



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTION AND HUMAN RIGHTS DIVISION

PETITION NO 334 OF 2016

IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

**IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT OF THE RIGHTS
AND FREEDOMS IN ARTICLES 25(C), 47(1) & (2), 48 & 50(10 OF THE CONSTITUTION OF
KENYA**

AND

**IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT OF THE
CONSTITUTION IN ARTICLES 2,3,10,19(1) & (2), 20(1) & (2), 21(1), 22(1), 23, 258(1) & 259(1)
OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT OF THE
CONSTITUTION IN ARTICLES 96(3), 226(2) AND 229(7) & (B) OF THE CONSTITUTION OF
KENYA**

BETWEEN

KYALO KAMINA.....PETITIONER

VERSUS

THE SENATE.....1ST RESPONDENT

THE SPEAKER OF THE SENATE.....2ND RESPONDENT

AND

NAIROBI CITY COUNTY ASSEMBLY.....1ST INTERESTED PARTY

HON DR. EVANS KIDERO.....2ND INTERESTED PARTY

RULING

Introduction

1. Following the Auditor General's Report for the Financial Year 2013/14 on the County Government of Nairobi, the County Assembly (1st Interested Party) has undertaken a consideration of the Report in terms of Article 229 (7) and (8) of the Constitution which empowers the Senate and the relevant County Assembly to which an audit report is submitted to consider such report and take appropriate action within three months of the submission. Subsequently, the Senate by a letter of 11th May 2016 has called for information relating to various audit queries raised in the Auditor's Report to enable it to consider and take appropriate action on the auditor's report as mandated under Article 229 (8).

2. It is not clear whether the Auditor's Report had been made to the two oversight organs under Article 229 (7) of the Constitution but the petitioner contends that the auditor's report and the consideration thereof for appropriate action can only be made to and by one organ in view of the use of the word "**or**" in the empowering provisions of Article 229 (7) and (8) as follows:

*"229 (7) Audit reports shall be submitted to Parliament **or** the relevant county assembly.*

*(8) Within three months after receiving an audit report, **Parliament or the county assembly** shall debate and consider the report and take appropriate action."*

The Petition

3. The Petitioner who describes himself as an adult male of sound mind filed the petition herein dated 1st August 2016 relying on **facts of the case as set out in the petition** as follows:

"THE FACTS RELIED UPON

18. The auditor General is obligated under article 229(4) to within six months after the end of each financial year to audit and report, in respect of that year, on among others the accounts of the national and county governments and the accounts of all funds and authorities of the national and county governments.

19. In discharge of his constitutional duties, the auditor General has been auditing and reporting on the accounts of the Nairobi City County government and its accounts of all its funds for all the financial years including the 2013/2014 financial year.

20. The Auditor General is further obligated under article 229(7) to submit to parliament or the relevant county assembly the audit reports.

21. In further discharge of his constitutional duties, the Auditor General has been submitting its audit reports of the Nairobi City County Government to the Nairobi City County Assembly.

22. The Nairobi city county assembly, the 1st interested party herein, is obligated under article 229(8) to within three months after receiving an audit report from the Auditor General to consider the report and take appropriate action.

23. In discharge of its constitutional duties, the Nairobi City county assembly has been considering the auditor general reports, including the 2013/2014 financial year audit report and recommending appropriate actions to be undertaken.

24. In a letter dated 11th may 2016 addressed to the Hon Dr Evans O Kidero, the 2nd interested party herein, the Senate (the 1st respondent herein) purporting to be considering the report of the auditor General on the financial operations of the Nairobi County Executive for the financial year 2013/2014 (1st July 2013 to 30th June 2014), the senate ordered the county government, through the governor, to submit listed documents in order for the senate to fully interrogate the equally

listed audit queries.

25. The said letter raises the following critical constitutional questions;

(a) When did the Auditor General submit the audit report for the Financial year 2013/2014 (1st July 2013 to 30 June 2014) to the senate for consideration and to take appropriate question? (if at all the audit report was ever submitted to the senate);

(b) whether it is legal and constitutional for the Auditor General to submit the audit report for the Financial Year 2013/2014 (1st July 2013 to 30th June 2014) to both the senate and the Nairobi city county assembly in respect of article 229(7) of the constitution?;

(c) Which action takes precedence if the senate and the Nairobi City county assembly recommend different actions which they both deem appropriate? And

(d) Is it in the spirit of the constitution to put two public institutions in a situation of conflict?

26. Article 258(1) grants every person the right to institute court proceedings claiming that the constitution has been contravened, or is threatened with contravention.

