



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CONSTITUTIONAL PETITION NO. 5 OF 2017**

**IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT OF THE PROVISIONS OF ARTICLES 1(1),  
(2),3(1),6(2),96,125,174AND 189 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**GEORGE OWINO OKODE.....1<sup>ST</sup> PETITIONER**

**COUNTY ASSEMBLY OF SIAYA.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**THE SENATE.....RESPONDENT**

**JUDGMENT**

1. The Petitioners herein **GEORGE OWINO OKODE** and the **COUNTY ASSEMBLY OF SIAYA** brought this Constitutional Petition dated 19<sup>th</sup> December, 2017 pursuant to **Articles 1 (1), 2 (2), 3(1), 6(2), 96, 125, 174 and 189 of the Constitution of Kenya** against the Respondent, **THE SENATE OF THE REPUBLIC OF KENYA** on alleged violation and infringement of the above cited provisions of the Constitution.

2. The gravamen of the Petition is as set out at paragraphs 17 and 35 of the Petition which is that the Respondent has routinely invited County Assembly Speakers to appear before its Committee on Public Accounts to answer audit queries on the Auditor General's report submitted under Article 229 of the constitution while fully aware that the speaker is neither the accounting officer nor a person who is reasonably expected to have relevant information on financial matters.

3. The Petitioners therefore seek the following orders as listed at page 9 of the Petition:

*(a) A declaration that the senate is bound by the provisions of article 189 (1) of the Constitution to perform its functions and exercise its powers in a manner that respects the functional and institutional integrity as well as the constitutional status and institutions at the County level;*

*(b) A declaration that resonating the intention of article 96 of the constitution and 226 (2) of the Constitution of Kenya and Section 148 of the Public Financial Management Act 2012, the Senate cannot invite speakers to personally appear before it to answer questions on county assembly finances in total disregard of the procedures and requirements of public finance management that is stipulated by the public finance management act, 2012;*

*(c) Costs of the Petition.*

4. A brief statement of facts which can be drawn from the whole Petition document and in particular paragraphs 14-34 thereof is that the Auditor General under article 229 of the Constitution is obligated to within six months after the end of each financial year, to audit and report, in respect of that year the accounts of the national and county governments and submit its audit reports to Parliament including Senate.

5. That the Auditor General having submitted its reports according to its constitutional mandate, it was now the Senate's turn to consider the reports submitted and recommend appropriate actions to be undertaken.

6. However, it is asserted that in so doing, the Senate has routinely invited Speakers of various County Assemblies who have appeared before it to discuss the contents of the reports submitted, which invitation by the Senate of the County Assembly Speakers is considered to be unconstitutional for the reason that the Speaker is not the Accounting Officer of a County Assembly thus not the right person to answer to audit queries.

7. The Petitioners claim that Section 148 (4) of the Public Finance Management Act provides that the Clerk of the County Assembly shall be the Accounting Officer of the County Assembly and as such it is the Clerk who is accountable to the Senate and that the Senate should be guided by the legal and constitutional structures of County Public Finance Management and accounting when carrying out its mandate.

8. The petitioners in their proposition relied on two cases, namely:

1. ***Constitutional Petition No. 8 of 2014; International Legal Consultancy Group Vs the Senate and the Clerk of the Senate.***
2. ***Constitutional Petition No. 413 of 2014; The Council of Governors and 6 Others Vs The Senate.***

9. The particular paragraphs of the above judgements relied on by the petitioners are as follows: In the first Petition, the court held *inter alia*;

***“The powers to summon anyone under Article 125 can only be exercised by the Senate when it is properly seized of a matter in execution of its constitutional mandate. The summons should also be issued against persons who are reasonably expected to have relevant knowledge or information necessary to assist the Senate with matters under consideration.”***

10. The court in the above decision then proceeded to analyze why a County Governor is a person who is reasonably expected to have relevant knowledge or information necessary to assist the Senate with matters under consideration and to this effect relied on Section 30 (3) (f) of the County Governments Act, 2012 which provides that: *in performing the functions under subsection (2), the Governor shall be accountable for the management and use of the county resources* and subsequently opined that:

***“by implication, this provision means that the County Governor as the overall head of the county is accountable for the utilization of county resources including the National revenue allocated to his or her respective county. Since the Accounting Officers at the county are directly answerable to the County Assembly for the management of financial resources under the Public Finance Management Act, 2012, who then is the Governor accountable to under Section 30(3) (f)? In our considered view, since the County Governors are not answerable to the County Assembly in terms of fiscal management of the county resources under Section 149 of the Public Finance Management Act, 2012, they must be held to account by the Senate for the National revenue allocated to their respective counties.”***

11. In the second case it was similarly stated as follows:

***“the question now arising is whether the said Governors were or are with the relevant information that would have entitled them to be summoned by the Senate’s Committee aforesaid....however, the role of the Governor under Section 30 (3) (f) of the said County Governments Act is critical in fiscal management at the county level. He is the Chief Executive Officer and the buck stops with him in the management of county resources.***

