



**Salaries and Remuneration Commission v County Assembly of Kakamega
& another; Attorney General & 3 others (Interested Parties) (Constitutional
Petition 1 of 2023) [2025] KEHC 13534 (KLR) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13534 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CONSTITUTIONAL PETITION 1 OF 2023
JN KAMAU, PJO OTIENO & SC CHIRCHIR, JJ
SEPTEMBER 18, 2025**

BETWEEN

SALARIES AND REMUNERATION COMMISSION PETITIONER

AND

COUNTY ASSEMBLY OF KAKAMEGA 1ST RESPONDENT

COUNTY GOVERNMENT OF KAKAMEGA 2ND RESPONDENT

AND

THE HONOURABLE ATTORNEY GENERAL INTERESTED PARTY

COMMISSION ON REVENUE ALLOCATION INTERESTED PARTY

OFFICE OF THE CONTROLLER OF BUDGET INTERESTED PARTY

COUNCIL OF GOVERNORS INTERESTED PARTY

JUDGMENT

Introduction

1. In its Petition dated 14th April 2023 and filed on 24th April 2023, the Petitioner describes itself as an independent commission duly established under Article 230 of *the Constitution* of Kenya, 2010 and whose functions are to, inter alia; set and regularly review the remuneration and benefits of all State Officers and to advise the National and County Governments on the remuneration and benefits of all other public officers.
2. It brings the Petition on grounds that Article 230 of *the Constitution* mandates it to address the principles of public finance and fiscal responsibility, the budgetary process and the complexity of



salaries and benefits for state and public officers and ensure fairness, transparency and harmonised remuneration and benefits in the public sector.

3. Subsequently, the Petitioner contends that on 17th June 2022, in exercise of the authority conferred under Article 185 of *the Constitution* as read with Section 8 of the *County Governments Act*, the County Assembly of Kakamega, the 1st Respondent herein, enacted into law the Kakamega County (State Officers) Pension Scheme, Act, 2022 (hereinafter referred to as “the impugned Act”) contrary to Article 230 (4) (a) of *the Constitution* and in excess of the retirement benefits it had set out in the published Gazette Notice No 2888 of 1st March 2013 and subsequently reviewed and published in Gazette Notices No 8794 and 8795 of 27th July 2022.
4. It further contends that the entire legislative process by the Respondents did not engage it and that they did not carry out public participation as required by law.
5. It asserts that the annual cost implication of the retirement benefits under the impugned Act for State Officers who serve for one (1) term is Kshs120,609,594/= while for those that serve for two (2) terms is approximately Kshs 285,062,036/=.
6. The Petitioner seeks the following prayers:-
 - a. A declaration be and is hereby granted that the setting and regular review of remuneration and benefits, including retirement benefits, for State Officers in the County Government is a function that is exclusively vested in the Salaries and Remuneration Commission by dint of Article 230(4) of *the Constitution*.
 - b. A declaration be and is hereby granted that the setting and regular review of remuneration and benefits, including retirement benefits, for State Officers in the County Government of Kakamega is a function that is exclusively vested in the Salaries and Remuneration Commission by dint of Article 230(4) of *the Constitution*.
 - c. A declaration be and is hereby granted that the applicable retirement benefits, for State Officers in the County Government of Kakamega is as set by the Salaries and Remuneration Commission and published in Gazette Notice No 2888 of 1st March 2013 and subsequently reviewed and published in Gazette Notices Nos 8794 and 8795 of 27th July 2022.
 - d. A declaration be and is hereby granted that the Respondents in enacting the Kakamega County (State Officers) Pension Scheme Act, 2022 acted in excess of legislative authority conferred on County Assemblies under Article 185 of *the Constitution* as read together with the Fourth Schedule of *the Constitution* to *the Constitution*.
 - e. A declaration be and is hereby granted that the Respondents in enacting the Kakamega County (State Officers) Pension Scheme Act, 2022 violated and contravened the provisions of Article 230(4)(a) of *the Constitution*.
 - f. A declaration be and is hereby granted that the Respondents in failing to conduct stakeholder engagement and public participation before conferring retirements benefits to persons who hold the Office of Governor, Deputy Governor, Speaker and Members of County Assembly from 8th August 2017, violated and contravened the provisions of Article 10 of *the Constitution*.
 - g. A declaration be and is hereby granted that the Kakamega County (State Officers) Pension Scheme Act, 2022 is unconstitutional, null and void ab initio.
 - h. An order of Mandamus be and is hereby issued directing the clerk of the Kakamega County Assembly, the 1st Respondent’s Authorized Officer and the Chief Officer responsible for



matters relating to finance in the County Government of Kakamega, to within a period of six months from the date of this order, recover in full the entirety of any amount of monies and other benefits paid or conferred as retirement benefits, pursuant to the Kakamega County (State Officers) Pension Scheme Act, 2022; and

- i. Any further relief or orders that this honorable court may deem just and fit to grant.

The Petitioner's case

7. The Petition is accompanied by the Supporting and Supplementary Affidavits sworn on 14th April 2023 and 18th December 2023 respectively.
8. The Supporting Affidavit is sworn by Anne R. Gitau in her capacity as the Chief Executive Officer and the Secretary of the Petitioner in which she avers that the Petitioner is mandated under Article 230 (4) of *the Constitution* to set and regularly review the remuneration of all State Officers; and to advise the National and County Governments on the remuneration and benefits of all other public officers.
9. The Petitioner states that pursuant to the provisions of Article 230 (4) (a) and (5) of *the Constitution* and Section 12 of the *Salaries and Remuneration Commission Act* (hereinafter referred to as "SRC Act"), it reviewed the remuneration and benefits for the State Officers serving in County Governments and set new remuneration and benefits vide Gazette Notices No 8794 and No 8795 of 27th July 2022.
10. It contends that notwithstanding the existence of the retirement benefits for State Officers serving in County Government set by itself, the 1st Respondent brought to its attention that it had passed the impugned Act, whose objects it explained, was to provide for pension and other retirement benefits to persons who held offices of the Governor, Deputy Governor, Speaker and Member of County Assembly (hereinafter referred to as "subject State Officers") effective the 8th August 2017.
11. It posits that the impugned Act contravenes the principles set out in Section 12 (1) of the SRC Act, as the subject State Officers shall earn retirement benefits different from other such State Officers in the other forty-six (46) County Governments. It adds that if the impugned Act is implemented, the hefty retirement benefits as set out in the impugned Act are fiscally unaffordable, unsustainable and pose a significant burden on public coffers.
12. It further posits that the legislative authority conferred on County Assemblies under Article 185 (2) and the Fourth Schedule of *the Constitution* of *the Constitution* does not confer the 2nd Respondent the function of setting remuneration and benefits for State Officers in the County.
13. In the Supplementary Affidavit Sworn by Dr Hilary Patroba, Director of Remuneration Services, the Petitioner contends that the functions and authorities of the County Assemblies do not extend to legislating on matters concerning setting or reviewing the remuneration and benefits, including retirement benefits for State Officers.
14. It faults the 1st Respondent for not undertaking public participation or consulting it on the impugned Act before the 2nd Respondent assented it into law. It points out that the import of the 2nd Respondent's letter dated 28th September 2022 was to seek its clarification on the way forward to enable the County operationalise the impugned Act.
15. In its Written Submissions dated 14th April 2023, the Petitioner has identified the following three (3) issues for determination:-



