



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 178 OF 2016

BETWEEN

WANJIRU GIKONYO.....1ST PETITIONER

CORNELIUS ODUOR OPUOT.....2ND PETITIONER

AND

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

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

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

NATIONAL GOVERNMENT CONSTITUENCY

DEVELOPMENT FUND BOARD.....4TH RESPONDENT

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

AND

THE COUNCIL OF GOVERNORS.....1ST INTERESTED PARTY

CHARLES AGAR OWINO2ND INTERESTED PARTY

PETER RUNKIN OUMA ONYANGO.....3RD INTERESTED PARTY

ISABEL NYAMBURA WAIYAKI.....4TH INTERESTED PARTY

RULING

Introduction

1. The Petition herein raises, perhaps not for the first time, in this court, fundamental questions about

- the constitutional validity of the provisions of the National Government Constituencies Development Fund Act (‘ **the NGCDF Act**’). The NGCDF Act may be deemed as a legislative component of the National Assembly’s response to this court’s decision of 20 February 2016, in the **Institute for Social Accountability –Vs- The National Assembly & Others HCCP No. 71 of 2013 [2015]eKLR** (‘ **the CDF case**’), where the court declared the Constituencies Development Fund Act 2013 unconstitutional.
2. The Petitioners believe that the NGCDF Act is a standalone statute and now seek to invalidate various of its provisions for being unconstitutional. In the meanwhile, the Petitioners would like to see the implementation of the NGCDF Act stalled.
 3. The Petitioners have thus sought conservatory orders through an application filed on 5 May 2016, the subject of this ruling.

Material Facts

4. The background to the impugned Act is relatively clear.
5. On 3 February 2013, a registered trust the Institute of Social Accountability filed by way of petition a constitutional challenge to the Constituencies Development Fund Act No. 30 of 2013 (‘**the CDF Act**’). The CDF Act was a piece of legislation which set up a fund for purposes of financing and implementing development projects in political Constituencies. The fund was largely, if not wholly, financed by the national government.
6. The constitutional challenge was on the basis that the CDF Act substantively contravened various provision of the Constitution in the manner it was administered. Besides the challenge was also the snivel that the CDF Act offended the basic principles of division of revenue and of functions. The CDF Act was then also attacked for not having followed the prescribed legislative process including being subjected to public participation.
7. Over two years later and after an incisive and meticulous analysis of the issues, a three judge bench of this court on 20 February 2015 returned the verdict that the CDF Act was unconstitutional and invalid. The court however proceeded to suspend the order of invalidity for twelve months and directed the national Government to remedy the now patented defects in the CDF Act within twelve months, or the CDF Act stood invalidated at the end of the twelve-month window. So ordered the court:

“the National Government may generally remedy the defect within that period [of 12 months] and the Constituencies Development Fund Act shall stand invalidated at the expiry of the twelve (12) months or may be repealed earlier.”

8. The national government acted and sponsored the NGCDF Bill which was published on 9 October 2015.
9. On 15 December 2015, the NGCDF Act became law but its commencement was suspended by the same statute to 19 February 2016. And, six weeks later this Petition was filed seeking a declaratory prayer, inter alia, that the numerous provisions of the NGCDF Act that violate the Constitution cumulatively rendered the NGCDF Act constitutionally invalid.
10. The Petitioners complaints did not end with the impugned NGCDF Act. The NGCDF Act established the national Government Constituency Development Fund (‘ **the NGCDF**’) and it had to be funded by national revenue.
11. The Petitioners faulted and impugned the Division of Revenue Bill, 2016 (‘**DRB**’) and its off-shot the Division of Revenue Act 2016 (‘**DRA**’). By the DRA, the 1st Respondent allocated to the NGCDF a share of the national revenue to help implement and promote the NGCDF Act. The DRB was published on 9 March 2016 whilst the DRA was enacted on 6 May 2016.

Petitioners’ case

12. The Petitioners case is contained largely in the Petition.
13. Apart from the prayer for conservatory orders, the Petitioners have also sought an order for certification under Article 165(4) of the Constitution. Article 165(4) provides for the empanelment