12. To this end, the Petitioners claim that analysis of that nature cannot be successfully sustained when it comes to the County Assembly Speakers because the functions of the Speaker do not include financial management. They enumerated the functions of the Speaker of the County Assembly as provided for under Article 178 (2) of the Constitution which functions include presiding over a sitting of the County Assembly with the other functions listed as follows:

- i. *To administer the oath of affirmation or allegiance to Members of County Assembly and issue writs for vacant seats.*
- ii. *To protect the rights of minority while making sure that the majority have their way.*
- iii. *Organizing the business of the house as he/ she is a member of the house business committee*
- iv. *Spokesperson of the assembly and shall ensure that the dignity of the assembly is upheld and its rights and privileges are not abused.*
- v. *The speaker represents assembly to the outside world.*
- vi. *The speaker is the final authority on all matters touching on the interpretation and application of the practice and procedure of the assembly at all times.*

13. In light of the foregoing, the petitioners aver that none of the above functions can be interpreted in a manner that places on the Speaker of the County Assembly the responsibility of accounting for the County’s finances and that unlike a Governor, a Speaker cannot be said to be a person that has relevant information or knowledge to assist the Senate with the matter under consideration. They relied on the following holding, as regards the manner in which the senate ought to exercise its power;

***“.....there must be a measure of restraint by the Senate. Put another way, when the Senate uses its powers to summon with regard to oversight mandate under Article 96(3) of the Constitution, it must not do so arbitrarily and capriciously. It must exercise caution and refrain from acting in a manner that could be construed as micro-managing devolved units at the county level. It must endeavor to sustain the spirit and letter of the Constitution as enshrined in Article 6 (2) of the Constitution. “The Senate is therefore required by the Constitution under Article 6(2) when exercising its oversight powers over the County Governments under Article 96(3) of the Constitution to do so in a manner that fosters and nurtures the principles of devolution***

*in the new constitutional dispensation....”*

14. The Petition is supported by the Supporting Affidavit dated 19<sup>th</sup> December 2017 sworn by **George Owino Okode** who is the Speaker of the Siaya County Assembly in which he reiterates the above averments and states that his attention was drawn to various letters written by the Clerk of the Senate requiring the attendance of the County Assembly Speakers at the Senate to answer audit queries. He deposes that the Speakers felt compelled to appear before the Senate which questioned on matters not within their knowledge or as would reasonably be expected of them to know. Further, that, it is informative to note that the office of the Speaker does not mandate him to participate in the implementation of County Budgets and therefore, the Senate ought not to be allowed to arbitrarily invite county assembly speakers to answer to matters not within their knowledge.

**The Respondent's Case**

15. The Respondent Senate filed its Replying Affidavit through its Clerk Mr. Jeremiah Nyegenye on 1/2/2018 in opposition and response to the Petition stating that the Petition is a complete abuse of the court process and a waste of precious judicial time as the matters raised have been canvassed in other courts in Kenya as admitted to by the Petitioners at paragraph 20 of the Petition. Further, that the Petitioners seek orders that are a mere restatement of the law and only want to engage the court in an academic exercise as the orders sought are on behalf of the County Speakers, whereas they have not shown that either the 1<sup>st</sup> Petitioner or any other County Speakers have been aggrieved by the alleged actions of the Senate.

16. It was further stated in the Replying Affidavit that the Petitioners have not presented any evidence to court to show that the Senate had invited any County Speakers to appear before Senate and that as such, the Petition is academic, speculative and without any legal basis.

17. That pursuant to Article 125(1) of the Constitution, the Respondent herein has power to summon any person to appear before it for the purpose of giving evidence or providing information and that therefore the orders sought by the Petitioners go against the said constitutional stipulations which provides that **“either House of Parliament, and any of its Committees, has power to summon any person to appear before it for purpose of giving evidence or providing information”**.

18. According to Mr. Nyegenye, the Senate has not used its powers arbitrarily or capriciously and that contrary to the Petitioners' belief, the Senate's power is not limited to an accounting officer and that it may seek information from any individual in exercise of its oversight mandate and that the instant Petition is an attempt to veto the Respondent's oversight role.

19. Further, that the 1<sup>st</sup> Petitioner being a public officer ought to be keen to uphold the national values of transparency and integrity as envisioned in Article 10 of the Constitution rather than seek to bar the Senate from exercising its constitutional mandate if need arises and that upon advise from their legal counsel, the jurisdiction of this court can only be invoked in the event of an excess of jurisdiction by way of breach of the Constitution and that in this case, it there has been no violation of the same by the Respondent.

