



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 300 OF 2014

**(CONSOLIDATED WITH PETITION NO. 490 OF 2014, JUDICIAL REVIEW APPLICATION
NOS. 35 & 247 OF 2014**

BETWEEN

REAL DEALS LIMITED & 3 OTHERS.....APPLICANT

AND

**KENYA NATIONAL HIGHWAYS AUTHORITY & ANOTHER.....
RESPONENTS**

AND

COUNCIL OF GOVERNORS.....INTERESTED PARTY

JUDGEMENT

Introduction

1. This judgement is the subject of Petition Nos. 300 of 2014 and No. 490 of 2014 as well as Judicial Review Application Nos. 35 & 247 of 2014 which were consolidated as they raise similar issues.
2. The 1st Petitioner herein, **Real Deals Limited**, is described as a company engaged in trade and business of outdoor advertising and signage in Nairobi and elsewhere in the Republic of Kenya.
3. The 2nd Petitioner, **The Nairobi County Government**, it was pleaded, is established under Article 176(1) of the Constitution which, pursuant to the provisions of Article 186(1) of the Constitution, is required to perform the functions set out in the Fourth Schedule to the Constitution. Of particular importance in relation to this matter, is part 2(3) of the Fourth Schedule to the Constitution which lists the functions and powers of the County as “control of air pollution, noise pollution, other public nuisances and outdoor advertising”.
4. The 3rd Petitioner which is also the 4th Petitioner, **Outdoor Advertising Association of Kenya**, on the other hand is described as an association comprising different companies engaged in the trade and business of outdoor advertising in Nairobi and elsewhere in the Republic of Kenya and incorporated and registered under the **Societies Act**, Cap 108, Laws of Kenya.

5. The 1st Respondent, **Kenya National Highways Authority**, (hereinafter referred to as “the Authority”) is described as a statutory body established by section 3 of the **Kenya Roads Act**, Cap 408, Laws of Kenya.

6. The 2nd Respondent, **Kenya Roads Board** (hereinafter referred to as “the Board”) is described as a body corporate established under section 4 of the **Kenya Roads Board Act**, Cap 408 Laws of Kenya.

Petitioners’ Case

7. According to the Petitioners and ex parte Applicants (hereinafter referred to as Petitioners for ease of reference), Section 5 of the **County Governments Act**, provides that the County Government shall be responsible for the functions provided for in Article 186 and assigned in the Fourth Schedule of the Constitution and that it is these provisions of the law that informed the 2nd Petitioner’s move to include the charges or fees for outdoor advertising in its **County Finance Act** and therefore forms part of the revenue. It was contended that Article 186(1) of the Constitution of Kenya sets out the respective functions and powers of the National and County Governments and provides that the functions of the national government and the county governments are those set out in the fourth schedule to the constitution. Part 2(3) to the Fourth Schedule of the Constitution of Kenya on the other hand vests all County Governments, including the 2nd Petitioner herein, with the functions and powers of control of air pollution, noise pollution, other public nuisances and outdoor advertising. Therefore, it was pleaded, pursuant to the provisions of Article 176(1), 186(1), part 2(3) of the Fourth Schedule of the Constitution, as well as Section 5 of the **County Governments Act**, it is the sole mandate of the County Government to levy charges or fees relating to outdoor advertisements falling within its area of jurisdiction.

8. According to the Petitioners, on or about 10th May, 2013 the Minister for Roads enacted the **Kenya Roads (Kenya National Highways Authority) Regulations, Legal Notice No. 86 of 2013** (hereinafter referred to as “the Regulations”) pursuant to the powers conferred on him by Sections 22(2)(d) and 46 of the **Kenya Roads Act**. The said Regulations at Section 6(1) require a person who wishes to make use of any portion of a road reserve on a class A, B or C to make an application to the Director-General of the Respondents. The same Regulations at Schedule “A” provide the fees for Commercial Advertisement or Billboards on road reserves or abutting areas as Kshs 5,000.00 per square metre of commercial advertisements or billboards placed within road reserves and abutting areas in cities and municipalities and Kshs 4000.00 per square metre of commercial advertisement or billboard placed within road reserves and areas abutting road reserves in other areas.

9. It was averred that on or about May 2014, the Respondents, in patent breach of the 2nd Petitioner’s constitutional mandate, issued a public notice regarding the payment of annual fees and installation and maintenance of approved structures/items on road reserves and facilities for class A, B and C Roads. In the said notice the Respondents, on the basis of the provisions of Section 49(3) of the **Kenya Roads Act** and the Regulations required the immediate settlement of unpaid charges and rates for structures/Adverts owned by various firms and individual in regions countrywide. In connection with the said notice, the Respondents published a list of the specified structures/installations and the outstanding amounts in specific regions in the country on its website. With specific regard to Nairobi County, the Respondents called for the payment a flat fee of Kshs 1000 in registration fees for each advertisement and a total sum of Kshs 75,156,700 in annual advertisement fees.

10. The Petitioners averred that on 18th December, 2013, the Respondent invited bids with a view to entering into a consultancy contract for the design, fabrication, installation, testing and commissioning of billboards, marketing, management and maintenance of outdoor advertising services along the Northern Corridor. To the Petitioners, minutes of the meeting of the Tender Committee held on 6th January, 2014 confirm that the sole purpose of the Respondent’s decision and intended action is to collect revenue from outdoor advertising. To the Petitioners, the entry into a consultancy contract for the design, fabrication, installation, testing and commissioning of billboards, marketing, management and maintenance of outdoor advertising services along the Northern Corridor in the manner intended by the Respondent will interfere with the current outdoor advertising control functions and powers of the County Governments,

will amount to double taxation on members of the Petitioners and will create a monopoly in favour of whichever single individual awarded the consultancy contract.

11. The Petitioners added that on or about June 2014, the Respondents, in further breach of the 2nd Petitioner's constitutional mandate, invited tenders from eligible candidates for the temporary use of class A, B & C Road reserve land and structures for placement of advertisements or notices. However vide another Notice dated 2nd July, 2014, the Respondents postponed the tender opening and closing scheduled for 3rd July, 2014 until further notice.

12. According to the 1st, 3rd and 4th Petitioners, they have erected and maintain advertising structures and devices of class A, B and C on road reserves in Kenya and the revenue from these structures is currently collected by various County Governments in whose jurisdiction the roads pass.

13. It was averred that by their respective Public Notices, the Respondents cited Section 49(3) of the **Kenya Road Act** as conferring upon them Respondent the authority to levy charges on adverts owned by various firms and individuals as per regulation 6(5) of the Regulations. However, to the Petitioners, the provisions of the **Kenya Roads Act** and the Regulations made thereunder, which Act and Regulations were enacted before the promulgation of the Constitution, should therefore be interpreted in a manner that excludes the authority to charge fees on outdoor advertising since that is the sole mandate of the county governments in whose jurisdiction the advertisements fall. To the Petitioners, the object and purpose of the 2nd Respondent is overseeing the road network in Kenya and coordinating the maintenance, rehabilitation and development funded by the Kenya Roads Fund and its powers are set out under section 8 of the **Kenya Roads Board Act**. As for the 1st Respondent, it was contended that it was established with the object and purpose of management, development, rehabilitation and maintenance of national roads and its powers are set out under section 22 of the Act creating it, the **Kenya Roads Act**.

