



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 252 OF 2016

IN THE MATTER OF ALLEGED INFRINGEMENT OF THE PROVISIONS OF ARTICLES 1(1),

1(3), 2(2), 2(4), 3(1), 6(2), 10, 174(G), 175, 183, 185, 186, 186(2), 187(1), 189, 189(1)(C), 203(1)

(D), 217, 258 AND 259(1) OF THE CONSTITUTION OF KENYA

BETWEEN

COUNCIL OF COUNTY GOVERNORS.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE NATIONAL ASSEMBLY.....2ND RESPONDENT

THE SENATE.....3RD RESPONDENT

CABINET SECRETARY,

THE NATIONAL TREASURY.....4TH RESPONDENT

COMMISSION ON REVENUE ALLOCATION.....5TH RESPONDENT

AND

CONTROLLER OF BUDGET.....INTERESTED PARTY

JUDGEMENT

THE PETITION

1. The Petitioner; Council of Governors instituted this Petition dated 15th June 2016 on the even date seeking the following reliefs:-

a) A declaration that the National Government cannot allocate itself funds for and undertake devolved functions, without first executing inter-government agreements required by Article 187 of the Constitutions.

b) A declaration that in accordance with Article 202 (2) of the Constitution all funds christened in the Division of Revenue Act as conditional or unconditional grants should be netted from the national government's share of revenue and not from the overall revenues raised nationally.

c) A declaration that in accordance with Article 202(2) of the Constitution all funds christened in the Division of Revenue Act as conditional or unconditional grants should be disbursed to the Counties through the County Revenue Fund.

d) A declaration that 'national interest' as stated in Article 203(1) (a) of the Constitution does not necessarily connote functions

of the national government as provided in the 4th Schedule of the Constitution.

e) A declaration that funds christened as ‘national interest’ in the Division of Revenue Act 2016 or any other Division of Revenue Act enacted to implement the provisions of Article 202 and 203 of the Constitution cannot be apportioned on devolved functions without the same being channelled to the Counties as conditional or unconditional grants.

f) A declaration that, in its entirety, the Division of Revenue Act, 2016 is inconsistent with the provisions of Article 6(2), 10(2)(a), 174(c), (d) and (h), 202(2), 174(g), 175(b), 186, 186(2), 187(1), 189, 189(1) (c), 203(1)(d), 217 of the Constitution.

g) An order directing the respondents to take necessary steps to amend the Division of Revenue Act, 2016 to conform to the provisions of Articles 202(2) and 203(1) of the Constitution.

BACKGROUND

2. The Petitioner herein; Council of Governors instituted this Petition after parliament went ahead and enacted the ***Division of Revenue Allocation Act in 2016*** to sharing and devolution of power. The Act was assented to by the President on 23rd May 2016 and provides for divisions of revenue modality between the National and County governments.

3. The Division of Revenue Act 2016 hereinafter the “Act” for financial year 2016/2017 provides for the allocation of the following funds to the National Government;

a) Kshs.4121 Billion for free Maternity Health Care.

b) Kshs.4.5 Billion for Leasing Medical Equipment.

c) Kshs.4.5 Billion for level 5 hospitals.

4. All the above are devolved functions yet parliament allocated the funds to the National Government. In an attempt to camouflage the Constitutional anomaly, the Act made the allocations as a conditional grant. The County Governments aggrieved by the manner in which the National Government was silently taking over devolved functions through allocation of funds to itself filed this Petition seeking the orders hereof as set out in the Petition.

5. The National Assembly, the 2nd Respondent herein subsequently filed a Notice of Preliminary Objection on 25th July 2016 on the grounds that the Petition had not exhausted all the Alternative Dispute Resolution Mechanisms to resolve the dispute before approaching the Court.

6. On 3rd March 2016, Justice Muriithi, allowed the Preliminary Objection and ordered that the Petition be stayed pending reference of the dispute between the Petitioner and the National Government to Alternative Dispute Resolution Mechanism in accordance with ***Article 189(3) of the Constitution*** and the ***Intergovernmental Relations Act***.

7. On 9th October 2017, the Attorney General in line with the Court’s order invited parties to a meeting where the parties resolved to have the dispute mediated upon by the ***Intergovernmental Relations Technical Committee*** hereinafter the ***IGRTC***.

8. On 16th November 2017, the parties agreed that the following issues arise for determination by the mediation process:-

i. Whether the allocation of conditional grants in the division of Revenue Act, 2016 is made in accordance with Article 202(2) of the Constitution.

ii. Whether the accounting officer of the national government can spend money for conditional grants directly in the counties to undertake devolved function with the execution of an intergovernmental agreement under Article 187 of the Constitution.

iii. Which is the scope of an intergovernmental agreement under Article 187 of the Constitution?

iv. Whether the national interest means the interest of the national government and not of county governments.

v. What is the meaning of national interest as a criteria of revenue allocation as per Article 203(1) (a) of the Constitution?

vi. Whether the national interest means the interest of the national government and not of the county government.

vii. Whether an allocation for national interest ought to be allocated exclusively to the national government.

viii. Whether the national government can use the funds for the national interest directly to undertake devolved functions.

ix. Whether the national government has a constitutional obligation to disburse to counties, as conditional or unconditional grants, money allocated as national interest that are earmarked for devolved functions.

9. The first Mediation Report prepared by *Intergovernmental Relations Technical Committee (IGRTC)* was filed in Court on 14th September 2018 and it had the following conclusions:-

a) That the parties reached a consensus that conditional grants are derived from the National Government's share of the revenue. However, the parties noted that the Act defines conditional allocations as additional resources allocated to County Governments from revenue raised nationally.

b) With regards to issue no 2-4, the parties noted that the same had been addressed in circular no.8/2017 dated 29th August 2017 on Guidelines for management of Intergovernmental Fiscal Transfers in Kenya which addressed the division of revenue.

c) On the meaning of national interest, the parties agreed that the matter is polycentric in nature and this may not be adequately addressed in the mediation process.