- a. Whether the legislative authority conferred by the 1st Respondent under Article 185 of *the Constitution* extends to enactment of legislation touching on the remuneration and benefits for State Officers;
 - b. Whether the Respondents have breached the provisions of Article 230 (4) of *the Constitution* by enacting a law that confers retirement benefits on State Officers;
 - c. Whether the Respondents have violated the provisions of Article 10 of *the Constitution* in failing to undertake public participation.
16. On the first issue, the Petitioner submits that by dint of Article 185 (2) of *the Constitution*, the legislative authority vested in County Assemblies is strictly limited to the making of laws that are necessary for, or incidental to the functions of the County Government under the Fourth Schedule of *the Constitution* of *the Constitution*. In support thereof, it cites the case of Raiply Woods (K) Ltd & Another vs Baringo County & 3 Others [2017]eKLR where it was held that the County Assembly cannot overlook *the Constitution* when carrying out its legislative mandate.
 17. It further submits that the Fourth Schedule of *the Constitution* of *the Constitution* is clear on the powers and functions conferred on County Governments and does not extend to setting and regularly reviewing the remuneration and benefits for State Officers in the County Government. It adds that the impugned Act is not necessary for or incidental to the effective performance of the 2nd Respondent's functions and powers under the Fourth Schedule of *the Constitution* of *the Constitution*.
 18. On the second issue, it restates the assertions in the Petition and adds that Article 260 of *the Constitution* defines the offices of Governor, Deputy Governor, Member of County Assembly or other member of the Executive Committee of a County Government as State offices.
 19. It is emphatic that the said office holders are all State Officers and, therefore, their remuneration and benefits can only be set and regularly reviewed by it. It thus argues that the enactment of the impugned Act constitutes usurping its exclusive mandate to set and regularly review the remuneration and benefits for such officers as was held in the case of Kenya National Commission on Human Rights vs Attorney General & Another [2015]eKLR.
 20. The Petitioner urges the court to hold that in granting retirement benefits to State Officers, the impugned Act is unconstitutional as it violates the explicit provisions of Article 230 (4) of *the Constitution*.
 21. On the last of its issues, the Petitioner submits that public participation is one of the core national values and principles of governance as set out under Article 10 of *the Constitution*. In view of the significant impact on public finances arising under the impugned Act, it was, therefore, imperative and constitutional obligation under Articles 10 and 201 of *the Constitution* for the Respondents to undertake public participation.
 22. It further submits that the Respondents did not controvert its assertion that they failed to undertake public participation prior to the enactment of the impugned Act or consult it. It thus urges the court to render the impugned Act unconstitutional, null and void.
 23. In its Supplementary Submissions dated 26th February 2024, filed pursuant to leave of court granted on 26th September 2023, it reiterates its submissions respecting; the extent of legislative authority conferred on County Assemblies, the objects and purpose of the impugned Act and public participation as undertaken by the 1st Respondent which issues were raised by the Respondents and 4th Interested Party in their respective submissions.



24. It stresses that the Respondents have not demonstrated how the impugned Act is incidental to the performance of the functions and exercise of the powers of the County Government as set out under the Fourth Schedule of *the Constitution* of *the Constitution*.
25. On the 2nd issue, it submits that the objects and purpose of the impugned Act is to confer pension benefits on the aforementioned office holder contrary to Article 230 (4) (a) of *the Constitution*. It further invites the court to apply the Pith and Substance Doctrine which holds that constitutional validity of legislation should be determined by its true nature and purpose, rather than its incidental or peripheral effects as was held in the case of *Pevans East Africa Limited & Another vs Chairman Betting Control and Licensing Board & 7 others* [2017] eKLR.
26. For this case, the Petitioner points out that in applying the Pith and Substance Doctrine, the impugned Act will confer retirement benefits to the office holder and not establish a pension scheme. It asserts that establishing the County Pension Scheme is only peripheral as the substantive sections elaborate benefits for officers which squarely falls under its constitutional mandate.
27. On the last issue of public participation, it points out that following the promulgation of *the Constitution*, the participation of the general public in public affairs including direct and indirect participation in the enactment of legislation is a constitutional imperative. It argues that failure by the 1st Respondent to undertake meaningful public participation or at all renders the impugned Act unconstitutional.

The 1st Respondent's case

28. Esther Ariko, the Acting Clerk of the County Assembly of Kakamega, swore a Replying Affidavit on 17th July 2023 in opposition to the Petitioner's Petition and on behalf of the 1st Respondent.
29. It is the 1st Respondent's case that the enactment of the impugned Act was done in accordance with its legislative mandate and that it did not usurp the Petitioner's mandate.
30. It states that under Article 185 of *the Constitution*, it is vested with the legislative authority of the County and as such it has the authority to make laws. It asserts that its legislative authority is extensive and can make laws necessary for, or incidental to the effective performance of the functions and exercise of the powers of the County Government.
31. It invokes Articles 176, 178 and 179 of *the Constitution* and points out that the roles of the office holders of the subject State Officers are prescribed under *the Constitution*, the *County Governments Act* and the *County Assemblies Service Act* and as such they are part and parcel of the County Government Public Service within their specific counties.
32. It further states that on the other hand, under Article 230(4)(a) of *the Constitution*, the Petitioner has the power to set and regularly review the remuneration and benefits of the State Officers and accordingly, has met its mandate through various gazette notices.
33. It contends that the impugned Act fundamentally establishes a pension scheme for the subject State Officers. It adds that the listed beneficiaries in the aforesaid pension scheme are part and parcel of the County Government Public Service within the meaning of Article 176 of *the Constitution*.
34. It is categorical that there is nothing unconstitutional with the County Government establishing a pension scheme for the State Officers serving under its service upon their exit from employment having served their full terms as contemplated under *the Constitution*. It asserts that according to Gazette Notice Nos 8794 and 8795 of 27th July 2023, the Petitioner acknowledged the authority and liberty of



- employers in the public service, save for itself, to establish pension schemes for State Officers appointed for a fixed term of office with its mandate being to set and review the financial retirement benefits.
35. It further contends that under Section 11 of the SRC Act, the Petitioner's mandate is to inter alia make recommendations on matters relating to the salary and remuneration of state or public officers.
 36. It points out that the Petitioner has distinct and clear functions from its own, with the Petitioner's functions being that of oversight with the prerogative to make recommendations, review and set the rate of the employer's contribution to the scheme, which function it can still perform through periodic reviews of the rates as provided for in law.
 37. It further avers that in the foregoing, it has not encroached on the jurisdiction of the Petitioner as it has only set up the pension scheme within its prerogative as the legislative arm on matters concerning the County Government and that the Petitioner has all the machinery to review the said pension scheme in accordance with its constitutional and statutory functions. It thus terms the present Petition as misconceived and an abuse of the court process.
 38. It points out that it followed due procedure in enacting the impugned Act including public participation that was composed of taking into consideration the various reviews and recommendations by the citizens and other stakeholders. It asserts that it is trite law that the presumption is that any law promulgated by the legislature including the County Assembly, is constitutionally sound and as such the burden to prove otherwise rests with the Petitioner.
 39. It calls upon the court to consider the purpose and the effect of implementing the impugned Act and whether the same infringed a constitutional right. It is categorical that the impugned Act was enacted for the purpose of granting pension and other retirement benefits to the State Officers in the County Government and as such does not infringe on any rights but seeks to promote the economic and social right to social security and fair labour relations. It adds that the existence of a pension scheme for the State Officers speaks to their retirement benefits and essential remuneration benefits which are incidental to their ardent discharge of the duties to the public service. In the circumstances, it urges the court to dismiss the Petitioner's Petition.
 40. In its Written Submissions dated 8th December 2023, it invokes Articles 185 and 259 of *the Constitution* and submits that *the Constitution* has unequivocally given it the lee way to make laws as long as these laws are necessary for, or incidental to the effective performance of the functions and exercise of powers under the Fourth Schedule of *the Constitution*. To buttress its point, it places reliance on the case of County Government of Kiambu & Another vs Senate & Others [2017]eKLR where it was held that the County Assembly makes any laws that are necessary for the effective performance of the functions and exercise of the powers of the County Government.
 41. It reiterates that establishing a pension scheme for the subject State Officers only seeks to promote their economic and social right to social security and fair labour relations as provided for under Articles 41 and 43 of *the Constitution*. In this regard, it places reliance on the case of Coalition for Reforms and Democracy (CORD) vs Attorney General International Institute for Legislative Affairs & Another (Interested Parties)[2019]eKLR where it was held that Article 43(1)(e) of *the Constitution* provides that every person has the right to social security. It is emphatic that as long as the said subject State Officers had been elected and served the people in their terms, they were entitled to the said benefits.
 42. It asserts that the Petitioner was established under Article 230 of *the Constitution* which expressly provides for its mandate under Article 230(4). It adds that Section 11 of the SRC Act further sets out the Petitioner's mandate.