14. Consequently, any provision (or interpretation thereof) of the provisions of the **Kenya Roads Act** and the Regulations made thereunder that attempts to confer upon the Respondents the authority to charge fees on outdoor advertisements is unlawful and should be declared unconstitutional. Further, it was contended that section 49(3) of the **Kenya Roads Act** and Regulation 6 and Part 1A of the Schedule to the Regulations are *ultra vires* the mandate of the Respondents and unconstitutional to the extent that they confer upon the Respondents the power to levy charges and control outdoor advertising which mandate rests solely with the 2nd Petitioner. Consequently, any purported action by the Respondent to impose any charges or fees on outdoor advertisements amounts to a patent breach of the constitutional mandate of the 2nd Petitioner and should be declared null and void.

15. The particulars of breach according to the Petitioners are that the said Regulations breach the Principles and objects of devolution under Article 174 and 175 of the Constitution of Kenya, 2010; Regulation 6 and Part 1A thereof threatens the principles and values of devolved government brought about by the new Constitution and undermines the sovereignty of the Constitution contrary to the provisions of Articles 1, 2, 174 and 175 of the Constitution of Kenya; to the extent that the said Regulations undermine devolution, this honourable court is enjoined to declare it unconstitutional under Article 2(4) of the Constitution; the same violate fundamental consumer rights of the residents of Nairobi County under Article 46 of the Constitution of Kenya which entitles all residents of Nairobi County to the right to the protection of their economic interests in relation to services provided by the public entities including outdoor adverting, a mandate which, by dint of Article 186(1) of the Constitution of Kenya, as read together with Part 2(3) to the Fourth Schedule thereof, the 2nd Petitioner is enjoined to perform, at a cost; that the net effect of the Respondents' actions as well as the Regulations is that the residents of the County and others who advertise within the County will end up paying twice for the same licence and service contrary to the provisions of Article 47 of the Constitution which ensures protection of the economic interests of consumers.

16. According to the Petitioners, the functions and powers of revenue collection from outdoor advertising through the levy of fees charges and rates have been donated to County Governments under Article 209(3) of the Constitution as read together with the Fourth Schedule of the constitution and are

exercisable under *The Physical Planning Act*, Cap 26 of the Laws of Kenya, *The County Governments Act No. 17 of 2012* and *The Public Finance Management Act No. 18 of 2012*.

17. It was disclosed that since various County Governments such as the County Governments of Nairobi, Nakuru, Kisumu and Uasin-Gishu have in exercise of the functions and powers distributed and allocated to them by the Constitution and statutes, enacted Acts for the control of outdoor advertising and collection of revenue therefrom by way of levy of fees, charges and rates, the said Regulations and the Respondents' decision and intended action will lead to double taxation of the Petitioners and the larger outdoor advertising industry and is therefore unconstitutional, unlawful, *ultra vires* and contravenes statute. To the Petitioners the aforesaid contravene their legitimate expectation that outdoor advertising shall be controlled by County Governments; that outdoor advertising industry shall not be subjected to double taxation and that organs of the National Government of which the Respondents are; and shall not exercise or interfere with the same functions and powers.

18. To the petitioners, the enactment of the Regulations aforesaid contravened the Petitioners rights and freedoms under the constitution in the sense that the Respondents did not seek the participation of the Petitioners in the enactment of the Regulations in contravention of Article 10(2)(c) and 35 of the Constitution but to the contrary, undertook deliberations leading to the enactment of the Regulations in secrecy, in contravention of the said provisions. In contravention of Article 20 of the Constitution, the Respondent had arbitrarily and without prior consultation declared pre-existing structures to be in contravention of Section 49 of the *Kenya Roads Act* and threatened to withdraw approval for, demolish, remove or otherwise adversely interfere with structures belonging to the Petitioner thereby contravening its established proprietary rights and interests. The Respondents, it was averred, contravened the Petitioners' right to information necessary for it to gain full benefit from the services rendered by the Respondent in connection with outdoor advertising and signage in contravention of Article 46 of the Constitution. Further, the Petitioners' exclusion in the processes leading to the enactment of the Regulations did not constitute the exercise by the Respondent of administrative action that is lawful, reasonable and procedurally fair, in contravention of Article 47 of the Constitution and that the Respondents' imposition of fees and charges on outdoor advertising and signage contravened the procedure out in Article 209 and 210 of the Constitution, on imposition of fees and charges.

19. It was the Petitioners' further assertion that the Regulations do not comply with the provisions of Section 11 of the *Statutory Instruments Act, 2013* and that the enforcement or implementation of the Regulations in the manner enacted will be a further contravention and infringement of the Petitioners' rights and freedoms.

20. To the Petitioners, the fees imposed by the Respondents are punitive and expose the Petitioners to a real risk of closure of business and loss of livelihood thus denying the Petitioners their fundamental right to economic well-being and the right to earn a living contrary to the provisions of the constitution.

21. It was further contended that the Regulations are unlawful, unreasonable and unconstitutional in so far as the same purport to impose fees on private land, that is "abutting areas" of road reserves as provided for under Regulation 6 of the Regulations. It was therefore the Petitioners' case that it is just that Regulation 6 and Schedule 1A of the *Kenya Roads (Kenya National Highways Authority) Regulations, 2013* be declared unlawful, unconstitutional and invalid and the Respondents restrained from enacting any legislation on fees and charges for outdoor advertising and signage, without consultation with the Petitioners.

22. The Petitioners therefore sought the following orders:

1. **A declaration that the Public Notices and Invitation to Tender issued by the Respondent on or about May 2014 to June 2014, or any other date, are *ultra vires* the mandate and functions of the Respondent under Section 4 of the Kenya Roads Act Cap 408, Laws of Kenya and are therefore null and void**
2. **A declaration that Section 49(3) of the Kenya Road Act does not confer upon the Respondent the power or authority to levy charges or exercise any control over outdoor advertisements**

on Road Reserves or abutting areas.

3. A declaration that Regulation 6 and Part 1A of the Schedule to the Kenya Roads (Kenya National Highways Authority) Regulations, 2013 is unconstitutional to the extent that it allows the Respondent to levy charges on approvals to place commercial advertisements or Billboards on Road Reserves or abutting areas which mandate vests in the County Governments under Article 186(1) of the Constitution and Part 2(3) of the Fourth Schedule to the Constitution of Kenya.
4. Judicial Review orders of *Certiorari* do issue to remove into this honourable Court and quash the Public Notices and Invitation to Tender issued by the Respondent on or about May 2014 to June 2014, or any other date, calling on members of the public to pay advertisement fees to the Respondent and inviting tenders for the temporary use of class A, B & C Road reserve land and structures for placement of advertisements or notices.
5. Judicial Review orders of *Mandamus* do issue compelling the Respondent to refund all monies paid by the Owners of advertisements in Nairobi County, in respect of the said advertisements, in compliance with the illegal Public Notices issued by the Respondent.
6. An order of permanent injunction do issue to restrain the Respondent from levying charges on outdoor advertisements or in any way interfering with or usurping the exclusive mandate of County Governments under Article 186(1) of the Constitution of Kenya and Part 2(3) of the Fourth Schedule to the Constitution of Kenya.
7. An Order of *certiorari* be and is hereby issued to remove into this Court and quash the entire decision by the Respondent made on 18th December, 2013, inviting bids with a view to entering into a consultancy contract for the design, fabrication, installation, testing and commissioning of billboards, marketing, management and maintenance of outdoor advertising services along the Northern Corridor.
8. An Order of Prohibition be and is hereby issued prohibiting the Respondent from receiving and acting upon bids with a view to entering into consultancy contract for the design, fabrication, installation, testing and commissioning of billboards, marketing, management and maintenance of outdoor advertising services along the Northern Corridor and/or from entering into any contract in respect thereof.
9. Costs of these proceedings.

