REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.413 OF 2014

BETWEEN

THE COUNCIL OF GOVERNORS…….1ST PETITIONER

DR. ALFRED MUTUA……..……..2ND PETITIONER

PATRICK SIMIYU KHAEMBA…….....3RD PETITIONER

AHMED ABDULLAHI MOHAMED……..……..4TH PETITIONER

WYCLIFFE OPARANYA……...……..5TH PETITIONER

JAMES OMARIBA ONGWAE……..…….6TH PETITIONER

MARTIN NYAGA WAMBORA……..……...7TH PEITIONER

AND

THE SENATE……..RESPONDENT

JUDGMENT

Introduction

1. This Petition concerns the constitutionality of summons dated 12th August 2014 issued to certain County Governors by the Senate through its Sessional Committee on County Public Accounts and Investments. The summoned Governors, namely; Isaac Ruto of Bomet County, William Kabogo of Kiambu County, Mwangi wa Iria of Murang'a County and Jack Ranguma of Kisumu County were to appear before the aforesaid Committee on 26th August 2014 to allegedly answer questions on County financial management as raised in the Report of the Auditor General for the financial year 2012/2013.

2. The said Governors and later the 2nd – 7th Petitioners who had likewise been summoned, did not appear before the said Committee. Consequently, the Senate, allegedly exercising powers under **Article 228(4)** and **(5)** of the **Constitution,** on 7th August 2014, resolved that the Controller of Budget should not authorize any withdrawal of public funds for purposes of the Counties headed by the aforementioned Governors until they had responded to the audit queries raised to the

satisfaction of the Senate.

3. In their Petition dated 19th August 2014, the Petitioners question the constitutionality of the said witness summons and the constitutional power and authority of the Senate to pass a resolution directing the Controller of Budget not to authorize withdrawals of public funds until satisfactory answers are provided by the Petitioners to the audit queries. According to the Petitioners, the summons contravene **Article 226(2)** of the **Constitution** which provides that the Accounting Officer of a County public entity is accountable to the County Assembly for its financial management. They claim that in summoning the County Governors, the Senate is usurping powers of County Assemblies and in any event that County Governors are not the Accounting Officers of the County and cannot answer any audit queries.

4. In their Petition they therefore seek the following orders;

"(a) A declaration that in view of the provisions of Article 6(2) of the Constitution which provides that the Governments at the national and County levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and co-operation, the Senate cannot exercise powers under Articles 125 of the Constitution in a manner that cripples County Governments.

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

(c) A declaration that resonating the intention of Article 96 of the Constitution and 226(2) of the Constitution of Kenya and Section 148 of the Public Financial Management Act 2012, the Senate cannot summon Governors to personally appear before it to answer questions on County Government finances in total disregard of the procedure and requirements of public finance management that is stipulated by the Public Finance Management Act, 2012.

(d) A declaration that the Senate is bound by the methods, procedures and requirements of the Public Finance Management Act, 2012 when undertaking its oversight and summoning powers.

(e) A declaration that resonating the intention of Article 96 of the Constitution and 226(2) of the Constitution of Kenya and Section 148 of the Public Finance Management Act, 2012, it is proper, legal, and constitutional for Members of the Executive Committee responsible for finance and the Chief Officers responsible for finance to appear before the Senate or any of its Committee to answer on County Government finances and to generally provide information that helps the Senate to undertake its oversight functions as stipulated in Article 96 of the Constitution.

(f) A declaration that resonating the intention of Article 6(2), 96, 174, 185(3) and 226(2) of the Constitution of Kenya, the Senate cannot summon an accounting officer of the County Government to answer questions on County financial management, at the first instance. It must first allow the oversight and legislative mechanisms at the County level to be concluded given that these Governments are functional distinct and are based on the principle of Separation of Powers.

(g) A declaration that resonating the intention of Article 6(2), 96, 174, 185(3) and 189 of the Constitution and within the meaning of Article 226(2) and Article 96(4) of the Constitution of Kenya, the Senate's oversight role over nationally collected revenue to Counties is not identical to the County Assembly's oversight over the Executive.

(h) A declaration that resonating the intention of Article 96(4) of the Constitution and in view of the provisions of Article 185(3) and Article 226(2) of the Constitution of Kenya, the Senate's power is limited to oversight over national agencies which manage national revenue allocated to Counties such as the National Treasury.

i. ***A declaration that resonating the intention of Articles 6(2), 189(1), 174 and 96(4) of the***

Constitution, and in view of the provisions of Article 185(3) of the Constitution of Kenya, the County Assembly is the sole organ that can undertake oversight over the County Executive.

j. ***A declaration that the Senate can only exercise it powers under Article 125 of the Constitution to scrutinize County financial and other records for purposes of making a determination with regard to an impeachment, interventions in a County, suspension of a County, or for purposes of developing national legislation necessary for more prudent management of finance at the County level.***

k. ***A declaration that the Senate does not have sole constitutional powers to direct National Treasury and Controller of Budget not to release funds to Counties without following the provisions of Article 225 of the Constitution.***

- ***A declaration that stoppage of funds to a County public entity can only be done by following the provisions of Article 225 of the Constitution.***

m. ***A permanent injunction be issued to retrain the Senate from summoning County Governors to appear before it to answer questions on County public financial management.***

- ***A permanent injunction be issued to retrain the Senate from summoning accounting officers at the County level to appear before it to answer questions on County public financial management.***

- ***An order or certiorari to quash the Resolution of the Senate issued on 7th August 2014 that purports to direct the National Treasury and the Controller of Budget not to release funds to Kiambu, Bomet, Kisumu and Murang'a Counties.***

p. ***There be no order as to costs."***

The Petitioners' Case

5. The Petitioners' case is contained in their Petition dated 19th August 2014, the Supporting affidavit sworn by Isaac Ruto on the same date and written submissions dated 19th August 2014 and 1st December 2014. Their case was presented by Mr. Ahmednassir, SC as lead Counsel assisted by Mr. Nyamu, Mr. Wanyama and Mr. Issa Mansur.

6. It was Mr. Ahmednassir's submission that the Constitution at **Article 189(1)** provides that the Government, at either level, shall perform its functions and exercise its powers in a manner that respects the functional and institutional integrity of Government at either level. Thus as an institution of the National Government, the Respondent is duty bound to respect the functional and institutional independence of Governors and their offices.

7. He submitted further that the Senate's role under **Article 96** of the **Constitution** is limited to the protection of the interests of Counties at the national level which includes considering, debating and approving Bills concerning Counties in Parliament and to determine allocation of national revenue among Counties as provided for under **Article 217** of the **Constitution**. That the Senate's oversight role is at the national level and not at the County level. He thus contended that the Constitution does not vest the Senate with an oversight role with respect to expenditure of devolved funds unlike the National Assembly which has an oversight role over expenditure of national funds as provided for under **Article 95(4) (c)** of the **Constitution.** That the oversight role with respect to expenditure by County Governments is vested upon the County Assemblies in accordance with the provisions of **Article 185(3)** of the **Constitution**. He therefore concluded on this issue that the County Assembly is the body that is constitutionally charged with the responsibility of ensuring that devolved revenue to a county government is spent in a manner that respects the principles of devolution and public finance.

8. Mr. Ahmednasir also submitted that the Constitution has provided for a distinct framework of accountability of County financial resources. In that regard, he submitted that the Office of the Controller of Budget under the provisions of **Article 228** is mandated to submit to each house of Parliament a report on the implementation of budgets of both the National and County Governments every four months. Further, that the Auditor General also submits reports to Parliament or the relevant County Assembly with regard to various audit queries for debate as provided for under **Article 229** of the **Constitution**. It was his position therefore that the Senate's mandate on public finances of a County is limited to making recommendations for improving the management of public finances as provided for under **Section 8(1) (d)** of the **Public Finance Management Act of 2012** and not otherwise.

9. It was his further submission on this point that the **Public Finance Management Act** provides a clear and elaborate regime with respect to accountability of County financial resources. For instance, he claimed that **Part 1V** of the **Act** has set out County Government's responsibilities concerning management and control of public finances such as establishment of County Treasuries and their responsibilities; establishment of the position of County Executive Member of Finance and County Accounting Officer, and their roles. He submitted that the Senate has not been accorded any role under the Act for the management of County resources and that the issues raised by the Senate against Governors ought to be dealt with by the County Assemblies of the respective Counties as set out under the **Public Finance Management Act.** In any event, he submitted that where there are issues at the County level that require national intervention, the **Public Finance Management Act** at **Section 187** has established the Intergovernmental Budget and Economics Council which would adequately address any such concerns raised.

10. On his part, Mr. Wanyama, submitted that there is need for various levels of Government to respect distribution of power. He relied on the decision of the Constitutional Court of South Africa in ***Certification of the Constitution of the Republic of South Africa (1994) (4) SA 744*** where it was held that intervention in a matter exclusively reserved for Provincial Governments by the National Government should be exercised in very exceptional circumstances. He also referred to the case of ***International Legal Consultancy Group vs The Senate and the Clerk of the Senate Kerugoya Constitutional Petition No.8 of 2014*** where the Court held that National and County Governments should consult each other on contested issues and avoid engaging in adversarial litigation.

11. It was his further submission that the Accounting Officer of a County is not the County Governor but the County Executive member in charge of Finance who may delegate the power to accounting officers within the County. That the Accounting Officer is accountable to the County Assembly as provided for under **Article 226(2)** of the **Constitution** and **Section 149** of the **Public Finance Management Act**. It was therefore his contention that there is a misconceived show of might on the part of the Senate in summoning Governors and is done in total disregard to the existing structures of County Financial Management. That County Assemblies would be undermined and be crippled when County Executives are made accountable to the Senate and not the County Assemblies.

12. As regards the applicability of **Article 125** of the **Constitution**, Mr. Wanyama submitted that the Senate can only exercise its power to call for evidence as provided for under **Article 125** of the **Constitution** while discharging its constitutional mandate under **Article 96** of the **Constitution.** That **Article 125** does not confer on the Senate the mandate to summon Governors and ask them to account for County funds and that the same power to call for evidence is also granted to the County Assemblies as provided for under **Article 195** of the **Constitution.**

13. As to the power of the Senate to withhold funds under **Article 225** of the **Constitution,** he submitted that the Senate acted illegally in passing a resolution on 7th August 2014 directing the Controller of Budget and the National Treasury to withhold funds meant for Bomet, Murang'a, Kiambu and Kisumu Counties. To buttress that point, he relied on Supreme Court ***Advisory Opinion No. 2 of 2013, Speaker of the Senate & Another vs Attorney General*** where it was

stated that Courts have a constitutional duty to safeguard and protect devolution.

14. Lastly, on the issue of *res judicata*, Mr. Ahmednassir stated that the Petition is not barred by that doctrine as the parties in this case were not parties in a previous Petition. That the summons in the previous suit were issued by the Respondent's Standing Committee on Economic and Finance Affairs addressed to various Governors and their County Executive Committees to appear before it to answer queries with respect to County fiscal management for the first quarter of the financial year 2013/2014. In the instant Petition, he argued, the summons have been issued by the Respondent's Sessional Committee on County Public Accounts and Investments to various Governors to answer queries emanating from the Report of the Auditor General on the financial operations of their Counties and the defunct Local Governments for the financial year 2012/2013(1st January to 30th June 2013).

15. Further, that the doctrine of *res judicata* does not apply because this Petition raises four fundamental issues that were not determined in the previous Petition; namely;

a. ***Whether Governors, who are not the accounting officers of county governments, can be summoned to answer queries relating to the accounts of a county government.***

b. ***Whether the Senate can usurp and purport to exercise an oversight mandate vested in County Assemblies by virtue of Article 226(2) of the Constitution.***

c. ***Whether Governors can lawfully be held accountable for transactions in the financial year during which the defunct local authorities together with the Transition Authority (in line with its functions under Section 7 of the Transition to Devolved Governments, Act, 2012) were in charge of county resources.***

d. ***The Petition also seeks to challenge a resolution passed by the Respondent on 7th August 2014, purporting to ask the Controller of Budget not to release funds to County Governments, in contravention of the provisions of Article 225 of the Constitution.***

16. He concluded on this issue by submitting that even if the issues in this Petition were the subject matter in ***Kerugoya H.C. Constitutional Petition No.8 of 2014,*** that decision does not bind this Court as it was given *per incuriam.* He relied on the decision in the case of ***Jagbir Singh Rai & 3 Others vs Tarlochan Singh Rai Estate & 4 Others (2013) e KLR*** where the Supreme Court set out the applicability of the principle of *per incuriam*. On the same principle he also referred the Court to the cases of; ***Young vs Bristol Aeroplane Co Ltd 91944) 2 ALL ER 293*** and ***Morella Ltd vs Wakeling (1955) 1 ALL ER 708***.

17. On his part, Mr. Nyamu while associating himself with submission by the other Counsel appearing for the Petitioners, urged the Court to be guided by the values and principles of the Constitution in determining the Petition; and that the 2nd Petitioner was not a party to the ***Kerugoya H.C. Petition No.8 of 2014*** and has filed the instant Petition challenging the summons issued to him by the Senate allegedly exercising its powers under **Article 125** of the **Constitution**.

18. For the above reasons the Petitioners prayed that the Petition be amended and the Court should make findings as follows ;

"(i) That the summons by the Senate violated the provisions of Article 189(1) of the Constitution, which requires that the different levels of Government exercise their powers in a manner that respects the functional and institutional integrity as well as the constitutional status and institutions at the County level.

ii. ***That the Senate cannot summon governors to personally appear before it to answer questions on County Government finances in total disregard of the Constitution and the Public Finance Management Act.***

iii. ***That Article 125 of the Constitution cannot be considered in isolation and does not vest the Senate with powers to summon Governors to account for expenditure of County funds.***

iv. ***That the resolution by the Senate to direct the National Treasury and the Controller of Budget not to release funds to Counties without following the provisions of Article 225 of the Constitution is patently unlawful.***

v. ***The witness summons dated 12th August 2014 issued by the Senate through its Sessional Committee on County Public Accounts and Investments summoning various Governors to appear before it are unconstitutional, null and void."***

The Respondent's case

19. In response to the Petition, the Respondent filed a Replying Affidavit sworn on 22nd August 2014 by Mrs. Consolata Waithera Munga, a Senior Deputy Clerk of the Senate. It also filed written Submissions dated 8th December 2014. Mr. Kilukumi, Learned Counsel, presented its case.

20. Before addressing the merits of the Petition, Mr. Kilukumi raised what he considered as preliminary issues regarding the competence of the Petition and the jurisdiction of the Court to determine the same. In that regard, he submitted firstly, that the Petitioners have violated the law by citing the Senate as the Respondent to the Petition instead of the Attorney General.