27. The petitioner is of the view that article 229(7) & (8) of the constitution has been contravened, or is threatened with contravention hence the action (petition)”

4. On the basis of these facts, the petitioner seeks final orders as follows:

“PETITIONER’S PRAYERS DATED 1ST AUGUST 2016

A. A declaration that the respondents have violated Articles 2,3,10,19(1) & (2), 20(1) & (2), 21(1), 22(1), 23, 25(c), 37(1) &(2), 48 & 50(1), 96(3), 226(2), and 229(7) & (8) of the Constitution.

B. A declaration that considering for purposes of taking appropriate action(s) by the 1st and 2nd Respondents, their committees, officials, employees, servants and/or agents or anybody working under or for them of the auditor General’s Financial Audit report for the financial year 2013/2014 (1st July 2013 to 30th June 2014) is unconstitutional, unlawful, irregular, illegal, null and void.

C. A declaration that a letter dated 11th May 2016 addressed to the 2nd interested party from the 1st respondent’s sessional county public accounts and investments committee purporting to be considering the report of the auditor general on the financial operations of the Nairobi county executive for the financial year 2013/2014 (1st July 2013 to 30th June 2014) and ordering the county government, through the 2nd interested party, to submit listed documents in order for the 1st respondent to fully interrogate the equally listed audit queries is unconstitutional unlawful, irregular, illegal, null and void.

D. costs of the petition.

E. And any other or further relief as this honourable court may deem fit to grant”

Application for conservatory Order

5. By a Notice of Motion filed together with the Petition and dated the 1st August 2016, the petitioner sought conservatory orders, as follows:

1. *This application be certified as urgent and service be dispensed with in the first instance.*
 2. *A conservatory order do issue prohibiting the 1st and the 2nd respondents, their committees, officials, employees, servants and/or agents or anybody working under or for them from considering for purposes of taking appropriate action (s) of the Auditor General's Financial Audit Report for the Financial Year 2013/2014 (1st July 2013 to 30th July 2014).*
 3. *A conservatory order do issue restraining the 1st respondent's sessional County Public Accounts and Investments Committee from demanding that the county government through the 2nd interested party, submit listed documents in order for the 1st respondent to fully interrogate the equally listed audit queries through the letter dated 11th May 2016 addressed to the 2nd interested party in respect of the Auditor General's Financial Audit Report for the Financial Year 2013/2014 (1st July 2013 to 30th June 2014.)*
 4. *The cost of this application be provided for.*
 5. *Any other or further relief which this honourable court deems fit and just to grant*
6. The Motion was expressed to be based upon grounds that:
1. *The auditor general is obligated under article 229(4) to within six months after the end of each financial year to audit and report, in respect of a particular year, on among others the accounts of the national and county governments and the accounts of all funds and authorities of the national and county governments.*
 2. *In discharge of his constitutional duties, the auditor general has been auditing and reporting on the accounts of the Nairobi City County Government and its accounts of all its funds for all the financial years including the 2013/2014 financial year.*
 3. *The Auditor general is further obligated under article 229 (7) to submit to parliament or the relevant county assembly the audit reports.*
 4. *In further discharge of his constitutional duties, the auditor general has been submitting its audit reports of the Nairobi City County Government to the Nairobi City county assembly.*
 5. *The Nairobi city county assembly the 1st interested party herein is obligated under article 229(8) to within three months after receiving an audit report from the Auditor generals to consider the report and take appropriate action.*
 6. *In discharge of its constitutional duties, the Nairobi city county assembly has been considering the auditor general reports, including the 2013/2014 financial year audit report and recommending appropriate actions to be undertaken.*
 7. *In a letter dated 11th May 2016 addressed to the Hon Dr. Evans O. Kidero the 2nd interested party herein, the senate (the 1st respondent herein) purporting to be considering the report of the Auditor general on the financial operations of the Nairobi County Executive for the financial year 2013/2014 (1st July 2013 to 30th June 2014) the senate ordered the county government, through the governor, to submit listed documents in order for the senate to fully interrogate the equality listed audit queries.*
 8. *It is not clear if and when the Auditor general submitted the audit report for the financial year 2013/2014 (1st July 2013 to 30th June 2014) to the senate for consideration and to take appropriate question (if at all the audit report was ever submitted to the senate)*

9. *It is unconstitutional and illegal for the auditor general to submit the audit report for the financial year 2013/2014 (1st July 2013 to 30th June 2014) to both the senate and the Nairobi city county assembly for consideration and action by virtue of article 229(7) of the constitution.*

10. *There is therefore a risk that the senate would reach a different conclusion and recommend different action(s) from the finding and recommendations of the Nairobi city county assembly wherein both the institutions have the concurrent jurisdiction to consider and take appropriate action(s) in respect of the auditor General audit report for a particular financial year.”*

The Respondents’ Response

7. The Respondents filed a response to the Notice of Motion dated 1st August 2016 by way of a **Notice of Preliminary Objection and Grounds of Opposition** dated 4th August 2016. The principal defence of the respondents was that ***‘it is lawful, legal, constitutional and proper for the Senate to consider and deal with the Report of the Auditor General for the Financial Year 2013/2014 and indeed any other reports of the Auditor General.’***