- of a bench by the Chief Justice to hear, the Petition once it is certified that the Petition raises a substantial question of law. The bench is to be of an uneven number of not less than three.
14. The Petitioners state that the NGCDF Act, like its precursor the CDF Act 2013, is unconstitutional. The Petitioner also faults the DRA 2016 and states that it is unconstitutional.
 15. Particularly, the Petitioners nit-pick various provision of the NGCDF Act and state them to be unconstitutional.
 16. First, it is stated the NGCDF Act violates the principle of separation of powers as it gives members of parliament roles which should be the preserve of the national government. Section 15(4) and Section 19 which respectively relate to the appointment and removal of members of the 4th Respondent are faulted. The two sections unite the National Assembly's contribution to such appointments and removal.
 17. The Petitioners also claim that Section 23 of the NGCDF Act which allows the National Assembly to get involved in the approval of the budget of the 4th Respondent is a violation of the principle of separation of powers. Likewise, Section 43 of the NGCDF Act is also stated to be inconsistent with the constitutional doctrine of separation of powers in so far as the Members of the National Assembly got to nominate and approve members of the National Constituency Development Fund Committee. Section 53 of the NGCDF Act is also stated by the Petitioners to be unconstitutional.
 18. It is also the Petitioners' case that the use of the NGCDF in national government concurrent functional areas affects and interferes with county governments. In these respects the Petitioners pointed to such services as sports, culture and environmental activities. The Petitioners state that the NGCDF undermines the functional integrity of county governments. And , further the Petitioners add that the architecture of the NGCDF Act failed to appreciate the Constitutional principle of division of functions.
 19. It is additionally the Petitioners' case that the NGCDF Act violates Constitutional principles of public finance in many respects. This includes when the NGCDF Act provides at Section 52 that the existence of another allocation by the national government to a project would not be good enough reason to deny any funding of a project under the NGCDF Act. Such duplication, it is contended is not in accord with the principle of prudent use of public resources and finances.
 20. On a procedural aspect, the Petitioners contend that the NGCDF Act and its implementation involve and concern the county governments with the meaning of Article 110(1)(a) of the Constitution and the failure to involve the Senate in the legislation of the NGCDF Act and additionally the failure to debate recommendations made by the Commission on Revenue Allocation, it is stated, violated Articles 110(1) (a) and 205(2) of the Constitution.
 21. In sum, the Petitioners contend that the NGCDF effectively creates a third level of government at the constituency level which is contrary to Articles 1(4), 2(1) and 3(2) of the Constitution.
 22. The Petitioners state that their contention as to a third level of government is vindicated by the DRB and the DRA which allocated funds to the NGCDF before the vertical division of revenue between the county and national governments. Such allocation, it is stated, is itself unconstitutional and hence the sub-challenge to the NGCDF Act through an attack on the to the DRA.

The Respondents' case

1st Respondent

23. A Replying Affidavit was sworn and filed on behalf of the 1st Respondent on 19 May 2016. Mr. Moses K. Lessonet, the Member of Parliament for Eldama Ravine Constituency swore the Affidavit in his capacity as the chairperson of the 1st Respondent's select committee on Constituency Development Fund.
24. The 1st Respondent contends that the purpose and objective of the NGCDF Act was to achieve constitutional values and principles and points to Section 3 of the NGCDF Act in these respects.
25. The 1st Respondent also contends that the NGCDF Act is constitutional and that pursuant to the decision in the CDF case, the 1st Respondent aligned the provisions of the new Act being the NGCDF Act to the provisions of the Constitution. For this reason, constitutionality must thus be

- presumed in the circumstances. In these respects the 1st Respondent urges judicial restraint until the NGCDF Act is actually shown and found to be unconstitutional.
26. On the specifics, the 1st Respondent states that the NGCDF Act under Section 4 provides for the NGCDF to be funded by appropriation of not less than 2.5% of the national government's share of revenue as decided by the annual Division of Revenue Act. In this regard, the 1st Respondent states the NGCDF Act has clearly observed the principles of public finance.
27. The 1st Respondent also denies that the NGCDF Act violates the principles of separation of powers pointing out that under the NGCDF Act, the role of the Member of National Assembly is limited to oversight which is a core role compelled under Article 95 of the Constitution.
28. The 1st Respondent further states that the NGCDF Act, especially at Section 24, deals with only matters reserved for the national government and not otherwise.
29. It is finally the 1st Respondent's case that, proportionately, the NGCDF assists a wide range of members of the society and the court should be reluctant to interfere with the same if only to preserve and promote the public's interest.

2nd Respondent

30. The 2nd Respondent has thus far taken no part in the proceedings.

3rd and 5th Respondents

31. On the part of the 3rd and 5th Respondents, their joint case is outlined in the Notice of Grounds of Opposition filed on 6th June 2016.
32. It is the said Respondents' case that the Petitioner has not shown how the Constitution has been violated.
33. The 3rd and 5th Respondents also take the stand that the NGCDF Act is to be presumed Constitutional until proven otherwise and further that the Petitioners' case is pegged on "speculation, false alarm unfounded fear and conjecture". According to the 3rd and 5th Respondents there is no conflict between the functions under the NGCDF Act and those of devolved governments.