21. Secondly, that the Petitioners had not served the mandatory 30 days' notice upon the Attorney General before filing the Petition as provided for under **Sections 12 (1)** and **13A** of the **Government Proceedings Act.** On that issue he relied on the case of ***Orengo vs Attorney General (2007) e KLR*** where Visram J (as he then was) explained the rationale behind **Section 13A (1)** aforesaid and he also cited the case of ***Kenya Bus Service Ltd & Another vs Minister for Transport & 2 Others (2012) e KLR*** where Majanja J held that **Section 13A** of the **Governments Proceedings Act** violates **Article 48 of the Constitution**. He claimed in that regard that **Article 159(2) (d)** of the **Constitution** cannot be invoked to excuse non-compliance with substantive provisions of the law. He further relied on the Court of Appeal decision in ***Nguruman Ltd vs Shompole Group Ranch & Another (2014) e KLR*** and ***Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others (2013)e KLR*** where the Court stated that a court cannot ignore clear rules of procedure despite the provisions of **Article 159(2)(d)** of the **Constitution**. Consequently, he claimed that the Petition is incompetent and should be struck off.

22. Thirdly, that the **National Assembly (Powers and Privileges) Act (The Privileges Act),** limits and restricts the powers of this Court to interfere with parliamentary business. That the dispute before this Court arose out of Parliamentary proceedings and the decision taken by the Respondent to summon the Petitioners and consequently passing the resolution conditionally suspending transfer of funds to specified Counties. It was Mr. Kilukumi's position that the said decision cannot be questioned in this Court by virtue of the provisions of **Article 117 (2)** of the **Constitution** as read together with **Sections 12, 14, 15** and **29** of the **Privileges Act.** He relied on the decision of ***Ngoge vs Kaparo & Others (2007) e KLR*** to buttress his point.

23. Lastly, that the core issue raised in this Petition was resolved by a three judge bench in the ***Kerugoya H. C. Petition No.8 of 2014*** and that the 2nd to 7th Petitioners were beneficiaries of the orders made in that Petition. Further, that the same Advocates appearing in this Petition represented the Petitioner, International Legal Consultancy Group in ***Kerugoya H.C. Petition No.8 of 2014***. That all the issues being raised now, save for one, were identical with those in ***Kerugoya H.C. Petition No.8 of 2014*** and that it was therefore an abuse of legal process for lawyers, to seek, through the disguise of a 'fresh' client, to have a second bite at the cherry. In addition, that the decision of this Court although constituted differently is binding and a party dissatisfied with it ought to resort to an appeal and not fresh proceedings. On that submission he relied on the decision in ***Pop in (Kenya) Ltd & 3 Others vs Habib Bank A.G Zurich (1990) e KLR.***

24. In any event, Mr. Kilukumi further claimed that the 1st Petitioner has filed a reference in the Supreme Court, being **Reference No. 1 of 2014** seeking an advisory Opinion on the same issues forming the subject of the Petition. He thus contended that the Petitioners are forum shopping for a different opinion from that of the High Court in ***Kerugoya H.C. Petition No.8 of 2014.***

25. On the merits of the Petition, Mr. Kilukumi in a very concise presentation, submitted that **Article 125** of the **Constitution** clothes Parliament with the Constitutional power and authority to summon any person to appear before it for the purposes of giving evidence or providing information; that a Governor cannot disregard a summons; and that by so disregarding it, has committed a criminal offence as provided for under **Section 13(a)** of the **Privileges Act**. That Parliament enjoys the same powers as the High Court in enforcing the attendance and examination of witnesses on oath and to compel production of documents. Further, that the power to summon any person for the above purpose is not restricted, qualified or otherwise conditioned.

26. He submitted that in the order of things, Governors are the Chief Executive Officers of the Counties and a County Executive Committee Member of Finance is an appointee of the Governor *albeit* with the approval of the County Assembly; while an Accounting Officer is designated by the County Executive Member of Finance. That a Governor is answerable to the Senate for the portion of the national resources that the Senate has horizontally allocated to the Counties and takes personal responsibility for the reasonably foreseeable consequences of any actions or omissions arising from the discharge of the duties of the office of Governor. That as such, the Senate, in carrying out its mandate of exercising oversight over national revenue allocated to the County governments, is required to summon County Governors to ensure financial prudence and probity in usage of county funds. On that issue, he relied on the decision in ***Kerugoya H.C. Petition No.8 of 2014.***

27. As regards the resolution of the Senate that the Controller of Budget ought not to authorize withdrawal of public funds by the four mentioned Counties, Mr. Kilukumi submitted that the said resolution was provoked by the Governors' defiance of the summons. He stated that a resolution of Parliament is a declaration of opinion or purpose and cannot be challenged in Courts of law and that the doctrine of separation of powers bars the Court from barring the Senate from exercising its mandate. He also submitted that the order of Certiorari sought by the Petitioners cannot issue in the circumstances of this case as the same is issued against inferior Tribunals and the Senate is not such a tribunal. In that regard he referred the Court to the cases of ***Bradhaugh vs Gosset (1884) 12 Q.B.D 271***, ***Republic vs The Judicial Commission of Inquiry into the Goldenberg Affair (2007) 2 EA 392*** and ***Stockdale vs Hansard (1839) 9 Ad & E 210***.

28. He also submitted that the Senate Standing Orders bar this Court from reversing the resolutions of the Senate and so the Petition cannot lie in the circumstances.

29. On the issue of costs, Mr. Kilukumi submitted that the same should be borne by the Petitioners, who have initiated the current proceedings for the second time after the same issues had been concluded by a judgment of the High Court at Kerugoya delivered on 16th April, 2014. For that proposition, he relied on the decision of ***Truth Justice and Reconciliation Commission vs Chief Justice of the Republic of Kenya (2012) e KLR.***

30. For the above reasons, he urged the Court to find that the Petition is incompetent and dismiss it with costs.

The Response

31. In response to Mr. Kilukumi's submission, Mr. Issa Mansur submitted that the Senate was a proper party to these proceedings and that not all proceedings must be instituted for and on behalf of the Attorney General as provided for under **Section 12** of the **Government Proceedings Act.**

32. On the issue of immunity from proceedings as provided for under **Article 117** of the

Constitution, he submitted that it is only the President and judicial officers who are immune from Court proceedings. That the Senate does not have such immunity and in any case, the **Privileges Act** was enacted prior to the promulgation of the **Constitution 2010** and must be interpreted in the context of the said **Constitution**.

Determination

33. We have considered the Pleadings and the Submissions of the parties. We are of the view that there are three issues for determination arising from the Petition and they are as follows;

a. **Whether the Petition is competent and whether the Court has jurisdiction to determine it.**

b. **Whether the Senate has the mandate to summon County Governors to answer queries raised by the Auditor General in regard to the 2012/2013 financial year.**

c. **Whether the resolution by the Senate directing the National Treasury and the Controller of Budget not to authorize withdrawal of public funds by Counties was/is constitutional.**

d. **Whether Governors can lawfully be held accountable for transactions in the financial years during which the defunct local authorities together with the Transition Authority (in line with the Functions under Section 7 of the Transition to Devolved Governments Act 2012) were in-charge of County Resources.**

e. **What reliefs (if any) are available to the parties.**

Before we consider the above issues, there is one issue we must address in passing as regards the claim of forum shopping, the contention by the respondent being that the Petitioners have filed this Petition and also sought an advisory opinion from Supreme Court on the same issue. In response to this contention, Mr. Issa submitted that the advisory opinion, **Reference No.1 2014**, has since been withdrawn and is no consequence to these proceedings. Mr. Issa is an Officer of the Court, and we have no reason to disbelieve him on that point.

Whether the Petition is competent and whether this Court has jurisdiction to determine it

34. The Respondent contended that the Petition before us is incompetent for violating the law on two fronts; firstly, that the Petitioners have violated the law by citing the Senate as the Respondent in the Petition instead of the Attorney General. Secondly, that the Petitioners had not served the mandatory 30 days' notice upon the Attorney General before filing the Petition as provided for under **Section 12(1)** and **13A** of the **Government Proceedings Act.** As to the jurisdiction of this Court, the Respondent submitted that the Court does not have jurisdiction to determine the constitutionality of the acts of the Senate in summoning County Governors because the **Privileges Act** limits and restricts the powers of this Court to interfere with parliamentary business. Lastly, that the issues raised in the Petition are *res judicata* in view of the judgment in **Kerugoya, H.C. Petition No.8 of 2014**.

35. In addressing these preliminary issues, the issue of jurisdiction is the first that a Court should determine because without it, the entire proceeding becomes a nullity - See the case of ***The Owners of Motor Vessel "Lillian S" vs Caltex Oil Kenya Ltd (1989) KLR 14***.

36. In that regard, we shall start with the competence of the Petition and if we find that the Petition as framed is competently before us, we shall then proceed to determine the issue of applicability of the **Privileges Act**. We shall thereafter consider the doctrine of *res judicata* and what a decision *per incuriam* is, and their applicability to the present Petition.

Whether the Petition is Competent

37. In addressing this issue, we shall determine whether the Attorney General ought to have been sued instead of the Senate and secondly, the applicability of the 30 days' notice upon the Attorney General before institution of the Petition. We shall start with the former issue.

38. **Section 12 (1)** of the **Government Proceedings Act** provides thus;

"Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney General as the case may be".

39. The question we must therefore answer is whether it is mandatory to sue the Attorney General where the conduct of the Senate or its proceedings are in issue. To answer that question, we shall be guided by the provisions of **Article 156 (1)** of the **Constitution** which establishes the office of the Attorney General. **Article 156 (4)** provides the functions of that office as follows;

"(1) …

(2) …

(3) …

(4) The Attorney-General—

(a) is the principal legal adviser to the Government;

(b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and

(c) shall perform any other functions conferred on the office by an Act of Parliament or by the President."

40. Pursuant to the above provision, Parliament enacted the Office of the **Attorney General Act** of **2012** and its **Section 5(1)** states that the functions of that office are as follows;

"(a) Advising Government Ministries, Departments, Constitutional Commissions and State Corporations on legislative and other legal matters;

(b) Advising the Government on all matters relating to the Constitution, international law, human rights, consumer protection and legal aid;

(c) Negotiating, drafting, vetting and interpreting local and international documents, agreements and treaties for and on behalf of Government and its agencies;

(d) Coordinating reporting obligation to international human rights treaty bodies to which Kenya is member or on any matter which member States are required to report;

f. ***Drafting legislative proposals for the Government and advising the Government and its agencies on legislative and other legal matters;***

g. ***Reviewing and overseeing legal matters pertaining to the registration of companies, partnerships, business names, societies, adoptions, marriages, charities, chattels, hire functions of the purchase and coat of arms;***

h. ***Reviewing and overseeing legal matters pertaining to the administration of estates and trusts;***

i. ***In consultation with the Law Society of Kenya, advising the Government on the regulation of the legal profession;***

j. ***Representing the National Government in all civil and constitutional matters in accordance with the Government Proceedings Act;***

k. ***Representing the Government in matters before foreign Courts and tribunals; and***

- ***Performing any function as may be necessary for the effective discharge of the duties and the exercise of the powers of the Attorney General."***

41. Looking at the law above, it is clear that the Attorney General can represent the National Government in proceedings which it has been sued. To our mind the provisions of **Article 156(4)** and **Section 5(1)** of the **Office of the Attorney General Act** are clear, unambiguous and it is difficult to understand the worth of the objection raised by Mr. Kilukumi. In ***Isaac Aluoch Polo Aluochier vs Uhuru Muigai Kenyatta and Anor, Petition No.360 of 2013*** Lenaola J stated as follows;

"I have taken time to reflect on the matter and regarding representation by the Attorney General in Court proceedings, certainly Article 156(4) (b) is crystal clear; that he shall represent the National Government in legal proceedings other than criminal proceedings. The proceedings before me are not against the National Government because the Respondents by whatever measure and whatever the significance and importance of their respective offices, cannot be "the government". "Government" has been defined as "to signify the established system of political rule, the governing power of the Country consisting of the executive and the legislature considered as an organised entity and independently of the persons of whom it consists from time to time" – per Dixon J, in <u>Burns vs Ransley [1949] A.L.R. 817."</u>

42. We are in agreement with the learned judge and it is clear to us that the **Constitution, 2010** allows the Attorney General the right to represent the National Government in Court proceedings but does not stipulate that the Attorney General should be sued in all instances where any organ of the National Government has been sued and to say otherwise would be absurd. Obviously. Mr. Kilukumi has misunderstood the law, because suing and being sued in one's name is different from representation. In any event, the law he relied on at **Section 12(1)** of the **Government Proceedings Act** is subject to the Constitution as the supreme law of the land, and any inconsistency cannot stand to the extent of that inconsistency.

43. But it must be understood and we reiterate this point, that the Attorney General also has a mandate to represent the national and public interest in Court proceedings and where organs comprising the National Government are minded to seek his representation, we see no illegality either - See ***Isaac Aluoch Polo Aluochier vs Uhuru Muigai Kenyatta and Another (supra)*** and ***Okiya Omtatah Okoiti & Another vs Attorney General and 7 Others Petition No.446 of 2013***.

44. However and having said so, one cannot reasonably fail to note that the law as it exists under **Section 12(1)** of the **Government Proceedings Act** was enacted in the era of the **Repealed Constitution** where there was only one level of Government and the role of the Attorney General was defined differently. We say so because the **Constitution 2010** at **Article 2** creates two levels of Government, the National and County Government. In that regard, in ***Isaac Aluoch Polo Aluochier vs Uhuru Muigai Kenyatta and Anor (supra)*** Lenaola J stated thus;

"In the Kenyan context, the two levels of Government; national and devolved, form the Government of Kenya and the Constitution deliberately limited the role of the Attorney General to legal proceedings involving the National Government, and devolved Governments are left to seek their own legal representatives. But it must be noted that his <u>advise</u> as opposed to <u>representation</u> is to "the Government" in the wider context as defined above."

We agree and we shall say no more on this point.

45. We now turn to determine the question whether failure to serve the 30 days' notice to the Attorney

General before filing the Petition is illegal as submitted by Mr. Kilukumi.

46. In that regard, **Section 13A (1)** of the **Government Proceedings Act** provide as follows;

"No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing in the prescribed form have been served on the Government in relation to those proceedings".

47. We are aware of the decisions in the case of ***Orengo v Attorney General (supra)*** where it was held that **Section 13A(1)** creates a mandatory obligation on every person prior to the filing of any litigation against the Government to issue the required 30 day notice to the Attorney General. In ***Hudson Laise Walumbwa vs Attorney General HCCC No. 2714 of 1987*** Ringera J stated as follows;

"Section 3 of the Government proceedings Act is in clear and mandatory terms that do not permit any excuses or exceptions. Its plain meaning, to my mind, is that no proceedings against the Government, under the Government Proceedings Act, can be or be instituted before the Statutory Notice has been given and expired. The dictionary meaning of the word lie in this context is, according to the Concise Oxford Dictionary, 8th edition, 'be admissible or sustainable'. A suit which does not lie cannot be tried by a Court of Law. This Section (S.13) is not in the nature of statutory period of limitation which must be pleaded and which could be waived by the defendant expressly or by conduct. It is in the nature of a substantive peremptory bar to institution and the trial of a suit filed in disregard of its requirements. The Attorney General cannot waive it. Neither can the Court. And it matters not why it was not complied with. As a part of substantive law, the defendant may or may not plead it."

