



REPUBLIC OF KENYA



Ondago v Natembeya & 15 others; Auditor General & another (Interested Parties) (Constitutional Petition E003 of 2023) [2023] KEHC 22268 (KLR) (19 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22268 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CONSTITUTIONAL PETITION E003 OF 2023**

**AC MRIMA, J
SEPTEMBER 19, 2023**

BETWEEN

KEVINE OTIENO ONDAGO PETITIONER

AND

**H.E. GEORGE NATEMBEYA, GOVERNOR COUNTY GOVERNMENT OF
TRANS-NZOIA 1ST RESPONDENT**
THE COUNTY GOVERNMENT OF TRANS-NZOIA 2ND RESPONDENT
**THE COUNTY EXECUTIVE COMMITTEE MEMBER FOR FINANCE,
COUNTY GOVERNMENT OF TRANS-NZOIA 3RD RESPONDENT**
**THE CHIEF OFFICER FINANCE, COUNTY GOVERNMENT OF TRANS-
NZOIA 4TH RESPONDENT**
EDWARD OUKO 5TH RESPONDENT
JAMIN KWANUSU 6TH RESPONDENT
ALEX RUGERA 7TH RESPONDENT
CHRIS WASIKE MUNG'OMA 8TH RESPONDENT
IMELDA MIDZUKANI ARUULA 9TH RESPONDENT
KIRATO WANJALA WANYONYI 10TH RESPONDENT
JARED RODRICK NYAUNDI 11TH RESPONDENT
PATRICK CHACHA 12TH RESPONDENT
SILAS MUSAKALI 13TH RESPONDENT
TABITHA MUTHUI KIMONYO 14TH RESPONDENT
CHRISTIAN GATHERU MAHINDA 15TH RESPONDENT



JAMES RWANDA NCEBERE 16TH RESPONDENT

AND

THE AUDITOR GENERAL INTERESTED PARTY

SALARIES & REMUNERATION COMMISSION INTERESTED PARTY

The Taskforce established to audit pending bills and human resource in Trans Nzoia County and its resultant report declared unconstitutional for usurping the powers of the Auditor General, the County's Internal Audit Office and the Audit Committee

The petition raised governance issues relating to the constitutionality of the taskforce established by the Governor of Trans Nzoia County to audit pending bills and human resource in Trans Nzoia County. The court held that the establishment of the Taskforce contravened various articles of the Constitution, the Public Audit Act, the Public Finance Management Act and Public Finance Management (County Governments) Regulations, 2015, by usurping the powers of the Auditor General and those of the Internal Audit Office and the Audit Committee of the County Government of Trans Nzoia County. The court thus found the Taskforce and its resultant report unconstitutional.

Reported by Kakai Toili

Constitutional Law – public finance – financial officers and institutions - financial officers and institutions charged with the duty to audit counties – where a governor of a county established of a taskforce to undertake audit of pending bills and human resource - whether the establishment of the taskforce was unconstitutional for usurping; the powers of the Auditor General; the internal audit office of the county government; and the audit committee of the county government - whether the report by the taskforce could be legally adopted and debated by the respective county assembly - what was the appropriate procedure to be followed by a governor who found the audit reports by the Auditor-General to be inadequate - Constitution of Kenya, 2010, articles 174(a) and (i), 226(3) and 229; Public Audit Act, Cap 412B, sections 23 and 24.

Constitutional Law – public finance – financial officers and institutions – Auditor General vis a vis the internal audit office and the audit committee in a county government - role of the Auditor General, the internal audit office and the audit committee in a county government - nature of audits that the Auditor General may undertake - what was the distinction between the internal audit office and the audit committees in county governments and the Auditor General - Constitution of Kenya, 2010, articles 226(3) and (4) and 229; Public Finance Management Act, Cap 412A, section 155; Public Audit Act, Cap 412B, sections 4, 7, 31, 33 and 36; Public Finance Management (County Governments) Regulations, 2015, regulations 156 and 167.

Constitutional Law – national values and principles – public participation – public participation in county governments - whether it was mandatory for decisions which dealt with the day-to-day operations of county government to be subjected to public participation

Constitutional Law – interpretation of the Constitution -principles of interpreting the Constitution - what were the principles of interpreting the Constitution – Constitution of Kenya, 2010, article 259.

Brief facts

The petition raised governance issues relating to the constitutionality of the Taskforce on Pending Bills and Human Resource Audit (the Taskforce) as undertaken by the Trans Nzoia County Government. The petitioner contended that the establishment of the Taskforce by the 1st respondent to undertake the audit of pending bills and human resource variously infringed the Constitution, the Public Finance Management Act 2012 and the Public Audit Act 2015. The petitioner stated that the 1st interested party (the Auditor General) had exclusive constitutional powers to audit all State organs including county governments. Those audit roles included but were not limited to finance, performance, accountability and special audits.



The petitioner contended that private individuals had no powers to audit the County Government. The petitioner further argued that it was only the Auditor General who was vested with powers to delegate constitutional and statutory audit powers but done so procedurally. The petitioner thus sought for among other orders; a declaration that the decision of the 1st respondent to appoint the Taskforce to audit the accounts of the County Government of Trans-Nzoia, which was a constitutional mandate of the Auditor General was unconstitutional.

Issues

- i. Whether the establishment of a taskforce by a county government to undertake audit of pending bills and human resource was unconstitutional for usurping;
 1. the powers of the Auditor General;
 2. the Internal Audit Office of the county government; and
 3. the Audit Committee of the county government.
- ii. Whether a report by a taskforce established by a county government to undertake audit of pending bills and human resource could be legally adopted and debated by the respective county assembly.
- iii. What was the distinction between the internal audit office and the audit committees in county governments and the Auditor General?
- iv. What was the appropriate procedure to be followed by a governor who found the audit reports by the Auditor-General to be inadequate?
- v. What were the types and nature of audits that the Auditor General may undertake?
- vi. What was the role of the internal audit office and the audit committee in a county government?
- vii. Whether it was mandatory for decisions which dealt with the day-to-day operations of county government to be subjected to public participation.
- viii. What were the principles of interpreting the Constitution?

Held

1. Constitutional interpretation also referred to as judicial interpretation was the legal creativity of attributing or assigning meaning to the provisions of the Constitution. The Constitution was document sui generis. The relevant principles of interpretation of the Constitution as extracted from case law were that;
 1. as provided by article 259 the Constitution, the Constitution should be interpreted in a manner that promoted its purposes, values and principles; advanced rule of law, human rights and fundamental freedoms and permitted development of the law and contributed to good governance;
 2. the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion;
 3. the Constitution must be interpreted broadly, liberally and purposively so as to avoid the austerity of tabulated legalism;
 4. the entire Constitution had 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); and
 5. the court as an independent arbiter of the Constitution had fidelity to the Constitution and had to be guided by the letter and spirit of the Constitution.
2. Article 226 of the Constitution provided for accounts and audit of public entities. The provision called for the enactment of an Act of Parliament to provide for the keeping of financial records and the auditing of accounts of all governments and other public entities, and to prescribe other measures for securing efficient and transparent fiscal management; and the designation of an accounting officer in every public entity at the national and county level of Government. Article 226(3) plainly stated that the accounts of all governments and State organs shall be audited by the Auditor-General. In



- article 226(4), the accounts of the office of the Auditor-General were to be audited and reported on by a professionally qualified accountant appointed by the National Assembly. Article 229(1) of the Constitution created the independent office of the Auditor-General. Once appointed, the Auditor-General undertook the mandate in article 229(4).
3. To enable the Auditor-General discharge its duties, Parliament passed several legislations; one of them was the Public Audit Act, No. 34 of 2015. That statute provided in its preamble that it was an Act of Parliament to provide for the functions and powers of the Office of the Auditor-General in accordance with the Constitution, and for connected purposes. Section 4 of the Public Audit Act, commanded the Office of the Auditor-General to ensure reasonable access to its services in all parts of Kenya and may establish branches at any place in Kenya. Further to the functions and responsibilities of the Auditor-General as set out in article 229 of the Constitution, section 7 of the Public Audit Act, provided for other functions.
 4. Section 31 of the Public Audit Act provided for how the processes of audit shall be undertaken. The audits under article 229 of the Constitution, may take the form of annual financial audits, performance audits or procurement audits. The annual financial audits referred to the audits undertaken under article 229. They were undertaken for State Organs and public entities and the Auditor-General reported annually to Parliament and relevant county assembly. Performance audits were conducted to examine the economy, efficiency and effectiveness with which public money had been expended pursuant to article 229. Those audits usually related to projects implementation. In doing so, the Auditor-General evaluated, whether the citizen had gotten value for money in the project. The report was also submitted to Parliament or county assemblies for tabling and debate.
 5. In procurement audits, the Auditor-General examined the public procurement and asset disposal processes of a State organ or a public entity with a view to confirm as to whether procurements were done lawfully and in an effective way. The report was also submitted to Parliament or county assemblies for tabling and debate. That was provided for under section 36 of the Public Audit Act.
 6. Apart from the three types of audits which the Auditor-General may undertake under article 229 of the Constitution, there were other two types of audits which the Auditor-General may, as well, undertake. They were, as follows: -
 1. Periodic audits.
 2. Forensic audits.
 7. Periodic audits were provided for under section 34 of the Public Audit Act. They may be undertaken by the Auditor-General at his or her own initiative or upon request by an entity. Those audits were proactive, preventive, and deterrent to fraud and corrupt practices, systemic and were usually carried out to determine and evaluate the effectiveness of risk management, control and governance processes in State Organs and public entities. Section 37 of the Public Audit Act was on forensic audits. They were audits requested by Parliament and county assemblies to establish fraud, corruption or other financial improprieties in State Organs and public entities.
 8. Regardless of the type of an audit, all audit reports must be submitted to Parliament or the relevant county assembly, as the case may be. The reports must also contain recommendations on how a State organ or public entity may improve the application of funds in a lawful and in an effective way and how responsive the State organ or public entity had been to past audit findings and recommendations.
 9. The Auditor-General had powers to prepare special reports in the course of an examination and audits. Those reports were on matters that came to the attention of the Auditor-General and the Auditor-General felt should immediately be brought to the attention of Parliament or the relevant county assembly. The Auditor-General may outsource audit services pursuant to section 23 of the Public Audit Act. The Auditor may also engage the services of or work in consultation with professional or technical experts or consultants, whether in the public service or not, to enhance its performance. That was provided for in section 24 of the Public Audit Act.