43. It reiterates that the said mandate was exercised through gazette notices such as Gazette Notices No 8794 and 8795 in which it recognised the existence of pension schemes set by other authorities. It makes reference to the Petitioner's correspondence to the Council of Governors in the 2nd Respondent's Replying Affidavit sworn on 20th April 2022 (sic) where the Petitioner had expressly recommended the establishment of a pension scheme by the County Governments and for the same to adhere to its guidelines issued through letter Reference Number SRS/TS/COG/3/61/48 Vol II dated 10th February 2020.
44. It adds that through a letter dated 21st August 2020, the Petitioner expressed the need to have the pension scheme cover all State Officers in County Governments in the spirit of equity and fairness. It is emphatic that the Petitioner and itself were two (2) distinct bodies and were under an obligation to work interdependently to promote the achievement of their roles under *the Constitution*.
45. It is categorical that it has exercised its legislative mandate to establish a pension scheme for the distinct subject State Officers and the Petitioner is obligated to make recommendations and advise the 2nd Respondent on the intricacies of such a pension scheme, which recommendations and reviews can still be done in the progressive realisation of the impugned Act.
46. It further submits that pursuant to Article 196 of *the Constitution*, it is obligated to facilitate public participation in policy formulation, legislative process and any other decision affecting the residents of the County. It relies on the case of Republic vs County Government of Kiambu Ex parte Robert Gakuru & Another[2016]eKLR where it was held that the yardstick for public participation was that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue, and to have an adequate say, and that it could not be expected of the legislature, that a personal hearing would be given to every individual who claimed to be affected by the laws or regulations that were being made.
47. It then cites the case of Commission for the Implementation of Constitution vs Parliament of Kenya & Another & 2 Others[2013]eKLR where it was held that what amounts to a reasonable opportunity would depend on the circumstances of each case.
48. It asserts that the impugned Act was born and advised by the draft Bill prepared by the Council of Governors, the 4th Interested Party herein, which proposed a similar pension scheme as the impugned Act. It contends that the said Bill was submitted to the Petitioner and the proposals set out in the various correspondences between the Petitioner and the 4th Interested Party, to which the 2nd Respondent was privy. It adds that through the letter dated 21st August 2020, the Petitioner expressly contributed to the said Bill and issued its recommendations and reviews on the various facets and issues on the Bill.
49. It further points out that through a letter dated 28th September 2022, the Petitioner was invited to offer its advisory opinion on the County Government's contribution to the scheme, which letter elicited no response. It asserts that it also invited views and memoranda to be hand delivered and emailed to it. It is emphatic, therefore, that it had fully met the threshold of public participation as set out in Article 10 of *the Constitution* and that the Petitioner's allegation is untenable.
50. It also relies on the case of Council of County Governors vs Attorney General & Another[2017]eKLR where it was held that there was the general presumption that every Act of Parliament was constitutional and the burden of proof lies on every person who alleges otherwise. It urges the court to uphold the constitutionality of the impugned Act and dismiss the Petition herein.



The 2nd Respondent's case

51. Vivianne Mmbaka Komwonyo, the County Attorney of the 2nd Respondent, swore a Replying Affidavit on 22nd May 2023 in opposition to the Petition and on behalf of the 2nd Respondent.
52. It is the 2nd Respondent's case that it operated as the County Executive Committee of Kakamega County Government as established under Article 179 of *the Constitution*. It asserts that its functions were outlined under Article 183 of *the Constitution* and that the 1st Respondent's functions were outlined under Article 185 of *the Constitution*.
53. It states that it is not disputed that pursuant to Article 185 of *the Constitution*, the 1st Respondent enacted the impugned Act which was procedurally assented to on 17th June 2022 and published in the Kenya Gazette on 30th June 2022. It explains that it was, therefore, mandated pursuant to Article 183(1) of *the Constitution* to ensure the implementation of all enacted legislation including the impugned Act.
54. It further avers that whereas the Petitioner is mandated under Article 230(4) of *the Constitution* to set and review the remuneration benefits of all State Officers, it does not have the legislative authority either at the National or County level of Government as the same is reserved for the National and County Assemblies respectively.
55. It is categorical that in the performance and execution of their powers and functions, State organs such as the 1st Respondent and the Petitioner ought to work interdependently and in harmony so as to achieve the ultimate vision of the people of Kenya as outlined in *the Constitution*.
56. It is emphatic that the enactment of the impugned Act was well within the mandate of the 1st Respondent and was outside the constitutional mandate of the Petitioner. It is categorical that the Petitioner is not vested with the authority to establish a pension scheme for any State Officer either at National or County level and that the pension scheme established by the impugned Act was well aligned with the provisions of *the Constitution* and the *Retirement Benefits Act*, Cap 197 (Laws of Kenya).
57. It contends that in Paragraph 2(c) of Gazette Notice No 8794, the Petitioner acknowledged that a County Government may establish a pension scheme for its State Officers and only stated that it would set the rate of the employer's contribution to the scheme. It adds that through the letter dated 28th September 2022, the 2nd Respondent invited the Petitioner to offer its advisory opinion on the County Government's contribution to the scheme so as to operationalise the same, which letter elicited no response.
58. It points out that the mere allegation that the retirement benefits under the impugned Act were higher than the gratuity set by the Petitioner is not sufficient reason to declare it unconstitutional. It asserts that whereas the Petitioner states that the retirement benefits set in the impugned Act are fiscally unsustainable, it has not clearly demonstrated that allegation as it is trite that he who alleges must prove.
59. It is categorical that the Petitioner had made a generalised conclusion that the impugned Act was unconstitutional in its entirety without stating the specific provisions that have allegedly violated *the Constitution*. It adds that it was apparent that the Petitioner has only considered part of the impugned Act and has failed to conceive the intention of the County legislators in totality.
60. It further states that the impugned Act was advised by the draft Bill prepared by the 4th Interested Party and shared with the Petitioner for comments and input and was, therefore, constitutional. It asserts that the principle of proportionality and utilitarianism militates against the grant of the orders



sought on account of its potentially constitutionally undesirable ripple effect of undermining County Assemblies' legislative mandate.

61. In its Written Submissions dated 8th December 2023, it places reliance on the cases of *US vs Butler* 297 US 1 (1936) and *Were Samwel & 14 Others vs Attorney General & 2 Others*[2017]eKLR where the common thread was that while examining the constitutionality of a statute, the duty of a court was to set out the impugned provisions and juxtapose them against the constitutional provisions alleged to be violated and determine whether or not they were unconstitutional.
62. It further cites the case of *Olum & Another vs Attorney General of Uganda*[2002] 2 EA 508 where it was held that to determine the constitutionality of a section of a statute or Act of Parliament, the court had to consider the purpose and effect of the impugned statute or section thereof and that if its purpose did not infringe a right guaranteed by *the constitution*, the court had to go further and examine the effect of its implementation.
63. It is its contention that the impugned Act does not confer retirement benefits but establishes a pension scheme and that the Petitioner lacks the authority to establish retirement schemes for State Officers. It invokes Articles 185 and 230(4) of *the Constitution* and argues that at no point does the functions or powers of the Petitioner and the 1st Respondent intersect. It further cites the cases of *Attorney General vs LSK & Another* [2017]eKLR and *R vs Big M. Drugmart Ltd* [1986]LRC where the common thread was that both purpose and effect were relevant in determining constitutionality of a legislation.
64. It argues that there is nothing in the impugned Act that offends Article 230(4) of *the Constitution* or infringes upon the powers and constitutional mandate of the Petitioner. It asserts that a clear and conclusive reading of the impugned Act will demonstrate that it establishes a scheme as an irrevocable statutory trust to provide pension for its members upon their retirement or to their dependents upon death. It adds that Section 26(1) of the impugned Act provides for a deduction of twelve percent (12%) and three percent (3%) from the pensionable emoluments of each member towards the scheme.
65. In the foregoing, it argues that it is therefore blatantly fallacious to hold that the money benefits to be paid out of the scheme to the members will be from the consolidated fund. It asserts that the functions and powers of the Petitioner as envisaged under Article 230(4) of *the Constitution* and Section 11 of the SRC Act do not envisage establishment of pension schemes for state and public officers as part of its functions and that it is limited to advising the National and County Governments on matters relating to remuneration and benefits.
66. The 2nd Respondent cites Gazette Notices No 8794 and No 8795 and submits that the impugned Act is in further realisation of the right to social security as envisaged under Article 43 of *the Constitution*. It points out that in enacting laws that are necessary and incidental to the exercise of its functions, the 1st Respondent had acted in the best interest of promoting the values enshrined in Article 10 of *the Constitution*. It further relies on the case of *LSK vs Attorney General & Another*[2019]eKLR where it was held that purposive interpretation should be given to statutes so as to reveal the intention of the legislature and the statute itself.
67. It is its further submission that the Respondents are also constitutional organs and have their roles which are not subservient to that of the Petitioner. To buttress its point, it invokes Articles 6(2) and 189 of *the Constitution* and relies on the cases of *Senate & 2 Others vs Council of County Governors & 8 Others* (Petition 25 of 2019)[2022]KESC 7 (KLR), *Speaker, Nakuru County Assembly & 46 Others vs Commission on Revenue Allocation & 3 Others*[2015]eKLR and *Senate & 48 Others vs Council of County Governors & 54 Others*[2019]eKLR where the common thread was that the National and County levels were distinct but inter-dependent and were expected and bound to conduct their mutual relations on the basis of consultation and cooperation.