48. Similarly, in ***Barrack Omudho Aliwa and Another vs Salome Arodi and Another Succession Cause No.38 of 2008***, Njagi J stated as follows;

"Section 13A of the Government Proceedings Act requires that no proceeding should be commenced against the Government until after the expiry of thirty day's notice in writing upon the Government in relation to those proceedings. In the instant case, no such notice was given and in the absence of such notice, any intended proceedings against the Government cannot stand."

49. In interpreting the constitutionality of **Section 13A(1)** of the **Government Proceedings Act** and having addressed his mind to the above decisions, Majanja J in ***Kenya Bus Services Ltd and Another vs Minister for Transport & 2 Others (supra)*** expressed his mind as follows;

"***The strictures imposed by these provisions must be considered in light of the right of access to justice. The right of access to justice protected by the Constitution involves the right of ordinary citizens being able to access remedies and relief from the Court. In Dry Associates vs Capital Markets Authority and Another Nairobi Petition No. 328 of 2011 (unreported), the Court stated, "Access to justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one's rights; equal right to the protection of those rights by the law enforcement agencies, easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal series; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay."***

50. The learned judge went on to say that;

"By incorporating the right of access to justice, the Constitution requires us to look beyond the dry letter of the law. The right of access to justice is a reaction to and a protection against legal formalism and dogmatism. (See 'Law and Practical Programme for Reforms' (1992) 109 SALJ 22) Article 48 must be located within the Constitutional imperative that recognizes the Bill of Rights as the framework for social, economic and cultural policies. Without access to justice the objects of the Constitution which is to build a society founded upon the rule of law, dignity, social justice and

democracy cannot be realized for it is within the legal processes that the rights and fundamental freedoms are realized. Article 48 therefore invites the Court to consider the conditions which clog and fetter the right of persons to seek the assistance of Courts of law."

51. He observed, further, that;

"The provisions for demanding [prior notice before suing the |Government is justified on the basis that the government is a large organization with extensive activities and fluid staff and it is necessary for it to be given the opportunity to investigate claims laid against it and decide whether to settle or contest liability taking into account the public expense. While the objectives are laudable, the effect of mandatory notice provisions cause hardship to ordinary claimants. I am of course aware that pre-litigation protocols, for example Order 3 Rule 2 of the Civil Procedure Rules, require that notice be given before action is commenced but the penalty for non-compliance is not to lose the right to agitate the cause of action but to be denied costs incurred in causing the matter to proceed to action."

52. The Learned Judge then concluded as follows;

"Viewed against the prism of the Constitution, it also becomes evident that Section 13A of the GP provides no impediment to access to justice. Where the state is at the front, left and centre of the citizen's life, the law should not impose hurdles on accountability of the Government through the Courts. An analysis of the various reports from Commonwealth which I have cited clearly demonstrate that the requirement for notice particularly where it is strictly enforced as a mandatory requirement diminishes the ability of the citizen to seek relief against the government. It is my finding therefore that Section 13A of the Government Proceedings Act as a mandatory requirement violates the provisions of the Article 48.

53. We agree with the learned judge and we see no reason to depart from his finding as we find the same to be sound in law. In so holding we are also aware of the Court of Appeal decision in ***Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others (supra)*** where the Court stated as follows;

"In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under Section 1A and 1B of the Civil Procedure Act (Cap 21) and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases."

54. Reading all the above findings together and while conscious of the fact that any rule of procedure that violates a party's fundamental right and freedom cannot be said to be sound, we do not see any prejudice that the Respondent has suffered by the alleged failure of the Petitioner to issue the 30 days' notice to the Attorney General as prescribed under the provisions of **Section 13A(1)** of the **Government Proceedings Act.**

55. We say so because the issues in contest are solely to do with the conduct of the Senate which is an organ of State that can properly be sued as such. In fact, the Senate entered appearance in its own name and by Counsel and we completely see no reason why the failure to either enjoin the Attorney General as a party or failure to give him notice of the intended proceedings will advance (impair/impede) the cause of justice. We therefore decline to strike out the Petition as we are conscious that it serves the interests of justice to determine it on its merits and resolve the important issues that it raises.

Whether the Privileges Act and Senate Immunity to Legal Proceedings limit the Jurisdiction of this Court.

56. It is not contested that the dispute, subject of this Petition, arose out of the proceedings and the decision taken by the Respondent to summon the 2nd to 7th Respondent and the subsequent

passing of a resolution suspending the transfer of funds to specified Counties. In that regard, Mr. Kilukumi submitted that the said decision cannot be questioned in this Court by virtue of the provisions of **Article 117 (2)** of the **Constitution** as read together with **Sections 12, 14, 15** and **29** of the **Privileges Act**. We pause here to determine the issue of Parliamentary privilege and immunity from legal proceedings.

57. To our mind, and we must agree with both Mr. Ahmednassir and Mr. Kilukumi on their submissions on this issue, under the doctrine of separation of powers, Parliament as a distinct and independent organ is entitled to exercise its mandate without undue interference from other arms of Government. As regards the doctrine of separation of powers, **Article 1** of the **Constitution** reposes the sovereign power of the State in the people of Kenya but provides for the delegation of that power to various state organs. These include Parliament, County Assemblies, the Executive at the National and County Levels of Government, the Judiciary, Independent Tribunals and Commissions. To facilitate the proper and effective exercise of that delegated power, the Constitution has allocated functions, powers and responsibilities to all these organs. To that end, every State Organ ought to be accorded the space to perform its constitutional mandate without undue interference, and in our view that is the embedment of the doctrine of separation of powers.

58. Having said so, we are also aware of the provisions of **Article 2** of the **Constitution** which states that;

(I) This Constitution is the Supreme law of the Republic and binds all persons and all state organs at both levels of government.

(2) No person may claim or exercise state authority except as authorised under this Constitution.

59. On this issue, the words of Kasanga Mulwa J in ***R vs Kenya Roads Board exparte John Harun Mwau HC Misc Civil Application No.1372 of 2000*** remain true one and half decade later when he stated;

"Once a Constitution is written, it is supreme. I am concerned beyond peradventure that when the makers of our Constitution decided to put it in writing and by its provision thereof created the three arms of Government namely the Executive, the Legislature and the Judiciary, they intended that the Constitution shall be supreme and all those organs created under the Constitution are subordinate and subject to the Constitution."

60. We agree and would add that when any of the state organs steps outside its mandate, this Court will not hesitate to intervene. The Supreme Court has ably captured this fact in ***Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011*** where it expressed itself as follows

"The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation."

61. Subsequently, the Supreme Court in **Speaker of** ***National Assembly -vs-Attorney General and 3 Others (2013) e KLR*** stated as follows;

"Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to

assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering his Opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act. "

62. The Court went on to state as follows;

"Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signaled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of "right" and "wrong" in such cases, short of a resolution in plebiscite, is only the Courts."

63. We are duly guided and this Court vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under **Article 165(3)** of the **Constitution**, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the Petition before us alleges a violation of the Constitution and violation of the Constitution by the Respondent and in the circumstances, it is our finding that the doctrine of separation of power does not inhibit this Court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of the Constitution. In fact the invitation to do so is most welcome as that is one of the core mandates of this Court.

64. The submission made by Mr. Kilukumi that **Article 117** of the **Constitution** as well as the **Privileges Act** limit the jurisdiction of this Court to question the acts of the Senate cannot however be wished away. We say so because **Article 117** of the **Constitution** provides that;

"(1) There shall be freedom of speech and debate in Parliament.

(2) Parliament may, for the purpose of the orderly and effective discharge of the business of parliament provide for the powers, privileges and immunities of parliament, its committees, the leader of the majority party, the leader of the minority party, the chairpersons of committees and members."

65. On the other hand, **Section, 14, 15** and **29** of the **Privileges Act** provides;

"12. <u>Proceedings not to be questioned</u>

No proceedings or decision of the Assembly or the Committee of Privileges acting in accordance with this Act shall be questioned in any Court.

14. <u>Power to order attendance of witnesses</u>

(1) The Assembly or any standing committee thereof may, subject to the provisions of Sections 18 and 20, order any person to attend before it and to give evidence or to produce any paper, book, record or document in the possession or under the control of that persons.

(2) The powers conferred by subsection (1) on a standing committee may be exercised by any other committee which is specially authorized by a resolution of the Assembly to exercise those powers in respect of any matter or question specified in the resolution.

15. <u>Attendance to be notified by summons</u>

(1) Any order to attend to give evidence or to produce documents before the Assembly or a Committee shall be notified to the person required to attend or to produce the documents by a summons under the hand of the Clerk issued by the direction of the Speaker.

(2) In every summons under subsection (1) there shall be stated the time when and the place where the person summoned is required to attend and the particular documents which he is required to produce, and the summons shall be served on the person mentioned therein either by delivering to him a copy thereof or by leaving a copy thereof at his usual or last known place of abode in Kenya with some adult person; and there shall be paid or tendered to the person so summoned. If he does not reside within four miles of the place of attendance specified in the summons, such sum for his expenses as may be prescribed by Standing Orders of the Assembly.

(3) A summons under this Section may be served by an officer of the Assembly or by a police officer.

29. Courts not to exercise jurisdiction in respect of acts of Speaker and officers of the Assembly

Neither the Speaker nor any officer of the Assembly shall be subject to the jurisdiction of any Court in respect of the exercise of any power conferred on or vested in the Speaker or such officer by or under this Act or the Standing Orders."

66. In setting out the above sections of the law verbatim, we are alive to the fact that although these provision were enacted under the **Repealed Constitution, Section 7** of the **Sixth Schedule** to the **Constitution** provides that any law in existence before the promulgation of **Constitution 2010**, shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution 2010. In that regard, **Article 93(1)** of the **Constitution** establishes the Parliament of Kenya which consists of both the Senate and the National Assembly. We thus find that the provisions of the Privileges Act are applicable to the Senate to the extent established by **Section 7** of the **Sixth Schedule** aforesaid.

67. As to the place of the privileges and immunities provided for under **Article 117** and **Sections 12, 14, 15 and 29** of the **Privileges Act**, and legal proceedings in respect to acts of the Senate and a County Assembly, the High Court in ***Martin Nyaga Wambora vs County Assembly of Embu & 4 Others Kerugoya H.C. Petition No.3 of 2014*** stated as follows;

"We have no doubt in our minds that the Senate and the National Assembly hold, exercise and enjoy privileges, immunities and powers bestowed on them, their members and officers in terms of the provisions of the National Assembly (Powers and Privileges) Act. Indeed in so holding we are in agreement with the reasoning of Dumbutshena, Chief Justice of Zimbabwe, in Smith vs Mutasa and Another (1990) LRC 87 where he cited with approval the holding of Evans CJHC in Re Clarke et all and AG of Canada (1978 81DLR (3d) 33 at 51 where he stated as follows:

"In dealing with the issue of parliamentary privileges, counsel for the respondent submitted that the Courts have no jurisdiction to determine the nature and extent of such privileges. He argued that Parliament is the source and the sole judge of the privileges of its Members. This would create an interesting obstacle for the applicants in the present case. I would point out, however, that I am asked to interpret Standing Order (SOR) /76-644. In doing so, I am asked to determine whether SOR/76-644 overrides or abridges existing parliamentary privileges. In this respect, I do not consider that I am infringing on the jurisdiction of Parliament… Historically, there has always been some question whether the Courts have jurisdiction to determine the nature and extent of parliamentary privilege. As the supreme law –giving body, it would seem only natural that Parliament should be the source of authoritative guidelines on the subject. On the other hand, there is something inherently inimical about Members of Parliament determining the nature and extent of their own rights and privileges. The Courts have seized on this to consistently review the nature and extent of parliamentary privilege."

68. Dumbutshena C. J. in ***Smith vs Mutasa Case (supra)*** put the matter beyond debate when he reasoned thus;

"….the Courts apparently have an implicit jurisdiction to deal with questions of parliamentary privilege. Notwithstanding the submission of counsel for the Respondent, I have no hesitation in proceeding to evaluate the effect of SOR/76-644 on the privileges of Members of Parliament. Roman Corp. Ltd et al v Hudson's Bay Oil & Gas Co Ltd et al(1971) 2 OR 418, 18DLR (3d) 134 (Houlden J. (Ont H.C.); affirmed (1972) 1 OR 444, 23 DLR (3d) 292(C.A.); affirmed (1973)SCR 820, 36 DLR(3d) 413 (discussed, infra), is sufficient authority for the proposition that the Courts of law in Canada have jurisdiction to adjudicate on matters involving the privileges of members of parliament.'

69. Having been persuaded by the reasoning in ***Smith vs Mutasa Case (supra),*** the High Court in the ***Wambora Case (supra)*** stated as follows;

"We appreciate that privileges, immunities and powers are such as those provided for by the National Assembly (Powers and Privileges) Act are essential for the proper governance and protection of Parliament because parliament needs them for the control of its internal procedures and for complete freedom of expression in their deliberations inside the National Assembly. It is undisputed that the resolution to impeach the 1st Petitioner was made within the proceedings of the Senate. We are clear in our minds that should the Senate violate the Constitution and the law in the course of its proceedings it falls upon the judiciary to say so and to pronounce such violation. The Court cannot ignore any breaches of the Constitution in favour of parliamentary privilege. The Constitution is the Supreme law of the land and it binds all persons and all state organs at both levels of Government…"

70. The Court then went on to conclude that;

"If the Senate violates the Constitution, the Courts being the guardian of the Constitution must step in and lift the veil on the doctrine of parliamentary privilege if necessary. We have pondered deeply on the issue and we agree with the Zimbabwean Supreme Court that, Members of Parliament, the Speaker and officers in his office, can only enjoy immunity from court action if their decisions or actions are made in accordance with the letter and spirit of the Constitution. We therefore find that Sections 12 and 29 of National Assembly (Powers and Privileges) Act on parliamentary privilege do not oust the jurisdiction of this Court to inquire into the legality of the 1st, 2nd, 5th and 6th Respondents actions."

71. We agree entirely with the Court and adopt the same reasoning here as if it was ours. To our mind, this Court has the power to enquire into the constitutionality of the actions of the Senate notwithstanding the privilege of *inter alia*, debate accorded to members of the Senate. That finding is fortified under the principle that the Constitution is the Supreme Law of this country and the Senate must function within the limits prescribed by the Constitution. In cases where it has stepped beyond what the law and the Constitution permit it to do, it cannot seek refuge in illegality and hide under the doctrine of parliamentary privilege. That is all there is to say on that subject.

Whether the Petition is *res judicata*

72. It was Mr. Kilukumi's further submission that the issue as to whether the Senate can summon Governors has been settled by this Court in ***Kerugoya H.C. Petition No.8 of 2014*** and as such the same issue cannot be entertained again as it is barred by the doctrine of *res judicata*.

73. In response to this issue, Mr. Ahmednassir claimed that the Petition is not *res judicata* and that the judgment in ***Kerugoya H.C. Petition No.8 of 2014*** was given *per incuriam*. We shall now proceed to address the applicability of the doctrine of *res judicata* and later the meaning of a decision per *incuriam* in the context of the instant Petition. The doctrine of *res judicata* in civil law is provided for under **Section 7** of the **Civil Procedure Act 2010**, as follows;

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and

finally decided by such court."

