REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 381 OF 2014

(AS CONSOLIDATED WITH PETITION NO 430 OF 2014)

THE COUNCIL OF GOVERNORS …….…….1ST PETITIONER

BARASA KUNDU NYUKURI……..…..2ND PETITIONER

ALBERT SIMIYU WAMALWA ……...3RD PETITIONER

PHILIP WANYONYI WEKESA ……..4TH PETITIONER

VERSUS

THE SENATE ……..….. 1ST RESPONDENT

THE NATIONAL ASSEMBLY ……...2ND RESPONDENT

THE SENATORS OF THE 47 COUNTIES …… 3RD RESPONDENT

THE SPEAKERS OF

THE 47 COUNTIES …….1ST – 47 INTERESTED PARTIES

CLEMENT NYAMANGO …….48TH INTERESTED PARTY

ATTORNEY GENERAL ……...49TH INTERESTED PARTY

COMMISSION ON THE IMPLEMENTATION

OF THE CONSTITUTION ……..50TH INTERESTED PARTY

KATIBA INSTITUTE ……..….AMICUS CURIAE

JUDGMENT

Introduction

1. This judgment relates to two petitions. The first is **Petition No. 381 of 2014- The Council of Governors vs The Senate, The National Assembly, the Senators of the 47 Counties and the Attorney General.** This petition was, on 12th September 2014, consolidated with **High Court Petition No. 430 of 2014- Barasa Kundu, Albert Simiyu and Philip Wanyonyi Wekesa vs The Speaker of the National Assembly and Others (formerly Bungoma High Court Petition No. 11 of 2014)**

2. At the heart of the dispute in the consolidated petitions are two cornerstones of governance in Kenya – the rule of law and devolved governance. The rule of law prescribes that state organs can only exercise powers granted to them by the law, and such law as grants powers to state organs must be in conformity with the Constitution. The petitioners challenge the constitutionality of amendments to the County Government Act, No. 17 of 2012, through the County Governments (Amendment) Act, 2014 (hereafter "the CGAA"). They allege that the provisions of the CGAA grant powers to state organs in conflict with the allocation of functions in the Constitution.

3. The 2010 Constitution of Kenya introduced a system of devolved governance, the impetus behind which is to ensure accountable use of state resource and to curb misuse of state power. The petitioners allege that the challenged provisions of the CGAA are in conflict with the system of devolved government and will have the effect of giving national government an unconstitutional say in county affairs.

Background

4. The facts giving rise to the consolidated petitions are not in dispute. On 24th July 2014, the National Assembly of Kenya had, pursuant to consultation with the Senate, enacted the **CGAA.** The **CGAA** amended the **County Government Act** by introducing a new section 91A which establishes the **County Development Boards** (hereafter **"CDBs"**) in each of the 47 counties in Kenya. The CDBs were to comprise, *inter alia*, members of the National Assembly representing constituencies within respective counties, members of county assemblies, as well as members of the executive operating within respective counties, and were to be chaired by the Senator from the county.

5. Following the enactment of the CGAA and the establishment of the CDBs, the Council of Governors (hereafter the 1st petitioner), a body comprising all the Governors of the 47 Counties, lodged Petition No. 381 of 2014 challenging the constitutionality of the CDBs. The 1stpetitioner asks the Court to declare the provisions of Section 91A of the CGAA, which vests various functions in the CDBs, unconstitutional for violating Articles **6(2); 95, 96, 174(1), 175, 179(1), 179(4), 183(1), 185(3)** and **189(1)** of the Constitution. The basis of the challenge is that through the CDBs, Senators and members of the National and County Assemblies would be undertaking executive functions at the County level. Specifically, the Court has been requested to determine the constitutionality of section 91A and declare the creation of the CDBs null and void. In the Amended Petition dated 11th August 2014, the 1st petitioner seeks the following orders:

> ***A. A declaration that within the intendment of Article 6(2), 95, 96, 174 and 175 of the Constitution and resonating the intention of 179(i), 179(4), 183(1), 183(1) and 189(1) of the Constitution, the provisions of section 91A(1) of County Government (amendment) Act 2014 that establishes County Development Boards which shall be comprised in the manner stated in the said Act and undertake the functions outlined in section 91 A(2) of the Act are unconstitutional.***
>
> ***B. A declaration that within the intendment of Article 6(2), 95, 96, 174(i) and 175 of the Constitution and resonating the intention of 179(1), 179(4) 183(1), 185(3) and 189(1) of the Constitution, the provisions of section 91A(1) of County Government (amendment) Act 2014 that establishes County***

Development Boards which shall be comprised in the manner stated in the said Act and undertake the functions outlined in section 91A(2) of the Act are null and void.

C. There be no order as to costs.

6. Petition No. 381 of 2014 was filed on 28th July 2014, and was amended on 11th August 2014. On 26th August 2014, Bungoma High Court Petition No. 11 of 2014 was filed. It was later transferred to the High Court in Nairobi as High Court Petition No. 430 of 2014 and consolidated with Petition No. 381 of 2014. Following the consolidation of the petitions on 12th September 2014, the Council of Governors was to be the 1st petitioner, while Mr. Barasa Kundu, Albert Simiyu and Philip Wanyonyi Wekesa were to be the 2nd, 3rd and 4th petitioners respectively.

7. Like the 1st petitioner, the 2nd, 3rd and 4th petitioners challenge the constitutionality of the CGAA and seek the following orders:

1. That this Honourable court declares that the Senate and National Assembly of the Republic of Kenya acted contrary to the provisions and principles of the Constitution of Kenya 2010;

2. That this Honourable court declares the County Governments (Amendment) Act 2014 unconstitutional and illegal

3. That this court be pleased to grant orders barring all the 47 senators from inaugurating and chairing County Development Boards until this matter is heard and determined.

4. That this Honourable Court pronounces itself on the separation of power principle between the national legislature and the county executive, particularly with regard to the current conflict of functions/roles and interest between the senators, national assembly members, county assembly members and governors.

8. In the course of the proceedings, various applications for joinder of parties were made. Pursuant to an application made on behalf of the 47 County Speakers, the Court granted leave to the applicants to be enjoined as the 1st - 47th interested parties. A similar application for joinder was made on behalf of a Mr. Clement Nyamongo, who was permitted to participate in the proceedings as the 48th interested party. The Court also permitted the participation of the office of the Attorney General (**AG**) as the 49th interested party, the Commission on the Implementation of the Constitution (**CIC**) as the 50th interested party, and Katiba Institute (**Katiba**) as an Amicus Curiae.

9. Interim orders were granted in the matter on 25thAugust 2014 temporarily prohibiting the 3rd– 50th respondents from convening and chairing meetings of the CDBs established in the 47 Counties under the said section 91A of the CGAA.

10. The Court also referred the matter to the Chief Justice, in accordance with the provisions of Article 165(4) of the Constitution, to constitute a Bench of an uneven number of judges to hear the matter in light of the fact that the matter raised a substantial question of law. The Chief Justice constituted a Bench comprising Lenaola, M. Ngugi and Odunga JJ.

The Facts

11. In 2013, the **County Governments (Amendment) Act (No.2) Bill** was introduced in the Senate. The intention of the Bill was to establish CDBs, and upon the concurrence of the National

Assembly and Senate, it was passed and received Presidential assent on 30th July 2014. The CGAA amended the County Government Act (hereafter **"CGA"**) by inserting three new sections immediately after section 91 of the Act, namely sections 91A, 91B and 91C. These amendments provide for the establishment of the CDBs, their composition, and sources of funds, and creates an offence for obstructing the functions of the CDBs. With respect to composition, section 91A provides that the CDB in each county comprises national and county level state and public officers, some with legislative and others with executive powers. All the permanent members of the CDBs drawn from the national government are from the legislative arm of the national government.