68. It then emphasises that it had sought the input of the Petitioner in the spirit of collaboration and furtherance of the duty bestowed upon it under Article 230(4)(b) of *the Constitution* and that, therefore, the engagement with the Petitioner in the enactment of the impugned Act was done in a manner that respected the functional and institutional integrity, the constitutional status and the institutions of the County Government as decreed by Article 189(1) of *the Constitution*.
69. It cites the case of National Assembly & Another vs Institute of Social Accountability & Others[2017]eKLR where it was held that County Governments were semi-autonomous units exercising delegated sovereign power for purposes of governance. It is emphatic that the 1st Respondent acted within the confines of *the Constitution* while it consulted the Petitioner within the framework established by *the Constitution*.
70. On public participation, it relied on the case of British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) vs Cabinet Secretary for the Ministry of Health & 2 Others; Kenya Tobacco Control Alliance & Another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party) [2019]eKLR where it was held that allegations of lack of public participation did not necessarily vitiate the legislative process.
71. It is its further contention that in its letters dated 7th April 2022 and 20th April 2022, the Petitioner gave its views on the proposals contained in the bills which demonstrates that the Petitioner was sufficiently consulted and participated in all consultations leading to the enactment of the impugned Act. It adds that the 4th Interested Party's letter dated 6th April 2022 makes reference to meetings held between the Petitioner and the 4th Interested Party.
72. It asserts that in British American Tobacco (Supra), the Supreme Court upheld the Court of Appeal's findings that evidence of meetings, discussions, consultations and communications constituted adequate public participation. It is emphatic that together with the 1st Respondent, they had conducted adequate public participation in the enactment of the impugned Act and urged the court to find as much.
73. It further argues that this Petition falls short of the threshold set in Anarita Karimi vs Republic as cited with approval in Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others[2013]eKLR and should, therefore, be dismissed.

1st and 2nd Interested Parties' case

74. The 1st and 2nd Interested Parties filed a Replying Affidavit sworn by Mary A.C Wanyonyi, the Chairperson of the 2nd Interested Party, on 25th July 2023, and Written Submissions dated 21st November 2024, on 26th July 2023 and 14th February 2025 respectively. Although their counsel informed the court that they filed an affidavit by Margaret Nyakang'o, that was sworn on 21st June 2023, from the record, the said Margaret Nyakang'o was the 3rd Interested Party's deponent represented by a different counsel.
75. The 2nd Interested Party explains its mandate to be:-
- a. to make recommendations concerning the basis for the equitable sharing of revenue raised by the National Government and County Governments and among the County Governments as provided in Articles 215 and 216(1) of *the Constitution*;
 - b. to make recommendations on other matters concerning the financing of, and financial management by, County Governments and, pursuant to Article 216 (2) and (5) of *the Constitution*;



- c. to submit its recommendations to the Senate, the National Executive, County Assemblies and Executives; and
 - d. to recommend to the Senate the budgetary ceilings on the recurrent expenditures of each County Government.
76. On the impugned Act, it avers that the implementation of the same will amount to a contravention of the principles of public finance under Article 201 of *the Constitution* on responsible financial management and prudent use of public money, fiscal responsibilities principles as set out in Section 107 of the *Public Finance Management Act*, 2012, and regulations on the wages and benefits of subject State Officers. It adds that the implementation of the impugned Act will further strain the service delivery and implementation of development projects in the County.
77. In their Written Submissions, the two(2) Interested Parties acknowledge that Governors, Deputy Governors and Members of the County Assemblies are all State Officers, and that they are subject to Article 230(4)(a) of *the Constitution*.
78. They contend that by enacting the impugned Act, the Respondents are usurping the mandate of the Petitioner and assert that if there was need to enact a legislation on counties pension schemes, it could have as well been undertaken by the Senate.
79. Additionally, in asking the court to find the impugned Act unconstitutional, they argue that Article 185 of *the Constitution* does not confer County Governments with powers to contravene Article 230(4)(a) and (b) of *the Constitution*. It stresses that Part 2 of the Fourth Schedule of *the Constitution* determines the devolved functions assigned to the County Governments. It further submits that Article 185(1) and (2) of *the Constitution* only gives County Assembly power to legislate for the purposes necessary for, or incidental to, the effective performance of functions of the County Government.

The 3rd Interested Party's case

80. The 3rd Interested Party's response to the Petition is through the Replying Affidavit of Dr Margaret Nyakang'o sworn on the 27th June 2023 in her capacity as the Controller of Budget.
81. The 3rd Interested Party highlights its roles to include overseeing the implementation of the budgets of both the National and County Governments in accordance with Article 228(4) of *the Constitution*, to authorise withdrawal of public funds, to prepare statutory reports to the executive and legislature on budget implementation of National and County Governments, to advise Parliament and County Governments regarding financial matters, to conduct investigations on complaints regarding budget implementation, to disseminate information to the public on budget implementation and to enforce the prescribed budgetary limits as determined by relevant legislations and authorised institutions, among other roles.
82. It argues that Article 228(5) of *the Constitution* explicitly directs it not to approve any withdrawal from a public fund unless satisfied that the withdrawal is authorised by law. It further reasons that where a County Government enacts a legislation such as the impugned Act, it would not authorise any approval for withdrawal of money unless satisfied that the enacted legislation complies with the law, and in this case, with the guidelines issued by the Petitioner which is charged with the mandate for remuneration and benefits for state and public officers.
83. It explains that *the Constitution* and the *Public Finance Management Act* Cap 412A (Laws of Kenya) establish principles for responsible use of public funds aimed at safeguarding them and that Regulation



