & 3 others* Civil Application 28 of 2018; [2018] KECA 731 (KLR) - (Mentioned)
5. *International Legal Consultancy Group v Senate & another* Constitutional Petition 74 of 2014; [2014] KEHC 7533 (KLR) - (Mentioned)
6. *Kiambu County Government & 3 others v Robert N Gakuru & others* Civil Appeal 200 of 2014; [2017] KECA 459 (KLR) - (Explained)
7. *Mwangi, John Muraya & 551 others v Minister for State for Provincial Administration & Internal Security 4 others* Petition 3 of 2013; [2014] KEHC 5388 (KLR) - (Mentioned)
8. *Mwau, John Harun v Independent Electoral And Boundaries Commission & another* Petition 26 of 2013; [2013] KEHC 6762 (KLR) - (Mentioned)



9. *Nairobi Metropolitan PSV Saccos Union Ltd & 25 others v County of Nairobi Government & 3 others* Petition 486 of 2013; [2013] eKLR - (Mentioned)
10. *Okoit, Okiya Omtatah v Nairobi Metropolitan Service & 2 others; Mohamed Abdala Badi & 9 others (Interested Parties)* Petition 52 of 2020; [2020] KEELRC 869 (KLR) - (Mentioned)
11. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR) - (Mentioned)
12. *Senate & 2 others v Council of County Governors & 8 others* Petition 25 of 2019; [2022] KESC 7 (KLR) - (Mentioned)

### **South Africa**

1. *Doctors for Life International v Speaker of the National Assembly and others* CCT12/05 [2006] ZACC11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) - (Mentioned)
2. *Land Access Movement of South Africa Association for Rural Development and others v Chairperson of the National Council of Provinces and others* [20016] ZACC 22 - (Explained)
3. *Matatiele Municipality and others v President of the Republic of South Africa and others (2)* (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) - (Mentioned)
4. *Minister of Health & anor v New Clicks South Africa (Pty) Ltd 7 others* (2006 92) SA311 (CC) - (Mentioned)

### **India**

*Kedar Nath v State of WB* (1953) SCR 835 (843) - (Mentioned)

### **United States**

*Maqoun v Illinois Trust Bank*, 170 US 283 (1898)- (Mentioned)

### **Statutes**

#### **Kenya**

1. Appropriations Act, 2023 (Act No 5 of 2023) In general - (Cited)
2. Children Act (cap 141) section 4(3); 5; 7(1)(2); 8(1); 10 (Interpreted)
3. Constitution of Kenya articles 1(4); 2; 6; 10; 21(2); 35; 43; 53(1)(b); 174; 185(2); 186(1); 187(2); 189; 196; 201; 226(5); Schedule 4; part 2 - (Interpreted)
4. County Assemblies Powers and Privileges Act (cap 265C) section 11(2) - (Interpreted)
5. County Governments Act (cap 265) section 87, 115 - (Interpreted)
6. Intergovernmental Relations Act (No. 2 of 2012) section 26 - (Interpreted)
7. Intergovernmental Relations Act (cap 265F) part III; section 23(a). 26(5) - (Interpreted)
8. Public Finance Management Act (cap 412A) In general - (Cited)
9. Public Procurement and Asset Disposal Act (cap 412C) In general - (Cited)

### **Instruments**

1. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1976
2. United Nations Convention on the Right of the Child, 1989 article 28

### **Advocates**

None mentioned

## **JUDGMENT**

1. On 20 June 2023, Hon Johnson Sakaja the Governor and Nairobi City County (the 1<sup>st</sup> and 2<sup>nd</sup> respondents) respectively, announced the launch of school feeding programme dubbed “*Disbi Na County*” (the programme), aimed at feeding children enrolled in public primary school within the County. The County budget for the year 2023/2024 presented in the County Assembly had Kshs 1, 223, 750,000 allocated to the programme. A further Kshs 500,000,000 was allocated for the construction of kitchens in support of the programme.



2. Following the announcement regarding the launch of the programme, Tunza Mtoto Coalition Kenya and Janet Muthoni Ouko, (the petitioners), filed this petition against the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent); the Nairobi City County Assembly (the 3<sup>rd</sup> respondent); the Clerk, Nairobi City County Assembly (the 4<sup>th</sup> respondent) and the Speaker Nairobi City County Assembly (the 5<sup>th</sup> respondent), challenging the propriety of the decision to launch the programme.
3. The office of the Controller of Budget; Cabinet Secretary, Ministry of Education; the Law Society of Kenya; Hon Jateso Peter Imwatok; Hon Anthony Kiragu Karanja and the Intergovernmental Relations Technical Committee have been joined as the 1<sup>st</sup> to 6<sup>th</sup> interested parties in these proceedings. The petition is supported by an affidavit; further affidavit and supplementary affidavit as well as written submissions.