20. The Reply by the Respondent prompted the Petitioners to file a Supplementary Affidavit dated 13/2/2018 through the Speaker of the County Assembly of **Siaya George Owino Okode** deposing that matters deposed in his affidavit in support of the Petition indeed demonstrate that there is an arbitrable dispute between the Respondent and himself and that he has sound grounds for bringing this Petition.

21. That the court ought to note that the crux of the matter is in the distinction, dissimilarity and non- uniformity between the roles of a Governor and a Speaker in respect of financial matters and that the same can be established upon a meticulous analysis of the two matters previously canvassed and that such analysis would not amount to an invitation to retry the matters.

22. In response to the contention in the Replying Affidavit that the Petitioners have not presented any evidence to court to indicate that the Senate has invited the County Speakers, he draws the attention of court to a copy of the letter filed in court on 20/12/2017 marked as exhibit 3 in his Affidavit in support of the Petition.

23. Further it is deposed that it is not in contention that the Senate has an oversight role in the management of county affairs as stated in the Reply. However, that the Senate ought to take account of the nature of each office bearer's engagement, functions and responsibilities in connection with the issue under inquiry and that in circumstances where a particular office has been mandated to carry out the very function giving rise to the inquiry, that office must be the first port of call when an inquiry is undertaken, and that to invite a secondary party who is neither mandated nor reasonably expected to be in the know relevant to the inquiry would amount to arbitrary use of power.

24. Lastly, that the basis of the Petition is that despite judicial pronouncements on similar claims and parameters for use of senatorial powers established, the Senate has continued to engage non-key informants in complete disregard of those findings.

**Submissions**

25. The parties filed written submissions to canvass the petition and highlighted the same orally. The petitioners submissions are dated 26/2/2018 with the main issue raised being, **whether the Senate can summon the Speaker of a County Assembly?** The petitioners also framed the following issues for determination:

a. *What is the position of a County Assembly vis-à-vis the Senate*

b. *Is the office of the County Speaker the right office to answer to questions touching on the financial management of the county?*

c. *Do the customs and traditions of Parliament anticipate a probe conducted by one House against another?*

26. The submissions give a brief background that on 12/8/2014, the Senate summoned 6 Governors to appear before it and that among the persons to appear was the Siaya County Governor. However, it is stated that the Governors did not honor the summons and as a consequence thereof, the Senate imposed on the Controller of Budget not to authorize release of public funds to their counties. The Governors then filed Petitions to question the validity of the summons but their Petitions were dismissed on account of the provisions of Article 125 of the Constitution.

27. It was submitted that the Senate has continued to place reliance on the above Article 125 of the Constitution and the ensuing judgments dismissing the petitions of the governors to call upon Speakers of various County Assemblies.

28. On issue 1, it was submitted in concession that it is not in doubt that the Senate can summon anyone before it. However, that a general application of the power to summon witnesses not only undermines the core principles and values of devolution but also that its outcome would be cumbersome, complex and incommodious.

29. The petitioners further submitted that both the Senate and County Assemblies have equal powers despite dissimilarity in their functions and that the Constitution puts both houses at par with none superior to the other. They cited Articles 3, 4, 6(2), 176 and 189 of the Constitution, maintaining that the Task Force on Devolution while providing guidance on the meaning of Articles 6 and Article 189 of the Constitution in its interim report of 2011 at page 27 stated:

***“This connotes a measure of equality and autonomy among the two levels at least in the sense of each of them being created by the Constitution as opposed to being created by another level of government. None is created and therefore can be abolished by another level of government. {...} distinctness in this sense rules out the concept of hierarchy as a relationship principle. In effect, the levels of government must have the freedom to make decisions in the functional area assigned to them by the constitution without interference from other level of government. At the relation level, this principle calls for a certain measure of mutual respect among the two levels of government”.***

30. On this, the petitioners submitted that it is clear that each level of government enjoys similar status, adding further that both are representative houses mandated to oversight and legislate and that one house is a replica of the other and that power to summon witnesses is bestowed on both houses and that for the County Assembly is at Article 195 (1) (2) which corresponds verbatim to Article 125.

31. Further, that the petitioners drew the court’s attention to the **Parliamentary Powers and Immunities Act, 2017** which law they submitted, applies to the County Assemblies. In addition, it was submitted that the authority to use National government legislation derives from the County Governments Act, 2012 at Section 17 which states that ***“the National Law regulating the powers and privileges of Parliament shall with necessary modifications apply to the matter in question until the County Assembly enacts the required legislation”.***

32. On issue 2, the petitioners reiterated their Petition and the respective roles of Governors *vis a vis* those of the County Speakers and submitted that the cases turned on one issue; *that the person summoned must be a person who has information that is relevant to the matter under inquiry.* They then submitted that the question as to whether the Senate Committee could summon Governors was answered as follows:

***“It then follows that under Article 125, the County Governor and the County Assembly member for Finance who belong to the Executive Arm of the County Government can also be summoned by the Senate in exercise of their oversight mandate under Article 96 (3) of the Constitution.”***

33. It was thus submitted by the Petitioners that by contrast, a County Assembly Speaker is not the Chief Executive Officer of the County and that neither is he logically clothed with powers that would require him to account to the Senate on the use of County Assembly finances. That his roles as established under Article 178 (1) (2) (a) (b) of the Constitution of Kenya, in the County Governments Act, 2012 and House Standing Orders are distinct from those of Governors who can be summoned as provided for under Section 30(2) and (3) and in particular 30 (3) (f) of the County Governments Act hence the same logic used to summon Governors cannot be used to summon Speakers.