8. The Notice of Preliminary Objection was given therein as follows:

“PRELIMINARY OBJECTION DATED 4TH AUGUST 2016

1. That the law firm of Prof. Tom Ojienda & Associates Advocates is a potential witness into this matter both before the senate and before this Honourable Court and should therefore not have prepared the pleadings herein and represented the petitioner in this matter. This is because:

a. Annexure “KK2” to the supporting affidavit of the petitioner, Kyalo Kamina sworn on 1st august 2016 is the report of the auditor –General for the period 1st Jul 2013 to 30th June 2014:

b. The law firm of Prof. Tom Ojienda & Associates Advocates is adversely mentioned at page 56 of the annexure which is page 26 of the report as follows:

“3.2.3 Irregular payments for legal services

The following irregularities were observed in payment of legal fees:-

i. The Nairobi City County paid Ksh30,000,000 on 7th January 2014 to Prof Tom Ojienda & Associates Advocates for Legal Services...?

c. Rule 8 of the Advocates (Practice) Rules made under the Advocates Act states as follows: [rule not set out in Notice].

d. There is a clear conflict of interest in Prof. Tom Ojienda & Associates Advocates continuing to act in this matter and their name should be struck off from these proceedings and the petitioner directed to either appoint another Advocate of represent himself in person.

e. In the case of ***Francis Mugo & 22 others v James Bress Muthee, Alex M. Ndirangu, Gilbert Kabage t/a Pata Commercial Enterprises, John Muthee Ngunjiri t/a Tango Auctioneers & General Merchants.*** [2005]eKLR the firm of Mukite Musangi & Co. Advocates was disqualified from conducting the suit because the defendant intended to call the advocate as their witness. The said advocate had drawn and witnessed a lease which was relevant to the case.

f. In ***Uhuru Highway Development Ltd & others v Central Bank of Kenya Ltd & Others*** (2), [2002] 2 EA 654 it was held that an advocate who had drawn the contested agreement between the parties to the case could not act for the party for he was likely to be called as a witness.”

9. The first Interested Party filed a Notice of Appointment of Advocate but had not filed any response by the time of hearing of the Notice of Motion on the basis of its urgency. The 2nd Interested Party, the Governor of the County of Nairobi had not entered appearance to the Petition at the time of hearing although it would appear that he had not been personally served.

10. The respondent's case, as presented by their Counsel, Mr. Njoroge, was three-fold as follows:

a. That the firm of Prof. Ojienda was disqualified from representing the petitioner in a matter relating to the investigation of the question of fees paid to it. Rule 9 of the Advocates (Practice) Rules was cited and the decision of the High Court in Nakuru HCCC NO. 122 of 2005 **Francis Mugo & 22 Ors v. James Bress Muthee and 3 Ors.** (2005) eKLR (per Musinga, J., as he then was) applying the said Rule.

b. That the correct interpretation of the word 'or' in Article 229 (4) of the Constitution was conjunctively to allow the presentation of the Auditor's report to both the County Government and the Senate. Reliance was placed on a passage from Thornton, G.C., Legislative Drafting 4th Ed, Butterworths (1996) at pp. 95-96 and to the House of Lords three to two majority decision in **Federal Steam Navigation Co. Ltd. v. Department of Trade and Industry** (1974) 2 All ER 97, (1974) 1 WLR 505, cited therein, in which the word 'or' was construed to mean 'and /or' to support the convictions of **both** a Master and downer of a ship under section 1 of the Oil in Navigable Water Act 1955 which provided that -

“If any oil to which this section applies is discharged from a British ship registered in the United Kingdom into a part of the sea which is a prohibited sea area, or if ..., the owner or master of the ship shall... be guilty of an offence.”

c. That Senate had an oversight role over the affairs of the County Governments. Counsel cited Article 96(3) and 254 (2) of the Constitution and the Final Report of the Committee of Experts on Constitutional Review of 11th October 2010, p.125 to explain the intention of the makers of the Constitution with respect to devolution as providing another layer of checks and balances as follows:

“Committee of Experts (COE) Report, October 2010

8.12 Chapter Eleven: Devolved Government

In line with the desire of the people for dispersal of power to the grassroots, the PSC agreed on the principle of devolution and a two tier system of devolved government.

8.12.1 Relationship between the national and the county governments:

A presidential system of government should be subject to checks and balances both at the centre and at the devolved level. Ideally, the political consensus on the presidential system should have been followed by a fundamental revision of the structure of devolution (size and number of units, powers and functions, and revenue capacity) towards a more effective system of checks by the devolved governments, over the national governments. The CoE could not undertake such revision without endangering other aspects of the consensus of the PSC.