10. Apart from the Office of the Auditor-General, there was also the Audit Advisory Board established under section 25 of the Public Audit Act. Its main function was to advise the Auditor-General on the exercise of its powers and the performance of the functions under the Constitution and the law. There were other legislations which variously provided for the audit roles in Kenya.
11. There was a deliberate design by the people of Kenya and Parliament to ensure that, on the basis of public audits, State organs and public entities were protected from pilferage and waste of public resources and those culpable were accordingly dealt with. For instance, under article 226(5) of the Constitution, if the holder of a public office, including a political office, directed or approved the use of public funds contrary to law or instructions, the person was liable for any loss arising from that use and shall make good the loss, whether the person remained the holder of the office or not.
12. The Constitution and the Public Audit Act mandated Parliament and county assemblies to debate on the audit reports and make appropriate resolutions including referring matters for further investigations by other entities. The Auditor-General could refer matters for further investigations to the relevant entities. Further, the Public Audit Act and other legislations created criminal offences. Parliament and county assemblies may also recommend the withholding of funds to a State organ or public entity or the surcharging of monies found deficient or lost in State organs or public entities.
13. The issues of pending bills and human resource related to prudent use of public finances. Such issues were usually captured under the audits undertaken pursuant to article 229 of the Constitution. The audits contemplated under article 229 were annual financial audits, performance audits or procurement audits. If for instance the twin issues were, for any reason, not properly captured under the reports prepared pursuant to article 229, the County Government had the leeway of requesting the Auditor-General to carry out a periodic audit. Further, the County Government could also have requested the County Assembly of Trans Nzoia to sanction the Auditor-General to carry out a forensic audit.
14. Article 174 of the Constitution provided for the objects of devolution. They were nine of them including the promotion of democratic and accountable exercise of power, enhancement of checks and balances and the separation of powers, among others. Article 179 of the Constitution asserted the position that the governor was the chief executive officer of a county. Article 235 of the Constitution was on the staffing of county governments. Such was to be undertaken within a framework of uniform norms and standards prescribed by an Act of Parliament.
15. Section 155 of the Public Finance Management Act provided for the need of a county government to maintain internal auditing arrangements. A county government was required to establish an internal auditing committee whose composition and functions were to be prescribed by the appropriate regulations. The regulations in the instant case were the Public Finance Management (County Governments) Regulations, 2015. In Part XIII, the Regulations provided for internal audit and audit committees. Regulation 156 of the Regulations created the office of the County Head of Internal Audit Services. The office was in the County Treasury. The Head of Internal Audit unit enjoyed operational independence through the reporting structure by reporting administratively to the accounting officer and functionally to the audit committee.
16. The role of the internal audit office was to review and evaluate budgetary performance, financial management, transparency and accountability mechanisms and processes in county government entities, including the county assembly. It also had the duty to give reasonable assurance through the audit committee on the state of risk management, control and governance within the organization and to also review the effectiveness of the financial and non-financial performance management systems of the entities.



17. Under regulation 167 of the Public Finance Management (County Governments) Regulations, 2015, each county government was to establish an audit committee. The committee comprised of between 3 and 5 members. The main function of the audit committee was twofold.
 1. The committee supported the accounting officers with regard to their responsibilities for issues of risk, control and governance and associated assurance; and
 2. it followed up on the implementation of the recommendations of internal and external auditors.
18. The internal audit office and the audit committees were offices within a county government. Their work could however be used by the Auditor-General under section 33 of the Public Audit Act. The entities provided for in section 155 of the Public Finance Management Act and the Public Finance Management (County Governments) Regulations, 2015, were internal entities and were limited to undertaking audit roles within the county government entities unlike the Auditor-General who was an external entity with jurisdiction across Kenya. Therefore, according to the Constitution and the law, external audits of a State organ or public entity were to be carried principally by the Auditor-General. That was expressly so stated under article 226(3) and (4) of the Constitution.
19. There was no provision which allowed the placement of the report by the Taskforce before the Trans Nzoia County Assembly. It, hence, meant that the report could not be legally adopted and debated by the Trans Nzoia County Assembly. Likewise, no resolutions could be made on it. Further, any recommendations and sanctions, if any, as contemplated in law could not be implemented for want of legality. One, therefore, wondered how the report would be of any benefit to the County Government.
20. The Taskforce was neither established nor sanctioned by the Auditor-General. The Taskforce was also not part of the internal audit office or the audit committee of the County Government. The establishment of the Taskforce contravened articles 174(a) and (i), 226(3) and 229 of the Constitution, the Public Audit Act, the Public Finance Management Act and Public Finance Management (County Governments) Regulations 2015 by usurping the powers of the Auditor General and those of the internal audit office or the audit committee of the County Government.
21. In most cases when a new incoming governor took office, there was the desire to start the tenure on a clean platform and to readily understand all financial and governance issues in the county. That was, indeed constitutionally expected of any governor holding office. However, whereas the governor was the chief executive officer of a county, he was like a caged animal, only able to move, but within the cage. In the instant case, the cage was the Constitution and the law. The governor remained at liberty to dispense with all the wide powers accorded to the office, but only in accordance with the Constitution and the law. That was the hallmark of article 10 of the Constitution.
22. The first port of call of a governor who wished to carry out an audit of the county must be the Constitution and the law. If for any reason, the governor found the audit reports by the Auditor-General prepared under article 229 of the Constitution to be inadequate, the appropriate procedure to be undertaken was for the governor to request the Auditor-General for a periodic audit. Further, the governor may request the county assembly to sanction the Auditor-General to undertake a forensic audit.
23. In a case where the governor wished to have the audit undertaken by another qualified auditor other than the Auditor-General, such a request should be made to the Auditor-General to either outsource the service pursuant to section 23 of the Public Audit Act or to seek professional assistance and consultancy under section 24 of the Public Audit Act. In any case, the Auditor-General would render a decision and in the event the governor was not satisfied with the decision, a legal challenge may be maintained.
24. Had the court found that the establishment of the Taskforce was within the constitutional confines, it would have gone ahead to find against issue (c). For clarity, the court would have found that the establishment of the Taskforce did not require any form of public engagement since the decision to



establish the Taskforce would have been one of those which dealt with the day-to-day operations of the County Government. Such decisions, as opposed to those which transcended the boundaries of internal decisions, did not call for any form of public participation. Likewise, the court would have found issue (d) in the affirmative. There was no evidence to find that articles 47 and 50 of the Constitution were in any way infringed in the manner the Taskforce carried out its duties. The petitioner did not, at least, file any disposition by any affected party to that end.

25. It was unclear why the petitioner had to wait for the Taskforce to fully undertake its mandate to present its report and then lodge the petition about two months later. There was delay on the part of the petitioner. Had the petition been filed during the time when the Taskforce was carrying out its mandate, or even earlier, the court would have been placed in a position to determine the suitability or otherwise of conservatory orders. However, that did not happen. The petitioner was guilty of laches. In such a scenario, the maxim of equity that equity aided the vigilant and not the indolent applied. Equity was no longer an equitable remedy, it was elevated under article 10(2)(b) of the Constitution to a constitutional principle.

Petition partly allowed.

Orders

- i. *A declaration was issued that the establishment of the Taskforce by the Governor of Trans Nzoia County vide Kenya Gazette (Vol CXXIV-No.218) Notice No. 12643 which notice was published on October 21, 2022 contravened articles 174(a) and (i), 226(3) and 229 of the Constitution, the Public Audit Act, the Public Finance Management Act and Public Finance Management (County Governments) Regulations, 2015, by usurping the powers of the Auditor General and those of the Internal Audit Office and the Audit Committee of the County Government of Trans Nzoia County. The Taskforce and its resultant report were, therefore, unconstitutional, null and void.*
- ii. *Given the laches on the part of the petitioner in challenging the establishment of the Taskforce and the advanced state of implementation of the audit report of the Taskforce by the 1st, 2nd, 3rd and 4th respondents, the declaration of unconstitutionality in (i) above was suspended pending the following: -*
 1. *The 1st respondent shall, within 14 days of the instant order, (since the Auditor-General did not participate in the matter) forward the audit report prepared by the Taskforce together with a copy of the judgment and the decree thereof to the Auditor-General. The 1st respondent shall then serve all the parties therein with the evidence of service within 7 days of service upon the Auditor-General.*
 2. *The Auditor-General shall then consider the report and decide on whether it met the appropriate parameters required by the Constitution and the law. The Auditor-General shall further consider whether to deem and adopt the audit report as having been initially sanctioned by the Office of the Auditor-General. Further, the Auditor-General shall have the option of rejecting the report. The decision was to be made and communicated to the 1st respondent within 60 days of service as directed in (a) above.*
 3. *In considering the report in (b) above, the Auditor-General shall be at liberty to call for any documents or information either from the 1st, 2nd, 3rd and 4th respondents or elsewhere as the law permitted, or to even carry out any inspection(s) at the offices of the 1st, 2nd, 3rd and 4th respondents as to enable it make the decision.*
 4. *In the event the Auditor-General decided to adopt the report, the Auditor-General would be at liberty to adopt it as it was or to make any changes to it or to make further or other recommendations and findings as it deemed fit. The Auditor-General shall then inform the 1st respondent of its decision in writing as directed in (b) above.*
 5. *Once a decision to adopt the report was made and communicated by the Auditor-General to the 1st respondent, then the report shall, thereafter, be dealt with in accordance with the law.*



- iii. *In the event the Auditor-General rejected the audit report by the Taskforce in its entirety, or if the 1st respondent failed to effect service of the report and judgment as directed, the declaration of unconstitutionality of the Taskforce and its report in (i) above shall take effect.*
- iv. *Once the declaration of unconstitutionality of the Taskforce and its report set in as provided for in (iii) above, the proceedings of the Taskforce and the resultant findings and recommendations together with any actions taken by the 1st, 2nd, 3rd and/or 4th respondents in the implementation of the audit report shall have no force of law or at all. The same shall accordingly stand quashed by an order of certiorari and the state of affairs shall revert to as it were before the establishment of the Taskforce. In that case, all the sums of monies expended upon the Taskforce shall be made good in accordance with article 226(5) of the Constitution.*
- v. *Pending service as directed in (ii)(a) above and the outcome of the decision by the Auditor-General, the 1st, 2nd, 3rd and 4th respondents and/or their agents, representatives or assignees were restrained from any further and/or subsequent implementation of the findings and recommendations contained in the impugned audit report.*
- vi. *The parties remained at liberty to apply.*
- vii. *Parties shall bear their respective costs.*