34. The submissions also considered whether the use of powers to summon is in line with the requirements of Article 10 of the Constitution and here it was submitted that the most fundamental constitutional precepts that permeate each and every action by a state organ, whether in interpreting statute or implementing a policy decision are the national values and principles of government enshrined under Article 10 of the Constitution.

35. The petitioners relied on **IEBC vs National Super Alliance and Others CA No. of 2017**, where it was stated that these values and principles are justiciable as a matter of right. The Court of Appeal held inter alia:

***“The values espoused in Article 10 (2) are neither aspirational nor progressive, they are immediate, enforceable and justiciable...our view on this matter is reinforced by Article 259 (1) (a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles. Consequently, in this Appeal, we make a firm determination that Article 10 (2) of the Constitution is justiciable and enforceable and violation of the Article can found a cause of action either on its own motion or in conjunction with other constitutional articles or statutes as appropriate.***

36. In the above holding, the court placed reliance on the **Matter of Peter Makua Muscoda and Award of Mining Concessionary Rights to the Mui Coal Basin Deposits- Constitutional Petition Nos. 305 of 2012; [2015] eKLR** where the High Court noted:

***“...they all agree that the precepts of Article 10 of our Constitution are established rights which are justiciable in Kenya. Hence, if any of the allegations made by the Petitioners is factually proven, it would lead to an appropriate relief by the court.”***

37. To this end, the Petitioners submitted that both the **Kerugoya** and the **Nairobi** courts extensively addressed the Senate on how they ought to use power to summon parties when dealing with the County Governments and reiterated the holding in the Kerugoya case already stated at page 4 above and submitted that had the Senate reconsidered the use of the power to summon when dealing with Speakers, this Petition would not have arisen and further, that in light of Article 10, Senate ought to be held accountable when they willfully neglect to conduct their affairs in a manner that is consistent with judicial pronouncements.

38. On issue 3, it was submitted that the drafters of Parliamentary Privileges and Immunities Act, 2017 anticipated situations where the power to summon would be brought to question as is according to Section 14 of the Act. The add, that our system of government is relatively new, thus the senate or courts have not dealt extensively with the potential conflict between powers and privilege of county assemblies in relation to those of the Senate and state that the exercise is defeated because usages, customs and traditions must have existed from time immemorial- they must have antiquity. The novelty of the devolved system of government is the autonomy to antiquity.

39. It was further submitted that that the corollary of Parliament's immunity from outside interference is that those matters subject to parliamentary privilege fall to be regulated by Parliament alone. Reference was made to Sir **William Blackstone's Commentaries on the laws of England** where he states:

*“ the maxim underlying the law and custom of parliament is that whatever matter arises concerning either house of parliament, ought to be examined, discussed and adjudged in that house to which it relates, and not elsewhere.”*

40. The petitioners thus submitted that Parliamentary Privileges and Immunities Act, 2017 Section 11 which provides that **“no proceedings or decision of Parliament or the committee of powers and privileges acting in accordance with this act shall be questioned in any court”** does not have adequate provision for the protection of County Assemblies.

41. The petitioners further submitted that in light of devolved government, there is need for a wholesome examination into the laws of Kenya touching on immunities, powers and privileges of Parliament and that the court at Article 159 is to interpret the Constitution in a manner that promotes its purposes and good governance. In this regard they relied on the cases of **Republic v National Assembly Committee of Privileges & 2 others ex-parte Ababu Namwamba [2016] eKLR** , **Speaker of the Senate & another vs Hon. Attorney General & another & 3 others Advisory Reference No.2 of 2013 [2013] eKLR**, **Mugambi Manyara & another v Attorney General & 5 others [2017] eKLR** which dealt with separation of powers, **Njoya & others vs Attorney General, Nduyabo vs Attorney General** which all in all state that the Constitution should be interpreted as a whole in a manner that promotes the spirit and letter of the constitution, good governance while not losing sight on the doctrine of separation of powers.

