



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT VIHIGA**

**CONSTITUTIONAL PETITION NO. E008 OF 2021**

FRANCIS ANGUEYAH OMINDE.....1<sup>ST</sup> PETITIONER

JOSEPH MUKUNA SIMEKHA.....2<sup>ND</sup> PETITIONER

**AND**

**VIHIGA COUNTY EXECUTIVE COMMITTEE**

**MEMBER FINANCE AND ECONOMIC PLANNING.....1<sup>ST</sup> RESPONDENT**

**THE GOVERNOR VIHIGA COUNTY.....2<sup>ND</sup> RESPONDENT**

**THE SPEAKER COUNTY ASSEMBLY OF VIHIGA.....3<sup>RD</sup> RESPONDENT**

**THE CLERK COUNTY ASSEMBLY OF VIHIGA.....4<sup>TH</sup> RESPONDENT**

**AND**

**THE CONTROLLER OF BUDGET.....1<sup>ST</sup> INTERESTED PARTY**

**DR. PATRICK SAISI.....2<sup>ND</sup> INTERESTED PARTY**

**PAMELA MBAGAYA KIMWELE.....3<sup>RD</sup> INTERESTED PARTY**

**MARY AMALEMBA.....4<sup>TH</sup> INTERESTED PARTY**

**PAUL MBUNI.....5<sup>TH</sup> INTERESTED PARTY**

**DR. AMOS KUTWA.....6<sup>TH</sup> INTERESTED PARTY**

**ENGINEER KENNETH ELVUNA KESEKO.....7<sup>TH</sup> INTERESTED PARTY**

**GEOFFREY LUGALIA VUKAYA.....8<sup>TH</sup> INTERESTED PARTY**

**HENRY MANGONGO LUMBASYO.....9<sup>TH</sup> INTERESTED PARTY**

**PROF. INONDA MWANJE.....10<sup>TH</sup> INTERESTED PARTY**

**FELISTUS BARASA.....11<sup>TH</sup> INTERESTED PARTY**

**KENYA NATIONAL UNION OF CLINICAL OFFICERS.....12<sup>TH</sup> INTERESTED PARTY**

**JUDGMENT**

1 The petition, dated 28<sup>th</sup> June 2021, and amended on 6<sup>th</sup> September 2021, is brought by Francis Angueyah Ominde and Joseph Mukuna Simekha, to be known hereafter as the petitioners, citing several violations of the Constitution, with respect to the approval of budget estimates for the Vihiga County Government for the financial year 2021/2022. The petitioners are concerned about principles governing public finances, and argued that the Vihiga County Executive Committee, to be known hereafter as the Cabinet, had not followed the due process of law in approval of the budget estimates, and principally that the budget estimates presented to the County Assembly of Vihiga had not been approved by the Cabinet. They further argue that there was no public participation in the development of the budget. It is on that basis that they would like the budget making process, that led up to the presentation of the budget before the County Assembly, to be declared unconstitutional, null and void.

2 The case for the petitioners is set out in the petition and the affidavits sworn in support, by the 1<sup>st</sup> petitioner on 28<sup>th</sup> June 2021 and the 2<sup>nd</sup> petitioner on 6<sup>th</sup> September 2021. The 1<sup>st</sup> respondent submitted, on 30<sup>th</sup> April 2021, to the County Assembly, the Vihiga County Annual Budget Estimates, in accordance with section 129(2) of the Public Finance Management Act, No. of 18 of 2012. On 3<sup>rd</sup> May 2021, the 2<sup>nd</sup> interested party, the Deputy Governor of Vihiga County, wrote to the 2<sup>nd</sup> respondent, the Governor of Vihiga County, raising concern that the Annual Budget Estimates had not been submitted to the Cabinet for approval in accordance with section 129(1) of the Public Finance Management Act, and a draft of the enabling legislation for the County Budget had also not been discussed or approved by the Cabinet. He stated that the Budget Estimates and Appropriation Bill presented to the County Assembly had, therefore, been improperly placed before the County Assembly for approval. On 21<sup>st</sup> June 2021, the County Secretary, on prompting from the 4<sup>th</sup> respondent, wrote to the 2<sup>nd</sup> interested party, saying that the 1<sup>st</sup> respondent bore the responsibility of ensuring compliance with the Public Finance Management Act. The County Assembly was said to be processing the Annual Budget Estimates without full compliance with the law, and that the Annual Budget Estimates were before the County Assembly prior to being discussed and approved by the County Executive.

3 It is averred that the 1<sup>st</sup> respondent had violated Article 179 of the Constitution, which provides that the executive authority of the County Government vested in and was exercised through the Cabinet. The 1<sup>st</sup> respondent is also said to have violated section 129(1) of the Public Finance Management Act, by failing to submit the estimates to the Cabinet for approval before submission to the County Assembly. It is submitted that the 2<sup>nd</sup> respondent had failed in leadership by failing to cause the Cabinet to discuss and approve the Annual Budget Estimates before their submission to the County Assembly, and had acted contrary to Article 179 of the Constitution and section 30(3) of the County Governments Act, No. 17 of 2012. The 3<sup>rd</sup> and 4<sup>th</sup> respondents, the Speaker and the Clerk of the County Assembly of Vihiga, respectively, are blamed for failing to take remedial action, in the face of the violations, and are said, therefore, to have failed to exercise oversight, consequently violated Article 185(3) of the Constitution, and their conduct was repugnant to Article 73 of the Constitution.

4 The petitioners cite Regulation 38(1) of the Public Finance Management (County Governments) Regulations, 2015, which allows the 1<sup>st</sup> interested party, where the budget estimates submitted to the County Assembly have not been approved or are unlikely to be approved by the County Assembly, to authorise withdrawals of up to 50% from the County Revenue Fund, based on the last approved budget by the County Assembly, for the purpose of meeting expenditure of the County Government for the financial year. They submit that that provision ought to apply to the Vihiga County. They seek declarations that the budget making process is unlawful and unconstitutional; the Appropriation Bill for 2021 is unconstitutional, unprocedural, null and void; the respondents have violated the Constitution; 2<sup>nd</sup> respondent has failed in leadership and is unfit to hold office; and that the expenditure for Vihiga County for the financial year 2021-2022 be as per section 38(1) of the Public Finance Management (County Governments) Regulations, among others.

5 The amendment introduced on 6<sup>th</sup> September 2021 principally posits that there was no public participation in the development of the budget estimates, despite the same being a mandatory requirement under the Public Finance Management Act and the Regulations made under it. It is specifically averred that the 1<sup>st</sup> respondent failed to publish and publicise the annual budget circular for the financial year 2020/2021, and thus violated Article 201 of the Constitution, section 128 of the Public Finance Management Act and Regulation 30(1)(7) of the Public Finance Management (County Governments) Regulations.

6 It also averred, in the amended petition that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties, who were members of the Cabinet began to face hostility, from the 2<sup>nd</sup> respondent and members of the County Assembly, for their stand on the impugned budget, and specifically on their insistence that there be compliance with the rule of law with respect to public finance management, and were viewed as an impediment to the plans by the 2<sup>nd</sup> respondent and the County Assembly to ring fence at least Kshs. 500, 000, 000.00 for exclusive control of the members of the County Assembly in the next general election. It is averred that the 2<sup>nd</sup> respondent and the County Assembly were working together as a unit despite the principle of separation of powers, which forced the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties to assume the oversight role that the County Assembly ought to have been playing. It is averred that it was as a result of that that impeachment proceedings were initiated against them, which are the subject of separate High Court proceedings, being Vihiga High Court Constitutional Petition No. E006 of 2021 (consolidated with Vihiga High Court Constitutional Petitions Nos. E005 and E007 of 2021) and Vihiga High Court Judicial Review No. E001 of 2021.

7 The petitioners, therefore, seek declarations that the budget making process for the Vihiga County for the year 2021/2022 is unlawful and unconstitutional for want of the statutory requirement of approval by the Cabinet as constituted as at 30<sup>th</sup> April 2021, for want of transparency openness and adequate public participation, and for lack of the 2020/2021 Financial Year Annual Budget Circular by the 1<sup>st</sup> respondent; a declaration that the Vihiga County Appropriation Bill or Act of 2021 was unprocedural, unconstitutional, null and void; a declaration that the 2<sup>nd</sup> respondent had failed to show leadership in the County Government of Vihiga and was unfit to hold office; an order that the expenditure for the Vihiga County for the financial year 2021/2022 be as per Regulation 38(1) of the Public Finance Management (County Governments) Regulations or section 34 of the Public Finance Management Act; a declaration that the exclusion of the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties from the Cabinet as a result of their impugned position on the budget making process was unconstitutional null and void; and an order compelling the respondents to personally bear the costs of any funds incurred in the processing of the impugned budget estimates, punitive damages be imposed on the 1<sup>st</sup> and 2<sup>nd</sup> respondents and costs of the petition be provided for.