12. The Act places the coordination and harmonisation role of county development plans and projects within the ambit of the CDBs. The Memorandum of Objects and Reasons for the CGAA also indicates that the Act intends to provide CDBs with the power to consider and adopt county integrated development plans and county annual budgets before they are tabled in the County Assemblies for approval. The Memorandum of Objects and Reasons also provide that:

> ***"The Bill concerns county governments in terms of Article 110 (1) (a) of the Constitution in that the process of coordination, harmonization, adoption and approval of county development plans and county annual budgets affects the functions and powers of the county governments."***

13. These provisions, in the view of the petitioners, violate the Constitution by involving members of the national government in county affairs, and also by involving members of the legislature in county executive matters, thus undermining devolution and violating the principle of separation of powers.

THE SUBMISSIONS

Submissions by the Council of Governors

14. The 1st petitioner submits that Articles 179(1) and (2) vest the executive power of county governments in the county executive committee. Article 6(2) provides that government at national and county level are distinct and inter-dependent. Its contention is that Senators are members of the national parliament which is vested with legislative authority in terms of Article 94 of the Constitution, and they have no role to play at county level. It is its contention further that as the CGAA provides powers, other than legislative powers, to Senators, which powers are outside the realm of national government, it is unconstitutional.

15. With regard to devolution, it is its case that the CGAA is an affront to devolution which, in terms of Article 174 has, as its aims, to promote democratic and accountable exercise of power, and to foster national unity by recognising diversity.

15. The 1st petitioner further argues that the Constitution does not contemplate that members of the Senate and National Assembly would micro manage planning and budgeting in the counties; therefore, by giving Senators and Members of the National Assembly coordination and implementation roles in the county governments, section 91A of the CGAA violates the Constitution. In addition, it is its case that the CGAA violates Article 2(2) which provides that no person may claim or exercise State authority except as authorised under the Constitution.

16. The 1st petitioner relies on **Speaker of the National Assembly & Others vs De Lille, M.P. & Another [297/298] [199] ZASCA**, where the Supreme Court of South Africa held that no matter how formidable, efficient or well-meaning a legislature, it cannot make law or perform any act which is not sanctioned by the Constitution. Reliance is also placed on the Supreme Court judgment of **Speaker of the Senate vs the Attorney General [2013] eKLR** in which it was held that the National Assembly and the Senate shall perform their respective functions in accordance with the Constitution.

Submissions by the 2nd -4th Petitioners

17. The 2nd - 4th petitioners argue that under section 91A of the CGAA, the CDBs include Senators, Members of the National Assembly and women representatives, which offends the constitutional objective of devolution. They further submit that separation of powers has three elements: that the same persons should not form part of more than one of the three organs of government, meaning, for instance, that Members of Parliament or Senators should not be in the Executive; that one organ of Government should not control or interfere with the work of another, for example, that the Executive, at whatever level, should be independent of the Legislature in execution of its mandate; and finally, that one organ of government should not exercise the functions of another, meaning that the legislature, for instance, should not have executive powers.

The 2nd -4th petitioners further argue that under the Public Finance Management Act, the county executive is the organ mandated to manage financial matters at the county level. It is their case therefore that the attempt under section 91A of the CGAA to provide another vehicle for spending money in the county is unconstitutional.

18. The 2nd- 4th petitioners, further contend that section 91A aforesaid donates executive functions to the legislative arms of both national and county governments and creates a situation where the Senate and County Assemblies, which have oversight roles over the county executives, are themselves executing county executive functions through the CDBs.

19. According to the 2nd- 4th petitioners, section 91B of the CGAA provides that the operational expenses in respect of CDBs shall be provided for in the annual estimates of the revenue and expenditure of the respective county governments. It is their contention that this means that the county governments will spend money on functions performed by agents of national government. In their view, money must follow functions and you cannot devolve a function without devolving the requisite funds. They therefore urge the Court to find the CGAA unconstitutional and grant the prayers sought in the petition.

Submissions by 1st-47th Interested Parties

20. The Speakers of all the county assemblies, who were joined in the proceedings as the 1st-47th interested parties, also supported the petition. While underscoring the supremacy of the Constitution and the need to interpret it in a manner that promotes its purpose, values and principles, the 1st -47th interested parties argue that the CGAA is unconstitutional. Their case is that the only organs of devolved government are the county assembly and county executive created by the Constitution under Article 176, and with their mandates set out in Articles 179(1), 183, 185, 210 and 212 of the Constitution. They submit that the very composition of the CDBs, which muddles national government organs and offices with county government organs and offices to undertake a task vested exclusively in county governments is a violation of Articles 6(1) and (2) of the Constitution.

21. These interested parties further submit that in enacting the CGAA without consulting county governments, Parliament breached Article 189(1) that enjoins the respondent to respect the functional and institutional integrity of county governments and consult county governments in their mutual relations. It is also their contention that the CGAA is unconstitutional in that it alters the structure of county government without having conducted a referendum as required by Article 255, thus creating an alien structure of county government.

22. The Speakers assert, further, that the CGAA usurps the mandate of county executives and assemblies, which are set out in Articles 179 and 183, as well as 185, 210 and 212 of the Constitution. Their submissions is that to the extent that the CGAA purports to mandate the CDBs to prepare and consider county development plans and budgets and to submit such plans and budgets to county assemblies for consideration, adoption, rejection or amendment, the CGAA

usurps the executive authority vested in county executives by Article 179(1)

23. It is also their contention that for CDBs to consider county annual budgets is to breach the mandate of county assemblies under sections 117, 129 and 131 of Public Finance Management Act (PFMA).

24. According to the 1st -47th interested parties, the CDBs create a conflict of interest and muddle up the oversight functions of the county assemblies and Senate over county executives. Such conflict, in their view, arises by requiring Senators and members of county assemblies to sit in CDBs and purport to exercise the very executive authority of county governments that they are supposed to exercise oversight over.

25. They further observe that in every county, there is an intergovernmental forum created under section 54(2) of the CGA, No 17 of 2012, with the mandate to harmonize services and coordinate development activities and inter-governmental functions in the counties. In their view, the CDB duplicates the role and functions of this forum.

26. It is also their case that the CDBs, as fora for intergovernmental consultations, breach Article 189(2) of the constitution. They submit that Article 189(2) contemplates the creation of the National and County Government Coordinating Summit, a forum which they submit has been created under section 7 of the Intergovernmental Relations Act, No 2 of 2012. In their view, to create the CDBs to provide the same functions as a forum for consultation and co-operation between national and county governments, which the Summit is already providing, is an imprudent use of public resources. They therefore ask the court to grant the prayers sought in the petition.

Submissions by CIC

27. CIC agrees with the petitioners that the CGAA, specifically section 91A thereof, is unconstitutional and must be struck out for being unconstitutional. It is its contention that the CGAA contravenes Articles 1(3), 2, 6, 10, 11, 94 , 95, 96, 174, 175, 179, 183, 185, 189, 190, 201, 259 as well as the Fourth Schedule and sections of the Sixth Schedule of the Constitution.

28. CIC further contends that the CGAA is ambiguous as there is no clarity as to how the body it establishes is to be a consultative forum between national and county governments whilst its membership consists largely of Members of Parliament, County Assembly Members and County Government officials; and there is also no clarity as to which office is referred to in section 91A(1)(m). This provision makes reference to the ***"head of a department of the national government or the county government or any other person invited by the Board to attend a specific meeting of the Board."***

29. According to CIC, by giving Senators, members of the national and county assemblies and county and national government administrators the role of coordination and implementation of functions designated to the county government executive, the CGAA muddles up the constitutional functions and responsibilities of the executive and the legislature on the one hand, and the national and county governments on the other, thereby offending the principle of separation of powers.