74. The rationale behind the provision of **Section 7** of the **Civil Procedure Act** is that if the controversy in issue is finally settled or determined or decided by a competent Court, it cannot be re-opened. The rule of *res judicata* is also based on two principles: that there must be an end to litigation and a party should not be vexed twice over the same cause. This was the holding of the Court of Appeal in ***Omondi v National Bank of Kenya Ltd and Others (2001) EA 177.***

75. Applying the above principles, can the present Petition , in the above context, be said to be barred by the principle of *res judicata*?

76. In determining this question, we shall first consider the issue as to whether the parties in this Petition are the same as those in ***Kerugoya H.C. Petition No.8 of 2014.*** The Petition herein has been filed by the Council of Governors and six Governors, namely; Dr. Alfred Mutua, Patrick Simiyu Khaemba, Ahmed Abdullahi Mohammed, Wycliffe Oparanya, James Omariba Ongwae and Martin Nyaga Wambora as against the Senate. In ***Kerugoya H.C. Petition No.8 of 2014***, the Petition had been filed by a non-governmental organization, International Legal Consultancy Group, which had described itself in that case as a public interest organization that champions the observance of the rule of law and the Respondents were the Senate and the Clerk of the National Assembly. According to Mr. Kilukumi, the Petitioners in the instant Petition were the direct and immediate beneficiaries of the judgment in ***Kerugoya H.C. Peititon No.8 of 2014*** and that the same advocates representing the instant Petitioners also represented the Petitioner in ***Kerugoya H.C. Petition No.8 of 2014***.

77. To begin with, we do not think that an advocate can be condemned for representing different parties or even the same parties in court proceedings as alleged by Mr. Kilukumi. In any case, every litigant has a right to choose a counsel of their choice in proceedings before any Court in Kenya and we have never understood representation to be a ground for invoking the doctrine of *res judicat,*. attractive as the argument may seem.

78. Having said that, *prima facie*, we do not have any evidence before us to demonstrate the nexus between the Petitioner in ***Kerugoya H.C. Petition No.8 of 2014*** i.e. International Legal Consultancy Group and the instant Petitioners so that we can conclusively determine that any of the Petitioners is claiming on behalf of the other or as the other's agent. Having held so, it follows that the first hurdle to the doctrine of *res judicata* can only be determined in the negative.

79. The second barrier to the doctrine of *res judicata* is the requirement that the issue in the present proceedings must have been the same as in a previous proceeding.

80. In that regard, we deem it appropriate to reproduce, verbatim, the prayers in both Petitions. In ***Kerugoya H.C. Petition No.8 of 2014***, the Petitioners had sought the following orders;

"(i) A declaration that resonating the intention of Articles 2, 3, 10 and within the intendment of Articles 159(1), 160(1) and 259 of the Constitution of Kenya if the Constitution makes provision as to how the legislature should conduct its internal affairs or as to the mode of the exercise of its legislative powers, a Court of law can exercise its jurisdiction to ensure the legislature comply with the Constitutional requirement.

(ii) A declaration that resonating the intention of Article 96 and 226(2) of the Constitution of Kenya and Section 148 of the Public Financial Management Act 2012 and Section 30 of the County Governments Act, 2012, the Senate cannot summon Governors to personally appear before it to answer questions on County Government finances.

(iii) A declaration resonating the intention of Article 96 and Article 226(2) of the Constitution of Kenya that the Senate cannot summon an accounting officer of the County Government to answer questions on County financial management. This is an exclusive power of the County Assembly.

(iv) A declaration resonating the intention of Article 96 of the Constitution and within the meaning of Article 226(2) of the Constitution of Kenya, the Senate's oversight role over nationally collected revenue to Counties is not identical to the County Assembly's oversight over the executive.

(v) A declaration resonating the intention of Article 96 of the Constitution and within the meaning of Article 226(2) of the Constitution of Kenya, the Senators power is limited to oversight over national agencies which manage national revenue allocated to Counties such as the National Treasury.

vi. ***A declaration that the Senate can only exercise its powers under Article 125 of the making a determination with regard to an impeachment, intervention in a County, suspension of a County, or for purposes of developing national legislation necessary for more prudent management of finances at the County level.***

vii. ***A permanent injunction to be issued to restrain the Senate from summoning County Governors to appear before it to answer questions on County public financial management.***

viii. ***A permanent injunction to be issued to restrain the Senate from summoning County Executive Committee Members to appear before it to answer questions on County public financial management.***

ix. ***A permanent injunction be issued to restrain the Senate from summoning accounting officers at the County level to appear before it to answer questions on county public financial management.***

x. ***There be no orders as to costs."***

81. In the instant Petition, the Petitioners have sought this Court's intervention in determining the following questions;

"(1) Considering the provisions of Article 6(2) and 189(1) of the Constitution, what is the scope of oversight powers of the Senate under Article 96(4) of the Constitution with respect to County Governments?

(2) What is the meaning of the phrase 'the Senate represents the Counties and serves to protect interests of the Counties and their Governments' as provided for in Article 96(1) of the Constitution?

(3) What is the meaning of the phrase 'the accounting officer of a County public entity shall be account table to the County Assembly for its financial management' as provided for at Article 226(2) of the Constitution of Kenya?

(4) Resonating the intention of Article 96 and 226(2) of the Constitution of Kenya whether an accounting officer of the County Government is accountable to the Senate on its financial management.

(5) Resonating the intention of Article 96, 226(2) and in view of the provisions of Article 6(2), 179 and 189 of the Constitution of Kenya whether the Senate can summon a governor to personally appear before it to answer questions on County public financial management?

(6) Whether in accordance with the provisions of Article 179 (4) of the Constitution, the governor is an accounting officer?

(7) Considering the provisions of Article 96 and 225 of the Constitution, whether the Senate can pass a resolution to direct the National Treasury and the Controller of Budget not to release funds to Counties?"

82. The Petitioners have then asked the Court, upon answering the above questions, to issue the following orders;

"(a) A declaration that in view of the provisions of Article 6(2) of the Constitution which provides that the Governments at the national and County levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and co-operation, the Senate cannot exercise powers under Articles 125 of the Constitution in a manner that cripples County Governments.

(b) A declaration that the Senate is bound by the provisions of Article 189 (1) of the Constitution to perform its functions and exercise its powers, in a manner that respect the functional and institutional integrity, as well as the constitutional status and institutions at the County level.

(c) A declaration that resonating the intention of Article 96 of the Constitution and 226(2) of the Constitution of Kenya and Section 148 of the Public Financial Management Act 2012, the Senate cannot summon Governors to personally appear before it to answer questions on County Government finances in total disregard of the procedure and requirements of public finance management that is stipulated by the Public Financial Management Act 2012.

(d) A declaration that the Senate is bound by the methods, procedures and requirements of the Public Finance Management Act 2012 when undertaking its oversight and summoning powers.

(e) A declaration that resonating the intention of Article 96 of the Constitution and 226(2) of the Constitution of Kenya and Section 148 of the Public Financial Management Act 2012 it is proper, legal, and constitutional for Members of the Executive Committee responsible for finance and the Chief Officers responsible for finance to appear before the Senate or any of its Committee to answer on County Government finances and to generally provide information that helps the Senate to undertake its oversight functions as stipulated in Article 96 of the Constitution.

(f) A declaration that resonating the intention of Article 6(2), 96, 174, 185(3) and 226(2) of the Constitution of Kenya, the Senate cannot summon an accounting officer of the County Government to answer questions on County financial management, at the first instance. It must first allow the oversight and legislative mechanisms at the County level to be concluded given that these Governments are functional distinct and are based on the principle of Separation of Powers.

(g) A declaration that resonating the intention of Article 6(2), 96, 174, 185(3) and 189 of the Constitution and within the meaning of Article 226(2) and Article 96(4)of the Constitution of Kenya, the Senate's oversight role over nationally collected revenue to Counties is not identical to the County Assembly's oversight over the executive.

(h) a declaration that resonating the intention of Article 96(4) of the Constitution and in view if the provisions of Article 185(3) and Article 226(2) of the Constitution of Kenya the Senate's power is limited to oversight over national agencies which manage national revenue allocated to Counties such as the National Treasury.

i. ***A declaration that resonating the intention of Article 6(2), 189(1), 174 and 96(4) of the Constitution and in view of the provisions of Article 185(3) of the Constitution of Kenya the County Assembly is the role organ that can undertake oversight over the County Executive.***

j. ***A declaration that the Senate can only exercise it powers under Article 125 of the Constitution to scrutinize County financial and other records for purposes of making a determination with regard to an impeachment, interventions in a County, suspension of a County, or for purposes of developing national legislation necessary for more prudent management of finance at the County level.***

k. ***A declaration that the Senate does not have sole constitutional powers to direct National Treasury and Controller of Budget not to release funds to Counties without following the provisions of Article 225 of the Constitution.***

- ***A declaration that stoppage of funds to a County public entity can only be done by following the***

provisions of Article 225 of the Constitution.

m. ***A permanent injunction be issued to retrain the Senate from summoning County Governors to appear before it to answer questions on County public financial management.***

- ***A permanent injunction be issued to retrain the Senate from summoning accounting officers at the County level to appear before it to answer questions on County public financial management.***

❍ ***An order or certiorari to quash the Resolution of the Senate issued on 7th August 2014 that purports to direct the National Treasury and the Controller of Budget not to release funds to Kiambu, Bomet, Kisumu and Murang'a Counties.***

p. ***There be no order as to costs."***

83. Looking at the prayers in the two Petitions, it is clear to us that in both Petitions, the main issue for determination by the Courts were whether the summoning of Governors by the Senate together with County Executive Committee Members of Finance to answer questions regarding County finances and fiscal management in their respective Counties, is constitutional or not.

84. However, Mr. Ahmednassir submitted that the following issues were not the subject of determination in ***Kerugoya H.C. Petition No.8 of 2014***;

i. ***Whether Governors, who are not the Accounting Officers of County Governments, can be summoned to answer queries relating to the accounts of a County Government.***

ii. ***Whether the Senate can usurp and purport to exercise an oversight mandate vested in the County Assemblies by virtue of Article 226(2) of the Constitution.***

iii. ***Whether Governors can lawfully be held accountable for transactions in the financial year during which the defunct local authorities together with the Transition Authority (in line with its functions under Section 7 of the Transition to Devolved Governments, Act, 2012) were in charge of county resources.***

iv. ***The Petition also seeks to challenge a resolution passed by the Respondent on 7th August 2014, purporting to ask the Controller of Budget not to release funds to County Governments, in contravention of the provisions of Article 225 of the Constitution.***

85. Looking at the above said issues again together with the questions the Petitioners have sought for determination as stated elsewhere above, it is clear that those issues were not in contention within ***Kerugoya H.C. Petition No.8 of 2014***. In addition, there is a totally new issue before us as regards the constitutionality of the resolution passed by the Respondent purporting to ask the Controller of Budget not to authorize withdrawal of funds by specified Counties.

86. We say so well aware that the substratum of the Petitioners' case is the summoning of Governors by the Senate to answer financial management queries. Although the issue whether Governors can be summoned by the Senate was addressed considerably in all its facets in ***Kerugoya H.C. Petition No.8 of 2014***, it is our finding that the questions that have been raised for interpretation now were largely not before the High Court at Kerugoya.

87. In ***E.T vs Attorney General (2013) e KLR,*** while considering the principle that litigation must come to an end, Majanja J stated that;

"The Courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the Court in another way and in the form of a new cause of action which has been resolved by a court of competent jurisdiction."

88. Similarly, the same finding was the gist of the decision in **Njangu vs Wambugu and Another Nrb HCC No. 2340 of 1991** where Kuloba J stated as follows as regards the importance of having a closure to litigation;

"If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his aces some cosmetic face lift on every occasion he comes to Court, then I do not see the use of the doctrine of res judicata."

89. We must agree with the reasoning of the learned judge and are also alive to the decision of the Court of Appeal in **Pop In (Kenya) Ltd & 3 Others vs Habib Bank AG Zurich (supra)** where the Court on the doctrine of *res judicata* stated that;

"… there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of res judicata is the judgment of Wigram VC in Henderson v Henderson (1843) Hare 00, 115, where the judge says:

"Where given matter becomes the subject of litigation in, and of adjudication by, court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies, except in special cases, not only to points which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time"."

90. We are guided and while we have no reason to disagree with the above findings and in the context of our finding that there are new issues placed before us for determination, we are also aware of the general rule that r*es judicata* is applied sparingly in constitutional matters. In ***Okiya Omtatah Okoiti and Another v Attorney General & 2 Others Petitions No. 593 of 2013*** Lenaola J stated as follows;

"Whereas these principles [of res judicata] have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of res judicata can and should only be invoked in constitutional matters in the clearest of cases and where a party is relitigating the same matter before the Constitutional Court and where the Court is called upon to redetermine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious."

We reiterate the same sentiments in this Petition.

91. Simply put therefore, and in the circumstances of the present case, it is our finding that the issues raised in this Petition are not barred by the doctrine of *res judicata* and having expressed ourselves as above on that issue, we would have stopped there subject to what we shall say later about the constitutionality of the summons issued to Governors. However, Mr. Ahmednassir submitted that the judgment in ***Kerugoya H. C. Petition No.8 of 2014*** was given *per incuriam* and must we must now pause to determine that issue.

Whether the judgment in *Kerugoya Petition No.8 of 2014* is *per incuriam*

92. The Supreme Court in ***Jasbir Singh Rai & Others vs Tarlochan Rai Estate & 4 Others (supra)*** considered the meaning of a decision *per incuriam* and stated as follows in that regard;

"a decision per incuriam is one rendered in ignorance of a constitutional or statutory prescription or of a binding precedent; but if a decision be such, this, by and of itself, does not, perforce, render it 'inappropriate', or 'mistaken', or 'wrong' – for the decisions could still rest upon its own special merits, and be in every respect sustainable as a matter of principle."

93. Similarly, the House of Lords in ***Young vs Bristoal Aeroplane Co Ltd (1944) 2 ALL ER 293*** stated as follows in regard to the circumstances in which a *per incuriam* decision can be ignored.

"On a careful examination of the whole matter we have come to the conclusion that this Court is bound to follow previous decision of its own as well as those of Courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are [as may be summarized]; (i) The Court is entitled, and bound to decide which of two conflicting decisions of its own it will follow. (ii) The Court is bound to refuse to follow a decision of its own decision of the House of Lords. (iii) The Court is not bound to refuse to follow a decision of its own if it is satisfied that the decision was given per incuriam."

94. Applying the above principle in the instant Petition, was the judgment in ***Kerugoya H.C. Petition No. 8 of 2014*** given *per incuriam*? We think not. The High Court in Kerugoya in ***Petition No.8 of 2014*** gave its judgment on the constitutionality of the Senate summoning the Governors and in doing so stated as follows;

"Logically, in exercise of its powers under Article 125 of the Constitution, the Senate is empowered to summon any person, including the accounting officers of the County Governments if such officers can provide information or evidence in relation to the National revenue allocated to a particular County.