8 The affidavit in support of the petition was sworn by the 1<sup>st</sup> petitioner, on 28<sup>th</sup> June 2021. He avers to have previously served in the County

Government as County Secretary but was hounded out of office by the 2<sup>nd</sup> respondent. He avers to have had been notified of the goings on the budget by the 2<sup>nd</sup> interested party. He states that he got information from social media that the County Assembly was about to pass a budget and an Appropriation Bill without the mandatory statutory County Executive approval. He then wrote to the 2<sup>nd</sup> interested party to provide him with the information, and he was given several letters exchanged between 1<sup>st</sup> interested party and the respondents. He avers that he established that on or before 30<sup>th</sup> April 2021, the 1<sup>st</sup> respondent had submitted to the County Assembly the subject estimates. In one of the letters dated 3<sup>rd</sup> May 2021, the 2<sup>nd</sup> interested party wrote to the 2<sup>nd</sup> respondent, with a copy to the 3<sup>rd</sup> respondent, raising concern that the budget estimates had not been submitted to the Cabinet for approval. He asserts that the budget estimates were improperly before the County Assembly because of that want of approval, and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents had been notified of the fact, and the 2<sup>nd</sup> respondent, being the Chair of the Cabinet was aware of the illegality. He cites material from a WhatsApp group, where on 4<sup>th</sup> May 2021, the 4<sup>th</sup> respondent was said to have indicated that the 1<sup>st</sup> respondent had forwarded budget estimates to the County Assembly without Cabinet approval. To which two members of the County Assembly are said to have remarked that the documents ought to be returned to him. On 31<sup>st</sup> May 2021, the 2<sup>nd</sup> respondent was said to have written a letter to the 2<sup>nd</sup> interested party distancing the County Assembly from the illegality and attributing the anomalies to the County Executive. He refers to another letter dated 4<sup>th</sup> June 2021 from the 4<sup>th</sup> respondent, saying that once the County Assembly received any statutory document or report from the County Executive, it would be believed that all due process was followed before any such document was forwarded to the County Assembly for processing. Another letter is dated 21<sup>st</sup> June 2021, from the County Secretary to the 2<sup>nd</sup> interested party, stating that it was the 1<sup>st</sup> respondent who was reasonable for budget estimates, and according to the 1<sup>st</sup> petitioner, the County Secretary was passing blame to the 1<sup>st</sup> respondent, yet the County Secretary was the custodian of all Cabinet minutes and documents. He asserts that despite the said correspondence, the County Assembly was going ahead with the process despite the illegality. He avers that the budget estimates before the County Assembly had not been discussed and did not have Cabinet approval. He avers that since it would be illegal for the County Assembly to approve illegal estimates, the 1<sup>st</sup> interested party ought to activate Regulation 38(1) of the Public Finance Management (County Governments) Regulations.

**9** Attached to the affidavit are several documents. There is the letter dated 23<sup>rd</sup> June 2021, from himself to the 2<sup>nd</sup> interested party, saying that he had seen several letters in social media about the budget estimates being submitted to the County Assembly without Cabinet approval, and requesting confirmation of the truth of the allegations, and asking to be supplied with copies of correspondence to enable him file a public interest suit. The second document is a cover copy of the Executive Supplementary Budget 2020/2021. The third document is a letter from the office of the 2<sup>nd</sup> interested party, dated 3<sup>rd</sup> May 2021, addressed to the 2<sup>nd</sup> respondent, stating that the County Fiscal Strategy Paper and the County annual budget estimates had been submitted to the County Assembly without Cabinet approval, and asking to know why that was so. The fourth document is an extract from or an excerpt of a WhatsApp conversation allegedly between the 4<sup>th</sup> respondent and others. The fifth document is a letter from the 3<sup>rd</sup> respondent, dated 3<sup>1st</sup> May 2021, addressed to the 2<sup>nd</sup> interested party, in response to his, where it is stated that the irregularities alleged in execution were of the Executive function, but were concerning, and directing the County Assembly administration to take the necessary action. The sixth document is from the 4<sup>th</sup> respondent, dated 4<sup>th</sup> June 2021, addressed to the County Secretary, forwarding a letter from the 2<sup>nd</sup> interested party where he had alleged that documents were forwarded to the County Assembly without Cabinet approval, and asking the County Secretary to apprise the 2<sup>nd</sup> interested party on the Cabinet approval. It was asserted that once the County Assembly received any statutory document or report from the County Executive, it was believed that all the due process had been followed before any such documents were forwarded to the County Assembly for processing. The seventh and last document is a letter from the County Secretary, dated 21<sup>st</sup> June 2021, addressed to the 2<sup>nd</sup> interested party, in response to his letter, which the 4<sup>th</sup> respondent had forwarded to the County Secretary. The County Secretary informed the 2<sup>nd</sup> interested party that the proper person to deal with the matters raised was the 1<sup>st</sup> respondent, who had informed him, the County Secretary, that the procedure had been strictly followed. He went to state that he could not release Cabinet minutes, without approval of the Cabinet, and undertook to seek approval of the Cabinet for release of the minutes to the 2<sup>nd</sup> interested party.

**10** The response by the 1<sup>st</sup> and 2<sup>nd</sup> respondents took the form of an affidavit, sworn on 5<sup>th</sup> July 2021, by the County Secretary, Ezekiel Ayiego, filed herein on 6<sup>th</sup> July 2021. He avers to be the secretary to the Cabinet, and that two meetings were held to deliberate on and approve the 2021/2022 budget estimates, both were held virtually on 24<sup>th</sup> February 2021 and 30<sup>th</sup> April 2021, due to the Covid-19 pandemic, and all the issues relating to the budget were addressed at those Cabinet meetings. He avers that the last meeting was held virtually because that was the last day for the budget estimates to be submitted to the County Assembly and a delay would have led to violation of the timelines. He asserts that the Cabinet met and approved the budget. He concedes to corresponding with the 2<sup>nd</sup> interested party on the budget, but states that Cabinet deliberations were confidential, and what was available to the public are the decisions and the resolutions, and even then, he could only relay such decisions and resolutions to the public on directions of the Cabinet, and not on his own initiative, and that that was the position that he communicated to the 2<sup>nd</sup> interested party. He accuses the petitioners, by using his correspondence with the 2<sup>nd</sup> interested party, when the 2<sup>nd</sup> interested party himself has not sued over the matter, of a scheme to undermine the 2<sup>nd</sup> respondent, and points at Vihiga High Court Constitutional Petition No. E004 of 2021, which seeks to have the 2<sup>nd</sup> respondent declared unfit to hold office. He avers that the 1<sup>st</sup> petitioner has declared interest in the post of Governor of Vihiga County at the next general elections to held in 2022, and the 2<sup>nd</sup> petitioner was his campaigner and manager, and the cause herein was part of their campaign to sow seeds of discord for political gain.

**11** Attached to the affidavit of Ezekiel Ayiego are several documents. There are minutes of a meeting held on 24<sup>th</sup> February 2021, of the Vihiga County Economic Forum, where the Director of Budget Policy presented a paper on the County Fiscal Policy Strategy, which indicated proposed ceilings for 2021/2022. The next document are minutes of a meeting held virtually on 30<sup>th</sup> April 2021, where the 1<sup>st</sup> respondent presented the County Budget Estimates for the Financial Year 2021/2022. It is indicated that the estimates were approved, with amendments, for forwarding to the County Assembly. The third set of documents are the pleadings and other papers filed in Kisumu High Court Constitutional Petition No E006 of 2021, which later became Vihiga High Court Constitutional Petition No. E004 of 2021. The last two documents appear to be press statements, one in the names of the petitioners, and the other anonymous, relating to the budget and governance crisis in Vihiga.

**12** There is also another affidavit, sworn on 5<sup>th</sup> July 2021, and filed herein on 6<sup>th</sup> July 2021, by Alfred Indeche, the 1<sup>st</sup> respondent. He avers that the freezing of the budget was going to adversely affect the operations of the County Government, and especially with respect to

payment of salaries and implementation of development projects. He avers that the budget cycle begins in August, but states that for current year operations had been disrupted by Covid- 19 since March 2020. He avers that he planned the County Budget and meetings were held on 24<sup>th</sup> February 2021 and 30<sup>th</sup> April 2021 to discuss it. The cabinet held a virtual meeting on 30<sup>th</sup> April 2021, and approved it. He avers that the petitioners had picked on correspondence from the 2<sup>nd</sup> interested party to mislead the public, and argues that they should have sought information or clarifications from him. He asserts that matters relating to finance were directly under him, and not the 2<sup>nd</sup> respondent. He asserts that there were no violations of the Constitution.

**13** The 1<sup>st</sup> respondent swore a further affidavit on 6<sup>th</sup> October 2021, filed herein on 7<sup>th</sup> October 2021, to respond to the issues raised in the amended petition. He avers that the budget process for the year 2021/2022 went through all the procedures provided in the Public Finance Management Act and the Regulations. He avers that there was public participation, and the circular setting out the guidelines for the process as required by section 128 of the Public Finance Act was issued. He further avers that the budget estimates fully complied with the requirements of Regulation 30 of the Public Finance Management (County Governments) Regulations 2015. He adds that a committee of Senate investigated the same issue, of compliance, which came up during the pendency of the petition, and no adverse report was returned. He states that the 2<sup>nd</sup> petitioner had also attended before the Senate committee and presented his material. He avers that the salaries of all health workers employed in 2019, despite the irregularities that attended the process of their recruitment, had been catered for in the budget, and payment had already been effected. On the letter dated 4<sup>th</sup> May 2021, he explains that the same was a normal communication to the members of the Cabinet, requiring them to confirm that budget allocation had been captured in the budget estimates for ward development for each ward. He avers that elected members of the County Assembly had sought assurance of the 2<sup>nd</sup> respondent on that, and there was nothing like re-engineering the budget process. He further states that the Public Finance Management Act mandated the Cabinet member responsible for finance to manage the entire budget process for the entire County Government, including the County Assembly and the County Executive, and consultations with the County Assembly were, therefore, not misplaced. He asserts that the development funds for the wards could not be under the control of the members of the County Assembly as such funds remain the responsibility of the County Executive, and members of the County Assembly were not losing their oversight role or authority over the funds. On the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties not being given a chance to express their views on the budget, he says that the budget estimates originate from the departments of the County Government, which fall under the respective Cabinet members, and it was up to each Cabinet member to take charge of their department, and if they failed to, then that could not be blamed on him. He avers that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties never brought it to his attention that they had hostilities with the 2<sup>nd</sup> respondent, and he was not aware of any objection on the budget from any Cabinet member. He says that the only issue that came to his attention was the letter by the 2<sup>nd</sup> interested party to the County Assembly, which he dealt with. He urges that the court finds that there was no violation of the law.