10. On 14th October 2018, Hon. Lady Justice Okwany, upon consideration of the Report and arguments raised by the parties was convinced that, that all efforts to resolve the dispute had not failed and consequently ordered that issues No. 5 to 9 be submitted to a second mediation which would be facilitated by either the *Intergovernmental Budget and Economics Council (IBEC)* or the summit for determination in line with provisions of *Article 189(3) of the Constitution* and *Section 35 of the Intergovernmental Relations Act*.

11. The second mediation process was conducted by the *Intergovernmental Budget and Economic Council (IBEC)* which filed the Report in Court on 10th June 2020. The report findings on the meaning of national interest (*Article 203(1) of the Constitution*) is as follows:-

a) In defining the meaning of national interest for the purposes of the COK 2010, one ought to be guided by Article 259 of the Constitution. The Commission on Implementation of the Constitution (CIC) defined the term national interest as: 'a set of agreed policies, goals, priorities and resultant programs which have fiscal implications and which benefit the country as a whole.' This definition was generally agreed upon by the mediation committee.

b) National interests transcends both levels of government as it benefits the entire country. National interest can therefore be the interest of either level of government.

c) Where a function has been earmarked as one being of national interest, an allocation for the same ought to be allocated to the government level that has been assigned the functions under the fourth schedule.

d) Article 187 of the Constitution provides that a function or power of government at one level may be transferred to a government at the other level by agreement between the governments. By virtue of this provision, either level of government can undertake a devolved function where there is existence of an agreement between the two levels.

e) Article 202(2) provides that County Governments may be given additional allocations from the national government's share of revenue, either conditionally or unconditionally.

PETITIONER'S CASE

12. The Petitioner argue that the language used in the Report is that of a possibility yet the diametric of division of revenue between the two levels of government is couched in mandatory terms in the constitution. The Petitioner contend that it is imperative that these issues are well interpreted by this Honourable Court which is bestowed with jurisdiction under *Article 165 of the Constitution* to interpret the Constitution in order to provide a binding judgment to guide parliament in the preparation of future Division of Revenue Acts for the overall good and benefit of devolution.

THE 1ST AND 4TH RESPONDENTS CASE

13. The 1st and 4th Respondents urge that the parties deliberated and settled on the *Intergovernmental Relations Technical Committee* to mediate the dispute between the parties. The parties appeared before mediation on multiple occasions unfortunately, the mediation proceedings were upset and the Petitioner sought to have the court determine the very same issues which it had set to mediate.

14. The Parties being unable to agree on the way forward, the Court ordered that mediator do file his report with the Court to enable it make its determination on the extent of compliance with the ruling of Hon. Justice Muriithi. The Court (Hon. Okwany J) upon reading the report and upon hearing the parties issued a ruling, on 28th November 2018 ordering the parties herein, to return to the mediation Table referring the matter to the Intergovernmental Budget and Economic Committee for determination. The Court ordered further in default of parties reaching an agreement, the matter be referred to summit in accordance with *Article 189(3) of the Constitution* for further attempts at alternative disputes resolution with a view to determining the issues in the Petition.

15. Arising out by the Court's Ruling (Hon. Okwany J) the secretariat of the Intergovernmental Budget and Economic Council (hereinafter IBEC) convened a technical committee meeting which deliberated the issues for determination in this matter and thereafter for emergent report presented to the full IBEC which adopted the findings of the committee and issued its report to court by hand of the Office of the Attorney General on 21st January 2020.

16. The Parties herein were able to agree on various working definition and guidelines that are expected to guide the division of revenue and matters on conditional and unconditional grants. The parties herein were also able to, under the guidance of the National Treasurer (4th

Respondent) and Commission of Revenue Allocation (5th Respondent herein) determine the proper working definition of ‘national interest’ as found within **Article 203(1) of the Constitution of Kenya 2010**.

17. The 1st and 4th Respondents contend that this Court ought to take Judicial notice of the note of the Commission of the same Allocation as established within **Article 215 of the Constitution**.

18. **Article 216 of the Constitutions** sets out the functions of Revenue Allocation and provides as follows:-

“Article 216

(1) The Principal function of the Commission on Revenue Allocation is to make recommendations concerning the basis for the equitable sharing of revenue raised by the national government-

a) Between the national and county governments; and

b) Among the country governments.

(2) The Commission shall also make recommendations on other matters concerning the financing of, and financial management by, country governments, as required by this Constitution and national legislation.”

19. The 1st and 4th Respondents invite the Court to take Judicial notice of the composition of the IBEC as outlined within the Public Finance Management Act and note that almost all parties in this matter are represented within the Council.

THE 5TH RESPONDENT

20. The 5th Respondent urge that upon reference of this matter to the **Intergovernmental Relations Technical Committee (IGRTC)**; the mediation team distilled the issues for determination and therefore filled a mediation report on 14th September 2018 and gave the findings on each of the 9 issues for determination.

21. The Petitioner was dissatisfied with IGRTC Report for reasons that the same did not solve the questions in contest in the Petition. The Petitioner requested the Court to give directions on the Petition. In a Ruling delivered on 28th November, 2018, this Honourable Court referred the following issues to mediation by the Intergovernmental Budget and Economic Council (IBEC) –

a) What is the meaning of national interest as a criteria of revenue allocation as per Article 203(1)(a) of the COK 2010.

b) Whether the national interest means the interest of the national government and not of the country governments.

c) Whether an allocation for national interest ought to be allocated exclusively to the national government.

d) Whether the national government can use the funds for national interest directly to undertake devolved functions.

e) Whether national government has a constitutional obligation to disburse to counties, as conditional or unconditional grants, money allocated as national interest that are earmarked for devolved functions.

22. The IBEC filed its report in Court on 10th June, 2020. Having participated in the development of the report, the 5th Respondent associates itself with the findings therein.

23. The 5th Respondent contend that the only issue that remains for this Honourable Court’s determination is whether the allocation of conditional grants in the **Division of Revenue Act 2016** was made in accordance with the Constitution.

ANALYSIS AND DETERMINATION

24. I have carefully considered the pleadings herein, parties rival submissions, and the mediation reports and from the same the issues arising thereto for determination can be summed up as follows:-

a) Whether the allocation of conditional grants in the Division of Revenue Act 2016 is made in accordance with Article 202 (2) of the Constitution and whether the national government can attach terms to funds disbursed as conditional grant?

b) Whether an accounting officer of the national government can spend money from conditional grants directly in the counties to undertake devolved functions without an intergovernmental agreement under Article 187 of the Constitution?

c) What is the meaning of “national interest” in the context of Division of Revenue between the two levels of government and whether what constitutes “national interest” is a justifiable issue for courts to determine?