4th Respondent

34. The 4th Respondent's case may be retrieved from the Replying Affidavit of Yusuf Mbuno sworn on 2nd June 2016.
35. Factually, the 4th Respondent reconfirmed the position that the NGCDF Act was enacted pursuant to the High Court's judgment in the CDF case. In this regard, the 4th Respondent pointed out that the purpose of the NGCDF Act was to provide for the establishment of the NGCDF and identify the constituency as a platform for identification, performance and implementation of national government functions.
36. It is the 4th Respondents' case that such legislative framework is necessary for the progressive realization of the economic and social rights guaranteed under Article 43 of the Constitution. The 4th Respondent states that the NGCDF Act is constitutional pursuant to Article 6(3) and the results were already being realized.
37. Additionally, the 4th Respondent contended that the NGCDF is akin to similar lawful and Constitutional funds established pursuant to Article 206(2) (c) of the constitution.

Arguments in court

38. The Petitioners' case on the application for conservatory orders and certification under Article 165(4) was presented by Mr. Wilfred Nderitu and Mr. Waikwa Wanyoike, who appeared for the 1st and 2nd Petitioners respectively. Mr. Anthony Njoroge appeared for the 2nd Respondent. The

3rd and 5th Respondent's case was urged by Mr. Mwangi Njoroge while the 4th Respondent was represented by Mr. Waweru together with Mr Naikuni.

39. The 1st Interested Party, being the Council of Governors, was represented at the oral hearing by Mr. Peter Wanyama. Mr. Mbiyu Kamau together with Mr. Githinji appeared for the 2nd and 3rd Interested Parties while Mr. James Ochieng Oduol appeared for the 4th Interested Party.

The 1st Petitioner's submissions

40. Mr. Wilfred Nderitu who appeared for the 1st Petitioner adopted wholly the 2nd Petitioner's submissions. I have summarized the 2nd Petitioner's submissions in the following paragraphs.

The 2nd Petitioner's submissions

41. Mr. Waikwa Wanyoike highlighted the 2nd Petitioner's submissions filed on 20th May 2016.
42. Counsel stated that the focus was on the fact of two unconstitutional pieces of legislation. In particular, counsel asserted that one piece of unconstitutional legislation was being used to implement another piece of unconstitutional law. Stating that the DRA was contrary to the provisions of Articles 201 and 203 of the Constitution, Mr. Waikwa submitted that the DRA had been enacted even against the face of explicit provisions of the NGCDF Act. In this regard, Counsel pointed to Section 4 of the NGCDF Act which provides for the NGCDF to be allotted at least 2.5% of the national government's share of revenue.
43. Counsel then pointed out the various provisions of the NGCDF Act which he dubbed unconstitutional. These provisions included Sections 15, 19, 23, 43 and 53 amongst others.
44. On the DRA, Mr. Waikwa pointed out that the schedule thereto was clearly unconstitutional in so far as it applied a formula which was contrary to the provisions of Articles 202, 203 and 218 in so far as the money allocated to the NGCDF was netted from the national revenue before the equitable sharing between the national government on the one hand and the county governments of the other.
45. Mr. Waikwa submitted that the Petitioners had established a prima facie case with a likelihood of success to warrant the issuance of the conservatory orders and avoid the Petition being rendered nugatory. According to Mr. Waikwa, there was clear evidence of the NGCDF being unconstitutional and invalid.
46. Further, Mr. Waikwa submitted that it was in the public interest that the conservatory order was issued. According to counsel, in purporting to net the amounts for the NGCDF before the vertical division of revenue between the national and devolved governments the rule of law as well as the principles of public finances under the Constitution had been violated to the public's detriment.
47. Counsel then submitted that it was paramount that every person as well as state organ observed the Constitution. Mr. Waikwa referred the court to the cases of **Wanjiru Gikonyo & 2 Others vs. National Assembly of Kenya & 3 Others [2015]eKLR** as well as the case of **Muslims for Human Rights & Another vs. The Inspector General of Police & 2 Others [2015]eKLR** wherein Justice Emukule stated as follows:

“[86] On the argument that the public interest[sic] outweighs the public interest, and that the balance of convenience leans to the public interest, there is no greater public interest than the adherence to the Constitution, and the rule of law; however inconvenient and cumbersome this may at times appear.”

48. On the issue of certification under Article 165(4) of the Constitution, counsel stated that the Petition raised substantial questions of law and in particular pointed to the issue of the national government netting funds prior to the vertical division. Counsel framed the two substantial questions of law as:

- a. Is the structure and architecture of the NGCDF Act an affront to the basic structure of the Constitution especially in regard to devolution?
- b. Is the netting of the NGCDF monies before the vertical division of the revenue an affront to the Constitutional principles of public finance in Articles 201, 202 and 203 of the

Constitution?

49. For completeness, counsel added that the questions were both of public interest and novel. Further, counsel submitted that the prayers sought in the Petition had far-reaching consequences if granted and that it would only be met to certify the Petition as raising substantial questions of law.

