Gikonyo & another v National Assembly of Kenya & 4 others; Council of Governors & 3 others (Interested Parties) (Constitutional Petition 178 of 2016) [2024] KEHC 10886 (KLR) (Constitutional and Human Rights) (20 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10886 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION 178 OF 2016

RE ABURILI, K KIMONDO & M THANDE, JJ

SEPTEMBER 20, 2024

IN THE MATTER OF ARTICLES 1 (3), 2, 3, 6(1) & (2), 10, 93 (2), 94 (4)2, 95, 131 (B), 165 (3) (D), 174, 175 (B), 179(1), 183, 186, 201 (A), (B) (II), (D) AND (E), 202 (2), 203, 205 (1), 217, 218, 258 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE FOURTH SCHEDULE TO THE CONSTITUTION

BETWEEN

WANJIRU GIKONYO ..... 1ST PETITIONER

CORNELIUS ODUOR OPUOT ..... 2ND PETITIONER

AND

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

THE SENATE OF THE REPUBLIC OF KENYA ..... 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 3RD RESPONDENT

NATIONAL GOVERNMENT CONSTITUENCY DEVELOPMENT FUND BOARD ..... 4TH RESPONDENT

CABINET SECRETARY, TREASURY ..... 5TH RESPONDENT

AND

COUNCIL OF GOVERNORS ..... INTERESTED PARTY

CHARLES AGAR OWINO ..... INTERESTED PARTY

PETER RUNKIN OUMA ONYANGO ..... INTERESTED PARTY

ISABEL NYAMBURA WAIYAKI ..... INTERESTED PARTY

The National Government Constituencies Development Fund Act of 2015 as amended in 2022 and 2023 is unconstitutional.

The petitioners challenged the National Government Constituencies Development Fund Act, 2015, arguing it violated constitutional principles of devolution, separation of powers, and prudent financial management. They claimed the Act improperly involved Members of Parliament in fund oversight, duplicated county government functions, and bypassed Senate consultation. The High Court found the Act unconstitutional, holding that it undermined devolution by intruding into county functions, created inefficiency through duplication, and violated the doctrine of separation of powers by allowing MPs to oversee projects. The Court also ruled the Act breached Articles 201 and 205 by failing to ensure prudent financial management and bypassing Senate consultation.

Reported by John Ribia

Statutes *– constitutionality of statutes – constitutionality of the National Government Constituencies Development Fund Act, 2015 – where a constitutional petition challenging the constitutionality of an Act was filed and amendments were made to the Act there after – effect of amendments on the constitutional petition - whether amendments to the National Government Constituencies Development Fund Act, 2015 in 2022 and 2023 that were made in 2022 and 2023 after the instant petition was filed rendered the petition moot, particularly regarding provisions that were repealed or substantially altered.*

Devolution *– county governments – financial autonomy of county governments – National Government Constituency Development Fund vis-à-vis the financial autonomy of statutes - whether the National Government Constituencies Development Fund Act, 2015 undermined the constitutional principles of devolution by encroaching on the functional and financial autonomy of county governments –*

Constitutional Law *– basic structure doctrine – applicability of the basic structure doctrine in Kenya – whether the basic structure doctrine was applicable in Kenya - whether the National Government Constituencies Development Fund Act, 2015 infringed on the basic structure of the Constitution by effectively creating a third level of government – Constitution of Kenya articles 89 and 174*

Constitutional Law *– separation of powers – Legislature vis-à-vis the Executive – management of the Constituency development Fund by Members of Parliament vis-à-vis the financial autonomy of county governments - whether the involvement of Members of Parliament in the implementation and oversight of the Fund under the National Government Constituencies Development Fund Act, 2015 contravened the doctrine of separation of powers by blurring the distinction between legislative and executive functions – Constitution of Kenya articles 93, 95, 129, 130, and 131; National Government Constituencies Development Fund Act (cap 414A) sections 3(k) and (l), 4(8), 8, 11, 14, 15(4), 16, 19, 22, 23(1), 24(b), 25, 26(2), 27(10), 31, 36, 43, 48, 50, 52, and 53; Public Finance Management Act (cap 412A) section 24(4)*

Constitutional Law *– national values and principles – prudent and responsible financial management – allocation of funds under the Constituency Development Fund – allegation of duplication of roles as the functions of the Fund were handed to the county governments under the Fourth Schedule to the Constitution - whether the allocation of funds under the National Government Constituencies Development Fund Act, 2015 complied with the constitutional principles of prudent and responsible financial management, particularly in ensuring transparency, accountability, and avoidance of duplication of funding structure – Constitution of Kenya article 201; Contingency and County Emergency Funds Act (cap 412A) section 10(2); National Government Constituencies Development Fund Act (cap 414A) sections 3(k) and (l), 4(8), 8, 11, 14, 15(4), 16, 19, 22, 23(1), 24(b), 25, 26(2), 27(10), 31, 36, 43, 48, 50, 52, and 53; Public Finance Management Act (cap 412A) section 24(4)*

Constitutional Law *– constitutional procedures – allocation of revenue to county governments – role of Senate – role of the Commission of Revenue Allocation – whether the Constituency Development Fund complied with the above procedures - whether the enactment of the National Government Constituencies Development Fund*

Act, 2015 adhered to constitutional procedures, including consultation with the Senate and the Commission on Revenue Allocation, given its impact on county governments and revenue allocation – Constitution of Kenya article 205; National Government Constituencies Development Fund Act (cap 414A) sections 3(k) and (l), 4(8), 8, 11, 14, 15(4), 16, 19, 22, 23(1), 24(b), 25, 26(2), 27(10), 31, 36, 43, 48, 50, 52, and 53; Public Finance Management Act (cap 412A) section

Brief facts

The petitioners filed a constitutional petition challenging the constitutionality of the National Government Constituencies Development Fund Act, 2015 (the 2015 Act/the Act). The Act was enacted to replace the Constituencies Development Fund Act, 2013, which had been declared unconstitutional. The petitioners argued that the 2015 Act violated several constitutional principles, including the doctrine of separation of powers, the principle of devolution, and prudent management of public finance.

The petitioners contend that the 2015 Act allowed for the allocation of funds to the National Government Constituencies Development Fund (NGCDF) prior to the vertical division of revenue between the National and county Governments. They alleged that the practice contravenes articles 201 and 203 of the Constitution, which outlined principles of public finance. The petitioners also asserted that the Act improperly involves Members of Parliament in the administration of public funds, undermining the constitutional doctrine of separation of powers and creating conflicts between different levels of government.

Additionally, the petitioners argued that the Act duplicated functions assigned to county governments under the Fourth Schedule of the Constitution, resulting in inefficient use of public resources and confusion in governance structures.

Issues

i. Whether amendments to the National Government Constituencies Development Fund Act, 2015 in 2022 and 2023 that were made in 2022 and 2023 after the instant petition was filed rendered the petition moot, particularly regarding provisions that were repealed or substantially altered.

ii. Whether the National Government Constituencies Development Fund Act, 2015 undermined the constitutional principles of devolution by encroaching on the functional and financial autonomy of county governments.

iii. Whether the National Government Constituencies Development Fund Act, 2015 infringed on the basic structure of the Constitution by effectively creating a third level of government.

iv. Whether the National Government Constituencies Development Fund Act, 2015 encroached on the functions reserved for county governments, leading to duplication and inefficiency.

v. Whether the involvement of Members of Parliament in the implementation and oversight of the Fund under the National Government Constituencies Development Fund Act, 2015 contravened the doctrine of separation of powers by blurring the distinction between legislative and executive functions.

vi. Whether the allocation of funds under the National Government Constituencies Development Fund Act, 2015 complied with the constitutional principles of prudent and responsible financial management particularly in ensuring transparency, accountability, and avoidance of duplication of funding structures.

vii. Whether the enactment of the National Government Constituencies Development Fund Act, 2015 adhered to constitutional procedures, including consultation with the Senate and the Commission on Revenue Allocation, given its impact on county governments and revenue allocation.

Held

1. Under article 259 of the Constitution, the court was enjoined to interpret the Constitution in a manner that promotes its purposes, values and principles. The general presumption was that Acts of Parliament were enacted in conformity with the Constitution. The provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining

the other. Courts must be a liberal approach that promoted the rule of law and had jurisprudential value that must take into account the spirit of the Constitution.

2. The 2022 and 2023 amendments, several sections of the National Government Constituencies Development Fund Act (the Act) were deleted and repealed. Sections 15(4), 19, 43(2)(e), 53 were deleted, repealed or substituted by the 2023 Act. The challenge to those provisions in the petition was moot. however, there was still a raging dispute calling for adjudication on the remainder of the Act. The 2022 and 2023 amendments to the 2015 Act did not negate the substratum of the entire petition.
3. Devolution was a key cornerstone in the architecture of the Constitution. The Constitution called for optimal utilization of public resources. Sustainable development was a national value and principle under article 10 of the Constituion. So much so that the framers of the Constitution abhorred wastage of government resources through multiplication of delivery channels.
4. The creation of the constituency as a service delivery unit under the Act led to multiple channels of funding and implementation of projects, wastage of public resources and lack of clarity. All those undermined the principle of devolution and the architecture of the Constitution on the two levels of government, separation of powers and the primary oversight role of Parliament.
5. The basic structure doctrine was not applicable in Kenya. The challenge to the Act founded upon violation of the doctrine of basic structure of the Constitution failed.
6. Parliament as a legislative arm of government under the Constitution consists of the Senate and the National Assembly. The legislative remit of the National Assembly fell under the National Government in the vertical division of powers between the National Government and the county governments. That was evident from article 95 of the Constitution.
7. The nature of the projects set out in the Act as amended in 2022 and 2023 included education bursary schemes, education days, teaching and learning activities and other learners' social support programmes; climate change mitigation activities including afforestation, reafforestation, grassroot sensitization and tree seedling production. Section 8 of the Act created an emergency reserve equivalent to 5% which shall remain unallocated and available for emergencies that may occur within the Constituency. This Emergency Reserve was akin, in all respects and aspects to the County Emergency Funds and the Contingency Fund created under the Contingency and County Emergency Funds Act (CCEF Act). The object of the Act was to ensure that the Contingencies Fund, and the County Emergency Funds were managed and operated by the National Government and the county governments respectively as contemplated by article 208(2) of the Constitution.
8. Part 3 of the CCEF Act under section 10(2) provides for the purpose of the emergency fund being to enable payments to be made in respect of a county when an urgent and unforeseen need for expenditure arises for which there was no specific legislative authority. The fund at the county level was administered by the county government secretary while at the National Government level, it was administered by the Treasury under the management of the Cabinet Secretary responsible for matters relating to Finance. The emergency reserve was a replica of the above two other funds established by statute and consequently, the 2015 Act created a duplication of activities and or wastage of resources which could alternatively be assigned to the county governments as provided in article 186(3) of the Constitution.
9. It was important to have clarity about which level of government was empowered to do what. That avoided confusion and duplication of mandates and responsibilities, and allowed for proper accountability to citizens in respect of service delivery. When there was no clarity, blame could easily be shifted from one sphere of government to the other. The Fund had the potential of creating confusion in the implementation of projects by the two levels of government. Duplication of funding for the same project was inevitable leading to wastage of scarce public resources. The Fund fostered a state of lack of clarity as to which level of government was responsible for which particular project thereby compromising accountability.

10. The doctrine of separation of powers was a key organizational framework for governance under the 2010 constitutional Scheme. The doctrine was a fundamental principle of law that required the three arms of government to remain separate, and that one arm of government should not usurp functions belonging to another arm. Allowing Legislators any role, even a merely ceremonial role in discharging a mandate that belongs to the executive branch at either the national or the county level, would promote conflict of interest and compromise their oversight role.
11. Section 15 (4) of the 2015 Act provided for the approval of members of the NGCDF Board by the National Assembly. Section 19 provided for the role of the National Assembly in considering petitions for removal of members of the NGCDF Board while section 43 (1) (4) & (6) and (9) provided for the establishment of the NGCDF Committee for every constituency, approval of the same by the National Assembly and tied the meeting of the Committee to the parliamentary election or by election timelines. Section 15(4) above had since been repealed vide an amendment to the 2023 Amendment Act. However, the National Assembly, under section 15(1)(e), had retained the role of approving members of the Board appointed by the Cabinet Secretary on recommendations of the Public Service Commission. Under section 43(4) and (5), the names of the seven persons of the NGCDF Committee shall be submitted to the National Assembly for approval before appointment and gazettement by the Board.
12. Whereas the role of the National Assembly in the two scenarios under sections 15 (1) (e) and 43 (4) and (5) of the Act could safely be said to be oversight role, the catch was in section 43(9) which was clear that the Fund Account Manager who was the holder of the purse to the Fund, seconded by the Board to the Constituency shall be the custodian of all records and equipment of the Constituency during the term of Parliament and during transition occasioned by general election or a by election. That meant that the term of the Fund Account Manager was tied to the term of Parliament which was five years or in the case of a by election. The Member of the National Assembly remained in the shadows of the Fund, controlling its operations, however remotely, at the constituency level.
13. Section 53 of the 2015 Act provided for the establishment of a Constituency Oversight Committee for projects under the Act which comprised the constituency Member of Parliament as well as other members. Section 53 (3) involved the Constituency Member of Parliament as the member of the Oversight Committee in mobilizing, sensitizing and soliciting views, opinions and proposals from the public. The entire section 53 of the Act was deleted as a whole in the 2023 legislative amendments and therefore any challenge to the same was moot.
14. Article 1(4) of the Constitution established the National and county Governments as two distinct levels of government, each deriving its power directly from the Constitution itself. The county government, as outlined in Article 1, did not receive its authority from the National Government but rather from the people of Kenya and the Constitution. That framework positions both levels of government as equals, with neither being subordinate to the other. That said, the National and county Governments were separate yet interconnected entities, required to engage in consultations and cooperation as mandated under articles 6(2) and 189 of the Constitution.
15. As long as the Fund, as established, involved aspects of service delivery, however well intended, had the effect of creating structures that were incompatible with the nature of the distribution of functions between the two levels of government.
16. Article 95 of the Constitution provides for the roles of the National Assembly. Article 95 did not grant the National Assembly the power to implement projects in the constituency as a service delivery unit. The mandate of members of the National Assembly was to represent, legislate and oversight the national revenue and its expenditure. Accordingly, by creating a Fund that is administered by the constituency, which was a unit of political representation for legislative and oversight roles, however far removed, the Member of the National Assembly may be, in the management and administration of the Fund, ran afoul the doctrine of separation of powers.