Petitioners' Submissions

23. It was therefore submitted that the powers and functions of the Respondents are limited to overseeing the road network in Kenya and coordinating the maintenance, rehabilitation and development funded by the Kenya Roads Fund as circumscribed by Section 8 of Cap. 408A. In the Petitioners' view, based on *Administrative Law*, by Sir William Wade, 10th Edn., the Respondent should not act outside that scope of limit of powers and functions and that any attempt to act outside of that limit is liable to be stopped. According to the said author:

“Public administration is carried out to a large extent under statutory powers, conferred upon public authorities by innumerable Acts of Parliament. Statutory duties, imposed similarly, also play their part, but it is a minor one in comparison with powers. This is because duties are obligatory and allow no element of discretion, which raises the most numerous and most characteristic problems of administrative law...When the question arises whether a public authority is acting lawfully or unlawfully, the nature and extent of its power or duty has to be found in most cases by seeking the intention of Parliament as expressed or implied in the relevant Act. The principles of administrative law are generalized rules of statutory interpretation. Thus the dominating source of power is Parliament, but there are certain other sources which do not have a statutory basis. These are the royal prerogative; corporate and contractual powers; and non-legal and abnormal powers...Statutory powers therefore have considerable latitude, and by reasonable construction the courts can soften the rigour of the ultra vires principle. Although this book contains so many instances of that principle being infringed, it must be remembered that the courts intervene only where the thing done goes beyond what can fairly be treated as incidental or consequential”.

24. It was submitted that the Respondent's source of revenue is the Kenya Roads Board Fund established under Section 31 of Cap. 408A which section sets out the sources of revenue and the mode of expenditure thereof. Whereas the Respondents attempted to justify their intention to collect revenue from outdoor advertising on the basis of Section 6(2)(k) of Cap. 408A, it was submitted that the said provision provides:

Without prejudice to the generality of section (1), the Board shall

identify, quantify and recommend to the Minister such other potential sources of revenue as may be available to the Fund for the development, rehabilitation and maintenance of roads.

25. To the Petitioners the key phrase is "such other potential sources of revenue as may be available to the Fund". However, in the Petitioners' view, any such other source must of necessity, be read *ejusdem generis* the sources set out in Section 31 of Cap. 408A and the source must also, not interfere with any other sources of revenue, for which the National Government or County Governments have exercised their respective revenue collection powers under the Constitution or Statute. A reading of Cap. 408A, according to the Petitioner, limits the Respondent's source of revenue to the Kenya Roads Board Fund. However, there appears to be no express provision under Cap. 408A empowering the Respondent to collect revenue from outdoor advertising let alone control that business. It was submitted based on Articles 209 and 210 of the Constitution that "***no tax or licensing fee may be imposed, waived or varied except as provided by legislation.***"

26. It was the Petitioners' case that the functions and powers of control of outdoor advertising are vested in County Governments under the Fourth Schedule of The Constitution Part 2, Paragraph 3 and that in exercising the power of control, the County Government issues development permissions for the erection and maintenance of advertising structures under Part V of the ***Physical Planning Act***, Cap. 286 of the Laws of Kenya and that development permission fees are paid before permission is given. ***The Public Finance Management Act, No. 18 of 2012***, on the other hand, in section 171 gives mandate over the management of revenue in urban areas to the accounting officer and whose exercise of power must be consistent with the provisions of ***The Urban Areas and Cities Act*** No. 13 of 2011. To the Petitioners, in urban areas and cities, ***The Urban Areas and Cities Act*** No. 13 of 2011 contains the legislation for governance and management and Boards are established under Sections 13 and 14 and mandated under Section 43 to appropriate monies allocated by County Assemblies which monies include revenue collected from outdoor advertising, a service provided by County Governments under the First Schedule of the said Act.

27. It was averred that revenue from outdoor advertising on roads in highways and rural areas is collected by the respective County Governments and regulated by the ***Physical Planning Act***, Cap. 286 of the Laws of Kenya as well as ***The Kenya Roads Act*** No. 2 of 2007 by the Kenya National Highways Authority. It was averred that County Governments have, in exercise of power donated to them under the ***County Government Act***, Cap. 17 of 2012 and the ***Public Finance Management Act***, No. 18 of 2012 enacted ***County Finance Acts*** through which revenue from outdoor advertising is collected. The ***Nairobi County Finance Act***, 2013, for example, it was submitted is an Act to provide for the various taxes, fees and charges for services and for other revenue raising measures by the County Government and for matters incidental thereto and sets out an elaborate regime for collection of revenue from outdoor advertising. It was contended that revenue from outdoor advertising is collected by County Governments and is not another potential source of revenue available to the Respondents hence it will be illegal for the Respondents to collect revenue from the same source. To the Petitioners, outdoor advertising does not fall under "***Such other potential sources of revenue as may be available to the Fund...***"

28. In support of this position the Petitioners relied on **Robert N. Gakuru –vs- Governor Kiambu County & 3 others (2014) eKLR**, and submitted that collection of revenue from outdoor advertising by the Respondents when such revenue has been collected by the County Government is double taxation hence the attempt to do so should be quashed and prohibited.

29. It was further submitted that the Petitioners had demonstrated how in the past and now, revenue from

outdoor advertising has been and is being collected. The intended action by the Respondents will interfere with the Petitioners' legitimate expectation that outdoor advertising shall be controlled by County Governments, there shall be no doubt taxation on it and that organs of the National Government of which the Respondent is, shall not exercise or interfere with the powers and functions of County Governments on the matter. This expectation need be enforced to uphold the rule of law and good governance. Legitimate expectation is now part of administrative law. Reliance was placed on *Administrative Law*, by Sir William Wade, 10th Edn. at where the scope of limit and intervention of the Court was set out thus:-

“A further reason for the protection of the legitimate expectation lies in the trust that has been reposed by the citizen in what he has been told or led to believe by the official. Good government depends upon trust between the governed and the governor. Unless that trust is sustained and protected officials will not be believed and government becomes a choice between chaos and coercion. The protection of trust as a concept has its origins in German law and it plainly overlaps with the protection of ‘legal certainty’. But it has this particular advantage: It is a simple concrete question of fact whether trust has been reposed in an official’s promise, so this principle does go ‘some distance’ to indicate which expectations should be protected and which should not. It captures precisely why legitimate expectations should be protected.”