Respondents' Submissions

1st Respondent

50. Mr. Anthony Njoroge urged the 1st Respondents case.

51. Opposing both limbs of the Petitioners' application, Mr. Njoroge submitted firstly that both the NGCDF Act and the DRA were constitutional.

52. According to counsel, the NGCDF Act had been subjected to public participation and it indeed under Section 24 ensured that it did not interfere with the county governments' functions. Additionally Mr. Njoroge stated that under the NGCDF Act the members of the National Assembly only exercised an oversight role, which was a role recognized under the Constitution. Then referring to constitutional provisions which mandate the National Assembly to approve the appointment of the Cabinet Secretaries as well as of the Chief Justice and the Deputy Chief Justice, Mr. Njoroge asserted that the concept of Parliamentary approval of appointees to public office was not new to the NGCDF Act.

53. On the DRA, Counsel submitted that it was constitutional noting that the county governments were now going to access 32.3% of the national revenue and further that the allocation to the NGCDF had been done pursuant to Section 4 of the NGCDF Act which the Petitioners had conceded to be constitutional.

54. Mr. Njoroge wound up his submissions by asserting that the Petitioners had failed to establish a prima facie case with a likelihood of success in view of the fact that all Acts of Parliament are deemed constitutional until proven otherwise. In counsel's view, the proof could only come at or after the full hearing of the Petition.

55. Additionally, Mr. Njoroge also submitted that the Petition would not be rendered nugatory and public interest did not favour granting the orders sought. Then making reference to the case of **Judicial Service Commission vs. Speaker of the National assembly & Another HCCP No. 518 of 2013**, counsel urged the court to be cautious and weigh the effect of granting any conservatory orders when it may turn out that the Petition is ultimately unsuccessful.

3rd and 5th Respondents

56. Starting his submissions with a statement to the effect that the NGCDF Act involved development programs by the national government and there was no place where the national government could be restricted from initiating development programs, Mr. Mwangi Njoroge on behalf of the 3rd and 5th Respondents submitted that the Petitioners did not have a prima facie case when the principles of public finance and devolved government were reviewed.

57. Counsel submitted that both the NGCDF Act and the DRA were constitutional and that the Petitioners could not show the prejudice they would suffer if the orders sought were denied. According to Mr. Mwangi Njoroge, any order stalling development, if issued, would neither be proportionate nor assist in the achievement of constitutional values.

4th Respondent submissions

58. The 4th Respondent's case was put forward by Mr. Waweru Gatonye assisted by Mr. Naikuni.

59. Mr. Gatonye submitted that the Petitioner had failed to satisfy the requirements of a conservatory order.

60. Firstly, the Petitioners did not show that the NGCDF Act and the DRA were unconstitutional and the burden was always upon the Petitioners to rebut the presumption of constitutionality. Then referring to the cases of **Ndyanabo vs. Attorney General of Tanzania [2001] EA 495, Kizito**

Mark Ngaywa vs. Minister of state for Internal Security and Provincial administration & another [2011]eKLR and Susan Wambui Kaguru & 4 Others v Attorney General & Another [2012]eKLR , Mr. Gatonye submitted that where a conservatory order was being sought on the basis of unconstitutionality of a statute the Petitioner faced a higher burden to discharge.

61. In the instant case counsel submitted the NGCDF Act had not been shown to be out rightly unconstitutional but the rather the court was being invited to make inferences. Likewise, with regard to the DRA the Appropriation Bill had since taken care of the Petitioners fears by ensuring that the funds allocated to the NGCDF were only part of the national governments revenue share.
62. Mr. Gatonye then submitted that granting a conservatory order would not help in promoting constitutional values as sustainable development would be stalled and the dignity of the people affected. In support of this proposition, Mr. Gatonye referred the court to the case of **Satrose Ayuma & 11 others v Registered trustees of the Kenya Railways Staff retirement benefits scheme & 3 others [2015] eKLR**. According to counsel, public interest was going to be better served if the application was declined.
63. Mr. Gatonye, finally, reiterated the point that the Petition would not be rendered nugatory.

1st Interested Party's submissions

64. Mr. Peter Wanyama's submissions on behalf of the 1st Interested Party were centred on Article 203 of the Constitution.
65. Mr. Wanyama submitted that it was obviously unconstitutional to net monies to be allocated to the NGCDF prior to the division of revenue between the national government and the county governments, as had happened in the instant case.
66. According to Mr. Wanyama, the DRA as read together with the NGCDF Act had simply been used by the national government to create another level of government.
67. Counsel urged that the application be allowed.

2nd and 3rd Interested Parties' submissions

68. Represented by Mr. Mbiyu and Mr. Githinji, the 2nd and 3rd Interested Parties submitted that granting a conservatory order would have a grave effect on the public as various projects including but not limited to construction of schools, school bursaries and would be affected.
69. Counsel urged that the application be denied.