- 25 of the Public Finance Management (County Government) Regulations, 2015, limits the County Government's expenditure on wages and benefits to 35% of the County Government's total revenue, which the impugned Act violates for the following reasons;
- i. The County Government of Kakamega enacted the second Supplementary Budget for FY 2022/23 in May 2023 which was assented to on 17th May 2023;
 - ii. The total Supplementary Budget amounts to Kshs 16,198,042,547/= which comprises of Kshs 4,988,983,215/= (30.8%) for development expenditure and Kshs 11,209,059,332/= (69.2%) for recurrent expenditure;
 - iii. The recurrent expenditure is Kshs 11,209,059,332/= comprising of Kshs 6,631,334,979/= for personal emoluments and Kshs 4,577, 724,353/= for operations and maintenance.
84. It asserts that the proportion of personal emoluments to the County's total revenue is 40.9% thus above the statutory set limit for personal emoluments of 35% and that the implementation of the Kakamega County (State Officers) Pension Scheme would exceed the existing ceiling of 35% resulting in a significant increase to 42.8%.
85. In its Written Submissions dated 30th November 2023 and filed on 24th July 2023(sic) it identifies three (3) issues for determination:-
- a. what is its role in budget implementation;
 - b. what is the impact of the impugned Act on the set budgetary ceilings and the fiscal principles of public finance and;
 - c. whether the County Government can set remuneration and benefits of state and public officers.
86. On the first issue, it highlights its mandate under Article 228 of *the Constitution*, the *Controller of Budget Act*, Cap 429 (Laws of Kenya) and the *Public Finance Management Act*, to include overseeing budget implementation for both National and County Governments, authorising withdrawal of money from public funds, preparing statutory reports, advising Parliament and County Governments on financial matters, conducting investigations, undertaking alternative dispute resolution, undertaking public sensitisation on budget matters and enforcing budgetary ceilings, among other roles.
87. It maintains that although the impugned Act forms the basis for planning and appropriation of public funds, which falls within its mandate, the impugned Act had not been presented to it for implementation or as a basis for requisitioning funds.
88. On the impact of the impugned Act on the budget, it submits that its implementation would undermine the provisions of Article 228(6) of *the Constitution* and Regulation 25(1)(b) of the Public Finance Management (County Government) Regulations which limits County Government expenditure on wages and benefits to 35% of the County Government's total revenue.
89. On the authority of the County Government to set remuneration and benefits of state and public officers, it submits that this mandate is a preserve of the Petitioner. It asserts that this mandate is derived from Article 230(4) of *the Constitution* which confers upon the Petitioner the responsibility to establish and regularly review the remuneration and benefits of all State Officers.
90. It further submits that on construing of *the Constitution*, Article 259(11) of *the Constitution* vests the Petitioner with the mandate to determine the remuneration for public officers. It adds that Section 11



of the SRC Act empowers the Petitioner to make recommendations regarding the review of pensions payable to holders of public offices.

91. It is the 3rd Interested Party's additional submission that the Respondents receive recommendations and advice on remuneration and benefits of public officers, which recommendations and advice guide them in their legislative authority as outlined in Article 185 of *the Constitution*.
92. The 3rd Interested Party cites Re Senate, Advisory Opinion No 2 of 2013 where the Supreme Court underscored the duty of the court to protect the mandate and integrity of all constitutional institutions, offices and state organs.

The 4th Interested Party's case

93. The 4th Interested Party opposes the Petition through the Affidavit of Mary Mwiti sworn on 21st July 2023 in which she introduces herself as the Chief Executive Officer of the 4th Interested Party.
94. It is its case that there is no law that provides for pension for State Officers in the County Governments despite the fact that social security is guaranteed as a basic right for every person under Article 43 of *the Constitution*. It adds that there is no universal scheme of social security for State Officers in the County and that the need is created by the fact that different State Officers are governed by different legal instruments referring to the *Retirement Benefits (Deputy President and Designated State Officers) Act* Cap 197B (Laws of Kenya) which makes provision for pension for retired Deputy President, Prime Minister, Vice President, Speaker, Chief Justice and Deputy Chief Justice.
95. It asserts that Article 185 of *the Constitution* confers County legislative powers upon County Assemblies and that the 1st Respondent enacted the impugned Act in exercise of these powers. It further states that this action was motivated by the advisory opinion given by the Attorney General on 18th July 2019 to the National Treasury directing that following the division of revenue between the National and County Governments, County Governments would be required to designate their own administrators depending on the pension scheme adopted for the purpose.
96. It terms the Gazette Notices issued by the Petitioner with regards to pension benefits for both the officers at the National and County Governments to be discriminatory and a violation of Article 27 of *the Constitution* for the reason that whereas it confers a pension with defined benefits for State Officers at the National Government, it subjects Governors to gratuity which it calculates at 31% of the basic pay without any other retirement benefits.
97. It further contends that under Article 204(4) of *the Constitution*, the Petitioner's mandate is limited to setting and periodically reviewing the remuneration and benefits of public officers, and advising the National and County Governments. It argues that the establishment and legislation of pension schemes do not fall within this mandate.
98. It therefore asserts that, in adherence to the doctrine of separation of powers, the court should refrain from encroaching upon the legislative authority vested in a constitutionally mandated body.
99. In its Written Submissions dated and filed on 9th February 2024, the 4th Interested Party, identifies the following issues for determination:-
 - a. whether the 1st Respondent was within its mandate in enacting the impugned Act;
 - b. whether the impugned Act is constitutional; and
 - c. whether the exclusion of State Officers at the County level from pension benefits amounts to discrimination.



100. On the first issue, it submits that the County Assembly is duly vested with legislative authority by Article 185 of *the Constitution* to enact laws that are necessary for or incidental to the effective performance of the functions and exercise of powers of the County Government. It therefore urges the court to restrain itself in matters that deal with the legislative authority of County Governments and refer the court to the decision in Robert N Gakuru & Another vs Governor Kiambu County & 3 Others (Supra) where the court underscored the need for judicial restraint in matters which deal with legislative authority of County Governments.
101. On the same point, it cites the decision in Republic vs Vice Chancellor Moi University & 2 Others, Ex-parte Benjamin J Gikenyi for the proposition that an illegality is committed where the decision maker commits an error of law in its decision making, acting without jurisdiction, or ultra vires in direct affront of the law or its principles. It then underlines that no demonstration had been made that the 1st Respondent acted illegally or exceeded its jurisdiction in enacting the statute.
102. On the second issue, it submits that the key principle of determining constitutional validity of a statute is by examining its purpose and effect and that a statute can only be nullified if its purpose and effect is inconsistent with *the Constitution*. In support of this point, it refers the court to the decision in Charanju Lal vs Union of India (1950) SCR 869, for the proposition that the court must presume that the legislature understands and appreciates the needs of the people and thus makes laws that target to address the problems of the people.
103. It also cited the Law Society of Kenya vs Attorney General & 2 others, Petition No 318 of 2012 and Center for Rights Education and Awareness & Another vs John Harun Mwau & 6 Others (Nairobi Civil Appeal No 74 of 2012), where the courts held that to determine the constitutionality of a statute, the court must discern the purpose and effect of the same, from the statute itself, so that if the purpose, effect of implementation do not infringe on the constitutionally guaranteed rights then the court must let the statute be. On the flip side, if there is an affront or threat at violation of an enshrined right, the law shall be declared unconstitutional. To the 4th Interested Party, the impugned Act aligns with the realisation of the right to social security as enshrined under Article 43(1)(e) of *the Constitution*.
104. On the third issue, it submits that whereas State Officers including the President, Deputy President, Chief Justice, Deputy Chief Justice and Speakers of Parliament, including those retired all enjoy pension benefits with defined benefits, State Officers in County Governments are only entitled to gratuity and a mere sendoff package for retiring officers. To the 4th Interested Party this treatment undermines the principles of equality and fairness under Article 27 of *the Constitution*.
105. It then relies on Council of Governors vs Salaries and Remuneration Commission [2018] KEHC 3338 (KLR), where the court held that in granting to the Governors housing allowance and not their Deputies had no reasonable acceptable basis for the differential treatment. The 4th Interested Party considers the following words in the decision as determinative of the rendition of the court: -

“I have no reason to doubt that there can be no more unreasonable, unjustifiable and unfair differential treatment deputy governors have been subjected to than this, a classic case of unfair discrimination that article 27(5) of *the constitution* prohibits”

Analysis and Determination

106. The court has considered the Petition, parties’ affidavit evidence and their written submissions and discerns the issues that arise for determination to be:-
 - a. Did the Petition meet the threshold of a Constitutional Petition?



- b. Did the impugned Act confer benefits or did it establish a retirement benefits scheme?
- c. What is the legislative mandate of the 1st Respondent?
- d. What is the mandate of the Petitioner on retirement benefits of State Officers serving in the County Government?
- e. Did the 1st Respondent conduct public participation in enacting the impugned Act?
- f. Whether the impugned Act or portions of it are unconstitutional?
- g. When does the declaration of unconstitutionality take effect?
- h. Is the Petitioner entitled to the remedies sought?
- i. What is the appropriate order on costs?

Did the Petition meet the threshold of a Constitutional Petition?