30. The Petitioners also relied on **Keroche Industries Limited –vs- Kenya Revenue Authority & 5 others (2007) eKLR** for the holding that:-

“An abrupt change as was intended in this case, targeted a particular company or industry in certainly abuse of power. Stated simply legitimate expectation arise for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way. In this case the applicant did not expect an abrupt change of tariff where the process of manufacture or its products had not changed. Public authorities must be held to their practices and promises by the court and the only expectation is where the public authority has a sufficient overriding interest to justify a departure from what has been previously promised. In this case imposing a liability of 1 billion on the applicant to be paid within 14 days through attractive in terms of enhanced public revenue and perhaps for the zeal of meeting annual tax targets, I find is not an overriding interest for the reasons set out in this judgment including failure to satisfy the principle of legality.”

31. To the Petitioners, the Respondent’s contravention of the Constitution and Statute cannot be justified on the plea of public interest as it is now settled law that public interest is best served by enforcing the Constitution and Statute as was held in **Republic –vs- County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya (2014) eKLR** thus:-

“There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the constitution and the law as the rule of law is one of the national values of the constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered in a forum where in accordance with the law, the ex-parte applicant members were granted an opportunity to be heard. There cannot be public consistently with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi judicial decision.”

32. It was therefore the Petitioners’ case that any attempt by the Respondents to collect revenue outside the scope of their statutory powers and functions under Cap. 408A is unconstitutional and illegal. It is *ultra vires* Cap. 408A. It contravenes the elaborate revenue power allocation role under The Constitution of Kenya, *The County Government Act* and the *Public Finance Management Act, No. 18 of 2012*. It is an attempt to exercise powers and functions in excess of jurisdiction hence is not permissible. In support of this submission the Petitioners relied on **Francis Chachu Ganya & 4 others -vs- Attorney General & Another (2013) eKLR**, in which the Court examined the effect of exercise of power without authority and held as follows:

“In my view, it would be an illegality if the body that purports to exercise the powers by giving notice is not the one mandated to do so. Therefore the notice that was purportedly issued by the Commissioner of Lands was issued by a person not authorized to do so and to that extent the said notice was either issued without jurisdiction or in excess of jurisdiction.”

33. In the Petitioners’ view, the Respondents have no power to collect revenue from outdoor advertising and that attempt must be quashed and prohibited since the Respondents being statutory bodies can only exercise revenue collection powers and functions in accordance with the powers and functions donated to them by Cap. 408A which powers and functions do not extend to collection of revenue from outdoor advertising. These powers and functions have already been allocated to County Governments by the Constitution and Statute. The contract and action intended by the Respondent will result in double taxation and interference with other revenue collection powers and functions of constitutional organs. The Court was therefore urged to remedy the interference.

1st Respondent’s Case

34. The 1st Respondent, the Kenya National Highways Authority (hereinafter referred to as “the Authority”) averred that it is a State Corporation established under the ***Kenya Roads Act, 2007 (hereinafter referred to as the Act)*** with the responsibility for the Management, Development, Rehabilitation and Maintenance of National Roads (Class A, B & C roads). In pursuit of its authority, the Authority’s mandate as set out in Section 4(1) of the Act, which includes the management of road reserves and access to roadside developments in respect of National roads (Class A, B & C roads), is responsible for :

- a. Installation of any form of structure for the placement of advertisements on road reserves including signage and gantries;
- b. Placement of Communication Cables along and/or across Class A, B or C roads;
- c. Laying of water pipelines along and/or across ;
- d. Laying of sewer lines along and /or across;
- e. Erection of power lines along and/or across, and;
- f. Construction of or Improvement of access roads to Property.

35. It was contended that in providing and managing these activities, it is the responsibility of the Authority to ensure the safety of road users and the protections and management of road assets hence service providers are expected to comply strictly with the conditions issued by the Respondent when an approval for the above activities is granted. In its view, lack of effective management of placement of structures for advertising on road reserves has, and may lead to:

- a. Poorly erected/ constructed advertisement structures(Billboards) which collapse causing accidents or closure of highways;
- b. Wrongly placed adverts which block motorists view especially at junctions and sharp bends;
- c. Risk to public safety due to destruction of highway structures such as bridges by the irregular *ad hoc* fixing of massive advertisement structures on footbridges and vehicle bridges.
- d. Insecurity to pedestrians on footbridges in cases where adverts cover full length and whole height of such facilities;
- e. Obstruction and distraction of road users, especially motorists.

36. It was contended that the emergence of numerous service providers gave rise to the need for a legal framework for closer control and management of use of road reserve land and other roads assets/facilities. To this effect, the Minister responsible for Roads in exercise of the powers conferred by Section 22(2) (d) and 46 of the ***Kenya Roads Act 2007***, published Legal Notice No 86 of May 2013 in the Kenya Gazette Supplement No. 74 to enable the Respondent Authority to effectively manage the roadside activities and ensure safety to road users and road assets. The Authority, it was averred, thus lawfully derives its mandate mainly from:

- i. The Constitution of Kenya 2010 (which designates roads into National and County Roads and

- accords the management of the roads to the National County Government respectively)
- ii. **Kenya Roads Act 2007** (which created the Respondent Authority)
 - iii. Legal Notice No 86 of May 2013 (which provides for fees and charges for use of facilities on national roads and road reserves.)
 - iv. **Traffic Act** Cap 403 Section 91 (which prohibits encroachment on Road Reserves for Safety purposes)

37. It was asserted that the Respondent has lawful mandate to grant approvals to any person or body to lay structures or carry out works over or below or on road reserves as per section 49 of the **Kenya Roads Act 2007** and that the Authority is merely exercising its mandate granted to it under section 4(1) of the **Kenya Roads Act 2007** by providing space for rental purposes on its land and facilities to enable it fund its activities. To the Authority, it is therefore not correct for the applicants to allege the respondent has no mandate over outdoor advertising on roads and road reserves. To the contrary, section 22(2)(d) of the **Kenya Roads Act** gives the Authority powers to determine, impose and levy rates, tolls charges, dues or fees for the use of facilities, with Ministerial Approval and the Authority acted in line with section 40 of the **Kenya Roads Act 2007** which allows for the gazettement of this charges which gazettement was done vide **Legal Notice No 86** of May 2013.

38. The Authority clarified that the charges listed by it under Part 1(2) of the Schedule to the said **Legal Notice No 86 of May 2013** relate to fees payable per square foot for the structures placed on the road reserves for purposes of placing the advertisement and not the cost of the advertisements themselves . It therefore contended that the applicant's application for judicial review and the petition respectively is therefore misplaced and baseless as it is premised on the wrong interpretation of the law and the wrong impression that the authority is charging for the cost of the advertisements themselves which is not the case. It should be noted that several advertisements can be placed on a structure built for advertisements in a year and that authority mandate effects charges only once a year for the structures and not the advertisements. Whereas the constitution gives power to the County Governments to charge fees for outdoor advertising , the power to lease and charge for the ground space payable per square foot for the structures placed on the road reserve for purposes of placing the advertisements vests on the Kenya National Highways Authority. The granting of advertisement rights or even the construction of advertisement structures on road reserves thus fall under the jurisdiction of the Authority but not the County Governments.