**14** The 1<sup>st</sup> respondent has attached a number of documents to his further affidavit. There is copy of a newspaper advertisement by him, being a public participation notice, under Article 10 of the Constitution, section 105 of the County Government Act, section 117(5) of the Public Finance Management Act and Legal Notice No. 35 of 2015, inviting the general public, civil society, community based organisations, interested parties and stakeholders to give views on the draft Vihiga County Fiscal Strategy Paper 2021, via written submissions due to Covid-19 regulations, through addresses given in the notice. The second document is a County Treasury circular, dated 24<sup>th</sup> August 2020, addressed to all Cabinet members, all accounting officers and the 4<sup>th</sup> respondent, forwarding guidelines for the preparation of the medium term expenditure framework budget for the period 2021/22 to 2023/2024. The third document is a General Warrant 2021, from the 2<sup>nd</sup> respondent, addressed to the 1<sup>st</sup> respondent, dated 25<sup>th</sup> June 2021, authorising the 1<sup>st</sup> respondent to issue the funds indicated. The warrant was issued in accordance with section 2 of the Vihiga County Appropriation Act 2021. The fourth document is a letter dated 26<sup>th</sup> February 2021 from the 1<sup>st</sup> respondent addressed to the 4<sup>th</sup> respondent, forwarding the Vihiga County Fiscal Strategy Paper 2021, and the Vihiga County Fiscal Strategy Paper 2021 itself. The fifth document is a schedule from the Department of Health, County Government of Vihiga, showing payment of salary arrears for the health workers recruited in 2019. The sixth document is the Vihiga County Appropriation Act, 2021. The seventh document is a summary of the deliberations and resolutions of the Cabinet meeting of 30<sup>th</sup> April 2021, dated 30<sup>th</sup> June 2021, written by the County Secretary, addressed to the 1<sup>st</sup> respondent and copied to the 2<sup>nd</sup> respondent, the 2<sup>nd</sup> interested party and the Chief officer in the Department of Finance, for further action by the 1<sup>st</sup> respondent. The eighth document is the medium term expenditure framework of the budget estimates 2021/2022 forwarded to the County Assembly. The tenth, and last, document is from the County Secretary, dated 8<sup>th</sup> October 2020, addressed to the 1<sup>st</sup> respondent, forwarding a summary of the deliberations and resolutions of a meeting held on 30<sup>th</sup> September 2020, on a County Budget Review and Outlook Paper.

**15** The County Secretary also swore a further affidavit, on 7<sup>th</sup> October 2021, filed herein on 8<sup>th</sup> October 2021, to respond to the issues raised in the amended petition. He avers that it was his duty as County Secretary to organise Cabinet meetings and to maintain minutes. He avers further that the 2<sup>nd</sup> interested party and five Cabinet members allegedly opposed to the budget did not raise any issue of irregularities before the Cabinet, and no such issues were discussed, and he did not, consequently, maintain any minutes relating to those objections. He asserts that after the budget estimates were presented to Cabinet, members were invited to express their views on it, and if any member had any issue then they ought to have raised it, and if there were hostilities between the 2<sup>nd</sup> respondent and the County Assembly then the same ought to have been raised at that meeting. He averred that the 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties were impeached by the County Assembly, and that the allegations they faced did not include their opposition to the budget estimates. He further avers that the 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties were invited to a Cabinet meeting to defend themselves, but they did not honour the invitation, and the 2<sup>nd</sup> respondent went ahead to implement the impeachment resolution by the County Assembly. He has attached to his affidavit documents from the County Assembly relating to the said impeachment proceedings.

**16** The County Secretary attached to that further affidavit a number of documents. The first is copy of a letter dated 27<sup>th</sup> May 2021, from the 4<sup>th</sup> respondent, to 3<sup>rd</sup> interested party, forwarding to her, through the County Secretary a copy of the documents from the County Assembly of accusations against her and inviting her to defend herself. The second document is a similar letter addressed to the 7<sup>th</sup> interested party. The third document is a similar letter addressed to the 6<sup>th</sup> interested party. The fourth document is a similar letter addressed to the 5<sup>th</sup> interested party. The fifth document is a similar letter addressed to the 3<sup>rd</sup> interested party.

**17** The 3<sup>rd</sup> and 4<sup>th</sup> respondents' response to the petition took the form of a notice of preliminary objection, dated 5<sup>th</sup> July 2021, and filed

herein on even date. It is averred in it that the petition was fatally defective frivolous vexatious misconceived and devoid of merit, and a non-starter and an abuse of the court process. The preliminary objection was canvassed by way of written submissions, and it was determined in a ruling that was delivered herein on 26<sup>th</sup> August 2021, overruling it.

**18** Following the dismissal of the preliminary objection on 26<sup>th</sup> August 2021, the 3<sup>rd</sup> and 4<sup>th</sup> respondents filed grounds of opposition on 15<sup>th</sup> September 2021, dated 14<sup>th</sup> September 2021, where it is averred that the petition is misconceived bad in law and an abuse of the court process, it is frivolous vexatious and trivial, it does not meet the mandatory requirements for granting the orders sought, it does not disclose a cause of action against the respondents, it is incurably defective and the orders sought are vague.

**19** Dr. Margaret Nyakang'o, the holder of the Office of Controller of Budget, the 1<sup>st</sup> interested party herein, reacted to the petition by filing a replying affidavit, sworn on 13<sup>th</sup> October 2021, and filed herein on 18<sup>th</sup> October 2021. In that affidavit, the 1<sup>st</sup> interested party has set out the roles of her office, which include oversight of budgets, control of withdrawals of funds by the County Governments, reporting to the Executive and Legislature on budget implementation by the spending units, advising County Governments on financial matters, conducting investigations on budget implementation matters, undertaking alternative dispute resolution to resolve conflicts and issues relating to budget implementation, dissemination of information to the public on budget implementation, monitoring and evaluating budget implementation, and enforcing budgetary ceilings set by legislation and institutions mandated to set such ceilings. She avers that the Public Finance Management Act and the Public Finance Management (County Governments) Regulations have strict statutory timeframes for the budget making process. One, on 30<sup>th</sup> August each year, the Cabinet member for finance should issue a circular to all County entities, under section 128 of the Public Finance Management Act and Regulation 30(1) of the Public Finance Management (County Governments) Regulations, which should address certain matters, as set in the relevant law. Two, 1<sup>st</sup> September of each year, the Cabinet member for planning should submit an Annual Development Plan for County Assembly for approval, as required by section 126(3) of the Public Finance Management Act. Three, 30<sup>th</sup> September of each year the Cabinet member for finance should prepare and submit the County Budget Review and Outlook Paper to the Cabinet, as required by section 118 of the Public Finance Management Act. Four, by 28<sup>th</sup> February of each year, the County Executive Committee member for finance should have prepared and presented to the Cabinet the County Fiscal Strategy Paper for approval, and the County Treasury shall thereafter submit the approved County Fiscal Strategy Paper to the County Assembly. The County Assembly is required to publish and publicise the said paper within seven days after its submission to the County Assembly. Five, on or before the 28<sup>th</sup> February of each year, the County Treasury should submit to the County Assembly a statement setting out the debt management strategy of the County Government over the medium term, as required by section 123 of the Public Finance Management Act. Six, the County Treasury is also required to submit its cash flow projections to the 1<sup>st</sup> interested party, as required by section 127(1) of the Public Finance Management Act. Seven, by 30<sup>th</sup> April of each year, the after approval by the County Executive Committee, the Cabinet member for finance should submit to the County Assembly the budget estimates, with supporting documents and any bills required for implementation of the budget, and ensure that the estimates submitted are in line with the resolutions adopted by the County Assembly on the County Fiscal Strategy Paper. Eight, the Clerk of the County Assembly is required to prepare and submit to the County Assembly the budget estimates, as required by section 129 of the Public Finance Management Act. Nine, upon approval of the budget estimates by the County Assembly, the Cabinet member for finance should then prepare and submit a County Appropriation Bill to the County Assembly of the approved estimates, as required by section 129(7) of the Public Finance Management Act. Ten, by the 30<sup>th</sup> June of each year, the County Assembly should consider the budget estimates, with a view to approve them with or without amendments, in time for the relevant appropriation law and any other law required for implementation of the budget, as provided in section 131 of the Public Finance Management Act.

**20** On public participation, she avers that the same is a requirement under the Articles 10 and 201 of the Constitution and sections 117 and 125(2) of the Public Finance Management Act, and both County Executive and the County Assembly are expected to embrace the principles of public participation, openness and accountability in the budget making process. On the matter of delay in the budgeting process, she avers that the Public Finance Management Act anticipates that there could be delay in the enactment of the Appropriation Act, whereupon section 134 of the Act allows withdrawal of money from the County Revenue Fund to meet expenditure necessary to carry on the services of the County Government pending enactment of the Appropriation Act. It is further averred that the money to be withdrawn under section 134 of the Public Finance Management Act should not exceed 50% of the budget estimates submitted to the County Assembly for the financial year. Public Finance Management Act. She further states that Regulation 38 of the Public Finance Management (County Governments) Regulations, provides that where the budget estimates submitted to the County Assembly are not approved by the beginning of the financial year, the 1<sup>st</sup> interested party may exercise discretion and grant authority to withdraw up to 50% of the last approved budget pending the enactment of the Appropriation Act. She avers that before she approves such withdrawal, the County Assembly has to consent for the use of the Vote on Account. She avers that section 134 and Regulation 38 were only temporary measures to prevent hampering of the operations of the County, whether there was delay in the budgeting process, and the provisions should be invoked only for a limited period pending the enactment of the Appropriation Act, and the same should be used sparingly and only on exceptional circumstances, since it amounted expenditure of funds off budget.

**21** On the court order suspending execution of implementation of the Vihiga County Budget for the year 2021/2022, and ordering that the County operate on Vote on Account, the 1<sup>st</sup> interested party avers that it was anticipated that the County Government would not be able to continue operating on Vote on Account, by the end of December 2021, as it is expected that the 50% ceiling will have been reached, and it will not be able to start timely the budgeting for 2021/2022 until the 2020/2021 cycle is completed and an Appropriation Bill enacted. On the conditional funds, the 1<sup>st</sup> interested party draws the attention of this court to the decision in *Council of County Governors vs. Attorney General & 4 others; Controller of Budget (Interested Party)* [2020] eKLR (JA Makau J), where the Counties were barred from appropriating the conditional grants in their budgets even though such conditional grants previously formed part of the budget of the Counties and were appropriated for in the Counties through Appropriation Acts. She avers that the decision is under appeal at the Court of Appeal, and that she could not legitimately grant approval for withdrawal of conditional funds from the County Revenue Fund.