4th Interested Party's submissions

70. The 4th Interested Party's counsel Mr. James Ochieng Oduol submitted that as there was a presumption of constitutionality, the court would only interfere if there were exceptional circumstances.
71. Counsel urged that the public interest be taken into account and also the fact that denial of the funds would affect not just projects but individuals like school going children who were then likely to miss the national exams.
72. Finally, counsel submitted that the Petitioners were seeking an interim declaration in the guise of an interim injunctive order and that there was no place for interim declaratory orders in any jurisprudential set up.

Petitioners' rejoinder

73. In a brief rejoinder, Mr. Nderitu urged that the application be looked at holistically and that when the Petitioners claimed unconstitutionality it was in reference to both the NGCDF Act and the DRB as well as the DRA .
74. On public interest, the 1st Petitioner stated that public interest favoured obedience to the Constitution under Articles 3 and 10.
75. Mr. Waikwa also looped in to the effect that there was prima facie evidence of violation of the Constitution in the manner the revenue had been divided. Besides, Mr. Waikwa added the Petition

would be rendered nugatory if no orders were granted as the monies would be disbursed and quickly expended.

Discussion and Determination

76. I have closely considered the application as well as all the pleadings filed on behalf of the parties. I have also reviewed the parties submissions on the application dated 4 May 2016.
77. Two narrow issues may currently be isolated for determination. First, has the Petitioner made out a case for grant of a conservatory order? Secondly, does the Petition raise a substantial question of law to warrant the empanelment of a bench of an uneven number of judges being not less than three to determine the Petition?
78. In answering the first issue, I must at the onset point out that at this stage of the proceedings I am not expected and neither should I make any definitive and final findings of the law or of fact. An appropriate and general review of the relevant and material facts will suffice. Likewise an appropriate and general affirmation of the law will be adequate. This is in view of the now generally accepted principles to be followed in the consideration of an application for conservatory orders.
79. The principles applicable in applications for a conservatory order are now well settled. There is already adequate authority locally and comparatively emphasizing the principles. Both the Petitioners' counsel as well as the Respondents' counsel also clearly appreciated the principles and copiously referred to decided case law. I need not rehash the principles in detail.
80. It is now a relatively common cause that a party needs to demonstrate a prima facie case with a likelihood of success and that the Petitioner stands to suffer prejudice if the conservatory order is not granted. Additionally, the court ought to consider whether the Petition would be rendered nugatory in the absence of a conservatory order and whether constitutional values or principles would be promoted by the lack of or issuance of a conservatory order.
81. Finally, in the exercise of the discretion to grant the conservatory order, it is necessary to invite the concept of public interest and consider whether the issuance of a conservatory order would serve the wider public interest. These principles were summarized in the case of **Kenya Small Scale Farmers Forum vs. Cabinet Secretary Ministry of Education NRB HCCP No. 399 of 2015 [2015] eKLR** where also the Supreme Court of Kenya decision in **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others SCP No. 2 of 2013 [2014] eKLR** was cited with approval.
82. As was recently pointed out by the court in **Bia Tosha Distributors Ltd vs. Kenya Breweries Limited and 3 Others HCCP No. 249 of 2016 [2016] eKLR** :

“The above principles are not catalogued and must be considered generally together and not necessarily in an itemized manner”.

It is for the court to wholly balance the conflicting positions once a prima facie case is made out.

83. I must also hasten to add that the purpose of conservatory orders, which are orders unique only to constitutional litigation, ideally is to ensure the observance of a status quo which also may lead to observance of constitutional provisions. The court is at liberty to fashion in appropriate terms such conservatory orders as may be necessary in the circumstances of each case and for purposes of securing any provisions or values of the Constitution until determination of the claim.
84. The jurisdiction of the court to consider and if invited grant a conservatory order in the instant Petition was not doubted or challenged by any of the parties. Only the 4th Interested Party submitted that the Petitioners were seeking “an interim declaration” in the guise of an interim injunctive order. I would quickly state that such submissions overlook the constitutional realities of today. I see no reason why in appropriate cases the court may not fashion an interim declaration. Besides, interlocutory declarations already obtain in many jurisdiction in civil proceedings and there would be no reason to skip constitutional litigation: see for example **NHS Trust vs. T [2005] 1 All ER 387**, where it was held that an interim declaration may issue where the facts are obvious or agreed upon and in exceptional cases.