A. WHETHER THE ALLOCATION OF CONDITIONAL GRANTS IN THE DIVISION OF REVENUE ACT 2016 IS MADE IN

ACCORDANCE WITH ARTICLE 202 (2) OF THE CONSTITUTION AND WHETHER THE NATIONAL INTEREST CAN ATTACH TERMS TO FUNDS DISBURSED AS CONDITIONAL GRANT?

25. The Respondent herein, commission on Revenue Allocation is established under **Article 215 of the Constitution** and its Principal function is to make recommendations concerning the basis for the equitable sharing of the revenue raised by the National Government between the National and County Governments and among the county Governments as provided in **Article 216(1) of the Constitution**.

26. **Article 202(2) of the Constitution** provides that county government may be given additional allocations from the national government's share of the revenue, either conditionally or unconditionally.

27. In furtherance of the Constitutional direction enshrined in **Article 202(2)** and **Article 187(2) of the Constitution**, the commission can make recommendations on the conditional allocations to counties. **Article 203 of the Constitution** sets out the criteria to be taken into account in determining the equitable shares provided for under **Article 202 of the Constitution**.

28. **Article 205(1) of the Constitution** stipulates that when a bill that includes provisions dealing with the sharing of revenue, or any financial matter concerning country government is published, the commission shall consider those provisions and may make recommendations to the National Assembly and the Senate. On its part, **Article 203 (2) of the Constitution** stipulates that any recommendations made by the Commission shall be tabled in parliament, and each House shall consider the recommendations before voting on the Bill. It should be noted that the Senate plays a key role in division of revenue between the two levels of government.

29. The responsibility to control public funds is clearly vested in the National Treasury pursuant to **Article 225 of the Constitution** and the **Public Finance Management Act, 2012** and the Treasury performs these duties together with parliament.

30. On division of revenue, **Article 218 of the Constitution** provides for the manner in which the Senate and the National Assembly should process thus:-

“218. Annual Division and Allocation of Revenue Bills

(1) At least two months before the end of each financial year, there shall be introduced in Parliament—

(a) a Division of Revenue Bill, which shall divide revenue raised by the national government among the national and county levels of government in accordance with this Constitution; and

(b) a County Allocation of Revenue Bill, which shall divide among the counties the revenue allocated to the county level of government on the basis determined in accordance with the resolution in force under Article 217.

(2) Each Bill required by clause (1) shall be accompanied by a memorandum setting out—

(a) an explanation of revenue allocation as proposed by the Bill;

(b) an evaluation of the Bill in relation to the criteria set out in Article 203(1); and(c) a summary of any significant deviation from the Commission on Revenue Allocation's recommendations, with an explanation for each such deviation.”

31. In dividing the revenue raised nationally, the Senate and the National Assembly rely on the criteria in **Article 203 of the Constitution** to determine the amount of revenue that should be allocated to the national and country governments.

32. **Article 202 of the Constitution** requires that the criteria be taken into account to determine the equitable share, which clearly means that the figure is not fixed and varies every year based on the following criteria:-

a) The national interest;

b) Any provision that must be made in respect of the public debt and other national obligations;

c) The needs of the national government, determined by objective criteria;

d) The need to ensure that country governments are able to perform the functions allocated to them;

e) The fiscal capacity and efficiency of country governments;

f) Developmental and other needs of counties;

g) Economic disparities within and among counties and the need to remedy them;

h) The need for affirmative action in respect of disadvantaged areas and groups;

i) The need for economic optimisation of each county and to provide incentives for each county to optimise its capacity to raise

revenue;

j) The desirability of stable and predictable allocations of revenue; and

k) The need for flexibility in responding to emergencies and other temporary needs, based on similar objective criteria.

33. It therefore follows that the share revenue to the counties can vary so long as the amount allocated to the County is not less than (15%) of fifteen per cent of all revenue collected by the national government.

34. The Petitioners contend that the division of revenue is a process that concerns the application of national resources to development and indeed how the resources will be allocated. It is urged one of the principles of public finance as embedded in **Article 201(b) of the Constitution** is that the public finance system shall promote an equitable society. **Article 202 (1) of the Constitution** provides that revenue raised nationally shall be shared equitably among the national and county governments. The legal instruments that elaborates how revenue is to be shared between the two levels of government is the Division of Revenue Act which is enacted yearly by parliament.

35. The focus of this Petition is **Article 202(2) of the Constitution** which states that County Government may be given additional allocation from the national government's share of revenue, either conditionally or unconditionally. The use of the would 'may' in my view connotes that the issuance of conditional or unconditional grants is at the discretion of the national government.

36. **Article 203 of the Constitution** as already indicated herein above provides the criteria that shall be taken into account in determining the equitable share for each level of government. It therefore follows the division of revenue between the two levels of governments is partly informed by the role played by each of the government amongst other factors such as fiscal capacity and efficiency of county governments as well as the development and other needs of the counties.

37. Further **Article 230(1) of the Constitution** provides that one of the criteria is the need to ensure that country governments are able to perform the functions allocated to them in the Fourth schedule of the Constitution. This provision in my view is intended to promote the principles of development governance set out in **Article 175(b) of the Constitution** which provides that County governments shall have reliable source of revenue to enable them to govern and deliver service efficiently.

38. In the instant Petition, the Petitioner contend that the **Division of Revenue Act** for financial year 2016/2017 provides for the allocation of funds for devolved functions to the National Government as follows:-

a) Kshs.4,121 Billion for Free Maternal Health Care

b) Kshs.4.5 Billion for leasing Medical Equipments

c) Kshs.4.5 Billion for Level 5 hospitals.

39. The Petitioner contend that in an attempt to cure the above fundamental breach, the **Division of Revenue Act, 2016** went ahead to make the allocation as a conditional grant. The allocation of money to the national government to undertake the above devolved functions on paper, it is urged, appears as conditional grant but the Petitioner urges in reality it is the accounting officers of the national government who manage the funds.