**22** The 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties filed a response, through an affidavit that the 2<sup>nd</sup> interested party swore on 28<sup>th</sup> September 2021, filed herein on 18<sup>th</sup> October 2021. He avers to be the Deputy Governor, by virtue of which position he sits in the County Cabinet. He asserts that the budget for the County Government of Vihiga for the financial year 2021-2022 was never discussed or approved by the Cabinet. He avers that the 1<sup>st</sup> respondent did not forward it to the County Cabinet for approval, and despite that the 1<sup>st</sup> respondent forwarded the same to the County Assembly for approval. He states that it was on account of that that he did write to the 2<sup>nd</sup> respondent, with copies to

the 3<sup>rd</sup> and 4<sup>th</sup> respondents, raising concern that the budget estimates had not been forwarded to the Cabinet for approval, and refers to the documents attached to the petition. He asserts that without approval of the Cabinet the budget estimates for the year 2021-2022 were a nullity.

23 There is an issue relating to the participation of Mr. Musiega in these proceedings as Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> respondents. It is raised by the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties filed a Motion dated 15<sup>th</sup> July 2021, which was lodged at the registry on even date, after I had reserved the matter for ruling on application by Mr. Musiega for authority to the 1<sup>st</sup> interested party to allow the respondents access up to 50% of the budget for the previous year. The application dated 15<sup>th</sup> July 2021 sought arrest of the ruling on the oral application or determination of the application dated 15<sup>th</sup> July 2021 be determined before the date fixed for hearing. The principal prayer in the application dated 15<sup>th</sup> July 2021 was that the filings and submissions by Mr. Musiega be expunged from the record on technical ground set out in the application. When the parties appeared before me on 15<sup>th</sup> July 2021, to confirm filing of written submissions on a pending preliminary objection, and to take a date for ruling on that objection, the said application was not the record, and therefore no directions were given on it, for that would have been the most opportune time to give directions on its disposal. It appears that it was lodged in the registry thereafter, for I saw it for the first time when I embarked on the exercise of writing the ruling on the oral application. The advocate for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties, Mr. Malenya, was in court that morning, and he did address me on the preliminary objection, but he did not allude to the application of 15<sup>th</sup> July 2021, nor raise objection to Mr Musiega addressing the court, nor intimate to court that he would be moving the court to have Mr Musiega barred from the proceedings for the reasons given in that application. I had occasion to deal with that issue in my ruling of 21<sup>st</sup> July 2021, noting that although Mr. Malenya was in court on 15<sup>th</sup> July 2021, when he had opportunity to raise those issues, but he did not, and directed that the application could be heard *inter partes* after it had been served on all the parties affected by it, and directions given on its disposal. After I delivered the ruling on the oral application by Mr. Musiega, on 21<sup>st</sup> July 2021, although Mr. Malenya for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties was present, he did not address me on the application dated 15<sup>th</sup> July 2021, with a view to indicating whether he had served it, and to ask for directions. I delivered the ruling on the preliminary objection on 26<sup>th</sup> August 2021, Mr. Malenya was not in court, and no one held his brief, and the matter of his application dated 15<sup>th</sup> July 2021 did not come up, nor was it raised by any of the advocates present. After delivery of the ruling Mr Sore and Mr Musiega raised two issues, which I dealt with. Mr. Sore asked for a date for directions, and I allocated 22<sup>nd</sup> September 2021 for that purpose. Mr. Musiega asked me to vary the orders made in the ruling delivered on 21<sup>st</sup> July 2021, and I directed him to file a formal application. Nothing else arose. On 22<sup>nd</sup> September 2021 when the matter came up for directions, Mr Malenya for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties, was not in attendance, but his brief was held by Mr. Sore. The matter had come up for directions on the main petition. By that date two other applications had been filed, there was the application by Mr. Sore to amend the petition and that by Mr Musiega to vary the orders of 21<sup>st</sup> July 2021 and for directions on the main petition. I was urged to give directions on the three applications, including that dated 15<sup>th</sup> July 2021, by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties. Mr. Sore indicated that if the application for amendment was allowed, he would abandon the application dated 15<sup>th</sup> July 2021 to pave way for disposal of the main petition. I granted him the order to amend and gave directions on the disposal of the petition. That had the effect of disposing of the application dated 15<sup>th</sup> July 2021.

24 The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties then filed, on 1<sup>st</sup> October 2021, a Motion, dated 28<sup>th</sup> September 2021, after the proceedings of 22<sup>nd</sup> September 2021, which had rendered the application of 15<sup>th</sup> July 2021 abandoned. In the said application, they urge that their application dated 15<sup>th</sup> July 2021 be heard first among other orders. Firstly, the application dated 15<sup>th</sup> July 2021 was abandoned on 15<sup>th</sup> July 2021, at the behest of Mr. Sore, who held brief for Mr. Malenya for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties. Secondly, the court gave directions on the hearing of the petition on 22<sup>nd</sup> September 2021, and the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties were bound by those directions. Curiously, when the matter came on 18<sup>th</sup> October 2021, for the hearing of the petition, or for highlighting of the submissions on the petition, Mr. Malenya was not in court to take directions on his application dated 28<sup>th</sup> September 2021. His brief was held by Mr. Sore, who did not address the court at all on the said application, instead he went on to submit on the main petition, although he did say that the issue of Mr. Musiega was subsumed in the petition.

25 Before I leave the issue of directions, let me state that case management is the responsibility of the court. It is in the hands of the court. The court manages the case. It directs how the same is to be handled by the parties, the direction that it has to take. Once directions are given, the parties are bound to follow them, even where they do not agree with them. The parties ought not to decide on their own course of action despite the directions of the court. This what the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties appear to have done. Directions were given on 15<sup>th</sup> July 2021, on how the matter was to be handled, but instead of following those directions, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties decided to lodge an application in court the same day hoping that it would dislodge the directions earlier given. When that application was abandoned on 22<sup>nd</sup> September 2021, at the behest of the advocate who was holding brief for their advocate, they lodged another dated 28<sup>th</sup> September 2021 despite the directions of 22<sup>nd</sup> September 2021 for filing of submissions on the petition.

26 It is important to underscore the role of interested parties in a cause. They are not principal parties. They are in the second tier. The principal dispute is not between them, but rather between the principal parties, in this case the petitioners and the respondents. The interested parties come into the suit, either by way of joinder by the principal parties, or upon a court order, to assist the court, where the presence of that party before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. They are not core parties, and their absence in the matter would not hamper the court in determining it.

27 The other consideration, of course is that this is a constitutional petition, and the Constitution itself eschews technicalities that tend to delay the determination of the dispute or to obfuscate the issues. The substance of the petition is the budget process, the issue about Mr. Musiega is a technicality of procedure that Article 159 of the Constitution frowns upon, particularly where it is not raised at the very onset of the matter. It would be more of a strategic manoeuvre to prolong the dispute. The matters raised in the application dated 15<sup>th</sup> July 2021 can be pursued even after determination of these proceedings to recover any moneys that Mr. Musiega may earn from the brief, should it turn out that he was not properly instructed. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties are not challenging the professional competence of Mr. Musiega in terms of lack of a licence or conflict of interest, and such like, for which the court would, without hesitation, bar him from the proceedings, but they raise contractual questions internal to the Vihiga County Executive. The matter at hand is extremely urgent. It revolves

around the budget if the Vihiga County Government. There are interim orders that restrict its access to the budget funds; and its operations, programmes and projects are likely to be adversely disrupted, should there be delay in the determination of the dispute. Interlocutory applications, of the character of those dated 15<sup>th</sup> July 2021 and 28<sup>th</sup> September 2021, would occasion such delay and disruption, and should be frowned upon.

**28** Having disposed of the matter of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties, let me turn to the written submissions of the parties, for the directions of 22<sup>nd</sup> September 2021 were that the petition be disposed of by that manner. I have in the record before me written submissions by the 1<sup>st</sup> petitioner, the 2<sup>nd</sup> petitioner, the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the 3<sup>rd</sup> and 4<sup>th</sup> respondents, and the 1<sup>st</sup> interested party.

**29** The 1<sup>st</sup> petitioner maintains that the respondents had deliberately flouted the mandatory statutory provisions under the Constitution and the Public Finance Management Act, making the entire budget making process unconstitutional, null and void. He points at Article 201 of the Constitution, on the principles of openness, accountability and public participation. He cites sections 87(b) and 91 of the County Governments Act on citizen participation, with respect to access to the process of formulating and implementing policies, laws and regulations, including approval of proposals, projects and budgets, among others. He also cites sections 125(2) and 207 of the Public Finance Management Act, which he submits require the Cabinet member for finance to ensure that there is public participation in the budget process. He has raised the issue of the appearance of Mr. Musiega in the proceedings, arguing that it was subsumed into the petition, and cites a decision in Kisumu High Court Constitutional Petition No. 9 of 2020, which barred him from exercising the duties of County Attorney. He has identified issues around whether a budget circular was issued, whether budget estimates and relevant documents were submitted to the Cabinet, whether the estimates originated from the Cabinet and the legality of the meeting of the 2<sup>nd</sup> respondent and members of the County Assembly, whether the 3<sup>rd</sup> and 4<sup>th</sup> respondents properly exercised oversight over the County Executive in view of the cosy relationship between the County Assembly and the 2<sup>nd</sup> respondent, among others. The 1<sup>st</sup> petitioner argues that the budget circular was not issued by the 1<sup>st</sup> respondent, and that the 1<sup>st</sup> respondent began the budget cycle with the meeting of the County Budget and Economic Forum. He submits that the 1<sup>st</sup> respondent has not stated when the budget estimates were submitted to the Cabinet instead he talked about when the Cabinet approved the estimates, on 30<sup>th</sup> April 2021, which was the last date for submission of the estimates and the Appropriation Bill to the County Assembly. He relies on a WhatsApp group communication to submit that the 4<sup>th</sup> respondent received the estimates without the approval of the County Executive Committee. He also submits that the County Assembly, going by the WhatsApp discussions had surrendered its oversight role, and there was no separation of power between it and the County Executive. He also submits that members of the County Assembly and the 2<sup>nd</sup> respondent met on 4<sup>th</sup> May 2021 to remake the budget estimates, and questions how that would be possible if the estimates had been submitted on 30<sup>th</sup> April 2021. On the County Appropriation Bill, 2021, it is submitted that although the same was allegedly submitted to the County Assembly on 30<sup>th</sup> April 2021, the County Appropriation Bill placed on record is dated 23<sup>rd</sup> June 2021. It is argued that the latest an appropriation bill could be introduced in the County Assembly was 30<sup>th</sup> June 2021, which was the last day of the financial year. It is further submitted that the County Assembly did not state when and whether the bill was approved. On personal liability of the persons responsible for the monies expended on the impugned budget, the court is urged to order that they be personally liable.