Citations

Cases

Kenya

1. *Afubwa, Timothy Otuya & another v County Government of Trans Nzoia & 3 others* Petition 4 of 2015; [2016] KEHC 4441 (KLR) - (Mentioned)
2. *Ahmed Issack Hassan v Auditor General* Petition 356 of 2014; [2015] KEHC 4712 (KLR) - (Mentioned)
3. *Attorney-General & 2 others v Ndi & 79 others; Dixon & 7 others (Amicus Curiae)* Petition 12, 11 & 13 of 2021 (Consolidated); [2022] KESC 8 (KLR) - (Mentioned)
4. *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* Civil Appeal 74 & 82 of 2012; [2012] eKLR - (Mentioned)
5. *County Government of Trans Nzoia v Timothy Afubwa* Civil Appeal 26 of 2017 - (Mentioned)
6. *David Ndi & others v Attorney General & others* Petition E282, 397, E400, E401, E402, E416 & E426 of 2020; [2021] KEHC 12605 (KLR) - (Mentioned)
7. *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* Petition 2B of 2014; [2014] eKLR - (Mentioned)
8. *In the Matter of Interim Independent Electoral Commission* Constitutional Application 2 of 2011; [2011] KESC 3 (KLR) - (Mentioned)
9. *In the Matter of the Kenya National Commission on Human Rights* Advisory Opinion Reference No. 1 of 2012; [2014] eKLR - (Mentioned)
10. *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) - (Mentioned)
11. *In the Matter of the Speakers of the 47 County Assemblies* Advisory Opinions Application 3 of 2014; [2016] KESC 7 (KLR) - (Mentioned)
12. *Rai & 3 others v Rai & 5 others* Petition 4 of 2012; [2013] KESC 21 (KLR) - (Applied)
13. *Kitilit, Willy Kimutai v Michael Kibet* Civil Appeal 51 of 2015; [2018] KECA 573 (KLR) - (Mentioned)
14. *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)* (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) - (Applied)
15. *Ombati v Chief Justice & President of the Supreme Court & another; Kenya National Human Rights and Equality Commission & 2 others (Interested Party)* Petition E242 of 2022; [2022] KEHC 11630 (KLR) - (Mentioned)



16. *Ouma v Orenge & another* Constitutional Petition E001 of 2023; [2023] KEHC 3722 (KLR) - (Mentioned)
17. *Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* Constitutional Petition 159 of 2018 & 201 of 2019 (Consolidated); [2020] eKLR - (Mentioned)
18. *Republic v Chief Magistrates Court, Nairobi & another ex parte Chudasama ?* 473 of 2006; [2007] KEHC 2940 (KLR); [2008] 2 EA 311 - (Explained)
19. *Rono, Nicholas v County Secretary County Government of Bomet & 3 others* Petition 3 of 2019; [2020] KEELRC 542 (KLR) - (Mentioned)
20. *Sabina Wanjiru Chege v Independent Electoral and Boundaries Commission* Constitutional Petition E073 of 2022; [2022] eKLR - (Mentioned)
21. *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)
22. *Thuranira & 4 others v Attorney General & 2 others; Registrar of Political Parties & 3 others (Interested Parties)* Petition E043, E057 & E109 of 2022; [2022] KEHC 482 (KLR) - (Mentioned)
23. *Total Kenya Limited v Kenya Revenue Authority* Civil Application 135 of 2012; [2013] KECA 437 (KLR) - (Explained)

South Africa

Fose v Minister of Safety & Security [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 - (Followed)

Texts

1. Garner, BA., (Ed) (2004), *Black's Law Dictionary* St Paul Minnesota: Thomson West 8th edition
2. Intosai Framework of Professional Pronouncements (2016), *International Standards of Supreme Audit Institutions (ISSAI) 30 Code of Ethics*

Statutes

Kenya

1. Constitution of Kenya articles 1(1); 2; 3; 10(2); 23(3); 47; 73(1); 159(1); 179(4); 201; 226(3)(4)(5); 229; 230; 248(3); 259(1) - (Interpreted)
2. County Governments Act (cap 265)sections 30(2)(d); 31(d); 45; 59; 75 - (Interpreted)
3. Fair Administrative Action Act (cap 7L)section 4 - (Interpreted)
4. Public Audit Act (cap 412B) sections 7(1)(a); 9(1); 10; 23; 24; 25; 33; 34; 36; 37- (Interpreted)
5. Public Finance Management (County Governments) Regulations 2015 (cap 412A Sub Leg) regulations 155, 156, 167(4) - (Interpreted)
6. Public Finance Management Act (cap 412A)sections 33, 149(2); 155 - (Interpreted)
7. Supreme Court Act (cap 9B) section 3- (Interpreted)

Advocates

Miss Kyalo h/b for *Mr. Obondi* for the petitioner

Miss. Omuya h/b for *Mr. Simiyu* for the respondents

JUDGMENT

Introduction:

1. The Petition subject of this judgment raises governance issues relating to the constitutionality of the Taskforce on pending bills and human resource audit as undertaken by the Trans Nzoia County Government.



2. The Petitioner describes himself as an enthusiast constitutional defender. He contended that he filed the Petition in the interest of the public to protect the constitutional mandate of the Auditor General relating to formation of Taskforces within County Governments.
3. It is vehemently contended that the establishment of a Taskforce by the 1st respondent to undertake the audit of pending bills and human resource variously infringes the Constitution.
4. The Petition was opposed by all the respondents. The interested parties, however, did not participate in the hearing.

The Parties

5. The 1st respondent is the Chief Executive of the County Government of Trans-Nzoia in accordance with article 179 (4) of the Constitution.
6. The 2nd respondent is a devolved unit of the Government established under article 176 as read with the First Schedule of the Constitution.
7. The 3rd respondent is a member of the County Executive Committee which is established by dint of articles 176(1) and 179(1), (2), (3) and (6) of the Constitution. In furtherance of section 30(2)(d) of the County Governments Act 2012, he is appointed by the Governor to be in charge of Finance in the County Executive.
8. The 4th respondent is an officer in the County Public Service established under section 45 of the County Governments Act and is responsible to the County Executive Committee member for the administration of a county department.
9. The 5th, 6th, 7th, 8th, 9th, 10th and 11th respondents were appointees of the Taskforce on Trans-Nzoia County Pending Bills and Human Resource Audit appointed on October 21, 2022 by the 1st respondent *vide* Kenya Gazette (Vol CXXIV-No 218) Notice No 12643.
10. The 12th, 13th, 14th, 15th and 16th respondents are the co-opted members of the Taskforce.
11. The 1st interested party is a constitutional independent office established under article 229 as read together with article 248(3)(a) of the Constitution. It is tasked with the responsibility of audit and report in respect to each financial year on inter alia, the accounts, funds and authorities of County Governments, within six (6) months after the end of each financial year. Its report is submitted to the relevant county assembly to confirm whether or not public money has been applied lawfully and in an effective way.
12. The 2nd interested party is an independent office established in line with articles 230 and 248(2)(h) of the Constitution. Its powers and functions are to set and regularly review the remuneration and benefits of all State officers and advise the National and County Governments on the remuneration and benefits of all other public officers.

The Petitioner's Case

13. The petitioner cited articles 1(1) & (3), 2(1),(2) & (4),3(1), 10(2), 23(3), 47, 73(1), 159(1), 201, 226(5), 248(3)(a), 229(4),(6),(7) & (8), 249(1), 258(1) and 259(1) of the Constitution as well as section 149(2) of the Public Finance Management Act 2012 and section 7(1)(a) of the Public Audit Act 2015 to lay a legal and constitutional matrix in support of the Petition dated March 23, 2023 and filed on March 24, 2023.



14. According to the petitioner, since those cited provisions were violated by the Respondents, he was entitled to the following reliefs: -

1. A declaration that the decision of the 1st respondent to appoint a Taskforce to audit the accounts of the County Government of Trans-Nzoia, which is a constitutional mandate of the Auditor General is illegal and unconstitutional and violates the provisions of article 229 of the Constitution;
2. A declaration that within the intendment of article 229 of the Constitution as read with section 7 and 10 of the Public Audit Act 2015, it is only the office of the Auditor General mandated to perform audit of accounts of County Governments;
3. A declaration that within the intendment of article 226 of the Constitution as read with section 149 of the Public Finance Management Act 2012 that the Accounting Officers of a County entity shall ensure that every expenditure shall be lawful and authorized;
4. A declaration that the 1st, 3rd and 4th respondents violated article 201(d) of the Constitution when they approved irresponsible and imprudent use of public funds to finance the audit of the County Government accounts, a function that the tax payers have already paid the Auditor General to do;
5. A declaration that the 1st, 3rd and 4th respondents violated article 210(d) of the Constitution when they approved irresponsible and imprudent use of public funds for remuneration of members of the Taskforce – without mandate and authority of the Salaries and Remuneration Commission;
6. A declaration that the respondents have breached the provisions of article 47 of the Constitution, by proceeding to make adverse recommendations against persons mentioned in the Taskforce report, specifically, one Patrick Simiyu Khaemba, without according him opportunity to be heard;
7. A declaration that the respondents have breached the provisions of article 10 of the Constitution on public participation, by proceeding to make Taskforce report without meaningful and qualitative consultation with members of the public;
8. An order of certiorari to issue to bring into the honourable court for purposes of quashing the Report of the Taskforce on pending bills and human resources audit dated 10/03/2023;
9. An order of permanent injunction do and is hereby issued restraining the respondents, their agents and officers under their authority from conducting any further financial and human resource audit contrary to the Constitution;
10. An order be issued pursuant to the provisions of article 226(5) of the Constitution for the respondents to refund to the public coffers the sum of Kshs 20,000,000.00 or such other sums that will be ascertained through an audit by the Auditor General, which funds were used for to prepare the Taskforce report;



11. An order be issued for the Auditor General to conduct a special audit within a reasonable (sic) on the issues raised by the Taskforce specifically on pending bills;
12. The respondents bear the cost of the Petition.
15. The petitioner pleaded that vide the Kenya Gazette (Vol CXXIV-No.218) Notice No 12643 published on October 21, 2022, the 1st respondent appointed a Taskforce for purposes of verification of the pending bills and human resource audit of the County Government of Trans-Nzoia.
16. The composition of the Taskforce's leadership included its Chair being the retired Auditor General (FCPA Edward Ouko, the 5th respondent herein), deputized by his immediate Deputy. Concluding their assigned task, the Taskforce submitted a Report dated March 10, 2023 namely Report of the Taskforce on Pending Bills and Human Resource Audit – Natembeya's Road to Prosperity.
17. The petitioner cited article 229(4)(a) of the *Constitution* to fortify that the 1st interested party has exclusive constitutional powers to audit all State organs including County Governments. Those audit roles included but were not limited to finance, performance, accountability and special audits. For this reason, the Petitioner contended that private individuals had no powers to audit the County Government. In addition, it was only the 1st Interested Party vested with powers to delegate constitutional and statutory audit powers but done so procedurally.
18. The petitioner's delineation of the Petition was that it was precedent setting since it challenged the usurpation of constitutional and statutory powers of the Auditor General. This was due to the fact that the Taskforce Report bore similarities with the antecedent reports of the Auditor General for the County Executive of Trans-Nzoia. C
19. The petitioner questioned whether the immediate Auditor General and his deputy, as Chair and member respectively of the Taskforce, were authorized to sit and audit the 2nd respondent notwithstanding the audit exercise that they conducted between 2013 and 2020. Those reports were annexed in a bundle and marked KOK3. This, he argued, violated article 229 of the *Constitution*.
20. He lamented that the Taskforce lacked the requisite mechanisms to conduct the audit process that would guarantee the right to fair administrative action. He explained that since audit processes uphold the audi alteram partem rule and take considerations as to appropriate recommendations, the Taskforce was haphazard and uncoordinated since it failed to follow such due processes. This is because it failed to afford the members cited in the report an opportunity to address the Taskforce on any allegations leveled against them. He was of the view that the cited members ought to have been involved in the process from commencement up to release of the report. The absence of such due process was in breach of article 47 of the *Constitution* and section 4 of the *Fair Administrative Action Act 2015*. He was apprehensive that its implementation was in conflict with the erstwhile audit reports of the 1st interested party.
21. According to the petitioner, the process ought to have implored the consultative approach by issuing a letter of understanding to the affected members. Thereafter, share the audit findings which process would be followed by drafting a management letter to the Accounting Officer. Following, the draft audit report is issued to the institution under audit for queries or resolution of standing issues. Finally, the final audit report is then presented to the Senate or County Assembly for their further action.
22. The petitioner opined that the Taskforce had usurped the powers of the 1st interested party. He thus questioned whether the sum of Kshs 20,000,000 utilized by the Taskforce, was lawful, constitutional,