17. Under section 27 of the Act, the constituency committee was charged with the task of deliberating on project proposals from all wards in the constituency and any other project that may be beneficial to the constituency. The committee was also required to consider the constituency strategic plan and identify a list of priority projects to be submitted to the Board. The funding of projects was provided for under section 25 of the Act. The projects were then implemented by the project management committee, pursuant to section 36. Section 54 provided that the provisions of the Act were complimentary to any other development efforts by the National Government or any other agency. It further provided that nothing in the Act shall be taken or interpreted to mean that an area may be excluded from any other development programmes. No area of development was out of the reach of this Fund under the Act and could directly encroach even on the functions of the county governments under the Fourth Schedule of the Constitution.
18. Projects under the Act may include those undertaken by both the National and county Governments. Accordingly, given the governments at both levels also budget for all their functions, programmes and projects, allocating money to the Fund leads to double financing of the same functional areas. That undermines the fiscal efficiency imperative that eliminates wastages in service delivery. Duplication of projects and programmes even if intended for the public good, would inevitably result in wastage or abuse of public funds allocated for the same. In such circumstances, fiscal reporting could not be clear.
19. The Act provided for conceptualization, funding and implementation of projects within constituencies. Under section 54, no area was out of the reach of the Act and projects thereunder may extend to functions of both the National and county Governments. The Fund had the potential of creating confusion in the implementation of projects by the two levels of government and to duplicate funding for the same projects leading to wastage of scarce public resources and compromising accountability. The 2015 Act, notwithstanding the 2022 and 2023 amendments, violated the constitutional principles of public finance.
20. Under article 216 of the Constitution, the principal function of the Commission on Revenue Allocation (CRA) was to make recommendations concerning the basis for the equitable sharing of revenue raised by the National Government, between the National and county Governments and among the county governments. The recommendations by the CRA on the formula for equitable sharing of nationally raised revenue between the National and county Governments was not obtained. However, under article 205, the making of the recommendations by CRA on the proposals was at its discretion. Nevertheless, the National Assembly was required to submit the proposals to the CRA for consideration.
21. Article 109(3) and (4) of the Constitution clarified when a bill, of the nature of the dispute now before us, should originate from either House of Parliament or when there should be concurrence of both Houses. The impugned Act created an anomalous executive-based- function at the constituency wedged somewhere between the National Government and County Governments. The Fund distorted the devolved structure of government and created structures that were incompatible with the nature of the distribution of functions between the two levels of government. The enactment of the statute without concurrence of the Senate ran counter to article 193 of the Constitution.
22. The National Government may not allocate any funds to its agencies prior to the division of revenue. It was only after the equitable division of all revenue raised is done under a Division of Revenue Bill, under article 218 of the Constitution that the National Government could proceed to allocate funds to its agencies. The National Government may only allocate funds to its agencies from its equitable share under the Division of Revenue Act as envisaged in article 218(1)(a).
23. No funds could be allocated on the basis of a bill that had not been enacted into law. The for an order seeking to restrain the 5th respondent from allocating funds to the Fund on the basis of the Bill as well as the prayer for an order striking down those parts of the Bill purporting to allocate funds to the Fund

before the vertical division of revenue between the county and National Governments were premature and not ripe for consideration by the court at that point.

24. A division of revenue act provided for the equitable division of revenue raised nationally between the two levels of government in a given financial year. Accordingly, even if the Act in question had been in existence at the time of filing the petition, which it was not, the same was for the financial year 2016/2017 and lapsed by effluxion of time.

25. The Fund had been in operation since 2003. Its centrality and the value of its programmes to the local communities across 290 constituencies could not be gainsaid. There were short-term, medium-term and long-term projects already being implemented by the Fund. Moreover, the life span of the projects was not necessarily pegged to the financial year. The Fund had employees and may have contracts with third parties. At the time of the instant judgment, Kenya was in the middle of the current financial year and funds may have been allocated for ongoing projects. Despite the finding that the 2015 Act as last amended in 2023 was unconstitutional, it would not be in the interest of the nation or of the cause of justice to bring it to an abrupt closure. The principle of justiciability prohibited the court from entertaining hypothetical or academic issues or engage in abstract arguments. The Division of Revenue Act having lapsed at the end of the financial year in question, there was no live issue for determination by the court. The matter was not justiciable. The impugned Act and Fund established thereunder and its programmes ceased to operate at the stroke of midnight on June 30, 2026.

26. The time was ripe for the people of Kenya to appreciate that a constituency was not a service delivery unit but of representation and that the role of the Member of the National Assembly must remain that of representation, legislating and oversight as per article 95 of the Constitution. Funds had been allocated in the current financial year to the projects under the Fund. Extending the Fund beyond the current financial year would unreasonably perpetuate the unconstitutionality of the Act. The 2015 Act and the Fund cease to operate on June 30, 2025, the end of the current financial year.

Petition partly allowed.

Orders

i. *The National Government Constituencies Development Fund Act of 2015 as amended in 2022 and 2023 was declared unconstitutional.*

ii. *The National Government Constituencies Development Fund and all its programmes, projects and activities shall cease to operate at the stroke of midnight on June 30, 2026.*

iii. *Each party was to bear their own costs.*

Citations

Cases

Kenya

1. *Attorney-General & 2 others v Ndii & 79 others; Dixon & 7 others (Amicus Curiae)* Petition 12, 11 & 13 of 2021 (Consolidated); [2022] KESC 8 (KLR) - (Explained)
2. *Center for Rights Education and Awareness & anothers v John Harun Mwau & 6 others* Civil Appeal 74 & 82 of 2012; [2012] KECA 249 (KLR) - (Explained)
3. *Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 others* Constitutional Petition 496 of 2013; [2013] KEHC 6919 (KLR) - (Mentioned)
4. *Council of County Governors v Attorney General & 5 others* Petition 252 of 2016; [2020] KEHC 10361 (KLR) - (Mentioned)
5. *Council of Governors v Speaker of the Senate & others* Petition 381 & 430 of 2014; [2015] KEHC 6965 (KLR) - (Explained)
6. *Dande & 3 others v Inspector General, National Police Service & 5 others* Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated); [2023] KESC 40 (KLR) - (Explained)

7. *Gitau, Yussuf Abdallah v Building Centre (K) Ltd & 4 others* Petition 27 of 2014; [2014] KESC 50 (KLR) - (Explained)
8. *In the Matter of the Interim Independent Electoral Commission* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR) - (Mentioned)
9. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Advisory Opinions Application 2 of 2012; [2012] KESC 5 (KLR) - (Explained)
10. *In the Matter of the Speaker of the Senate & another* Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR) - (Explained)
11. *Institute of Social Accountability & another v National Assembly & 4 others* Petition 71 of 2013; [2015] KEHC 6975 (KLR) - (Explained)
12. *Jayne Mati & another v Attorney General & another* Petition 108 of 2011; [2011] KEHC 4292 (KLR) - (Mentioned)
13. *Murambi, Robert Isaac v Attorney General & 3 others* Constitutional Petition 3 of 2016; [2017] KEHC 3034 (KLR) - (Explained)
14. *National Assembly of Kenya & another v Institute for Social Accountability & 8 others* Civil Appeal 92 & 97 of 2015 (Consolidated); [2017] KECA 170 (KLR) - (Explained)
15. *Okiya Omtatah Okoiti v Parliamentary Service Commission & another* Petition E062 of 2021; [2021] KEELRC 1471 (KLR) - (Explained)
16. *Otiende, Antony Otiende v Public Service Commission & 3 others* Petition 54 of 2015; [2016] KEHC 938 (KLR) - (Mentioned)
17. *Republic v National Employment Authority & 4 others ex-parte Middle East Consultancy Services Limited* Judicial Review Application 171 of 2018; [2018] KEHC 9449 (KLR) - (Explained)
18. *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR) - (Mentioned)
19. *Trusted Society of Human Rights Alliance v Attorney General & 2 others; Mumo Matemu (Interested Party); With Kenya Human Rights Commission & another (Amicus Curiae)* Petition 229 of 2012; [2012] KEHC 2480 (KLR) - (Explained)
20. *Wambui & 10 others v Speaker of the National Assembly & 6 others* Constitutional Petition 28 of 2021 & Petition E549, E037 & E065 of 2021 & E077 of 2022 (Consolidated); [2022] KEHC 10275 (KLR) - (Mentioned)
21. *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* Petition 453 of 2015; [2016] KEHC 5536 (KLR) - (Explained)

Tanzania

Ndyanabo v Attorney General [2001] EA 495; (2002) AHRLR 243 (TzCA 2002) - (Explained)

South Africa

1. *National Coalition for Gay and Lesbian Equality and Other v Minister of Home Affairs and Others* (CCT10/99) [1999] ZACC 17 - (Mentioned)
2. *Van Rooyen and Others v The State and Others* [2002] ZACC 8 - (Mentioned)

Namibia

State v Acheson 1991 20 SA 805 - (Explained)

India

Bhim Singh v UOI & others 2010) INSC 358 (6 May 2010) - (Mentioned)

United States

Panama Refining Company v Ryan (1934) 293 US 388, 440 - (Mentioned)

Canada

1. *Borowski v Canada (Attorney General)* [1989] 1 SCR 342 - (Explained)
2. *Canadian Western Bank v Alberta* [2007] 2 SCR 3, 2007 SCC 22 - (Mentioned)

3. *R v Morgentaler* [1993] 3 SCR 463 - (Mentioned)

Texts

1. Carol, A., (Ed) (2007), *Constitutional and Administrative Law* Harlow: Pearson Longman 5th Edn p 37
2. Leopold, P., Jackson, P., (Prof) (Eds) (2001), *O Hood Philips and Jackson: Constitutional and Administrative Law* London: Sweet & Maxwell, 8th Ed, pg 12, para 1-017
3. Pierce, RJ., (1989), *Separation of Powers and the Limits of Independence* The American Constitutional Tradition of Shared and Separated Powers William & Mary Law Review Volume 30 (1988-1989) Issue 2

Statutes

Kenya

1. Constituency Development Fund Act (cap 414) In general - (Cited)
2. Constitution of Kenya articles 1(3)(4); 2(1)(2)(4); 3(2); 4(1); 6(1); 10; 24; 53(1); 89(1); 93; 95; 96; 109(3)(4)(5); 110(1); 125; 129; 130; 131; 163(7); 165(4); 174; 175; 176(2); 183(1)(b); 186; 187(1); 189; 201; 202(2); 203; 205(2); 206; 208(2); 216; 218; 234(2)(iii); 259; Schedule IV; part 2; Chapter 12 - (Interpreted)
3. Contingencies Fund and County Emergency Funds Act, 2011 (Act No 17 of 2011) section 10(2); part 3 - (Interpreted)
4. County Governments Act (cap 265) In general - (Cited)
5. Division of Revenue Act (2022) In general - (Cited)
6. Intergovernmental Relations Act (cap 265F) In general - (Cited)
7. National Government Co-Ordination Act (cap 127) In general - (Cited)
8. National Government Constituencies Development Fund Act (cap 414A) sections 3(k)(l); 4(8); 8; 11; 14; 15(4); 16; 19; 22; 23(1); 24(b); 25(5)(7)(8)(10); 26(2); 27(10); 31; 36(2)(3); 43; 48; 50; 52; 53; part IV, V, VI, VII- (Interpreted)
9. Public Finance Management Act (cap 412A) section 24(4) - (Interpreted)

Advocates

None mentioned

JUDGMENT

Introduction

1. The petitioners challenge the constitutionality of the *National Government Constituencies Development Fund Act* of 2015 (hereafter, the 2015 Act) in a petition dated May 4, 2016 and filed on May 5, 2016. They impugn the Act which came into force on February 19, 2016 as well as the Division of Revenue Bill dated March 9, 2016.

2. Simultaneously, the petitioners sought a conservatory order to halt the release to the National Government Constituency Development Fund (the Fund), of allocated funds for the year 2016/2017. The petitioners also prayed for certification that the matter raised substantial questions of law for empanelment by the Chief Justice of an uneven number of judges under article 165(4) of the *Constitution*.

3. By a ruling dated July 4, 2016, the petitioners were granted the conservatory orders sought. The Court also certified the matter as one raising a substantial question of law and forwarded the file to the Chief Justice for the empanelment of the bench.

4. The delay in the determination of this petition can be attributed to a number of factors including death, transfer, recusal and or promotion of some members of the bench to the Court of Appeal. In addition, the parties had requested the court to stay the hearing of the petition pending the disposal of the appeal from the High Court decision in the *Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR to the Court of Appeal and eventually to the Supreme Court. The High Court had found the *Constituency Development Fund Act, 2013* (the 2013 Act) unconstitutional. The Court of Appeal partly upheld the decision of the High Court. Both parties being aggrieved, lodged a further appeal to the Supreme Court, in SC Petition on No. 1 of 2018. The Supreme Court rendered its decision on August 8, 2022 affirming the decision of the High Court.

5. The petitioners sought the following reliefs:

   a. That a declaration that the allocation of the funds before vertical division between the national and the county government contravenes Article 203 of the *Constitution* and therefore unconstitutional.

   b. That those parts of the Division of Revenue Bill/Act locating the source of funds for the NGCDF before vertical division of revenue between the county and national government is a violation of the *Constitution* principles of public finances under article 201 and 203 of the *Constitution* and the rule of law principle under article 10 and it is inimical to the basic structure of the *Constitution* in regard to devolution of powers.

   c. That a declaration be issued that the *National Government Development Fund Act*, 2015 is unconstitutional, because it offends the principles of separation of powers, division of functions and the principles of public finance.

   d. That a declaration be issued that the bill that resulted into the Act was a Bill concerning county governments and hence failure to subject it for consideration be senate was unconstitutional and renders the Act invalid.

   e. That a declaration be issued that any attempt to establish a constituency provided for in Article 89 (1) as a unit of development and parallel planning from the county and national executive planning and implementation of executive functions is unconstitutional because it goes against the basic structure of the *Constitution*.

   f. That a declaration be issued that any office, organ or body purportedly established by this *NGCDFA* is illegal as it is created in contravention of the *Constitution*.

   g. That a declaration be issued that the numerous provisions of the *NGCDFA* that violate the *Constitution* cumulatively render the entire Act untenable and therefore constitutionally invalid.

   h. That an order issue striking down the *NGCDFA* in its entirety for being unconstitutional.

      i. That an order issue permanently restraining the Cabinet Secretary from allocating funds to the National Government Constituency Development Fund on the basis of the Division of Revenue Bill/Act, 2016.

   j. That an order issue striking down those parts of the Division of Revenue Bill/Act, 2016 purporting to allocate funds to the NGCDF before the vertical division of revenue between the county and national governments.

k. That an order issue providing mechanisms and timeline of winding up any and all projects and activities undertaken under the Act.

l. That the costs of, and incidental to, this petition be awarded to the petitioners against the Respondents.

m. That this honourable court be pleased to grant such further directions or orders as may be just.

The petitioners' case

6. The petition is dated May 4, 2016 and is supported by an affidavit of even date and a further affidavit sworn on August 21, 2017 by the 1st petitioner Wanjiru Gikonyo.

7. The petitioners' case is that the impugned Act violates the principles of public finance. Firstly, that the National Assembly through the Division of Revenue Bill allocated a portion of the national revenue to the Fund before vertical division between the county and national government in violation of articles 201 and 203 of the *Constitution*.

8. Secondly, that the spirit of sections 3(k), 3 (1), 4 (8), 24 (b), 25(5), (7), (8), 26 (2), 27 (10), 36 (2), (3), 48 and 52 of the, 2015 Act permits a possible duplication of projects and assets contrary to the constitutional principles of prudent use of resources, responsible financial management and clear fiscal planning guaranteed under article 201 of the *Constitution*.

9. Thirdly, that the Division of Revenue Bill related to matters of the counties and the sharing of revenue between the two levels of government yet the Senate and Commission on Revenue Allocation (CRA) were not consulted, as required by article 205 of the *Constitution*.

10. Additionally, the petitioners assert that the entire framework of the impugned Act offends the doctrine of separation of powers. That it also violates the principle of division of functions between the two levels of government and therefore defeats the very essence of devolution.

