



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 381 OF 2014
CONSOLIDATED WITH PETITION NO. 430 OF 2014 FORMELY BUNGOMA

PETITION NO 11 OF 2014

THE COUNCIL OF COUNTY GOVERNORS..... 1st PETITIONER

AND

THE SENATE..... 1st RESPONDENT

THE NATIONAL ASSEMBLY..... 2nd RESPONDENT

THE SENATORS OF THE 47 COUNTIES..... 3rd RESPONDENT

AND

THE ATTORNEY GENERAL..... INTERESTED PARTY

RULING

1. The Amended Petition dated 11th August 2014 challenges the constitutionality of the County Government (Amendment] Act 2014 which introduces Section 91A to the County Government Act 2012 .Section 91A establishes for each County a board to be known as the County Development Board which consists of;

- a) **The Member of the Senate for the County elected under Article 98 (1) 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(l)(a) of the Constitution and 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 to 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 Secretary to 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; and**
- m) The head of a department of the National Government or the County Government or any other person invited by the Board to attend specific meeting of the Board.**

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.**

3. In its Petition, The Petitioner claims that **Article 179(1)** of the Constitution vests the executive authority of the County in the Executive Committee and thus it is unconstitutional for the County Government (Amendment) Act 2014 to purport to vest executive powers to County Development Boards as contemplated under **Section 91(A)** of the County Government (Amendment) Act 2014. That **Article 179(4)** of the Constitution also provides that the Governor and Deputy Governor are the Chief Executive Officer and Deputy Chief Executive Officer of a County, respectively, and as such they have the Constitutional powers to coordinate development matters in the County. And that the creation of the County Development Board is an attempt by the Senate and the National Assembly to micro-manage the affairs of counties. The Petitioner has therefore proposed the following as the issues for determination by the Court:

- i. Whether Parliament is bound by the provisions of Articles 6(2) of the Constitution to conduct its legislative powers and other business in a manner that respects the functional, institutional and legislative distinctness of a County Government.**
- ii. Whether Parliament is bound by the provisions of Article 189 of the Constitution of Kenya to conduct its legislative powers and other functions in a manner that respects the functional and institutional integrity of County governments, and respect their constitutional status and institutions.**
- iii. Whether the provisions of the County Government (Amendment) Act 2014 that establishes County Development Boards and which shall be comprised in the manner stated at Section 91A (1) of the County Government (Amendment) Act 204 and**

undertake the functions prescribed at Section 91 A (1) of the said Act, violate the provisions of Articles 6(2), 95, 96, 174(i), 175, 179(1), 179(4), 183(1), 185(3) and 189(1) of the Constitution.

iv. Whether within the intendment of Articles 6(2), 10, 95, 96, 174(i), 175, 179(1), 179(4), 183(1), 185 (3) and 189 (1) of the Constitution, a Senator, Member of the National Assembly and Member of the County Assembly can undertake functions allocated to the Executive arm of government at the County level.

v. What is the meaning of a Governor being 'Chief Executive Officer' of the county as provided for at Article 179 (4) of the Constitution?

4. Looking at the Petition, it is clear that it raises substantive and weighty issues of the law as it relates to the interpretation of the Constitution and in particular whether the said amendment to the County Government Act undermines the structure of devolved government as argued by the Petitioner. I am therefore satisfied that the questions for interpretation as stated elsewhere above raise substantive issues of law especially as to whether the amendment violates the provisions of the Constitution in any way. I therefore certify the Petition as raising a substantial question of law warranting it to be heard by a bench of more than one judge as provided for under **Article 164(5)** of the Constitution.