30. CIC further contends that there has been insufficient public participation in the enactment of the CGAA, which violates the requirements of Article 10 and 118 of the Constitution.

Submissions by the Respondents

31. In opposing the petition, the respondents submit that the role of courts to declare legislation unconstitutional is circumscribed. They rely on the decision in **Law Society of Kenya vs Attorney General of Kenya & 2 Others [2013] eKLR** for this proposition.

32. It is also their submission that the consolidated petitions are incompetent for failure to comply with the mandatory provisions of sections 12(1) and 13A(1) of the Government Proceedings Act. The crux of the respondents' contention in this regard is that the Attorney General has to be cited as a respondent by virtue of these provisions as well as Article 156(4) (a) and (b) of the Constitution and cannot, as the petitioners have done, involve him in the proceedings as an interested party; and further, that a 30 days' notice must be served on the state prior to institution of proceedings as required under section 13A(1) of the GPA. The intention behind these requirements, according to the respondents, is to avoid unnecessary litigation in the event that a matter is capable of settlement or resolution without the necessity of engaging the courts.

33. The respondents further contend that there is a presumption of constitutionality with respect to legislation, and to justify the nullification of legislation, there must be a clear and unequivocal breach of the Constitution. They rely on the decision of the Court of Appeal of Tanzania in **Ndyanabo vs Attorney General [2001] 2 EA 485** and the decision of Majanja J in **Law Society of Kenya vs Attorney General and 2 Others [2013] eKLR** to submit that the CGAA is presumed to be constitutional unless the petitioners can show the contrary.

34. The respondents further argue that the overall objective and reasons for the passage of the CGAA is critical in determining constitutional compliance. According to the respondents, the functions of the CDB are found in section 91A(2) which is to ***"provide a forum, at the county level, for consultation and coordination between the national government and the county government matters of development and projects in accordance with the Constitution, and, more specifically, article 6(2), article 10 and article 175"***; ***"consider and give input on any county development plans before they are tabled in the county assembly for consideration"; "consider and given input on county annual budgets before they are tabled in the county assembly for consideration"*** and ***"consider and advise on any issues of concern that may arise within the county"***. The respondents submit that the language is clear that there is no executive power or authority to make executive decisions in this context, and that the role of the CDBs is purely advisory.

35. The respondents further submit that the CDBs provides an excellent forum for the Senator to obtain first hand information at the county level on the financial requirements of the county which shall, in turn, inform debate at the national level when the Division of Revenue Bill and the County Allocation of Revenue Bills are being debated and passed by Parliament. They submit that there are, moreover, several other examples of such co-ordination boards in the county context, for example, the Inter-Governmental Budget and Economic Council and the National and County Government Co-ordinating Summit created by the Intergovernmental Relations Act, 2012. It is their case that the CGAA is part of the national legislation contemplated by Article 220(2)(c) of the Constitution to prescribe ***"the form and manner of consultation between the national government and county governments in the process of preparing plans and budgets"*** and accordingly, CGAA is firmly grounded on express provisions of the Constitution.

36. The respondents contend that if there is duplication of roles, it is the role of Parliament to repeal, modify or amend legislation so as to avoid any unnecessary duplication, and duplication of roles per se cannot render an Act of Parliament unconstitutional. They rely on the decision in **United States v Butler 297 US 1 (1936)** cited with approval in **National Conservative Forum vs Attorney General [2013] eKLR; Kenya Small Scale Farmers Forum vs R [2013] eKLR** and **CIC vs Parliament [2013] eKLR** for the proposition that ***"for the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government."***

37. With regard to the complaint that there was no public participation in the enactment of the CGAA, the respondents submit that the Bill was published in the Kenya Gazette of 16th August 2013 and on 11th October 2013, an advertisement in the *Daily Nation* newspaper called for public participation in accordance with Article 10 and 118 of the Constitution, and that members of the public and several institutions did send written memoranda.

38. The respondents further argue that the petitioners' contention that the CGAA interferes with the principle of distinctiveness and autonomy envisaged under Articles 6 and 189 (1) (a) of the Constitution, which require that the national and county government operate independently but with mutual cooperation, has no basis. Their argument is that Articles 6 and 189 require the governments at the national and county level to consult, cooperate, coordinate and liaise with each other so as to achieve optimal delivery of service, conduct their mutual relations on the basis of consultation and cooperation with coordinated policies and administration; and that the Constitution expressly provides for setting up of joint authorities. It is their case therefore that the CDB is a classical illustration of such joint authorities which create a multi-sectoral forum for consultation and cooperation. The respondents rely on the decision in **International Consultancy Group v Senate & Clerk of the Senate [2014] eKLR** to support their submissions with respect to the need for the two levels of government to work together in the delivery of services to the people.

39. The respondents deny the contention by the petitioners that the CGAA breaches the principle of separation of powers. They submit that CDBs were created to provide a consultative forum at the county level and accords with various constitutional provisions. In particular, they cite Article 189 of the Constitution which requires mutual cooperation and interdependence between the different levels of government. It is their submission that the CDBs do not have any executive powers and do not make executive decisions, and in their view, the levels of separation of powers the petitioners seek are unrealistic. The respondents rely on the decision of the Supreme Court of India in **Bhim Singh v U.OI & 7 Others (2010) INSC 358** and the decision of the Supreme Court of Kenya in **Re the Matter of the Interim Independent Electoral Commission [2011] eKLR Constitutional Application No 2 of 2011** for the proposition that functions of the different arms of Government must inevitably overlap, and that in modern governance, a strict separation of powers is neither possible nor desirable.

Submissions by the 48th Interested Party

40. The 48th interested party, Mr. Clement Nyamongo, opposed the petition. Though he did not appear at the hearing of the matter, he had filed submissions in opposition to the petition. His argument as set out in his submissions and affidavit is that the shared governmental responsibilities do not deprive Governors of their constitutional powers; that the CGAA will bring about the harmonisation of development projects at the county level and thereby translate into a constitutional right to cooperate. It was his case that there was no overlap of statutory duties of the legislative and executive branches of government.

Submissions by the Attorney General

41. The Attorney General supported the position taken by the respondents. In his opposition to the petition, the AG makes two main submissions. First, he argues that the presumption is that any legislation promulgated by the legislature is constitutionally sound and that it is upon the person alleging that it is unconstitutional to prove it is unconstitutional. He relies for this principle on the decision in **Ndyanabo vs Attorney General [2001] EA 495**. He further relies on the decision in **Pearlberg vs Varty [1972] 1 WLR 534** in which it was stated that:

> ***"One should not start by assuming that what Parliament has done in a lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown."***

42. The AG also opposes the invitation to the Court to declare the CGAA unconstitutional, placing reliance on the dictum in **Mount Kenya Bottlers Limited & 3 Others vs Attorney General and Others [2012],** that ***"courts cannot act as 'regents' over what is done in Parliament because such an authority does not exist".***

43. The AG opposes the petitions, secondly, on the basis that Article 119(1) of the Constitution

provides that any person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation. According to the AG, the petitioners ought to have approached Parliament before filing the present petition. He therefore prays that the consolidated petitions should be dismissed.

Submissions by Katiba

44. The Amicus Curiae submits that the CGAA and the CDBs that it establishes are unconstitutional for two reasons. It contends, first, that they offend the constitutional principle of division and separation of powers and secondly, that the conceptualisation and passage of CGAA is inimical to the constitutional principles of good governance and rule of law.