### **The Petitioners' Case**

4. The petitioners aver that under Part 2 of the Fourth Schedule of the Constitution, the County governments' function in so far as education is concerned, is limited to pre-primary education, village polytechnics, home craft centres and childcare facilities.
5. The petitioners state that the launch of the impugned programme was in violation of articles 185(2), 186(1) and 187(2) of the Constitution. They argue that no legal notice was published or deed of transfer signed between the national government and the 2<sup>nd</sup> respondent authorizing the transfer and delegation of powers, functions and competencies of the national government function in respect to primary schools to the 2<sup>nd</sup> respondent.
6. The petitioners further argue that there was no proper public participation as required by articles 10, 174, 196 and 201 of the Constitution as read with sections 87 and 115 of the County Government Act. According to the petitioners, no notices were published either in the local dailies, local radio stations, or local televisions stations to sensitize members of the public on the intended takeover of the function of the national government by the 2<sup>nd</sup> respondent.
7. The petitioners rely on the decisions in Robert N Gakuru & 8 others v Governor Kiambu County & 3 others [2014] eKLR; 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); and Matatiele Municipality and others v President of the Republic of South Africa and others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC), in support of this argument.
8. The petitioners argue that when the County Integrated Development Plan (CIDP) 2023-2027 was prepared, the proposed school feeding programme was mooted under the health department. However, the programme was secretly shifted to the inclusivity, public participation and customer service sector, to shield the impugned programme from public scrutiny.
9. The petitioners fault the 3<sup>rd</sup> respondent for approving the feeding programme and the allocation of funds to the programme despite knowing that there was no transfer of this function. The petitioners further fault the 4<sup>th</sup> respondent for failing to exercise his powers under Standing Order 1 of the Nairobi City County Standing Orders.
10. It is the petitioners' submission that the 2<sup>nd</sup> respondent cannot allocate its own funds in support of a national government function and undertake the function without first executing an intergovernmental agreement. They rely on the decision in Council of County Governors v Attorney General & 4 others; Controller of Budget (Interested Party) [2020] eKLR.



11. According to the petitioners, the respondents launched the programme despite knowing that the 2<sup>nd</sup> respondent already had an existing feeding programme for the ECDE which was catered for in the Guidelines for Implementation of free ECDE Education in Public Pre-Schools within Nairobi City County.
12. The petitioners assert that out of 250,000 ECED age going children, the County has only space for 27, 735 children in its public ECED Centres. This leaves out 88.8% of the ECED going children without access to educational facilities. The petitioners argue, therefore, that the amount allocated to the programme would have been used in building more ECED centres with the goal of enrolling 100% of ECED going children.
13. The petitioners take the view, that the programme is limited to public schools, keeping away the benefit of the children attending non-formal schools from benefiting in free nutritious meals. The implications are that the programme will extend further inequality, disadvantage and marginalization against children and households of those who have been denied a chance to attend publicly funded primary education.
14. The petitioners maintain that the respondents have not demonstrated the 2<sup>nd</sup> respondent's readiness to take up the function. Further, to the extent that the programme conflates the county level functions and the national level functions, it violates article 10 of the Constitution on transparency and accountability.
15. The petitioners take the view, that clauses in the agreement contravene article 186 and 187(2) of the Constitution as read with part III of the *Intergovernmental Relations Act*. The programme is also unconstitutional for want of the Senate involvement. The petitioners rely on articles 1(4), 2, 10, 186, 187, 189 and the Fourth Schedule to the Constitution. They cite Part III of *Intergovernmental Relations Act* and decisions in *Council of County Governors v Attorney General & 4 others; Controller of Budget (Interested Party)* [2020] eKLR; *Senate & 2 others v Council of County Governors & 8 others* (Petition 25 of 2019) [2022] KESC 7 (KLR) (Constitutional and Human Rights) (17 February 2022) (Judgment).
16. The petitioners again rely on the decision in *Senate & 2 others v Council of County Governors & 8 others* (*supra*) to argue that the feeding programme does not conform to the Constitution and should thus be declared unconstitutional.
17. Relying on paragraph 31 of the *International Convention on Economic, Social and Cultural Rights, (ICESCR)*, the petitioners contend that the programme is discriminatory to alternative providers at Basic Education and Training schools that provide basic education to needy children in the informal settlements and rural areas of Kenya.
18. On the basis of the above arguments, the petitioners seek the following reliefs:
  - a. A declaration be and is hereby issued that the purported transfer of the primary school education function from the National Government to the County government through the launch of public primary school feeding program announced on or about 20 June 2023 dubbed ' *Dishi Na County*' is null and void *ab initio* for being in violation of articles 185(2), 186(1) and 187(2) contained in Part 2 of the fourth Schedule of the Constitution of Kenya, 2010.
  - b. A declaration be and is hereby issued that the purported transfer of the primary school education function from the National Government to the County Government through the public primary school feeding program launched on



or about 20 June 2023 dubbed ‘*Dishi Na County*’ is null and void ab initio for being in violation of article 10 of the Constitution.