11. The petitioners also claimed that sections 15(4), 19, 23(1), 43 and 53 of the Act allow members of the National Assembly to control the implementation of the Act and the administration of the Fund contrary to the principle of separation of powers and in violation of articles 93, 95, 96 and 129-131 of the *Constitution*.

12. The petitioners added that the architecture of the entire Act, 2015 violates the principle on division of functions.

13. According to the petitioners, the 2015 Act elevates the constituency to a third level of government contrary to articles 1(4), 2(1) & (2), 3(2), 6(1), 10, 174, 186, and 189 of the *Constitution*. In their view, this interferes with the basic structure of the *Constitution*

14. It is the petitioners' case that at the core, this case is about the integrity and protection of devolution and that it relates to the duty of and need for courts to be proactive in protecting the constitutional principles that relate to devolution.

15. The petitioners further contended that the impugned Act is philosophically and structurally similar to the 2013 Act as it undermines devolution, causes conflicts between county governments and the national government and between members of the National Assembly and governors.

16. The petitioners called two expert witnesses. The first was Dr. Conrad M. Bosire who adopted his written statement filed on 12th July 2017 as his evidence in chief. The second was Dr. Mutakha Kangu who relied on his expert report filed on May 17, 2017 as his evidence in chief.

17. In his report and testimony, Dr. Bosire gave the historical background of *CDF*, tracing it back to colonial initiatives and the post-independence period up to the enactment of the *CDF* Act, 2003. He stated that the rationale was to facilitate the involvement of national legislators in local development and service delivery. The original CDF law in 2003 had local development objectives and that the MP was at the centre of implementation of the fund objectives. Bosire cited a study by Yvon Rocaboy, Francois Vaillancourt and Rejane Hugounenq who observed:

> By providing constituencies with grants and delegating to them the authority to develop investment projects, the government has weakened the municipal council's lead role in the provision of local public stakeholder by authorizing them to recruit project managers, thereby creating a new local bureaucracy that then entered into competition with the Local Authorities' administrative power.

18. In his view the Act has made substantial attempts to align CDF to the *Constitution*. He observed that the Act attempts to remove MPs from the active management and leadership of the Fund. This however stands in stark contrast with the historical influence and dominance MPs have over the Fund.

19. He referred to a paper titled Constituency Development Funds (CDFs) as a Tool of Decentralized Development presented at the 56th Commonwealth Parliamentary Conference, Nairobi, Kenya (10-19 September 2010), Workshop E: The role of Parliamentarians in facilitating grassroots projects, Dr. Mark Baskin stated that Ghana, Tanzania, Uganda and Zimbabwe in Africa have similar funds. Other countries beyond the region with similar funds include Bhutan, India, Jamaica, Pakistan, Papua New Guinea, Philippines and Solomon Islands. The paper provided details on the method of creation of funds and the year of creation, the percentage of the budget allocated, the level of control over the funds by the MPs, types of projects funded or prohibited, who controls the funds, and who plays oversight.

20. He concluded that none of the African countries with a multi-level system of government where significant powers and resources are devolved has such a system. All countries with CDF systems are unitary systems with a centralized as opposed to a devolved system of government.

21. In his report and testimony Dr. Kangu outlined the history of social funds tracing them to the structural adjustment programs (SAPs) fronted by the World Bank and International Monetary Fund. He stated that SAPs as instruments used in restructuring macroeconomic policies in countries, were a major contributor to the emergence of a deepened inequality with little benefits to the poor. In order to reduce the socio-political impact of SAPs on the poor, the World Bank and other IFIs introduced social funds.

22. He testified that the Constituency Development Fund (CDF) was introduced through legislation in 2003. The *CDF* Act ensured that 2.5% of the national budget was set aside and allocated to constituency-based projects to help fight poverty at the grass root level through implementation of community-based projects.

23. According to this witness, although the Act sought to redress the issues raised by the High Court when it declared the 2013 Act unconstitutional in Pet. 71 of 2013, it remains unconstitutional for the following reasons: Firstly, that members of the National Assembly who have a vested interest in ensuring that more money goes to the national government from which the Fund gets a percentage, may compromise their objectivity, which may lead to a vertical division of revenue that reduces the share of county governments. The report states that contrary to the requirement under Article 201, the Act lacks clarity in how the national government's portion of revenue will be shared between the Fund as an agency of the national government and other departments of the national government.

24. Secondly, that given that the national government must budget for all its functional areas, allocating money to the Fund leads to double financing of the same functional areas. Both agencies may fail to provide the service and keep passing the responsibility to each other. Additionally, that accountability may be compromised since both agencies may present to the public the same project claiming credit for the same. Further, that the Fund leads to wasteful duplication of roles and structures, resulting in imprudent and irresponsible use of public money.

25. Thirdly, that the projects to be financed by the Fund are not specifically identified in the Act which uses broad terminology to describe allowable projects. Dr. Kangu further stated that the Fund has the effect of transforming the constituency into a third level of government contrary to constitutional provisions. He agreed with the High Court that a constituency is a unit of representation for electing a member of the National Assembly, and not a third level of government with infrastructural development functions; a constituency forms part of a county territory, as such attempts to implement infrastructure development projects in the constituency financed by the national government through the Fund would interfere with the functions of the county government.

26. Fourthly, that even if the Act provides that projects to be financed thereunder are to be in respect of national government functions, there is no clarity to ensure that the projects do not intrude into the functional areas of the county governments. Lastly, that the Act establishes an emergency fund in total disregard of the fact that the emergency functional area is a concurrent function of both the national and county governments.

27. The report further states that one of the objectives of devolution is to allow provision of proximate services to the grassroots and allow the people to participate in governance and decision making. He referred to Article 6(3) which requires every national state organ to ensure reasonable access to its services in all parts of the republic and article 176(2) under which county governments have decentralized their functions at the subcounty level which is equivalent to the constituency, the ward and village levels. He stated that the Act creates a multiplicity of unnecessary structures to manage the Fund and projects and that these structures are parallel to both national and county projects. Relying on para 121 of the decision in Pet. 71 of 2013, he stated that national and county governments have decentralized their functions and provision of services.

1st respondents' case

28. The 1st respondent filed a replying affidavit sworn on April 18, 2017 by Michael Sialai, Clerk of the National Assembly. He deposed that the Fund was created under section 4 of the Act and that its functions are set out by section 3.

29. He deposed that the Fund is implementing activities including the following:

    i. identifying children from needy backgrounds for bursary funds to realize their right to education under article 53(1) (b) of the *Constitution*;

    ii. drafting proposals for bursary funds for needy children;

    iii. seeking placements for the children who are beneficiaries of the bursaries; and

    iv. funding infrastructure projects that fall within the functions of the national government such as classrooms to create a conducive environment for children to learn.

30. He averred that a member of the National Assembly is not a member of the National Government Constituency Development Fund Committee (the Constituency Committee), and is therefore not involved in the implementation of the Fund. He referred to sections 43 and 50 of the Act establishing

both the Constituency Committee and the Select Committee of the Fund and their mandate. In his view, the role of the National Assembly is limited to oversight as stipulated under article 95(5)(b) of the *Constitution*. In this regard, Parliament approves the names of persons selected to serve in the Constituency Committee.

31. He opined that the Act does not violate the doctrine of separation of powers and that the constituency is a unit not of the devolved government but of the national government. He relied on the Report of the Committee of Experts on Constitutional Review dated 11th October 2010. In addition, article 206(1)(a) of the *Constitution* empowers Parliament to establish public funds for a specific purpose and that the Fund is one such fund.

32. The 1st respondent's position is that the Act facilitates the performance and implementation of national government functions, and not those of the devolved governments. It disputed the claim that the enactment of the Act required the concurrence of the Senate or that the financing of the Fund reduces the share allocated to county governments.

33. Pursuant to a notice of motion dated January 29, 2024 the 1st respondent sought to stay the proceedings pending the determination of whether the petition had become moot by virtue of legislative amendments to the Act in 2022 and 2023. It also prayed for leave to provide new and further information regarding the amendments. The court allowed the introduction of new and further information but directed that the question of mootness being closely intertwined with other issues raised in the petition be considered together with the petition.

34. The 1st respondent relied on submissions dated May 15, 2017 as well as further submissions dated October 1, 2019.

2nd respondent's case

35. The 2nd respondent filed grounds in support of the petition dated February 14, 2024 out of time and without leave of the court. The 2nd respondent did not file written submissions and thus had nothing to highlight at the hearing of the petition.

4th respondent's case

36. The 4th respondent filed a replying affidavit sworn on May 5, 2017 by Yusuf Mbuno its acting Chief Executive Officer denying all the allegations by the petitioners. It denied that the Act gives members of the National Assembly roles reserved for the national executive as alleged by the petitioners in paragraph 34 of the petition. He further stated that the budget for the NGCDF Board is approved by the Cabinet Secretary as stipulated under the Act.

37. Additionally, that the clear provisions of section 24 of the 2015 Act gives the national government authority to implement projects falling within its mandate. He averred that emergency services, sports and environmental activities are not reserved exclusively for county governments as urged by the petitioners.

38. He added that the 2015 Act did not require approval of the Senate. The 4th respondent's position is that sections 4 and 24 of the Act clearly show that the funds are derived from the national government's share of revenue to be utilized for works and services "falling within functions of the national government."

39. He also stated that the Fund is anchored on strategic documents and policies aligned to the national government development plans. He annexed copies of the strategic plans for the period 2016/2017 and 2020/2021.

40. He stated that the structure of the Fund adheres to principles of finance, prudent use and responsible financial management, through a careful and elaborate identification of projects implemented under the Fund. In addition, that there is a project management committee and a Constituency Committee oversighting the process.

41. According to the 4th respondent the projects under the Fund are complementary to any other development effort by the national government. As such there is no parallel and duplicative offices created under the Act.

42. The 4th respondent denies the allegation by the petitioners that the Act creates third level of government. In its view the Act recognizes a constituency as a platform for identification, performance and implementation of the national government functions outlined in section 3 of the Act.

43. The 4th respondent also called an expert witness, Dr. Charles Oyaya who produced a report dated July 19, 2017 and a supplementary report filed on October 5, 2017. His two reports can be broadly summarized as follows: That the challenges by the petitioners to the Act most of which relate to the concurrent mandates between national and county governments are practically transitional in nature. As such, they should not form grounds for the entire abrogation of the Act. On whether the design and operations of the Fund leads to a usurpation by the legislature of the essential function of another branch leading to a removal of checks and balances, he opined that the Act greatly delimits the role of MPs in regards to overall governance, management and administration of the Fund. MPs are relegated to more of an advisory position tasked with assisting community mobilization and project oversight.

44. He stated that the formal functions of MPs in relation to the Act relate mostly to legislative functions. He gave the example of the functions of the Select Committee established under Section 50 to examine legislative proposals; oversight by the Constituency Oversight Committee established under section 53; representation and constituency service explaining the membership in the constituency development committee established under Section 43, of two persons nominated by the constituency office. His view is that while this arguably constitutes a breach of separation of powers, what requires probing is whether this negates the checks and balances. He concludes that in the overall purpose, structures and procedures of the Act, the extent of separation of powers seems sustainable.

45. The 4th respondent also relied on the written submissions dated May 16, 2017, further submissions dated September 29, 2019 as well as a supplementary list of documents dated October 2, 2019. The court was urged to dismiss the petition.

3rd and 5th respondents' case

46. The 3rd and 5th respondents relied on their submissions dated September 20, 2017. They also associated themselves with the submissions by the 1st respondent.

Interested Parties' Case__**

47. The 1st interested party participated in the hearing but did not file any pleadings or submissions on the main petition. As regards the 2nd to 4th interested parties, other than the application for joinder, they did not participate in the hearing of the petition.

Analysis and Determination

48. We shall consider the submissions by the parties in the course of our analysis of the identified issues. From the evidence and submissions, the following broad issues arise for our determination:

i. Whether the petition has been rendered moot by the 2022 and 2023 amendments to the Act.

ii. Whether the impugned Act violates the principle of and structure of devolution in the *Constitution*.

iii. Whether the impugned Act violates the basic structure of the *Constitution*.

iv. Whether the Act offends the division of functions between the two levels of government.

v. Whether the Act violates the doctrine of separation of powers.

vi. Whether the Act is in breach of the principles of public finance.

vii. Whether the process of enactment of the Act was unlawful for failure to involve the Senate and the Commission on Revenue Allocation.

viii. Whether allocation of monies to the Fund before the vertical division of the national revenue between the county and national government was unlawful.

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

49. Before we analyze the issues, we shall briefly advert to the general principles of constitutional interpretation.

50. Under article 259 of the *Constitution*, the court is enjoined to interpret the *Constitution* in a manner that:

(a) Promotes its purposes, values and principles;

(b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) Permits the development of the law; and

(d) Contributes to good governance.

51. Article 2 (4) of the *Constitution* provides that any law, that is inconsistent with the *Constitution* is void to the extent of the inconsistency, and any act or omission in contravention of the *Constitution* is invalid.

52. Article 10 on the other hand is premised on the basis that the national values and principles are binding to all and ought to be considered when enacting, applying and interpreting any law. the *Constitution* stands as a unique document, serving as the supreme authority of law within the nation. It holds unparalleled power and influence, requiring that all other laws yield to its interpretation without question. (See *Wambui & 10 others v Speaker of the National Assembly & 6 others* (Constitutional Petition 28 of 2021 & Petition E549, E037 & E065 of 2021 & E077 of 2022 (Consolidated)) [2022] KEHC 10275 (KLR) (Constitutional and Human Rights) (13 April 2022) (Judgment)).

53. In Nairobi High Court Constitutional Petitions No. 33 and 42 of 2018 (Consolidated) *Okiya Omtatah Okoiti v Public Service Commission & 73 others* (2021) eKLR, this court discussed the principles of constitutional interpretation at length. It observed as follows: -

> As regards the interpretation of the *Constitution*, suffice to say that the *Constitution* itself gives guidelines on how it ought to be interpreted. That is in articles 20(4) and 259(1).
>
> 55. Article 20(4) requires courts while interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and the objects of

the Bill of Rights. Article 259(1) command courts to interpret the *Constitution* in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.

56. Courts have also rendered how the *Constitution* ought to be interpreted. The Supreme Court in a ruling rendered on December 21, 2011 in In the Matter of Interim Independent Electoral Commission [2011] eKLR discussed the need for courts, while interpreting the *Constitution*, to favour a purposive approach as opposed to formalism. The court stated as under: -

> (86) .... The rules of constitutional interpretation do not favour formalistic or positivistic approaches (articles 20(4)and 259(1)). the *Constitution* has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. the *Constitution* has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in article 10, in chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the courts.(87)In article 259(1) the *Constitution* lays down the rule of interpretation as follows: "This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance." Article 20 requires the courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.
>
> (88) ..... Article 10 states clearly the values and principles of the *Constitution*, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.
>
> (89) It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting the *Constitution*, is a task distinct from interpreting the ordinary law. The very style

of the *Constitution* compels a broad and flexible approach to interpretation.

57. On the principle of holistic interpretation of the *Constitution*, the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2015] eKLR affirmed the holistic interpretation principle by stating that:This court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that the *Constitution* should be interpreted in a holistic manner, within its context, and in its spirit.

58. The meaning of holistic interpretation of the *Constitution* was addressed by the Supreme Court in In the Matter of the Kenya National Human Rights Commission, Sup Ct Advisory Opinion Reference No 1 of 2012; [2014] eKLR. The court at paragraph 26 stated as follows: -...But what is meant by a holistic interpretation of the *Constitution*? It must mean interpreting the *Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the *Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result."