42. On the part of the Respondent Senate, it was submitted relying on the depositions in the Replying Affidavit sworn by Mr. Jeremiah Nyegenye the Clerk of the Senate dated 1/2/2018 that **prayer (a)** of the Petition is a mere restatement of the law and it burdens the court unnecessarily and should thus be dispensed with stating that the Petitioners reiterated similar prayers as those sought by the Petitioners in Nairobi H.C Petition No. 413 of 2014 where the court stated:

*“The following prayers are a mere restatement of the law: (b) a declaration that the Senate is bound by the provisions of Article 189 (1) of the Constitution to perform its functions and exercise its power in a manner that respects the functional and institutional integrity as well as the constitutional status and institutions at the county level.”*

43. The Respondent also framed three issues for determination as follows:

- i) Whether the Senate has a role in the oversight of county finances**
- ii) Whether the Speaker of a County Assembly is exempt from proceedings under Article 125 of the Constitution**
- iii) Whether the issues here are justiciable.**

44. On whether the Senate has a role in the oversight of county finances, it was submitted that the court must determine the role of the Senate with regard to oversight of funds allocated to the counties. Reference was made to Articles 1 (1), 1 (4), 3 (1), 10, 35 and 96 of the Constitution. It was further submitted that under Article 96 and particularly 96 (3), of the Constitution, the Senate is to interrogate how counties are managing their affairs and in so doing, determines allocation of national revenue among the counties and thereafter exercises oversight over this national revenue allocated to county governments. A definition of oversight was given as per the **Cambridge Dictionary** as follows **“responsibility for a job or activity and for making sure it is being done correctly”**.

45. The respondent submitted further that Article 1 (1) of the Constitution as read together with Article 35 gives every citizen the right to information; indicates that the right can be exercised by an individual personally or through the elected representatives, as the members of the Senate in this case. In addition, it was contended that the role of Senate in Public Finance and County Revenue has been determined in the cases of: **Speaker of The Senate & another Vs Attorney General & 4 others [2013] eKLR**, **Council of Governors & 6 others v Senate [2015] eKLR**, **International Legal Consultancy Group vs The Senate and The Clerk of the Senate; Kerugoya Constitutional Petition No. 8 of 2014** and **Kyalo Kamina v Senate and 3 others [2016] eKLR**.

46. All the foregoing cases discuss the role of the Senate to be- to safe guard principles of devolved governments i.e. protect interests of County Governments, participate in law making functions, debating and approving bills, determining allocation of national revenue and exercise oversight (ensure accountability) over the national revenue thereby ensuring the fruits of devolution.

47. According to the respondent, the Senate is the appropriate body at the National level that protects the counties and that therefore it is the appropriate oversight body to check whether the County Governments operate financial management systems that comply with national

legislation pursuant to Article 190 (2) of the Constitution. Further, that the Senate's Standing Order No. 212 creates the Senate Sessional County Public Accounts and Investments Committee which lists the functions in relation to finance matters.

48. In addition, it was submitted that Articles 259 and 174 of the Constitution call into issue integrity, transparency and accountability of resources received. Reliance was placed on the Supreme Court holding in **Re the Matter of the Interim Independent Electoral Commission [2011] eKLR** which sums up the overall roles of the Senate thus:

*“We have taken note too that the Senate (which brings together county interests at the national level) and the National Assembly (a typical organ of national government) deal expressly with matters affecting county governments; and that certain crucial governance functions at both the national and county level- such as finance, budget and planning, public service, land ownership and management, elections, administration of justice- dovetail into each other and operate in unity.”*

49. In submitting further, the respondent referred to the **Final Report of the Committee of Experts on Constitutional Review**, which in summary states that the purpose of oversight on the county governments was to enhance “**checks and balances and the separation of powers**” for devolved /county governments. It was thus submitted in conclusion on the issue that the Constitution confers upon the Senate an oversight role over officials of the County Governments, including Speaker of the County Assembly.

50. On Whether the Speaker of a County Assembly is exempt from proceedings under Article 125 of the Constitution, the respondent relied on Article 125 of the Constitution and submitted that the provision is clear as it uses the words: “**any person**” and that therefore the Senate can call any person for purposes of ensuring integrity, transparency and accountability in public offices to provide evidence and or information to the Committee. The respondent likened Article 125 to the power of the court and submitted that no person is to ignore or challenge such summons by court.

51. The respondent further relied on the Kerugoya **High Court Petition No.8 of 2014** as relied on by the Petitioners on interpretation of the above Article 125 of the Constitution. In the respondent's view, a **Speaker of a County Assembly is a person who is reasonably expected to have relevant knowledge or information to assist in ensuring transparency.**

52. On basis of the holding in the Kerugoya Court, it was submitted that there was need to critically evaluate the roles of a Speaker of a County Assembly, who is also the Chairperson of the County Assembly Service Board which is created under Section 12 of the County Governments Act. In their view the responsibilities of the County Assembly Service Board under Section 12 (7) of the County Governments Act make the Speaker a person who is reasonably expected to have relevant knowledge or information necessary to assist the Senate with certain matters which may be under consideration. This is so because the Board is responsible for providing services and facilities to ensure the efficient and effective functioning of the County Assembly, creating offices in the County Assembly Service, preparing annual estimates of expenditure and exercising budgetary control over the service and that all this are audit items within the knowledge of the Speaker.