- c. A declaration that the allocation of Kshs 1,223,750,000 towards the said program announced on or about June 20, 2023 dubbed ‘*Dishi Na County*’ and a further Kshs 500,000,000 for construction of kitchens in the Nairobi City County budget for the 2023/2014 Financial Year Budget Appropriation Bill, 2023 is null and void ab initio.
- d. An order of injunction be and is hereby issued restraining the respondents, by their agents, employees, servants or otherwise howsoever, from implementing and/ or further implementing the public primary school feeding program dubbed ‘*Dishi Na County*’, launched on or about June 20, 2023.
- e. A declaration that the public primary school feeding program launched by the 1<sup>st</sup> and 2<sup>nd</sup> respondents on or about 20 June 2023 is discriminatory and a violation of the constitutional rights to free education to children attending non-formal institutions as provided under the [Constitution](#) article 53(1) (b), section 5, 7(1) and 7(2) of the [Children Act](#) 2013, article 28 of the [United Nations Convention on the right of the child](#).
- f. An order directing the 2<sup>nd</sup> respondent to allocate funds in its yearly budget for infrastructural development of ECDE Public Pre Schools Pre Schools in Nairobi City County and to ensure 100% enrolment of ECDE school going children within Nairobi City County.
- g. An order directing the 2<sup>nd</sup> respondent to allocate funds in its yearly budget for the establishment, registration, licensing and assessment of child care facilities in accordance with Nairobi Children Facilities Act, 2017 and the Nairobi City County Childcare Facilities Regulations, 2023.
- h. Any other order or relief that this honourable court deems fit and just to grant in the circumstances of the petition.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondent’s Response**

19. The 1<sup>st</sup> and 2<sup>nd</sup> respondents oppose the petition through a replying affidavit and further affidavit sworn on July 7, 2023 and September 6, 2023 respectively. They also filed written submissions.
20. The 1<sup>st</sup> and 2<sup>nd</sup> respondents argue that they signed a Memorandum of Understanding, (the MOU), with the Ministry of Education on July 17, 2023 in which both parties agreed to collaborate on the programme that would see over 250,000 school children benefit. The MOU was a collaboration which did not in any way amount to transfer of a function of the national government to the 2<sup>nd</sup> respondent.
21. The 1<sup>st</sup> and 2<sup>nd</sup> respondents maintain that the MOU was a collaboration between the two levels of government and the arrangement was done in accordance with article 189 of the Constitution. They rely on [Council of County Governors v Attorney General & 4 others](#) [2020] eKLR; [International Legal Consultancy Group v Senate & another](#) [2014] eKLR and [Senate and others v Council of County Governors & 8 others](#) [2022] eKLR.
22. They assert, articles 6 and 189 of the [Constitution](#) as read with sections 23(a) of the [Intergovernmental Relations Act](#), allow cooperation of the two levels of government in the performance and exercise of their functions and powers and for that purpose, they may set up joint committee and joint authorities.



- The 1<sup>st</sup> and 2<sup>nd</sup> respondents assert, therefore, that the programme was informed by the fact that the national government only managed to feed 54 public primary schools out of 210 registered schools. For that reason, the main aim was to ensure inclusivity of all children within the county into the programme.
23. Regarding public participation, the 1<sup>st</sup> and 2<sup>nd</sup> respondents maintain that there was public participation. Stakeholders and residents of the county were consulted on the partnership between the national government and the county government towards the programme. Thereafter, on April 27, 2023 the 1<sup>st</sup> and 2<sup>nd</sup> respondents resolved that the feeding programme that was in Health, Wellness and Nutrition sector be transferred to the inclusivity, public participation and customer service sector in the initial phase of the programme as this phase involved extensive public participation and stakeholder engagement. The programme has since reverted to the Health, wellness and nutrition sector.
  24. The 1<sup>st</sup> and 2<sup>nd</sup> respondents assert that an advertisement was put out inviting the public to participate in the intended programme. The call for public participation yielded fruits as there were participants from different sub counties in the public participation as shown by reports from the different sub-counties as of 14<sup>th</sup> and 16 February 2023. Reliance is placed on the decisions in *Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County of Nairobi Government & 3 others* [2013] eKLR and *Doctors for Life International v Speaker of the National Assembly & others* (*supra*).
  25. The 1<sup>st</sup> and 2<sup>nd</sup> respondents nonetheless take the view, that public participation under section 26(5) of the *Intergovernmental Relations Act* is only applicable where there is a transfer of powers and functions/mandate. In the present case there was no such transfer.
  26. The 1<sup>st</sup> and 2<sup>nd</sup> respondents argue that beyond just feeding and guaranteeing school attendance, the collaboration with the national government has also seen a commitment to build over 5000 classrooms in the county. They contend that the petitioners have misapprehended article 189(2) of the *Constitution* which confers discretion. It is the 1<sup>st</sup> and 2<sup>nd</sup> respondents' case, that article 2.3 (iii) of the agreement provides for the establishment of a joint committee. They reiterate that the agreement is a document emanating from both levels of governments the 2<sup>nd</sup> respondent and the Ministry of education.
  27. Relying on the decisions in *John Harun Mwau v Independent Electoral and Boundaries Commission & another* [2013] eKLR and *Maqoun v Illinois Trust Bank* (1898) 170 US 283, the 1<sup>st</sup> and 2<sup>nd</sup> respondents argue that the introduction of the programme to public primary schools cannot be construed as discrimination and there is no evidence to demonstrate discrimination.
  28. Regarding the impropriety on the part of the 2<sup>nd</sup> respondent in its budgetary process, the petitioners argue that the petitioner did not challenge the constitutionality of the *Appropriations Act*, 2023 that was passed by the County Assembly thus the allocations cannot be impeached.
  29. On the issue of request for a copy of the agreement, the 1<sup>st</sup> and 2<sup>nd</sup> respondents state that there was no violation of the right of access to information under article 35. They urge that the petition be dismissed with costs.