54. In *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR, the Court of Appeal summarized the various principles of constitutional interpretation as follows:

(21) .... Before the High Court embarked on the interpretation of the contentious provisions of the *Constitution*, it restated the relevant principles of interpretation of the *Constitution* as extracted from case law thus: -that as provided by article 259 the *Constitution* should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance.that the spirit and tenor of *constitution the Constitution* must preside and permeate the process of judicial interpretation and judicial discretion.that the *Constitution* must be interpreted broadly, liberally and purposively so as to avoid "the austerity of tabulated legalism.that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).

These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statues which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result;

> presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise..... The court as an independent arbiter of the *Constitution* has fidelity to the *Constitution* and has to be guided by the letter and spirit of the *Constitution*.

55. In Advisory Opinion Application on No 2 of 2012, *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR, the Supreme Court spoke to purposive interpretation of the *Constitution*. It had the following to say: -

> "...The approach is to be purposive, promoting the dreams and aspirations of the Kenyan people, and yet not in such a manner as to stray from the letter of the *Constitution*."

56. To assist courts in determining the constitutionality of an Act of Parliament or its provisions, a number of principles have been established in numerous decisions. The first principle is the general presumption that Acts of Parliament are enacted in conformity with the *Constitution* as was affirmed by the Court of Appeal of Tanzania in the case of *Ndyanabo v Attorney General* [2001] EA 495 as follows:

> It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative...there is a presumption of constitutionality of a legislation, save where a clawback or exclusion clause is relied upon as a basis for constitutionality of the legislation, the onus is upon those who challenge the constitutionality of the legislation; they have to rebut the presumption.

57. Similarly, the High Court in the case of *Isaac Robert Murambi v Attorney General & 3 others* [2017] eKLR, expressed: -

> The first principle in determining the constitutionality of a statute or a provision thereof is the general presumption that Acts of Parliament are enacted in conformity with the *Constitution*-see Ndyanabo and Alex Kyalo Mutuku. The second principle is that the onus of proving that a law is unconstitutional lies with the person saying so. The duty of the court then is to juxtapose the statute or its impugned provisions with the provisions of the *Constitution*... Thirdly, the court must also be guided by the cardinal rule that a statute should be construed according to the intention expressed in the statute itself-see Halsbury's Laws of England, 4th ed Vol 44(1) para 1372b...The fourth principle is that the *Constitution* should be given a purposive and liberal interpretation-see Anthony Njenga Mbuthi v Attorney General & 3 others [2015] eKLR.

58. Finally, in discussing how constitutionality of impugned Acts of Parliament ought to be interpreted against the constitutional muster, the High Court in Petition No 71 of 2014, Institute of Social Accountability & another v National Assembly & 4 others [2015] eKLR remarked as follows:

> [I]n determining whether a statute is constitutional, the court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see Murang'a Bar Operators and another v Minister of State for Provincial Administration and Internal Security and others Nairobi Petition No 3 of 2011 [2011] eKLR, Samuel G Momanyi v Attorney General & another (supra)). Further, in examining

whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect. The Canadian Supreme Court in the R v Big M Drug Mart Ltd, [1985] 1 SCR 295 enunciated this principle as follows: -

> Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity.

59. Fourth, the *Constitution* should be given a purposive, liberal interpretation. The Supreme Court In re the Matter of the Interim Independent Electoral Commission Constitutional Application (supra) at para 51 adopted the words of Mohamed A J in the Namibian case of *State v Acheson* 1991(20 SA 805, 813) where he stated that;

> "the *Constitution* of a nation is not simply a statute which mechanically defines the structures of government and the relationship government and the governed. It is a mirror reflecting the "national soul" the identification of ideas and..... aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the *Constitution* must, therefore preside and permeate the process of judicial interpretation and judicial discretion.

Lastly and fundamentally, it is the principle that the provisions of the *Constitution* must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see Tinyefuza v Attorney General of Uganda Constitutional Petition No 1 of 1997 (1997 UGCC 3)).

We are duly guided by the principles we have outlined and we accept that while interpreting the impugned legislation alongside the *Constitution*, we must bear in mind our peculiar circumstances. Ours must be a liberal approach that promotes the rule of law and has jurisprudential value that must take into account the spirit of the *Constitution*. "As this is a matter that concerns devolution, we recall what the Supreme Court stated in The *Speaker of the Senate & another v Attorney-General & another & 3 others* - Advisory Reference No 2 of 2013 [2013] eKLR.

59. The preceding broad conversation regarding how courts should address the constitutionality of statutes provides a foundation for examining the subsequent issues within this petition.

Whether the petition has been rendered moot by the 2022 and 2023 amendments to the Act

60. The 1st respondent's case is that the petition is moot and should be dismissed following extensive amendments to the 2015 Act. The amendments were enacted subsequent to the filing of the petition vide the *National Government Constituencies Development Fund (Amendment) Act*, 2022 (2022 Amendment Act) which amended sections 2, 3, 5, 6, 7, 12, 13, 16, 19, 28, 32, 34, 36, 43, 46 and 56 of the Act. Additionally, the *National Government Constituencies Development Fund (Amendment) Act*, 2023 (Amendment Act 2023) introduced amendments to sections 3, 4, 15, 19, 24, 25, 34, 43, 48, 52, 53, 53A and 54.

61. The 1st respondent thus contends that the amendments have fundamentally altered the legal landscape that gave rise to the dispute, thereby rendering the petition moot and otiose. Relying on the case of

National Coalition for Gay and Lesbian Equality and Other v Minister of Home Affairs and Others (CCT10/99) [1999] ZACC 17 (South Africa), the 1st respondent argued that the substratum of the original grounds in the petition no longer holds. Accordingly, the petition is moot, academic and non-justiciable.

62. The 1st respondent also cited the case of Supreme Court of Canada in *Borowski v Canada (Attorney General)* [1989] 1 SCR 342 which challenged the constitutionality of section 251(4), (5) and (6) of the Criminal Code. The Court held that the matter was moot following the striking down of the impugned provisions in *R. v. Morgentaler* (No. 2), during the pendency of proceedings. They also relied on *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* [2016] eKLR which challenged the constitutionality of the Affirmative Action Social Development Fund Regulations 2015, which had been revoked during the pendency of the suit. The court found inter alia that the repealed or amended legislation should not be the subject of judicial consideration especially where any orders made would be of no practical effect. The 1st respondent further relied on *Dande & 3 others v Inspector General, National Police Service & 5 others* (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment) where it was stated that courts should avoid deciding matters that are abstract, academic or hypothetical. It urged the court not to act in vain in deciding matters that have been overtaken by events.

63. The petitioners' response is that notwithstanding the amendments, to the 2015 Act, there is still a raging controversy that requires resolution by this court.

64. The question for our determination in light of the amendments, is whether there remains a tangible and concrete dispute concerning the constitutionality of the Act. We are well guided by the Supreme Court in The Institute for Social Accountability case, (supra), on this issue. In the case, the issue of mootness had first arisen in the Court of Appeal, where the question was whether the enactment of the 2015 Act rendered the appeal moot. The Court of Appeal had found that there was still a dispute requiring adjudication. On further appeal, the Supreme Court held:

> (47) The common thread from the above decisions is that a matter is moot when it has no practical significance or when the decision will not have the effect of resolving the controversy affecting the rights of the parties before it. If a decision of a court will have no such practical effect on the rights of the parties, a court will decline to decide on the case. Accordingly, there has to be a live controversy between the parties at all stages of the case when a court is rendering its decision. If after the commencement of the proceedings, events occur changing the facts or the law which deprive the parties of the pursued outcome or relief then, the matter becomes moot.

65. The Supreme Court went on to consider the effect of legislative change to the offending legislation during the pendency of proceedings and decisions relating thereto and stated:

> (52) The emerging general principle flowing from the above decisions is that where a new statute is enacted that unequivocally and clearly addresses the concerns that are at the heart of a dispute then such a dispute will be moot.

66. After considering the amendments to the Act and their effect, the Supreme Court stated:

> (56) To our minds, the highlighted provisions contain some of the pertinent issues that were still raging controversies before the Court of Appeal for determination even after the coming into force of the NGCDF Act, 2015. Moreover, given that the impugned provisions of the CDF Act 2013 had also been re-enacted in the NGCDF Act, 2015, it did not unequivocally settle the issues in dispute between the parties. As such, there was still live controversy between the parties and therefore it was in the public interest to have the questions that were still raging

adjudicated and determined by the Court of Appeal. In this regard, we are persuaded by the decision of the Constitutional Court of South Africa in AAA Investments (Pty) Limited v Micro-Finance Regulatory Council & Another 2007 (1) SA 343 (CC), 2006 (11) BCLR 1255 (CC) where it was held at para 27 that even in cases that can be said to be technically moot, it is good practice for the court to seize jurisdiction in a matter where the law on a particular issue is not settled and the question is of critical import to the operation of government.

(57) In light of the above, we agree with the reasoning of the Court of Appeal that the same violative provisions have been re-enacted into the NGCDF Act, 2015. Therefore, the intervening legislation did not render the appeal moot because the legislation did not unequivocally address the issues raised by the appellants. Consequently, we affirm the finding of the Court of Appeal that the appeal before that court was not moot.

67. In *Dande & 3 others v Inspector General, National Police Service & 5 others* (supra) the Supreme Court stated:

> The doctrine of mootness requires that controversy must exist throughout judicial proceedings including at the appellate level. An appeal or an issue is moot when a decision will not have the effect of resolving a live controversy affecting or potentially affecting the rights of parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The doctrine of mootness is therefore based on the notion that judicial resources ought to be utilized efficiently and should not be dedicated to an abstract proposition of law and that courts should avoid deciding on matters that are abstract, academic, or hypothetical.

68. Guided by the above authorities, we find that following the 2022 and 2023 amendments, several sections of the Act were deleted and repealed. Sections 15(4), 19, 43(2)(e), 53 were deleted, repealed or substituted by the 2023 Act. The challenge to these provisions in the petition is thus moot.

69. We note that the original section 19 which was challenged in the petition was repealed and substituted therefor with new sections 19 and 19A. We are fortified in our decision because the petition was never amended.

70. We however find that there is still a raging dispute calling for adjudication on the remainder of the Act. For instance, the amendments to section 15(1)(e) & (2) empower the Public Service Commission to make recommendations to the Cabinet Secretary on the persons to be appointed as members of the National Government Constituencies Development Fund Board established under section 14 of the Act. However, the appointment is still subject to approval by the National Assembly.

71. In addition, the challenged section 19(2),(3) & (4) of the Act was repealed. The effect of the repeal is that the National Assembly is not involved in the removal of member of the Board. However, the amendments introduced the new section 19(A) for the filling of a vacancy in the Board. Under Section 19(A) (2) to (9) the National Assembly is deeply involved in the consideration, vetting and approval of all applicants nominated by the Cabinet Secretary and has veto power over the nominees. Further, while the Public Service Commission recommends to the Cabinet Secretary persons for appointment as chairperson and members of the Board the final word would seem to still rest with the National Assembly. The National Assembly is also involved in the setting of a budget for the Board.

72. Section 43(6) is challenged because of the temporal nature of the Constituency Committee which is tied to either the general election or a by election, which is a pointer to the control by the incumbent Member of the National of Assembly. Although the 2023 amendment to this section deleted the 2022 amendment by removing the words “by-election”, the Committee is still tied to the life of Parliament.

73. Section 43(6), (8) & (9) of the impugned Act are being challenged because of the temporal nature of the life of the office of the Fund Account Manager tied to the term of office of the Member of National Assembly. These sub sections were never amended hence the controversy still remains. In addition, subsection 9 still refers to a by-election which word was removed from sub section (6).

74. In light of the foregoing, we find that the 2022 and 2023 amendments to the 2015 Act do not negate the substratum of the entire petition.

Whether the impugned Act violates the principle of and structure of devolution in the *Constitution*

75. The key argument by the petitioners is that devolution is a central pillar of the *Constitution* under articles 1 (3), 174 and 175. They referred to the following passage appearing at page 230-231 of the Final Report of the *Constitution* of Kenya Review Commission 2005:

> The ideal is always a discrete model that ensures effective separation and check on power and functions at all levels and units of devolution, as opposed to a system in which institutions, powers and functions overlap. Essentially, the different levels and units of devolution act as locations of power and enlargements of democratic space, thus enhancing and deepening democracy, democratic methods and people's participation in government processes. Location of power closer to the people also achieves public accountability since power is easier to control at the local rather than at the national level...
>
> Again, poorly designed devolution units may mean expensive duplication of ineffective government; over-bureaucratizing the decision-making process as well as weakening the process of accountability. Moreover, the unjustifiable multiplication of machineries and processes of intergovernmental consultations may result in government rigidity and the accompanying resource and opportunity costs.

76. They also referred to the history and significance of devolution as captured in the advisory opinion by the Supreme Court in *In the Matter of the Speaker of the Senate & another* [2013] eKLR where Mutunga CJ in his concurring opinion stated:

> (182) The current devolution provisions in Chapter 11 of the new Constitution are a major shift from the fiscal and administrative decentralization initiatives that preceded it. It encompasses elements of political, administrative and fiscal devolution. There is a vertical and horizontal dispersal of power that puts the exercise of State power in check. Importantly, the *Constitution* has created a Senate, an institution that enjoys direct legitimacy and a popular mandate, commanding it to be the protector of devolution.

77. They contend that the 2015 Act is "philosophically and structurally similar to the *CDF* Act 2013" and undermines devolution, causes conflict between county and national governments and between the Members of Parliament and Governors. It is further argued that it violates the constitutional principle of division of functions between the two levels of government. Reliance was placed on the decision in *The Council of Governors v Speaker of the Senate & Others* [2015] eKLR where the court held:

> 90. Thus, the constitutional mandate of both the National Assembly and Senate are circumscribed by the *Constitution* and limited to those areas expressly placed within their mandate. With respect to the Senate, its constitutional mandate is that of representation of counties and protection of the interests of counties at the national level; law-making in relation to matters concerning counties at the national level; and allocation of revenue to counties, and oversight over national revenue allocated to counties. Its mandate, like that of the National Assembly,

does not extend to matters or functions reserved by the *Constitution* to counties at the county level.

78. They cited the High Court decision in The *Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR, for the proposition that the powers of one level of government must be protected against intrusion by the other. In that case, the High Court found that the CDF Act 2013 was unconstitutional. Reference was also made to the case of *Council of Governors v Speaker of the Senate & Others* [2015] eKLR where the creation of county development boards by the Senate was impugned by the High Court for altering the structure of devolved governments.

79. They further submitted that article 174 (c) and (d) as read with section 14, Part 2 of the Fourth Schedule to the *Constitution* assign county governments the exclusive function of community development projects at the local level. Learned counsel contended that section 22 of the Act is ambiguous for allowing NGCDF projects to intrude into functional areas of county governments. He also referred to sections 8 and 25(8) & (10) which list sports, local emergency services and environmental activities as Fund projects which in his view contravene the Fourth Schedule to the *Constitution* which assigns them to county governments.