39. It was the Authority's case that **Legal Notice No 86 of 2013** has enabled the Respondent Authority to effectively manage its operations which include enforcing Standards for Advertisement Structures. It disclosed that on 6th June, 2014 the Authority in compliance with Procurement regulations, invited tenders for temporary use of **Class A, B and C** road reserve land and facilities, on payment of requisite rental fees, for the erection of structures for placement of adverts. According to it, through the advertisement of its tender notice dated 6th June, 2014, the Respondent was merely acting in its powers of maintenance of road reserves through a fair competitive process in line with the spirit of Article 232 of the Constitution of Kenya, Section 49 of the **Kenya Roads Act 2007**, the Procurement regulations particularly Section 51 and 54 of the **Public Procurement and Disposal Act** and good corporate governance and also pursuant to a ruling given by the Honourable court in Nairobi High Court Judicial Review Case No 246 of 2012 - **Amica Business Solutions -vs – KeNHA and others.**

40. It was contended that in coming up with the Rules and Regulations of 2013 pursuant to the powers conferred it by sections 22(2) (d) and 46 of the **Kenya Roads Act**, the following were taken into account ;

- i. The provision of the constitution, which distinguish National and County Roads, and relevant legislation.
- ii. The fact that the County Governments are also charging for the advertisements in the county roads and have in some cases passed respective bills under their respective Finance Acts

41. In its view, it was not in contradiction with the following provisions of the law as alleged

- a. **Physical Planning Act** Cap 26, and the **County Governments Act**,

- b. Article 10(2) of the constitution with regard to public participation
- c. Article 35 of the constitution
- d. Article 47 with regard to the exercise of the administration action lawfully, reasonably and procedurally

42. In so advertising as described herein above, the Authority was of the view that it acted within the powers vested in it by section 49 of the Kenya Road Act hence it was incorrect for the Petitioners to allege generally that the implementation of the advertisement will result in double taxation in the outdoor advertising industry. Instead it reiterated that it, in its capacity and as mandated by the **Kenya Roads Act 2007**, may provide space for rental purposes on its land and facilities to enable it to fund road operations.

2nd Respondent's Case

43. According to the 1st Respondent, the Board is a State Corporation established under the **Kenya Roads Board Act 1999** (the Act) with the sole mandate of overseeing the road network in Kenya coordinating the maintenance, rehabilitation of the roads and the advise the minister on all matters related thereto. In carrying out its mandate, the Board funds the development, maintenance and rehabilitation of all roads in the Country and continues to oversee the use of the said roads including but not limited to the ones mentioned by the Applicants herein.

44. It was contended that under Section 6(2)(k) of the Act, the Respondents are statutorily mandated to identify, quantify and recommend to the Minister such other potential sources of revenue as may be available to the fund for the development, rehabilitation and maintenance of roads. Pursuant to the above provision and with a view of raising more funds to allow for the improvement of the road network in Kenya, the Respondent in the year 2011 carried out various studies which identified outdoor advertising as a potential source of revenue for road development and maintenance in Kenya.

45. The Board disclosed that prior to the above study, it had been engaged in outdoor advertisement mainly for public interest on advertisements on road safety and HIV-AIDS awareness and upon concluding the above study on revenue generation through outdoor advertisement, the Board recommended the same to the Minister as required by law which recommendation, the minister approved in the year 2012 and allocated funds for the same. The Minister mandated the Board to implement the project and constituted a joint implementation team made up of the officials of the Kenya National Highways Authority and the Respondent to spearhead the implementation of the said project. According to the Board, based on the study carried out by the Board, the proposed outdoor advertisement project can generate revenues of up to Kshs 124 million per year, which revenue will be strictly applied towards development rehabilitation and maintenance of roads in Kenya and this will have a great impact on the road network in the Country. In its view, the citizens of Kenya would highly appreciate improvement of the road network, which improvement have mainly been hindered by the absence of sufficient funds to carry out the necessary and required road works throughout the Country.

46. It was reiterated that in exercising its mandate to identify quantify and recommend to the Minister such other potential sources of revenue as may be available to the fund for the development, rehabilitation and maintenance of roads, the Board acted legitimately and in public interest and did not breach any law. It was however, clarified that the Board does not intend to carry out the outdoor advertisement project for any private gain since the same is solely intended to raise revenues for development and maintenance of roads in the Country. Since the roads in Kenya rely mostly on the revenues from the Respondent for their maintenance, repair and rehabilitation and its necessary that the Respondent be allowed to raise revenues in a lawful and legitimate manner to improve the revenues available for road works.

47. It was however admitted that the subject project has been developed since the year 2011 and it is now in its final stage. The National Government through the Minister of Roads has since allocated funds for the project and the Respondent is in the process of procuring the same through competitive bids. In furtherance of the foregoing, the Respondent on 18th December, 2013, invited bids with a view to

entering into a consultancy contract for the design, fabrication, installation, testing and commissioning of billboard, marketing, management and maintenance of outdoor advertising services along the Northern /corridor. Pursuant to the above advertisement, the Applicants herein have approached this honourable court with a view of scuttling the project and denying the Respondent and the Government of Kenya legitimate revenue for improving road network in the Country. It was added that the Applicants have filed the application under the pretext that the Respondent has no mandate to raise money for road maintenance despite being fully aware that the Respondent is mandated to identify sources of revenues for road development and maintenance.

48. To the Board, the Petitioners hope to mislead the court into believing that that only source of revenue for the Respondent under the Act, is the Kenya Roads Fund without disclosing that under Section 6 (2)(k) of the Act, the Respondent Board is statutorily, mandated to identify, quantify and recommend to the Minister such other potential sources of revenue as may be available to the fund. It was asserted that the subject roads where the Bill Boards are supposed to be placed belong to the Government through Kenya National Highways Authority and their development and maintenance is funded by the Respondent herein which has been mandated by the Minister to implement the outdoor advertisement project with a view of raising funds for roads development and maintenance. The proposed project is to be carried out in the Northern Corridor where there are currently no bill boards and the same will not affect the business operations of the Applicants in any way. The Board has no intention whatsoever of competing with the Applicants in their business but it will put up its Bill Boards on public road reserves with no presence of other billboards. It was contended that the Respondent has not sought to regulate and/or control outdoor advertisement save for seeking to develop its own bill boards for outdoor advertisement with a view of raising additional revenue for the improvement of road network in Kenya. Further, the Board has not sought to oust the mandate of the County Governments as provided under the Constitution save for that the respondent is applying the its rights as the agents for the proprietors of the National Roads to use the road reserves to generate income for the development of other roads in the Country.

49. To the Board, under the Fourth schedule to the constitution the mandate of the county governments is to regulate outdoor advertisements and the fees that county government charge is regulatory fees for issuing permits and licences to those putting up billboards. The Respondent on the other hand will be seeking planning permission from the county governments in whose areas the billboard are placed and will pay the stipulated county government fees just like any other person who wishes to construct billboards. Accordingly there is no contradiction between role of the county government and the mandate which the Respondent is exercising. It was averred that the Board is developing the bill boards in the road reserves which belong to the Government of Kenya under the custody of the Kenya National Highways Authority whose activities are funded by the Board and the same body is part and parcel of the outdoor advertisement project herein hence the court must not allow the Petitioners to use the court process as a means of defeating regular government initiatives being carried out in good faith with the sole intention of raising funds for developing road networks in the Country.

Respondents' Submissions

50. It was submitted on behalf of the Respondents while reiterating the foregoing averments that under the 4th Schedule of the **Constitution**, the construction and operation of the National trunk roads is a reserve of the National Government and not the County Government which mandate as pertains the operation of the National Roads is vested in the Respondents herein.