- necessary and proper since the sum was paid out of public funds. He was dubious as to whether the utilization of such funds was approved by the 1st interested parties thereby unconstitutional and illegal.
23. In his view, the action of approving the said expenditure from public funds by the 1st, 3rd and 4th respondents without the approval of the 2nd interested party amounted to an illegal and unconstitutional process violated article 2(2), 10 and 201 of the *Constitution*.
 24. The petitioner accused the Taskforce of failing to conduct public participation during the preparation of the report. This action violated article 10 of the *Constitution*. Furthermore, the petitioner decried that the notice period for the head count leading up to the recommendations about ghost workers was too short.
 25. According to the petitioner's observation, the report of the Taskforce was imported from the 1st interested party's reports for the years 2013 to 2021. This was in direct conflict since its Chair audited the 2nd respondent from 2013 to 2019. In addition, those reports had been or were currently in the process of implementation. For these reasons, the petitioner stated that the report was in breach of article 249(2), 229(6) and (7) of the *Constitution*, section 7(1)(a) and 48 of the *Public Audit Act*, 2015 and the *International Standards of Supreme Audit Institutions (ISSAI) 30 Code of Ethics*.
 26. He explicated that the process of implementation of the 1st interested party's reports involves the participation of the Senate and the County Assembly to hear the County Executive for queries. In the process, contentious issues are flagged for investigation purposes. He cited the example of the acquisition of land for construction of Trans Nzoia Referral Hospital which issue was investigated by EACC. For this reason, he was apprehensive that the recommendations of the Taskforce would stir inconsistencies and double jeopardy.
 27. Further demonstrating bias from the absence of fair administrative action, the petitioner cited the following recommendations as adversely affecting the mentioned persons in the report: -
 - i. Adverse recommendations were made against staff members yet they were never invited to make representations;
 - ii. The report was allegedly inaccurate and baseless since relevant people failed to contribute towards its development. He cited that though the judgment in Kitale High Court Petition No 4 of 2015; *Timothy Otuya Afubwa & another v The County Government of Trans Nzoia* justified the recommendations of the Taskforce towards a refund of the sum of Kshs. 185 million that was approved for acquisition of land for the construction of the Trans Nzoia County Referral Hospital, the Court of Appeal in Eldoret Civil Appeal No 26 of 2017; *County Government of Trans Nzoia v Timothy Afubwa* and another urged parties to mediate on the dispute since Kshs 1.6 billion had already been utilized. Ultimately, a mediation settlement was adopted by the court on 15/02/2023. The petitioner stated that those facts were not disclosed in the report;
 - iii. The report adversely mentioned the First Governor of the 2nd respondent at Chapter 14.1 without affording him an opportunity to make representations. His conclusion thus was that the Taskforce report was politically motivated. Further political elements were interpreted from the title page "Natembeya's Road to Prosperity", the 1st respondent's campaign tag line;



- iv. During the release of the report, the 1st respondent was accused of making vindictive remarks about his predecessor when he threatened to move into his private property and evict him unprocedurally. The 1st respondent promised to implement the report immediately.
28. The petitioner accused the Taskforce of acting ultra vires. For instance, it exceeded its terms of reference in making some of the recommendations in the report. He disclosed that the Taskforce's mandate was only constrained to audit, advise and guide the 2nd respondent on the status and settlement of the genuine pending bills, future management of bills and payables to avoid delays and accumulation of pending bills and human resource management. Furthermore, as per the Gazette notice, the Taskforce was mandated to conclude its findings within 30 days from October 17, 2022. However, they only published the report on March 10, 2023 outside those stipulated timelines.
29. The petitioner then stated that the findings on pending bills had been tailored to lay a platform for denial of payment of lawful bills and rent-seeking. It was thus injudicious for the County Government to implement the 1st interested party's report for lacking procedural fairness.
30. The petitioner posited that audit reports must generally incorporate the standards set out under the ISSAIs to include the report on whether the financial statements present a true and fair view of the financial position and performance of the entity, lawfulness and effectiveness in use of public resources and whether internal controls, risk management and overall governance were effective. In light of the above, the petitioner was neurotic that the implementation of the report would affect the operations of the 2nd respondent and service delivery to the detriment of the residents of Trans Nzoia.

The Respondents' Case

31. The respondents entered appearance on April 4, 2023. They relied on the replying affidavit of Truphosa Amere, the 2nd respondent's County Secretary, sworn on April 3, 2023 and filed on May 4, 2023, to oppose the Petition in its entirety.
32. The respondents rejected the petitioner's public interest drive urging that there were no constitutional or statutory violations against the petitioner or any of the alleged persons.
33. They maintained that the actions of the respondents in so far as the Taskforce is concerned, did not in any way abrogate the 1st interested party's mandate. That, the appointment of the Taskforce was made in line with article 179 and 235 of the Constitution, section 31 (d), 59 and 75 of the County Government Act and section 155 of the Public Finance Management Act 2012.
34. While acknowledging the mandate and powers of the 1st interested party to audit financial accounts, the respondents avowed that the said powers were not exclusive as set out in section 155 of the Public Finance Management Act, 2012. Under the said provision, the 1st and 2nd respondents are called upon to place internal audit measures to ensure prudent expenditure of public finances.
35. The respondents further justified the appointment of the Taskforce by relying on section 33 of the Public Audit Act 2015 which empowers the 1st and 2nd respondents to implement internal audit mechanisms independent of the 1st interested party.
36. The respondents found the petitioner's protection of the First Governor's alleged rights as preposterous as he was neither a party to the Petition nor complained to any person that he was unaware



of the activities of the Taskforce. Further, responding to the allegations that the adversely mentioned persons were condemned unheard, the respondent stated as follows: -

- a. By didn't of Gazette Notice dated 21/10/2022 (TA1), all members of the public were deemed to have been notified of the creation of the Taskforce;
 - b. All sittings of the Taskforce were communicated to members of the public through advance notices circulated in the county offices, sub-county offices, notice boards and official social media sites of the 1st and 2nd respondents (TA2);
 - c. The 1st and 2nd respondents on 11/11/2022 published in a newspaper of wide circulation a notice (TA3) inviting members of the public to attend and participate in its sessions.
37. In response to the appointment of FCPA Edward Ouko as Chairperson of the Taskforce, the respondents stated that the allegations that he was involved in the 1st and 2nd respondents' audits were baseless. Be that as it may, any previous involvement was purely restricted to audited accounts of the 2nd respondent.
38. It was deposed that the Taskforce's scope was restricted to consideration of the pending bills and the 2nd respondent's human resource component. As such, it was untrue to allege that the Taskforce's mandated was dedicated to look at the 1st and 2nd respondents' audited accounts.
39. It was further deposed that there was no conflict of interest since the Taskforce's report did not amount to an audit of financial accounts as contemplated in the Public Audit Act 2015.
40. The respondents continued that the 5th respondent's functions as Chair of the Taskforce could not invalidate the process since any of his decisions could be outvoted by the other 6 members that served in the Taskforce.
41. The respondents accused the petitioner of impeding accountability and promoting corruption and theft of public resources since he only intended to retain the status quo in operationalization of the 2nd respondent's cycle of activities. They unearthed the petitioner's motivation in filing the Petition as burying wrongdoing and shielding those who violated the law.
42. The respondents defended that the Taskforce implemented their mandate in line with the Gazette Notice.
43. Finally, the respondents emphasized that the Constitution had placed significance on transparency and accountability in public affairs. That, the principles and values of governance in public service must be deployed transparently and accountably. Thus, where public resources had been utilized to establish whether public resources were lawfully used, then that action was prudent so long as the same did not undermine the authority of the 1st Interested Party.

The Petitioner's Submissions

44. The Petition was heard by way of reliance on the pleadings and written submissions. Parties also supplemented the written submissions with oral highlights.



45. The petitioner's written submissions and list and digest of authorities were all dated and filed on May 2, 2023. He framed the following issues for determination: -
1. Whether the decision of the 1st respondent to appoint a Taskforce to audit the accounts of the County Government of Trans Nzoia is illegal and unconstitutional?
 2. Whether the report of the Taskforce is illegal and unconstitutional?
 3. Whether the 1st, 3rd and 4th respondents' approval of expenditure of public funds for use by the Taskforce was illegal and unconstitutional?
46. In his opening address, learned counsel for the petitioner, Mr. Obondi, cited the workmanship of Philosophers Aristotle and Plato to urge this court to uphold the rule of law while minding that a social contract remained between elected leader and the sovereign power of the people.
47. In answering the first issue as framed, in the affirmative, the petitioner defined the term 'audit' from the 8th Edition of *Black's Law Dictionary*. Gathered from that definition, the petitioner submitted that a plain reading of the scope of the Taskforce could only mean that the assignment was an audit within the meaning ascribed to the term. He fortified that conclusion by finding that sections 7, 36 and 38 of the *Public Audit Act*, sections 30 and 31 of the *County Government Act* and articles 179, 226(3) and 229 of the *Constitution*, which establish the role of the 1st respondent, fitted the descriptive scope carried out by the Taskforce.
48. The petitioner observed that while the audit of a County Government could take place annually, periodically or by special audit as set out in section 9(1)(a) and 34 of the *Public Audit Act*, that role could never be commissioned to anyone else other than the 1st interested party. He thus critiqued the opening clause set out in the Gazette Notice as unconstitutional and offending the mandate of the 1st respondent set out in article 179 of the *Constitution*, section 30 and 31 of the *County Government Act*.
49. Having established that the Taskforce carried out an audit, the petitioner submitted that the respondent acted unconstitutionally for proceeding with the Taskforce's mandate since an audit is exclusively reserved for the 1st interested party and no natural or juristic person could purport to act as such. The petitioner cited several decisions as well as article 2(2) of the *Constitution* to conclude that the 1st respondent could arrogate himself powers in an attempt to be a law unto himself.
50. The petitioner further submitted that the Taskforce usurped the role of the 1st respondent in contravention of section 7 of the *Public Audit Act* as read with article 226(5) and 229(3) of the *Constitution*. He found evidence of usurpation in making audit findings at page 9, 29, 33, 36, 49, 60 and 62 of the report. Relying on section 31 of the *Public Audit Act* and article 47 of the *Constitution*, the petitioner submitted that the process was unprocedural since those adversely mentioned were not given an opportunity to explain their actions or lack thereof. He set out several instances as found in pages 77, 92, 93, 112, 131, 236 and 413 – 472 of the bundle.
51. Submitting further on the illegality of the Taskforce report, the petitioner continued that the 5th respondent lacked autonomy and independence as he was conflicted. This is because he had audited the 2nd respondent from 2013 to 2022 before the creation of the Taskforce. He accused the 1st respondent of capriciously handpicking the constituent members.
52. Next, the petitioner found that the Taskforce illegally exceeded the term of office which was designed to only last 30 days.