40. In respect of **Revenue Bill 2016**, the **Commission on Revenue Allocation** contend that, the commission makes its recommendation of the division of revenue through a consultation process. That in its recommendation; the commission noted, that in accordance with **Article 187(2) of the Constitution**, which provides that; if a function or power is transferred from a government at one level to a government at the other level, then arrangements shall be put in place to ensure that the resources necessary for the performance of the function or exercise of the power are transferred. The Commission therefore contend that it is in line with the principle of **"funds follow functions"** and invariably requires clear linkages between assigned function, planning, budgeting and revenue allocation either level of government.

41. In the instant Petition the Petitioner has not submitted that the **Division of Revenue Act 2016** failed to allocate the counties the minimum 15% of nationally raised revenue and this can be seen from the following statement in the Explanatory memorandum to the **Division of Revenue Bill, 2016**;

"6. After making the above adjustment, County Governments' equitable share of revenue in the financial year 2016/2017 is estimated to be Khss.280.3 billion (see Table 1). This allocation is above the constitutional minimum of 15% percent of the latest audited revenues for FY 2013/14 (i.e. Kshs.935.7 billion)."

42. From the above it turns out the Parliament did not violate the constitution as it allocated the county governments the minimum of 15% required and therefore, having received more than the constitutionally mandated minimum of 15%. It is not demonstrated that there is a constitution violation to warrant High Court to invoke its jurisdiction under **Article 165 of the Constitution**.

43. A perusal of the explanatory Memorandum to the **Division of Revenue Bill, 2016**, the following statements explain the manner in which the revenue raised nationally was divided between the national and the country governments:-

"Explanation of the Allocations to the National and County Governments as Proposed in the Bill.

4. The DoRB, 2016 proposes to allocate the County Governments Kshs.302.2 billion in the financial year 2016/17, which relative to

the 2014/15 allocation, reflects an increase of Kshs.20.4 billion or 7 per cent. This allocation comprises of an equitable share of Kshs.280.3 billion and additional conditional allocations from the share of national government revenue amounting to Ksh.21.9 billion.

County Governments' Equitable Share

5. The County Governments' equitable share of revenue raised nationally for the financial year 2016/17 is arrived at by growing the County Governments' equitable share for 2015/16 of Kshs.259.77 by a growth factor of 7.8 percent. This growth has taken into consideration performance of revenue in the past which has not been on target. The equitable share of revenue, thus determined, is an unconditional allocation to the County Governments and therefore County Governments are expected to plan, budget, spend account and report on the funds allocated independently. This allocation to County Governments takes into account all the functions gazetted for transfer to County Governments by the Transition Authority."

44. As regards conditional allocations, the Explanatory memorandum is clear that the conditional allocations are drawn from the national government's share of revenue:

"Additional Conditional Allocations to County Governments

7. Article 202(2) of the Constitution provides for additional allocation to County Government from the National Government's share of revenue, either conditionally or unconditionally. Pursuant to this Article, the National Government proposes to allocate the following additional conditional allocations to support specific national policy objectives to be implemented by County Governments:"

45. It therefore follows from the above that, in the financial year 2016/2017, the county governments were allocated the sum of Kshs.280.3 billion from a total national revenue of Kshs.935.7 billion which is 29.95% of the revenue raised nationally. The Petitioner having received then an additional 29.95% of the revenue raised annually, the national government clearly made additional allocation to the country governments as per paragraph 7 of the explanatory memorandum to the **Division of Revenue Bill, 2016**.

46. In the instant Petition it should be noted the commission took into account that at the time of making conditional allocations, the national government had not fully devolved some of the functions assigned to the country in the Fourth Schedule of the Constitution. Some of the devolved functions were either being performed by the ministers or various corporations that existed before devolution. The Commission thus took into account the functions assigned to each level of government to ensure there is no mismatch between the resources and delivery on responsibilities assigned to the national and country governments. This therefore lead to the commission making its recommendations pursuant to **Article 216(5) of the Constitution** and **Section 190 of the Public Finance Management Act** to the Senate, the National Assembly the National Executive, County Assemblies and County Executives.

47. The Commission in arriving at its recommendations was guided by **Chapter 12 of the Constitution** which provides for the principles, legal and institutional framement of public Finance; which recommendation were issued in fulfilment of its constitutional role.

48. The 5th Respondent relies on the High Court decision in **County of Mandera & 2 others v. The Commission on Revenue Allocation & 4 Others [2017] eKLR** where Mativo J. stated thus:

"One of the most important policy changes ushered in by Kenya's 2010 constitution was an overhaul of the way in which resources are shared across the country. The Constitution took this power away from the executive and created new bodies, including the Commission on Revenue Allocation and the Senate, to lead a more transparent and objective process of deciding how to share resources. Article 216 (1) of the Constitution mandates the Commission on Revenue Allocation to make recommendations concerning the basis for the equitable sharing or revenue raised by the National Government between the national and county governments, and among the country governments. Article 216(2) mandates the Commission to make recommendations on other matters relating to the financing of, and financial management by, county governments and to encourage fiscal responsibility."

49. Similarly in the case of **Council of Governors & 47 others v. Attorney general & 3 Others (Interested Parties); Katiba Institute & 2 Others (Amicus Curiae) [2020] eKLR** where the Court, while holding that the advise of the Commission is not binding on Parliament, the Court nonetheless affirmed the positon of the recommendation of the 5th Respondent as follows:-

"[56] A critical reading of the provisions cited above, leaves no doubt that the Constitution places a very high premium on the recommendations by the Commission for Revenue Allocation. Such recommendations once tabled in Parliament, must be accorded due consideration before a vote takes place in either of the Houses, on the Division of Revenue Bill and the County Allocation of Revenue Bill. This is the unequivocal prescription in Article 205 of the Constitution. Even where the National Government intends to appropriate money form the Equalization Fund, the Commission must still be consulted, and if following such consultation, it makes recommendations, the National Assembly must consider the same before passing on Appropriation Bill.