- 107. It is settled law that where a petitioner alleges a violation of constitutional rights and seeks relief under *the Constitution*, such a petitioner must plead with precision the specific constitutional provisions alleged to have been violated and demonstrate the manner of the alleged violation. This principle was articulated in *Anarita Karimi Njeru vs Republic* (Supra).
- 108. Upon perusal of the Petition, the Court notes that at Part D, the Petitioner has set out alleged violations of rights under Articles 185, 230, 10, and 174 of *the Constitution* and has provided an explanation under each Article on how the alleged violations occurred. The Court is satisfied that the Petition meets the constitutional threshold, and consequently, the objection raised by the 2nd Respondent fails.
- 109. Now on the substance, the court will consider the specific constitutional provisions the Petitioner alleges have been violated.

Did the impugned Act confer benefits or did it establish a retirement benefits scheme?

- 110. The Petitioner submits that the objects and purpose of the impugned Act is to confer pension benefits on the subject State Officers contrary to Article 230 (4) (a) of *the Constitution*. It further argues that the establishment of the County Pension Scheme was only peripheral as the substantive sections elaborated benefits for officers which squarely fell under its constitutional mandate.
- 111. On the other hand, the Respondents and the 4th Interested Party contend that the impugned Act fundamentally establishes a pension scheme for the officers in the County Government being the subject State Officers. They are emphatic that the Pension Scheme established by the impugned Act was well aligned with the provisions of *the Constitution* and the *Retirement Benefits Act* Cap 197 (Laws of Kenya). It is their contention that the impugned Act does not confer retirement benefits but establishes a pension scheme.
- 112. Notably, Section 2 of the *Retirement Benefits Act* defines ‘retirement benefits scheme’ as ‘any scheme or arrangement (other than a contract for life assurance) whether established by a written law for the time being in force or by any other instrument, under which persons are entitled to benefits in the form of payments or post-retirement medical cover determined by age, length of service, amount of earnings or otherwise and payable primarily upon retirement, or upon death, termination of service, or upon the occurrence of such other event as may be specified in such written law or other instrument.’
- 113. A perusal of the impugned Act indicates that it defines itself as an Act of the County Assembly of Kakamega to provide for the granting of pension and other retirement benefits to persons who hold



- the office of subject State Officers effective 8th August 2017 and for connected purposes. It further interprets the word, “benefits” to mean pension and other retirement benefits conferred by it.
114. Section 6(1) of the impugned Act establishes the County State Officers Retirement Benefits Scheme. Section 3 thereof provides that the object of the Scheme is to provide benefits for its members upon their retirement or for their dependents (sic) or nominees upon the death of such members.
 115. The retirement benefits of the subject State Officers are provided for in Part III and IV of the said impugned Act.
 116. The mandate to establish retirement benefits scheme for the subject State Officers is vested in the County Service Board and the County Assembly Service Board and not in the Petitioner herein. Indeed, the functions and powers of the Petitioner as envisaged under Article 230(4) of *the Constitution* and Section 11 of the SRC Act do not envisage establishment of pension schemes for state and public officers as part of its functions and that it was limited to advising the National and County Governments on matters remuneration and benefits.
 117. It follows that the duty to establish the retirement benefits scheme for the subject State Officers was within the County establishments. The court finds that the 1st Respondent established retirement benefits scheme pursuant to Gazette Notices 8794 and 8795. Indeed, in its letter Reference Number SRS/TS/COG/3/61/48 Vol II dated 10th February 2020 alluded to in the 2nd Respondent’s submissions but not annexed in its Replying Affidavit, the Petitioner had advised and recommended to employers to establish retirement benefits schemes provided that they adhered to the Commission’s guidelines issued. In addition, in its letter dated 21st August 2020, the Petitioner had expressed the need to have the pension scheme cover all State Officers in the County Governments for equity and fairness to all State Officers.
 118. The court further finds that the establishment of a retirement benefits scheme goes hand in hand with conferment of benefits. The court is unable to foresee a retirement benefits scheme not conferring benefits.
 119. Be that as it may, whether the 1st Respondent could legislate on retirement benefits scheme, whether there was consultation, whether due process was followed and whether the scheme established was constitutional are questions to be answered later in this decision.

What is the legislative mandate of the 1st Respondent?

120. It is the Petitioner’s case that in enacting the impugned Act, the Respondents acted in excess of legislative authority conferred on County Assemblies under Article 185 and the Fourth Schedule of *the Constitution*.
121. In the circumstances, it contends that the 1st Respondent violated its constitutional mandate by purporting to set retirement benefits for State Officers, a function that was reserved for it under Article 230 of *the Constitution*.
122. On the other hand, the 1st Respondent argues that it has the legislative competence under Article 185 of *the Constitution* to enact laws necessary for the effective performance of the County functions, which included providing for the welfare of its leaders even after they left office.
123. Article 185(1) and (2) of *the Constitution* vests legislative authority in the County Assembly and empowers it to make laws necessary for the effective performance of County Government functions. The said Article provides as follows:-



1. The legislative authority of a County is vested in, and exercised by, its County assembly.
 2. A County assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the County Government under the Fourth Schedule of *the Constitution* (emphasis added).
124. Further, Section 8(1)(b) of the *County Governments Act* Cap 265 (Laws of Kenya) sets out the role of the County Assembly as follows:-
- “The County assembly shall perform the roles set out under Article 185 of *the Constitution*.”
125. The Fourth Schedule of *the Constitution* stipulates as follows:-“The functions and powers of the County are:-
1. Agriculture, including— a. crop and animal husbandry; b. livestock sale yards; c. County abattoirs; d. plant and animal disease control; and e. fisheries.
 2. County health services, including, in particular- a. County health facilities and pharmacies; b. ambulance services; c. promotion of primary health care; d. licensing and control of undertakings that sell food to the public; e. veterinary services (excluding regulation of the profession); f. cemeteries, funeral parlours and crematoria; and g. refuse removal, refuse dumps and solid waste disposal.
 3. Control of air pollution, noise pollution, other public nuisances and outdoor advertising.
 4. Cultural activities, public entertainment and public amenities, including— a. betting, casinos and other forms of gambling; b. racing; c. liquor licensing; d. cinemas; e. video shows and hiring; f. libraries; g. museums; h. sports and cultural activities and facilities; and i. County parks, beaches and recreation facilities.
 5. County transport, including- a. County roads; b. street lighting; c. traffic and parking; d. public road transport; and e. ferries and harbours, excluding the regulation of interNational and National shipping and matters related thereto.
 6. Animal control and welfare, including— a. licensing of dogs; and b. facilities for the accommodation, care and burial of animals.
 7. Trade development and regulation, including— a. markets; b. trade licences (excluding regulation of professions); c. fair trading practices; d. local tourism; and e. cooperative societies.
 8. County planning and development, including— a. statistics; b. land survey and mapping; c. boundaries and fencing; d. housing; and e. electricity and gas reticulation and energy regulation.
 9. Pre-primary education, village polytechnics, homecraft centres and childcare facilities.
 10. Implementation of specific National Government policies on natural resources and environmental conservation, including— a. soil and water conservation; and b. forestry.
 11. County public works and services, including— a. storm water management systems in built-up areas; and b. water and sanitation services.
 12. Fire fighting services and disaster management.
 13. Control of drugs and pornography.



14. Ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.”
126. A reading of the Fourth Schedule of *the Constitution* indicates that it did not allocate to County Assemblies the function of setting or reviewing remuneration and benefits for State Officers as the same was not incidental to, the effective performance of the functions and exercise of the powers of the County Government.
127. The court has had due regard to the case of *Speaker of the Senate & Another vs Attorney-General & Another; Law Society of Kenya & 2 Others (Amicus Curiae)* (Advisory Opinion Reference 2 of 2013) [2013] KESC 7 (KLR), where the Supreme Court held that devolution did not amount to a transfer of sovereignty and that County Governments exercised delegated authority within the constitutional framework and their powers were subject to the supremacy of *the Constitution* and National legislation.
128. Further, in the case of *Senate & 3 Others vs Speaker of the National Assembly & 10 Others* [2025] KESC 11 (KLR), the Supreme Court held that in determining whether a Bill contains provisions affecting the functions and powers of County Governments as outlined in Article 110(1)(a) and the Fourth Schedule of *the Constitution*, the inquiry must focus on the impact of the Bill's provisions on the functions and powers.
129. The Supreme Court, in *Communications Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others* [2014] eKLR, emphasised that *the Constitution* must be interpreted holistically, in context, and in its spirit. It stated:
- “(137) The court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that *the Constitution* should be interpreted in a holistic manner, within its context, and in its spirit. In the Matter of the Kenya National Human Rights Commission, Sup. Ct. Advisory Opinion Reference No 1 of 2012; [2014] eKLR, the court[paragraph 26] had thus remarked:
- “...But what is meant by a holistic interpretation of *the Constitution*? It must mean interpreting *the Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what *the Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.”
130. It is also important from the onset to put into context, the structure of the County unit within the model of devolution crafted under *the Constitution*. The devolved system in Kenya is based on a unitary system of Government that decentralises key functions and services to County units. The Kenyan State model is not federal in nature and does not envisage the workings of a County as a politically and financially independent state. The role of the counties is, therefore, laid out in precise and exact terms under Chapter Eleven of *the Constitution*.
131. Going further, Article 186 of *the Constitution* states that:-



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 of *the Constitution*(emphasis added).
 2. A function or power that is conferred on more than one level of Government is a function or power within the concurrent jurisdiction of each of those levels of Government.
 3. A function or power not assigned by this constitution or National legislation to a County is a function or power of the National Government(emphasis added).”
132. Consequently, it follows that the legislative mandate of the 1st Respondent is limited to functions, or matters incidental to functions, set out in Part 2 of the Fourth Schedule of *the Constitution*. The 1st Respondent did not, therefore, have power or mandate to enact the impugned Act.
133. It is the considered view of the court that for the sake of uniformity and the need for equal treatment of all State Officers serving in the County Governments, it would be undesirable for each County to legislate on the benefits of its State Officers without regard to what happens in other counties. The court therefore finds that Counties cannot be permitted to have separate legislation to cover the same cadre of State Officers for uniformity purposes. The court finds that there is need, for a commensurate and uniform retirement benefits scheme for the subject State Officers and that it is the mandate of Parliament to enact a National law as contemplated in Article 186(3) of *the Constitution*.

What is the mandate of the Petitioner on retirement benefits of State Officers serving in the County Government?

134. Article 230(4) of *the Constitution* vests upon the Petitioner the mandate to set and regularly review the remuneration and benefits of all State Officers and to advise the National and County Governments on the remuneration and benefits of all other public officers. Article 260 further defines State Officers in County Government to be Members of a County Assembly, Governors and their Deputies, and Members of the County Executive Committee.
135. The Petitioner’s constitutional mandate is expounded under Section 11 of the SRC Act, Cap. 412D, (Laws of Kenya). That provision empowers it to inquire into and advise on salaries and remuneration paid out of public funds; determine the review cycle of such remuneration; make recommendations relating to the remuneration of specific State or public officers; and to recommend the review of pensions payable to holders of public office.
136. Section 2(1) of the SRC Act makes it clear that retirement benefits form part of remuneration by defining “salary and remuneration” to include the ordinary, basic or minimum wage or pay and any additional emoluments and benefits payable, directly or indirectly, whether in cash or in kind, by an employer to an employee arising from the employment relationship. It is thus clear that the mandate of the Petitioner includes the setting and regular review of benefits due and payable to State Officers in County Government.
137. In execution of this mandate, the Petitioner, through Gazette Notice No 6518 of 7th July 2017, issued guidelines on Remuneration and Benefits for State Officers in the County Government. Part 3(c) of the guidelines provided that a State Officer serving a fixed term shall be paid a service gratuity at the rate of 31% of the basic remuneration package for the term served.
138. Further, through its 2023 publication titled Understanding Retirement Benefits in the Public Service, SRC clarified that State Officers at the County level have two (2) retirement benefit options; either pension or gratuity, but not both for the same period. Where a pension scheme is chosen, it must



be a Defined Contribution (DC) scheme in which pensionable emoluments constitute 60% of the monthly gross remuneration as set by SRC. The employer is required to contribute not less than 15% of the pensionable emoluments but not exceeding twice the employee's rate or 20%, whichever is lower. The employee has to contribute at least 7.5%, with voluntary additional contributions being permissible. Importantly, the guidelines say, any proposed pension scheme must be submitted to SRC for concurrence prior to its establishment.

139. There are Judicial pronouncements which underscored SRC's exclusive mandate over retirement benefits. The Court of Appeal, in *SRC vs NHIF Management Board & 2 Others*, Civil Appeal No. 156 of 2016 [2024] KECA 419 (KLR), affirmed that SRC's advice is binding and not merely advisory, noting that such advice has a constitutional underpinning and is in rem, binding all persons, State organs and commissions.
140. Similarly, in *Kenya National Commission on Human Rights vs Attorney General & Another* [2015] KEHC 7634, the court held that Parliament's enactment of amendments to the *Presidential Retirement Benefits Act* without consulting SRC was unconstitutional as it violated Articles 10 and 230 of *the Constitution* and the provisions of the SRC Act.
141. These decisions unequivocally affirm that retirement benefits for State Officers, including those in County Governments, must be structured within SRC's guidelines and cannot be unilaterally vested by either courts or legislatures without its input.

Did the 1st Respondent conduct public participation in enacting the impugned Act?

142. Public participation has been entrenched in our Constitution as a national value and a principle of governance under Article 10 of *the Constitution* and is binding on all State organs, State Officers, Public Officers and all persons whenever any of them applies or interprets *the Constitution*, enacts, applies or interprets any law and makes or implements public policy decisions. Article 174 of *the Constitution* mandates the participation of the people in decision making.
143. Since the promulgation of *the Constitution*, the rationale, scope and application of public participation as a principle of governance has been subject of numerous decisions by the courts. The Court of Appeal speaking to the importance of public participation in the case of *Legal Advice Centre & 2 Others vs County Government of Mombasa & 4 Others* [2018]eKLR stated as follows: -

“The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning.”

144. Public participation is a key element in the legislative functions at all levels. This was appreciated in the case of *Republic vs County Government of Kiambu Ex parte Robert Gakuru & Another* (Supra) where the court held that:-

“However, it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to



be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations. Accordingly, the law is that the forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”

145. Further, in SC Petition No. 5 of 2017 *British American Tobacco Kenya Limited vs Cabinet Secretary for the Ministry of Health & 4 Others* (Supra) it was held that:

“Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to ‘fulfill’ a constitutional requirement. There is need for both quantitative and qualitative components in public participation... Public participation is not an abstract notion; it must be purposive and meaningful.”

146. It is therefore trite in law that for public participation to be deemed adequate, it must be real and not merely illusory or a cosmetic exercise, encompassing both quantitative and qualitative components. It should not be a public relations act or a symbolic box-ticking ritual. A reasonable opportunity must be afforded to the public and all interested parties to understand the issues and express their views.

147. It is the Petitioner’s case that the Respondents herein did not engage it or carry out public participation as required by law before enacting the impugned Act. It asserts that the Respondents’ failure to undertake meaningful public participation rendered the impugned Act unconstitutional. It contends that the letter dated 28th September 2022 from the 2nd Respondent seeking clarification on implementation of the impugned Act did not constitute adequate public participation.

148. It further avers that the 1st Respondent’s Submission of Memorandum is of no probative value for reasons that; the notice is unsigned, the deponent does not disclose on what date the notice was published, the deponent does not disclose the medium on which the notice was published and, the deponent does not disclose who submitted the views or memoranda on the bill and how the 1st Respondent addressed such views.

149. The Respondents counter these claims by stating that the enactment process included public participation, taking into consideration various reviews and recommendations from citizens and other stakeholders. They presented the Submission of Memorandum as evidence of such notice. They further highlight that the impugned Act originated from a draft Bill prepared by the 4th Interested Party, which was subsequently submitted to the Petitioner for comments and input. They also note that the Petitioner had contributed to the Bill and issued recommendations and reviews. They assert that they had fully met the threshold of public participation as set out in Article 10 of *the Constitution*.