80. The 1st respondent submitted that the petitioners failed to prove that the functions performed by the national government through the Fund fall exclusively within the jurisdiction of county governments. Furthermore, that the projects implemented by the Fund, the management or oversight does not infringe on the functions of the county governments. The 1st respondent argued that such projects constitute works or services within the sphere of the national government; and, that in any case, various arms of government are interdependent.

81. It relied on the Final Report of the Committee of Experts on Constitutional Review for the proposition that constituencies are unviable as a unit of the devolved government. At page 70 of the Report, the experts wrote:

> Considerations underlying cost also made constituencies unviable as units of devolved government, in addition to the fact that using constituencies as units of devolved government would have confused the roles of MPs and devolved governments. Clustering constituencies or districts would simply exacerbate the problems noted above.

82. Regarding the claim that the Act had encroached on the functions of the county governments reserved by the Fourth Schedule or locating Fund projects outside the county governments' planning process, the 1st respondent submitted that the national government has power through the Cabinet Secretary in charge of the docket under section 24(4) of the *Public Finance Management Act* with approval of the National Assembly to establish the Fund and to appropriate from the Consolidated Fund by an Act of Parliament under article 206 (2) (a) or 206(2)(c) of the *Constitution*.

83. The 1st respondent further contended that the 2015 Act clearly provides that the projects to be undertaken are in respect of works and services falling within the functions of the national government under the Fourth Schedule to the *Constitution*. Additionally, that section 31 of the 2015 Act gives the National Government Constituency Development Fund Board the power to scrutinize and approve the projects to be funded. Reference was made to *National Assembly of Kenya & another v Institute for Social Accountability & 6 others* [2017] eKLR where the Court of Appeal stated:

> (26) The distribution of functions in the Fourth Schedule is not static, comprehensive, inflexible or exclusive. By article 186(2), a function may be conferred on both levels of government in which case it is within the concurrent jurisdiction of both governments.

> By article 186(3), a function which is not assigned to a county is a function or power of the national government. The Fourth Schedule does not demarcate exclusive functions, concurrent functions and residual function. Furthermore, the category of function in the Fourth Schedule, are described in broad terms and the breadth of each category is not defined. In some categories, the word "including"' and the phrase "including in particular" are used, which connote that each category may include several functions. Article 168(3) also shows that apart from the *Constitution*, a function or power may be conferred by a national legislation and article 186(4) provides: "For greater certainty, Parliament may legislate for the Republic on any matter.

84. The 1st respondent thus submitted that there was no duplication of functions; and, that the Fund compliments the development agenda of the national and county governments and is not an additional allocation to county governments. Further, that notwithstanding any overlaps of functions, the Fund does not fall within the administration of the county governments. Reliance was made on *National Assembly of Kenya & another v Institute for Social Accountability & 6 others* case [supra].

85. Counsel also cited article 189 of the *Constitution* which calls for co-operation between national and county governments. Reference was also made to the *Intergovernmental Relations Act*, 2012 which provides for settlement of disputes between various levels of government. Reference was made to *National Assembly of Kenya & Another v The Institute for Social Accountability & 6 Others* [2017] eKLR where the Court of Appeal held that the *Constitution* does not bar a Member of Parliament from involvement in development activities in their constituency. The learned Judges had this to say:

> (62) In relation to the facts of this case, there is nothing in the *Constitution* or in Leadership and Integrity Act which restricts a Member of Parliament from involvement in development activities in his constituency. The Member of Parliament is a leader in his own right and represents the constituents both inside and outside Parliament. What the court characterised as unconstitutional is the involvement of Members of Parliament in the planning, approval and implementation of CDF Projects.

86. Relying on *Council of County Governors v Attorney General & 4 others; Controller of Budget (Interested Party)* [2020] eKLR, the 1st respondent argued that the *Constitution* envisages concurrent and exclusive functions for both levels of government and that therefore, there was nothing offensive for the Fund engaging in projects such as health or education.

87. The 3rd and 5th respondents' objections to the petition are three-fold: Firstly, that there is a general presumption of legality or constitutionality of a statute which the petitioners have failed to rebut. On this point, they cited, among other cases, *Ndyanabo v Attorney General* [2001] 2 E.A 485 and *The Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR. Secondly, that the impugned Act does not in any manner usurp the functions of county governments or offend the doctrine of separation of powers. Thirdly, the 3rd and 5th respondents submitted that the role of Parliament under the Act remains purely that of oversight; and, accordingly, the impugned Act is constitutional.

88. We have considered the rival positions. It is now settled that devolution a key cornerstone in the architecture of the *Constitution*. We cannot put it better than the Supreme Court in *In the Matter of the Speaker of the Senate & another*, Advisory Opinion 2 of 2013 [2013] KESC 7 (KLR):

> (183) Devolution is the core promise of the new Constitution. It reverses the system of control and authority established by the colonial powers and continued by successive Presidents. The large panoply of institutions that play a role in devolution-matters, evidences the central place of

devolution in the deconstruction-reconstruction of the Kenyan state. Thus, a "Chapter 11-Only" approach would wrongly obscure the interlocking nature of devolution with other aspects and institutions of the *Constitution*, an element which is critical to its success. These other elements include Treasury, which plays a significant role in public finance matters; Parliament, which requires a functional Senate to provide sufficient protection to the devolved governments, and ensure that there is no gridlock in the budgetary or legislative processes; Judiciary, particularly the Supreme Court, whose mandate under Article 163(6) is to give 'advisory opinion... on any matter concerning county government', and which is an arena for arbitrating conflicts between the National Government and County Governments; Independent Commissions and Offices, such as Controller of Budget and Auditor General, which are crucial in ensuring probity and accountability.

89. The answer to the question whether the 2015 *Act* violates the principle of and structure of devolution is partly provided in the binding decision of the Supreme Court in The Institute for Social Accountability case (supra) as follows:

> (71) This court's jurisprudence is to the effect that a matter touching on county government incorporates any national-level process bearing a significant impact on the conduct of county government. As such, it is important to consider the functions that would be funded by the money derived from the new constitutional basis for the CDF under the amended section 4(2) of the CDF Act. As stated elsewhere in this judgment, Section 3 of the CDF Act 2013 provides that "the object and purpose of the Act is to ensure that a specific portion of the national annual budget is devoted to the constituencies for purposes of infrastructural development, wealth creation, and the fight against poverty at the constituency level." Therefore, some of the functions contemplated under section 3 of the CDF Act 2013 such as infrastructural development and the fight against poverty are also functions bestowed upon the county government under Part 2 of the Fourth Schedule to the *Constitution*. Infrastructural development such as roads, health, agriculture, and trade are functions that are conferred upon both the national and county governments. We however note that these functions are distinct with each level of government given a specific area of operation. This court in Base Titanium Limited v County Government of Mombasa & another (SC Petition 22 of 2018) [2021] KESC 33 (KLR) (16 July 2021) (Judgment) quoted with approval the decision in High Court in Petition *No. 472 of 2014*, Council of County Governors v Attorney General & 4 others [2015] eKLR where the court clarified that the County governments will be in charge of Class D, E, F and G (County Roads), whilst the National government is in charge of Class A, B, and C (National Trunk Roads).
>
> (72) From the above, it is clear that some of the functions contemplated by Section 3 of the CDF Act 2013 concern county governments. Therefore, the CDF (Amendment) Act, 2013 should have been tabled before the Senate in accordance with Article 96 of the *Constitution* for consideration.

90. the *Constitution* calls for optimal utilization of public resources. Indeed, one of the national values and principles of governance in article 10 of the *Constitution* is sustainable development. So much so that the framers of the *Constitution* abhorred wastage of government resources through multiplication of

delivery channels. The Supreme Court in The Institute for Social Accountability & another v National Assembly [supra]. At paragraph *104*, the learned Judges found:

> ..."community-based projects" that veer to the functional competence of the county governments threatens or violates the principle of prudent and responsible management of public funds enshrined in article 201(d) of the *Constitution*.

91. The learned Judges were even more emphatic at paragraph 105 of their judgment:

> Taking into account that we have already made a finding that the wide reach of the Fund under section 22(1) of the CDF Act 2013 will inevitably involve the fund in the implementation of functions constitutionally assigned to the county governments, we find that there is a real threat of the Fund creating confusion as to which project is being implemented by which level of government. In addition, it creates the prospect of duplication of funding for the same project leading to wastage of scarce public resources. Lastly, it creates a state of lack of clarity as to which level of government is responsible for which particular project therefore compromising on accountability. [emphasis added]

92. The upshot is that the creation of the constituency as a service delivery unit under the Act leads to multiple channels of funding and implementation of projects, wastage of public resources and lack of clarity. All these undermine the principle of devolution and the architecture of the *Constitution* on the two levels of government, separation of powers and the primary oversight role of Parliament.

Whether the impugned Act violates the basic structure of the *Constitution*

93. The petitioners argued that the 2015 Act offends the basic structure of the *Constitution* by creating a third level of government. Reference was made to article 89 (1) and the decisions in *Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 others* [2013] eKLR and Kenya National Human Rights Commission [2014] eKLR.

94. Learned counsel stated that in the *Commission for the Implementation of the Constitution v National Assembly of Kenya case* [supra], Lenaola J (as he then was), stated at paragraph 71 that "where the basic structure or the design and architecture of our constitution is under threat, this Court can genuinely intervene and protect the *Constitution*".

95. In the end, and relying on the decision in The *Institute for Social Accountability case* [supra], the petitioners submitted that any law that makes the constituency a unit for development offends the basic structure of the *Constitution*.

96. The reply by the 1st respondent is that the basic structure doctrine is not applicable in Kenya. Reference was made to the Supreme Court decision in *Attorney-General & 2 others v Ndii & 79 others; Dixon & 7 others* (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR), where it was stated:

> The basic structure doctrine and the four sequential steps for amendments as prescribed by the High Court and the majority of the Court of Appeal were not applicable in Kenya under the *Constitution*. Any amendment to the *Constitution* had to be carried out in strict conformity with the normative standards and the provisions of Chapter Sixteen of the *Constitution*.

97. In view of the above judgment, which is binding on this court and by dint of article 163(7) of the *Constitution* which provides that "all courts, other than the Supreme Court, are bound by the decisions

of the Supreme Court", we find that the challenge by the petitioners to the 2015 Act founded upon violation of the doctrine of basic structure of the *Constitution* fails.

Whether the Act offends the division of functions between the two levels of government

98. The petitioners asserted that the Act fails to respect the principle of division of functions by interfering with the functions and functional integrity of county governments. They impugned section 22 of the Act alleging that the section does not provide any clarity that is required to ensure that the Fund projects do not intrude into functional areas of county governments; sections 8, 25(8) and (10) which lists sports, local emergency services and environmental activities as part of the projects located to the Fund, yet these services and activities are set apart under the Fourth Schedule to the *Constitution* as functions of the county governments. The petitioners relied on the cases of *The Council of Governors v Speaker of the Senate & Ors* [2015] eKLR; *The Institute of Social Accountability case* [supra]; and *Canadian Western Bank v Alberta* [2007] 2 SCR 3, 2007 SCC 22. In the former two cases, the court emphasized the need to enact legislation that assists and strengthens the county governments in the discharge of their roles. Similarly, in the cited Canadian case, the court acknowledged that the powers of one level of government must be protected against intrusion, even incidental by the other level.

99. It was submitted that the Canadian and South African Courts developed a criterion referred to as the Pith and Substance Test to determine what level of government has the competency to deal with a certain matter or function, which test looks at the dominant purpose of the law.

100. According to the petitioners, to realize the objects of devolved government under article 174 (c) and (d), item 14, Part 2 of the Fourth Schedule to the *Constitution* assigns to the county governments the exclusive function of ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.

101. It was therefore argued that as a consequence, community development projects at the local level must be implemented and coordinated by and through county governments and their structures.

102. Learned counsel for the 1st respondent outlined the background and evolution of the Fund and the Act as impugned. In his view, the National Assembly remedied the defects of the 2013 Act which was subject of High Court Petition No. 71 of 2013, by enacting the 2015 Act long before the Court of Appeal delivered its judgment on the appeal in Petiti on 71 of 2013. He highlighted the administrative and financial structure of the Act and the nature of projects undertaken under the impugned Act. He submitted that the Act does not violate the division of functions between the national and county governments nor does it contravene the principles of public finance. In his view, the Act was a vital instrument for the implementation of national government functions at the grass root levels and therefore urged this court to dismiss the petition.

103. We have considered the arguments by the parties. As earlier stated, article 6(2) of the *Constitution* provides 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. Under Article 186 (1) of the *Constitution*, the functions and powers of the national government and county governments shall be as set out in the Fourth Schedule.

104. Parliament as a legislative arm of government under the *Constitution* consists of the Senate and the National Assembly. The legislative remit of the National Assembly falls under the national government in the vertical division of powers between the national government and the county governments. This is evident from article 95 of the *Constitution*.

105. We have examined the nature of the projects set out in the 2015 Act as amended in 2022 and 2023. The projects include education bursary schemes and education days, teaching and learning activities and other learners' social support programmes; climate change mitigation activities including afforestation, reafforestation, grassroot sensitization and tree seedling production.

106. In *The Institute for Social Accountability case*, (supra), the Supreme Court stated as follows concerning the implementation of community projects and the funding thereof:

> 86. Determinative of this question is the interpretation of section 22(1) of the CDF Act 2013 which in listing the projects for which the Fund is to be deployed stipulates as follows:
>
> > "Projects under this Act shall be community-based in order to ensure that the prospective benefits are available to a widespread cross-section of the inhabitants of a particular area."
>
> 87. The determinative phrase "community-based" is not defined anywhere in the statute. However, Bryan A Garner (Ed), Black's Law Dictionary, 7th ed. (West Group, 1999) at page 273 defines "community" as follows:"
>
> A neighborhood, vicinity, or locality; 2. A society or group of people with similar rights or interests."
>
> There is an evident connection between "community" that is the target of the CDF projects and "local".
>
> 88. A similarly important provision to the determination of this question is section 3 of the CDF Act 20132013 quoted in paragraph 71 of this Judgment. A look at the Fourth Schedule of the *Constitution* (pursuant to the terms of article 186(1) of the *Constitution*) that distributes functions between the national government and the county governments, shows that it is the county governments that are allocated most of the functions and powers that can be said to be "community" or "local" in orientation. Examples of such functions and powers include those relating to county health services, county transport, trade development, county public works and services, pre-primary education, and village polytechnics, amongst others. In contrast, to a large extent, the functions and powers of the national government with respect to most of these functions relate to policy formulation. This approach in the fourth schedule of the *Constitution* resonates with the principle of "subsidiarity" which underpins the division of powers under devolved systems of government. Subsidiarity is the broad presumption that sub-national governments ought to be assigned those functions and powers which vitally affect the life of the inhabitants and allow the development of the country in accordance with local conditions of sub-national units, while matters of national importance concerning the country as a whole and overarching policy formulation are assigned to the national government. It follows and we so find that the implementation of community-based projects envisaged under section 22 and the infrastructural development projects envisaged under section 3 of the CDF Act 2013 would inevitably cover and target the functions assigned to county governments. (emphasis added)

107. According to the 1st respondent, these projects are meant to assist the local community. However, we note that the Supreme Court in above case added that:

> 104. It is against this context, that we must determine the question posed as to whether Section 22(1) of the CDF Act 2013 allowing the CDF to fund "community- based projects" that veer to the functional competence of the county governments threatens or violates the principle

of prudent and responsible management of public funds enshrined in article 201(d) of the *Constitution*.