5. In **Petition No. 430 of 2014**, formerly **Bungoma Petition No. 11 of 2014**, the Petitioners Barasa Kundu Nyukuri, Albert Simiyu and Philip Wanyonyi Wekesa have filed this Petition seeking an interpretation of the following questions;

i. That this Honourable Court interpret and determine whether or not the National Assembly and the Senate violated the Constitution of Kenya, 2010 by enacting the County Governments (Amendment) Act 2014, thereby creating the County Development Board for each of the 47 County Governments in Kenya;

ii. That this Court interpret and determine whether or not the two chambers of Parliament violated the Constitutional Principle of Separation of Powers between the Legislature and the Executive at the level of the devolved Government system and structure of governance;

iii. That this Court interpret and determine whether or not the principle of public participation was adhered to by the National Assembly and Senate before enacting the County Governments (Amendment) Act 2014, especially with regard to the establishment of the County Development Boards;

iv. That this Court interpret and determine whether or not there is a conflict of interest between the Constitutional oversight role and function of Senators and their newly acquired executive role and function as Chairpersons of the County Development Boards under the County Governments (Amendment) Act 2014;

v. That this Court interpret and determine whether or not the action of Senators to inaugurate and preside over/chair the County Development Boards is consistent with Article 73 and other provisions of Chapter 6 of the Constitution of Kenya 2010;

vi. That the Court interpret and determine whether or not the Senate and National Assembly complied with the National Values and Principles of Governance stipulated in Articles 1, 6, 10, 73 and 232 (c), (d), (e), (f), (h) & (i) of the Constitution of Kenya 2010;

vii. That this Court interpret and determine whether or not the powers of Senators as Chairpersons of County Development Boards undermines and erodes the powers of the 47 governors as Chief Executives of their respective counties;

viii. That this Court interpret and determine whether or not the aforementioned enactment

of the position of Senators as Chairpersons of the said County Development Boards undermines the executive powers and function of the County Executives [Committees] chaired by Governors in terms of identifying and implementing development programmes, projects and budgets with approval by County Assemblies;

xi. That this Court interpret and determine whether or not the position of Senators as Chairpersons of the said Boards usurps powers of the County Assemblies and creates conflict between the Senate and County Assembly oversight roles anchored in different articles of the Constitution of Kenya 2010;

x. That this Court interpret and determine whether or not the Attorney General misadvised the President of the Republic of Kenya on Constitutional implications the County Government Amendment Act 2014, with provisions empowering Senators to chair County Development Boards;

xi. That this Court interpret and determine whether or not the County governments (Amendment) Act 2014 complied with the Constitution of Kenya 2010 threshold and principles of Affirmative Action and equity for Women, Persons with disability, minorities and marginalized groups in the composition of the County Development Boards;

xii. That this Court should interpret and determine whether or not Article 96 and 217 (1) & (2) (c) and (d), with regard to the role of the Senate at National level applies to the role of Senators at the County level as enacted in the County governments (Amendment) Act, 2014;

xiii. That this Court interpret and determine whether or not the creation of the County Development Boards under the County Governments (Amendment) 2014 is an extra burden to the tax payers countrywide;

xiv. That this Court interpret and determine whether or not the Senate misinterpreted the objects of the provisions Article 96 as read together with Article 217 (1) and (2) and Article 259 (1) (a), (b), (c), (d) & 2, of the Constitution of Kenya 2010.

xv. That this Court interpret and determine whether or not the three categories of Respondents acted within or outside their Constitutional mandate in enacting the County Governments (Amendment) Act 2014, by creating County Development Boards and the position of Imperial Senators with both oversight powers, executive powers and roles.

6. As ordered by the Chief Justice in his directions of 27th August 2014, I am satisfied that **Petition No. 430 of 2014** raises similar issues as those raised in **Petition No. 318 of 2014**. The two Petitions will be heard together by a three judge bench as appointed by the Chief Justice on 27th August 2014. **Petition 318 of 2014** shall be the parent file. The Petitioners in **Petition No. 430 of 2014** shall therefore become 2nd, 3rd and 4th Petitioners respectively in the Consolidated Petition.

7. Orders Accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF OCTOBER 2014.

ISAAC LENAOLA

JUDGE

In the presence of:

Mr. Ahmednassir and Mr. Mansur for Petitioner

Mr. Kilukumi for Respondent

Mr. Ojienda for 1st -47th Interested Parties

Mr. Mogere for 48th Interested Party

Miss. Kimani for 49th Interested Party

Miss. Ameyo holding brief for Mrs. Kambuni for 50th Interested Party

Mr. Waikira holding brief or Miss Nkonge for Amicus Curiae

2nd, 3rd and 4th Petitioners present