Irrespective of that, the object of devolution as a means to provide for another layer of checks and balances was still pursued by the CoE. Therefore, enhancing “checks and balances and the separation of powers” as one of the objects of devolution, which object the PSC had suggested to delete, was retained in the Proposed Constitution.

It was also important to maintain the relationship between the two levels of government as one in which each level respected the functional and institutional integrity of the other.

Respecting this constitutional status implied that neither of the governments is subordinate to the other. In view of this, the Proposed Constitution did not adopt the PSC proposal for a provision that the “national government takes precedence over county governments”. The CoE also retained in the Proposed Constitution the distribution of functions to the county governments free from a general power of regulation by the national government as had been suggested by the PSC.”

The respondents, accordingly, urged the court to disqualify the firm of Prof. Ojienda from representing the petitioner in the proceedings and to dismiss the Notice of Motion for conservatory orders herein.

11. Counsel for the Interested Party Nairobi City County Assembly, Ms. Abong’o supported the Petition’s case.

Issue for Determination

12. The questions for determination in this application and the Preliminary Objection taken by the respondents are:

- a. whether the court will grant a conservatory order barring the Senate from consideration of the audit report on the relevant County Government; and
- b. whether the counsel on record for the petitioner is disqualified from acting for the petitioner in this matter.

Principles for grant of conservatory orders

13. The Court takes guidance for the Supreme Court decision in *Gatirau Peter Munya v. Dickson Mwenda Githinji & 2 Ors. SC K Petition No. 2 of 2013, (2014) eKLR, where Ojwang and Wanjala, SCJJ held:*

“186. “Conservatory orders” bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospect of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes.”

The court has considered the three principles for the grant of conservatory orders, namely the *inherent merit of the case*, that is arguability or the existence of an arguable case; risk of prejudice of the applicant and whether the petition will be rendered nugatory if conservatory order is declined; and the consideration of public interest, or balance of public interest and private party causes, as necessary.

Relevant Constitutional Provisions

14. Article 96 (3) of the functions of the Senate provides –

“96. (1) The Senate represents the counties, and serves to protect the interests of the counties and their governments.

(2) The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113.

*(3) The Senate determines the allocation of national revenue among counties, as provided in Article 217, and **exercises oversight over national revenue allocated to the county governments.***

(4) *The Senate participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article 145.*”

15. Article 228 (6) is in terms as follows:

“Article 228 (6) –

*(6) Every four months, **the Controller shall submit to each House of Parliament a report on the implementation of the budgets of the national and county governments.**”*

16. Article 229 of the Constitution of Kenya provide as follows:

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

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

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

(5) The Auditor-General may audit and report on the accounts of any entity that is funded from public funds.

(6) An audit report shall confirm whether or not public money has been applied lawfully and in an effective way.

(7) Audit reports shall be submitted to Parliament or the relevant county assembly.

(8) Within three months after receiving an audit report, Parliament or the county assembly shall debate and consider the report and take appropriate action.

17. Article 254 (2) provides –

“(2) At any time, the President, the National Assembly or the Senate may require a commission or holder of an independent office to submit a report on a particular issue.”

Senate’s Letter of 1st August 2016

18. As shown the letter of the Senate calling for the information the subject of the Petition, the Senate is clearly a purported exercise of authority under Articles 96(3), 228(6) and 229 (7) & (8) as follows:

“The Senate

Parliament building

Po box 41842 00100

NAIROBI

Hon(Dr) Evans O. Kidero

Governor

Nairobi County

NAIROBI

Dear Governor

MEETING WITH THE SENATE SESSIONAL COUNTY PUBLIC ACCOUNTS AND INVESTMENTS COMMITTEE

The Senate Sessional County Public Accounts and Investments Committee is established by the Senate pursuant to Standing Order No 212 and is mandated-

- (a) “pursuant to article 96(3) of the Constitution, to exercise oversight over national revenue allocated to the county governments;
- (b) Pursuant to article 228(6) of the Constitution, to examine the report of the controller of Budget on the implementation of the budgets of county governments;
- (c) Pursuant to article 229(7) and (8) of the Constitution to examine the reports of the Auditor-General on the annual accounts of the county governments;
- (d) To examine special reports, if any, of the Auditor-General on county government funds;
- (e) To examine the reports, if any, of the auditor general on the county public investments; and
- (f) To exercise oversight over county public accounts and investments”

At its sitting held on Tuesday, 10th May 2016, the Committee continued its consideration of the Report of the Auditor-General on the financial Operations of the Nairobi County Executive for the Financial Year 2013/2014 (1st July 2013 to 30th June 2014), following up from the previous meeting held on Thursday 17th December 2015.