We have also examined Section 30(3)(f) of the County Governments Act of 2012. The same states that the County Governor shall be accountable for the management and use of County resources. By implication, this provision means that the County governor as the overall head of the County is accountable for the utilization of county resources including the National revenue allocated to his or her respective county. Since the accounting officers at the County are directly answerable to the County Assembly for the management of financial resources under the Public Finance Management Act 2012, who then is the Governor accountable to under Section 30(3)(f)? In our considered view, since the County Governors are not answerable to the County Assembly in terms of fiscal management of the County resources under Section 149 of the Public Finance Management Act 2012, they must be held to account by the Senate for the National revenue allocated to their respective Counties in view of the provisions of Section 30(3)(f) of the of the County Governments Act, 2012 as read together with Article 10(2)(c) on the National Values and Principles of Governance. The Governors being State Officers are bound by the national values of transparency, accountability and observance of good governance when performing their duties as the Chief Executive Officers of the County Governments."

The Court went to state that;

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

accountable exercise of power; and to enhance checks and balances of powers, will be defeated.

The position advance by the Petitioner that the County Governors cannot be summoned by the Senate by virtue of Article 226(2) of the Constitution, Section 148 of the Public Finance Management Act, 2012 and Section 30 of the County Government Acts 2012 is therefore untenable. "

95. The Court then concluded on that issue at paragraph 66 as follows;

96. ***"In conclusion, we find that the Senate acted within its constitutional mandate under Article 96(3) and Article 125 of the Constitution when it issued the summons dated 8th February, 2014 to the Governors and the County Assembly Members of Finance of the respective Counties with regard to the report by the Controller of Budget."***

96. Inspite of the above finding, Mr. Ahmednassir argued that the above decision was made *per incuriam* and was given contrary to the express provisions of **Articles 1, 6, 96** and **226** of the **Constitution.** He specifically took issue with paragraph 67 of the judgment where the learned judges had stated as follows;

"Having made this finding, we wish to make a few observations. As stated earlier, Article 125 of the Constitution grants the Senate and the National Assembly and their respective Committees the power to summon any person to give evidence or provide information with regard to a matter they are seized of. This constitutional power must be respected by all public officials at all times. However, it is the respectful view of this Court that when these powers are exercised in reference to members of the County Government, there must be a measure of restraint by the Senate. Put another way, when the Senate uses its powers to summon with regard to its oversight mandate under Article 96(3), it must not do so arbitrarily and capriciously. It must exercise caution and refrain from acting in a manner that could be construed as micro-managing devolved units at the County level. It must endeavor to sustain the spirit and letter of the Constitution as enshrined in Article 6(2) which states thus; 'the Governments at the National and County levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and co-operation'."

97. Looking at the above paragraph (67), it is clear to us that it was a statement made as *obiter dictum* and that is all there is to it. In the event, we do not think that the High Court in ***Kerugoya H.C. Petition No.8 of 2014*** made its substantive decision *per incuriam*, the *obiter dictum* notwithstanding, and as can be seen from the judgment, the learned judges considered the arguments made before them and applied their collective judicial mind to the submissions made by the Petitioners and also considered the provisions of the **Public Finance Management Act,** the **County Government Acts** as well as the Constitution, and we can therefore conclude that the judgment was founded on valid pillars of the law. In that regard, the words of the Supreme Court in ***Jasbir Singh Rai & Others vs Tarlochan Rai Estate & 4 Others (supra)*** ring loud in our ears. It stated thus;

"***Comparative judicial experience shows that the decision of a superior Court is not to be perceived as having been arrived at per incuriam, merely because it is thought to be contrary to some broad principle, or to be out of step with some broad trend in the judicial process; the test of per incuriam is a strict one – the relevant decision having not taken into account some specific applicable instrument, rule or authority. This position is illustrated by the English House of Lords judgment in Cassell & Company Limited vs Broome [1972] 2 WLR 645, in which the Court of Appeal's perception of Rookes vs Barnard [1964] AC 1129 as being per incuriam was the subject. The relevant passage (per Lord Reid) reads;***

'I am driven to the conclusion that when the Court of Appeal described the decision in Rookes vs Barnard as decided per incuriam, or 'unworkable' they really only meant that they did not agree with it …

When this House undertakes a careful review of the law it is not to be described as acting per incuriam or ultra vires if it identified and expounds principles not previously apparent to the counsel who

addressed it or to the judges and text-book writers whose divergent or confusing expressions led to the necessity for the investigations."

98. We have seen no reason to depart from the above guiding principles and having found that the decision in ***Kerugoya H.C. Petition No.8 of 2014*** was not made *per incuriam*, the next issue is whether we can rehear the issue of the constitutionality of the summons issued to Governors in the present Petition and as urged by Mr. Ahmednassir, finally resolve that issue.

99. The question in that regard is whether we, as a bench of three judges, can depart from a decision of a similar bench of the same Court. This question, which touches on the meaning of precedence, has been repeatedly addressed by scholars and jurists in the past, and the answer to it is now obvious. In ***Benjamin Cardozo's 'The Nature of the Judicial Process', New Haven; Yale University Press (1921) p. 149,*** the learned author stated as follows;

"In these days, there is a good deal of discussion whether the rule of adherence to precedent ought to be abandoned altogether. I would not go so far myself. I think adherence to precedent should be the rule and not the exception. I have already had occasion to dwell upon some of the considerations that sustain it. To these I may add that the labour of judges would be increased almost to breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."

100. Further, in ***R vs Knuller (Publishing, Printing and Promotions) Ltd (1973) A.C 435,*** Fenton L J delivering the judgment of the Court stated as follows;

"It was decided by this House in Shaw vs Director of Public Prosecution [1962] A.C 220 that conspiracy to corrupt public morals is a crime known to the law of England …

"I dissented in Shaw's case. On reconsideration I still think that the decision was wrong and I see no reason to alter anything which I said in my speech. But it does not follow that I should now support a motion to reconsider the decision. I have said more than once in recent cases that our change of practice in no longer regarding previous decision of this House as absolutely binding does not mean that whenever we think that a previous decision was wrong we should reverse it. In the general interest of certainty in the law we must be sure that there is some very good reason before we so act… I think that however wrong or anomalous the decision may be it must stand and apply to cases reasonably analogous unless or until it is altered by Parliament."

101. We are in agreement with the above reasoning and the message sent is simply that in common law jurisdictions, certainty in law has to be maintained but within certain limits. Thus in ***Fitzleet Estates vs Cherry (1971) 1 WLR 1345***, Lord Wilberforce expressed himself as follows;

"Nothing could be more undesirable, in fact, than to permit litigants, after a decision has been given by this House with all appearance of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected …Doubtful issues have to be resolved and the law knows no better way of resolving them than by the considered majority opinion of the ultimate tribunal. It requires much more than doubts as to the correctness of such opinion to justify departing from it."

102. At home, the Supreme Court in ***Jasbir Singh Rai & Others vs Tarlochan Rai Estate & 4 Others (supra)*** stated as follows on the same issue;

"This is a clear perception of the doctrine of precedent in the functioning of the superior Courts in the common law tradition. The message is simply this; As a matter of consistent practice, the decisions of the higher Courts are to be maintained as precedent; and the foundation laid by such Courts is in principle, to be sustained. This, of course, leaves an opening for the special circumstances which may occasionally dictate a departure from previous decisions."

103. We are guided and what emerges from the above exposition of the law is that a Court is bound to follow the decisions of a higher Court, its own decision, as well as those of Courts of co-ordinate jurisdiction. However, a Court can only depart from the decisions of a higher Court or its earlier findings, if there is a substantial cause and in exceptional circumstances which may compel it to do so. Do such exceptional circumstances arise in the instant Petition? Our answer is in the affirmative and we shall say why shortly.

104. As can be discerned from the pleadings in the instant Petition and from the judgment in ***Kerugoya H.C. Petition No.8 of 2014***, now before the Court; the facts in the Kerugoya Petition were that nine Governors for the Counties of Bungoma, Bomet, Kiambu, Kitui, Kisumu, Nakuru, Narok, Tana River and Wajir were summoned together with their respective County Executive Committee Members for Finance to the Senate through summons dated 8th February 2014, or thereabout to respond to various issues concerning finance and fiscal issues in their respective Counties and to appear on diverse dates from 19th February 2014 onwards. In the instant Petition, on the other hand, the Senate through witness summons required the 2nd to the 7th Petitioners to appear before the Senate Committee on County Public Accounts and Investments and answer queries on County financial management as raised in the Report of the Auditor General for the financial year 2012/2013 and for financial year 2012/2013 in regard to the now defunct local authorities.

105. To our collective mind therefore and as correctly pointed out by Mr. Ahmednassir, the question of powers of the Senate to question Governors in regard to financial management by the now defunct local authorities being raised in the present Petition as well as the constitutionality of the act of the Senate to order the Controller of Budget to suspend withdrawal of funds by the specified Counties in this Petition have never been determined by any competent Court and we are obligated to do so.

106. We are guided in taking this approach by the decision in **Siri Ram Kaura vs. M J E Morgan [1961] EA 462** in which the then East African Court of Appeal stated as follows:

"The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. <u>The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before...The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.".</u>

107. While therefore it is clear to us that the issue of summons issued to Governors by the Senate in alleged exercise of its powers under **Article 125** of the **Constitution** is in dispute in both Petitions, we are inclined to find that since the parties in each Petition and the facts in support thereof are substantially different, and could not have formed the subject of the previous Petition, the law may also well apply to each of those facts differently. In saying so, we are conscious of our findings above on *res judicata* but we are also of the view that a party in a court of law should not be left without a remedy and that is the essence of the doctrine of *ubi jus ibi remedium*. In the event, this Court cannot and should not be a bar to a party's right to have a dispute that can be

resolved by the application of law determined by a Court of competent jurisdiction. To find otherwise would in essence amount to denying such a party its right to access justice as provided for under **Article 48** of the **Constitution**.

108. We are also alive to the provisions of **Article 259(1)** of the **Constitution** which provide that ***"This Constitution shall be interpreted in a manner that…permits the development of the law***". If this Court is to develop the law, it must have liberty to depart from its previous decisions in very exceptional circumstances - See ***Jabir Singh Case (supra***). We also note that none of the parties urged that it was not possible for this Court to depart from the decisions of any of the Courts with concurrent jurisdiction and as we also understand it, decisions of such Courts are merely persuasive and only those of a higher Court are binding.

109. Having found as we have, we now proceed to determine the merits or otherwise of the Petition before us. In that regard, we shall start by determining the first question posed for interpretation by the Petitioners; the role of the Senate vis-à-vis County Governments in financial matters.

The Role of the Senate

110. Both Mr. Ahmednassir and Mr. Kilukumi were in agreement that the Senate's role is well defined in **Article 96** of the Constitution and is twofold; to protect the interests of the Counties at the national level and to exercise oversight of national revenue allocated to Counties by the National Government. Their point of departure is in the submission made by Mr. Ahmednassir that the Constitution does not vest the Senate with an oversight role with respect to expenditure over devolved funds, unlike the National Assembly which has an oversight role over expenditure of national funds under **Article 95(4) (c)** of the **Constitution**. That the oversight role now claimed by the Senate is in fact vested on the respective County Assemblies under the provisions of **Article 226(2)** of the **Constitution.**

111. The starting point for us is therefore the provisions of **Article 96** of the **Constitution** which expresses the role of the Senate in the following terms;

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.***

112. In interpreting the above provision, the High Court in ***Kerugoya H.C. Petition No. 8 of 2014*** stated as follows;

"It is not in doubt that the Senate represents the Counties, and serves to protect the interests of the counties and their Governments at the National level. It is mandated to participate in the law-making function of Parliament by considering, debating and approving Bills concerning the Counties. The Senate also determines the allocation of National revenue among counties and exercises oversight over National revenue allocated to the County Governments…In our considered view, the Senate and the County Governments are constitutionally designed to work together in ensuring the fruits of devolution. It is therefore our position that the Senate, which is at the National level of Government, has a critical role in ensuring that the counties interests are protected at the National Level of

Government."

113. The Supreme Court has also interpreted the above provision in ***Speaker of the Senate & Another v Attorney General, Advisory Opinion No. 2 of 2013*** in the following terms;

"***It is evident that the Senate, though entrusted with a less expansive legislative role than the National Assembly, stands as the Constitution's safeguard for the principle of devolved government. This purpose would be negated if the Senate were not to participate in the enactment of legislation pertaining to the devolved units, the counties [Article 96(1), (2) and (3)]."***

114. We agree with the above holdings and the first question we must answer relates to the meaning of the phrase***, "The Senate represents the Counties, and serves to protect the interests of the Counties".*** This phrase is not difficult to understand at all and we find it to be straight forward. To our mind, it means that the Senate is the organ that relates with the National Government at the national level over county interests. In so relating, it ought to provide sufficient protection to devolved Governments and ensure that operations at the county level are as near normal as possible by ensuring that Counties have sufficient resources to carry out their respective functions. In that regard the Court in ***Kerugoya H.C. Petition No. 8 of 2014*** stated as follows;

115. ***"Under Article 217 of the Constitution, the Senate is accorded the powers to determine and allocate the National revenue to, and between, counties once every five years through a resolution. The Senate makes the initial decision through requesting and considering the recommendations of the Commission on Revenue Allocation taking into account the Constitutional principles outlined in Article 203 of the Constitution; considering public input, and inter alia the input of County Governors. The Senate's decision is final unless two-thirds of the National Assembly reject or change the basis of allocation."***

115. Further to the above, we find that the Senate protects the interests of the Counties by participating in the enactment of legislation concerning Counties as provided for under **Articles 109 - 113** of the **Constitution**. In that regard therefore the Senate represents the interests of the Counties at the national level and serves to advance their interest and should not ever be seen to be derailing them.

116. We therefore sum it all up with the words of the Chief Justice, Dr. Willy Mutunga, in ***Speaker of the Senate & Another v Attorney General, Advisory Opinion No. 2 of 2013*** that; "***Article 96 of the Constitution represents the raison d'etre of the Senate as 'to protect' devolution'."*** In our view therefore, even when there is a semblance of threat to devolution and interests of the Counties, it is the constitutional duty of the Senate to guard Counties jealously against such a danger as it is the body constitutionally mandated to do so.

117. Having answered that question as we have done, the next question relates to the meaning of **"oversight powers of the Senate"** over national revenue allocated to counties.

118. If we understood the Petitioners well, they were in agreement that the Senate has a mandate to determine allocation of national revenue to respective Counties but their quarrel seems to be over the Senate's role to exercise oversight over expenditure of such revenue. In their view, such an oversight role is vested on the County Assemblies and the National Assembly and not the Senate. That the Senate's role is only limited to oversight over national agencies that manage national revenue allocated to Counties such as the National Treasury.