85. Moreover, in addition to Article 23 of the Constitution which expressly confers upon the court the power to grant conservatory orders, I am satisfied that the court's hermetical jurisdiction is always available for purposes of ensuring that any alleged violations of the Constitution are nipped and dealt with at an early stage and an appropriate status quo is maintained or installed, as the case may be pending the ultimate determination of the litigation: see **Judicial Service Commission –v- Speaker of National Assembly [2013] eKLR [para 22-23]** . In my view, that may include making an interim declaration, including for example that a person is entitled to immediate medical care rather than wait to make a declaration when the substratum no longer exists. The power of the court to hold the ring in constitutional litigation should not be limited even at the interlocutory stage.
86. In the instant Petition, I understood the Petitioners and the 1st Interested Party to advance two essential grounds in support of the application.
87. The grounds were pegged to constitutional invalidity of statutes. First, it was urged that the NGCDF Act is unconstitutional and various provisions of the impugned statute were pointed out. Secondly, and almost as an alternative argument for the Petitioners, was that the DRA, and the DRB before it, was also unconstitutional. It was the Petitioners stand that the implementation of the NGCDF Act needed to be stalled due to the unconstitutionality of the NGCDF Act and one way of stalling the same was through barring the disbursement of any funds by the 5th Respondent.
88. The Petitioners alleged that the NGCDF Act is unconstitutional in so far as it violates the principles of separation of powers. According to the Petitioners the involvement of the Members of the National Assembly in the NGCDF was inimical to the doctrine of separation of powers as it affected the powers of the executive as well as those of the Public Service Commission. The Petitioners also pointed to the violation of division of functions between the national and county governments, noting that the NGCDF Act had provisions which encroached on county governments' functions. The Petitioners then attacked the NGCDF Act for having been enacted without the involvement of the Senate.
89. Then too, there was an issue of violation of principles of public finance. It was argued by the Petitioners that to the extent that the NGCDF Act *“creates an elaborate structure with various offices and bodies where both the national and county governments have numerous offices and bodies implementing their functions and projects, the NGCDF Act resulted in a duplication of projects/roles and expenditure thereby undermining the constitutional principles of prudent and responsible use of resources, responsible financial management and clear fiscal planning”*.
90. The Respondents' as well as the 2nd, 3rd and 4th Interested Parties' response was curt. The NGCDF Act they insisted was constitutional and the Petitioners had not demonstrated any invalidity.
91. The court's approach where the constitutionality of a statute is questioned is now relatively clear. The courts have consistently and variously referred to the case of **US –v- Butler 297 US 1 [1936]** for guidance. In **US –v- Butler (Supra)** the court stated as follows:

“When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.”

92. Besides laying the statute next to the relevant Article of the Constitution, the court is then enjoined to interpret the relevant constitutional provisions in a manner that best promotes, protects and advances the principles or purpose and values of the Constitution: see Article 159(2) (e) of the Constitution.
93. Critical to the process however is that the impugned statute also needs to be interpreted. The trend

- in statutory interpretation would see to it that textual considerations are read in concert with the legislative intent and established legal norm. The intention expressed in the impugned statute itself, as well as its purpose and effect should always be discerned before returning a verdict of unconstitutionality: see **Samuel E Momanyi vs. Attorney General & Another HCCP No. 341 of 2011 [2012]eKLR** and **R vs. Big M Drug Mart Ltd [1985] 1 SCR 295**.
94. But underlying all the foregoing approach is the presumption that legislation is enacted to comply with constitutional and legal norms, including the rights and freedoms, principles and values in the Constitution. This presumption of constitutionality acknowledges the centrality of constitutional principles and values which bind all persons and all state organs. The presumption only yields where the contrary is shown: see generally **Ndyanabo vs. Attorney General of Tanzania [2001] E A 495** and also **Susan Wambui Kaguru & Others vs. Attorney General & Another [2012]eKLR**, referred to by the 4th Respondent.
95. I do not for a moment doubt the principles outlined above.
96. They are sound.
97. Notwithstanding Mr. Waikwa's urging that Article 2(4) of the Constitution is to the effect that legislation is not to be presumed constitutional, for now I hold the view that parliament's legislative competence is simply not to be second guessed without any in depth interrogation of the purpose and effect of any impugned legislation. That all are enjoined to observe the Constitution should not be doubted given that he who alleges otherwise has the burden to show the contrary. The presumption as to constitutionality is out of principle and must be made until rebutted. The rebuttal of course can be effected at any stage of the proceedings. Nothing stops a party from clearly demonstrating even at an interlocutory stage any unconstitutionality.
98. The NGCDF Act has to be subjected to proper and detailed scrutiny. The court must for the moment however presume that the NGCDF Act is constitutionally sound.
99. The Respondents urged me to presume that the NGCDF Act is unconstitutional even as the Petitioner urged the contrary. A finding of unconstitutionality requires a more delicate and detailed approach. It would also be important that all factors are taken into consideration as I seek to determine whether the Petitioners have shown that there is a prima facie case that the NGCDF Act is unconstitutional.
100. It is a common factor that the NGCDF Act traces its origins to the court decision in the CDF case. In that case the court declared the CDF Act unconstitutional. The Respondents (save the 4th) thereafter embarked on a mission to not only restructure the CDF but also obtain a new regulatory statutory framework. The result was the NGCDF Act. The Respondents contend that all the concerns previously raised have been rectified.
101. In the CDF case the court found that the CDF Act was enacted without going through the motions in the Senate yet it was a counties Bill. In the CDF case too, the court found that the CDF was not a conditional grant to counties within the meaning of Article 202 of the Constitution. The court as well found that the statute threatened to upset the division of functions between the national and county governments.
102. Finally in the CDF case the court also found that the CDF Act offended the principle of separation of powers in far as Members of Parliament were involved in the planning approval and implementation of CDF Projects.
103. Still in the CDF case, the court appreciated that the CDF was a noble fund with a worthwhile purpose.
104. However, while the court proceeded to declare the CDF Act unconstitutional, the court fell short of stating that a similar fund could not be operated by/and or run through the national government. Instead, the court urged that the defects be rectified. In my view, had the court simply stopped at the declaration as to invalidity it would have been much easier to infer that funds in the shape or form of the constituency development funds ran through constituencies could not exist. It would have been easier to presume unconstitutionality of such funds or of statutes establishing them.
105. Instead, the Respondents took the cue from the court in the CDF case and re-legislated.
106. The Respondents now state that all the defects which existed in the CDF Act as founded by the court in the CDF case have since been rectified through the new legislation. The Respondents point to Section 4 of the NGCDF Act and state that the funds are now drawn from the national governments share of the equitably shared revenue. The Respondents also point to Section 24 of the NGCDF Act and state that the projects and development ventures undertaken under the