At the meeting the committee resolved that the County government submit the following documents in order to fully interrogate the following audit queries:

i. Audit Query 1.1.1. Prior Year Issues:

The Committee directed that documentation evidencing closure of accounts and transfer of funds to the County Revenue Account for the respective accounts be availed to the Committee.

ii. Audit Query 1.1.2 Revenue Collection, Banking and Maintenance of records.

The Committee directed that the county government provide comprehensive evidence of the recipients of the IOU's, the recovery process, how much was recovered, and the whereabouts of the money after the recovery. Further, the Committee directed that the County Government provide evidence of disciplinary action.

iii. Audit Query 1.1.3 Encashment of //cheques in the Cash Office

The Committee directed that this query be addressed together with the one above with compressive responses and supporting evidence;

iv. Audit Quesy1.2.1: Outstanding Rates

The committee requested evidence of new valuation rules and internal audit mechanisms as well as evidence of efforts to collect outstanding rates due;

v. Audit Query 2.1.2: Outstanding Imprests

The Committee requested evidence of the disciplinary action taken by the County Government against the said employees, and evidence of the court case;

vi. Audit Query 2.1.2: Construction of Perimeter Walls

The Committee directed that the Governor deposit evidence of the resurveys for Madaraka Primary School and airport View Primary School;

vii. Audit Query 2.2.3: Allocation of County land to private developers

The Committee directed that the County Government report on the status of the 2 parcels of land. On the matter of the material allegedly lost, the Committee directed that the County government ascertain or auditor verification, the state of the materials;

Audit Query 3.2.3 Irregular payments for Legal Services

The Committee directed that the Governor table the initial fee note plus any evidence of negotiation resulting in the deduction of fees in order for the Committee to determine if all prequalified advocates were accorded an opportunity to compete;

ix) Audit Query 5.1.2. Ministry of Environment

The Committee requested copies of the newspaper advertisement for the tender, the list of the prequalified service providers, and the minutes of the tender committee;

x) County Governments' written response was not provided for the following: Audit Queries: 5.1.3: Ministry of Public works and infrastructure: 5.1.4; Ministry of Physical Planning, Housing and Lands 5.1.5; Finance and Economic Planning 5.1.6: Mbagathi District Hospital; 5.1.7 Mama Lucy Hospital and all of 5.2: Missing payment vouchers

The Committee directed that the revised written response from the County Government include the missing queries listed;

xi) Audit query 6.2: Non remittance of Provident Funds, LAPTRUST and PAYE deducted

The Committee requested that evidence of remittance be provided;

xii) Audit Query 7.1: Misuse of Fuel and Poor Maintenance of work tickets

The Committee directed that records of surcharge where applicable, need to be made available, including the total amount to be recovered. The Committee further requested proof of recovery;

xiii) Audit Query 8.2: Parking Income Variance

The Committee noted that the documents provided were insufficient and requested comprehensive documentation of the query be provided. Failure to which, the Committee resolved to recommended that the Acting Chief Finance Office be surcharged the Kshs72,637,789.00; and,

xiv) Audit Query 8.3: Loss of Revenue duet to computerization of off-street parking

The committee requested comprehensive evidence that the money was collected and banked.

You are requested to forward your written responses to the specific issues raised in the report of the Audit General referred above to the Committee and the Auditor General on or before 17th May 2016.

Ms. Marya Adjibodou, (0722 xxxxxx), madjibodou@xxxxxxxxxx) is the clerk to this committee and is responsible for facilitating this matter

Yours truly

J.M. NYEGENYE, CBS,

CLERK OF THE SENATE”

Concurrent jurisdiction

19. The final determination of the question whether the Senate can, as it were, relook what has been taken up by the relevant County Assembly must await the full hearing of the petition. At this stage, the court must, however, in the words of the Court in **Munya** assess the ‘inherent merit of the case’ as well as consider where the balance of convenience with regard to public interest lies in order to justify the grant of conservatory orders.

20. **Article 186** of the Constitution provides –

“(1) Except as otherwise provided by this Constitution, the functions and powers of the national government and the county governments, respectively, are as set out in the Fourth Schedule.

(2) A function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government.

(3) A function or power not assigned by this Constitution or national legislation to a county is a function or power of the national government.

(4) For greater certainty, Parliament may legislate for the Republic on any matter.

21. A County Government is described as comprising the County Assembly and the County Executive Article **176** (1) provides that –

There shall be a county government for each county, consisting of a county assembly and a county executive.

Article 229 (7) confers the power to consider for appropriate action the auditor’s report on the **Senate**, one of the Houses of Parliament at the National Level, and the **County Assembly** at the County Government level. In accordance with Article 186(2) such a function is or power is within the **concurrent jurisdiction** of the two levels of Government.