45. Katiba sets out the constitutional framework that provides for separation of powers and devolution of functions. It submits that the Senate's power to deal with county matters are circumscribed to limited instances by the Constitution, and it does not have the power to supervise or authorise development plans at the county level. In CIC's view, the Senate's role in relation to matters of counties is limited to those matters that are at the purview of or to be undertaken at the level of national government and not those relating to the business of or functions exclusively reserved for county governments. In enacting a law that gives Senate and National Assembly members a key role with regard to the executive business of counties, Parliament has enacted a law that is unconstitutional.

46. In addition, Katiba contends that CGAA allows members of Parliament and county assemblies to perform implementation and administrative roles as well as oversight roles; that this makes parliamentarians and county assembly members both legislators as well as executors of legislation; that this weakens the ability of the legislator to hold the county executive accountable for its use of state authority and financial management, and that this goes against the principle of separation of powers, as well as the provisions of the County Government Act which at section 9(2)(a) provides that ***" A member of the county assembly shall not be directly or indirectly involved in the executive functions of the county government and its administration"***. Katiba relies on the Supreme Court judgment **In Re the Matter of the Interim Independent Electoral Commission Constitutional Application No.2 of 2011** and **Jayne Mati & Another v Attorney General and Another, Nairobi Petition No 108 of 2011** in support of this argument.

47. Katiba contends, further, that section 91A(2)(a) is unconstitutional because CDBs have been created to provide forums for collaboration and consultation between the two levels of government yet other statutory mechanisms exist to facilitate collaboration between the two levels of government. Katiba specifically refers to section 187 of the Public Finance Management Act which established the Inter-governmental Budget and Economic Council for cooperation and consultation on financial matters, and section 54(2) of the County Governments Act which creates a forum responsible for ***"harmonisation of services rendered in the county, coordination of development activities in the county and coordination of intergovernmental functions."***

48. Finally, Katiba refers to Article 201(d) which requires, as a principle of public finance management, that public finances be prudently used. It was its submission that the duplication of structures does not adhere to this principle.

ANALYSIS AND DETERMINATION

Issues for Determination

49. We have considered the pleadings and submissions of the parties, and we take the view that the key issue for determination in this matter is whether the **County Governments (Amendment) Act 2014** (also referred to in this judgment as **CGAA**) is unconstitutional for being in violation of the Constitution. In determining this issue, we shall also consider and determine several collateral issues that were raised by the petitioners in respect thereto, as well as certain preliminary issues

relating to the competence of the petition raised by the respondents. For the sake of good order, we deal first with the preliminary issues raised by the respondents.

Preliminary Issues

50. The respondents have raised several questions relating to the competence of the petition before us, the first two of which relate to the provisions of the Government Proceedings Act (GPA).

Non-Compliance with the Government Proceedings Act

51. The respondents have argued that the petition is incompetent as it has not complied with the requirements of the Government Proceedings Act. Their submissions are, first, that the Attorney General, rather than the Senate, the National Assembly and the individual members of the Senate, should have been made the respondent in this matter as required by section 12 of the Government Proceedings Act. They also impugn the petition on the basis that the petitioners did not give the 30 day notice required under section 13A of the said Act prior to instituting the proceedings.

52. The preamble to the Government Proceedings Act states that it is:

> ***An Act of Parliament to state the law relating to the civil liabilities and rights of the Government and to civil proceedings by and against the Government; to state the law relating to the civil liabilities of persons other than the Government in certain cases involving the affairs or property of the Government; and for purposes incidental to and connected with those matters.***

53. Section 12(1) of the Act, which is relevant for present purposes, provides as follows:

> ***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.***

54. It must be observed, first, that the present matter is not a civil matter relating to ***"the affairs or property of government"*** in the manner contemplated under the provisions of the Government Proceedings Act. The petition before us seeks the interpretation of the question whether an Act of Parliament is unconstitutional for violating the Constitution. It is brought under the provisions of Article 165 and 258 of the Constitution which grant the Court the jurisdiction to interpret whether an Act of Parliament is inconsistent with or otherwise in contravention of the Constitution. It cannot therefore be deemed to be *"civil proceedings"* as contemplated in the Government Proceedings Act. In our view, the provisions of section 12 of the said Act do not apply to petitions alleging violation of constitutional rights or contravention of the Constitution.

55. However, even if the said Act was found to be applicable, we take the view that any shortcomings in terms of process is cured both by the Constitution itself and the rules of procedure made pursuant thereto. Article 156(4)(b) of the Constitution provides that the Attorney General:

> ***"…shall represent the national government in court or in any other legal proceedings to which the national government is a party."***

56. As the national government, through the Senate and the National Assembly, is part of these proceedings, the Attorney General is constitutionally mandated to represent the national government and he is automatically part of these proceedings. In any case as this Court recently held in **The Council of Governors and Others vs. The Senate Petition No. 413 of 2014:**

> ***"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."

57. In addition, Rule 5(b) of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (The Mutunga Rules)** states that**:**

> ***"A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute."***

58. Ideally, the office of the Attorney General should have been made a substantive party to these proceedings, instead of an interested party. However, as is evident both from the Constitution and the rules which require that substantive justice be done, the joinder, misjoinder or non-joinder of a party is not sufficient to defeat a matter. As rule 5(d) of the **Mutunga Rules** further makes clear, the Court can make substitutions, or require the joinder of a party either as a petitioner or respondent:

> ***"The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—***
>
> ***(i) order that the name of any party improperly joined, be struck out; and***
>
> ***(ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added".***

59. These rules are in accord with the requirements of the Constitution that in exercising judicial authority, the Court should seek to do substantive justice, hence the provisions of Article 159(2)(d) that ***"justice shall be administered without undue regard to procedural technicalities***." In the circumstances, we find that the objection by the respondents with regard to the position of the AG on the basis of section 12 of the Government Proceedings Act is without merit.

60. The second objection, also on the basis of the Government Proceedings Act, is founded on the provisions of section 13A of the said Act. The respondents argue, on the authority of the case of **Orengo vs Attorney General (2007) eKLR**, that the 30 day notice period required under section 13A of the Government Proceedings Act is absolute and cannot be derogated from. We take the view that two responses to this argument suffice. First, it must be observed that there are instances in which litigation against the government must be commenced on an urgent basis, when the 30 day notice period would defeat the purpose of the litigation. Secondly, the question of section 13A has been considered with respect to constitutional petitions, and found to be unconstitutional for violating the provisions of Article 48 which provides that ***"The State shall ensure access to justice for all persons…"***.

61. In interpreting the constitutionality of **section 13A(1)** of the **Government Proceedings Act** and having addressed his mind to the decisions in **Orengo vs Attorney General (supra), Hudson Laise Walumbwa vs Attorney General HCCC No. 2714 of 1987** and **Barrack Omudho Aliwa and Another vs Salome Arodi and Another Succession Cause No.38 of 2008**, 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."

62.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."

63.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."

64.The Learned Judge then concluded as follows;

"Viewed against the prism of the Constitution, it also becomes evident that Section 13A of the GPA provides an 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 Article 48.

65.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. As was held in **The Council of Governors and Others vs. The Senate** (supra):

"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. 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."

66. It is to be observed also that only the Court can grant the relief that the petitioner is seeking in this matter, namely the declaration of invalidity of legislation on the basis that it is unconstitutional. The Attorney General could not have provided the petitioners with the relief that they seek, and even had we found that the 30 day notice was a requirement, it would have been a procedural step that would serve no purpose in a matter such as this. In the circumstances, we find no merit in the objections by the respondents with respect to the competence of the petition, which we find is properly before us.

Jurisdiction

67. It is also incumbent on the Court to consider its jurisdiction in relation to the present matter, which revolves around the functions and distribution of powers between the national and county governments. This is in light of the argument by the AG that the petitioner should have approached Parliament if it was dissatisfied with the provisions of the CGAA, implying that the court has no jurisdiction to deal with this matter and that any dispute with regard to its provisions should be addressed to Parliament.