53. Finally, the petitioner described the recommendations as illegal, Wednesbury, unreasonable, unprofessional and egregious. In discussing the last issue as framed, the Petition submitted that the approved expenditure for use by the Taskforce violated article 201 and 226 (5) of the Constitution.
54. In further support of the first issue, the petitioner cited several decisions including Attorney General & 2 others v David Ndi & 79 Others (Amicus Curiae) KESC 8 (KLR), Thuranira & 4 others v Attorney General & 2 others [2022] KEHC 482 (KLR), Ombati v Chief Justice and President of the Republic of the Supreme Court & another [2022] KEHC 11630 (KLR), Sabina Wanjiru Chege v Independent Electoral and Boundaries Commission [2022] eKLR and In the Matter of the Speaker of the Senate & another [2013] eKLR.
55. Submitting on the second issue, the petitioner faulted the report on five areas being the usurpation of the mandate of the Auditor General, violation of the principles of natural justice, conflict of interest, lack of independence and illegal extension of tenure and illegal, Wednesbury unreasonable and unprofessional recommendation.
56. The petitioner argued at length in demonstrating the above. He also referred to the decision in Ahmed Isaack Hassan v Auditor-General [2015] eKLR in urging the violation of the principle of natural justice and In the Matter of Interim Independent Electoral & Boundaries Commission [2011] eKLR in buttressing the principle of independence of constitutional organs, commissions and independent offices.
57. In urging the need to appropriately deal with public funds and not unnecessarily burden the taxpayers, the petitioner relied on Nicholas Rono v County Secretary County Government of Bomet & 3 others [2020] eKLR.
58. In the end, the petitioner reminded the court that it was discharging delegated powers and the need to protect public interest. The decision in Odinga & another v IEBC & 2 others (Presidential Election Petition No. 1 of 2017) (2017) KESC 42 (KLR) was cited in drawing the curtain to a close.

The Respondents' Submissions

59. The respondents relied on their written submissions evenly dated and filed on May 26, 2023 to state that the following issues fell for determination: -
 - i. Whether the 1st and 2nd respondents have the powers to appoint a Taskforce;
 - ii. Whether the scope of the terms of reference of the Taskforce usurps the Auditor General's duties;
 - iii. Whether there was sufficient public participation in the formation and operation of the Taskforce;
 - iv. Whether the operations of the Taskforce amounted to the alleged breach of the rules of natural justice;
 - v. Who bears the costs of the suit?
60. Learned counsel for the respondents, Mr Simiyu, cited articles 174, 179 and 235 of the Constitution, section 155 of the Public Finance Management Act and section 30 and 31 of the County Government Act as well as several authorities to fortify that the 1st and 2nd respondents had powers to appoint persons to assist in the running and management of the affairs of the 2nd respondent by dint of devolution.



61. For these reasons, the Taskforce was duly constituted with a view to enhancing transparency and accountability. It was the respondents' view thus that the petitioner only curtailed this process thereby negating that very role entrusted upon them.
62. In explaining that the Taskforce's terms of reference included an audit and human resource component, the respondents concluded that they did not usurp the 1st interested party's mandate. The respondents further outlined the role of the 1st interested party as set out in article 229 of the Constitution and section 7 of the Public Audit Act to state that the audit role was not an exclusive role and could be delegated. Withal, looking at section 33 and 155 of the Public Finance Management Act, the 1st and 2nd respondents had discretion to place internal audit mechanisms to ensure prudent expenditure of public finances.
63. Counsel for the respondents then explained that as per the impugned Gazette Notice, the terms of reference intended to provide a status of the County for the 2nd respondent. Since the 1st interested party's role was limited to audit of the financial accounts of the National and County Government for the financial year, there was neither exclusivity nor usurpation of powers. They thus accused the petitioner of narrowly interpreting the Constitution against the canons of constitutional interpretation.
64. On whether the 5th respondent was conflicted, the respondents submitted in the negative as it was not supported by evidence. He cited Ouma v Orengo & another (Constitutional Petition E001 of 2023) [2023] KEHC 3722 (KLR) (26 April 2023) (Judgment) to state that his experience was a value addition to the process in any event.
65. On whether there was public participation, the respondents submitted positively to the extent that it was not cosmetic but qualitative and quantitative as defined by courts. They cited several authorities as well as article 1, 10 and 174 of the Constitution to find that the same had met the constitutional and statutory threshold. Be that as it may, citing several authorities, the respondents submitted that public participation did not arise as it was an operational matter of the Taskforce.
66. On whether the operations of the Taskforce amounted to a breach of natural justice, learned counsel submitted that several notices were issued inviting members of the public to participate in the exercise. That those adversely mentioned in the report had only themselves to blame as they, on their own volition, elected not to appear before the Taskforce. In addition, they did not file any pleadings complaining that they were denied an opportunity to make presentations to the Taskforce.
67. Finally, since the Petition lacked basis, the Respondents urged this court to dismiss the Petition with costs.

The Petitioner's Rejoinder

68. The petitioner argued that he had the appropriate legal standing to maintain the Petition by dint of articles 22 and 258 of the Constitution and previous court decisions.
69. Responding to the Ouma v Orengo & another case (*supra*), the petitioner submitted that the decision was not only unbinding to this court, but was distinguishable from the facts and circumstances of this case. He thus urged this Court to disregard the same.
70. Lastly, on whether appropriate arrangements for conducting internal audit included the appointment of the impugned Taskforce, the petitioner cited regulations 155, 156 and 167(4) of the Public Finance Management (County Governments) Regulations 2015 to state that the same did not apply to the Taskforce.



71. In the end, the petitioner reiterated his calling that the Petition be allowed as prayed.

Analysis

72. Having carefully considered the Petition, the affidavits in support and in opposition and the annexures attached thereto, the following arise as the main issues of discussion: -

- a. Principles of constitutional interpretation.
- b. Whether the appointment of the Taskforce on Pending Bills and Human Resource Audit (hereinafter referred to as 'the Taskforce') contravenes articles 174, 179, 226(3), 229 and 235 of the Constitution by usurping the powers of the Auditor General, hence, unconstitutional.
- c. Whether the establishment of the Taskforce contravened articles 10 and 201(a) of the Constitution for want of adequate public participation.
- d. Whether the Taskforce carried out its duties within the calling of articles 47 and 50 of the Constitution by according the affected parties' fair administrative procedures including an opportunity to be heard.
- e. Remedies, if any.

73. The court will now deal with the above issues in seriatim.

Principles of Constitutional Interpretation:

74. Constitutional interpretation also referred to as Judicial interpretation is the legal creativity of attributing or assigning meaning to the provisions of the Constitution.

75. the Constitution is a document *sui generis*. It is the supreme law of the land and its interpretation has over time been developed by courts and scholars both locally and internationally.

76. Locally, superior courts have made pronouncements on how the Constitution ought to be interpreted. In David Ndii & others v Attorney General & others [2021] eKLR, the learned judges, while referring to various decision of the apex court and the Court of Appeal spoke to the subject as follows: -

399. One of the imports of recognition of the nature of the transformative character of our Constitution is that it has informed our methods of constitutional interpretation. In particular, the following four constitutional interpretive principles have emerged from our jurisprudence:

- a. First, the Constitution must be interpreted holistically; only a structural holistic approach breathes life into the Constitution in the way it was intended by the framers. Hence, the Supreme Court has stated in In the Matter of the Kenya National Commission on Human Rights, Supreme Court Advisory Opinion Reference No. 1 of 2012; [2014] eKLR thus (at paragraph 26):

"But what is meant by a holistic interpretation of the Constitution? It



must mean interpreting the Constitution in context. It is 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 the light of its history, of the issues in dispute, and of the prevailing circumstances."

- b) Second, our Transformative Constitution does not favour formalistic approaches to its interpretation. It must not be interpreted as one would a mere statute. The Supreme Court pronounced itself on this principle In Re Interim Independent Election Commission [2011] eKLR, para [86] thus:

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 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.

- c) Third, the Constitution has provided its own theory of interpretation to protect and preserve its values, objects and purposes. As the Retired CJ Mutunga expressed in his concurring opinion in In Re the Speaker of the Senate & another v Attorney General & 4 others, Supreme Court Advisory Opinion No. 2 of 2013; [2013] eKLR. (paragraphs 155-157):

(155) In both my respective dissenting and concurring opinions, In the Matter of the Principle of



Gender Representation in the National Assembly and Senate, Sup Ct Appl No 2 of 2012; and *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai and 4 others* Sup Ct Petition No 4 of 2012, I argued that both the *Constitution, 2010* and the *Supreme Court Act, 2011* provide comprehensive interpretative frameworks upon which fundamental hooks, pillars, and solid foundations for the interpreting our Constitution should be based. In both opinions, I provided the interpretative coordinates that should guide our jurisprudential journey, as we identify the core provisions of our Constitution, understand its content, and determine its intended effect.

- (156) The Supreme Court of Kenya, in the exercise of the powers vested in it by the *Constitution*, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower Courts and other institutions can rely on, when they are called upon to interpret the *Constitution*. Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the *Constitution*; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The Court must also remain conscious of



the fact that Constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to illuminate legal penumbras that Constitution borne out of long drawn compromises, such as ours, tend to create. The Constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras.

- d) Fourthly, in interpreting Constitution of Kenya, 2010, non-legal considerations are important to give its true meaning and values. The Supreme Court expounded about the incorporation of the non-legal considerations and their importance in constitutional interpretation in the Communications Commission of Kenya Case. It stated thus:

(356) We revisit once again the critical theory of constitutional-interpretation



and relate it to the emerging human rights jurisprudence based on Chapter Four – The Bill of Rights – of our Constitution. The fundamental right in question in this case is the freedom and the independence of the media. We have taken this opportunity to illustrate how historical, economic, social, cultural, and political content is fundamentally critical in discerning the various provisions of the Constitution that pronounce on its theory of interpretation. A brief narrative of the historical, economic, social, cultural, and political background to articles 4(2), 33, 34, and 35 of our Constitution has been given above in paragraphs 145-163.

(357) We begin with the concurring opinion of the CJ and President in Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others, Supreme Court Petition No. 2B of 2014 left off (see paragraphs 227- 232). In paragraphs 232 and 233 he stated thus:

(232) ...
References
to
Black's
Law
Dictionary
will
not,
therefore,
always
be
enough,
and



references
to
foreign
cases
will
have
to
take
into
account
these
peculiar
Kenyan
needs
and
contexts.