**30** On his part, the 2<sup>nd</sup> petitioner submits that the petition is about the intentional failure of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to comply with the laws governing the County budget preparation process, and especially sections 6, 7, 30(7), 125(2), 128(2)(4), 129(1)(2)(5)(6)(7), 130(1)(2) and 131(3) of the Public Finance Management Act, and thereby violating Article 179(1) of the Constitution. It is further submitted that the 2<sup>nd</sup> respondent had failed to provide leadership to the Cabinet. On public participation, it is submitted that sections 87 and 115 of the County Governments Act are mandatory on the matter. He submits that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had conspired with members of the County Assembly to extract a sum of Kshs. 500, 000, 000.00 from the budget. He further submits that the 3<sup>rd</sup> and 4<sup>th</sup> respondents had failed to offer oversight over the County Executive, specifically by failing to ascertain the documents mandatorily required to be submitted to it by the 1<sup>st</sup> respondent. Articles 174 and 185(3) of the Constitution, section 8 of the County Government Act and 129(2) of the Public Finance Management Act are cited in support of that argument. The issues framed by the 2<sup>nd</sup> petitioner for determination are whether there was gross violation of the Constitution and statute law by the respondents in the process of preparation of the Vihiga County budget for 2021/2022 financial year, whether the said budget stands the test of lawfulness and constitutionality, whether the 2<sup>nd</sup> respondent had failed in his constitutional leadership role in the budget making process and had undermined the Cabinet, whether the 3<sup>rd</sup> and 4<sup>th</sup> respondents had failed in their oversight roles and subverted the Constitutional and statutory role of the County Assembly of Vihiga in the budget making process, and whether the 2<sup>nd</sup> respondent abused his office by colluding with members of the County Assembly by sneaking in items into the budget estimates and coercing Cabinet members to join them in the conspiracy.

**31** The 1<sup>st</sup> and 2<sup>nd</sup> respondents start by framing the issues for determination, According to them these are whether the Cabinet had not approved the budget estimates as required by section 128 of the Public Finance Management Act and Regulation 30 of the Public Finance Management (County Governments) Regulations, whether section 128 of the Public Finance Management Act was violated through failure to issue the requisite circular and public participation guidelines, whether there was public participation, whether the contested budget did not provide for salaries of clinical officers, whether the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> 6<sup>th</sup> and 7<sup>th</sup> interested parties were impeached or threatened with impeachment for questioning the irregularity in the budget, whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents violated any law, whether there is any cause of action against the 2<sup>nd</sup> respondent, whether there is alternative dispute resolution for such disputes or the court is the first port of call, whether the petitioners legally fall within the category of public litigation or the petition was in the public interest., whether the petitioners have discharged their burden of proof. On approval of budget, it is submitted that the same was obtained, the court is pointed to the minutes on record, and it is explained that the same were not signed as the minutes could only be signed after they get confirmed at a subsequent meeting, which had not happened before the matter came to court. They dismiss the letter dated 4<sup>th</sup> May 2021 on the sum of Kshs. 500, 000, 000.00 as speculative. On compliance with section 128 of the Public Finance Management Act, on the budget circular and the guidelines on public participation, it is submitted that the said documents were generated and have been presented to court. On public participation, it is also submitted that the same was done and proof has been presented. On allocation in the budget for salaries of clinical officers, it is submitted that the evidence has been provided that they have been catered for in the budget. On 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> 6<sup>th</sup> and 7<sup>th</sup> interested parties, it is submitted that their impeachment had nothing to do with the budget. On whether the 2<sup>nd</sup> and 3<sup>rd</sup> respondents violated with the law, it is submitted that the law was fully complied with, specifically that the law did not assign any role to the 2<sup>nd</sup> respondent with respect to budget making. It is argued that the 2<sup>nd</sup> respondent was non-suited, and he had been dragged into the suit to suit negative political ends. It is asserted

that there was absolutely no case against the 2<sup>nd</sup> respondent. On alternative dispute resolution, it is submitted that it was open to the petitioners to petition the County Assembly under section 15 of the County Governments Act. On whether the suit was in public interest, it is submitted that the same is motivated by personal interests, for the 1<sup>st</sup> petitioner has declared interest in the seat of the 1<sup>st</sup> respondent in the next elections, with the support of the 2<sup>nd</sup> petitioner. The 1<sup>st</sup> petitioner is also described as former County Secretary for the Vihiga County, whose term had been terminated by the 2<sup>nd</sup> respondent. It is also argued that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties were also joined into the matter over their impeachment or threatened impeachment by the County Assembly; while the 12<sup>th</sup> interested party was brought in to pursue interests that were better pursued through the court with jurisdiction over employment matters. It is asserted that the petition was not in public interest. It is submitted that the petitioners had latched on correspondence between the 3<sup>rd</sup> respondent and the 2<sup>nd</sup> interested party which was not conclusive on the issues raised in it. It is submitted that the petitioners have not presented any evidence to support the allegations made in their petition, besides relying on letters by individuals who have not sworn any affidavits to support their veracity. It is submitted that costs should follow the event.

**32** The 3<sup>rd</sup> and 4<sup>th</sup> respondents submit that at the point when the County budget estimates are brought to the County Assembly, it is presumed that the County Executive had taken all the preliminary procedures for the documents to get to the County Assembly. It is submitted that the oversight that the County Assembly does, with respect to the budget process, is to go through the estimates provided by the County Executive, and that unless mischief or malice was read from somewhere in the documents no questions would arise. It is submitted that it was not enough for the 3<sup>rd</sup> and 4<sup>th</sup> respondents to be made aware of some discrepancy flowing from the County Executive, as there was a clear channel of communication, in case of discrepancy, taking the form of a memorandum from the Cabinet recalling the document, on grounds that the document was alien to the Cabinet. It is submitted that the fact there was no communication to recall the documents meant that the Cabinet was aware of the document, and there was no reason to think otherwise. It is submitted that if the Cabinet had not approved the budget estimates, as claimed, then the same Cabinet should have passed a resolution to recall it from the County Assembly for their action. It is argued that it has not been demonstrated that there was a requirement of the County Assembly to ask for proof showing that the County budget estimates had been approved by the Cabinet, and that the petitioners were only insinuating that the County Assembly ought to have asked for such on the mere hearsay that there was no such approval. It is submitted that it was not a matter of law that the 3<sup>rd</sup> and 4<sup>th</sup> respondents would require the approval of the Cabinet when budgets are presented to the County Assembly.

**33** The submissions by the 1<sup>st</sup> interested party are largely a reiteration of the averments made in her replying affidavit, on the budget preparation process and her role in it. She has largely taken a neutral position with regard to the matters in controversy, merely submitting that the contention on non-compliance with the procedures provide by the law and the statutory timeframes are allegations turning on issues of fact, which are entirely within the knowledge of the other parties, stating that the budget making process requires the involvement of the County Executive and the County Assembly, and one could not participate in the process without the other. It is also submitted that at every stage of the process the participation of the public and other stakeholders is required in the interrogation of the planning documents and giving views where need be.

**34** The submissions recited above were highlighted on 18<sup>th</sup> October 2021, Mr Musiega for the 1<sup>st</sup> and 2<sup>nd</sup> respondents opted not to highlight his submissions, and to leave the matter entirely in the hands of the court, but Mr. Sore for the 1<sup>st</sup> petitioner, the 2<sup>nd</sup> petitioner in person, and Ms. Ruto for the 1<sup>st</sup> interested party made their highlights.

**35** Mr. Sore submitted that Mr Musiega was not properly procured to act for the 1<sup>st</sup> and 2<sup>nd</sup> respondents as no approvals had been presented from the County Executive. On the budget circular, it was submitted that none was produced, for what was placed on record a schedule. On lack of approval of the budget estimates, it was submitted that the respondents were relying on unsigned minutes, which did not even refer to the Appropriation Bill, which became law on 28<sup>th</sup> June 2021, and wondered what was submitted on 30<sup>th</sup> April 2021. With regard to the 3<sup>rd</sup> and 4<sup>th</sup> respondents, it was submitted that oversight went beyond merely assuming that the documents were presented after the Cabinet had done all what was needed. It was asserted that presentation of estimates by one member of the Cabinet did not amount to a presentation by the Cabinet itself. He invited the court to vacate the order on the conditional grants.

**36** Mr. Simekha also asked the court to reverse the order on the conditional grant. He submitted that although it was required that the estimates be submitted to the County Assembly by 20<sup>th</sup> April, that was not done until 30<sup>th</sup> April. On the meeting where the estimates were discussed, he submitted that although the meeting was said to have been held for six hours, it only had two items, the Chairman's remarks and the County budget estimates. He submitted that they did not discuss the statutory bundle of budgetary estimates. On the Chairman's remarks, he submitted that it was not shown who had taken over as chairman after the 2<sup>nd</sup> respondent left.

**37** Ms. Ruto largely reiterated what was deposed in the replying affidavit of the 1<sup>st</sup> interested party. She submitted that public participation should be done continuously, given that the money to be spent belonged to the public, and that it was the people who knew the projects to be funded from the said moneys. She submitted that the Vihiga Government was utilising funds off budget, from the Vote on Account, because the budget estimates had not been presented to the County Assembly for it to authorise the expenditure. She submitted that authority of the County Assembly was mandatory before the funds in the Vote on Account was used. She submitted that the money disbursed from the Vote on Account needed to be incorporated into the budget. She argued that for Vihiga, the Vote on Account should not have been applied in the first place since there was an Appropriation Act in force, dated 28<sup>th</sup> June 2021, which meant that moneys were being spent on a Vote on Account, yet there was an Appropriation Act in place. She stated that the money was being spent somewhere, yet there was no mechanism for factoring it into the Appropriation Act, and added that the County Government should not be allowed to continue to use the money. She stated further that no development has been undertaken because the County was operating on a Vote on Account. She stated that that was not a good scenario for the County Government would have difficulty in implementing its budget. She urged that if the Appropriation Act was valid, then the County Executive ought to provide a mechanism for incorporation of the moneys spent on Vote on Account into the budget by way of a supplementary budget. She submitted that the next year's financial cycle had already began, and any further delay was likely to have a ripple effect.