68. This argument, in our view, runs counter to the constitutional provisions with respect to the jurisdiction of this Court. At Article 165(3)(d)(i), this Court is given the jurisdiction to determine the question whether any law is inconsistent with or in contravention of the Constitution. The jurisdiction of the Court to invalidate laws that are unconstitutional is in harmony with its duty to be the custodian of the Constitution, which pronounces its supremacy at Article 2 by proclaiming, at Article 2(4), that "***Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."***

69. Similarly, the general provisions of the Constitution, which are set out in Article 258 contain the express right to every person to ***"… institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention***." As this Court held in **The Council of Governors and Others vs. The Senate** (supra):

"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 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".

70. It is therefore our finding that this Court has the requisite jurisdiction to determine the question whether the CGAA 2014 is unconstitutional.

Whether Article 119(1) of the Constitution Applies

71. It is useful, however, in closing on jurisdictional questions, to address ourselves to the provisions of Article 119(1) of the Constitution. The AG submits that the petitioners ought to have approached Parliament in accordance with the provisions of Article 119(1) prior to filing its petition. Article 119(1) and (2) are in the following terms:

> ***"Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal legislation.***
>
> ***2. Parliament shall make provision for the procedure for the exercise of this right."***

72. The question is whether this provision is intended to take away the right of a party to question the constitutionality of an Act of Parliament, or indeed any action taken by the legislature, guaranteed under Articles 22 and 258. Further, whether it can also be taken as ousting the jurisdiction of the Court under Article 165(3)(d) to determine any question respecting the interpretation of the Constitution, including ***"the question whether any law is inconsistent with or in contravention of"*** the Constitution, or under Article 165(3)(d)(iii), to determine any matter ***"…relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government***"?

73. In our view, the answer must be in the negative. Doubtless, Article 119(i) will serve a useful purpose in allowing citizens to petition Parliament to consider matters of concern to them that are within the purview of Parliament, including the repeal or amendment of legislation. It appears to us, however, that Article 119 is not intended to cover situations such as is presently before this Court. The question of the constitutionality of the impugned CGAA was raised with Parliament prior to its enactment. As deposed by Mr. Charles Nyachae, the Chairman of CIC, in his affidavit sworn on 19th September 2014, the issue had been brought to the attention of Parliament through CIC's Advisory Opinion in the month of August 2014, prior to the enactment of the CGAA. Parliament, nonetheless, appears to have disregarded the concerns raised regarding its conformity with the Constitution and proceeded to enact the legislation.

74. It would therefore be, in our view, for the Court to abdicate its responsibility under the Constitution to hold that a party who considers that legislation enacted by Parliament in any way violates the Constitution is bound to first petition Parliament with respect to the said legislation. The constitutional mandate to consider the constitutionality of legislation is vested in the High Court, and Articles 2(4) and 165(3(d)(i) mandate this Court to invalidate any law, act or omission that is inconsistent with the Constitution. This is in harmony with the mandate of the courts to be the final custodian of the Constitution.

75. This Court appreciates that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or An Act of Parliament, that procedure should be strictly followed. Article 3(1) of the Constitution enjoins every person to respect, uphold and defend the Constitution. Similarly, Article 258(1) thereof donates the power to every person to institute court proceedings claiming that the Constitution has been contravened, or is threatened with contravention. If this Court were to shirk its constitutional duty under Article 165(3)(d), it would have failed in carrying out its mandate as the temple of justice and constitutionalism and the last frontier of the rule of law. In the circumstances, the argument that the petitioner should have approached Parliament under Article 119(1) is without merit.

Presumption of Constitutionality

76. It has been argued on behalf of the AG and the respondents that every Act of Parliament enjoys a presumption of constitutionality until the contrary is proved. Reliance for this proposition is placed on the case of **Ndyanabo vs Attorney General [2001] EA 495** a judgment of the Court of Appeal of Tanzania, as well as the English case of **Pearlberg v Varty [1972] 1 WLR 534**.

77. In the **Ndyanabo** case, the Court stated that:

> ***"Until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislations should receive such a construction as will make it operative and not inoperative"***

78. We agree, as found by the Court in **Ndyanabo**, that the principle of presumption of constitutionality is a sound principle. This is so except in the case of legislation that limit fundamental rights which, in our context, the Constitution has provided, at Article 24(3), the parameters against which the constitutionality of such legislation is to be weighed. With respect to legislation that is alleged to violate provisions of the Constitution other than the Bill of Rights, the obligation is on the petitioner to establish that the legislation violates a provision(s) of the Constitution. This was the view taken by the Court in the case of **Coalition for Reform and Democracy (CORD) vs Attorney General and Others [2015] eKLR** in which it stated:

> ***"We have been called upon to declare SLAA in its entirety, or at the very least certain provisions thereof, unconstitutional for being in breach of various Articles of the Constitution. In considering this question, we are further guided by the principle enunciated in the case of Ndyanabo vs Attorney General [2001] EA 495 to the effect that there is a general presumption that every Act of Parliament is constitutional. The burden of proof lies on any person who alleges that an Act of Parliament is unconstitutional.***
>
> ***However, we bear in mind that the Constitution itself qualifies this presumption with respect to statutes which limit or are intended to limit fundamental rights and freedoms. Under the provisions of Article 24 which we shall analyse in detail later in this judgment, there can be no presumption of constitutionality with respect to legislation that limits fundamental rights: it must meet the criteria set in the said Article."***

79. As the petitioners allege a violation of the Constitution, the presumption of constitutionality applies in this case, and the petitioners have an obligation to establish that the CGAA is unconstitutional.

Applicable Principles

80. Before considering the allegation by the petitioners that the CGAA is unconstitutional, however, it is important to set out the principles applicable in determining the question whether an impugned legislation or part thereof meets the test of constitutionality.

81. This Court has considered these principles in various decisions - see for instance the decision of the five-judge bench of the High Court in **Coalition for Reform and Democracy & Others vs The Attorney General (supra).**

82. In the case of **Institute of Social Accountability & Another vs National Assembly & 4 Others High Court Petition No. 71 of 2014 [2015] eKLR**, the Court stated as follows at paragraphs 57 – 60:

> ***[57] "[T]his Court is enjoined under Article 259 of the Constitution to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. In exercising its judicial authority, this Court is obliged under Article 159(2)(e) of the Constitution to protect and promote the purpose and principles of the Constitution.***

. . .

[I]n determining whether a Statute is constitutional, the Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 [2011]eKLR, Samuel G. Momanyi v Attorney General and Another (supra)). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect. The Canadian Supreme Court in the R v Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 enunciated this principle as follows;

Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity.

[59.] Fourth, the Constitution should be given a purposive, liberal interpretation. The Supreme Court in Re The Matter of the Interim Independent Electoral Commission Constitutional Application (supra) at para. 51 adopted the words of Mohamed A J in the Namibian case of State v Acheson 1991(20 SA 805, 813) where he stated that;

> ***"The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship government and the governed. It is a mirror reflecting the "national soul" the identification of ideas and.....aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion".***

Lastly and fundamentally, it is the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see Tinyefuza v Attorney General of Uganda Constitutional Petition No. 1 of 1997 (1997 UGCC 3)).