(233) It is possible to set out the ingredients of the theory of the interpretation of the Constitution: the theory is derived from the Constitution through conceptions that my dissenting and concurring opinions have signalled, as examples of



interpretative
coordinates;
it is
also
derived
from
the
provisions
of
section
3 of
the
*Supreme
Court
Act,*
that
introduce
non-
legal
phenomena
into
the
interpretation
of the
Constitution,
so as
to
enrich
the
jurisprudence
evolved
while
interpreting
all its
provisions;
and
the
strands
emerging
from
the
various
chapters
also
crystallize
this
theory.
Ultimately,



therefore,
this
Court
as the
custodian
of the
norm
of the
Constitution
has to
oversee
the
coherence,
certainty,
harmony,
predictability,
uniformity,
and
stability
of
various
interpretative
frameworks
dully
authorized.
The
overall
objective
of the
interpretative
theory,
in the
terms
of the
Supreme
Court
Act, is
to
“facilitate
the
social,
economic
and
political
growth”
of
Kenya.



400. With these interpretive principles in mind, which we will call the Canon of constitutional interpretation principles to our Transformative Constitution, we will presently return to the transcendental question posed in these Consolidated Petitions.....

77. The Court of Appeal also spoke to constitutional interpretation in *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR when it made the following remarks: -

(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: -

- a. 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.
- b. that the spirit and tenor of the *Constitution* must preside and permeate the process of judicial interpretation and judicial discretion.
- c. that the *Constitution* must be interpreted broadly, liberally and purposively so as to avoid “the austerity of tabulated legalism.
- d. 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).
- e. 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*.

78. With the above legal guidance, the court will now deal with the rest of the issues.

Whether the appointment of the Taskforce contravenes articles 174, 179, 226(3), 229 and 235 of the *Constitution* by usurping the powers of the Auditor General, hence, unconstitutional:

79. The rival parties’ positions have already been captured above. To be able to deal with this issue appropriately, this court will look at both the constitutional and statutory underpinnings relating to audits in public service in Kenya.

80. Article 226 of the *Constitution* provides for accounts and audit of public entities. The provision calls for the enactment of an Act of Parliament to provide for the keeping of financial records and the auditing of accounts of all governments and other public entities, and to prescribe other measures for securing efficient and transparent fiscal management; and the designation of an accounting officer in every public entity at the national and county level of government.



81. Article 226(3) of the Constitution plainly states that the accounts of all governments and State organs shall be audited by the Auditor-General. In sub-article (4), the accounts of the office of the Auditor-General are to be audited and reported on by a professionally qualified Accountant appointed by the National Assembly.

82. Article 229(1) of the Constitution creates the independent office of the Auditor-General. Once appointed, the Auditor-General undertakes the mandate in sub-article 4, which is cut out as under: -

229.

(4) Within six months after the end of each financial year, the Auditor-General shall audit and report, in respect of that financial year, on -

(a) the accounts of the national and county governments;

(b) the accounts of all funds and authorities of the national and county governments;

(c) the accounts of all courts;

(d) the accounts of every commission and independent office established by this Constitution;

(e) the accounts of the National Assembly, the Senate and the county assemblies;

(f) the accounts of political parties funded from public funds;

(g) the public debt; and

(h) the accounts of any other entity that legislation requires the Auditor-General to audit.

83. Further, under sub-article 5, the Auditor-General has the liberty to audit and report on the accounts of any entity that is funded from public funds.

84. The principal purpose of the audits is, according to sub-article 6, to confirm whether or not public money has been applied lawfully and in an effective way.

85. Once an audit report is generated, it is then submitted to Parliament or the relevant county assembly, as the case may be, where, within three months after receiving an audit report, Parliament or the county assembly must debate and consider the report and take appropriate action.

86. To enable the Auditor-General discharge its duties aforesaid, Parliament passed several legislations. One of them is the Public Audit Act, No 34 of 2015. The said statute provides in its preamble that it



is an Act of Parliament to provide for the functions and powers of the Office of the Auditor-General in accordance with the Constitution, and for connected purposes.

87. Section 4 of the Public Audit Act, commands the Office of the Auditor-General to ensure reasonable access to its services in all parts of the Republic and may establish branches at any place in Kenya.

88. Further to the functions and responsibilities of the Auditor-General as set out in article 229 of the Constitution, section 7 of the Public Audit Act, provides the following other functions: -

(1) In addition -

- (a) give assurance on the effectiveness of internal controls, risk management and overall governance at national and county government;
- (b) undertake audit activities in state organs and public entities to confirm whether or not public money has been applied lawfully and in an effective way;
- (c) satisfy himself or herself that all public money has been used and applied to the purposes intended and that the expenditure conforms to the authority for such expenditure;
- (d) conform that—
 - (i) all reasonable precautions have been taken to safeguard the collection of revenue and the acquisition, receipt, issuance and proper use of assets and liabilities; and
 - (ii) collection of revenue and acquisition, receipt, issuance and proper use of assets and liabilities conforms to the authority;
- (e) issue an audit report in accordance with article 229 of the Constitution;
- (f) provide any other reports as may be required under article 254 of the Constitution; and
- (g) perform any other function as may be prescribed by any other written legislation.

(2) Without prejudice to the generality of subsection (1), the Auditor-General may undertake any audits required under the Constitution, this Act or any other relevant law.



89. The powers of the Auditor-General are provided for in section 9 of the *Public Audit Act*, which includes: -

- (a) to conduct investigations on his or her own initiative, or on the basis of a complaint made by a third party;
- (b) to obtain professional assistance, consultancy or advice from such persons or organizations whether within or outside public service as he/she considers appropriate;
- (c) of conciliation, mediation and negotiation;
- (d) to issue summons to a witness for the purposes of his or her investigation;
- (e) of unrestricted access to-
 - (i) all books, records, returns, reports, electronic or otherwise and other documents of entities listed under article 229(4) of the *Constitution*;
 - (ii) any property or premises used or held by State Organs or public entities covered by article 229(4) of the *Constitution* and subject to audit under this Act,
Provided that such access is reasonably necessary, in the opinion of the Auditor-General, in carrying out his or her functions;
- (f) to request any public officer that is subject to this Act to provide explanations, information and assistance in person and in writing;
- (g) to locate any of his or her staff or an agent, for a time period to be determined by the Auditor-General, at the premises of any State Organ or public entity that is the subject of an audit or examination or review and that entity shall provide access to staff or agent and adequate office space, furniture and telephone access at the expenses of that State Organ or public entity;
- (h) to identify the origin of a transaction or officer who directed or approved it, where he or she has determined inaction, omissions, misuse or abuse of public resources by a public officer; and
- (i) to perform any function and exercise any powers prescribed by any other legislation, in addition to the functions and powers conferred by the *Constitution*.
- (j) require a search to be made of any records in a public office;
- (k) require copies to be made of, or extracts to be taken from, any records in a public office;
- (l) seize or access or obtain official electronic messages to the extent that it is necessary for purposes of undertaking an investigation or forensic audit in entities listed under article 229 (4) of the *Constitution*; and



- (m) solicit assistance of other National and County governments agencies in the exercise of his/her responsibilities under the Constitution, this Act or any other written law.
90. According to section 29 of the Public Audit Act all audits undertaken by the Auditor-General shall be subject to the Constitution and any written law and that, in discharging its functions, the Office of the Auditor-General shall apply the applicable international standards, principles and practices in their audits. Under section 30 of the Public Audit Act, the Auditor-General, subject to the provisions of articles 201 and 232 of the Constitution, determines the scope and extent of the examination or inspection of accounts and any other documents or information related to public expenditures or any other audits under which the Auditor-General considers necessary in carrying out his or her responsibilities and functions.
91. Section 31 of the Public Audit Act provides for how the processes of audit shall be undertaken.
92. The audits under article 229 of the Constitution, may take the form of Annual financial audits, Performance audits or Procurement audits.
93. The Annual financial audits refer to the audits undertaken under article 229 of the Constitution. They are undertaken for State Organs and public entities and the Auditor-General reports annually to Parliament and relevant county assembly. Performance audits are conducted to examine the economy, efficiency and effectiveness with which public money has been expended pursuant to article 229 of the Constitution. These audits usually relate to projects implementation. In doing so, the Auditor-General evaluates, whether the citizen has gotten value for money in the project. The Report is also submitted to Parliament or County Assembly for tabling and debate.
94. In Procurement audits, the Auditor-General examines the public procurement and asset disposal processes of a state organ or a public entity with a view to confirm as to whether procurements were done lawfully and in an effective way. The Report is also submitted to Parliament or County Assembly for tabling and debate. These are provided for under section 36 of the Public Audit Act.
95. Apart from the above three types of audits which the Auditor-General may undertake under article 229 of the Constitution, there are other two types of audits which the Auditor-General may, as well, undertake. They are, as follows: -
- (i) Periodic audits.
 - (ii) Forensic audits.
96. Periodic audits are provided for under section 34 of the Public Audit Act. These may be undertaken by the Auditor-General at his or her own initiative or upon request by an entity. These audits are proactive, preventive, and deterrent to fraud and corrupt practices, systemic and are usually carried out to determine and evaluate the effectiveness of risk management, control and governance processes in State Organs and public entities.
97. Section 37 of the Public Audit Act is on Forensic audits. These are audits requested by Parliament and County Assemblies to establish fraud, corruption or other financial improprieties in State Organs and public entities.
98. Regardless of the type of an audit, all audit reports must be submitted to Parliament or the relevant county assembly, as the case may be. The Reports must also contain recommendations on how a State



- Organ or public entity may improve the application of funds in a lawful and in an effective way and how responsive the State organ or public entity has been to past audit findings and recommendations.
99. It is also of importance to note that the Auditor-General has powers to prepare Special Reports in the course of an examination and audits. These reports are on matters that come to the attention of the Auditor-General and the Auditor-General feels should immediately be brought to the attention of Parliament or the relevant County Assembly.
 100. Further, the Auditor-General may outsource audit services pursuant to section 23 of the *Public Audit Act*. The Auditor may also engage the services of or work in consultation with professional or technical experts or consultants, whether in the public service or not, to enhance its performance. That is provided for in section 24 of the *Public Audit Act*.
 101. Apart from the Office of the Auditor-General, there is also the Audit Advisory Board established under section 25 of the *Public Audit Act*. Its main function is to advise the Auditor-General on the exercise of its powers and the performance of the functions under the *Constitution* and the law.
 102. There are, of course, other legislations which variously provide for the audit roles in Kenya. Another one is the *Public Finance Management Act* (hereinafter referred to as 'the PMFA') and the Regulations thereunder.
 103. The foregoing is the general constitutional and legislative framework of audits in Kenya. A closer look thereof reveals that there is a deliberate design by the people of Kenya and Parliament to ensure that, on the basis of public audits, State organs and public entities are protected from pilferage and waste of public resources and those culpable are accordingly dealt with. For instance, under article 226(5) of the *Constitution*, if the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not.
 104. The *Constitution* and the *Public Audit Act* further mandates Parliament and County Assemblies to debate on the audit reports and make appropriate resolutions including referring matters for further investigations by other entities. The Auditor-General can also refer matters for further investigations to the relevant entities. Further, the *Public Audit Act* and other legislations create criminal offences.
 105. Parliament and County Assemblies may also recommend the withholding of funds to a State Organ or public entity or the surcharging of monies found deficient or lost in State Organs or public entities.
 106. It is, therefore, against the foregoing background that the 1st respondent found it fit to, and, established a Taskforce to carry out an audit exercise. The Taskforce was appointed *vide* Kenya Gazette (Vol CXXIV-No.218) Notice No. 12643 which was published on October 21, 2022. The notice read as follows: -

Notice is given to the general public that in exercise of powers conferred to me by article 179 of the *Constitution of Kenya 2010* and sections 30 and 31 of the *County Governments Act*, I appoint a taskforce for the verification of Trans Nzoia County Pending Bills and Human Resource Audit. The purposes of the Taskforce is to advise and guide on the settlement of genuine pending bills and undertake an audit of human resource and staff establishment of Trans Nzoia County Government.