119. In our understanding of the above issue, it is evident and clear under the provision of **Article 95(4)(c)** of the Constitution that the National Assembly has the mandate to exercise oversight over national revenue and expenditure. This Article provides that; "***The National Assembly exercises oversight over national revenue and expenditure".***

120. As to the power of County Assemblies to exercise oversight over County funds **Article 185(3)** of the **Constitution** provides thus;

121."***A County Assembly, while respecting the principle of the separation of powers, <u>may</u> exercise oversight over the county executive organs."***

121.To our mind, this provision is limited in scope and its application is discretionarily to the County executive organs and does not apply as regards the wide powers the Senate and National Assembly have over national revenue as seen from both **Articles 96(3) and 95(4)(c)** of the Constitution.

122.Further, the Petitioners made Submission to the effect that **Article 226(2)** of the **Constitution** mandates County Assemblies to exercise oversight over national revenue allocated to Counties. For avoidance of doubt, **Article 226(2)** provides that;

"The accounting officer of a national public entity is accountable to the national assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management".

123.We find this provision to be plain, simple and clear; that an accounting officer for a County should be able to explain his decisions for financial management to a County Assembly. **"Accountable"** and **"oversight"** are two different terminologies. The drafters of the Constitution could not have used the two to mean the same thing. Had they intended that a County Assembly would exercise an oversight role over national revenue allocated to Counties, nothing would have been easier than for them to say so. We are aware in that regard of the rule of constitutional interpretation that several provisions of the Constitution must be read together and no one particular provision destroying each other but each sustaining the other - See ***Tinyefunza v Attorney General Petition no. 1 of 19967 (1997 UGCC 3).*** This rule is now popularly known as the rule of harmony.

124.In our view, a Constitution does not subvert itself and we therefore find that it would be completely out of order given the clear provisions of **Article 95(4)(c), 96(3)** and **226(2)** of the **Constitution** to allude that County Assemblies exercise an oversight role over national revenue allocated to the Counties to the exclusivity of the Senate. This therefore in our view means that a County Assembly does not have the mandate to exercise oversight over the national revenue allocated to the Counties because that is the exclusive mandate of the National Assembly and the Senate and we shall say why, later in this judgment.

125.Having said so, we must return where we began; that while the Senate has an oversight role over national revenue allocated to County Governments, the issue in that regard, as we understand it, is the scope, extent and nature of the said oversight role.

126.In answering that question, we must first explain the meaning of the word, ***"oversight",*** in its ordinary English meaning before we determine the extent of its applicability. The plain English meaning of the word ***"oversight"*** as defined in the **Concise Oxford English Dictionary, 10th Edition** is; "***the action of overseeing". "Oversee"*** has then been defined by the same dictionary as, "***supervise"*** *or* ***"look at from above"***.

127.Taking the above meanings and as can be seen in the context of **Article 96(3)** of the Constitution, in our interpretation, oversight implies a procedural and substantive function for the Senate. Procedural in the sense that the Senate is involved in the process leading to division and sharing of national revenue as between the National and County Governments as envisaged under **Articles 202** and **203** of the Constitution. The Senate thus gets involved in the enactment of the legislation contemplated in that regard and in particular as provided for under **Article 205** of the Constitution - See ***Speaker of the Senate & Another v Attorney General, Advisory Opinion No. 2 of 2013.***

128.After allocation of national revenue to Counties, the Senate exercises what we would call substantive oversight by ensuring that the revenue so allocated has been disbursed to the Counties

in accordance with the law and that County financial operations are going on as normally as possible. Substantive oversight would also, in our view, mean that the Senate would be mandated to get explanations on how Counties spend the National revenue allocated to them in the event audit queries are made by the Auditor General in his report made pursuant to the provisions of **Article 229** of the Constitution.

129. In the above regard, we recall the submission made by Mr. Wanyama that the Senates oversight role is limited to oversight over national agencies that manage national revenue allocated to counties such as the treasury. The same submission was made in ***Kerugoya H.C. Petition No.8 of 2014*** and the learned judges expressed themselves as follows;

"We therefore reject the argument by the Petitioner that the Senate's power is limited to oversight over National agencies which manage National revenue allocated to the counties such as the National Treasury. To our minds, this would be against the spirit and letter of Article 96(3) of the Constitution which vests a wide power on the Senate to oversee both the provision and expenditure of the national revenue allocated to the counties. In the foregoing, it is our determination that since the Senate was properly seized of the matters with regard to the issues raised by the Controller of Budget in the County Implementation Report, it had power to summon any person under Article 125 for purposes of giving evidence or providing information concerning the issues raised in that report."

130. We agree with the learned judges and we have combed through the provisions of the Constitution and the **Public Finance Management Act** and we have been unable to identify any particular provision of the law that empowers the National Treasury to get directly involved with financial management at the County level.

131. We say so say because **Article 207** of the **Constitution** establishes a Revenue Fund for each County into which shall be paid all revenue raised or received by or on behalf of the County Government. Under **Section 103(1)** of the **Public Finance Management Act**, there has been established a County Treasury for each County Government. The mandate and role of the County Treasury are stipulated under **Section 109 (3)** of the **Public Finance Management Act** and includes the administration of the county revenue fund and ensuring that the County Government complies with the provisions of **Article 207** of the Constitution. As to how the county revenue fund is administered, **Article 207 (3) and 228(4)** of the Constitution as well as **Section 109(6)** of the **Public Finance Management Act** stipulates that any withdrawals from Fund shall be done with the approval of the Controller of Budget.

132. The National Treasury is established under the provisions of **Article 225** of the **Constitution**, as an entity of the National Government. Its responsibilities and obligations are stipulated under **Section 12** of the **Public Finance Management Act** and are as follows;

Subject to the Constitution and this Act, the National Treasury shall-

a. ***Formulate, implement and monitory macro-economic policies involving expenditure and revenue;***

b. ***Manage the level and composition of national public debt, national guarantees and other financial obligations of national government within the framework of this Act and develop a framework for sustainable debt control;***

c. ***Formulate, evaluate and promote economic and financial policies that facilitate social and economic development in conjunction with other a national government entities;***

d. ***Mobilise domestic and external resources for financing national and county government budgetary requirement;***

e. ***Design and prescribe an efficient financial management system for the national and county***

governments to ensure transparent financial management and standard financial reporting as contemplated by Article 226 of the Constitution;

Provided that the national treasury shall prescribe regulations that ensure that operations of a system under this paragraph respect and promote the distinctiveness of the national and county levels of government;

f. ***In consultation with the Accounting Standards Board, ensure that uniform accounting standards are applied by the national government and its entities;***

g. ***Develop policy for the establishment, management, Operation and winding up of public funds;***

h. ***Within the framework of this Act and taking into consideration the recommendations of the Commission on Revenue Allocation and the Intergovernmental Budget and Economic Council, prepare the annual Division of Revenue Bill and the County Allocation of Revenue Bill;***

i. ***Strengthen financial and fiscal relations between the national government and county governments and encourage support for county governments in terms of Article 190(1) of the Constitution in performing their functions; and***

j. ***Assist county governments to develop their capacity for efficient, effective and transparent financial management in consultation with the Cabinet Secretary responsible for matters relating to intergovernmental relations.***

(2) The National Treasury shall have the following functions, in addition to those in subsection (1) –

a. ***Promote transparency, effective management and accountability with regard to public finances in the national government;***

b. ***Ensure proper management and control of, and accounting for the finances of the national government and its entities in order to promote the efficient and effective use of budgetary resources at the national level;***

c. ***Co-ordinate the preparation of annual appropriation accounts and other statutory financial reports by the national government and its entities;***

d. ***Prepare annual estimates or revenue of the national government, and co-ordinate the preparation of the budget of the national government;***

e. ***Consolidate reports of annual appropriation accounts and other financial statements of the national government and county governments and their entities***

f. ***Report every four months to the national assembly on the implementation of the annual national budget on areas not reported on by the Controller of Budget;***

g. ***Be the custodian of an inventory of national government assets except as may be proved by other legislation or the Constitution;***

h. ***Monitor the management of the finances of public enterprises and investments by the national government and its entities;***

i. ***Monitor the financial aspects of risk management strategies and governance structures for the national government and national government entities;***

j. ***Monitor the financial performance of state corporations; and***

k. ***Issue guidelines to national government entities with respect to financial matters and monitoring their implementation and compliance;***

3. ***The National Treasury shall take such other action, not inconsistent with the Constitution, as will further the implementation of this Act.***

133. As can be seen therefore, the National Treasury's role does not include the management of national revenue allocated to the Counties. There are other bodies mandated to do so and the law as stated under **Articles 203, 204, 205, 225** and **228** of the Constitution as well as under **Sections 12 and 109** of the **Public Finance Management Act** is clear on that aspect.

The meaning of the phrase 'Accounting Officer'

134. The Petitioners have also sought the interpretation of the term **"Accounting Officer".** In that regard, **Article 226** of the **Constitution** provides;

(1) Act of Parliament shall provide for -

(a) ….

(b) The designation of an accounting officer in every public entity at the national and county level of government

(2) The accounting officer of a national public entity is accountable to the national assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management.

Pursuant to this provision, Parliament enacted the **Public Finance Management Act.** The appointment and designation of a County Government Accounting Officer is provided for under **Section 148** of that **Act,** as follows;

1. ***A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finances of the county government entities as is specified in the designation.***

2. ***Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity.***

135. It therefore follows that "*an accounting officer"* for a County Government entity is the person so appointed and designated as such by the County Executive Committee Member for Finance under **Section 148** of the **Public Finance Management Act**. Indeed, **Section 148 (3)** of the **Public Finance Management Act** mandates the County Executive Committee Member for Finance to ensure that each County government entity has an accounting officer as provided for under **Article 226(2)** of the **Constitution.**

136. As regards the accounting officer for the County Assembly, **Section 148(4)** of the **Public Finance Management Act** provides that; ***"The Clerk of the County Assembly shall be the accounting officer of the County Assembly".***

137. Having found as we have, it follows that the question posed by the Petitioners as to whether the County Governor is an Accounting Officer, must be answered in the negative. He is not an Accounting Officer and we have said why.

138. The next question we must give an answer to is, whether the Accounting Officers identified above are accountable to the Senate on their financial management. In that regard, **Section 149(1)** of the same **Public Finance Management Act** provides for the responsibilities of Accounting Officers designated to the County Government as follows;

(1) An accounting officer is accountable to the county assembly for ensuring that the resources of the entity for which the officer is designated are used in a way that is—

a. ***lawful and authorised; and***

b. ***effective, efficient, economical and transparent.***

In that regard, the Court in ***Kerugoya H.C. Petition No.8 of 2014*** expressed itself as follows;

"We wish to point out that the first persons of contact with regard to any issue of financial management of a county would be the accounting officers appointed at the county level. We note that these officers are accountable to the County Assemblies by virtue of Article 226(2) of the Constitution and Section 149 of the Public Finance Management Act of 2012. Nevertheless, the Constitution provides for oversight of county public finances at two levels; by the County Assemblies at the county level and by the Senate at the National level".

We agree with the interpretation of the law above by the learned judges. We shall revert to the extent to which the Accounting Officers at the County Government level may become accountable to the Senate on management of County resources, shortly.

Whether the Senate can summon Governors to answer questions on County Public Finance Management.

139. It was the Petitioners' contention that the Senate has no mandate to summon Governors to answer questions on financial management of the Counties by Accounting Officers. That in any case, if the Senate has any audit queries, the same should be directed to the designated Accounting Officers for County Government entities. Further, that on financial matters in a County Government, the Senate's role is limited in scope and is primarily to make recommendations for improving the management of public finances.

140. We have already held that under **Article 96(3)** of the **Constitution**, the Senate has an oversight role over national revenue allocated to the County Governments including the expenditure of the said revenue. A County Assembly also has an oversight role over all County resources including the national revenue allocated to the Counties, grants, loans and revenue locally generated by the Counties.

141. The issue at this stage therefore is how is that oversight role to be exercised? Does it entail summoning County Governors and if so to do what?

142. In addition to the Senate's and County Assemblies' oversight role as above, we are clear in our minds that there are other independent organs which oversee the fiscal and financial management of revenue at the Counties. Firstly, under **Article 228(4)** of the Constitution, the Controller of Budget has the mandate of overseeing the implementation of the budgets at the National and County Governments by authorizing withdrawals from public funds established under **Article 204, 206** and **207** of the Constitution. The Controller of Budget shall not authorize any withdrawals unless satisfied that such withdrawal is authorized by the law. Secondly, **Article 229** of the Constitution provides for the office of Auditor General who audits the accounts of all public bodies including those of the National and County Governments. The Auditor General after auditing such accounts submits his report to the two Houses of Parliament and the relevant County Assembly, which then debate and consider the report within three months and take appropriate action – See ***Petition No.368 of 2014, Speaker, Nakuru County Assembly & Others v***

Commission on Revenue allocation and Others.

143. As can be seen from the above, the Constitution has established firm and strong structures which ensure that the principles of public finance as stipulated under **Article 201** of the Constitution are respected and adhered to. In our view therefore, all the above oversight mechanisms put together ensures that there is a proper checks and balances system which ensures accountability and transparency in fiscal matters in all public entities including County Governments.

144. In addition to the above, financial reporting by County Governments is done by both the County Treasury and by the Accounting Officer for each of the County Government entity. In that regard, **Section 163** of the **Public Finance Management Act** provides;

1. ***At the end of each financial year, the County Treasury shall, for the county government, consolidate the annual financial statements in respect of all the county government entities in formats to be prescribed by the Accounting Standards Board.***

2. ***The County Treasury shall include in the consolidated financial statements –***

a. ***A statement of all money paid into and paid out of the County Exchequer Account;***

b. ***A summary of-***

i. ***The appropriation accounts and statements prepared by accounting officers under Section 164, and***
ii. ***The statements prepared by receivers of revenue under Section 165;***

c. ***A statement of payments, if any. Made out of the County Exchequer Account that are authorized by legislation other than an Appropriation Act;***

d. ***A statement of the total amount of debt of the county government that is outstanding at the end of the financial year;***

e. ***A statement of the debt guaranteed by the national government at the end of the financial year;***

f. ***Such other statements as the county assembly may require; and***

g. ***A statement of the summary of the accounts from the county assembly;***

3. ***The County Treasury shall ensure that the statements and summarises referred to in subsection (2) are in a form that is in accordance with the accounting standards prescribed and published by the Accounting Standards Board from time to time.***

4. ***Not later than four months after the end of each financial year, the County Treasury shall -***

a. ***Submit the financial statements and summaries referred to in subsection (1) to the Auditor General; and***

b. ***Deliver a copy to the National Treasury, Controller of Budget and the Commission on Revenue Allocation.***

145. **Section 164** of the **Public Finance Management Act** provides for the annual reporting by Accounting Officers as follows;

At the end of each financial year, the accounting officer for a county government entity shall prepare financial statements in respect of the entity informants to be prescribed by the Accounting Standards Board.