53. It was further submitted that under Article 10(2) of the Constitution, one of the values of governance enshrined in the Constitution are transparency and accountability and that the Kerugoya Court gave its judgment on the constitutionality of the Senate in summoning the governors. In the said case the Court stated:

*“Under Article 10 of the Constitution, one of the values of governance enshrined in the constitution is transparency and accountability. Every officer in every state organ at both levels of government must respect and comply with any mechanism of accountability established by the Constitution and the law to the fullest extent possible...”*

54. On whether the issues here are justiciable, it was submitted that the Petitioners had not presented any evidence to court indicating that the Senate had invited County Speakers to appear thus the Petition is academic, speculative and without any legal basis and therefore not justiciable. Reliance was placed on **Samuel Muigai Nganga v The Minister for Justice, National Cohesion & Constitutional Affairs & another (2013) eKLR** where the meaning of justifiability was discussed:

*“In order for a claim to be justiciable as an Article III it must present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted. In part, the extent to which there is a ‘real and substantial controversy is determined under the doctrine of standing’ by an examination of the stake of the person making the claim, to ensure the litigant is fairly traceable to challenged action and likely to be redressed by the judicial review requested....”*

55. It was therefore submitted that the Petitioners raise no actual injury that could be challenged in court and that the effect of the orders sought by the Petitioners is to suspend the fundamental provisions of Article 35 of the Constitution and to restrict the Senate from carrying out its oversight mandates over national and county revenue, which, in the respondent's view, would not be in public interest, nor consistent with constitutional principles as the petitioners had not demonstrated any violation of the Constitution.

56. Upon the Petitioners receiving the Respondent's submissions, they filed a Reply dated 17/4/2018 to the Senate's submissions contending that they were not dispute that the Senate has a role in the oversight of county finances, neither were they denying that the Speaker does not have immunity as appertains Article 125 of the Constitution. The petitioners asserted that what they did not agree with is the summoning of witnesses in a manner that does not align to the letter and spirit of the Constitution and the arbitrary and capricious use of the Senate's powers that goes against the constitutional status of institutions of governance at the county level as provided for under Article 189.

57. In addition, the petitioners submitted that the provisions of Article 195 as read together with Article 125 of the Constitution calls for caution on taking actions that might undermine good order and the dignity of the legislatures at both levels of government.

58. On whether the Speaker is someone that can be summoned for having relevant information on the financial management of the County Assembly because of the position he holds in the County Assembly Service Board, the Petitioners made reference to the case of

**International Legal Consultancy Group Vs the Senate and the Clerk of the Senate** where the court: *“however, we wish to point out that the first persons of contact with regard to any issue of financial management of a county would be the accounting officers appointed at the county level”.*

59. On the issue of justiciability, the petitioners asserted that although they had not presented any evidence to court indicating that the Senate had invited the County Speakers, at pages 6-8 of their bundle of documents they annexed two letters dated 8/12/2016 and 23/5/2016 inviting the Speakers of Uasin Gishu County and Kakamega County respectively. Further, that the question of locus *standi* has long been dispensed with by the Constitution of Kenya under Article 258 (i) which provides that *“every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.”*

60. The Petitioners relied on **Timothy M. Njoya and Others Vs the Attorney General & Another (2004) eKLR** where it was held, citing **Ruturi & another v Minister of Finance and John Michuki v Attorney General** that:

*“...the courts first role should be to uphold constitutionalism and the sanctity of the Constitution. We think such a role cannot be well performed by shutting the door of the court on the ground that such persons who seek to uphold the Constitution on the ground that such persons have no peculiarly stake in a matter which belongs to all...we accordingly find that the applicants have locus standi to challenge compliance with the constitution...”*

61. Both parties’ advocates also made oral submissions highlighting and reiterating their written submissions.

## **DETERMINATION**

62. I have considered the Petition, the affidavit evidence by the Petitioners and the replying affidavit evidence by the Respondent. I have also considered the Petitioners’ Counsel Submissions and authorities in support as well as the Respondent’s Counsel Submissions and decided cases. In my humble view, the issues that flow for consideration are:

*(a) Whether the Senate has power to summon the speaker of the county assembly?*

*(b) Whether the roles of the county assembly and the senate are the same?*

*(c) what orders should this court make;*

*(d) Who is to bear the costs of this petition?*

63. On whether the Senate has power to summon the speaker of the county assembly, it is not disputable that Article 125 of the Constitution empowers the Senate and any of its committees to summon any person to appear before it for the purposes of giving evidence or providing information, and that power extends to compelling production of documents.