The Taskforce shall consist of:

Name

Position



Edward Ouko

Chairperson

Jamin Kwanusu

Secretary

Alex Rugeru

Member

Chris Wasike Mung'oma

Member

Imelda Midzukani Aruula

Member

Kirato Wanjala Wanyonyi

Member

Jared Rodrick Nyaundi

Member

The Terms of Reference for Trans Nzoia County Pending Bills and Human Resource Audit are to –

- a. obtain a full list of the Pending bills as the 8th August 2022;
- b. obtain request(s) for review of bill(s) from the affected supplier(s) contained in the bills' list;
- c. record description of the works done, goods supplied, services given and dates including exact locations;
- d. obtain evidence of delivery/performance or reports (for consultancy services);
- e. obtain evidence of receipt of goods and services/performance;
- f. carry out (where applicable) physical verification including circumstantial and corroborative evidence of work done and delivery;
- g. quantify and evaluate value for money of the work done, goods delivered, or services given;
- h. advise Trans Nzoia County Government on an appropriate arrangement of payment of the verified pending bills that is open, equitable, accountable and practical;
- i. advise on future management of bills and payables to avoid delayed payments;



- j. confirm the total number of county staff and the staff put on payroll;
- k. review the staff establishment, both the IPPD and the manual payroll, in terms of optimum numbers, in-post, station and duties assigned;
- l. obtain schedules indicating the statutory deductions such as NHIF, NSSF, PAYE and confirm remittance to the relevant statutory authorities;
- m. confirm the total percentage of wage bill against the acceptable level;
- n. review all the processes relating to recruitment, selection, appointments, training, promotions, re-designations, employee benefits and payroll administration and identify any gaps/non-compliance/short comings;
- o. determine whether there has been recruitments/hiring/processing of salaries that has not been properly authorized and recorded;
- p. Compile report with recommendations of actions that the county should undertake to ensure compliance with labour laws.

In performance of its functions, the Taskforce –

- a. shall hold such number of meetings at such places and such times and review all documents that are required as the Taskforce may consider necessary for the proper discharge of its mandate;
- b. shall have access to reports of any previous investigations relevant to its mandate;
- c. shall, as it considers appropriate, carry out or cause to be carried out such studies or research as may inform the Taskforce on its mandate;
- d. subject to the foregoing, the Taskforce shall have all the independence necessary for carrying out its function or expedient for the proper execution of its mandate;
- e. deliberations on the Taskforce shall remain confidential and members shall execute a confidentiality agreement;
- f. the Taskforce may summon any current or former member of staff of the County or any person to provide any given information that would held the Taskforce in its work; and
- g. The Taskforce may co-opt any person, whose knowledge, skills or competencies may be necessary to facilitate its work.

The Secretariat of the Taskforce



The Secretariat of the Taskforce shall be based at the office of the Governor, County Government Headquarters and shall be responsible to the Taskforce for –

- a. providing appropriate background brief to the Taskforce;
- b. preparing the Taskforce’s report and disseminating any information deemed relevant to the Taskforce;
- c. coordinating the provision of all documents required to facilitate the work of the Taskforce from the relevant departments;
- d. undertaking research and liaising with the relevant National and County Government Departments and any other institution in order to gather relevant information necessary for informing the Taskforce;
- e. Providing logistical support including vehicles and meeting venues.

Tenure

The assignment shall take thirty (30) days commencing October 17, 2022, but the same may be with justifiable reason be extended for such other period as it may be considered necessary. At completion of the assignment the Taskforce shall handover the report to the Governor with appropriate recommendations.

Remuneration

The remuneration of members of the Taskforce, Secretariat and support staff shall be as the applicable Salaries and Remuneration Commission’s guidelines contained in the relevant circulars.

Dated October 12, 2022

George Natembeya,

Mr/4300123 Governor,

Trans Nzoia County.

107. In sum, the Taskforce had the duty of establishing pending bills that were genuinely incurred and to ascertain the actual number of staffs of the County Government of Trans Nzoia.
108. The inevitable question which now begs an answer is whether the issue of pending bills and human resource could be dealt with under the constitutional and legislative framework which has been discussed above.
109. The answer to the above question cannot be a tall order. The issues of pending bills and human resource relate to prudent use of public finances. Such issues are usually captured under the audits undertaken pursuant to article 229 of the *Constitution*. As discussed above, the audits contemplated under article 229 of the *Constitution*, are Annual financial audits, Performance audits or Procurement audits.
110. If for instance the twin issues were, for any reason, not properly captured under the reports prepared pursuant to article 229 of the *Constitution*, still the County Government had the leeway of requesting the Auditor-General to carry out a periodic audit. Further, the County Government could also have requested the County Assembly of Trans Nzoia to sanction the Auditor-General to carry out a forensic audit.



111. Having said so, what now follows is a consideration as to whether the Taskforce is in line with the above constitutional and legal framework of audits in Kenya.
112. To that end, the respondents argued that the Governor acted within articles 174, 179 and 235 of the Constitution, section 155 of the Public Finance Management Act and sections 30 and 31 of the County Government Act to appoint persons to assist in the running and management of the affairs of the 2nd respondent by dint of devolution.
113. It was further argued that article 229 of the Constitution and section 7 of the Public Audit Act that the audit role was not an exclusive role and could be delegated more so, under sections 33 and 155 of the Public Finance Management Act, the 1st and 2nd respondents had discretion to place internal audit mechanisms to ensure prudent expenditure of public finances.
114. As earlier on stated, article 174 of the Constitution provides for the objects of devolution. They are nine of them including the promotion of democratic and accountable exercise of power, enhancement of checks and balances and the separation of powers, among others. article 179 of the Constitution, in the context of this matter, asserts the position that the Governor is the Chief Executive Officer of a county. article 235 of the Constitution is on the staffing of County Governments. Such is to be undertaken within a framework of uniform norms and standards prescribed by an Act of Parliament.
115. Before addressing the above constitutional and legal provisions, this court will deal with the argument that the public audit role is not an exclusive to the Auditor-General. Reference was made to sections 33 and 155 of the PFMA. Section 33 of the PFMA calls upon the Cabinet Secretary to submit the National Government Debt Management Strategy Paper to Parliament annually. The paper is a statement setting out the debt management strategy of the national government over the medium term with respect to its actual liability and potential liability in respect of loans and guarantees and its plans for dealing with those liabilities. The paper, respectfully, is not any form of audit. The paper is just a strategy employed by the national government on debt management.
116. Section 155 of the PMFA provides for the need of a County Government to maintain internal auditing arrangements. In so doing, a County Government is required to establish an Internal Auditing Committee whose composition and functions are to be prescribed by the appropriate regulations. The regulations in this case are the Public Finance Management (County Governments) Regulations 2015 (hereinafter referred to as ‘the regulations’).
117. In Part XIII, the Regulations provide for Internal Audit and Audit Committees. Regulation 156 creates the office of the County Head of Internal Audit Services. The office is in the County Treasury. The Head of Internal Audit unit enjoys operational independence through the reporting structure by reporting administratively to the Accounting Officer and functionally to the Audit Committee.
118. The role of the internal audit office is to review and evaluate budgetary performance, financial management, transparency and accountability mechanisms and processes in County Government entities, including the County Assembly. It also has the duty to give reasonable assurance through the Audit committee on the state of risk management, control and governance within the organization and to also review the effectiveness of the financial and non-financial performance management systems of the entities.
119. Under regulation 167, each County Government is to establish an Audit Committee. The committee comprises of between 3 and 5 members. The main function of the Audit committee is twofold. One, the committee supports the accounting officers with regard to their responsibilities for issues of risk,



control and governance and associated assurance, and, two, it follows up on the implementation of the recommendations of internal and external auditors.

120. Therefore, the Internal Audit office and the Audit Committees are offices within a County government. Their work can, however, be used by the Auditor-General under section 33 of the [Public Audit Act](#) as follows:

33. Use of work of internal auditor:

(1) The final report by an internal auditor which has been deliberated on and adopted by an audit committee of a State Organ or public entity, may be copied to the Auditor-General.

(2) The Auditor-General shall have unhindered access to all internal audit reports of a State Organ or any public entity, under subsection (1) above, which is subject to audit by the Auditor-General as provided for under article 229(4) of the [Constitution](#).

121. The upshot is that the entities provided for in section 155 of the [PMFA](#) and the Regulations are internal entities and are limited to undertaking audit roles within the County Government entities unlike the Auditor-General who is an external entity with jurisdiction across the country.

122. On the basis of the above, it is apparent that the constitutional and statutory provisions referred to by the Respondents do not upset the foregoing.

123. It, therefore, means that according to the [Constitution](#) and the law, external audits of a State organ or public entity are to be carried principally by the Auditor-General. That is expressly so stated under article 226(3) and (4) of the [Constitution](#), thus: -

(3) Subject to clause (4), the accounts of all governments and State organs shall be audited by the Auditor-General.

(4) The accounts of the office of the Auditor-General shall be audited and reported on by a professionally qualified accountant appointed by the National Assembly.

124. The argument propounded by the Respondents does not, therefore, hold. It runs contra the [Constitution](#). As it stands, the Governor created an entity unknown in the [Constitution](#) and the law and mandated it to discharge duties which the [Constitution](#) and the law bestowed upon the Auditor-General and the County Government. That is an outright usurpation of the constitutional and legislative duty and powers of the Auditor-General, the County's Internal Audit office as well as the Audit Committee.