2. ***The accounting officer shall include in the financial statements –***

a. ***appropriation accounts, showing –***

(i) the services for which the appropriated money was spent;

iii. ***The amounts actually spent on each service;***

And

iv. ***The status of each Vote compared with the appropriation for the Vote; and***

v. ***A statement explaining any variations between the actual expenditure and the sums Voted; and***

vi. ***Any other information specified by the County Treasury;***

(b) A statement of the entity's debt that is outstanding at the end of the financial year;

c. ***A statement of the entity's debt guaranteed by the national government as at the end of the financial year;***

d. ***A statement of the entity's assets and***

liabilities as at the end of the financial year in respect of-

h. ***Each Vote, clearly identifying between recurrent and development expenditure; and***

funds and deposits;

e. ***A statement of the accounting policies followed in preparing the financial statement; and***

f. ***A statement of the county government entity's performance against predetermined objectives***

3. ***The accounting officer shall prepare the financial statements in a form that complies with relevant accounting standards prescribed and published by the Account Standard Board from time to time;***

4. ***Within three months after the end of each financial year, the accounting officer for an entity shall –***

b. ***submit the entity's financial statements to the Auditor-General; and***

c. ***Deliver a copy of the statements to the relevant county Treasury, the Controller of Budget, and the Commission of Revenue Allocation.***

5. ***In the case of an entity that is a County corporation, the accounting officer shall submit a copy of the county corporation's financial statements to the County Executive Committee member responsible for that corporation who shall approve and forward the statements to the County Executive Committee member for finance.***

146. Clearly, and as can be seen from the law as stated above, a County Government submits its financial statements and summaries to the Auditor General. The Auditor General would then exercise his powers as provided for under **Article 229** of the **Constitution** and make a financial management report which would subsequently be submitted to Parliament and the County Assembly. The Senate as part of Parliament receives such a report in that capacity.

147. Having said so, we are at this stage obligated to return to the core issue in the Petition and examine the manner in which the Senate exercises its oversight role over national revenue allocated to the counties. The starting point would be **Section 8** of the **Public Finance Management Act** which provides for the responsibilities of the Senate Budget Committee in public finance matters as follows;

(1) The Committee of the Senate established to deal with budgetary and financial matter's has responsibilities for the following matters, in addition to the functions set out in the Standing Orders;

(a) ...

c. **...**

d. ***examine financial statements and other documents submitted to the Senate under Part IV of this Act, and make recommendations to the Senate for improving the management of Government's public finances; and***

(e) …

148. Thus far, it is therefore crystal clear that the Senate has the mandate to receive the financial statements of a County Government as well as the audit report of the Auditor General. In regard to those reports, it was the Petitioners' contention that the Senate's role is limited to making recommendations on the improvement of Government public finances and we agree with the Petitioners to that extent. However, we must also state that its role under **Section 8** of the **Public Finance Management Act** is wider in scope. In receiving the reports contemplated under **Section 163** and **164** of the **Public Finance Management Act**, it is expected to examine the financial statements and documents as submitted to it and thereafter make appropriate action including making recommendations on inter alia the improvement of government public finances and in this regard, the national revenue allocated to each County.

149. We agree with the submission made by Mr. Kilukumi that in examining the financial statements and documents as submitted to it, the Senate or its Committees has the power to summon any person to appear before it for purposes of giving evidence or providing information. In that regard **Article 125** of the **Constitution** provides that;

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

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

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

(b) To compel the production of documents; and

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

The Court in ***Kerugoya H.C. Petition No.8 of 2014***, while interpreting the above section stated as follows;

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

We agree with the learned judges and we see no reason to depart from that interpretation as it is sound.

150. Applying the same criteria in the instant Petition, we have seen the witness summons issued to the County Governors. One of them reads as follows;

"THE SENATE

SENATE SESSIONAL COMMITTEE ON COUNTY PUBLIC ACCOUNTS AND INVESTMENTS

WITNESS SUMMONS

TO: THE HON. ISAAC K. RUTO, GOVERNOR, BOMET COUNTY

WHEREAS, the Senate has mandated the Sessional Committee on County Public Accounts and Investments to –

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 the 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.***

AND WHEREAS, Article 125 of the Constitution and Section 14 and 15 of the National Assembly (Powers and Privileges) Act (Cap. 6)), as read together with Section 7 of the Sixth Schedule to the Constitution empower the Senate and any of its committees to summon any person to appear before it for the purpose of giving evidence or providing information;

NOW THEERFORE, the Sessional Committee on County Public Accounts and Investments summons you to appear, in person, before the committee on Tuesday, 26th August, 2014 at the Senate Committee Room 4, 1st Floor, Main Parliament Buildings at 10.00 a.m.

The Committee further requires that you submit the following documents to the Committee on that day.

1. ***Your continuous response to the Report of the Auditor General on the Financial Operations of the County Government of Bomet and its defunct Local Authority for the Financial year 2012/2013 (1st January to 30th June, 2013); and***
2. ***All other relevant documentation in your possession.***

GIVEN under my hand, for and on behalf of the Sessional Committee on County Public Accounts and Investments, the 12th day of August, 2014.

SIGNED

J.M. NYEGENYE, CBS

CLERK OF THE SENATE

Please acknowledge receipt of this witness summons as follows –

NAME: SIGNATURE: DATE OF SERVICE: PLACE OF SERVICE:

<u>TAKE NOTE</u> that should you fail to attend before the Committee on the date and time specified in this Witness Summons or to produce the documentation required by the Committee, you shall be guilty of an offence in terms of Section 23(a)of the National Assembly (Powers and Privileges) Act (Cap. 6), as read together with Section 7 of the Sixth Schedule to the Constitution, for which you shall be liable, on conviction, to a fine not exceeding two thousand shillings or to imprisonment for a term not exceeding twelve months, or to both such fine and imprisonment."

All the other summonses followed the same format.

151. Mrs. Consolata Waithera Munga in her affidavit sworn on 22nd August 2014 explained that the Senate Committee on Finance, Commerce and Economic Affairs on 8th February 2014, summoned fifteen Governors and the County Executive Members responsible for matters of finance requiring them to appear before the relevant Senate Committee and respond to various issues with regard to County finance and fiscal management. Subsequently, a number of County Governors appeared before the Senate Committee on various dates and responded to questions arising from the Report of the Auditor General on financial operations of certain defunct local authorities for the financial year 2012/2013 (1st January 2013 to 30th June 2013). That despite attendance by some County Governors, the 2nd to 7th Petitioner refused to attend as summoned. Fresh invitations were send by the Senate Committee on County Public Accounts and Investments through various letters issued on diverse dates in June, July and August 2014. The Governors have to date not appeared before the Senate Committee.

152. The question now arising is whether the said Governors were or are officers with the relevant information that would have entailed them to be summoned by the Senate's Committee aforesaid. Mr. Kilukumi in response to that issue submitted that the County Governors are the Chief Executive Officers of a County as provided for under **Article 179(4)** of the **Constitution**, and that fact is not in dispute. But according to the Petitioners, a Governor is not the Accounting Officer of any County entity and should not be called upon to answer queries on financial management. We have already found that an Accounting Officer of the County Government is such an officer as designated under **Section 148** of the **Public Finance Management Act**. But what is the role of the Governor as the Chief Executive Officer of the County? In that regard, the functions of the County Governor are provided for under **Section 30 (2)** of the **County Governments Act** as follows;

<u>30(2)</u> Subject to the Constitution, the Governor shall-

(a) Diligently execute the functions and exercise the authority provided for in the Constitution and legislation

a. ***Perform such State functions within the County as the President may from time assign on the basis of mutual consultations.***

b. ***Represent the county in national and international for a and events***

c. ***Appoint with the approval of the county assembly, the county executive committee in accordance with Article 179(2) of the Constitution***

d. ***Constitute the county executive committee portfolio structure to respond to the functions and competencies assigned to and transferred to each county***

e. ***Submit the county plans and policies to the county assembly for approval***

f. ***Consider, approve and assent to bills passed by the county assembly***

g. ***Chair meetings of the county executive committee***

h. ***By a decision notified in the county gazette assign to every member of the county executive committee, responsibility to ensure the discharge of the function within the county and the provision of related services to the people;***

i. ***Submit to the county assembly an annual report on the implementation status of the county policies and plans***

j. ***Deliver annual state of the county address containing such matters as may be specified in county legislation; and***

k. ***(Sign and cause to be published in the county Gazette, notice of all important formal decisions made by the Governor or by the county executive committee.***

153.In relation to financial management, **Section 30(3)** provides that;

30(3)(f) In performing the function under subsection (2), the Governor shall-

a. ***Provide leadership in the Country's governance and development;***

b. ***Provide leadership to the County executive committee and administration based on the County policies and plans;***

c. ***Promote democracy, good governance, unity and cohesion within the county;***

d. ***Promote peace and order within the Count;***

e. ***Promote the competitiveness of the County;***

f. ***Be accountable for the management and use of County resources; and***

g. ***Promote and facilitate citizen participation in the development of policies and plans, and delivery of services in the county.***

154.In interpreting the above Section, the Court in ***Kerugoya H.C. Petition No. 8 of 2014*** held as follows;

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

And as to whether the Senate Committee could summon Governors, the Court held as follows;

"It then follows that under Article 125, the County Governor and the County assembly Member for finance who belong to the executive arm of the County Government can also be summoned by the Senate in exercise of their oversight mandate under Article 96(3) of the Constitution. Though the

executive arm of the county Government is also answerable to the County Assemblies of their respective Counties, this does not preclude the said arm form providing information to the Senate when called upon to do so in exercise of their oversight mandate under Article 96(3). Further under Article 10(2) of the Constitution one of the values of governance enshrined in the Constitution is transparency and accountability.

Every officer in every State organ and at both levels of Government must respect and comply with any mechanism of accountability established by the Constitution and the law to the fullest extent possible. The Court under Article 259 must therefore interpret the Constitution in a manner that promotes good governance through transparency and accountability. Put in another way, when persons in charge of the managing County finances are not held to account, the objectives of devolution set out under Article 174 which includes promoting democratic and accountable exercise of power; and to enhance checks and balances of powers, will be defeated.

The position advance by the Petitioner that the County Governors cannot be summoned by the Senate by virtue of Article 226(2) of the Constitution, Section 148 of the Public Finance Management Act, 2012 and Section 30 of the County Government Acts 2012 is therefore untenable. "

We are fully in agreement with the learned judges. We would however wish to say that we have seen the witness summons reproduced elsewhere above. In so appearing before the Senate's Committee, a governor may appear with such officers as he deems necessary to answer the relevant questions under considerations. In our view, such officers include the Executive Committee Member responsible for matters of finance and the designated accounting officers as they are the persons whom the **Constitution** has mandated to deal with financial matters.

155. However, the role of the Governor under **Section 30(3) (f**) of the **County Governments Act** is critical in fiscal management at the County level. He is the Chief Executive Officer and the buck stops with him in the management of county resources. It is critical that such a provision exists so as to ensure responsibility of public resources which would ultimately enhance the national values as provided for under **Article 10** of the Constitution as well as the spirit and tenor of constitution.

In a nutshell, we see no fault with the summons issued by the Senate and for avoidance of doubt, they are constitutional and lawful.

Whether the resolution passed by the Senate directing the National Treasury and Controller of Budget not to release funds to counties is constitutional.

156. It is not in dispute that the Senate in its sitting of 7th August 2014, passed a resolution recommending that the Controller of Budget should not authorize any withdrawal of public funds by Bomet, Kisumu, Kiambu and Murang'a Counties until the mentioned County Governments had responded to the audit queries raised to the satisfaction of the Senate and the National Treasury including by the named Governors honouring the Senate Summons.

157. We are clear in our mind that the Senate acts and makes its decisions through resolutions and a resolution of the House is a declaration of opinion or purpose. Erskine May in his **Treatise on the Law, Privileges, Proceedings and Usage of Parliament, 24th Edition,** writes as follows on that aspect;

"Every question, when agreed to, becomes either an order or a resolution of the House. By its orders the House directs its committees, its members, its officers, the order of its own proceedings and the acts of all persons whom they concern, by its resolutions the House declares its own opinions and purposes."

158. The Petitioners have in that regard challenged the Resolution made by the Senate and have

submitted that it did not have any constitutional power to order the Cabinet Secretary, National Treasury and the Controller of Budget not to authorize withdrawal of funds to the named Counties. The question we must answer in that regard is whether the Senate has the powers to order stoppage of funds to the Counties in the manner that it did.

159. Mr. Kilukumi submitted that because of the doctrine of separation of powers, the resolution of the Senate cannot be questioned in a Court of law. Further, that the Senate made the resolution pursuant to the provisions of the Constitution.

160. In that regard, we have already found that the Constitution is the supreme law of the land and all state organs have an obligation to uphold it and the Senate must always act in accordance with the Constitution. Its procedures and resolutions must be made within the purview of the same constitution and it cannot purport to violate the Constitution and seek refuge in the doctrine of separation of powers. This Court, under **Article 165(3) (d) (ii)** of the Constitution is constitutionally mandated to examine whether anything done under the authority of the Constitution is well within the four corners of the Constitution. The Senate cannot therefore act in disregard of the Constitution and at the same time claim to exercise powers under the same Constitution. This Court will continue to exercise its jurisdiction and judicial authority as conferred by the people of Kenya to assert the authority and supremacy of the Constitution and when the Senate has violated the Constitution, it must be told so.

161. Having said so, it follows that the submission made by Mr. Kilukumi that a resolution of the Senate cannot be challenged in the courts of law due to the doctrine of separation of powers is untenable and we have said why. The last issue to determine therefore is whether the said resolution is constitutional or not.

162. On that issue, Mr. Kilukumi submitted that the Senate made said the resolution in accordance with the provisions of **Article 225** of the Constitution as well as under **Section 96** of the **Public Finance Management Act**. In that regard **Article 225** of the **Constitution** provides that;

163. ***(1) An Act of Parliament shall provide for the establishment, functions and responsibilities of the national treasury.***

(2) Parliament shall enact legislation to ensure both expenditure control and transparency in all governments and establish mechanisms to ensure their implementation.

(3) Legislation under clause (2) may authorize the Cabinet Secretary responsible for finance to stop the transfer of funds to a State Organ or any other public entity

a. ***Only for a serious material breach or persistent material breaches of the measures established under that legislation; and***

(b) subject to the requirements of Clause (4) to (7)

(4) A decision to stop the transfer of funds under Clause (3) may not stop the transfer of more than fifty percent of funds due to a county government

6. ***A decision to stop transfer the transfer of funds as***

contemplated in clause (3)

a. ***shall not stop the transfer of funds for more than sixty days; and***

b. ***may be enforced immediately, but will lapse retrospectively unless, within thirty days after the date of the decision, Parliament approves it by resolution passed by both Houses***

7. ***Parliament may renew a decision to stop the transfer of funds but for no more than sixty days***

at a time

8. ***Parliament may not approve or renew a decision to stop the transfer of funds unless;***

(a) the Controller of Budget has presented a report on the matter to Parliament; and

(b) the public entity has been given an opportunity to answer the allegations against it, and to state its case, before the relevant parliamentary Committee

163. Under the above provision of the Constitution, it is clear that the Cabinet Secretary responsible for matters of finance has the mandate to stop the transfer of funds to a state organ or a public entity.