[57] In view of the foregoing, it is our considered opinion that, where either of the two Houses passes a Bill envisaged under Article 205 of the Constitution, without considering the recommendations of the Commission on Revenue Allocation, the resultant legislation would be unconstitutional. By the same token, where the National Government appropriates money from the Equalization Fund without consulting the Commission, the resultant legislation would suffer a similar fate. The same result would obtain were the national Assembly passes legislation authorizing the National Government to appropriate money from the Equalization Fund without considering the recommendations, if any, by the Commission on Revenue Allocation."

50. The Commission further contend in accordance with the provisions of **Article 216(1) (a)** and **Article 203(1) of the Constitution**, the Commission recommended that the allocation of the conditional grants should be equitable and their distribution should not compromise the independence of the county governments as regards budgeting, planning and budget execution.

51. The Court while addressing itself to the rationale behind fiscal responsibility in **Speaker, Nakuru County Assembly & 46 others v. Commission on Revenue Allocation & 3 Others [2015] eKLR**, stated:

“Fiscal reporting mechanisms are clear at the National level and so are they in the County level with the County Executive, County Treasury and County Assemblies each charged with the responsibility of ensuring accountability and transparency in utilization of County resources and specifically, the mandate of approving County Budgets in the responsibility of a County Assembly”

52. The Commission’s Constitutional mandate clearly is to encourage fiscal responsibility in the formulation of policy geared towards ensuring accountability and transparency in the utilization of public finances. The management of intergovernmental transfers, including the duties of the national accounting officer in managing intergovernmental transfers to counties are set out in **Regulation 130 of the Public Finance Management (National Government) Regulations, 2015** which includes:-

“a) ensuring that transfers to a county government –

i) are made in accordance with the frameworks governing the conditional and unconditional transfers to county governments; and

ii) are deposited only into the Country Revenue Fund of a County Government; and

iii) are made in accordance with the relevant Act of Parliament unless the allocations are withheld or stopped in terms of Article 255 of the Constitution.”

53. Further a national government accounting officer who transfers any conditional allocation to country government shall, in addition to any other requirement in terms of the Act or any other applicable law or framework governing the allocation, monitor and evaluate the financial and non-financial performance of programmes, fully or partially funded by the allocation and submit to the National Treasury –

a) A quarterly report within 30 days after the end of each quarter;

b) An annual report within three months after the end of the financial year;

c) The attendant conditions of any conditional grant to a country accounting officers.

54. It is further provided that at **Regulation 130 (4) of the Public Finance Management (National Government) Regulations, 2015**, the reports referred to include information that: -

“a) indicate the total amount of funds transferred to each county government;

b) Indicate the amount of funds withheld or stopped form any county government, the reason for withholding or stopping and the action taken by the national government Accounting Officer and the county government Accounting Officer to deal with the matters that necessitated the withholding or the stoppage of the transfer;

c) Indicate any reductions or additions of conditional or unconditional allocations to county governments authorized by the National Treasury;

d) Indicate the funds, if any, spent by the national government Accounting Officer on the administration of the transfer to the counties; and

e) That may be required under the relevant law or framework governing the transfer by the National Treasury.”

55. The County Government Accounting Officer in accordance with **Regulation 131 (1) (a) of the Public Finance Management (National Government) Regulations, 2015** is responsible; for ensuring compliance with the requirements of the relevant law and frameworks governing the management of conditional transfers from the national government.

56. The Regulations envisage that the County Government Accounting Officer has the first mandate to monitor and evaluate the financial and non-financial performance of programmes, fully or partially funded by the allocation and report the same to the national government accounting officer, who subsequently reports to the national treasury.

57. The conditional allocation are drawn from the National Government share. The conditional grant in the Cambridge dictionary is defined as follows:-

“condition noun (Agreed Limit) An arrangement that must exist before something else can happen.”

58. **Article 202 (2) of the Constitution** provides “**County Governments may be given additional allocations from the national government’s share of the revenue, either conditionally or unconditionally.**” This in my view means where “**conditional allocation**” is made by the national government to the counties, the national government may impose conditions, that it deems fit for disbursement and management of the funds in a manner that meets the objectives of the national government. It should be noted that the “**conditional allocations**” are from the national government share of revenue and as such there is justification for imposing conditions by national government to have its objectives met.

59. I find in the instant Petition, there is no challenge to constitutionality of the various **Regulations of the Public Finance Management (National Government) Regulations, 2015** relied upon by the 5th Respondent; as regards the function of monitoring and evaluating conditional allocations to County Governments which, ultimately lies with the National Government.

60. In the case of **Institute of Social Accountability & Another V. National Assembly & 4 others [2015] eKLR**; the Court held that:-

“Conditional grants are a feature of most fiscally decentralized counties. Through conditional grants, the national government is able to achieve certain national governmental objectives within the decentralized units. What is paramount though is that the nature and design of such grants must respect the constitutional architecture.”

61. The Petitioner urge that the **Division Revenue Act 2016** defines “**conditional allocations**” as ‘**additional resources allocated to County Governments from revenue raised nationally.**’ The Petitioners urge that the definition thereto is wrong, contravenes **Article 202(2) of the Constitution** and in effect interferes with the County Governments autonomy and undermines devolution.

62. The 1st Mediation report states that Conditional grants are derived from the National Government’s share of revenue. It therefore follows that conditional grants are allocated to the counties from the national government’s share of revenue and not from the revenue raised nationally. I therefore find that the proper and justifiable way would be for the Act to indicate the additional money allocated to the counties is from the national government’s share specifying the conditions for their expenditure. Conditional grants bear conditions and for this reason the national government may impose conditions on how finances advanced to the county governments **under Article 202(2)** are to be utilised.

63. I therefore find that it is proper to take the conditional grants as money transfers from one level of government to another, either through competitive **project grants** or through more general **block grants** which is essentially and annual sum of money that is awarded by a national government to a county government to help fund a specific project. It is noteworthy that a national government places conditions on the use of the transferred funds by the recipient government. The conditions may be either financial or substantive in nature. In other words, the grantor uses these grants to induce certain reactions on the part of the grantee in order to bring a county level of government into line with the national level of government’s policy objectives. The greater the conditions placed upon the grant, the less flexible is the program for the recipient government.