Questions for the full trial

22. In construing the concept of **concurrent jurisdiction** in the present case, there are serious questions to be determined by the Court at the trial of the Petition. What is the impact of the concurrent jurisdiction? Is it lawful for one organ to undertake a consideration of an audit report while the same is pending before the other competent organ or after it has been considered and appropriate action taken by the other organ? Would not a re-consideration by one organ after the other has considered the audit report appear to be an appeal from that organ whereas jurisdiction is concurrent? Or is the mandate of the Senate under Article 96 (3) to exercise ‘oversight over national revenue allocated to the county governments’ so overarching in its application as to include a reconsideration of an audit report already considered by a county assembly with which it has concurrent jurisdiction under Article 229 (7)? Or, put in the reverse, is the statutory duty of the county governor under section 30 of the County Government Act 2012 to account such as to place him answerable to **both** the two organs notwithstanding their concurrent jurisdiction? Is there an element of double jeopardy in the matter?

23. With respect, I do not find that the provisions of Article 254 (2) of the Constitution supports a case for jurisdiction of the Senate to call for information from a county government but rather from the Auditor-General as an Independent Office within the meaning of Article 252 (3) (d) of the Constitution. Indeed, the marginal notes to Article 254 indicate that the provision is enacted for purposes of enforcing “Reporting by commissions and independent offices.” In addition, Article 228 (6) of the Constitution relates to reports by Controller of Budget and not Auditor General whose report is the subject of this petition.

24. Again, the Committee of Experts Report on the Constitution of Kenya 2010 of 11th October 2010, relied on by the respondents to establish general accountability of county governments to Senate, in truth appears to support greater autonomy on the two levels of government as follows:

*“It was also important to maintain **the relationship between the two levels of government as one in which each level respected the functional and institutional integrity of the other**. Respecting this constitutional status implied that **neither of the governments is subordinate to the other**. In view of this, the Proposed Constitution did not adopt the PSC proposal for a provision that the **“national government takes precedence over county governments”**. The CoE also retained in the Proposed Constitution the distribution of functions to the county governments free from a general power of regulation by the national government as had been suggested by the PSC.”*

As shown below, however, there is express oversight in the Senate over use of all funds allocated to the County Government from the national revenue.

25. While the court is not persuaded that the petitioner has a *prima facie* case with overwhelming chances or likelihood of success, that is not in my understanding the test. The test is rather one of arguability and an arguable case is not one that must succeed but one that is not frivolous. In view of the ambiguity as to the interpretation of the provision of Article 229 (7), the question cannot be said to be frivolous. If the court construes the word ‘or’ disjunctively, the Senate shall not have jurisdiction to consider the matter. Clearly, the petitioner’s cause is not idle and unarguable, and it cannot be said that he has no arguable case.

Whether Petition will be rendered nugatory

26. Once the Court has determined the issue, appropriate directions will be given as to the validity of the Senate’s call for information by letter of 11th May 2016 and any action taken by the Senate pursuant thereto in the meantime. In this respect the petition cannot be rendered nugatory. If the determination is that the Senate has no right to consider the audit report, the Court will quash the proceedings and any action taken thereon.

27. That the County Government and its Governor will have been compelled to give the information sought in the summons does not constitute an irreversible harm, as any prejudice may be reversed by the court order nullifying the proceedings, if the court finds that the Senate acted in excess of jurisdiction.

28. Moreover, in accordance with the Supreme Court decision in *Munya*, supra, “**Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospect of irreparable harm” occurring during the pendency of a case”.**

Public Interest considerations and balance of the proportionate causes of the parties

29. In their respective written submissions, respectively dated 3rd August 2016 and 4th August 2016 Counsel for the Petitioner and the Respondent, make counter arguments on the question of public interest. For the petitioner, it was submitted –

“20. [I]t is submitted by the petitioner that it is against public interest for the 1st and 2nd Respondents to be allowed to violate the constitution, and especially article 229 (7) & (8) of the Constitution, in the guise of performing a public function.

21. Further... there is no justification for two public institutions, funded by the public funds to embark on a similar task without any plausible explanation.

22. It is further breach of the rules of natural justice and hence against public interest for the county Government to be subjected to two processes on account of the same financial audit report.

23. The County government of Nairobi has been subjected to an unending summoning and questioning of its officials by two public institutions with concurrent jurisdiction to consider and recommend appropriate action(s) in respect of the Auditor General’s Financial Audit Reports. This is without doubt against public interest since it affects service delivery by the County government and wastage of public resources on a similar issue.”

30. For the respondent, it was submitted that –

“13. That there is nothing wrong with the Senate and County Assembly exercising concurrent jurisdiction over a County Government as that is the way the Constitution has set up our structure of Government. There is also nothing adverse to any person if the Senate and the County Government arrive at different conclusion over a matter so long as the resolutions made are lawful and constitutional.