164. Parliament has enacted the **Public Finance Management Act**, to govern the circumstances in which the stopping of funds can be done and the procedure to be invoked in such situations. **Section 92** to **99** of that Act makes general provisions on resolution of operational and financial problems of national and County Governments entities. Of most importance in the Petition before us is **Section 96(1)** of the Act which empowers the Cabinet Secretary to stop transfer of funds. This provision reads as follows;

Where the Cabinet Secretary finds a State organ which is a county government entity to be in serious or persistent material breach of its obligations or financial commitments, the Cabinet Secretary shall, in accordance with Article 225 of the Constitution, immediately stop the transfer of funds.

It is therefore clear that it is within the power of the Cabinet Secretary to stop transfer of funds to Counties. As to the Procedure for doing so, **Section 97** provides thus;

(1) Where the Cabinet Secretary makes a decision to stop the transfer of funds to a State organ or public entity in accordance with Article 225(3) of the Constitution and provisions of this Act, the Cabinet Secretary shall stop the payment and inform the Controller of Budget in respect of—

(a) the date from when the stoppage of transfer of funds takes effect; and

(b) the nature of serious material breaches, or persistent material breaches, committed by the State organ or public entity.

(2) Not later than seven days after the date of the decision to stop the transfer of funds, <u>the Cabinet Secretary shall seek approval from Parliament.</u>

165. Looking at the law above, it is clearly within the powers of the Cabinet Secretary to stop transfer of funds to county entities for the reasons stated under **Section 93** and **94** of the **Public Finance Management Act**. He can however only do so with the approval of Parliament as can be seen from the provisions of **Section 97(2**). In the instant Petition, it is the Senate that initiated the stoppage of withdrawal of funds and directed the Cabinet Secretary to stop the said withdrawal. The question therefore is whether the Senate has the powers to direct the Cabinet Secretary to stop the transfer of funds allegedly while exercising its oversight role under **Article 96(3)** of the **Constitution.**

166. The answer to the question can only be a resounding No. The manner in which funds can be withheld or withdrawals stopped is clear and we have set out law above. The grounds for doing so are also clear and one of them is not refusal by Governors to honour summons by the Senate. **Article 125** of the **Constitution** provides that where summons are issued by either House of Parliament and any of their committees, the House shall have the ***"same powers as the High Court – to enforce the attendance of witnesses and examine them on oath, affirmation or otherwise."*** Stoppage of withdrawal funds is certainly not one of the ways that this Court enforces the attendance of witnesses neither should the Senate purport to have such powers.

167. In making the above finding, we are also aware that the Controller of Budget under **Article 228(4)** of the **Constitution** cannot ***"approve any withdrawal from a public fund unless satisfied that the withdrawal is authorized by law"***. Conversely he cannot stop a withdrawal unless the stoppage is also authorized by law as set out above. That office is also enjoined by **Article 249(2) (b)** as read with **Article 248(3)(b)** to be ***"independent and not subject to direction or control by any person or authority"*** including the Senate unless the latter is acting within its own lawful mandate. How then can the Senate give directions that are not supported by the Constitution or any law?

It is our finding that the Resolution of the Senate directed at the Cabinet Secretary for finance and the Controller of Budget was not grounded in law and cannot stand.

Whether Governors can lawfully be held accountable for transactions in the financial year during which the defunct local authorities together with the Transition Authority (in line with its functions under Section 7 of the Transition to Devolved Governments Act 2012) were in charge of County resources

168. It is uncontested that the summons issued to certain county Governors raised questions regarding the financial management for financial year 2012/2013 as raised in the Report of the Auditor General for that financial year.

169. None of the Parties addressed us in their submissions on the above issue. However, it behoves upon us to address it as it was framed as a question for interpretation.

170. In that regard **Section 2** of the **Sixth Schedule** to the **Constitution** provides as follows as regarding the transition from local Government to devolved Government –

"(1) The following provisions of this Constitution are suspended until the final announcement of all the results of the first elections for Parliament under this Constitution—

a. ***Chapter Seven, except that the provisions of the Chapter shall apply to the first general elections under this Constitution.***

b. ***Chapter Eight, except that the provisions of the Chapter relating to the election of the National Assembly and the Senate shall apply to the first general elections under this Constitution; and***

(c) Articles 129 to 155 of Chapter Nine, except that the provisions of the Chapter relating to the election of the President shall apply to the first general elections under this Constitution.

(2) The provisions of this Constitution relating to devolved

government, including Article 187, are suspended until the date of the first elections for county assemblies and governors held under this Constitution.

(3) Despite subsection (2)—

(a) elections for county assemblies and governors shall be held in accordance with Articles 177 and 180 of this Constitution;

and

c. ***the laws relating to devolved government, required by***

this Schedule and Chapters Eleven and Twelve of this Interpretation. Suspension of provisions of this Constitution. Constitution, shall be enacted within the period stipulated in the Fifth Schedule.

(4) Article 62 (2) and (3) is suspended until the National Land is established."

171. **Section 15(1)** of the **Sixth Schedule** for the **Constitution** makes provisions for devolution of functions to be made by an Act of Parliament. The legislation to be enacted pursuant to **Section 15(2)** of the **Sixth Schedule** was intended to make provisions as follows;

"15. (1) …

(2) The legislation mentioned in subsection (1) shall—

(a) provide for the way in which the national government shall—

(i) facilitate the devolution of power;

(ii) assist county governments in building their capacity to govern effectively and provide the services for which they are responsible; and

ii. ***support county governments;***

(b) establish criteria that must be met before particular functions are devolved to county governments to ensure that those governments are not given functions which they cannot perform;

(c) permit the asymmetrical devolution of powers to ensure that functions are devolved promptly to counties that have the capacity to perform them but that no county is given functions it cannot perform; and

d. ***provide mechanisms that ensure that the Commission on the Implementation of the Constitution can perform its role in monitoring the implementation of the system of devolved government effectively.***

172. Parliament in the above regard enacted the **Transition to Devolved Government Act, 2013**. Its preamble reads thus;

"An Act of Parliament to provide a framework for the transition to devolved Government pursuant to Section 15 of the Sixth Schedule to the Constitution."

The objects and purpose of that Act are stated at **Section 3** of **Transition to Devolved Government Act** as follows**;**

a. ***Provide a legal and institutional framework for a co-ordinated transition to the devolved system of government while ensuring continued delivery of services to citizens;***

b. ***Provide, pursuant to section 15 of the Sixth Schedule to the Constitution, for the transfer of powers and functions to the national and county governments;***

c. ***Provide mechanisms to ensure that the Commission for the implementation of the Constitution performs its role in monitoring and overseeing the effective implementation of the devolved system of government effectively;***

d. ***Provide for policy and operational mechanisms during the transition period for audit, verification and transfer to the national and county governments of-***

i. ***assets and liabilities;***
ii. ***human resources;***
iii. ***pension and other staff benefits of employees of the government and local authorities; and***
iv. ***any other connected matters;***

e. ***provide for closure and transfer of public records;***

and

(f) provide for the mechanism for capacity building

requirements of the national government and the county governments and make proposals for the gaps to be addressed.

173. The transition to County Governments was to be overseen by a body known as the Transition Authority established under **Section 4(1)** of the **Transition to Devolved Government Act, 2012.** The functions of the Authority are then provided for under **Section 7(2)** of that Act as follows;

174. We have combed through the **Transition to Devolved Government Act** and its provisions as relates to transition. It is clear that the Act has sufficient provisions over transfer of functions from the National to County Governments. However the Act has little provision on transition from Local Governments to County Governments especially as regards financial management during the transition period. However, our reading of all the above provisions of the law is clear that after the 1st General Election, there was to be a transition from local Government to County Government once the County Governments came into existence in accordance with **Section 2** of the **Sixth Schedule** to the **Constitution**. Before that transition, the body responsible for facilitating and co-ordinating the transition was the Transition Authority. We say so because **Section 2** of the **Transition to Devolved Government Act** has made it clear that phase one of the transition was to be carried from the date of the commencement of the Transition to Devolved Government Act, which was assented to by the President on 27th February 20102 and commenced on 9th March 2012.

175. It is also certain that the Local Governments continued to exist until 4th March 2013 and we say so because the provisions of **Section 134** of the **County Government Act No. 17 of 2012** are in certain words that;

1. ***The Local Government Act is repealed upon the final announcement of all the results of the first elections held under the Constitution.***

2. ***All issues that may arise as a consequence of the repeal under Subsection (1) shall be dealt with and discharged by the body responsible for matter relating to transition.***

176. In addition, it can be seen from the provision of **Section 7(1) (e)** of the **Transition to Devolved Government Act**, that the Transition Authority was the body mandated to prepare and validate an inventory of all the assets and liabilities of Local Governments during the transition period. It was also responsible for creating mechanisms for transfer of assets. **Section 24** of the **Transition to Devolved Government Act** is also clear that the transfer of a function would be done if the County Government had satisfied the criteria established thereto. Relevant to the issue before us is the establishment of the necessary financial management system post the transition and in that regard, our interpretation of the law would be that County Governments would became responsible for the fiscal management and planning of County Governments immediately after the Transition Authority has handed over the assets and liabilities of Local Governments to the said County Governments.

177. Before any hand over has been done, it means that The Transition Authority would be the body responsible for all assets and liabilities of Local Governments. Indeed the provisions of **Section 35** of the **Transition to Devolved Government Act** bears that out clearly. This Section provides thus;

1. ***A State organ, public office, public entity or local authority shall not transfer assets and liabilities during the transition period.***

2. ***Despite subsection (1), a State organ, public office, public entity or Local authority shall—***

a. ***During Phase One, transfer assets or liabilities with the approval of the Authority, in consultation with the National Treasury, the Commission on Revenue Allocation, the Ministry of Local Government and the Ministry of Lands; or***

b. ***During Phase Two, transfer assets or liabilities with the approval of the Authority, in consultation with the National Treasury, the Commission on Revenue Allocation and the Cabinet Secretary responsible for matters relating to intergovernmental relations; and***

c. ***Transfer immovable property, with the approval of the Authority, in consultation with the National Treasury, the Commission on Revenue Allocation and the Cabinet Secretary responsible for matters relating to intergovernmental relations and lands.***

3. ***The Authority may, on its own motion or on a petition by any person, review or reverse any irregular transfer of assets or liabilities in contravention of subsection (1).***

4. ***Any transfer of assets or liabilities made in contravention of subsection (1) shall be invalid.***

178. From the pleadings before us, there is no evidence that any of the County Governments have properly taken over the assets and liabilities of Local Governments and to call upon any Governor to answer questions on the financial affairs of Local Authorities during the financial year 2012/2013 which fell in Phase One of the Transition period, would be an error or the part of the Senate. Such questions ought to be addressed to the Transition Authority which was never a party to this Petition.

What reliefs are available to the Petitioners?

179. We have addressed the three substantive questions arising from the Petition. Earlier in the judgment, we reproduced verbatim the four issues that were never addressed in ***Kerugoya H.C. Petition No.8 of 2014*** and we are satisfied that we have given out answers to them.

180. It is our findings therefore that looking at the declarations and orders sought, prayers (a), (b), (d), (g), and (i) are all a reproduction of the law and we do not deem it fit to grant orders in that regard. Prayers (c), (f), (h), (j), (m), and (n) cannot be granted for reasons given above.

181. In the end only Prayers (e), (k), (l) and (o) should be granted.

182. As for costs, this matter raised important issues relating to the role of the Senate *vis-à-vis* County Governments on matters of financial oversight. The Parties and the wider public are the beneficiaries of the orders to be made and further, any costs to be paid would ultimately come from public coffers. Let each Party therefore bear its own costs.

Final Orders

183. From what we have said above, the following prayers are denied and are consequently **DISMISSED**:

(a) A declaration that in view of the provisions of Article 6(2) of the Constitution which provides that the Governments at the national and County levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and co-operation, the Senate cannot exercise powers under Article 125 of the Constitution in a manner that cripples County Governments.

d. ***A declaration that resonating the intention of Article 96 of the Constitution and 226(2) of the Constitution of Kenya and Section 148 of the Public Financial Management Act 2012, the Senate cannot summon Governors to personally appear before it to answer questions on County Government finances in total disregard of the procedure and requirements of public finance management that is stipulated by the Public Finance Management Act, 2012.***

(f) A declaration that resonating the intention of Articles 6(2), 96, 174, 185(3) and 226(2) of the Constitution of Kenya, the Senate cannot summon an accounting officer of the County Government to answer questions on County financial management, at the first instance. It must first allow the oversight and legislative mechanisms at the County level to be concluded given that these Governments are functional distinct and are based on the principle of Separation of Powers.

(g) A declaration that resonating the intention of Article 6(2), 96, 174, 185(3) and 189 of the Constitution and within the meaning of Article 226(2) and Article 96(4)of the Constitution of Kenya, the Senate's oversight role over nationally collected revenue to Counties is not identical to the County Assembly's oversight over the executive.

(h) A declaration that resonating the intention of Article 96(4) of the Constitution and in view of the provisions of Article 185(3) and Article 226(2) of the Constitution of Kenya, the Senate's power is limited to oversight over national agencies which manage national revenue allocated to Counties such as the National Treasury.

i. ***A declaration that resonating the intention of Article 6(2), 189(1), 174 and 96(4) of the Constitution and in view of the provisions of Article 185(3) of the Constitution of Kenya the County Assembly is the sole organ that can undertake oversight over the County Executive.***

(m) A permanent injunction be issued to restrain the Senate from summoning County Governors to appear before it to answer questions on County public financial management.

- ***A permanent injunction be issued to restrain the Senate from summoning Accounting Officers at the County level to appear before it to answer questions on County public financial management.***

The following prayers are mere restatements of the law:

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

(d) A declaration that the Senate is bound by the methods, procedures and requirements of the Public Finance Management Act 2012 when undertaking its oversight and summoning powers.

The following prayers are **GRANTED**:

e. ***A declaration that resonating the intention of Article 96 of the Constitution and 226(2) of the Constitution of Kenya and Section 148 of the Public Finance Management Act, 2012, it is proper, legal, and constitutional for Members of the Executive Committee responsible for finance and the Chief Officers responsible for finance to appear before the Senate or any of its Committee to answer on County Government finances and to generally provide information that helps the Senate to undertake its oversight functions as stipulated in Article 96 of the Constitution.***

(k) A declaration that the Senate does not have sole constitutional powers to direct National Treasury

and Controller of Budget not to release funds to Counties without following the provisions of Article 225 of the Constitution.

(l) A declaration that stoppage of funds to a County public entity can only be done by following the provisions of Article 225 of the Constitution.

(o) An order or certiorari to quash the Resolution of the Senate issued on 7th August 2014 that purports to direct the National Treasury and the Controller of Budget not to release funds to Kiambu, Bomet, Kisumu and Murang'a Counties.

184. Each Party shall bear its own costs.

185. We apologise for the delay in delivering this judgment as members of this Bench were involved in other pressing matters. We thank counsel and the Parties for understanding.

186. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JUNE, 2015

…….. …… …….

I. LENAOLA M. NGUGI G. ODUNGA

JUDGE JUDGE JUDGE