We are duly guided by the principles we have outlined and we accept that while interpreting the impugned legislation alongside the Constitution, we must bear in mind our peculiar circumstances. Ours must be a liberal approach that promotes the rule of law and has jurisprudential value that must take into account the spirit of the Constitution. "<u>As this is a matter that concerns devolution, we recall what the Supreme Court stated</u> in The Speaker of the Senate & Another v Attorney-General & Another & 3 Others - Advisory Reference No. 2 of 2013 [2013] eKLR;"

82.At paragraph 136 of the **Institute of Social Accountability** case, the Court concluded as follows:

"[136] The Kenyan people, by the Constitution of Kenya, 2010 chose to de-concentrate State power, rights, duties, competences – shifting substantial

aspects to the county government, to be exercised in the county units, for better and more equitable delivery of the goods of the political order. The dominant perception at the time of constitution-making was that such a deconcentration of powers would not only give greater access to the social goods previously regulated centrally, but would also open up the scope for political self-fulfilment, through an enlarged scheme of actual participation in governance mechanisms by the people – thus giving more fulfillment to the concept of democracy."

83. These are the principles that will guide our consideration of the question whether section 91A of the CGAA meets constitutional muster.

Whether the County Governments (Amendment) Act 2014 Is Unconstitutional.

84. Having disposed of the preliminary issues raised in opposition to the petition and considered the applicable principles in interpreting the issue before us, we now turn to consider the issue at the heart of the matter: whether section 91A of the County Government (Amendment) Act violates the provisions of the Constitution.

85. The petitioners and CIC have argued that it does, for various reasons. First, that it provides for the involvement of the national and county legislatures in executive functions at the counties, thus violating the principle of separation of powers, in several respects. It is also in conflict with various legislation providing for devolution, and leads to a multiplicity of bodies dealing with devolution matters. In dealing with this substantive issue therefore, we shall start by considering the role of Parliament and Senate in devolved government.

86. In dealing with this question, it is important to bear in mind the constitutional provisions with regard to the exercise of power by state organs. In particular, we are cognisant of the provisions of Article 10 with respect to the national values and principles that govern the exercise of state power. Among these principles is the cardinal principle of the rule of law, which requires that only powers given under the Constitution or the law is exercised by any body or person. In this regard, Article 2(2) of the Constitution provides that ***"no person may claim or exercise State authority except as authorised under this Constitution"***. The effect of this is that if a certain power is granted to a specific organ, body or level of government, then no other entity can lawfully exercise that power.

87. From the outset, the Constitution sets out and recognises the basic principles with respect to separation of powers between respective arms and organs of government. Chief among these is the principle of devolution. At Article 1(3) and (4) of the Constitution, the people of Kenya delegate their sovereign power in the following terms:

> ***(3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—***
>
> ***(a) Parliament and the legislative assemblies in the county governments;***
>
> ***(b) the national executive and the executive structures in the county governments; and***
>
> ***(c) the Judiciary and independent tribunals.***
>
> ***(4) The sovereign power of the people is exercised at—***
>
> ***(a) the national level; and***
>
> ***(b) the county level.***

88. The respective powers of the organs of government are set out in the Constitution. With respect to the National Assembly, its powers are set out at Article 95, and, so far as is relevant for present purposes, are as follows:

> ***95. (1) The National Assembly represents the people of the constituencies and special interests in the National Assembly.***
>
> ***(2) The National Assembly deliberates on and resolves issues of concern to the people.***
>
> ***(3) The National Assembly enacts legislation in accordance with Part 4 of this Chapter.***
>
> ***(4) The National Assembly—***
>
> ***(a) determines the allocation of national revenue between the levels of government, as provided in Part 4 of Chapter Twelve;***
>
> ***(b) appropriates funds for expenditure by the national government and other national State organs; and***
>
> ***(c) exercises oversight over national revenue and its expenditure.***
>
> ***(5)The National Assembly—***
>
> ***(a)… ; and***
>
> ***(b) exercises oversight of State organs.***

89. With respect to the Senate, the Constitution provides at Article 96 as follows:

> ***96. (1) The Senate represents the counties, and serves to protect the interests of the counties and their governments.***
>
> ***(2) The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113.***
>
> ***(3) The Senate determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments.***
>
> ***(4) The Senate participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article 145.***

90. Thus, the constitutional mandate of both the National Assembly and Senate are circumscribed by the Constitution and limited to those areas expressly placed within their mandate. With respect to the Senate, its constitutional mandate is that of representation of counties and protection of the interests of counties at the national level; law-making in relation to matters concerning counties at the national level; and allocation of revenue to counties, and oversight over national revenue allocated to counties. Its mandate, like that of the National Assembly, does not extend to matters or functions reserved by the Constitution to counties at the county level.

91. The principles of devolution, which are at the heart of devolved government under the Constitution, are set out at Article 174 as follows:

174. The objects of the devolution of government are—

(a) to promote democratic and accountable exercise of power;

(b) to foster national unity by recognising diversity;

(c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;

(d) to recognise the right of communities to manage their own affairs and to further their development;

(e) to protect and promote the interests and rights of minorities and marginalised communities;

(f) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;

(g) to ensure equitable sharing of national and local resources throughout Kenya;

(h) to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and

(i) to enhance checks and balances and the separation of powers.

92. With regard to the exercise of powers at the county level, Articles 179 -185 are instructive. Article 179(1) provides that the executive authority of the county is vested in and exercised by the county executive committee comprising, as provided under Article 179(2)(a), the county governor and the deputy county governor, and members appointed by the county governor, with the approval of the county assembly, from among persons who are not members of the assembly.

93. With respect to its functions, the county executive committee is vested with power, under Article 183(1) to, inter alia, implement county legislation; implement within the county national legislation to the extent that the legislation so requires; manage and coordinate the functions of the county administration and its departments; and perform any other functions conferred on it by the Constitution or national legislation.

94. Such *"other functions"* are expressly conferred by the County Governments Act (CGA) and the Public Finance Management Act (PFMA) on the county executive committee by sections 30(3)(a) and 30(2)(f), 37, 104 and 105 of the CGA as well as sections 126, 129 and 130 of the PFMA. Thus, under the Constitution and legislation, it is the responsibility of the county executive comprising the governor and the county executive committees that he constitutes under section 30(2)(e) of the CGA to prepare and develop developmental plans and budget estimates and submit them to the respective county assemblies for approval.

95. It is thus evident that the powers of the Senate and the National Assembly do not include the powers to legislate at county level, which powers, under Article 185(1), are vested in the county assembly. They do not also, as is evident from Article 179 and 183, as well as the provisions of the CGA and the PFMA, include the preparation and development of plans and budgets for counties.

96. Further, under Article 189(1), the Constitution specifically requires the performance of functions

by the two levels of government in a manner that respects their independence by providing as follows:

> ***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 the other level, and respects the constitutional status of institutions of government at the other level and, in the case of county governments, within the county level.***

97. It is against this background that Parliament enacted the County Governments (Amendment) Act 2014. The Act is a four-section enactment which amended the County Governments Act by introducing three new provisions, sections 91A, 91B and 91C. Section 91A, which is what has precipitated the present dispute, is in the following terms:

> ***"There is established, for each county, a board to be known as the County Development Board, consisting of the following persons-***
>
> ***(a) The member of the Senate for the county elected under Article 98(1)(a) of the Constitution, who shall be the chairperson of the Board and convener of the Board's meetings.***
>
> ***(b) the members of the National Assembly elected under Article 97(1)(a) of the Constitution representing the constituencies located in the county.***
>
> ***(c) the woman member of the national Assembly for the County elected under Article 97(1)(b) of the Constitution.***
>
> ***(d) the governor as the chief executive officer of the county government, who shall be the vice-chairperson of the Board, and in his absence, the deputy governor of the county shall be the vice-chairperson.***
>
> ***(e) the deputy governor of the county;***
>
> ***(f) the leader of the majority party in the county assembly;***
>
> ***(g) the leader of the minority party in the county assembly;***
>
> ***(h) the chairperson of the county assembly committee responsible for finance and planning;***
>
> ***(i) the chairperson of the county assembly committee responsible for budget;***
>
> ***(j) the chairperson of the County Public Service Board, who shall be an ex-officio member;***
>
> ***(k) the County Secretary, who shall be the secretary of the Board and shall also provide Secretariat services to the Board, as an ex-officio member;***
>
> ***(l) the county commissioner, as an ex-officio member;***
>
> ***(m) the head of a department of the national government or the county government or any other person invited by the Board to attend a specific meeting of the Board.***

98. The functions of the CDBs are provided at section 91A(2) as follows:

(2) The County Development Board for each County shall:-

(a) Provide a forum at the county level, for consultation and coordination between the national government and the county government on matters of development and projects in accordance with the Constitution, and more specifically, Article 6(2), Article 10, and Article 174 of the Constitution.