64. I am of the view that the nature of conditions should not be constant for all counties but can vary from one county to another. The conditional grants may be materially or non-materially. The conditions may be imposed by the sphere of government allocating the funds, or the two spheres of government may negotiate them. In either case, an important feature of conditional grants is the method used to enforce the conditions. With specific grants, enforcement will typically not be an issue: the grant will only be paid if the recipient government undertakes the specific spending. For block grants, enforcement is more difficult because the conditions are typically rather value and subject to interpretation. The following methods of enforcement are possible in this scenario that is, the national government may enforce the conditions by penalising the county level of government whose programmes do not meet them or where there may be some dispute settlement mechanisms, possibly the courts, may be used for adjudication.

65. It is expected that if there are any financial conditions imposed on the county level of government, the conditions will usually entail matching requirements, and they are typically stated as a percentage of the conditional grant amount or as a percentage of total project costs, and financial matching requirements must come from local revenues raised by the country level of government or from its non-conditional share. On the other hand, substantive requirement reflect the nature of uses to which the recipient may apply the revenue granted by the national level of government.

66. The extent to which conditional grants are used and their design depend very much on the constitutional, institutional and fiscal circumstances. In the most general sense, the purpose of conditional grants is to influence the fiscal decisions of the county level of government presumably with the express intent of achieving some objective of the national level of government, including objectives that are stipulated by the Constitution.

67. It is expected that if the conditional funds are allocated to the county level of government, the funds would then be sent through the County Revenue Fund to the specific counties for the specific functions outlined by the national level of government. The effect of a conditional grant is that the funds are channelled directly to the activities in question and accounted for. The funds cannot therefore be re-appropriated by the County Assembly to other functions through a County Appropriation Bill.

68. The Petitioner urge that according to the **constitutional law expert, John Mutakha Kangu**, the equitable share is a right of each government and not a discretionary donation by national governments to the County Governments. In his book, ‘**Constitutional Law of Kenya on Devolution’ at page 252** he contends that there are three forms of funding for County governments’ from revenue raised nationally namely:

i. *An entitlement to an equitable share of revenue raised nationally;*

ii. *Additional allocations from the national government’s share of the revenue raised nationally which is given either conditionally or unconditionally; and*

iii. Equalisation funding from the revenue raised nationally.

69. In the submissions by the South Africa's Financial and Fiscal Commission to the South African Parliament to enable the enactment of the South African Division of Revenue Bill of 2002 with Specific Reference to the Conditional Grant System, the Commission stated that:

“Conditional grants are used in most decentralized systems of government to enable specified national objectives. The Constitution states that conditional grants must be provided from the national equitable share and that the division of revenue must recognize the role played by conditional grants within the national equitable share. This implies that there is a trade-off between increasing conditional grants to provinces and municipalities and the total amount available for equitable sharing between the 3 spheres of government.

70. Further according to the submission by the **South African Commission**, “conditional grants” are used as an intervention tool for the national level of government where there are concurrent functions. As such, in a bid to protect the respect of the institutional and functional integrity of either level of government, there ought to be an identification of objectives to be achieved and the monitoring of the performance of the various projects the funds are meant for. The two levels of government are also expected to make accountability arrangements and these arrangements clarified upfront. The national level of government is thus expected to have a Conditional Grant Framework with key requirements such as the purpose and conditions of the grant, measurable outputs and delivery indicators, why the objective cannot be met through the Equitable Share mechanisms, the projected lifespan of the grant and that the allocation criteria that must comply with the Constitution.

71. **Article 202 of the Constitution** provides for two forms of allocations. **Article 202(1)** provides for the **Division of Revenue Act** in the sense that it provides for the equitable sharing of the revenue raised nationally between the national level of government and the county level of government as provided for under **Article 218(1)(a) of the Constitution**. The other allocations provided for under **Article 202 of the Constitution** are conditional or non-conditional grants. **Article 202(2) of the Constitution** is instructive that the funds used as conditional or non-conditional grants are from the share allocated to the national level of government.

72. When allocating funds to the county level of government as either a conditional or non-conditional grant, it is expected that the allocation is made from the national level of government's share. Secondly, it is trite from the language used in **Article 202** as read with **Article 218(1)(a) of the Constitution**, conditional or non-conditional grants are not an item to be provided for under the **Division of Revenue Act**. Conditional and non-conditional grants can be issued to the county level of government under the auspices of **Article 190 of the Constitution** or through an agreement between the two levels of government that respects the institutional and functional integrity of the either level of government.

73. It is clear from the above that the conditional grants given to counties by the national government must emanate from its own share of the equitable revenue and not directly from the equitable share as contemplated under **Article 202 (2) of the Constitution**. Secondly, there ought to be a framework stating the purpose, the goal and the mechanism for the issuance of the conditional grant. Deviating from the set principles in **Article 203 of the Constitution** means that the equitable share raised nationally will significantly reduce resulting to a decrease in the equitable share allocated to counties. This would also mean that the decreased equitable share to counties undermines their financial autonomy since it restrains implementation of budgets.

74. In view of the above I find that conditional grants to counties should come from the National Government's share whereas funds for devolved functions should be allocated directly from the nationally raised revenue and not through the national government's share. I am of the view that the definition of “conditional allocations” used in **Section 2 of the Division of Revenue Act of 2016** that [**“conditional allocations” for the purposes of this Act, means additional resources allocated to county governments from revenue raised nationally**] is not only misleading but patently unconstitutional for going against the provisions of **Article 202(2) of the Constitution** which states that **“additional allocations”** from the national government's share may be given either conditionally or unconditionally to county governments.

75. In view of my findings herein above, I am of the considered view that it is proper for this Court to adopt the 1st Mediation report with regard to the issue of conditional grants and declare that the **Division of Revenue Act, 2016** contravened the provisions of **Article 202(2) of the Constitution** by defining that the conditional allocations to counties shall be from the revenue raised nationally instead of the national government's equitable share.

76. I find that the conditional grants in the **Division of Revenue Act 2016** were not done in accordance with the Constitution and it is evidently clear it is not in accordance with the law. The **Division of Revenue Act, 2016** contravenes the provisions of **Article 202 (2) of the Constitution** by defining that the conditional allocation to counties shall be from the revenue raised nationally instead of the national government equitable share. The **Division of Revenue Act** is therefore not made in accordance with **Article 202(2) of the Constitution** and is therefore unconstitutional.