105. Taking into account that we have already made a finding that the wide reach of the Fund under section 22(1) of the CDF Act 2013 will inevitably involve the fund in the implementation of functions constitutionally assigned to the county governments, we find that there is a real threat of the Fund creating confusion as to which project is being implemented by which level of government. In addition, it creates the prospect of duplication of funding for the same project leading to wastage of scarce public resources. Lastly, it creates a state of lack of clarity as to which level of government is responsible for which particular project therefore compromising on accountability.

106. While we appreciate the concerns that motivated the creation of the CDF and public support for it, there are more effective ways of decentralizing funding to the local level without compromising on key constitutional principles like those of public finance. For example, it is possible to channel the funding through the two governmental structures provided in the *Constitution*, for example, to the county governments as conditional or unconditional grants as envisaged in article 202(2); or, through the structures of the national government at the local levels as contemplated in article 6(3). We further note that even though the CDF (Amendment) Act, 2013 provides that the monies under the Act shall be considered as funds allocated under article 206 (2) (c), under Section 10 of the CDF Act 2013, the Cabinet Secretary in allocating the fund for each financial year must seek concurrence of the relevant Parliamentary Committee. This clearly violates the principles of accountability and integrity due to likely conflict of interest. This is because a Member of Parliament cannot oversee the implementation or coordination of the projects and at the same time offer oversight over the same projects. To this end, we find that the CDF as structured under the CDF Act 2013 violates the constitutional principles on public finance, particularly the principle of prudent and responsible management of public funds as enshrined in article 201(d) of the *Constitution* may be considered as development projects for purposes of this Act provided that the allocation to such activities does not exceed five per centum of the total allocation to the constituency in that financial year.

108. Addressing this issue of duplication of functions and therefore leading to wastage of resources, the Supreme Court in *The Institute for Social Accountability case* (supra) had this to say:

102. We take the view that Article 201 expresses the idea of responsible governance. It envisages that the two levels of government will manage fiscal resources prudently by putting in systems that ensures that the implementation of projects aimed at delivering a public good and service is cost-effective. It also embodies the desire for fiscal efficiency which speaks to the need to eliminate wastages in service delivery and provision of public good and service. It means that where it is a policy objective of the government to deliver a particular public good or service then the system for delivery of that policy objective should be designed in a manner that ensures that public funds are not wasted or abused.

103. The implication of the principle of prudent and responsible management of public money for questions of inter-governmental relations is that there should be clarity in the allocation and assignment of tasks to avoid duplication in the deployment of resources. This will avoid the problem of the two levels of the government ending up directing and spending resources on the same project....

109. Additionally, section 8 of the 2015 Act creates an Emergency Reserve equivalent to 5% which shall remain unallocated and available for emergencies that may occur within the Constituency. The section provides as follows:

(1) A portion of the Fund, equivalent to five per centum (hereinafter referred to as the "Emergency Reserve") shall remain unallocated and shall be available for emergencies that may occur within the Constituency.

(2) The Constituency Committee shall determine the allocation of the emergency reserve in accordance with the Act.

(3) "Emergency" shall be construed to mean an urgent, unforeseen need for expenditure for which it is in the opinion of the committee that it cannot be delayed until the next financial year without harming the public interest of the constituents.

110. This Emergency Reserve is akin, in all respects and aspects to the County Emergency Funds and the Contingency Fund created under the *Contingency and County Emergency Funds Act* No.17 of 2011 (CCEF Act). The object of the Act is to ensure that the Contingencies Fund, and the County Emergency Funds are managed and operated by the national government and the county governments respectively as contemplated by article 208(2) of the *Constitution*.

111. Part 3 of the *CCEF* Act under section 10(2) provides for the purpose of the emergency fund being to enable payments to be made in respect of a county when an urgent and unforeseen need for expenditure arises for which there is no specific legislative authority. This fund at the county level is administered by the county government Secretary while at the national government level, it is administered by the Treasury under the management of the Cabinet Secretary responsible for matters relating to Finance.

112. Having considered the functions of the emergency reserve and the contingency and emergency funds, we have no doubt in our minds that the emergency reserve is a replica of the above two other funds established by statute and consequently, we are in agreement with the petitioners that the 2015 Act created a duplication of activities and or wastage of resources which could alternatively be assigned to the county governments as provided in article 186(3).

113. It is important to have clarity about which level of government is empowered to do what. This avoids confusion and duplication of mandates and responsibilities, and allows for proper accountability to citizens in respect of service delivery. When there is no clarity, blame can easily be shifted from one sphere of government to the other.

114. We are therefore persuaded that first, the Fund has the potential of creating confusion in the implementation of projects by the two levels of government. Second, duplication of funding for the same project is inevitable leading to wastage of scarce public resources. Lastly, the Fund fosters a state of lack of clarity as to which level of government is responsible for which particular project thereby compromising accountability.

Whether the Act violates the doctrine of separation of powers

115. The petitioners asserted that the 2015 Act violates the principle and doctrine of separation of powers. They argued that the *Constitution* creates legislative and executive organs both at the national and county levels that are separate and independent of each other. They relied on the decisions of the Supreme Court in *Interim Independent Electoral Commission Constitutional* Application No. 2 of 2011; the High Court in *Jayne Matu & Another v AG and Another,* Nbi Petition No. 108 of 2011,

The *Institute of Social Accountability & another v National Assembly & 4 others* Pet 71 of 2013 and the South African Constitutional Court in *Van Rooyen and Others v The State and Others* [2002] ZACC 8.

116. They further submitted that the provisions of articles 1(3) and 2(2) of the *Constitution* ensure that each state organ performs its functions as mandated by the *Constitution*. They added that sections 15 (4), 19, 23 (1), 43 (1), (4) & (6), 53 (3) & (5) of the 2015 Act give members of the National Assembly roles that should be the preserve of the national executive. Further, that to the extent that a number of provisions allow members of the National Assembly to directly or in effect, participate in or be in control of the implementation of the Fund, was a violation of the *Constitution* and in particular, article 234 (2) (ii).

117. According to the petitioners, failure to observe the principle of separation of powers violates the principle of accountability as was explained by the Supreme Court in *The Institute of Social Accountability case* (supra).

118. To counter the above assertions and arguments, the 1st respondent contended that the Fund forms part of the expenditure estimates of the national executive and that its allocation is therefore determined by the National Assembly after the *Division of Revenue* Act is enacted. Further, that pursuant to section 4 of the 2015 Act as read with article 95 (4) (c) of the *Constitution*, the National Assembly is obliged to exercise oversight over national revenue and expenditure. The 1st respondent outlined the administrative structure of the Fund as set out in sections 14, 15, 16, and 43 of the 2015 Act as well as the audit structure of the Fund as stipulated in sections 11 and 16(b) thereof.

119. The 1st respondent further submitted that in determining whether the impugned statute violates the doctrine of separation of powers, this Court should be guided by the test laid out by the Supreme Court in The Institute of Social Accountability case, (supra) and that in doing so, analyze the role played by Members of the National Assembly in the Fund. The 1st respondent was categorical that neither it nor its members have personal interest or stakes in the determination and implementation of projects funded under the Act.

120. It was further contended that in any case, absolute separation of powers does not exist and that neither is it contemplated in the *Constitution*. Reliance was placed on an excerpt from Alex Carol's *Constitutional and Administrative Law*, 5th Ed pg 37; R. Pierce's article on *Separation of Powers and the Limits of Independence* (1989); and O. Hood Philips and Jackson in *Constitutional and Administrative Law*, 8th Ed, Paul Jackson and Patricia Leopold, London Sweet & Maxwell 2001 pg 12 para 1-017; and the cases of *Panama Refining Company v Ryan* (1934) 293 US 388, 440; and *Bhim Singh v U.O.I & Others* (2010) INSC 358 (6 May 2010).

121. It was submitted in reiteration that one cannot simply say that the impugned Act offends the principle of separation of powers and that the *Constitution* does not recognize complete separation of powers. They cited examples such as the independent commissions; that the President has a veto to override legislation; the Judiciary Fund as well as judge-made law. Further submission was that article 125 of the *Constitution* gives parliamentary committees powers of the High Court while the Senate has power to remove governors by impeachment, which is an exercise of judicial role; and, that Parliament approves the appointment of the Chief Justice and that therefore, there is no pure separation of powers.

122. The 1st respondent also cited the High Court judgment in The Institute for Social Accountability case (supra) and argued that the concept of a constituency development fund is not unconstitutional and that in enacting the said Act, Parliament was guided by the structural edicts given in the aforementioned case. Counsel for the 1st respondent submitted that members of the National Assembly are not involved in the performance of executive functions, hence, there has been no

violation of the principle of separation of powers since their role in the Act is restricted to oversight as envisaged in the *Constitution*.

123. In determining the above issue, this court acknowledges that the Supreme Court in The Institute for Social Accountability case (supra) explored in detail, the doctrine of separation of powers and its significance, describing it as "a key organizational framework for governance under the 2010 Constitutional Scheme." The Court emphasized that the doctrine is a fundamental principle of law that requires the three arms of government to remain separate, and that one arm of government should not usurp functions belonging to another arm. Appreciating this dichotomy, the court stated:

> The idea of separating the functions and personnel of the three branches of government is intended to give effect to the related concept of 'checks and balances' which is linked to the constitutional principles and values of accountability and good governance; which guarantees that a branch does oversight the discharge of the mandate by a different branch thereby providing restraint on the exercise of public power, for example, the Legislature should oversight the discharge of functions by the Executive branch.

124. The apex Court was categorical in the above case that "allowing Legislators any role, even a merely ceremonial role in discharging a mandate that belongs to the executive branch at either the national or the county level, would promote conflict of interest and compromise their oversight role."

125. The Supreme Court held that Article 1(3) of the *Constitution* delegates power vertically and horizontally to State organs namely, Parliament and the legislative assemblies in the county governments, National Executive and the executive structures in the county governments and Judiciary and the independent tribunals. It also stated that "each level of government has both institutional and functional distinctiveness from each other."

126. Section 15 (4) of the 2015 Act provided for the approval of members of the NGCDF Board by the National Assembly. Section 19 provided for the role of the National Assembly in considering petitions for removal of members of the NGCDF Board while section 43 (1) (4) & (6) and (9) provided for the establishment of the NGCDF Committee for every constituency, approval of the same by the National Assembly and tied the meeting of the Committee to the parliamentary election or by election timelines.

127. Section 15(4) above has since been repealed vide an amendment to the 2023 Amendment Act. However, the National Assembly, under section 15(1) (e), has retained the role of approving members of the Board appointed by the Cabinet Secretary on recommendations of the Public Service Commission. Additionally, under section 43(4) and (5), the names of the seven persons of the NGCDF Committee shall be submitted to the National Assembly for approval before appointment and gazettement by the Board.

128. Whereas the role of the National Assembly in the above two scenarios under sections 15 (1) (e) and 43 (4) and (5) can safely be said to be oversight role, the catch is in section 43(9) which is clear that the Fund Account Manager who is the holder of the purse to the Fund, seconded by the Board to the Constituency shall be the custodian of all records and equipment of the Constituency during the term of Parliament and during transition occasioned by general election or a by election. What this clearly means is that the term of the Fund Account Manager is tied to the term of Parliament which is five years or in the case of a by election. All this implies that the Member of the National Assembly remains in the shadows of the Fund, controlling its operations, however remotely, at the constituency level.

129. Again, section 53 of the 2015 Act provided for the establishment of a Constituency Oversight Committee for projects under the Act which comprised the constituency Member of Parliament as well as other members. Section 53 (3) involved the Constituency Member of Parliament as the member of

the Oversight Committee in mobilizing, sensitizing and soliciting views, opinions and proposals from the public. This entire section 53 of the Act was deleted as a whole in the 2023 legislative amendments and therefore any challenge to the same is moot. We say no more.

130. Article 1(4) of the *Constitution* establishes the national and county governments as two distinct levels of government, each deriving its power directly from the *Constitution* itself. The county government, as outlined in Article 1, does not receive its authority from the national government but rather from the people of Kenya and the *Constitution*. This framework positions both levels of government as equals, with neither being subordinate to the other. That said, the national and county governments are separate yet interconnected entities, required to engage in consultations and cooperation as mandated under Articles 6(2) and 189 of the *Constitution*.

131. The delineation of functions and powers between the two levels of government is provided under Article 186 and detailed in the Fourth Schedule of the *Constitution*. In cases where a function or power is shared by both levels, it falls under concurrent jurisdiction while functions not assigned to county governments remain within the purview of the national government.

132. Additionally, Article 187(1) of the *Constitution* provides for the transfer of functions between the national and county governments through mutual agreement. The national government can therefore influence county affairs in accordance with the *Constitution*, such as through conditional grants to county governments or by assigning functions to the counties as outlined in Articles 186(3) and 187. These grants can be structured to address specific needs within constituencies.

133. the *Constitution* also establishes a variety of institutions and grants them State authority distributed both vertically and horizontally. In the case of *Trusted Society of Human Rights Alliance v The Attorney General and Others* Nairobi Petition No. 243 of 2011 [2012] eKLR, the Court observed as follows:

> the *Constitution* consciously delegates the sovereign power under it to the three branches of government and expects that each will carry out those functions assigned to it without interference from the other two.... this must mean that the Courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the Executive sufficient latitude to implement legislative intent. Yet...the courts have an interpretive role-including the last word in determining the constitutionality of all governmental actions. That, too, is an incidence of the doctrine of separation of powers.

134. The Supreme Court, in In the Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 [2011] eKLR, at paras. 53-54 articulated the above position and described the doctrine of separation of powers as the "palpable spirit" of dividing power between the three branches of government as follows:

> The effect of the *Constitution*'s detailed provision for the rule of law in processes of governance, is the legality of executive or administrative actions to be determined by the Courts, which are independent of the Executive branch. The essence of separation of powers, in this context, is that the totality of governance powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set up, it is to be recognized that none of the several government organs functions in splendid isolation.

135. The 1st respondent argued that the Fund as established under the 2015 Act achieves the objectives of Article 6(3) of the *Constitution* which mandates every state organ to devolve services to the lowest level. This is acknowledged at section 3 of the 2015 Act that the objects of the Act are, among others:

to facilitate the performance and implementation of national government functions in all parts of the Republic pursuant to Article 6(3) of the *Constitution*.

136. It is factually correct that Article 6(3) of the *Constitution* mandates a national State organ to ensure reasonable access to its services in all parts of the Republic, so far as appropriate to do so having regard to the nature of the service. On the other hand, Article 176(2) emboldens the county governments to decentralize their functions and provision of their services to the extent that it is efficient and practicable to do so.

137. Addressing this issue in The Institute for Social Accountability case, (supra) the Supreme Court observed that these twin constitutional provisions are not a license to create a "third" or "parallel" level of government at the constituency. Further, that the decentralization of service delivery must be undertaken within the confines of the structures of the national government or county governments, not parallel to these two levels of government. To do otherwise would create a "third" or "parallel" structure of government which has the effect of altering the basic premises of the system of government created by the *Constitution* thereby "distorting the devolved structure of government."

138. The Supreme Court in the above case stated as follows:

> 130. It will also naturally follow that given the constitutional scheme on separation of powers; Members of legislative bodies, being Members of the National Assembly, Senators, County Women Representatives, and Members of County Assemblies ought not to be involved in the implementation of any service- based mandates which are a preserve of the Executive branch. This is the only way to respect the constitutional scheme on separation of powers and ensure that the Legislators' oversight mandate is not compromised through conflict of interest. Tolerating a contrary position would harm the *Constitution*'s value system, particularly the national values and principles of accountable and good governance.