**38** So, what are the issues for determination? I believe the issues for determination ought to be framed, based on the prayers sought in the petition, as amended, and they are:

- (a) Whether the budget making process for the Vihiga County for the financial year 2021-2022 was unlawful and unconstitutional for want of the mandatory statutory requirement of the approval of the County Cabinet as constituted as at 30<sup>th</sup> April 2021;
- (b) Whether the budget making process for the Vihiga County for the financial year 2021-2022 was unlawful and unconstitutional for want of transparency openness and adequate public participation;
- (c) Whether the budget making process for the Vihiga County for the financial year 2021-2022 was unlawful and unconstitutional for lack of the 2021/2022 financial year's budget circular by the 1<sup>st</sup> respondent;
- (d) Whether the Vihiga County Appropriation Bill or Act, 2021, was unprocedural, unconstitutional, null and void;
- (e) Whether the respondents had violated the Constitution and the law;
- (f) Whether the 2<sup>nd</sup> respondent had failed to show leadership in the County Government of Vihiga, and was, therefore, unfit to hold public office;
- (g) Whether an order should be made for expenditure for the Vihiga County for the financial year 2021-2022 as per Regulation 38(1) of the Public Finance Management (County Governments) Regulations or section 134 of the Public Finance Management Act;
- (h) Whether the exclusion of the 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties from the Cabinet for Vihiga as a result of their position on the budget making process was unconstitutional, null and void;
- (i) Whether an order should issue compelling the respondents to personally bear the costs of any funds incurred in the processing of the impugned budget estimates;
- (j) Whether the court should set punitive damages against the 1<sup>st</sup> and 2<sup>nd</sup> respondents personally for their unlawful acts and persistence in the unlawfulness;
- (k) Who should bear the costs of the litigation; and
- (l) What other orders or reliefs are necessary in the circumstances.

**39** The issues identified above relate largely to the budget making process for the Counties. The applicable law has been ably and comprehensively set out in the replying affidavit of the 1<sup>st</sup> interested party, sworn on 13<sup>th</sup> October 2021, whose contents have been exhaustively recited in paragraphs 19, 20 and 21 of this judgment. There is no need for me to regurgitate the provisions of the Constitution and the relevant legislation set out in the said affidavit afresh.

**40** On the first issue, whether the budget estimates from the 1<sup>st</sup> respondent were presented to the Cabinet and approved, the petitioners assert that they were not. It is the petitioners who have come to court with the allegation, and it is trite that the burden of proof is on them to prove that there was no such approval. The petitioners are not insiders within the Vihiga County Government, for they are not employees or officers within that Government, they are not privy to the goings on inside the Government, and, therefore, they would not have first-hand information on the matter. What they have presented to court are letters that the 1<sup>st</sup> petitioner obtained from the 2<sup>nd</sup> interested party, an insider, being the Deputy Governor, where he raised the issue with the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, and the responses that were received with respect to those queries, from the 3<sup>rd</sup> and 4<sup>th</sup> respondents, and the County Secretary. In the responses the officers were careful not to commit themselves on things that did not fall squarely on their docket, given that it was the responsibility of the 1<sup>st</sup> respondent to present the estimates to Cabinet and to get Cabinet approval, and also given that the queries were being raised by a very senior officer in the County Government, and touched on the fairly sensitive business of the County budget. The 3<sup>rd</sup> respondent did not sound as if she was aware of the lack of Cabinet approval and other irregularities, but stated that it was a matter of concern, and referred it to the 4<sup>th</sup> respondent for action. The 4<sup>th</sup> respondent did not also appear to have any knowledge of any irregularities or lack of approval by Cabinet, saying that whenever the County Assembly received any statutory documents from the County Executive for processing it would be assumed that the same had been subjected to due process. He opted to write to the County Secretary, to bring to his attention the issues raised by the 2<sup>nd</sup> interested party, and to invite the County Secretary to respond directly to the 2<sup>nd</sup> interested party, on whether the documents were approved by Cabinet. The County Secretary wrote to the 2<sup>nd</sup> interested party, first pointing out that the responsibility over budget estimates lay with the 1<sup>st</sup> respondent, and secondly to inform him that he had consulted the 1<sup>st</sup> respondent over the matter, who had said that the procedures were followed. He then went on to say he could not release the Cabinet minutes relating to that approval, without directions of the Cabinet, in line with section 44 (3)(b) of the County Government Act. From the correspondence highlighted above, there is no proof that the budget estimates were not approved by the Cabinet.

**41** The other bit of information that the petitioners rely on as proof of lack of approval, is a WhatsApp group conversation, where screenshots are exhibited allegedly showing communication by the 4<sup>th</sup> respondent touching on approval of budget estimates by Cabinet, and a response by a Ijaika. The date of the correspondence is not clear. The 4<sup>th</sup> respondent is accused of taking a position contradictory to that expressed in his letter to the County Secretary. Is this proof that the budget estimates did not have Cabinet approval? WhatsApp is a social media platform, which is not for use in official communication, and, therefore, there can only be limited reliance on such material.

**42** I have indicated above, that the petitioners were not insiders within the County Government, and, therefore, they were not privy to what was going on within the Government, and they could not, therefore, have direct access to material that would have assisted their case. I believe that it was with that in mind that they brought in or joined to the petition a large number of interested parties, being entities and

persons who could have been privy to the matters at hand. The 1<sup>st</sup> interested party is the Controller of Budget, an office established under the Constitution, and whose duty is to oversee and monitor budgets of Government at both levels, including the budget making process. It would be expected that the 1<sup>st</sup> interested party would have information on whether the budget making process for Vihiga County was above board. The 2<sup>nd</sup> interested party is the Deputy Governor of Vihiga County, and a member of the Cabinet. Crucially, he was the source of the material that the petitioners relied on to mount this petition. The 3<sup>rd</sup> to the 11<sup>th</sup> interested parties are all members of Vihiga Cabinet. The 12<sup>th</sup> interested party was brought on board by court order. Of interest, for the purposes of this part, are the 1<sup>st</sup> to 11<sup>th</sup> interested parties.

**43** As stated elsewhere, interested parties, whether brought on board by the party suing through his pleadings, or subsequently by court order, are parties to the suit who are not really primary players, but actors whose presence or participation is perceived to be of some assistance to the court, in terms of presenting material that would help the court to effectually and completely adjudicate on the dispute at hand. They may be persons who are likely to be affected by the final orders in some way, or who have a stake of one kind or other in the final outcome. They may be brought in by the primary parties to provide some form of backup, or assist seal gaps in the primary parties' case or to bolster the case.

**44** The 1<sup>st</sup> interested party filed a replying affidavit, in which she does not dwell the issues in controversy, but mainly highlights the role of the 1<sup>st</sup> interested party in budgets, specifically with respect to budget making. She also highlights the processes of budget making and the timelines that those involved have to adhere to. She is careful, in her affidavit and written and oral submissions, not to wade into the matters in controversy, by committing to whether or not the budget making process for Vihiga County met the threshold set out in the law, only stating that the facts relating to those issues are within the knowledge of the primary parties, and, therefore, leaving the question, as to whether there was compliance with the law to the court. In my view, the 1<sup>st</sup> interested party was not really a proper entity to join as such, for she has no stake in the final outcome of the matter, nor would she be affected by it, one way or the other. Her presence in the matter is crucial, but more as a friend of the court, or *amicus curiae*, who has no interest in the matter, beyond bringing her knowledge and expertise on budget making on board, to assist the court in the determination of the matter. She has maintained a neutral posture, as should any friend of the court, unlike an interested party, who is expected to support either of the primary parties. She was added or joined to the matter by the petitioners at inception, ostensibly to bolster their case, but she has maintained a neutral stance. With respect, to the first issue for determination, the material placed on record by the 1<sup>st</sup> interested party does not help the case for the petitioners, for it does not prove that the budget estimates were not given the approval by Cabinet before being forwarded to the County Assembly.

**45** The 2<sup>nd</sup> interested party, together with the 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties, came on record, through a notice of appointment of advocates, filed on 16<sup>th</sup> July 2021, by Messrs. Chimei & Co., Advocates, dated 15<sup>th</sup> July 2021. The 2<sup>nd</sup> interested party did file a response to the petition, by way of an affidavit sworn on 28<sup>th</sup> September 2021, on his own behalf and that of the 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties. He asserts that there was no approval of the budget estimates by the Cabinet, before the estimates were submitted to the County Assembly. The 2<sup>nd</sup> interested party does not attach any documents to his affidavit, and relies on those attached to the petition, which had in any case emanated from him. So the case by the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties is that the estimates were not presented to Cabinet and were forwarded to the County Assembly absent of approval by cabinet.

**46** The 1<sup>st</sup> and 2<sup>nd</sup> respondents case is that the budget estimates were presented to Cabinet and got approval of the Cabinet before they were sent to the County Assembly. The 1<sup>st</sup> respondent, as Cabinet member responsible for finance, and, therefore, the budget, states that the Cabinet did sit on 30<sup>th</sup> April 2021, virtually, he presented the budget estimates and the same were approved. He states that the 2<sup>nd</sup> interested party and other members of the County Budget and Economic Forum attended the meeting. The County Secretary, in the affidavit of 5<sup>th</sup> July 2021, confirms that a meeting was held on 30<sup>th</sup> April 2021, for the purpose of presentation to Cabinet for approval of the budget estimates for the financial year 2021-2022, and he has attached minutes of the said meeting, to support that contention. The minutes show that the 2<sup>nd</sup> interested party was in attendance, and so were the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> interested parties. The minutes reflect that the 1<sup>st</sup> respondent presented the budget estimates, the Cabinet deliberated on them, and approved them with amendments, after they were proposed by the 4<sup>th</sup> interested party and seconded by the 8<sup>th</sup> interested party.