B. WHETHER AN ACCOUNTING OFFICER OF THE NATIONAL GOVERNMENT CAN SPEND MONEY FROM CONDITIONAL GRANTS DIRECTLY IN THE COUNTIES TO UNDERTAKE DEVOLVED FUNCTIONS WITHOUT AN INTERGOVERNMENTAL AGREEMENT UNDER ARTICLE 187 OF THE CONSTITUTION?

77. The Petitioner's position on the issue in the 1st Mediation Report is that it is this Court which can determine the functions to be undertaken by the National and County Governments. The issue was unresolved by the Report. The 1st Report recommend that circular No. 8 of 2017 dated 29th August 2017 on Guidelines for Management of Intergovernmental Fiscal Transfer in Kenya should be interpreted by the Court to ascertain on functions.

78. From the above it appears that issues of dual accountability arise where money for devolved functions is allocated to the County Governments through the national government. The issue for consideration is therefore clear that is, who should account for the money? Is it the accounting officer of the national government or the county governments?

79. It appears that at one hand the Principle Secretary to the relevant Ministry is bound to account since it is the equitable revenue shared to the national government while on the other, the accounting officer at the County government is obligated to account for actual expenditure of the money sent to the County for specified activities. The Petitioner urge this process undermines the principles of Public Finance as envisaged in **Article 201(a) of the Constitution** which dictates that there shall be openness and accountability; including public participation in financial matters.

80. The Petitioners further contend that conditional grant cannot be spent at the national level, as it is mainly issued by the national government from its share to the counties. The national government may at its discretion set certain conditions for expenditure. The principal secretary, is obvious cannot spent money designated as conditional grant at the national level, as by doing so, would undermine the functional autonomy of county government.

81. Considering the **Fourth schedule of the Constitution** it is clear that, it assigns the two levels of government's specific functions which are outlined in part I and II of the Schedule. The functions are categorised as either exclusive, concurrent or residual functions. **Article 187 of the Constitution** provides that a function or power of government at one level may be transferred to a government at the other level by agreement between the governments. By virtue of this provision, the 2nd mediation report recommends that **either level of government can undertake a devolved function where there is existence of an agreement between the two levels.**

82. Upon considering the 2nd mediation report recommending that either level of government can undertake a devolved functions where there is existence of agreement between the two levels of government I find this to be a progressive and positive step towards enhancing devolved function and development in counties. I find that it would be in interest of eliminating the issues of dual accountability by adopting the 2nd mediation report recommending that either level of government can undertake a devolved function where there is existence of agreement between the two levels of government.

83. It should be appreciated that the purpose of conditional or unconditional funds is to enable the national government to meet its policy objectives at the County level of government. In doing so, the national government is expected to accede to the provisions of **Article 189(1) of the Constitution** by firstly, performing its functions and exercising its powers in a manner that respects the functional and institutional integrity of the county level of government. It also must respect the constitutional status of the county level of government. Secondly, in the event that there is need for the enhancement of capacity or coordinating policies and administration at the county level of government, the national level of government is expected to liaise with the county level of government in a manner that respects the functional and institutional integrity of the county level of government as stated in **Article 189(1)(c) of the Constitution**. Therefore, there is a legitimate expectation that if conditional grants are allocated to the county level of government, the national government must liaise with the county level of government in effecting the policy considerations the grants are intended for.

84. In the instant Petition, it is Petitioner's position that no agreement or any transfer was done between the two levels of governments. The national government allocated money for functions meant for the county level of government without liaising with the county level of government and acted as if those functions are allocated to the national level of government without following the provisions of **Article 187 of the Constitution**. To this date, the National Government has not executed the requisite inter-governmental agreement as required by **Article 187 of the Constitution** with respect to the mentioned devolved functions on **free maternal health care, leasing of medical equipment amongst others.**

85. The Respondents have not disputed the Petitioner's contention as stated hereinabove nor have they taken any rebuttal of the same. It therefore turns out that the respondents are in violation of the provisions of the constitution on the basis, that the national government accounting officers chose to directly spend money for conditional grants which was meant for the counties. It appears as if the national government has taken over the devolved functions, which in turn is against the spirit of devolution and contravenes the provisions of **Article 187 and 189 of the Constitution**.

86. There is no doubt the national government in overlooking the provisions of **Articles 187 and 189 of the Constitution** its actions amounts to encroachment on the functions and mandate of county governments with respect to misinterpreting the law and allowing the accounting officer of the national government to spend money for conditional grants meant for counties.

87. The Respondents position is that the function of monetary and evaluating conditional grants to county governments lies ultimately with the national government. This with due respect is totally wrong for allowing accounting officers of the national government to spend money from conditional grant meant for counties. I find that the national government may only intervene in activities of county governments pursuant to provisions of **Article 190(3) of the Constitution** and **Section 21 of the County Governments Act. Article 190(3) of the Constitution**, which states that:-

“Parliament may by legislation provide for intervention by the national government if a county government –

a) Is unable to perform its functions

b) Does not operate a financial management system that complies with the requirements prescribed by the national legislation.”

88. I have carefully considered parties submissions, the provisions of **Regulations 130, 131 of Public Finance Management (National Government, Regulations, 2015;** and **Articles 187 and 189 of the Constitution** and find that the law is very clear, that when an accounting officer of the national government spends money for conditional grants directly in the counties to undertake devolved functions without an intergovernmental agreement under **Article 187 or 189 of the Constitution**, acts in breach of the Constitution and the Law.

C. WHAT IS THE MEANING OF “NATIONAL INTEREST” IN THE CONTEXT OF DIVISION OF REVENUE BETWEEN THE TWO LEVELS OF GOVERNMENT AND WHETHER WHAT CONSTITUTES “NATIONAL INTEREST” IS A JUSTIFIABLE ISSUE FOR COURTS TO DETERMINE?

89. The “National Interest” as defined in **Article 203 (1) (a) of the Constitution** is not a legal question but rather is a political question for the Executive and the Legislature to determine during the extensive yearlong budget process.