139. Thus, as long as the Fund, as established, involves aspects of service delivery, however well intended, has the effect of creating structures that are incompatible with the nature of the distribution of functions between the two levels of government. The Supreme Court went on to say as follows, concerning the structure of the Fund:

> 91. ...The functions of service delivery which is the character and nature of "community-based" projects targeted by the CDF Act 2013 are by nature executive functions. Accordingly, by nature they should be discharged by the executive structures of the appropriate level of government in terms of Article 1(3) (b) of the *Constitution* which vests executive functions in "the national executive and the executive structures in the county governments.
>
> (92) We say so because the constituency as conceptualized in the 2010 Constitution is tied to political representation. Article 89(1) of the *Constitution* provides: "There shall be two hundred and ninety constituencies for the purposes of the election of the members of the National Assembly." Throughout the *Constitution*, the idea of constituency whenever it is used is linked to being an electoral unit for political representation. In its true essence, a constituency is a form of territorial districting that defines how voters are grouped for the election of Members of Parliament and are not conceptually envisaged to be service delivery units. This leads to an ineluctable conclusion that the role that a constituency as an electoral unit discharges and its place within the constitutional scheme is tied to the functions constitutionally vested in the Member of the National Assembly. That role is a legislative role and not a service delivery mandate. Therefore, we find that the constituency under the constitutional scheme is tied to the election of representatives to the legislature and representation of the people of the constituency at the National Assembly.

140. Article 95 of the *Constitution* provides for the roles of the National Assembly as follows:

(1) The National Assembly represents the people of the constituencies and special interests in the National Assembly.

(2) The National Assembly deliberates on and resolves issues of concern to the people. (3) The National Assembly enacts legislation in accordance with Part 4 of this Chapter. (4) The National Assembly––

(a) determines the allocation of national revenue between the levels of government, as provided in Part 4 of Chapter Twelve;

(b) appropriates funds for expenditure by the national government and other national State organs; and

(c) exercises oversight over national revenue and its expenditure.

141. There is nothing in the above Article that grants the National Assembly the power to implement projects in the constituency as a service delivery unit. The mandate of members of the National Assembly is to represent, legislate and oversight the national revenue and its expenditure. Accordingly, by creating a Fund that is administered by the Constituency, which is a unit of political representation for legislative and oversight roles, however far removed, the Member of the National Assembly may be, in the management and administration of the Fund, runs afoul the doctrine of separation of powers.

Whether the Act is in breach of the principles of public finance

142. The petitioners' case is that the Act offends the principles of public finance contained in Article 201. In particular, the petitioners submitted that the Act violates the principles of equitable share of resources, prudent use of public money, responsible financial management and clear fiscal planning. They contend that the 2015 Act which was intended to cure the unconstitutionality of the 2013 Act as found by the High Court in January 2015 in The *Institute for Social Accountability & another v National Assembly & 4 others* [2015] eKLR, is philosophically and structurally similar to the 2013 Act.

143. It is their contention that the Act undermines devolution, causes conflicts between county and national governments and between the Members of Parliament and governors. Further that the 2015 Act compromises the principles of fair elections, sustains corruption, intrudes on the functions of the national and county governments and in turn causes a wastage of resources.

144. The petitioners submitted that both national and county governments have elaborate offices and bodies to implement their respective functions. The structures for implementing executive functions at both levels of government are stipulated in statutory instruments including the *National Government Co-ordination Act* and the *County Governments Act*. As such, they asserted that the 2015 Act creates unnecessary, parallel and duplicative structures for conceptualization, management, coordination and implementation of projects.

145. It was further argued that the Act creates a stand-alone project conceptualization, funding and implementation structure that is not anchored on or referenced to the national government development plans or county integrated development plans. They referred to section 27 of the Act which deals with the constituency strategic development plan without elaborating whether the same is synchronized to national or county development plans.

146. The petitioners submitted that section 52 of the Act makes it clear that the Fund is not intended to be harmonized with the national government plans and hence duplication. The Court however notes that this section was repealed in 2023, and we have already found that it is moot.

147. The petitioners assert that under Article 186(3) of the *Constitution*, the national government can through legislation assign some of its functions to counties. Similarly, that under Article 183(1)(b), national legislation can assign the implementation of executive functions to the county executive. Additionally, that Article 202(2) enables the national government to finance such functions and policy objectives in the counties through conditional grants. It is the petitioners' argument that these provisions can be used to avoid duplication and to foster prudent use of resources and proper fiscal planning.

148. The petitioners further challenge the Act for creating numerous offices and bodies for implementation of projects, namely:

a. The Board established by section 14;

b. Chairperson of the Board (Section 15(3))

c. The Chief Executive Officer of the Board (Section 20) and then a separate office of the Secretary to the Board (Section 21)

d. The requirement that the Board appoints as such officers and staff as are necessary (Section 22)

e. An officer of the Board for each constituency (Section 22(2))

f. Project implementation committee (Section 36(1))

g. Project management committee (Section 9)

h. National Government Constituency Development Committee (Section 43)

i. Chairperson of Constituency Committee (Section 27)

j. Fund Account Manager (Section 12(3))

k. Staff of the Constituency Committee (Section 45(1))

l. The National Assembly Select Committee (Section 50(1));

m. Constituency Oversight Committee (Section 53);

n. Arbitrator (Section 56(4))

149. They contend that all those offices are supported through public funds, yet both the national and county governments have their own offices and bodies to implement their projects within their respective functional mandates. They argue that to the extent that the Act creates this elaborate structure, there is duplication of projects and roles and wastage, which undermine the constitutional principles of prudent and responsible use of resources.

150. The 1st respondent submitted that the Division of Revenue Act, 2016 was enacted in accordance with Article 202 of the *Constitution* on conditional allocations, Article 203 on criteria for determining equitable shares and the minimum allocation to county governments and Article 218 on procedures and requirements for consultations with the Commission on Revenue Allocation.

151. The 3rd and 5th respondents did not submit on this issue.

152. The 4th respondent's position on this issue is that the general structure of the Fund under Parts IV, V, VI and VII of the Act adheres to the principles of public finance on prudent use and responsible financial management. It was submitted that contrary to the petitioners' claim, the Act does not establish parallel and duplicative offices, but that the structure therein is complementary to the development effort by the national government. Further that the said structure is a realization of checks and balances and for effective implementation and delivery of services under the Act.

153. The 4th respondent further disagreed with the petitioners' contention that Articles 186(3), 183(1)(b) and 202(2) of the *Constitution* may be used to assign some of the national government functions to county governments. It argued that Article 183(1)(b) deals with functions of county executive committee and 186(3) deals with functions and powers that are not assigned to a county to be that of the national government.

154. We have considered the rival submissions. The principles and framework of public finance are set out in Part 1 of Chapter Twelve of the *Constitution*. Article 201 provides as follows:

> The following principles shall guide all aspects of public finance in the Republic—
>
> a. there shall be openness and accountability, including public participation in financial matters;
>
> b. the public finance system shall promote an equitable society, and in particular —
>
> i. the burden of taxation shall be shared fairly;
>
> ii. revenue raised nationally shall be shared equitably among national and county governments; and
>
> iii. expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;
>
> c. the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;
>
> d. public money shall be used in a prudent and responsible way; and
>
> e. financial management shall be responsible, and fiscal reporting shall be clear.

155. Article 201 requires that any entity dealing with public finance is to be guided by the principles set out therein. The Article speaks to the prudent and responsible management of public resources. This calls for accountability in the management of public resources.

156. The gravamen of the petitioners' case is that the Act offends the principles of equitable share of resources, prudent use of public money, responsible financial management and clear fiscal planning. The petitioners' complaint as we understand it, is that the Act creates unnecessary, parallel and duplicative structures for conceptualization, management, coordination and implementation of projects. This leads to wastage of public resources and militates against the constitutional principles of prudent and responsible use of resources and responsible financial management and clear fiscal planning.

157. In The Institute for Social Accountability case (supra) which challenged the 2013 Act, the Supreme Court considered the principles of public finance in relation to the said Act and had this to say:

> 101. Article 201 of the *Constitution* in entrenching the principles of public finance, embodies the promise of fiscal discipline and accountability in the management of public finances in Kenya. It seeks to re-engineer the management of public resources, especially public finances by enshrining principles to guide and inform all dealings with public finance. Crucial to the current dispute, is article 201(d) which directs that "public money should be used in a prudent and responsible way". Dr John Mutakha Kangu in 'Constitutional Law of Kenya on Devolution' (Strathmore University Press, Nairobi, 2015) at page 240 remarks on the normative demands of this provision as follows:
>
> > "'Prudent' here connotes a measure of carefulness, precaution, wisdom and good judgment in the expenditure and use of money. It calls for sensible, economical and frugal use of public funds. As used in this provision, the term embodies the concept of value for money and use of money for the right purposes. 'Responsible', on the other hand, involves the quality of being accountable for one's actions and responsive to the needs of the people. The two terms imply avoidance of wasteful use of funds and the choosing of priorities that are beneficial to the people."
>
> 102. We take the view that article 201 expresses the idea of responsible governance. It envisages that the two levels of government will manage fiscal resources prudently by putting in systems that ensures that the implementation of projects aimed at delivering a public good and service is cost-effective. It also embodies the desire for fiscal efficiency which speaks to the need to eliminate wastages in service delivery and provision of public good and service. It means that where it is a policy objective of the government to deliver a particular public good or service then the system for delivery of that policy objective should be designed in a manner that ensures that public funds are not wasted or abused.

158. What the Supreme Court stated regarding prudent and responsible management of public finance, is relevant to the matter herein. It also offers useful guidance in determining whether the Act under consideration violates the principles of public finance as set out in Article 201.

159. A key aspect of the Act is the identification of projects within constituencies. Section 27 provides for the identification and submission of projects as follows:

> 1. The chairperson of the Constituency Committee shall, within the first year of the commencement of a new Parliament and at least once every two years thereafter, convene open forum public meetings in every ward in the constituency to deliberate on development matters in the ward and in the constituency.
>
> 2. The Constituency Committee shall deliberate on project proposals from all the wards in the constituency and any other projects which the Constituency Committee considers beneficial to the constituency, including joint projects with other constituencies, consider the national development plans and policies and the constituency strategic development plan, and identify a list of priority objects, both immediate and long term, out of which the list of projects to be submitted in accordance with the Act shall be drawn from.
>
> 3. The list of proposed constituency based projects to be covered under this Act shall be submitted by Constituency Committee to the Board.

160. Under section 27, the constituency committee is charged with the task of deliberating on project proposals from all wards in the constituency and any other project that may be beneficial to the constituency. The committee is also required to consider the constituency strategic plan and identify a list of priority projects to be submitted to the Board. The funding of projects is provided for under section 25 of the Act. The projects are then implemented by the project management committee, pursuant to section 36. Section 54 provides that the provisions of the Act are complimentary to any other development efforts by the national government or any other agency. It further provides that nothing in the Act shall be taken or interpreted to mean that an area may be excluded from any other development programmes. This to our minds means that no area of development is out of the reach of this Fund under the Act and can directly encroach even on the functions of the county governments under the Fourth Schedule of the *Constitution*.

161. It is quite clear from the foregoing, that projects under the Act may include those undertaken by both the national and county governments. Accordingly, given the governments at both levels also budget for all their functions, programmes and projects, allocating money to the Fund leads to double financing of the same functional areas. This clearly undermines the fiscal efficiency imperative that eliminates wastages in service delivery. Duplication of projects and programmes even if intended for the public good, will inevitably result in wastage or abuse of public funds allocated for the same. In such circumstances, fiscal reporting cannot be clear.

162. The Supreme Court in The Institute for Social Accountability case (supra) addressed the duplication of deployment of resources and stated:

> 103. The implication of the principle of prudent and responsible management of public money for questions of inter-governmental relations is that there should be clarity in the allocation and assignment of tasks to avoid duplication in the deployment of resources. This will avoid the problem of the two levels of the government ending up directing and spending resources on the same project. John Mutakha Kangu in 'Constitutional Law of Kenya on Devolution' (supra) at page 177 aptly captures this concern as follows:
>
> > "It is important to have clarity about which level of government is empowered to do what. This avoids confusion and duplication of mandates and responsibilities, and allows for proper accountability to citizens in respect of service delivery.....when there is no clarity, blame can easily be shifted from one sphere of government to the other."
>
> 104. It is against this context, that we must determine the question posed as to whether section 22(1) of the CDF Act 2013 allowing the CDF to fund "community- based projects" that veer to the functional competence of the county governments threatens or violates the principle of prudent and responsible management of public funds enshrined in article 201(d) of the *Constitution*.
>
> 105. Taking into account that we have already made a finding that the wide reach of the Fund under section 22(1) of the CDF Act 2013 will inevitably involve the fund in the implementation of functions constitutionally assigned to the county governments, we find that there is a real threat of the Fund creating confusion as to which project is being implemented by which level of government. In addition, it creates the prospect of duplication of funding for the same project leading to wastage of scarce public resources. Lastly, it creates a state of lack of clarity as to which level of government is responsible for which particular project therefore compromising on accountability.

163. In answering the question whether the Act violates the principles of public finance, we have considered the provisions of the Act as well as the provisions of Article 201 of the *Constitution*. We are also guided by the decision of the Supreme Court in the above cited authority.

164. It is common ground that the Act provides for conceptualization, funding and implementation of projects within constituencies. As we have stated above, under section 54, no area is out of the reach of the Act and projects thereunder may extend to functions of both the national and county governments. We have already found that the Fund has the potential of creating confusion in the implementation of projects by the two levels of government and to duplicate funding for the same projects leading to wastage of scarce public resources and compromising accountability.

165. From our above analysis, we find that the 2015 Act, notwithstanding the 2022 and 2023 amendments, violates the constitutional principles of public finance.

Whether the process of enactment of the Act was unlawful for failure to involve the Senate and the Commission on Revenue Allocation

166. The petitioners argued that the Fund relates to matters concerning county governments. They faulted the passage of the Act by the National Assembly for want of concurrence by the Senate. Reliance was placed on Article 109 (4) and 110 (1) of the *Constitution* and the decisions in The *Institute for Social Accountability case [supra] and the Speaker of the Senate & another v AG & Another & 3 Others* Advisory Reference No. 2 of 2013 [2013] eKLR.

167. It was also submitted that to the extent that the National Assembly failed to consider the recommendations of the Commission on Revenue Allocation (CRA), the Act is unlawful. Reference was made to Article 205 (2) of the *Constitution* which provides as follows:

> 1. When a Bill that includes provisions dealing with the sharing of revenue, or any financial matter concerning county governments is published, the Commission on Revenue Allocation shall consider those provisions and may make recommendations to the National Assembly and the Senate.
>
> 2. Any recommendations made by the Commission shall be tabled in Parliament, and each House shall consider the recommendations before voting on the Bill.

168. Under Article 216 of the *Constitution*, the principal function of the Commission on Revenue Allocation is to make recommendations concerning the basis for the equitable sharing of revenue raised by the national government, between the national and county governments and among the county governments.