64. The Article stipulates:

*“(1) Either House of Parliament, and any of its committees, has power to summon any person to appear before it for the purpose of giving evidence or providing information.*

*(2) For the purposes of clause (1), a House of Parliament and any of its committees has the same powers as the High Court —*

*(a) To enforce the attendance of witnesses and examine them on oath, affirmation or otherwise;*

*(b) To compel the production of documents; and*

*(c) To issue a commission or request to examine witnesses abroad.”*

65. From the above provision, it is not in doubt that the Senate is conferred with the powers to summon any person to appear before it to give evidence or to provide information, within its Constitutional and statutory mandate. The powers to summon by the Committees are equivalent to those of the High Court. The said provision is similar to Article 195 of the Constitution which grants the County Assemblies similar powers to summon.

66. However, it is my humble view that the power to summon cannot be exercised arbitrarily or capriciously. In **International Legal Consultancy Group v Senate & another [2014] eKLR** in a ruling rendered by Mumbi Ngugi J on 19<sup>th</sup> February, 2014 the Learned Judge expressed herself thus and I fully concur:

*“While it (the Senate) does have the power under Article 125 to summon anyone, that power cannot have been intended to be exercised arbitrarily in isolation. Put differently, the provisions of Article 125 cannot be read in isolation, but it must be read in conjunction with other provisions of the Constitution which allocate the functions and powers to the various organs created by the Constitution”*

67. In other words, the powers to summon anyone under Article 125 can only be exercised by the Senate when it is properly seized of a

matter in execution of its constitutional mandate. In addition, **the summons should also be issued against persons who are reasonably expected to have relevant knowledge or information necessary to assist the Senate with matters under consideration.** [Emphasis added].

68. In relation to County Assembly finance matters, it is important that the person responsible or in charge of Finance be the relevant person to be summoned to provide information.

69. The petitioners asserted that that the Speaker is a person reasonably expected to have relevant knowledge or information as per Section 12 (7) of the County Governments Act. That may be so. Nonetheless, a Member of County Assembly in charge of Finance specifically designated for the docket of finance at the County Level is the person possessed with relevant material and information on the finances of the county assembly. In my humble view, that would be the person needed to shed light on the finance issues as opposed to the overall Speaker of the County Assembly that is merely privy to the general information in relation to all dockets within the County Assembly.

70. Therefore, rather than call the Speaker of the County Assembly to question him on finance matters of the county assembly, it would be prudent to call the Member in charge of Finance to answer to audit queries.

71. The Petitioners further assert that the functions of the County assembly cannot be interpreted in a manner that places on the speaker the responsibility of accounting for the county's finances and that unlike a Governor, a speaker cannot be said to be a person that has relevant information or knowledge to assist the Senate with the matter under consideration. I agree. I am fortified by the holding in **Constitutional Petition No. 8 of 2014; International Legal Consultancy Group Vs the Senate and the Clerk of the Senate (supra)** where it was stated, inter alia:

***“59. ....Since the accounting officers at the county are directly answerable to the County Assembly for the management of financial resources under the Public Finance Management Act 2012, who then is the Governor accountable to under Section 30(3)(f) " In our considered view, since the County Governors are not answerable to the County Assembly in terms of fiscal management of the County resources under Section 149 of the Public Finance Management Act 2012, they must be held to account by the Senate for the National revenue allocated to their respective Counties in view of the provisions of Section 30(3)(f) of the County Governments Act, 2012 as read together with Article 10(2)(c) on the National values and principles of governance. The Governors being State Officers are bound by the national values of transparency, accountability and observance of good governance when performing their duties as the Chief Executive Officers of the County Governments.***

***60. It then follows that under Article 125, the County Governor and the County Assembly Member for finance who belong to the executive arm of the County Government can also be summoned by the Senate in exercise of their oversight mandate under Article 96(3) of the Constitution. Though the executive arm of the County Government is also answerable to the County Assemblies of their respective counties, this does not preclude the said arm from providing information to the Senate when called upon to do so in exercise of their oversight mandate under Article 96(3). Further under Article 10(2) of the Constitution one of the values of governance enshrined in the Constitution is transparency and accountability. Every officer in every State organ and at both levels of Government must respect and comply with any mechanism of accountability established by the Constitution and the law to the fullest extent possible. The Court under Article 259 must therefore interpret the Constitution in a manner that promotes good governance through transparency and accountability. Put in another way, when persons in charge of the managing County finances are not held to account, the objectives of devolution set out under Article 174, which includes promoting democratic and accountable exercise of power; and to enhance checks and balances of powers, will be defeated.”***[Emphasis added].

72. There is therefore need to maintain specificity of roles, although a county assembly speaker is not ***precluded from providing information to the Senate when called upon to do so in exercise of their oversight mandate under Article 96(3).***

73. The Respondent argued that the county speaker is answerable to the questions raised for being privy to information on finances because the Member of County Assembly in charge of Finance acts directly under the speaker and that he /she acts in consultation with the Speaker.