(b) Consider and give input on any county development plans before they are tabled in the county assembly for consideration.

(c) Consider and give input on county annual budgets before they are tabled in the county assembly for approval;

(d) Consider and advise on any other issues of concern that may arise within the County.

99.Section 91B makes provisions with respect to the operational expenses of the CDBs. It states that:

"The operational expenses in respect of the County Development Board shall be provided for in the annual estimates of the revenue and expenditure of the respective county government."

100.The CGAA then creates an offence with respect to the operations of the CDBs and sets out a penalty under section 91C by providing as follows:

'Any person who knowingly and unlawfully obstructs, hinders, undermines or prevents the County Development Board from discharging its functions under this Act commits an offence and is liable on conviction, to punishment by a fine not exceeding one million shillings or imprisonment for a term not exceeding one year or both.'

101.It will be noted that section 91A(2)(b) has vested in the CDBs the mandate to give input on county development plans and county annual budgets before they are tabled in the county assembly for consideration. Noteworthy also is the composition of the CDB, which consists of a large number of members of the national legislature –its Chair is the Senator of the County, and the members of Parliament of constituencies within the County, as well as the women representative of the County, are members. The governor who, under the Constitution, is the Chief Executive Officer of the County, is the vice-chair of the CDB and deputises the Senator. Finally, it cannot escape notice that the CDB, though chaired by the Senator and composed of members of the national legislature and national executive, is intended to perform county functions, and to be funded from county funds, section 91B providing that the operational expenses of the CDB shall be provided for in "***the annual estimates of the revenue and expenditure of the respective county government."***

102.In our view, the composition and mandate of the CDBs upsets and is in violation of the framework created by the Constitution with respect to devolution and the separation of powers between the various institutions created under the Constitution which leaves the approval of county development plans and budget to county assemblies.

103.Neither the Senate, members of the National Assembly or members of the national executive such as county commissioners have a role to play in the planning and budgeting for county development plans. The Senate's role, as is evident from the provisions of Article 96, is to represent the counties at the national level, and to protect their interests and governments; to participate in the law-making function of Parliament by considering, debating and approving Bills concerning counties, and to determine the allocation of national revenue to and among counties.

Further, and more importantly, the Senate plays a critical oversight role with respect to the functioning of counties. In **The Council of Governors and Others vs. The Senate** (supra), a three-judge bench of this Court considered the meaning of the term ***"oversight"*** and stated as follows:

> ***[125]"…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".***

104. The Court then concluded as follows with respect to the oversight role of the Senate:

> ***[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.] <u>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."</u>***

105. Thus, we are convinced that the involvement of the Senate, National Assembly and national executive in the CDB violate the tenets and principles of the Constitution in three fundamental respects. First, it interferes with and compromises the roles of these organs in the exercise of their oversight functions over the functioning of counties and the use of revenue allocated to them. Secondly, and critically, it undermines the principle of devolution, a key cornerstone of the new Constitution and the governance structure of the country. Thirdly, it is in violation of the principle of separation of powers.

106. With regard to oversight, we have already analysed above the role of the Senate in representing the counties, in the enactment of legislation relating to counties, and in protecting the interests of counties at the national level. What the CGAA does is involve the Senate in the formulation of plans and budgets for counties, the same plans and budgets that it would thereafter be required to subject to scrutiny in exercise of it oversight role. It would be to defy common sense not to expect the inevitable conflict in the exercise of the oversight function of the Senate, and the consequent impact on devolution. In this respect, it is important to consider the issue of devolution and its place in Kenya's governance structure.

The Principle of Devolution

107. At the heart of devolution is a recognition that centralised power creates a climate for coercive state power. The people of Kenya have for long agitated for the decentralisation of power, and the right to have a say in their governance and the use of their resources. It is not surprising then that one of the key pillars of the Constitution is sharing of power and devolution, a principle which is captured in the national values and principles of governance in Article 10(2) of the Constitution. Devolved government is also recognised at the outset as one of the levels of government, the institutions to which and within which the people of Kenya have delegated their sovereign power as spelt out in Article 1(3)(b) and 1(4) of the Constitution.

108. In addition, under Article 6 of the Constitution, national and county governments have equal status as organs of state power, and in the exercise of their respective mandates, they must do so in a spirit of mutual respect. Article 6(2) 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".***

109. As though to underline the critical place of devolution in the new constitutional dispensation, as well as to make specific provision with regard to the operations of county governments, the Constitution devotes to it an entire chapter, Chapter 11 of the Constitution. In Chapter 12, the Constitution sets out, among other things, the principles of public finance and the manner of sharing revenue between national and county governments. It can properly be said that the commitment to devolution and sharing of power runs throughout the entire Constitution like a golden thread.

110. Thus, the structure of devolved government as envisioned by the people of Kenya and encapsulated in the Constitution cannot be altered without an elaborate amendment process that requires the direct endorsement of such a change by the people of Kenya people in accordance with the requirements of Article 255(1)(i).

111. By establishing the CDBs composed of the Senator, Members of the National Assembly and women members of the National Assembly, as well as national government officers at the county level, with the mandate to consider and make inputs into county budgets and plans, the CGAA effectively alters the structure of devolution by involving in its functioning and operations persons and officers from other levels of government. As we illustrate below, this is not the only shortcoming of this legislation. It effectively vests in the same hands the powers of planning, implementation and oversight, in clear violation of the principles of checks and balances and separation of powers, principles which we shall consider in the following section.

Separation of Powers

112. One of the objects of devolution set out in Article 174(i) is ***"to enhance checks and balances and the separation of powers."*** Separation of powers, in its most basic form, provides that the executive makes policy decisions, the legislature enacts laws and the judiciary interprets and applies the laws made by the legislature. The thinking behind separation of power is to ensure that there are checks and balances, and that no-one person or institution exercises all powers within a state. Thus, the Constitution provides at Article 94 that ***"the Legislative Authority of the Republic is derived from the people and at National level is vested and exercised by Parliament."***

113. Article 130 of the Constitution provides that the Executive Authority is vested in the President, Deputy President and the Cabinet. Legislative and executive authority at the national and county level is thus vested in different bodies, with the executive authority at the county level lying with the governor, the deputy governor, and the county executive committee, while the legislative authority is vested in the respective county assemblies. In **High Court Petition No. 229 of 2012- Trusted Society of Human Rights vs The Attorney General and Others,** the Court, while considering the principle of separation of powers in relation to the judiciary and the legislature,

observed as follows at paragraph 63 and 64 of the judgment:

> ***[63.] "….we begin by re-stating that the doctrine of separation of powers is alive and well in Kenya. Among other pragmatic manifestations of the doctrine, it means that when a matter is textually committed to one of the coordinate arms of government, the Courts must defer to the decisions made by those other coordinate branches of government. Like many modern democratic Constitutions, the New Kenyan Constitution consciously distributes power among the three co-equal branches of government to ensure that power is not concentrated in a single branch. This design is fundamental to our system of government. It ensures that none of the three branches of government usurps the authority and functions of the others. This constitutional design is a direct influence from Montesquieu, the noted French Philosopher who is often called the father of modern constitutionalism. Noting that separation of powers was essential to the liberty of the individual, Montesquieu famously said:***
>
> > ***When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.... There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals. 1 CHARLES SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 151-52 (Thomas Nugent trans., Hafner Publishing Co. 1949) (1748).***
>
> ***[64.] Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuan influence is palpable throughout the foundational document, the Constitution, regarding the necessity of separating the governmental functions. The Constitution consciously delegates the sovereign power under it to the three branches of government and expects that each will carry out those functions assigned to it without interference from the other two."*** (Emphasis added)

114. While these principles apply in relation to the co-ordinate arms of government at the national level, we take the view that they must apply with equal force in relation to the division of functions and mandates between the national and the county governments. Just as the national legislature cannot enter into the realm of the national executive with respect to planning and implementation, neither can the national legislature and executive enter into the executive functions at the county level without usurping the roles of the counties and thus violating the principles that separate national functions from county functions.