### **3<sup>rd</sup> Respondent's Response**

30. The 3<sup>rd</sup> respondent has also opposed the petition through a replying affidavit and written submissions. The 3<sup>rd</sup> respondent contends that the intergovernmental partnership is not a deed of transfer. It was entered into by the 2<sup>nd</sup> respondent and the 2<sup>nd</sup> interested party within the spirit of article 189(2) of the *Constitution*.



31. The 3<sup>rd</sup> respondent asserts that under article 2 of the agreement, parties agreed to undertake certain responsibilities jointly, including ensuring money earmarked for the programme was ring-fenced and timely is payment made to suppliers and service providers to ensure sustainability of the programme.
32. The 3<sup>rd</sup> respondent states that the 2<sup>nd</sup> interested party's responsibility was budgeting for the implementation of the programme as per the financing framework within the agreement underpinned by paragraph 15 of the Fourth Schedule to the Constitution. According to the 3<sup>rd</sup> respondent, in keeping with the spirit of article 6(2) of the Constitution, both levels of government have distinct roles under the partnership to facilitate their interdependence and mutual relations with a view of ensuring the implementation of the feeding programme within the county.
33. The 3<sup>rd</sup> respondent asserts that the 2<sup>nd</sup> respondent's Appropriation Bill, 2023, demonstrates that being the designate body authorizing the appropriation of money out of the County Revenue Fund, it acted within its mandate and in accordance with the Fourth Schedule to the Constitution.
34. The 3<sup>rd</sup> respondent contends that the petitioners' prayer to have the budgeted funds re-allocated is an affront to the doctrine of separation of powers and an encroachment on its mandate and that of the executive. The 3<sup>rd</sup> respondent urges that the doctrine of necessity be invoked to decline the orders sought as the 2<sup>nd</sup> respondent is midway in its financial year. Halting the implementation of the programme would occasion miscarriage of justice to the residents of the County.
35. The 3<sup>rd</sup> respondent submits that the agreement was executed, launched and implemented in accordance with the law. The court is urged to find that the agreement serves to uphold the best interests of the child. For this argument, the 3<sup>rd</sup> respondent relies on articles 6(2), 53, 189(1)(c) of the Constitution; paragraphs 15 and 16 of the Fourth Schedule to the Constitution; section 4(3) of the Children Act and the decision in Okiya Omtatah Okoiti v Nairobi Metropolitan Service & 3 others; Mohamed Abdala Badi & 9 others (Interested Parties) [2020] eKLR.
36. Regarding financial impropriety on the part of the 2<sup>nd</sup> respondent in its budgetary process, the 3<sup>rd</sup> respondent argues that the Appropriation Act, 2023 was enacted in accordance with the law. There was no irregular or subsequent allocation for the project outside the vote heads set out in the Bill. Its constitutionality had also not been challenged. Reliance is placed on Mumo Matemu v Trusted society of Human Rights Alliance and others and County Government of Kiambu & another v Senate & others [2017] eKLR.
37. The 3<sup>rd</sup> respondent maintains that there was no transfer of function, and an order directing the 2<sup>nd</sup> respondent to allocate funds to the development of ECE and for establishment of Child care facilities would be an encroachment of its and that of the Executive.
38. The 3<sup>rd</sup> respondent asserts that the exclusion of non-formal institutions in the programme is not discriminatory, since article 21(2) provides for progressive realization of the social economic rights including the right to education.
39. The 3<sup>rd</sup> respondent urges that the petition be dismissed and cites the decision in of Jasbir Singh Rai & 3 others v Tar lochan Singh Rai & 4 others [2014] eKLR for the proposition that each party bears its own costs.

#### 4<sup>th</sup> Respondent's Response

40. The 4<sup>th</sup> respondent has also opposed the petition through a replying affidavit. According to the 4<sup>th</sup> respondent, the prayers sought should be declined as they seek to sabotage the rights of school children guaranteed under article 53(1)(b)(c) of the Constitution. The 4<sup>th</sup> respondent states that this was a



leadership imperative and the petitioners mistook the programme to be a transfer of the education function by the 2<sup>nd</sup> respondent from the national government. The 4<sup>th</sup> respondent contends, therefore, that the petition does not meet the threshold of a constitutional petition.