14. That in the circumstances the petitioner:

(a) has no case with probability of success;

(b) has not shown how the petition shall be rendered nugatory as any resolution made pursuant to ongoing enquiries can be quashed by this honourable court;

(c) there is no violation of the Constitution and the public interest lies in allowing the Senate to continue with its constitutional role of oversight.”

31. While, according to the constitutional principle of separation of powers, it is for the court to determine the meaning of Article 229 (7) and (8) of the Constitution in accordance with its judicial mandate, the legislative and oversight mandates lie with Parliament. Principles II and III of the COMMONWEALTH (LATIMER HOUSE) PRINCIPLES ON THE THREE BRANCHES OF GOVERNMENT, Nov. 2003 provide as follows:

II) Parliament and the Judiciary

(a) Relations between parliament and the judiciary should be governed by respect for parliament’s primary responsibility for law making on the one hand and for the judiciary’s responsibility for the interpretation and application of the law on the other hand.

(b) *Judiciaries and parliaments should fulfill their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner.*

III) Independence of Parliamentarians

(a) *Parliamentarians must be able to carry out their legislative and constitutional functions in accordance with the Constitution, free from unlawful interference.*

(b) *Criminal and defamation laws should not be used to restrict legitimate criticism of Parliament; the offence of contempt of parliament should be narrowly drawn and reporting of the proceedings of parliament should not be unduly restricted by narrow application of the defence of qualified privilege.*

32. Therefore, as regards the balance of convenience in relation to public interest, the question whether to interfere with the exercise by the Senate of an oversight mandate is resolved by reference to this judicial policy of deference to constitutional bodies for matters within their constitutional competences. Mwongo, PJ. in *Martin Nyaga Wambora v. Speaker of the County Assembly of Embu & 3 Ors.* (2014) eKLR, relied on *Gatirau Peter Munya* case, supra, and identified this policy as follows:

“63. Thus, where a conservancy order is sought against a public agency like a legislative assembly that is mandated to carry out certain functions in the normal course of its business, it is only to be granted with due caution. The interruption of lawful function of the legislative body should take into account the need to allow for their ordered functioning in the public interest.

64. The Court appreciates that the petition raises weighty issues. No interlocutory order in this case can, however, be issued unless the court has the benefit of all the arguments by all the parties on the merits. The court should further be minded that this matter begun through a process enshrined under the Constitution, by virtue of Article 181 and section 33 of the County Government Act, 2012 and is now before the Senate.

65. The court will only issue conservatory orders in exceptional circumstances and will be minded of the mandate of other constitutional organs in exercise of their constitutional mandate.”

33. Similarly, Ojwang, SCJ. of the Supreme Court of Kenya has in a paper presented to a Judges' Conference in March 2014 considered the issue of conservatory orders against constitutional organs as follows:

“The effect is that it would not be in the public interest, nor would it be consistent with constitutional principle, for the courts to readily issue conservatory orders such as would have the effect of staying the due motions of core constitutional functions, or ancillary functions for the facilitation of primary constitution functions. For such functions not only represent the due motion of the constitution itself, but they are conceived to serve the public interest. The due discharge of such a public interest task, merits special protection over the perceived private right of one individual. While it is conceivable that the effectual discharge of such a public interest mandate could have the collateral effect of occasioning injury to a private individual, the public case should in principle prevail; and the individual's right if established, well suits compensatory measure in the form of damages. Just as with equitable injunctions in the context of public interest claims, as in the *Flemish Investment Ltd.* case, so with conservatory orders; they are not for granting where the effect is to stay the discharge of a clear constitutional function.”

Prof Ojwang, SCJ in a paper entitled *Court Process Pending Full Trial: The Use of Interlocutory Injunctions and Conservatory Orders, 14th March 2014.*

I agree.

Whether to grant a conservatory order

34. The question at this stage of the matter then appears to be whether the consideration by Senate of the matter the subject of this petition is **‘a clear constitutional function’** which should not be stayed in accordance with the judicial policy of deference to free functioning of constitutional organs or agencies. To be sure, although the petitioner sues in capacity only of ‘an adult male of sound mind’, the issue in this matter is not one of explicit private interest in the matter, seeing that even the County Assembly supports the petition. It is a question of the jurisdiction of the two constitutional organs and, consequently, their use of resources and mandate to take appropriate action after consideration of the audit report. There is of course, an aspect of private interest in the matter in the 2nd Interested Party protecting his governorship and the counsel his fees which are the subject of one of the queries (Audit Query 3.2.3). In my view, however, the public aspect of the matter which is the judicial interpretation of the respective mandates of the Senate and the County Assembly under correct construction of Article 229 (7) and (8) of the Constitution outweighs any inherent private interests.