169. It was not contested by the respondents that the recommendations by the Commission on Revenue Allocation (CRA) on the formula for equitable sharing of nationally raised revenue between the national and county governments was not obtained. However, we note that under Article 205, the making of the recommendations by CRA on the proposals is at its discretion. Nevertheless, the National Assembly was required to submit the proposals to the CRA for consideration.

170. Returning to the issue of the failure to involve the Senate, the 1st respondent's answer was that the Fund only finances identified and prioritized projects of the national government at the constituency level. The 1st respondent argued that, Senate was thus not required to concur in the legislation. Reliance was placed on the decision of the High Court in Nation Media Group Limited & 6 others v Attorney General & 9 others [2016] eKLR.

171. As we consider this issue, we are well guided by key articles of the *Constitution* detailing the place of the Senate in making of legislation. Article 96 states as follows:

(1) 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.

172. Article 109(3) and (4) on the other hand clarifies when a bill, of the nature of the dispute now before us, should originate from either House of Parliament or when there should be concurrence of both Houses, as follows:

(3) A Bill not concerning county government is considered only in the National Assembly, and passed in accordance with Article 122 and the Standing Orders of the Assembly.

(4) A Bill concerning county government may originate in the National Assembly or the Senate, and is passed in accordance with Articles 110 to 113, Articles 122 and 123 and the Standing Orders of the Houses.

173. the *Constitution* defines a "bill concerning county government" as:

a) A Bill containing provisions affecting the functions and powers of the County Governments set out in the Fourth Schedule

b) A Bill relating to the election of members of a county assembly or a county executive; and

c) A Bill referred to in Chapter Twelve affecting the finances of county governments.

174. The Supreme Court in In the Matter of the Speaker of the Senate & another case [supra] had this to say on the roles of both Houses of Parliament:

(54) The context and terms of the new Constitution, this Court believes, vests in us the mandate when called upon, to consider and pronounce ourselves upon the legality and propriety of all constitutional processes and functions of State organs. The effect, as we perceive it, is that the Supreme Court's jurisdiction includes resolving any question touching on the mode of discharge of the legislative mandate.

(55) The foregoing principle emerges clearly from a logical interpretation, for instance, of Article 109 of the *Constitution*...

175. It is now well settled that the *Constitution* bestows upon courts the power to authoritatively interpret whether the process of enactment of any statute complies with the *Constitution*. In the above decision, the Supreme Court added at paragraph *55*:

> [I]t is clear to us that it would be illogical to contend that as the Standing Orders are recognized by the *Constitution*, this Court, which has the mandate to authoritatively interpret the *Constitution* itself, is precluded from considering their constitutionality merely because the Standing Orders are an element in the "internal procedures" of Parliament. We would state, as a legal and constitutional principle, that Courts have the competence to

pronounce on the compliance of a legislative body, with the processes prescribed for the passing of legislation.

176. We referred earlier to an important finding by the Supreme Court at paragraph 93 of the judgment in The Institute for Social Accountability case [supra] stating:

> [T]he decentralization of service delivery must be undertaken within the confines of the structures of the national government or county governments, not parallel to these two levels of government. Therefore, we see a "third" or "parallel" structure of government as altering the basic premises of the system of government created by the *Constitution* and as distorting the devolved structure of government. This is more so in a context such as the CDF Fund which has the effect of creating structures that are incompatible with the nature of the distribution of functions between the two levels of government.

177. We stated earlier that the impugned Act created an anomalous executive-based- function at the constituency wedged somewhere between the National Government and County Governments. Notwithstanding the fact that its share may be from the allocation to the National Government, a fact contested by the petitioners, we are bound by the Supreme Court finding in the above case that the Fund "distorts the devolved structure of government" and creates "structures that are incompatible with the nature of the distribution of functions between the two levels of government". It must follow that the enactment of the statute without concurrence of the Senate ran counter to Article 193 of the *Constitution*.

Whether allocation of monies to the Fund before the vertical division of the national revenue between the county and national government was unlawful

178. The petitioners' claim is that under the *Division of Revenue Act*, the funds allocated to the Fund were netted before the vertical division of revenue between the national and county governments. As such, the Division of Revenue Act contradicts Section 4 of the 2015 Act which requires that the monies allocated to the Fund come from the share of the national government.

179. The petitioners further argued that the 2015 Act does not meet the requirement of national interest to warrant allocation of funds under Article 203 of the *Constitution* before vertical division of revenue between the two levels of government. That the allocation of funds before the vertical division of revenue undermines the equitable element of sharing of funds required under Articles 202 and 203 as it decreases the resources available to the counties, while increasing those to the national government. This, the petitioners argued violated the principles of public finance and interfered with the basic structure of the *Constitution*.

180. The 1st respondent submitted that contrary to the assertion by the petitioners, section 4(1) of the Act makes it manifestly clear that the allocation to the Fund is from the national government's share of revenue as divided by the annual Division of Revenue Act. They contended that the Division of Revenue Act clearly outlined the division of total shareable revenue between the two levels of government. Further, that the allocation to the Fund in the financial year 2016/2017 came during the consideration and approval of the Appropriations Act, 2016, which was enacted way after the Division of Revenue Act.

181. The 1st respondent further submitted that contrary to the petitioners' allegations, the 2015 Act does not cover functions allocated to county governments under the Fourth Schedule to the *Constitution*. Reliance was placed on section 24 thereof. The 1st respondent argued that given the objects of the Act

as stipulated under section 3 thereof, it is clear that the Fund intends to ensure that the services to be provided by the national government reach all persons at all levels of the country.

182. The 3rd and 5th respondents submitted that the Division of Revenue Act is now repealed by operation of law. They submitted that the issue is moot and hence not justiciable. Their case is that the funds allocated to the Fund are already spent and the declaratory orders sought against the provisions of the Division of Revenue Act cannot issue. Reliance was placed on the case of *Yusuf Gitau Abdallah v Building Centre (K) Ltd & 4 others* [2014] eKLR where the Supreme Court declined jurisdiction over a matter that was "not ripe for the consumption of the Supreme Court". They also relied on the cases of *Anthony Otiende Otiende v Public Service Commission & 2 others* [2016] eKLR and *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* [2016] eKLR.

183. We have considered the arguments on the issue. The law is that the division of revenue between the national and county governments is to be done equitably and from all revenue raised nationally. Under Article 201(b)(ii) of the *Constitution*, revenue raised nationally shall be shared equitably between the two levels of government. This is reiterated in Article 202 which provides that revenue raised nationally shall be shared equitably among the national and county governments. Section 4(1)(a) of the 2015 Act provides that the amount to be allocated to the Fund shall be not less than 2.5% of all the national government's share of revenue. Article 218(1) requires the introduction of the Division of Revenue Bill at least two months before the end of each financial year. The purpose of this bill is to divide revenue raised by the national government among the national and county levels of government in accordance with the *Constitution*.

184. In T*he Institute for Social Accountability case*, (supra), the Supreme Court was confronted with the issue whether the 2013 Act violated the constitutional principles on division of revenue and had this to say:

> 95. The gist of the dispute between the parties revolves around the interpretation of article 201(b)(ii) which provides that revenue raised nationally shall be shared equitably among national and county governments against section 4 of the CDF Act 2013 which establishes a Constituency Development Fund and which indicates that it is a national fund consisting of monies of an amount not less than 2.5% of all the national government ordinary revenue collected every financial year. The money is to be disbursed by the national government through the CDF Board as a grant to be channeled to the constituencies in the manner provided for by the Act.
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> 96. In interpreting article 202(1) of the *Constitution* which stipulates that 'revenue raised nationally shall be shared equitably among the national and county governments', we need to bear in mind that a key concern behind the enactment of the provision was to ensure the optimal funding and working of the devolved system of government. In addition, we need to adopt a harmonious interpretation of the *Constitution* as one whole. Pursuant to this interpretive approach, we need to take into account article 218(1)(a) which provides for the manner of enacting the Division of Revenue Bill. It provides that 'a Division of Revenue Bill, shall divide revenue raised by the national government among the national and county levels of government in accordance with this Constitution'.
>
> 97. Our understanding of what is contemplated by articles 202 (1) and 218(1)(a) of Constitution is that 'revenue raised nationally' is all the revenue accruing from all the revenue-raising powers of the national government. 'Revenue raised nationally' is synonymous with what is termed 'equitable share' and is allocated between the two levels of government. Prior to allocation, this revenue is not yet available to the national government to allocate to its agencies. Only after the national government has received its portion of the equitable share under the Division

of Revenue Act as envisaged in article 218(1)(a), will it be in a position to allocate funds to agencies and instrumentalities falling under its mandate.

98. It follows that the national government and county governments are the only entities entitled to participate in the vertical division of the "revenue raised nationally". To allow an agency of the national government or a "third" structure whose location within the constitutional system is unclear to participate in the sharing of the "revenue raised nationally" is a clear case of violation of not only article 202(1) but also article 218(1)(a) of the *Constitution*.

99. From the foregoing provisions, we find that section 4 of the CDF Act 2013 violates the provisions of the *Constitution* as it seeks to disrupt the revenue sharing formula by directly allocating 2.5% of all the national revenue while the *Constitution* requires that the revenue raised shall be shared equitably among the national and county governments. It is further our considered opinion that if at all any monies is to be deducted from the national revenue, the money should be granted from the national government revenue as a grant but not directly from the national revenue.

100. Consequently, we find that the CDF Act 2013 violates the principles of the division of revenue as stipulated in article 202(1) of the *Constitution*. We, therefore, reverse the finding of the Court of Appeal on this question and restore the finding of the High Court that the CDF Act 2013 violates the constitutional principle on the division of revenue.

185. Flowing from the cited constitutional provisions and the Supreme Court decision, it is clear that the national government may not allocate any funds to its agencies prior to the division of revenue. It is only after the equitable division of all revenue raised is done under a Division of Revenue Bill, under Article 218 of the *Constitution* that the national government can proceed to allocate funds to its agencies. Put differently, the national government may only allocate funds to its agencies from its equitable share under the Division of Revenue Act as envisaged in Article 218(1)(a).

186. In their prayers which are reproduced below, the petitioners appear to challenge both the Bill and the Act. They seek:

i. That an order issue permanently restraining the Cabinet Secretary from allocating funds to the National Government Constituency Development Fund on the basis of the Division of Revenue Bill/Act, 2016.

ii. That an order issue striking down those parts of the Division of Revenue Bill/Act, 2016 purporting to allocate funds to the NGCDF before the vertical division of revenue between the county and national governments.

187. We have carefully looked at both the Division of Revenue Bill and the Division of Revenue Act. The Bill was published on 9th March, 2016 and had not been passed by the National Assembly at the time of filing of the petition and the legislative process was still ongoing.

188. It is trite that no funds can be allocated on the basis of a bill that has not been enacted into law. In the premises, the prayer for an order seeking to restrain the 5th respondent from allocating funds to the Fund on the basis of the Bill as well as the prayer for an order striking down those parts of the Bill purporting to allocate funds to the Fund before the vertical division of revenue between the county and national governments, were in our view, premature and not ripe for consideration by the court at that point.

189. In *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* [2016] eKLR), Onguto, J. stated that the court ought not to act in vain or engage in premature adjudication of matters through

either the doctrine of ripeness or of avoidance. It must not decide on what the future holds either. Similarly, in *Republic v National Employment Authority & 3 others ex-parte Middle East Consultancy Services Limited* [2018] eKLR, where Mativo, J. (as he then was) stated:

> 45. This brings into focus the principle of ripeness which prevents a party from approaching a Court prematurely at a time when he/she has not yet been subject to prejudice, or the real threat of prejudice, as a result of conduct alleged to be unlawful. None of the parties deemed it fit to address this pertinent legal point. The principle of ripeness was aptly captured by Kriegler J[34] in the following words:-"The essential flaw in the applicants' cases is one of timing or, as the Americans and, occasionally the Canadians call it, "ripeness"... Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. Although, as Professor Sharpe points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. ...The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered."
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> 46. Lord Bridge of Harwich put it more succinctly when he stated:- "It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved."[35]It is perfectly true that usually the Court does not solve hypothetical problems and abstract questions and declaratory actions cannot be brought unless the rights in question in such action have actually been infringed.[36] The requirement of a dispute between the parties is a general limitation to the jurisdiction of the Court. The existence of a dispute is the primary condition for the Court to exercise its judicial function.[37] On the other hand, mootness involves the situation where a dispute no longer exists. Ripeness asks whether a dispute exists, that is, whether it has come into being.

190. We note that the petition is dated May 4, 2016 and was filed on May 5, 2016. The Act under challenge was not in existence, given that it was assented to on May 6, 2016 and came into effect on May 23, 2016. In the premises we find that the that the petitioners' prayer in respect of the *Division of Revenue Act*, was speculative.

191. Additionally, a division of revenue act provides for the equitable division of revenue raised nationally between the two levels of government in a given financial year. Accordingly, even if the Act in question had been in existence at the time of filing the petition, which it was not, the same was for the financial year 2016/2017 and lapsed by effluxion of time.

192. The principle of justiciability prohibits the court from entertaining hypothetical or academic issues or engage in abstract arguments. In the *Wanjiru Gikonyo & 2 others case* (*supra*) Onguto, J. stated:

> 27. Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination.
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> 28. Conversely, the court is also prevented from determining an issue when it is too late. When an issue no longer presents an existing or live controversy, then it is said to be moot and not worthy of taking the much sought judicial time.

193. We therefore find that the *Division of Revenue Act* having lapsed at the end of the financial year in question, there is no live issue for determination by this Court. Accordingly, the matter is not justiciable.

194. Per Kimondo & Aburili, JJ: The Fund has been in operation since 2003. Its centrality and the value of its programmes to the local communities across 290 constituencies cannot be gainsaid. We are also alive to the fact that there are short-term, medium-term and long-term projects already being implemented by the Fund. Moreover, the life span of the projects is not necessarily pegged to the financial year. In addition, the Fund has employees and may have contracts with third parties. Lastly, we are now in the middle of the current financial year and funds may have been allocated for ongoing projects. Accordingly, and despite our finding that the 2015 Act as last amended in 2023 is unconstitutional, it will not be in the interest of the nation or of the cause of justice to bring it to an abrupt closure.

195. We thus propose that the impugned Act and Fund established thereunder and its programmes shall cease to operate at the stroke of midnight on June 30, 2026.

196. Per Thande, J: We have found that the constituency is not a unit of service delivery and have found for this, and other reasons that the impugned Act and Fund are unconstitutional. The time is now ripe for the people of Kenya to appreciate that a constituency is not a service delivery unit but of representation and that the role of the Member of the National Assembly must remain that of representation, legislating and oversight as per Article 95 of the *Constitution*. I am equally alive to the fact that funds have been allocated in the current financial year to the projects under the Fund. However, I am of the view that extending the Fund beyond the current financial year would unreasonably perpetuate the unconstitutionality of the Act. In light of this I would propose that the 2015 Act and the Fund cease to operate on June 30, 2025, the end of the current financial year.

197. For all the above reasons, we now make the following declarations and orders:

1. That the National Government Constituencies Development Fund Act of 2015 as amended in 2022 and 2023 is hereby declared unconstitutional.

2. That the National Government Constituencies Development Fund and all its programmes, projects and activities shall cease to operate at the stroke of midnight on June 30, 2026.

3. That this petition having been filed in the public interest, each party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024

.....

K. KIMONDO

JUDGE

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R. E. ABURILI

JUDGE JUDGE

.....

M. THANDE

JUDGE JUDGE