41. In the submissions, the 4<sup>th</sup> respondent changes tune and argues that there was no statistical, empirical data, or expert opinion or report from the relevant stakeholders informing the decision to come up with the programme. There is also no legal framework that guides the programme.
42. The 4<sup>th</sup> respondent takes the position, that the programme fits into the Basic Education Act as governance and management of institutions of basic education which is a national function. The 4<sup>th</sup> respondent contends that during the CIDP validation and CFSP 2023, the issue of the feeding programme was never discussed and urges the court to determine the quality of public participation as captured in the 1<sup>st</sup> and 2<sup>nd</sup> respondents' further affidavit.
43. The 4<sup>th</sup> respondent is of the view, that the agreement was an afterthought given that the petition is dated 13 July 2023 while the agreement was entered into on 17 July 2023.
44. It is worth noting that the 4<sup>th</sup> respondent's submissions contradict the replying affidavit filed in opposition to the petition. Submissions is not evidence and a party should not approbate and reprobate over the same matter.

### 5<sup>th</sup> Respondent's Response

45. The 5<sup>th</sup> respondent opposes the petition through a replying affidavit and written submissions. The 5<sup>th</sup> respondent states that the programme did not take over the education function from the national government. The 5<sup>th</sup> respondent maintains that the programme was still a proposal under the Appropriation Bill, 2023 pending before the County Assembly when the petition was filed; there is no violation of the constitution and there was still room for debate and additional proposals.
46. According to the 5<sup>th</sup> respondent, the prayers sought in the petition, if granted, would amount to interfering with and curtailing a legislative process, thus offending the principle of separation of powers. The 5<sup>th</sup> respondent denies abdicating its duty and affirms that it does exercise and will continue exercising its mandate in accordance with the oath of office.
47. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties have not filed responses to the petition. However, the 2<sup>nd</sup> interested party has filed written submissions in opposition to the petition. The 2<sup>nd</sup> interested party argues that according to the agreement, the programme is a collaborative project between the national government and the 2<sup>nd</sup> respondent. Neither party has ceded its constitutional functions to the other as required by article 187 of the Constitution as read with section 26 of the Intergovernmental Relations Act.
48. The 2<sup>nd</sup> interested party further argues that there was public participation. The interested party relies on the decisions in Minister of Health & anor v New Clicks South Africa (Pty) Ltd 7 others (2006 92) SA311 (CC); 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; and John Muraya Mwangi & 501 others v Minister for State for Provincial Administration & Internal Security & 4 others [2014] eKLR, to support this argument.
49. The 2<sup>nd</sup> interested party argues that the petitioners have not adduced evidence that they tried to respond to the calls for public participation on the programme, but they were denied the opportunity to submit memoranda.



50. The 2<sup>nd</sup> interested party relies on section 10 of the *Children Act, 2022* and the decisions in *Kedar Nath v State of W.B.* (1953) SCR 835 (843); *John Harun Mwau v Independent Electoral and Boundaries Commission & Another* [2013] eKLR and *Nelson Andayi Havi v Law Society of Kenya & 3 others* [2018] eKLR, for the argument that differential treatment does not necessarily give rise to the unequal or discriminatory treatment prohibited by article 27 of the *Constitution*. It has to be demonstrated that such selection, or differentiation is unreasonable, or arbitrary and created for an illegitimate purpose.
51. In that regard, the 2<sup>nd</sup> interested party argues, the feeding programme cannot be said to be discriminative or in violation of the children's right to education as the government is undertaking it in fulfilment of its mandate of providing financial and infrastructure support to public schools.
52. It is the 2<sup>nd</sup> interested party's further argument that under article 53(2) of the *Constitution* and sections 4(3) and 8(1)(a) of the *Children Act, 2022*, a child's best interest is of paramount importance in every matter concerning the child. The court is urged to dismiss the petition.

#### **4<sup>th</sup> Interested Party's Response**

53. The 4<sup>th</sup> interested party opposes the petition through a replying affidavit and written submissions. The 4<sup>th</sup> interested party contends that the programme is meant to encourage poor children to remain in school and enhance school enrollment. The programme does not relate to education policy or standards; school funding or management; teacher remuneration; school infrastructure; education; curriculum formulation or development or examinations administration which are a preserve of the national government.
54. The 4<sup>th</sup> interested party further contends that the programme is a classic example of co-operation between the two levels of government contemplated under article 189 of the *Constitution*, and not transfer of a function. The programme is also in line with the social economic rights of children under article 43 and the rights of children under articles 43 and 53 of the *Constitution*, respectively. The programme is, therefore, in the best interest of children as envisaged under article 53(2) of the *Constitution* and the *Children's Act*.