- NGCDF are now strictly “in respect of works and services falling within the functions of the national government under the Constitution”. The Respondents thirdly, point out that the members of the National assembly are no longer under the NGCDF Act, directly involved in the operations and administration of the NGCDF but rather only exercise an oversight role, a role that the Constitution mandates the members of parliament to execute.
107. While I am not in a position to make a firm finding as to the constitutionality of the NGCDF Act, I am entitled to make a presumption now that it is constitutional. More incisive arguments on specific provisions of the NGCDF Act will be required. The NGCDF Act generally will need to be interrogated astutely before any conclusion is reached that the presumption as to constitutionality has been rebutted.
108. Unlike in the case of **Wanjiru Gikonyo & 2 Others vs. National Assembly of Kenya & 3 Others (No. 1) [2015]eKLR (‘the ASSDF case’)**, I am of the view that the Petitioners have not done enough at this stage to show me without further interrogation that the NGCDF Act is unconstitutional. The ASSDF case dealt with subordinate or delegated legislation. In the ASSDF case, at an interlocutory stage, the Petitioner was able to establish, and irrefutably so to the court, that funds were being appropriated by the National Assembly from the national revenue contrary to express provisions of the Constitution and also in the face of the decision by in the CDF case.
109. The court, in the ASSDF case, held the view that fidelity to both the Constitution and the court’s decision in the CDF case was critical. An interim injunction , later reviewed and partially vacated, was issued. The impugned subordinate legislation was also later quickly repealed as the challenge was still pending.
110. Even as I presume constitutionality of the NGCDF Act, I am by the same vein however convinced that the Petitioners’ questions are genuine and weighty. An ultimate and final answer needs to be given to the question whether Members of Parliament can get involved either directly or indirectly with the NGCDF outside the precincts of Parliament. An ultimate answer also needs to be given to the question whether a constituency can be a platform for identification, performance and implementation of national government functions, especially development programs. Those questions in my view should be able to resolve whether or not the constituency development funds, by whatever name, should actually survive the current constitutional framework.
111. I consequently would agree with the Respondents that at this stage, I ought to presume the constitutionality of the NGCDF Act and let it be. I would additionally agree with the submissions of both Mr. Waweru Gatonye and Mr. Ochieng Oduol that once the constitutionality of statute is presumed then any conservatory orders only ought to issue where the circumstances are extreme and exceptional.
112. There is no doubt that when it is a challenge on the constitutional validity of a statute at stake, the court ought to exercise reticence before granting any conservatory orders. That does not however mean that the principle of presumption of constitutionality is to be used to rob the court of jurisdiction. Where appropriate, the court will intervene even at an interlocutory stage: see **Wanjiru Gikonyo & Another vs. National Assembly (supra)** and also in **Coalition for Reform and Democracy (CORD) & Anor vs. Republic of Kenya & Another (No. 1)[2015]eKLR**.
113. I would conclude that faced with challenges of invalidity of a statute and a conservatory order application, the court ought not be concerned with the minutia of the law but rather the implications and effect on the people whilst also taking cognizance of any exceptional circumstances.
114. I have said enough on the NGCDF Act for now.
115. I deem it absolutely necessary to also reach a preliminary (prima facie finding) conclusion on the alternative argument in support of the application for conservatory order.
116. The 2nd Petitioner’s counsel Mr. Waikwa Wanyoike alongside Mr. Peter Wanyama, for the 1st Interested Party, strongly argued that the DRA is unconstitutional. They pointed to the schedule thereto and stated that right from the DRB the National Assembly opted to allow the netting off of the amount payable to the NGCDF from the revenue raised nationally prior to the division of revenue between the national government and the county governments.
117. Their argument ran thus: the NGCDF Act at Section 4 provides for revenue allotment of not less than 2.5% from the national government’s share of revenue, not the national revenue. Then Article 202 provides that the national government and the county government are to equitably share the