51. With respect to section 11 of the **Statutory Instruments Act, 2013**, it was submitted that the duty to lay the Regulations before the Parliament lies with the Cabinet Secretary in charge of the Regulation Authority. In this case, the Regulations published in legal notice no. 86 of May, 2013 fell under the Minister for Roads hence the Respondents had no power to undertake the Role of the Cabinet Secretary of Roads.

Section

11(1) states as follows

“Every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is

transmitted to the responsible Clerk for tabling before Parliament.”

52. It was therefore submitted that the question as to whether the said regulations were laid before the National Assembly can only be answered by the Cabinet Secretary responsible for Roads or the Attorney General being the Legal advisor to the Government. However, the Petitioners have failed to join the said parties, they cannot therefore be said that the Respondents violated the aforesaid section by failing (if it is true) to table/lay the Regulations before the Parliament as that solely is the role of the Cabinet Secretary. To the Respondents, the Regulations having been approved by the Minister, the Respondents are obligated to ensure compliance and implementation of the Regulations as per the provisions of Section 4(2)(d) of the Act. Section 49 of the ***Kenya Roads Act***, it was submitted, bestows the Authority the mandate to grant approvals to any person or body to lay structures or carry out works over or below or on roads reserves. In so doing, the Respondents have power to levy charges, fees or other dues as per the provisions of section 22 (2) (d) of the said Act which charges, tolls, fees and or dues must however be gazetted prior to implementation.

53. Article 209 (4) of the Constitution of Kenya empowers the national and County government with powers to impose charges for services they provide. It cannot therefore be said, as the petitioners do, that the Charges imposed by the Respondents were beyond their scope provided that the same only relates to **Class A, B and C roads** which is within their mandate. It was submitted that the Respondents acted in line with the provisions of section 40 of the ***Kenya Roads Act 2007*** which provides for the gazettelement of these charges which gazettelement was done vide Legal notice No. 86 of May 2013.

54. It was reiterated that the petition and application were premised on the misunderstanding of the legal notice and the invitation for bids. It was asserted that section 22 (2) (d) of the Act empowers to Respondent to charge fees for the use of its facilities while section 22(2) (f) of the Act empowers the Respondent to “to sell, **let** or otherwise dispose of any property, movable or immovable, which in the opinion of the Board, is not necessary for the purposes of the Authority:” To the Respondents, the legal notice and the invitation of bids was only in furtherance of the said powers of the Authority which does not levy fees for advertisements but for the placement of structures in their facilities. Whereas it is not in dispute that the County Government is empowered by the constitution to regulate outdoor advertising, the power to lease and charge for the placement of a structure on a road reserve for purposes of placement of an advertisement vests with the Respondent. The tender invite advert placed by the Respondent herein on 6th June, 2014 and which is the subject of these two suits was therefore a mere exercise of the Respondent’s mandate under Section 4(1) and 22(2)(d) of the Act that empowers the Authority to levy rates, tolls, charges or fees for use of its facilities and was meant to ensure transparency in line with Article 232 of the Constitution of Kenya, section 49 of the Act, the ***Public Procurement and Disposal Act*** particularly section 51 and 54 and the procurement regulations and good corporate governance and was meant to comply with the order of this Honourable Court in ***Judicial Review No. 246 of 2012, Amica Business Solutions vs. KeNHA and others*** where the court had directed the Respondent to put in place mechanisms to comply with the constitution in terms of procuring entities to erect structures for advertisements in road reserves.

55. According to the Respondents, the judgement in ***Judicial Review No. 246 of 2012, Amica Business Solutions vs. KeNHA and Others*** clearly confirmed that the responsibility for the Management, Development, Rehabilitation and Maintenance of National Roads (Class A, B & C roads) rests with the respondent and that they do not levy charges for the advertisement but for the placement of the structure within the road reserves. In their view, there has been no any other legislation to the contrary nor has there been a classification or other law setting out what are National and County Roads hence the respondents are merely carrying out their statutory mandate in the public interest which should in any event outweigh private interests by a few companies and individuals.

56. On the issue of double taxation, it was submitted that since Respondents herein only levy charges and not taxes, the issue of double taxation should therefore not arise as its mandate is only limited to fees payable per square foot for the structures placed on the road reserves for purposes of placing of the advertisement and not the cost of advertisement themselves. The Respondent therefore does not levy charges for the advertisement but for the placement of the structure within the road reserves. The issue of

taxation or even double taxation cannot therefore arise as the Respondents and the County Governments levy for quite different and distinct services. It should be noted that several advertisements can be placed on a structure in a year.

57. In the alternative, the Respondents submitted that the imposition of charges by the Respondent does not amount to double taxation since “double taxation” is defined by the Black’s Law Dictionary, 6th Ed. as, “ *the taxing of the same item or piece of property twice to the same person, or taxing it as the property of another person and again as the property of another, but this does not include the imposition of different taxes concurrently on the same property or income (e.g federal and state income taxes), nor the taxation of the same property to different persons with different interests in it or when it represents different values in their hands.....”*

58. In the Respondents’ view, from the above definition, it is clear that where taxation of the same property by different persons, the same does not constitute double taxation.

59. In summary, it was submitted on behalf of the Respondents that:

- a. That the Respondent did not contradict any of the laws alleged by the Petitioners and Applicants
- b. That the advertising was within the mandate of the Respondent as vested by section 49 of the **Kenya Road Act**.
- c. That it is incorrect to allege generally that the implementation of the advertisement will result in double taxation
- d. That the Respondent as mandated by the Act may provide space for rental space to fund its operations

60. The Respondents therefore sought for orders for the dismissal of the Petitions and Application to them with costs to the Respondent.

Determinations

61. Article 186(1) and (2) of the Constitution provides:

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

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

62. It follows that whereas the County and National governments have distinct roles, there are or may be occasions when functions may be conferred on both levels of government in which case such a function would be within the concurrent jurisdiction of both. Any function being performed as a result of the concurrency of jurisdiction, it is my view, must however retain its characteristic of being one function without duplication. Under part 2(3) of the Fourth Schedule to the Constitution, one of the functions of the County Governments is the control of air pollution, noise pollution, other public nuisances and outdoor advertising.

63. It is based on this provision that the Petitioners contend, the 2nd Petitioner has the exclusive power to levy charges in respect of the said outdoor advertising in their respective areas of jurisdiction. That there is no express provision under Part 1 of the same schedule empowering the national governments to control outdoor advertising is not in doubt. Section 6(1) of the **Kenya Roads Board Act** provides:

The object and purpose for which the Board is established is to oversee the road network in Kenya and coordinate the maintenance, rehabilitation and development funded by the Fund and to advise the Minister on all matters related thereto.

64. The Fund is defined in section 2 of the Act as meaning “Kenya Roads Fund established by section

30". However it is clear that "the Fund" is established under section 31 of the Act and subsection 2 thereof provides:

(2) There shall be paid into the Fund—

(a) all proceeds from the Road Maintenance Levy Fund;

(b) such moneys or assets as may accrue to or vest in the Board in the course of the exercise of its powers or the performance of its functions under this Act or under any other written law;

(c) such sums as may be payable to the Board pursuant to this Act or any other written law, or pursuant to any gift or trust;

(d) all moneys from any other source provided for or donated or lent to the Board.