#### **5<sup>th</sup> interested party's response**

55. The 5<sup>th</sup> interested party has also opposed the petition. It is the 5<sup>th</sup> interested party's case that there is no cause of action against him, and that he enjoys immunity under section 11(2) of the *County Assemblies Powers and Privileges Act*.
56. The 5<sup>th</sup> respondent agrees with submissions of the other respondents and maintains that the petition is predicated on a misapprehension of the Constitution and the law relating to the role of the Speaker of the County Assembly while discharging legislative obligations. The petition is, thus an abuse of the court process.

#### **6<sup>th</sup> Interested Party's Response**

57. The 6<sup>th</sup> interested party has opposed the petition through a replying affidavit and written submissions. It is the 6<sup>th</sup> interested party's position, that by letter dated 30 March 2023, the 2<sup>nd</sup> respondent requested for assistance in seeking the concurrence of the Ministry of Education in the implementation the programme.
58. The 6<sup>th</sup> interested party states that it organized and convened consultative meetings between the 2<sup>nd</sup> respondent and the Ministry of Education to deliberate on the matter with the aim of providing clarity



- on the scope of cooperation, and whether such cooperation could be anchored on article 187 or 189(2) of the *Constitution*.
59. According to the 6<sup>th</sup> interested party, the deliberations revealed that the 2<sup>nd</sup> respondent wanted a framework for co-operation with the Ministry of Education under article 189(2) of the *Constitution* in the implementation of the programme. The 6<sup>th</sup> interested party then coordinated a joint technical team in developing the agreement between the 2<sup>nd</sup> respondent and the Ministry of Education.
60. On 6 June 2023, the 6<sup>th</sup> Interested party states, it convened a consultative meeting between the 2<sup>nd</sup> respondent, the Ministry of education and relevant stakeholders for purposes of developing an intergovernmental partnership agreement to guide the co-operation between the two levels of government in the performance of their functions and exercise of their mandate on the implementation of the programme.
61. The joint technical team comprised representatives from executive office of the President, the Council of Governors, the 2<sup>nd</sup> respondent, Ministry of Education, National Council for Nomadic Education in Kenya (NACONEK), Office of the Attorney General, Office of the Prime Cabinet Secretary and the State Department for devolution. The 6<sup>th</sup> interested party maintains, therefore, that the petition is founded on a misapprehension of the scope of co-operation between the 2<sup>nd</sup> respondent and the Ministry of Education. This is because the agreement did not transfer a function power or competency as envisaged under article 187 of the *Constitution*.
62. The 6<sup>th</sup> interested party maintains that the programme being a result of a consultative meetings between the two levels of government, was in line with articles 6(2), 189(1)(c), and 189(2) of the *Constitution*. The engagements between the 2<sup>nd</sup> respondent and the Ministry of education were undertaken in an open and transparent manner within the confines of articles 6 and 189 of the Constitution. Reliance is placed on the decisions in *Senate & 2 others v Council of County Governors & 8 others (supra)* and *re The matter of the Speaker of the Senate & another* (2013) eKLR.
63. It is the 6<sup>th</sup> interested party's case, that the provisions of Part III of the Intergovernmental Relations Act, do not apply in this case, thus the petition is anchored on misconstrued perception that the implementation of the programme occasioned a transfer of a function.

### **Analysis and Determination**

64. Upon considering the pleadings and arguments by parties, I have distilled the following issues for determination. First, whether the programme is a transfer of function; second, whether there was public participation and third, whether the programme is unconstitutional.

### **Whether the programme is a transfer of function**

65. The petitioners' case is that Part 2 of the Fourth Schedule to the Constitution provides for the County governments' functions and in so far as education is concerned, it is limited to pre-primary education, village polytechnics, home craft centres and childcare facilities. They argue that the impugned programme was in violation of articles 185(2), 186(1) and 187(2) of the *Constitution*.
66. The petitioners further argue that there was no publication of a legal notice or deed of transfer signed between the national government and the 2<sup>nd</sup> respondent authorizing the transfer and delegation of powers, functions and competencies of the national government function in respect to primary schools to the county government.