115. The respondents have tried to defend the CDBs on the basis that they have been established to play an oversight role; that they only have an oversight role, and will not exercise any executive functions. However, the wording of section 91A is clear that the CDBs have the mandate to make "inputs" into the development plans and budgets of counties. Such inputs, in our view, are completely outside the constitutional parameters of the functions of national government and its structures such as the Senate and the National Assembly.

116. In the case of **Institute of Social Accountability & Another vs National Assembly & 4 Others (supra)**, the Court considered similar arguments with respect to the Constituency Development Fund Act. It observed as follows at paragraph 100:

> ***"100." ….It is therefore argued that through the CDF Act, Parliament has***

created an oversight role over the funds allocated under CDF and that CDF finances activities not supported by county governments such as education bursaries to needy students and security."

117.The Court then observed with respect to the executive authority of a county at paragraph 106 that:

"Executive authority of a county, including implementing legislation and managing and coordinating the functions of the county administration are roles bestowed on the county executive committee (CEC) under Article 183 of the Constitution. Indeed, both the Constitution and the law requires the CEC to submit reports regarding affairs of the county to the county assembly. Further, Article 179(4) of the Constitution designates the county governor and deputy governor as the chief executive and deputy chief executive of the county respectively. Additionally, Part XI of the County Government Act has provided for the statutory framework to be used in the county planning. Section 104 of that Act has made it mandatory for counties to plan for everything being implemented in the County."

118.By purporting to create an oversight role for national government in the counties, section 91A purports to allocate to national institutions roles in the counties that are not in compliance with the Constitution. In the **Institute of Social Accountability** case (supra), the Court held at paragraph 107 that:

"Article 186(1) of the Constitution has set out that national and county governments are to share certain functions within the County and those functions are clearly stipulated in the Fourth Schedule to the Constitution. The creation and assignment of roles to an entity outside the structures of governance established under the Constitution is antithetical to the principles of the Constitution as it threatens to violate the functional competencies of county government within which CDF operates."

119.While the CDBs may be said to differ from the CDF in that they are intended to exercise "oversight" functions, they are in virtually every respect analogous to the CDF. The allocation of any functions in relation to county development plans to national government institutions is not in line with the Constitution and offends the principle of devolution, separation of powers and allocation of functions. This was clearly articulated in the **Institute of Social Accountability** case when the Court observed at paragraph 122 that:

"Article 1(4) of the Constitution recognises two levels of government, the national and county governments. Each of these levels exercises power derived from the Constitution itself. Under Article 1 of the Constitution, the county government does not derive its power from the national government but directly from the People of Kenya and under the Constitution. These two levels of governments are therefore, in theory, equal and none is subordinate to the other. MPs and cabinet secretaries involved in the management or implementation of the CDF constitute the executive and legislative organs of the national government. Their involvement in development activities at the county level not only threatens to undermine the functions of the government at the county level but also blurs the executive and legislative divide that underlies the principle of separation of powers. We therefore find that it is unconstitutional for the national government to extend its mandate in the counties beyond its mandate under the Constitution through the artifice of the CDF.

120.The parallels between the CDBs and the CDF are obvious. In the same way that the legislature sought to retain its extension of powers in the counties through the CDF, and thus control funds

that constitutionally fall within the mandate of the counties, a similar attempt is being made to extend the powers of the national legislature, the National Assembly and Senate, into the county executive by assigning to the CDBs a role in the planning and budgetary processes of counties. This, we reiterate, not only undermines devolution, but is a direct threat to the principle of separation of powers which is one of the cornerstones of our new, democratic dispensation. We fully agree with the view of the Court in the **Institute of Social Accountability** case when it observed:

> ***[127] "The principle of separation of powers is at the heart of the structure of our government; each organ is independent of each other but acting as a check and balance to the other and also working in concert to ensure that the machinery of the state works for the good of Kenyans. The Apex Court in the Matter of the Interim Independent Electoral Commission (supra) expressed itself as follows;***
>
> > ***"The effect of the Constitution's detailed provision for the rule of law in processes of governance, is the legality of executive or administrative actions to be determined by the Courts, which are independent of the Executive branch. The essence of separation of powers, in this context, is that 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."***

121. We need say no more, we believe, to demonstrate how patently antithetical to the spirit of devolution, the principles of separation of powers and good governance, as well as the rule of law, the county development boards established under the County Governments (Amendment) Act, are. We therefore find and hold that section 91A of the County Government (Amendment) Act is unconstitutional. By necessary extension, sections 91B and 91C, which are intended to bolster the provisions of 91A of the CGAA, are also of necessity unconstitutional. As the entire County Governments (Amendment) Act consists of these three provisions, we have no hesitation in holding the entire Act unconstitutional, and therefore null and void.

Disposition

122. The petitioners in the consolidated petitions sought similar prayers with respect to the constitutionality of the CGAA. In the case of the 1st petitioner, it sought the following orders:

> ***A. A declaration that within the intendment of Article 6(2), 95, 96, 174 and 175 of the Constitution and resonating the intention of 179(i), 179(4), 183(1), 183(1) and 189(1) of the Constitution, the provisions of section 91A(1) of County Government (amendment) Act 2014 that establishes County Development Boards which shall be comprised in the manner stated in the said Act and undertake the functions outlined in section 91 A(2) of the Act are unconstitutional.***
>
> ***B. A declaration that within the intendment of Article 6(2), 95, 96, 174(i) and 175 of the Constitution and resonating the intention of 179(1), 179(4) 183(1), 185(3) and 189(1) of the Constitution, the provisions of section 91A(1) of County Government (amendment) Act 2014 that establishes County Development Boards which shall be comprised in the manner stated in the said Act and undertake the functions outlined in section 91A(2) of the Act are null and void.***
>
> ***C. There be no order as to costs.***

123. As is evident from the prayers set out above in respect of the 1st petitioner, as well as those of the 2nd - 4th petitioners set out earlier in this judgment, the petitioners substantially seek a declaration that the entire County Governments (Amendment) Act 2014 is unconstitutional. We see no purpose in granting the two prayers and instead grant the following final orders:

i. ***The County Governments (Amendment) Act 2014 is hereby declared unconstitutional, null and void;***

ii. ***As the petition raised issues of great public interest and importance, let each party bear its own costs of the petition.***

124. We are grateful to all the parties for their very extensive submissions and authorities, and for the diligence with which they presented their respective parties' positions on the issues in dispute.

Dated, and Signed at Nairobi this 10th day of July 2015

ISAAC LENAOLA MUMBI NGUGI G.V. ODUNGA

JUDGE JUDGE JUDGE

Dated, Delivered and Signed at Nairobi this 10th day of July 2015

ISAAC LENAOLA

JUDGE