65. Therefore if the action being challenged by the petitioners is an action the Respondents are empowered to perform any moneys accruing therefrom may properly form part of "the Fund" under section 31(2)(b) above. The Respondents have sought to rely on section 6(2)(k) of the **Kenya Roads Board Act** to justify their actions. That provision provides:

Without prejudice to the generality of section (1), the Board shall

identify, quantify and recommend to the Minister such other potential sources of revenue as may be available to the Fund for the development, rehabilitation and maintenance of roads.

66. The question that arises is therefore whether the impugned action is a source of revenue available to the fund for development, rehabilitation and maintenance of roads. It is not contested that the power to levy fee for outdoor advertisement is reserved to the County Government. This is a fact which the respondents acknowledge. However, the Respondents seem to be of the view that there is a distinction between the levying of charges for advertisement and the erection of billboards on roads reserves that about the roads maintained by the Respondents. To them due to emergence of numerous service providers gave rise to the need for a legal framework for closer control and management of use of road reserve land and other roads assets/ facilities. It was contended that the Respondents have not sought to regulate and/or control outdoor advertisement save for seeking to develop its own bill boards for outdoor advertisement with a view of raising additional revenue for the improvement of road network in Kenya. Further, the Board has not sought to oust the mandate of the County Governments as provided under the Constitution save that the respondents are applying the their rights as the agents for the proprietors of the National Roads to use the road reserves to generate income for the development of other roads in the Country. To the Respondents, in developing their own billboards, they would have, just like the 1st and 3rd petitioners, seeks the permission from the 2nd petitioner.

67. In my view where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others and based on **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327**, the courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it.

68. Therefore where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies. Whereas, if Parliament gives great powers to them, the courts must allow them to it, the Courts

must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence its actions; and it must not misdirect itself in fact or law. Most importantly it must operate within the law and exercise only those powers which are donated to it by the law or the legal instrument creating it. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**

69. In my view, the failure to adhere and observe the express provisions of a statute or legislative Instrument by which an authority exercises jurisdiction to make a decision would render the decision illegal and illegality is one of the grounds upon which the Court is entitled to quash a decision. See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.**

70. In this case, the power to control outdoor advertising is both constitutionally and statutorily reposed in the County Governments. To purport to create a parallel authority when there is no express legal instrument justifying such a creation can only lead to confusion and overlapping of such roles. For the respondents to expand their mandate purportedly under section 6(2)(k) of the ***Kenya Roads Board Act*** would amount to giving them jurisdiction by administrative craft and/or innovation. That provision only allows the Respondents to identify, quantify and recommend to the Minister such other potential sources of revenue as may be available to the Fund for the development, rehabilitation and maintenance of roads. Therefore they can only expand their powers to the extent that the sources of funding in question are available to the Fund. Here, the areas where they are purporting to spread their tentacles are the preserve of the County Governments. Whereas this Court appreciates that the Respondents have a duty to help in the generation of funds and income for the development of roads in the Country, their duty must be undertaken within the law and within the statutory mandate and without trespassing to areas reserved for other state organs.

71. In this case, ***Kenya Roads (Kenya National Highways Authority) Regulations, Legal Notice No. 86 of 2013*** purported to confer on the Director-General of the Respondents the power to approval applications for use of portions of road reserves of class A, B or C and imposed fee for Commercial Advertisement or Billboards thereon. Apart from that a public notice was issued regarding the payment of annual fees and installation and maintenance of approved structures/items on road reserves and facilities for class A, B and C Roads and a demand for immediate settlement of unpaid charges and rates for structures/Adverts owned by various firms and individual in regions countrywide was made with a publication of the outstanding amounts. The Respondents proceeded to invite bids with a view to entering into a consultancy contract for the design, fabrication, installation, testing and commissioning of billboards, marketing, management and maintenance of outdoor advertising services along the Northern Corridor.

72. One does not need to be rocket scientist to realise that in effect what the Respondents were undertaking was the collection of revenue from outdoor advertising. The exercise of that power in my view amounts to control of outdoor advertisement, a role which is reserved to the 2nd petitioner. In my view the Respondents cannot be allowed to usurp the mandate and powers reserved to another state organ under the guise of collecting revenue for the country. The importance of the devolved system of governance was appreciated by the Supreme Court in **Speaker of the Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR** in which **Mutunga, CJ** expressed himself as follows:

“The current devolution provisions in Chapter 11 of the new Constitution are a major shift from the fiscal and administrative decentralisation initiatives that preceded it. It encompasses elements of political, administrative and fiscal devolution. There is a vertical and horizontal dispersal of power that puts the exercise of State power in check...Devolution is the core promise of the new Constitution. It reverses the system of control and authority established by the colonial powers and continued by successive Presidents. The large panoply of institutions that play a role in devolution-matters, evidences the central place of devolution in the deconstruction-reconstruction of the Kenyan state...”

73. The learned President of the Supreme Court continued:

“Given Kenya’s history, which shows the central government to have previously starved decentralized units of resources, the extent to which the Constitution endeavours to guarantee a financial lifeline for the devolved units is a reflection of this experience and, more specifically, an insurance against recurrence. Indeed, in practically all its eighteen Chapters, only in Chapter Twelve (on public finance with respect to devolution) does the Constitution express itself in the most precise mathematical language. This is not in vain. It affirms the “constitutional commitment to protect”; and it acknowledges an inherent need to assure sufficient resources for the devolved units... Article 96 of the Constitution represents the *raison d’être* of the Senate as “to protect” devolution. Therefore, when there is even a scintilla of a threat to devolution, and the Senate approaches the Court to exercise its advisory jurisdiction under Article 163 (6) of the Constitution, the Court has a duty to ward off the threat. The Court’s inclination would not be any different if some other State organ approached it. Thus, if the process of devolution is threatened, whether by Parliamentary or other institutional acts, a basis emerges for remedial action by the Courts in general, and by the Supreme Court in particular... It is relevant to consider the range of responsibilities shouldered by these nascent county governments. The Bill of Rights (Chapter 4 of the Constitution) is one of the most progressive and most modern in the world. It not only contains political and civil rights, but also expands the canvas of rights to include cultural, social, and economic rights. Significantly, some of these second-generation rights, such as food, health, environment, and education, fall under the mandate of the county governments, and will thus have to be realized at that level. This means that county governments will require substantial resources, to enable them to deliver on these rights, and fulfil their own constitutional responsibilities...National values and principles are important anchors of interpretive frameworks of the Constitution, under Article 259 (a). *Devolution* is a fundamental principle of the Constitution. It is pivotal to the facilitation of Kenya’s social, economic and political growth, as the historical account clearly indicates. In my view, the constitutional duty imposed on the Supreme Court to promote devolution is not in doubt. The basis of *developing rich jurisprudence on devolution* could not have been more clearly reflected than in the provisions of the Constitution and the *Supreme Court Act*.”