67. They maintain, therefore, that the purpose and design of the programme is constitutionally flawed and the criteria for transfer of the function under article 187(1) of the Constitution has not been satisfied. They take the view, that the respondents ignored the provisions of article 187(2) of the Constitution and part III of the Intergovernmental Relations Act by allocating funds to undertake a national government function without first executing an intergovernmental agreement, thus violated articles 186(1), 189(2) and 226(5) of the Constitution by approving public funds to non-devolved functions. The petitioners again argue that there was no public participation before the launch of the programme.
68. The respondents and interested who took part in these proceedings argue that there was no transfer of functions, but a collaborative arrangement with the national government through the ministry of education which is allowed by article 187(2) of the Constitution.
69. I have considered respective parties' argument on this issue. To resolve the contestation, reference to the constitution is key. The Fourth Schedule to the Constitution contains distribution of functions between the National and County Governments. Part 1 provides for the functions of the national government, and in so far as this petition is concerned, functions 15 and 16 are relevant. At function 15, the national government is responsible for education policy, standards, curricula, examinations and the granting of university charters.
70. On function 16, the national government is responsible for universities, tertiary educational institutions and other institutions of research and higher learning and primary schools, special education, secondary schools and special education institutions.
71. Part 2 has functions of the county governments, and in so far as education is concerned, the Schedule provides that county governments are responsible for "pre-primary education", village polytechnics, home craft centres and childcare facilities.
72. From the constitutional stand point, there is no doubt that the national government is responsible for education at all levels, except pre-primary education, village polytechnics, home craft centres and childcare facilities which fall under the responsibility of county governments. The question before this court is whether the impugned programme was a transfer of a national government function to the 2<sup>nd</sup> respondent, a county government.
73. The petitioners argue that the 2<sup>nd</sup> respondent took over a national government function. The respondents hold the position that the arrangement between the 2<sup>nd</sup> respondent and the ministry of Education is a collaborative arrangement between two levels of governments.
74. Article 6(2) of the Constitution states that the governments at the national and county levels are distinct and interdependent and shall conduct their mutual relations on the basis of consultation and cooperation. The article recognises that although the governments at the two levels are distinct, they are interdependent and should, when conducting their affairs, do so mutually and in consultation. Interdependence and mutual consultation is, thus a constitutional imperative in the discharge of the mandate and performance of functions at the two levels.
75. I have read the intergovernmental partnership agreement entered into between the national government through the ministry of education, and the 2<sup>nd</sup> respondent, through the 1<sup>st</sup> respondent. The agreement is in relation to implementing school meals programme in public primary schools within the 2<sup>nd</sup> respondent county.
76. The agreement, after recognising the mandate and functions of the national government and county governments as provided for in the Fourth Schedule to the Constitution and the relevant provisions on interdependency and collaboration between the two levels of government, states at clause 1.3 of the



agreement, that the “intergovernmental partnership shall be a collaboration between the parties and shall not in any way translate or be construed to transfer any function and or power of the national government to the Nairobi City County Government”

77. There is further provision for the role of the national government towards the implementation of the agreement, including capacity building, budgeting, monitoring and evaluation towards implementing the programme. Parties also agreed on joint responsibilities, including entering into agreements with other parties such as donors to achieve better performance of the agreement, agree on systems and modalities for programme evaluation and establishing joint committees to spearhead the programme implementation.
78. On financing, article 3 states that financing is to be joint, drawn from both the Consolidated Fund and the County revenue. Administration of the funding for the programme is to be in accordance with the *Public Finance Management Act* (PFMA) and public funding is on 50:50 basis between the parties. Further, procurement of goods and services relating to the programme is to also be done in accordance with the *Public Procurement and Assets Disposal Act* and Regulations.
79. The agreement was executed on 17 July 2023 by Hon. Ezekiel Machogu, CBS, Cabinet Secretary, Ministry of Education and witnessed by Teresia Mbaika Malokwe, Principal Secretary, State Department for Devolution for the National Government. For the 2<sup>nd</sup> respondent, H E Sakaja Arthur Johnson, CBS, the Governor executed on behalf of the County, witnessed by Lydiah Kwamboka, the County Attorney.
80. From the terms of the agreement, it is clear that there was no intention to transfer the primary school is function from the national government to the 2<sup>nd</sup> respondent. Rather, this a mutual arrangement between the two levels of governments for the benefit of learners in the 2<sup>nd</sup> respondent county with the funding to be shared equally.
81. Furthermore, the 6<sup>th</sup> interested party has confirmed that it played a vital role and assisted the two parties negotiate so that everything was done in accordance with the Constitution and the law. According to the 6<sup>th</sup> interested party, the programme was the result of consultative meetings between the two levels of government in line with articles 6(2), 189 91)(c), and 189(2) of the *Constitution*.
82. There is the argument that the programme is discriminative because it leaves out children from informal education centres, majority of whom are from informal settlements and poor families. This argument has no basis. The petitioners have not placed evidence before this court to demonstrate that children from informal schools and poor families have been denied the opportunity to enrol in government learning centres to benefit from the programme. The petitioners have also not shown that there are no children from informal settlements or poor families attending government learning institutions who benefit from the programme. The petitioners have merely made an assertion without proof.
83. In the premise, I find and hold that the impugned programme is not a transfer of functions as contemplated under article 187 of the *Constitution*. I also find that there is no evidence that the programme is discriminative of any children within the county as alleged.

### **Public participation**

84. The next issue is whether there was public participation. The petitioners have argued that there was no public participation with regard to the programme and that there is no evidence to that effect. The respondents, supported by the interested parties, contend that there was public participation.



According to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, residents and stakeholders were consulted on the programme and their views taken into account.