74. It is trite that the County Assembly is responsible for approval of budgets and that it has the Speaker of the County Assembly as the figure head, he therefore takes a part in the approval of budgets. In that regard, the county assembly speaker can be called upon by the Senate to give information as this is in tandem with article 178 (2) of the Constitution as the Speaker presides over the county assembly hence the final authority on all matters of budgets. That being the case, he cannot purport to be a rubber stamping authority without knowing what he/she is consenting to.

75. Moreover the County Assembly Speaker is also the chair of the County Assembly Service Board that is responsible for preparing annual estimates of expenditure of the County Assembly service and submitting them to the County Assembly for approval; and exercising budgetary control over the service. In essence, the Senate's case is that the Speaker of the County Assembly is responsible for the preparation and approval of county assembly budgets hence he cannot purport to have no knowledge over the same as such the Senate in carrying out its oversight function, then it can question the authority of the Speaker mentioned above.

76. As I have stated above, albeit the county assembly speaker can be summoned by Senate to give information, the Senate must specify which information is sought from the speaker, that cannot be supplied by the member responsible for finances, since the County Assembly has an accounting officer responsible for the management of financial resources under the Public Finance Management Act 2012. That person is the Clerk to the county assembly who is the Chief administrative and the Chief Accounting Officer of the county Assembly and who oversees the day to day operations and affairs of the Assembly and is also responsible for certifying the passage of bills through the county Assembly.

77. Section 20 of the **County Assembly Services Act No. 24** of 2017 lists the procedural functions of the Clerk. The section provides:

***(1) The procedural functions of the Clerk shall include—***

***(a) The rendering of expert, non-partisan and impartial advice to the members of the county assembly on the legislative process, and parliamentary procedure and practice...***

78. Subsection (3) states ‘Subject to this Act and any other written law, the Clerk shall, in carrying out and exercising the power conferred on him or her by the Standing Orders and practices of the county assembly, be under the direction of the Speaker.

79. Much as the Clerk is under the direction of the speaker, section 1 (a) above confers on him/ her the responsibility to render expert advice to the county assembly thus it is upon the clerks to advice. The clerks are the ones responsible for certification of bills through the assembly. Accordingly, the Clerks of County Assemblies are without doubt the signatories / approvers of the documents presented and therefore they are the persons to be held answerable with regard to finances of the county assemblies and not the county assembly speakers.

80. On whether the roles of Senate and County Assemblies are the same, both the Petitioners and the Respondent have cited Constitutional provisions to show that their roles are similar to the other, though the Senate maintains that its role is enshrined at the National Level and is mandated to oversee accountable use of resources of all counties. The Senate’s pronouncements on this are indeed correct. However, that is not to say that the County Assemblies have no powers similar to the Senate. This is because the County Assemblies’ powers though corresponding to the Senate are specific to their respective counties and do not extend beyond, and the petitioners indirectly acknowledged this fact when they stated that should there be a lacuna at the county level, then they shall fall back on the provisions at the national level. In other words, the Senate plays a superior oversight role.

81. On what orders this court should make, I find and hold that the Senate can summon speakers of county assemblies but that matters audit query are matters within the docket of the Member of County Assembly in charge of Finance and the Clerk of the County Assemblies hence the latter are the right persons to be called upon to answer upon such matters relating to finances or audit queries, unless it is established with clarity that the particular query under investigation is within the knowledge of the Speaker and that only he can answer to it. This is in tandem with the need to exercise restraint as was stated in **International Legal Consultancy Group v Senate & another [2014] eKLR that:**

***“However, it is the respectful view of this court that when these powers are exercised in reference to members of the County Government, there must be a measure of restraint by the Senate.... It must exercise caution and refrain from acting in a manner that could be construed as micro-managing devolved units at the county level.”***

82. In the end, this petition only succeeds to the extent stated above. And as submitted by the Respondent, prayer a of the petition simply reproduces the provisions of the Constitution on the mandate of the Senate hence the court cannot grant or declare that which the Constitution has already clearly stipulated

83. On who should bear costs of the petition, costs, are in the discretion of the court although the general rule is that costs abide the event unless otherwise, upon which the court shall give reasons for. However, a having regard to the nature of this litigation between county assembly and Senate both of which are constitutional entities drawing public funds and the public nature of the petition, I order that each party bear their own costs.

84. Orders accordingly.

**Dated, Signed and Delivered in open court at Siaya this 3<sup>rd</sup> Day of October 2018**

**R.E ABURILI**

**JUDGE**

**In the presence of:**

Miss Ooga advocate h/b for Ongachi for the Petitioners

Mr. Wambulwa Advocate h/b for Mr. Angaya for the Respondent

CA: Brenda and Modestar