90. The Respondents contend that Article 203 permits the revenue allocation to be adjusted based on the criteria in **Article 203 (1) as long as the total county allocation meets the minimum threshold of 15% of the total revenue raised nationally.**

91. The Petitioner support the 2nd Mediation Report’s interpretation of “**national interest**” as **a set of agreed policies, goals, priorities and resultant programs which have fiscal implications, and which benefits the country as a whole** and pray that the same be adopted as a judgment of this court.

92. The “national interest” is clearly defined under **Article 203 of the Constitution**. I find that “national interest” is a key backbone in influencing the division of revenue between the two levels of government in line with **Article 203 of the Constitution**. However, in the past this term has been misused to mean that “National interest” means the **interest of national government**.

93. In considering whether the “national interest” is expendable, one has to have a look at **Article 259 of the Constitution** which the Petitioner seeks to rely on. **Article 259(1) of the Constitution** provides:-

“259. Construing this Constitution

(1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

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

(c) permits the development of the law; and

(d) contributes to good governance.”

94. The Petitioner aver seeking that the meaning of “**national interest**” must be guided by **Article 259 of the Constitution**; dealing with construing the Constitution, and agrees with the 2nd mediation report which states that “**the National interest transcends both levels of government as it benefits the entire country. National interest can therefore be the interest of either level of government.** The 2nd Mediation Report further states that **Where a function has been earmarked as one being of national interest, an allocation for the same ought to be allocated to the government level that has been assigned the function under the fourth schedule”.**

95. The Respondents do not agree and take the “**national interest**” as advocated for by the Petitioner as misguided and misinterpretation of the Constitution in submitting that the funds allocated to national interest must not be dedicated before equitable allocation to the counties.

96. The Respondents urges that **Article 203 of the Constitution** requires that the criteria therein be a determining factor in allocation of revenue between the national and county government and the 3rd Respondent submits that what constitutes the national interest in each financial year is a political question.

97. **Article 203(1) of the Constitution** provides for the criteria to be taken into account in determining the equitable shares provided for under **Article 202(1) of the Constitution** and in all national legislation concerning county government enacted in terms of Chapter Twelve of the Constitution. “**The national interest**” is one of the criteria to be used for the determination of the equitable share. It is expected that when allocating the equitable share meant for the national government or the county level of government, “**national interest**” is taken into consideration.

98. From provision of **Article 203 of the Constitution** it follows that equitable share allocated to the county level of government may be increased or reduced based on “**national interest**”. For instance, if the national interest is the enhancement of health services, more funds will be allocated to the county level of government to meet the goals and purpose of the national interest served by health. In another instance, where Kenya has been attacked by an external aggressor, the national interest will be defence spending. That means that revenue allocated to the national level of government may increase based upon serving the “**national interest**” that is defence of Kenya’s borders. The criteria set out in **Article 203(1) of the Constitution** is intended to insure equitable sharing of revenue.

99. It is noted however that the **Division of Revenue Act 2016**, used “**National Interest**” as the basis for setting aside revenue in total contravention of the Constitution. It is expected that national interest would only apply in the allocation of revenue under **ITEM G on Table 2: Evaluation of the Bill against Article 203 (1) of the Constitution**. “**National Interest**” cannot be the basis for setting aside revenue from the Consolidated Fund but is a criteria for the allocation of the equitable share under **Article 202(1) and Article 218(1)(a) of the Constitution**.

100. The **Division of Revenue Act** allocated funds for national interest which are deducted from the equitable share before the money is shared equitably between the levels of governments. For instance funds for NYS and security are deemed to be national interest and allocated to the national government way before the revenue raised nationally is shared between the national government and counties. The national interest is in my view just a factor to be considered before the funds are equitably allocated to each level of government. It does not constitute a separate faction that has to be allocated money.

101. Upon considering the parties submissions and the 2nd Mediation Report which has not been challenged or its contents denied by the

Respondents or by any party and which the Petitioners agree with, I find that the “**National Interest**” transcends both levels of government as it benefits the entire country. I also find that where a function has been earmarked as one being of national interest an allocation for the same ought to be allocated to government level that has been assigned the function under the fourth schedule. I find the position should be as recommended in 2nd Mediation Report.

102. I further find that what constitutes a “**National Interest**” is a justifiable issue for the courts determination and as I have already dealt with what constitutes a “**national interest**” hereinabove, I need not say more than already stated hereinabove.

103. The upshot is that the Petitioner’s Petition is merited and the same is granted in the following terms:-

a) A declaration be and is HEREBY issued that the National Government cannot allocate itself funds for and undertake devolved functions, without first executing inter-government agreements required by Article 187 of the Constitution.

b) A declaration be and is HEREBY issued that in accordance with Article 202 (2) of the Constitution all funds christened in the Division of Revenue Act as conditional or unconditional grants should be netted from the national government’s share of revenue and not from the overall revenues raised nationally.

c) A declaration be and is HEREBY issued that in accordance with Article 202(2) of the Constitution all funds christened in the Division of Revenue Act as conditional or unconditional grants should be disbursed to the Counties through the County Revenue Fund.

d) A declaration be and is HEREBY issued that ‘national interest’ as stated in Article 203(1) (a) of the Constitution does not necessarily connote functions of the national government as provided in the 4th Schedule of the Constitution.

e) A declaration be and is HEREBY issued that funds christened as ‘national interest’ in the Division of Revenue Act 2016 or any other Division of Revenue Act enacted to implement the provisions of Article 202 and 203 of the Constitution cannot be apportioned on devolved functions without the same being channelled to the Counties as conditional or unconditional grants.

f) A declaration be and is HEREBY issued that in its entirety, the Division of Revenue Act, 2016 is inconsistent with the provisions of Article 6(2), 10(2)(a), 174(c), (d) and (h), 202(2), 174(g), 175(b), 186, 186(2), 187(1), 189, 189(1) (c), 203(1)(d), and 217 of the Constitution.

g) An order be and is hereby issued directing the respondents to take necessary steps to amend the Division of Revenue Act, 2016 to conform to the provisions of Articles 202(2) and 203(1) of the Constitution.

h) I direct that each party do bear its own costs.

Dated, Signed and Delivered at Nairobi on this 3rd day of December, 2020.

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J. A. MAKAU

JUDGE