85. I have considered respective parties' arguments on this issue and perused the record. Public participation, as a national value, is central in the legislative or policy formulation processes. Article 10(1) of the Constitution states that the national values and principles of governance bind all State organs, State officers, public officers and all persons whenever they apply or interpret the Constitution; enact, apply or interpret any law; make or "implement public policy decisions." The national values and principles of governance include public participation. In that respect, the essence of Public participation one of the founding values in our Constitution cannot be over emphasized.
86. In the South African case of *Matatiele Municipality & Others v The President of South Africa and others* (2) (CCT 73/05 [2006] ZACC 12; 2007 (1) BCLR 47 (CC), the Constitutional Court stated that the representative and participative elements of democracy should not be seen as being in tension with each other. What the constitutional scheme requires is the achievement of a balanced relationship between representative and participatory elements in our democracy.
87. The court went on to state that the "Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process."
88. In *Minister for Health v New Chicks South Africa Pty Ltd*, CCT 59/04, [2005] ZACC 14; 2006 (2) SA 311 (CC), the same court observed that the forms of facilitating an appropriate degree of participation are capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to the members of the public and all interested parties to know about the issue and to have an adequate say.
89. In *Robert N Gakuru & others v Kiambu County Government & 3 others* [2014] eKLR the court observed that public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfillment of the constitutional dictates.
90. On appeal, in *Kiambu County Government & 3 others v Robert N Gakuru & others* [2017] eKLR, the Court of Appeal affirmed the High Court decision, stating;
- [20]"...The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. The Constitution in article 10 which binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation."
91. The Court of Appeal went on to opine that public participation must include and be seen to include the dissemination of information, invitation to participate in the process and consultation on the legislation. That is, people must be accorded an opportunity to participate in the legislative process and "this is a question of fact to be proved by the party that was required to comply with this constitutional requirement that indeed there was compliance."
92. In the words of Ngcobo, J in *Doctors for Life International v Speaker of the National Assembly & others* (CCT 12/05) [2006] ZACC 11, 2006 (12) BCLR 1399 (CC), 2006 (6) SA 416 (CC)) "merely allowing public participation...is not enough. More is required and measures need to be taken to facilitate public participation in the law-making process.



93. And in *Land Access Movement of South Africa Association for Rural Development and others v Chairperson of the National Council of Provinces and others* [20016] ZAACC22 the court observed that the standard to be applied in determining whether the obligation of facilitating public participation was met is one of reasonableness. The reasonableness of Parliament’s conduct depends on the peculiar circumstances and facts at issue.
94. The petitioners’ argument is that there was no public participation before the programme was launched. The respondents hold the opposite view, asserting that there was public participation. I have considered respective parties’ arguments on this issue and gone through the record in this matter. The 1<sup>st</sup> and 2<sup>nd</sup> respondents annexed documents to the affidavit showing attendance by residents in all the sub counties in the 2<sup>nd</sup> respondent during public participation.
95. I have perused the replying affidavit sworn by the 1<sup>st</sup> respondent on July 27, 2023. At paragraph 23, he deposes that public participation was properly conducted. He attached documents “SAJ 2” to demonstrate that indeed public participation was conducted. At page 26 of the document, is a public participation report on school feeding programme. The report was signed by Lula Juma, a public participation officer. The report covers areas of discussion covered during public participation, with a conclusion that public participation was well received.
96. There are also lists of participants. Some of the areas where public participation took place included, Embakasi South Sub County, Embakasi central, westlands among sub counties. The documents show that people attended at various centres, during the exercise.
97. The petitioners have not demonstrated that there were no such meetings, or that they attended the meetings but nothing happened. In the circumstances, there is no reason to persuade the court that there was no sufficient public participation. The 1<sup>st</sup> and 2<sup>nd</sup> respondent have demonstrated through evidence that indeed people were given reasonable opportunity to participate and give views on the impugned programme.
98. The court also takes note of the fact that the programme related to children and was therefore, for the welfare of children. Article 53(1)(c) states that every child had the right to basic nutrition, shelter and health care; while article 53(2) provides that a child’s best interests are of paramount importance in every matter concerning the child.
99. This right is replicated in section 8(1) of the *Children Act, 2022*. The section states that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, (a) the best interests of the child shall be the primary consideration. In this respect, every matter that has to do with the rights or welfare of children, the children’s welfare must come first.
100. Taking the constitutional and statutory decree into account and having considered the evidence of the issue of public participation, I find and hold that there was sufficient public participation on the programme. Further, since the programme was for the welfare of children I am satisfied that it is in the best interest of children that he programme was initiated and cannot be faulted.

## Conclusion

101. Having considered the petition, responses and submissions by parties as well as the Constitution and the law, I come to the following conclusion; First, there was no transfer of national government function to the county government. The programme was a joint undertaking between the Ministry of Education and the City County of Nairobi.



102. Second, there was sufficient public participation over the programme. There is evidence that members of the public were given reasonable opportunity to participate and give their views over the programme. The petitioners have not demonstrated that they participated or intended to participate but were denied the opportunity, or that the meetings said to have taken place did not.
103. Furthermore, this was a programme affecting the welfare of children and therefore, all matters touching on the welfare of children are of paramount importance.

**Disposal**

1. The petition is declined and dismissed.
2. Each party to bear own costs

**Dated Signed and delivered at Nairobi this 21<sup>st</sup> Day of June**

**2024**

**E C MWITA**

**JUDGE**