74. The Respondents relied on *Republic vs. Kenya National Highway Authority & 2 Others Ex-Parte Amica Business Solutions* [2013] eKLR. In that case, Korir, J expressed himself inter alia as follows:

“Did KeNHA in authorizing the interested parties to construct billboards and gantries usurp the powers of the Council? Going through the submissions of all the parties in these matters, it becomes clear that they are all in agreement that the power to authorize advertisements within the jurisdiction of the city of Nairobi belongs to the Council. What KeNHA did was simply to grant the interested parties permission to put up structures. The interested parties will still have to obtain permission from the Council to place advertisements on the structures. It should, however, be noted that it would be unreasonable for the Council to deny the interested parties the licence to advertise and yet they have been granted permission to construct billboards and gantries. I think that explains the reason why the interested parties had to seek the consent of the Council. Whatever the case, it is clear that the KeNHA did not usurp the powers of the Council in allowing the interested parties to put up the billboards and gantries on road reserves.”

75. That decision was based on section 49(1) of the *Kenya Roads Act* which provides:

(1) Except as provided in subsection (2), no person or body may do any of the following things without the responsible Authority’s written permission or contrary to such permission-

(a) erect, construct or lay, or establish any structure or other thing, on or over or below the surface of a road reserve or land in a building restricted area;

(b) make any structural alteration or addition to a structure or that other thing situated on or over, or below the surface of a road or road reserve or land in a building restriction area; or

(c) give permission for erecting, constructing laying or establishing, any structure or that other thing on or over, or below the surface of, a road or road reserve or land in building restriction area, or for any structural alteration or addition to any structure or other thing so situated."

76. Whereas I agree that the Authority has the power to permit a person or body to carry out any of the actions stipulated under section 49 aforesaid, such power must not be extended in order to encompass the control of the outdoor advertisement. The powers to control outdoor advertisement having been donated to the County Governments, the national government ought not to resort to claw-back tactics in order to deprive the County Governments of their source of revenue which they so much require in order to render services to their people. In this case, it is my view that the Respondents have not limited themselves to their powers under section 49 but have enlarged their powers outside their jurisdiction. My decision is founded on the definition of "double taxation" in *Black's Law Dictionary* (supra). Whereas the fees chargeable by the Authority in order to permit persons or bodies to erect structures etc on a road or road reserve is not necessarily double taxation, to permit the Respondents to charge monies in a manner that amounts to the control of outdoor advertisement clearly amounts to double taxation.

77. It was further the Petitioners' case that section 11 of the *Statutory Instruments Act* was not complied with. In **Kenya Country Bus Owners' Association (Through Paul G. Muthumbi – Chairman, Samuel Njuguna – Secretary, Joseph Kimiri – Treasurer) & 8 Others vs. Cabinet Secretary For Transport & Infrastructure & 5 others [2014] eKLR**, this Court held:

"Section 11(4) of the Statutory Instruments Act clearly provides for the consequences for the failure to lay the instrument before the house within the stipulated period and the consequences are that 'the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void.'...Therefore, in my view section 11(4) does not give the Court an option since the section is couched in mandatory terms and the consequences for non-compliance are similarly provided. It follows that the requirement must be read in mandatory terms as opposed to being merely directory. It is therefore my view that the Kenyan position must be distinguished from the position taken in *T S S Grain Millers Ltd vs. Attorney General [2003] 2 EA 685*, to the effect that a statutory instrument made by a Minister or other competent authority is valid and effective as soon as it is made or where it is required to be laid before Parliament, as soon as that has been done notwithstanding that the provisions of the Statutory instruments Act of 1946, and the Regulations made thereunder relating to the printing and issuing of statutory instruments have not been complied with. I similarly take a different view from that expressed by Simpson, CJ in *Republic vs. The Commissioner of Prisons Ex Parte Wachira [1985] KLR 398* to the effect that breach of statutory duty to lay an instrument before parliament will not of itself invalidate the instrument though it may amount to a misdemeanour and that even if not complied with, the Court would have held that the Regulations and Rules were not thereby rendered invalid...However, if after 11th February, 2014, seven days lapsed without the Regulations being tabled in Parliament the same thereby became void and ceased to have any effect."

78. In that case, I found that the onus is upon the authority propounding or seeking to rely on a statutory instrument to prove that it duly complied with section 11 aforesaid. In my view it is simply not enough for the Respondents to contend that it was not their responsibility to ensure compliance with section 11 of the aforesaid Act. The failure to comply with the provisions of section 11 of the *Statutory Instruments Act* has the effect of rendering the instrument in question null and void and it does not matter whose inaction led to the omission to comply with the law. In this case I have no basis upon which I can find that the said provision was complied with.

79. In the foregoing premises I do find merit in these petitions and application and grant the following orders:

1. **A declaration that the Public Notices and Invitation to Tender issued by the Respondents on or about May 2014 to June 2014, or any other date, are *ultra vires* the mandate and functions of the Respondent under Section 4 of the Kenya Roads Act Cap 408, Laws of Kenya and are therefore null and void**
2. **A declaration that Section 49(3) of the Kenya Road Act does not confer upon the 1st Respondent the power or authority to levy charges or exercise any control over outdoor advertisements on Road Reserves or abutting areas save for the charges relating to permission to undertake its mandate thereunder.**
3. **A declaration that Regulation 6 and Part 1A of the Schedule to the Kenya Roads (Kenya National Highways Authority) Regulations, 2013 is unconstitutional to the extent that it allows the Respondent to levy charges on approvals to place commercial advertisements or Billboards on Road Reserves or abutting areas, as opposed to charges for permits under section 49 of the Kenya Roads Act, which mandate vests in the County Governments under Article 186(1) of the Constitution and Part 2(3) of the Fourth Schedule to the Constitution of Kenya.**
4. **An order of Certiorari removing into this Court for the purposes of quashing the Public Notices and Invitation to Tender issued by the Respondent on or about May 2014 to June 2014 calling on members of the public to pay advertisement fees to the Respondent and inviting tenders for the temporary use of class A, B & C Road reserve land and structures for placement of advertisements or notices which notices and invitation are hereby quashed.**
5. **An order of permanent injunction do issue to restrain the Respondent from levying charges on outdoor advertisements or in any way interfering with or usurping the exclusive mandate of County Governments under Article 186(1) of the Constitution of Kenya and Part 2(3) of the Fourth Schedule to the Constitution of Kenya.**
6. **An Order of *certiorari* be and is hereby issued to remove into this Court for the purposes of being quashed the entire decision by the Respondent made on 18th December, 2013, inviting bids with a view to entering into a consultancy contract for the design, fabrication, installation, testing and commissioning of billboards, marketing, management and maintenance of outdoor advertising services along the Northern Corridor, which decision is hereby quashed.**
7. **An Order of Prohibition be and is hereby issued prohibiting the Respondents from receiving and acting upon bids with a view to entering into consultancy contract for the design, fabrication, installation, testing and commissioning of billboards, marketing, management and maintenance of outdoor advertising services along the Northern Corridor and/or from entering into any contract in respect thereof.**

80. With respect to the order for Mandamus compelling the Respondents to refund all monies paid by the Owners of advertisements in Nairobi County, in respect of the said advertisements, in compliance with the illegal Public Notices issued by the Respondent, I decline to grant the same for the simple reason that such an order is vague and uncertain and is incapable of being supervised by this Court.

81. I award the costs of these consolidated proceedings to the Petitioners/Applicants and interested party.

82. It is so ordered.

Dated at Nairobi this 5th day of October, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Kemunto and Miss Said for the Petitioners/Applicants

Mr Ochieng for the Respondents

Mr Gaturu for the Interested Party

Cc Patricia