**47** The 3<sup>rd</sup> and 4<sup>th</sup> respondents chose, like the 1<sup>st</sup> interested party, to adopt a rather neutral stance. Whereas the budget estimates should be presented to the County Assembly after approval by the County Cabinet, the 3<sup>rd</sup> and 4<sup>th</sup> respondents did not commit themselves to whether or not the budget estimates, as presented to the County Assembly had the approval of the County Cabinet. The 3<sup>rd</sup> and 4<sup>th</sup> respondents did not file any affidavits to address the issues raised in the petition, and filed grounds of opposition, raising issues that are fairly general. Their written submissions are apparently founded on the position stated in the letter by the 4<sup>th</sup> respondent, dated 4<sup>th</sup> June 2021, addressed to the County Secretary, attached to the petition, that once they received any document or report from the County Executive, they presume that all the due processes had been followed before any such documents were forwarded to the County Assembly for processing. That would mean that at the time they received the budget estimates from the 1<sup>st</sup> respondent, they presumed that the same had been granted the approval of the County Executive. That position effectively pushed the matter back to the petitioners, to establish by concrete evidence that the budget estimates placed before the County Assembly did not have the requisite approval of the County Executive.

**48** So, I have before me two conflicting cases, the petitioners say there was no approval of the budget proposals by Cabinet, and they rely on the word of the 2<sup>nd</sup> interested party to support their case. On the other hand, the 1<sup>st</sup> and 2<sup>nd</sup> respondents state that a Cabinet meeting was held on 30<sup>th</sup> April 2021, where the estimates were presented and approved, and have presented minutes to support their case. The petitioners submit that the minutes were not signed, while the 1<sup>st</sup> and 2<sup>nd</sup> respondents maintain that the minutes were not signed because they had not been confirmed, for the Cabinet had not sat, by the time the matter came to court, where such confirmation would have happened. To me the critical voice, with respect to the petitioners' case, should be that of the 2<sup>nd</sup> interested party, who appears to support their case, and whose documents the petitioners are using to agitate their case. He swore his affidavit in response to the petition on 28<sup>th</sup> September 2021, and filed it herein on 18<sup>th</sup> October 2021, long after the affidavits of the 1<sup>st</sup> respondent and the County Secretary of 5<sup>th</sup> July 2021 had been filed, on 6<sup>th</sup> July 2021, attaching the minutes of the alleged meeting of 30<sup>th</sup> April 2021. The 2<sup>nd</sup> interested party makes no reference whatsoever to the date of 30<sup>th</sup> April 2021, and merely avers that the 1<sup>st</sup> respondent did not present his estimates before Cabinet for approval, and he forwarded

them to the County Assembly without the approval. The allegations made in the affidavits of the 1<sup>st</sup> respondent and the County Secretary of 5<sup>th</sup> July 2021, that a Cabinet meeting was held on 30<sup>th</sup> April 2021, and the 2<sup>nd</sup> interested party attended it, and the meeting approved the budget estimates, go uncontroverted. If his case was that there was no such meeting, or if there was one, but he did not attend it, then he ought to have specifically said so. Failure to respond to specific allegations would mean that they are not traversed. A specific allegation should not be addressed by way of a general traverse, but a specific traverse. The other option should have been for the petitioners to have the matter heard *viva voce*, to give them opportunity to cross-examine the 1<sup>st</sup> respondent and the County Secretary on the contents of their affidavits, and specifically on the annexures, to test veracity. The petitioners did not take that route, instead they opted for written submissions, which leaves us with two conflicting versions of what exactly transpired. When the two positions are taken together, that by the 1<sup>st</sup> respondent and the County Secretary is more believable, as the allegations in their affidavits have not been specifically traversed or controverted. On whether the minutes are authentic, given that they are not signed by the Chairman of the meeting and the secretary, I note that explanations have been given that a subsequent meeting had not been held, where the minutes could have been confirmed, after which they would have been signed by the Chairman and the secretary of the meeting. That sounds to be a plausible explanation. I note that the minutes placed on record are certified as a true copy.

**49** The burden of proof was on the petitioners to establish that the budget estimates had not been presented to the Cabinet and, therefore, they did not get Cabinet approval before they were forwarded to the County Assembly. I am not persuaded that they have discharged that burden on a balance of probability. The position could have tilted in their favour had the 2<sup>nd</sup> interested party, and the other interested parties who are or were members of the Cabinet, and who were alleged to have had attended the alleged meeting, come out to specifically address what was alleged to have had taken place on 30<sup>th</sup> April 2021. His failure to respond to it would mean that the position that a meeting took place on that day, which he attended, and which approved the estimates, carries the day. Therefore, on the first issue, I find that the budget making process for the Vihiga County for the financial year 2021-2022 was lawful and constitutional for the mandatory statutory requirement of the approval of the County Cabinet, as constituted as at 30<sup>th</sup> April 2021, was given.

**50** The second issue was whether the budget making process for the Vihiga County for the financial year 2021-2022 was unlawful and unconstitutional for want of transparency openness and adequate public participation. The petitioners aver that the budget making process was not subjected to public participation, contrary to what is required under the Constitution and the relevant laws. The 2<sup>nd</sup> interested party did not, in his replying affidavit, address the issue of public participation, despite filing his affidavit in reply, after the amended petition was admitted on 22<sup>nd</sup> September 2021. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have responded to the amendments through the further affidavit of the 1<sup>st</sup> respondent of 6<sup>th</sup> October 2021. He avers that there was public participation, and has attached copy of a notice in the newspapers, in not clear which newspaper carried the notice and when, but it was about views being received before 22<sup>nd</sup> February 2021. It was addressed to the general public, civil society, community based organisations, groups, interested persons and stakeholders, and it invited them to give their views on the draft Vihiga County Fiscal Strategy Paper 2021. It directed them to submit written memorandum before 22<sup>nd</sup> February 2021, at either the County Treasury headquarter, or the Sub-County Administrator's office, or by post through Vihiga County Government PO Box 344-50300 Maragoli, or email address [vihigatransparency@yahoo.com](mailto:vihigatransparency@yahoo.com). The notice advised that the draft Vihiga County Fiscal Strategy Paper 2021 could be accessed from the Vihiga County Government website, [www.vihiga.go.ke](http://www.vihiga.go.ke). From the notice it would appear that no physical meetings were contemplated in view of Covid-19 protocols. The 1<sup>st</sup> interested party did not comment on whether the budget had been subjected to public participation, only saying that public participation was continuous. From the materiel on record, I am satisfied that there is evidence that the 1<sup>st</sup> respondent exposed the budget making process to adequate public participation. I, therefore, find, on the second issue that the budget making process for the Vihiga County for the financial year 2021-2022, was lawful and constitutional, for there was transparency openness and adequate public participation.

**51** The third issue is whether the budget making process for the Vihiga County for the financial year 2021-2022 was unlawful and unconstitutional for lack of the 2021/2022 financial year's budget circular by the 1<sup>st</sup> respondent. On the issue of the circular, the 1<sup>st</sup> respondent, in his affidavit sworn on 6<sup>th</sup> October 2021, says that he did issue such a circular, and he has attached one, dated 24<sup>th</sup> August 2020, which provided guidelines for preparation of the medium term expenditure framework budget for the period 2021/22 to 2023/24, and which is a 34-page document. After the filing of this affidavit, attaching the said circular, the petitioners and the 2<sup>nd</sup> interested party did not file any further affidavits to challenge its authenticity. In answer to the third issue, it is my finding, therefore, that the budget making process for the Vihiga County for the financial year 2021-2022 was lawful and constitutional for the 1<sup>st</sup> respondent had issued the 2021/2022 financial year's budget circular as required of him by the relevant law.

**52** The fourth issue is whether the Vihiga County Appropriation Bill or Act, 2021, was unprocedural, unconstitutional, null and void. The petitioners argue that the draft enabling legislation for the County budget was never laid before the Cabinet, was never considered and it was never approved, and, therefore, the same, together with the budget estimates, were improperly before the County Assembly. The 1<sup>st</sup> respondent has placed on record a copy of the Vihiga County Appropriation Act, 2021, in his affidavit of 6<sup>th</sup> October 2021, but he has not narrated how it came into being, in terms of whether it was placed before the Cabinet and whether it was approved. I have, however, looked at the contents of the Vihiga County Appropriation Act, 2021, as against the minutes of the Cabinet meeting of 30<sup>th</sup> April 2021 and the summary of the resolution of the cabinet meeting of 30<sup>th</sup> April 2021 on the estimates, as captured in the document dated 30<sup>th</sup> June 2021, and note that they are in agreement, and it would appear that the Vihiga County Appropriation Act, 2021 was based on the budget estimates presented and approved on 30<sup>th</sup> April 2021 by Cabinet. That being the case, and in answer to the fourth issue, I find that the Vihiga County Appropriation Act, 2021, was passed procedurally, and was constitutional.

**53** The fifth issue is whether the respondents had violated the Constitution and the law, and my answer to this, in view of my conclusions in paragraphs 49, 50, 51 and 52, here above, of this judgment, is that it is my finding that there was no violation of the Constitution and the relevant laws governing budget making by the respondents.

**54** The sixth issue is whether the 2<sup>nd</sup> respondent had failed to show leadership in the County Government of Vihiga, and was, therefore, unfit to hold public office. The case by the petitioners attacks the manner in which the budget making process was handled by the County Executive. As can be gleaned from the provisions of the law governing budget making, the duty of preparing a budget principally falls on the Cabinet member responsible for finance, the 1<sup>st</sup> respondent in this case. The relevant legislation does not assign any responsibility for budget

making to the 2<sup>nd</sup> respondent, for everything falls on the shoulders of the 1<sup>st</sup> respondent. I have not been pointed to any constitutional or legislative provision which assigns any roles or duties on the 2<sup>nd</sup> respondent with respect to budget making. Equally no material has been placed before me pointing to any failures on the part of the 2<sup>nd</sup> respondent regarding the budget making process. There is no proof that he was responsible for any of the irregularities alleged, or that he subverted or hindered the budget making process. One argument is that the 2<sup>nd</sup> respondent had written to members of the County Assembly or engaged them in a manner that was inimical to the doctrine of separation of powers. It has not been demonstrated that whatever engagement the 2<sup>nd</sup> respondent and members of the County Assembly might have had any effect on the budget, and in particular that the sum of Kshs. 500, 000, 000.00 mentioned with respect to that, was factored into the budget, or was contrary to the law. Overall, material has not been placed before me upon which I can conclude that there was failure of leadership on the part of the 2<sup>nd</sup> respondent, to warrant the making of a declaration that he was unfit to hold office. So, to the sixth issue, it is my finding that the 2<sup>nd</sup> respondent has not failed to show leadership in the County Government of Vihiga, and is not, therefore, unfit to hold public office.