125. There is yet another complication raised by the creation of the Taskforce. According to the [Constitution](#) and the [Public Audit Act](#), the reports prepared by or under the sanction of the Auditor-General are forwarded to Parliament and the County Assemblies, as the case may be. There is, however, in this case, no provision which allows the placement of the report by the Taskforce before the Trans Nzoia County Assembly. It, hence, means that the report cannot be legally adopted and debated by the Trans Nzoia County Assembly. Likewise, no resolutions can be made on it. Further, any recommendations and



sanctions, if any, as contemplated in law cannot be implemented for want of legality. One, therefore, wonders how the report will be of any benefit to the County Government.

126. In light of the foregoing, this Court does not find any difficulty in finding that the Taskforce was neither established nor sanctioned by the Auditor-General. The Taskforce was also not part of the Internal Audit office or the Audit Committee of the County Government. To that end, and in keeping with the principles of constitutional interpretation, the establishment of the Taskforce contravened articles 174(a) and (i), 226(3) and 229 of the Constitution, the Public Audit Act, the Public Finance Management Act and Public Finance Management (County Governments) Regulations 2015 by usurping the powers of the Auditor General and those of the Internal Audit office or the Audit Committee of the County Government.
127. Having found that the establishment of the Taskforce is unconstitutional for being an entity unknown within the Constitution and the law and having usurped the powers of the Attorney General and those of the Internal Audit office or the Audit Committee of the County Government, and in the unique circumstances of this matter, it readily comes to the mind of this Court that in most cases when a new incoming Governor takes office, there is the desire to start the tenure on a clean platform and to readily understand all financial and governance issues in the County.
128. That is, indeed constitutionally expected of any Governor holding office. However, whereas the Governor is the Chief Executive Officer of a County, he is like a caged animal, only able to move, but within the cage. In this case, the cage is the Constitution and the law. The Governor remains at liberty to dispense with all the wide powers accorded to the office, but only in accordance with the Constitution and the law. That is the hallmark of article 10 of the Constitution.
129. The first port of call of a Governor who wishes to carry out an audit of the County must be the Constitution and the law. If for any reason, the Governor finds the audit reports by the Auditor-General prepared under article 229 of the Constitution to be inadequate, this Court finds that the appropriate procedure to be undertaken is for the Governor to request the Auditor-General for a periodic audit. Further, the Governor may request the County Assembly to sanction the Auditor-General to undertake a forensic audit.
130. However, in a case where the Governor wishes to have the audit undertaken by another qualified auditor other than the Auditor-General, this Court finds that such a request should be made to the Auditor-General to either outsource the service pursuant to section 23 of the Public Audit Act or to seek professional assistance and consultancy under section 24 of the Public Audit Act. In any case, the Auditor-General will render a decision and in the event the Governor is not satisfied with the decision, a legal challenge may be maintained.
131. The reason why it is of paramount importance to have the sanction of the Auditor-General in the above scenarios is to ensure that the resultant audit report is eventually presented before the County Assembly, debated and the resolutions thereof accordingly acted upon.
132. Returning to the case at hand, and having found the establishment of the Taskforce unconstitutional, this Court does not find it prudent to deal with issues (c) and (d) as framed since, they are automatically subsumed by the declaration of unconstitutionality.
133. However, albeit so briefly, had this court found that the establishment of the Taskforce was within the constitutional confines, it would have gone ahead to find against issue (c). For clarity, this Court would have found that the establishment of the Taskforce did not require any form of public engagement since the decision to establish the Taskforce would have been one of those which deal with the day-to-day operations of the County Government. Such decisions, as opposed to those which transcends the



boundaries of internal decisions, do not call for any form of public participation. (See Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR.

134. Likewise, this court would have found issue (d) in the affirmative. There is no evidence to find that articles 47 and 50 of the *Constitution* were in any way infringed in the manner the Taskforce carried out its duties. The petitioner did not, at least, file any disposition by any affected party to that end. (See proof of constitutional petitions as discussed in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) case (supra)*).
135. The court will now look at the appropriate remedies in view of the above findings.

Remedies:

136. In determining the remedies, this court remains alive to the fact that the Taskforce completed its task, prepared a report and presented it to the Governor. The submission was on March 10, 2023. That is around 6 months ago.
137. By now, there is no doubt the report may have been fully implemented or substantively so. On one hand, public resources were expended by the Taskforce. On the other hand, despite the unconstitutionality, the report may have yielded impressive findings and appealing recommendations. This court also notes that it has not found any infraction of the Bill of Rights by the respondents.
138. It remains unclear to this court why the petitioner had to wait for the Taskforce to fully undertake its mandate, present its report and then lodge the instant Petition about two months later. There is obvious delay on the part of the petitioner. Had the Petition been filed during the time when the Taskforce was still carrying out its mandate, or even earlier, this court would have been placed in a position to determine the suitability or otherwise of conservatory orders. However, that did not happen. The upshot is that the petitioner is guilty of laches. In such a scenario, the maxim of equity that equity aids the vigilant and not the indolent applies. As it is today, equity is no longer an equitable remedy, it was elevated under article 10(2)(b) of the *Constitution* to a constitutional principle. (See the Court of Appeal in *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR).
139. Resulting from the above, both the petitioner and respondents are guilty of infringing the *Constitution* in one way or the other.
140. This court must, therefore, guard against a scenario where more public resources will be spent in legal challenges emanating from the implementation of the report and the declaration of the unconstitutionality in this decision. A balance, therefore, ought to be struck.
141. Article 23 of the *Constitution* provides for remedies in constitutional infractions. They include declaration of rights, injunctions, conservatory orders, declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24, an order for compensation, an order of judicial review among others.
142. The Court of Appeal in *Total Kenya Limited v Kenya Revenue Authority* [2013] eKLR held that even in instances where there are express provisions on specific reliefs a court is not precluded from making any other orders under its inherent jurisdiction for ends of justice to be met to the parties.



143. In *Republic ex parte Chudasama v The Chief Magistrate's Court, Nairobi and another* Nairobi HCCC No 473 of 2006, [2008] 2 EA 311, Rawal, J (as she then was) stated that:

While protecting fundamental rights, the court has power to fashion new remedies as there is no limitation on what the court can do. Any limitation of its powers can only derive from the *Constitution* itself. Not only can the court enlarge old remedies, it can invent new ones as well if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the Court itself, instead of being the protector, defender, and guarantor of the constitutional rights would be guilty of the most serious betrayal. See *Gaily v Attorney-General* [2001] 2 RC 671; *Ramanoop v Attorney General* [2004] *Law Reports of Commonwealth* (From High Court of Trinidad and Tobago); *Wanjuguna v Republic* [2004] KLR 520... The Court is always faced with variety of facts and circumstances and to place it into a straight jacket of a procedure, especially in the field of very important, sensitive and special jurisdiction touching on liberties and rights of subjects shall be a blot on independence and many faceted jurisdiction and discretionary powers of the High Court. See *The Judicial Review Handbook* (3rd Edn) by Michael Fordham at 361.

144. The Constitutional Court of South Africa in *Fose v Minister of Safety & Security* [1977] ZACC 6 emphasized the foregoing as follows: -

Appropriate relief will in essence be relief that is required to protect and enforce the *Constitution*. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the *Constitution* are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.

145. The appropriate balance in this matter is to regularize the Audit report prepared by the Taskforce at hand. In doing so, any further implementation of the findings and recommendations contained in the Audit report ought to be forestalled.

146. With such an approach, justice will be served to both the taxpayers and the County Government which is eager to entrench proper governance structures in place.

Disposition

147. Deriving from the above, the following final orders do hereby issue: -

- a. A declaration hereby issues that the establishment of the Taskforce on Pending Bills and Human Resource Audit by the Governor of the Trans Nzoia County *vide* Kenya Gazette (Vol CXXIV-No 218) Notice No 12643 which notice was published on October 21, 2022 contravened articles 174(a) and (i), 226(3) and 229 of the *Constitution*, the *Public Audit Act*, the *Public Finance Management Act* and *Public Finance Management (County Governments) Regulations 2015* by usurping the powers of the Auditor General and those of the Internal Audit office and the Audit Committee of the County Government of Trans Nzoia County. The Taskforce and its resultant report are, therefore, unconstitutional, null and void.
- b. Given the laches on the part of the petitioner in challenging the establishment of the Taskforce and the advance state of implementation of the audit report



of the Taskforce by the 1st, 2nd, 3rd and 4th respondents herein, the declaration of unconstitutionality in (a) above is hereby suspended pending the following: -

- (i) The 1st respondent shall, within 14 days of this order, (since the Auditor-General did not participate in this matter) forward the Audit report prepared by the Taskforce together with a copy of this judgment and the decree thereof to the Auditor-General. The 1st respondent shall then serve all the parties herein with the evidence of service within 7 days of service upon the Auditor-General.
 - (ii) The Auditor-General shall then consider the report and decide on whether it meets the appropriate parameters required by the Constitution and the law. The Auditor-General shall further consider whether to deem and adopt the Audit report as having been initially sanctioned by the Office of the Auditor-General. Further, the Auditor-General shall have the option of rejecting the report. The decision will be made and communicated to the 1st respondent within 60 days of service as directed in (i) above.
 - (iii) In considering the report in (ii) above, the Auditor-General shall be at liberty to call for any documents or information either from the 1st, 2nd, 3rd and 4th respondents or elsewhere as the law permits, or to even carry out any inspection(s) at the offices of the 1st, 2nd, 3rd and 4th respondents as to enable it make the decision.
 - (iv) In the event the Auditor-General decides to adopt the report, the Auditor-General will be at liberty to adopt it as it is or to make any changes to it or to make further or other recommendations and findings as it deems fit. The Auditor-General shall then inform the 1st respondent of its decision in writing as directed in (ii) above.
 - (v) Once a decision to adopt the report is made and communicated by the Auditor-General to the 1st respondent, then the report shall, thereafter, be dealt with in accordance with the law.
- c. In the event the Auditor-General rejects the audit report by the Taskforce in its entirety, or if the 1st respondent herein fails to effect service of the report and judgment as directed, the declaration of unconstitutionality of the Taskforce and its report in (a) above shall forthwith take effect.
 - d. Once the declaration of unconstitutionality of the Taskforce and its report sets in as provided for in (c) above, the proceedings of the Taskforce and the



resultant findings and recommendations together with any actions taken by the 1st, 2nd, 3rd and/or 4th respondents in the implementation of the Audit Report shall have no force of law or at all. The same shall accordingly stand quashed by an order of *certiorari* and the state of affairs shall revert to as it were before the establishment of the Taskforce. In that case, all the sums of monies expended upon the Taskforce shall be made good in accordance with article 226(5) of the *Constitution*.

- e. Pending service as directed in (b)(i) above and the outcome of the decision by the Auditor-General, the 1st, 2nd, 3rd and 4th respondents and/or their agents, representatives or assignees are hereby restrained from any further and/or subsequent implementation of the findings and recommendations contained in the impugned Audit Report.
- f. The parties herein remain at liberty to apply.
- g. As the matter is a public interest litigation, parties shall bear their respective costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 19TH DAY OF SEPTEMBER, 2023.

A. C. MRIMA

JUDGE