- revenue raised nationally. The formula for equitable distribution is to be traced also under Article 203. The counties will get less revenue and not as contemplated by the Constitution. Consequently, the division as provided under the DRA is unconstitutional and undermines devolution.
118. I did not hear the Respondents contest the submissions from any other angle save to state that the DRA is constitutional and that while the counties were entitled to just 15% of the national revenue they had been allotted over 30%.
119. I have reviewed the documents.
120. It is rather apparent when one reads the schedules to both the DRB and the DRA that the figures are relatively the same. The amount stated to be the sharable revenue is Kshs 1,380,199,000,000/=. The amount availed to the NGCDF is above Kshs.36,000,000,000/=. The Appropriation Bill 2016, has placed the amount at exactly Kshs. 35,505,000,000/=. That would work out to be slightly over 2.5% of the sharable revenue, and not of the national government's share of the revenue as provided for under section 4 of the NGCDF Act. 2.5% of the national government's revenue share would have been slightly above Kshs. 25,000,000,000/=.
121. Even a cursory reading of the Article 202 of the Constitution would reveal that the revenue should be shared equitably between the national and county governments. It appears no other entity is expected to share this revenue. On this, I would tend to agree with the 1st Interested Party that to proceed otherwise would be to undermine devolution. Once the Commission on Revenue Allocation sets the equitable ratio and in this case it seems to have been set at 32.3% and 68.7% respectively for the county and national governments, the national revenue ought not be chopped off unless as expressed in the Constitution. Even if it is a penny it ought not happen. To allow a small deduction today would amount to approval of a bigger deduction tomorrow. That may not only lead to uncertainty in revenue allocation but also undermine the spirit of devolution. There is evidently a prima facie case with likelihood of success, when the Petitioners state that the schedule to the DRB and the DRA are unconstitutional.
122. In my view, it would not be appropriate even at this very interlocutory stage to allow such a process of deduction to proceed without some interference.
123. In **Masai Mara (SOPA) Limited v Narok County Government NBI HCCP No. 336 of 2015 [2016]eKLR**, this court stated that mathematical accuracy should not be the basis for determining differentiation and thus discrimination as a constitutional issue. The instant case however provides a situation when a violation on the basis of mathematical accuracy, whether deliberate or inadvertent, may be a basis for alleging violation of the Constitution. Intervention is called for, even if not along the lines sought by the Petitioners.
124. In total, while I find that the Petitioners have a prima facie case on the issues raised in the NGCDF Act as well as the DRA, I do not find it proportionate to grant the orders as sought rather as it is a matter of mathematical accuracy for now. Given that even the Petitioners do not strongly doubt the need for the funds, I find and hold for now that the orders should not affect the 2.5% of what is the national government's revenue share. That way too, the Petition will not be rendered nugatory.
125. On the issue as to whether the Petition ought to be certified under Article 165(4) of the Constitution as raising substantial questions of law worthy of referral to the Chief Justice for empanelment of an uneven bench of not less than three judges to hear and determine the Petition, I am in agreement with the Petitioners. The questions already identified in paragraphs 48 and 110 of this Ruling, amongst others to be identified by the parties, are weighty and would invite some substantial input to be disposed of. They are certainly of public interest as well and the ultimate orders may end up sounding the death knell to the constituency development fund altogether. I also find that it is suitable to said matter for 3 judge bench.

Disposal

126. By way of disposal, I make the following orders
- a. Pending hearing and disposal of this Petition the Cabinet Secretary, Treasury or his successor in office is barred from releasing to the National Government Constituency Development Fund(NGCDF) any amount exceeding or over and above the amount of Kshs. 25,000,000,000/= during the financial year 2016/2017.

- b. The Petition herein is certified under Article 165(4) of the Constitution as raising substantial questions of law and is to be transmitted to the Office of the Chief Justice to enable his Lordship the Chief Justice to constitute an uneven bench of not less than three judges to hear and determine the Petition.
- c. Each party shall bear its own costs of the application.

127.Orders accordingly.

Dated, signed and delivered at Nairobi this 4th day July, 2016

J.L.ONGUTO

JUDGE