55 The seventh issue is whether an order should be made for expenditure for the Vihiga County for the financial year 2021-2022 as per Regulation 38(1) of the Public Finance Management (County Governments) Regulations or section 134 of the Public Finance Management Act. These provisions apply where the budget estimates have not been approved by the County Assembly by the beginning of the financial year, and where the County Appropriation Bill for a financial year has to be assented to by the beginning of the applicable financial year, respectively. The petitioners seek these orders because their case is that the budget estimates were not approved by the County Executive and were improperly presented to the County Assembly. It on that basis that the 1<sup>st</sup> and 2<sup>nd</sup> respondents invited me in July 2021 to allow expenditure to the extent of 50% on the strength of those provisions. However, I have found here above, that the budget making process complied with the law, and the resultant the Vihiga County Appropriation Act, 2021 was valid, and, therefore, there would be no need to apply Regulation 38(1) of the Public Finance Management (County Governments) Regulations or Section 134 of the Public Finance Management Act, to permit partial withdrawals. With regard to the seventh issue, it is my finding that an order should not be made for expenditure for the Vihiga County for the financial year 2021-2022 as per Regulation 38(1) of the Public Finance Management (County Governments) Regulations or Section 134 of the Public Finance Management Act.

56 The eighth issue is whether the exclusion of the 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties from the Cabinet for Vihiga as a result of their position on the budget making process was unconstitutional, null and void. From the amended petition it would appear that impeachment proceedings were initiated against the 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties, something which the 1<sup>st</sup> and 2<sup>nd</sup> respondents have confirmed. The petitioners aver that the said 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties got into problems with the 2<sup>nd</sup> respondent over their stand on the budget. Other than the averments in the amended petition on the 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties and their differences with the 2<sup>nd</sup> respondent, the petitioners have not, in their affidavits, sought to shed light on the nature of the dispute between them, and provide proof that the differences arose from the positions they had taken on the budget. The petition, like the plaint, is a pleading, it makes allegations of fact, which are to be proved at the oral hearing. Where a matter is intended to be determined on the basis of submissions, rather than oral evidence, then the said facts should be sought to be proved by way of averments on oath, in other words by way of affidavits. The petitioners, in the affidavits sworn on 28<sup>th</sup> June 2021 and 6<sup>th</sup> September 2021, provided scanty details, if at all, to support the extensive averments made in the amended petition on the victimisation of the 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties by the 2<sup>nd</sup> respondent over the budget. There is, therefore, no proof to support those averments. The 2<sup>nd</sup> interested party purported to swear an affidavit on their behalf, but he did not breathe a word about their dispute with the 2<sup>nd</sup> respondent, leave alone demonstrating that the genesis of it was the budget making exercise. The 1<sup>st</sup> and 2<sup>nd</sup> respondents, through the affidavit of the County Secretary, of 6<sup>th</sup> October 2021, have asserted that the impeachment proceedings had nothing to do with the budget, and have annexed documents from the impeachment process to demonstrate that. I have perused through the said documents and I believe the 1<sup>st</sup> and 2<sup>nd</sup> respondents. In any event, the dispute between the 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties and the 2<sup>nd</sup> respondent is subject to other proceedings, before this court, and it is, therefore, *sub judice*, and the little said about it the better. So, on the eight issue, I find that there is no proof that the exclusion of the 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties from the County Executive Committee for Vihiga, if at all, was not as a result of their position on the budget making process.

57 The ninth issue is whether an order should issue compelling the respondents to personally bear the costs of any funds incurred in the processing of the impugned budget estimates. I have made findings above, that the respondents had not violated any law during the budget making process, and that the budget was procedurally and validly processed and passed. Riding on those findings there would be no basis in law or fact to make the conclusions that the petitioners invite me to make on this issue. They have not shown that any of the respondents acted contrary to the law, and exposed the County Government to financial loss, in respect of which they should be ordered to make good. I, therefore, find, on this issue, that an order should not issue compelling the respondents to personally bear the costs of any funds incurred in the processing of the impugned budget estimates.

58 The tenth issue is whether the court should set punitive damages against the 1<sup>st</sup> and 2<sup>nd</sup> respondents personally for their unlawful acts and persistence in the unlawfulness. I will reiterate what I have said in the foregoing paragraphs, that I have made findings in the preceding paragraphs, that it has not been demonstrated that the respondents herein violated the Constitution or the relevant statutory law during the budget making exercise to warrant being penalised in any manner, including being condemned to pay damages. In any case to whom are they to pay damages? What would be the measure of the damages, for the petitioners did not prove any loss or damages suffered by anyone that would attract recompense by way of damages. With respect to this issue, I find that the court should not set punitive damages against the 1<sup>st</sup> and 2<sup>nd</sup> respondents personally for there is no proof that they were liable for unlawful acts or persistence in unlawfulness.

59 The eleventh issue is about who should bear the costs of the litigation. Costs naturally follow the event. In this case, I have found that the petitioners have woefully failed to prove, on a balance of probability, a case against the respondents, and in the event, they have lost the cause, and costs should follow that event. Issues were raised during submissions as to whether this is a public interest litigation, I resist the temptation to venture into that enquiry. It would suffice to say that this is a constitutional petition, and the practice is not to award costs against public spirited citizens, there is some debate on whether the petitioners herein are public spirited, who challenge acts or omissions of constitutional entities and office holders with a view to test whether their acts or exercise of the authority bestowed upon them by the Constitution and the law was within the parameters permitted by the Constitution and the law. I shall accordingly not impose costs on the petitioners. With respect to this issue I find and hold that each party shall bear their own costs

60 The twelfth, and final, issue is what other orders or reliefs are necessary in the circumstances. The 1<sup>st</sup> interested party pointed out that as there was an Appropriation Act in force, the order made herein earlier for expenditure of up to 50% of the budget had forced the County Government to spend funds, not based on the Appropriation Act, but on a Vote on Account, yet that expenditure was not aligned to the Appropriation Act, and that could cause difficulties with the finances of the County. Consequently, it is hereby directed that the 1<sup>st</sup> respondent shall prepare and present before the County Assembly a supplementary budget with a view to incorporate the moneys so far spent on the Vote on Account into the County budget, as outlined in the Vihiga County Appropriation Act, 2021. Of course, the 1<sup>st</sup> respondent shall be at liberty to consult with and obtain directions from the 1<sup>st</sup> interested party on the steps that he will need to take to normalise the situation with respect to the County budget for Vihiga.

61 The issue around the participation of Mr Musiega in these proceedings kept rearing its head. I dealt with it here above, and I believe I have been fairly comprehensive in what I have said about it. I reiterate what I have said in those paragraphs. The application was abandoned by Mr. Sore, who was holding brief for Mr. Malenya, in favour of his application for amendment of the petition being allowed, and to facilitate an expeditious disposal of the main petition. I note that when Mr. Sore made his final oral submissions on the petition, where he held brief for Mr. Malenya, he stated that issue had been subsumed in the petition. To the best of my recollection, there was no directive that the issue would be subsumed in the petition, instead, Mr. Sore himself had stated, on 22<sup>nd</sup> September 2021, that he would abandon it if his application for amendment was allowed, and the application for amendment was allowed on that understanding. Indeed, when Mr. Malenya filed his application dated 28<sup>th</sup> September 2021, that was the sentiment that he expressed, that the said application had been abandoned on those grounds, and he protested that those had not been his instructions. No directions were ever given on his application dated 28<sup>th</sup> September 2021, and no order was ever made to the effect that the issue regarding Mr. Musiega would be subsumed in the petition, and I shall, therefore, make no orders with respect to it.

62 The parties have addressed me on the matter of the nurses. I note that the 12<sup>th</sup> interested party, despite being added as a party to these proceedings, did not file a response to the petition, nor file written submissions. It has, therefore, not presented a case for the court to determine in its favour, consequently, I shall not make any orders with relation to the nurses. In any event, it has been demonstrated that their salaries, including arrears, have been provided for in the budget, and the matter should be left at that.

63 The issue of conditional grants has also been addressed by the petitioners and the 1<sup>st</sup> interested party. The 1<sup>st</sup> interested party brought to my notice the decision in *Council of County Governors vs. Attorney General & 4 others; Controller of Budget (Interested Party)* [2020] eKLR (JA Makau J), barring the Counties from appropriating conditional grants in their budgets. That order is apparently still in force, although it is subject to appeal. Of course, it is an order made by a court of concurrent jurisdiction, and it is not necessarily binding on me, but I cannot also ignore the same, to obviate a situation where courts of concurrent jurisdiction make conflicting decisions on similar issues. Since the matter is under appeal, it is only right that, as the decision of the appellate court is awaited, the decision in *Council of County Governors vs. Attorney General & 4 others; Controller of Budget (Interested Party)* [2020] eKLR (JA Makau J) should be honoured. Consequently, I shall vacate the order that I made on 16<sup>th</sup> September 2021 with respect to the conditional funds.

64 The upshot of it all is that I find that there is no merit in the petition before me, dated 28<sup>th</sup> June 2021, and amended on 6<sup>th</sup> September 2021, and I hereby dismiss it with no orders as to costs. The interim orders made on 29<sup>th</sup> June 2021, and which were extended thereafter, are hereby vacated. I have made other and further orders in paragraphs 59, 60 and 63 here above, with relation to costs, presentation of a supplementary budget and conditional funds. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17TH DAY OF NOVEMBER, .2021**

**W MUSYOKA**

**JUDGE**