35. Can the court make a final determination of the question at this stage, before the full hearing of the Petition? No! I accept the view as Lenaola, J. did in ***Benson Mutura v. County Government of Nairobi & 7 Ors.*** (2016) eKLR, that the final determination of the issues raised in the petition cannot be done at the interlocutory stage and they must await the hearing of the petition, the court finding in that case that the petition would not be rendered nugatory and therefore declining to grant the conservatory order.

36. In interpreting the Constitution, the court is enjoined to adopt a purposive construction by Article 259 (in similar tenor as Article 20) of the Constitution, as follows:

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

(a) promotes its purposes, values and principles;

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

(c) permits the development of the law; and

(d) contributes to good governance.”

37. In the present case, although the final determination of the question of the concurrent jurisdiction of the Senate to consider the audit report is a matter for decision at the trial, there is the principle of accountability which underpins all governance under the Constitution of Kenya 2010 in terms of Article 10 of the Constitution as follows:

“10. (2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.”

38. Further, one of the objects of devolution of government under Article 174 (a) of the Constitution is **“to promote democratic and accountable exercise of power.”**

39. In addition, without prejudging the merits of the petition, there appears to be, under Article 96 of the Constitution on the role of the Senate, a **general oversight jurisdiction** to ensure accountability for all revenue given to the county government from the national revenue and for that purpose a duty to consider

audit reports on county governments upon their submission by the Auditor General pursuant to 229(7) of the Constitution:

“Article 96 (3) –

(3) The Senate determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments.

40. The court has no basis for exempting the matters subject of this petition from this general jurisdiction as it has not been shown by the petitioner, who has the onus and burden of proof under sections 107 and 108 of the Evidence Act, that the audit queries the subject of the petition involves funds other than **national revenue** allocation and were, therefore, not matters within the Senate’s constitutional role of **“oversight over national revenue allocated to the county governments”**.

41. Moreover, the relevant Act of Parliament, the County Governments Act, 2012, imposes a duty of account on the county government, as follows:

“30 (3) In performing the functions under subsection (2), the governor shall—

(f) be accountable for the management and use of the county resources;”

42. In the light of the accountability provisions of the Constitution and statute set out above, the court considers that in determining the balance of public interest as a condition for the grant or refusal of conservatory orders, it would rather err on the side of allowing the process of enforcing accountability in the meantime before the question of meaning and import of the concurrent jurisdiction of the Senate and the County Assembly to consider audit reports on County Governments is finally settled upon full hearing of the Petition.

Disqualification of Counsel for the Petitioner

43. I left the issue for determination of the question of disqualification of the counsel for the Petitioner to the end because although raised as a preliminary point, it does not affect the right of the petitioner under the Constitution to approach the court under Articles 22 and 258 of the Constitution for determination of the issue of alleged violation and infringement by the Respondents of the provisions of the Constitution. As to who represents him in the suit is a secondary matter because the petitioner could well have approached the court as a self-representing petitioner.

44. In the present petition, the issue for determination in the petition is the effect of the concurrent jurisdiction of the Senate and the County Assembly and whether the Senate has power to reconsider an audit report on a county government previously considered by the relevant County Assembly pursuant to Article 229 (8) in view of the provisions of Article 229 (7) which provides that the audit report shall be made to the Senate **or** the County Assembly.

45. I do not consider that Petitioner’s counsel’s interest in Audit Query 3.2.3, as the counsel whose engagement and fees are questioned, debars his representation of the petitioner in this cause for the constitutionality of the (re)consideration of the audit report by Senate. In this petition, the Court shall not determine the merits of this audit query or other queries, in which case counsel may become a witness, but only the question of the validity of the inquiry by Senate after a previous one by the 1st Interested Party County Assembly.

46. There is, in addition, no risk of any confidential information obtained by the said counsel during his retainer for the County Government being used adversely against the interest of the said party. While the court agrees with the principles of the statute and case-law authorities on this point cited by the respondents, the same do not have any application in this matter.

Orders

47. Accordingly, for the reasons set out above, the Petitioner's Notice of Motion dated 1st August 2016 is declined.

48. The Respondents' Preliminary Objection dated 4th August 2016 is dismissed.

49. The matter before the court being one of accountability of a level of government is one of considerable moment in view of Article 10 entrenchment of accountability as one of the values and principles of governance. Accordingly, an expedited hearing for the determination of the issues in the Petition is warranted. There shall be an order, therefore, for the hearing of the petition on priority basis on dates to be fixed in consultation with counsel for the parties.

50. Costs in the Cause.

DATED AND DELIVERED THIS 2ND DAY OF SEPTEMBER, 2016.

EDWARD M. MURIITHI

JUDGE

Appearances

M/s Prof Tom Ojienda & Associates, Advocates for the Petitioners.

Mr. Antony Njoroge Advocate for the 1st and 2nd Respondents.

Ms. Abong'o for the 1st Interested Party.

Mr. Kazungu - Court Assistant.