150. They maintain that the Petitioner was sufficiently consulted and participated in all consultations leading to the enactment of the impugned Act. The 2nd Respondent also states that it invited the Petitioner to offer an advisory opinion on the County Government’s contribution to the retirement benefits scheme, but this invitation elicited no response. Therefore, the Respondents invoke the presumption of constitutionality of laws enacted by the legislature, placing the burden of proof on the Petitioner to demonstrate otherwise.



151. Further, the element of public participation should be in line with Section 5 of the *Statutory Instruments Act* Cap 2A (Laws of Kenya) which provides as follows:-

1. Before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to—
 - (a) have a direct, or a substantial indirect effect on business; or
 - (b) restrict competition;the regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument.
2. In determining whether any consultation that was undertaken is appropriate, the regulation making authority shall have regard to any relevant matter, including the extent to which the consultation—
 - (a) drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and
 - (b) ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.
3. Without limiting by implication the form that consultation referred to in subsection (1) might take, the consultation shall—
 - (a) involve notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, are likely to be affected by the proposed instrument; or
 - (b) invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.

5A. Explanatory memorandum

1. Every statutory instrument shall be accompanied by an explanatory memorandum which shall contain—
 - (a) a statement on the proof and demonstration that sufficient public consultation was conducted as required under Articles 10 and 118 of *the Constitution*;
 - (b) a brief statement of all the consultations undertaken before the statutory instrument was made;
 - (c) a brief statement of the way the consultation was carried;
 - (d) an outline of the results of the consultation;
 - (e) a brief explanation of any changes made to the legislation as a result of the consultation.
2. Where no such consultations are undertaken as contemplated in subsection (1), the regulation-making authority shall explain why no such consultation was undertaken.



3. The explanatory memorandum shall contain such other information in the manner specified in the Schedule and may be accompanied by the regulatory impact statement prepared for the statutory instrument.
152. Flowing from the above, failure to comply with the aforesaid principles can render legislation invalid, as legislation must conform to *the Constitution* in both its content and the manner in which it was adopted. The yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say, with what amounts to a reasonable opportunity depending on the circumstances of each case. Furthermore, public participation must be inclusive, meaningful, and purposive. The burden of proving adequate public participation lies squarely with the entity asserting it.
153. In the instant case, upon careful review of the submissions and the evidence presented, there is a significant disparity between the Respondents' general assertions of public participation and the specific requirements for proving meaningful and purposive engagement as demanded by constitutional principles.
154. While the Respondents claim to have engaged in various forms of public participation and consulted with stakeholders, including the Petitioner, the specific details necessary to substantiate these claims are conspicuously absent. In fact, it is the Petitioner's case that the 2nd Respondent only sought clarification on the implementation of the impugned Act vide a letter dated 28th September 2022.
155. Further, the 1st Respondent failed to provide precise information regarding when public recommendations were received, what the specific suggestions or comments from the public were or how these were considered and integrated into the impugned Act. The general reference to the annexed Submission of Memorandum without a detailed account of the actual process, falls short of demonstrating a substantive and transparent engagement.
156. The lack of specificity regarding the content and impact of public contributions prevents the court from ascertaining whether the spirit and letter of Article 10 of *the Constitution* were truly upheld. Moreover, the absence of a clear outline of how the Respondents complied with the consultation requirements under the *Statutory Instruments Act* further weakens their position.
157. Therefore, based on the material before the court, the Respondents have not discharged the burden of proof to demonstrate that meaningful public participation, consistent with constitutional imperatives, was undertaken in the enactment of the impugned Act.

Whether the impugned Act or portions of it are unconstitutional?

158. When a court is called upon to determine the constitutionality of a statute, there are a number of applicable principles that it must take into consideration.
159. Firstly, there is a general but rebuttable presumption on the constitutionality of every statute. The burden to prove the contrary is on the party alleging it. The presumption, therefore, is on the constitutionality of an enactment as was held in *Hambardda Dawakhana vs Union of India* Air [1960] AIR 554.
160. Another principle was set out in the case of *Olum & Another vs Attorney General of Uganda* [2002] 2 EA 508, where the court said:-

“To determine the constitutionality of a section of a statute or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section thereof.



If its purpose does not infringe a right guaranteed by *the Constitution*, the court has to go further and examine the effect of its implementation. If either its purpose or effect of its implementation infringes a right guaranteed by *the Constitution*, the impugned statute or section thereof shall be declared unconstitutional.”

161. The court is also required to consider the specific Article of *the constitution* which is the subject of the alleged infringement against the statute and determine whether there is a conflict. In the case of U.S vs Butler 297 U.S 1 [1936] as cited in the case of Were Samwel & 14 Others vs Attorney General & 2 Others [2017] KEHC 9433 (KLR), the court had this to say in this regard:-

“When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the Article of *the Constitution* which is invoked besides the statute which is challenged and to decide whether the latter squares with the former. All the court does or can do is to announce its considered judgement upon the question. The only powers it has, if such it may be called, is the power of judgement.”

162. The Petitioner challenges the constitutionality of the impugned Act on a number of grounds. Firstly, the Petitioner contends that the 1st Respondent acted ultra vires and contrary to the provisions of Article 185 and the Fourth Schedule of *the Constitution* by legislating on a matter outside its mandate; that the legislative authority of the 1st Respondent is limited to making laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the County Government under the Fourth Schedule of *the Constitution*, and that it does not extend to setting the remuneration and benefits of State Officers serving in the County Government of Kakamega. Thus, it is argued, what the County Assembly can legislate is subscribed by Article 185 of *the Constitution*.

163. In this regard, the Petitioner has relied on the decision of Raiply Woods (K) Ltd & Another vs Baringo County & 3 Others (Supra), where it was held that a County Assembly cannot overlook *the Constitution* when carrying out its legislative mandate. The Petitioner submits that the Fourth Schedule of *the Constitution* is clear on the powers and functions conferred on County Governments and does not extend to setting and regularly reviewing the remuneration and benefits of State Officers in the County Government.

164. The Respondents, on the other hand, maintain that the 1st Respondent acted within its legislative mandate under Article 185(1) and (2) of *the Constitution* to make laws necessary for County Government functions, including establishing a pension scheme to promote social security. They argue that the Petitioner’s mandate does not extend to establishing pension schemes itself, only setting the rate of employer contributions, and that they followed due public participation procedure.

165. The key question concerns the demarcation of powers between the 1st Respondent and the Petitioner herein regarding State Officers’ benefits. Article 185 of *the Constitution* vests legislative authority in County Assemblies, enabling them to make laws necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the County Government under the Fourth Schedule of *the Constitution*. A look at the Fourth Schedule of *the Constitution* shows that there is no provision granting County Governments or Assemblies the function of setting or reviewing remuneration and benefits for State Officers. The impugned Act, therefore, violates Article 185 of *the constitution*.

166. The Petitioner further contends that the enactment of the impugned Act contravenes the provisions of Article 230(4) (a) of *the Constitution*. It argues that the 1st Respondent usurped its exclusive constitutional mandate to set and regularly review the remuneration and benefits of all State Officers,



- including subject State Officers as enshrined in Article 230(4)(a) of *the Constitution*. The Petitioner highlights that its setting of benefits is determinative, not merely advisory, and no other State organ can arrogate this function.
167. The term “set” implies a determinative, not merely advisory, function, which is exclusively reserved for the Petitioner. Courts have consistently held that the Petitioner’s advice on remuneration and benefits is binding and essential for fiscal sustainability.
168. The preamble to the impugned Act provides that its purpose is to provide for the granting of pension and other retirement benefits for State Officers. The court has held hereinabove that the duty to establish retirement benefits schemes for State Officers serving in the Counties rests with the County establishments. However, the establishment does not require legislation. To the extent that the impugned Act comes with the attendant fiscal obligations that impact on public funds without recourse to the Petitioner which had exclusive mandate under Article 230(4)(a) of *the Constitution*, the court finds that in legislating on the subject of retirement benefits for the subject State Officers, the 1st Respondent exceeded its mandate under the Fourth Schedule of *the Constitution* rendering the entire impugned Act unconstitutional. The ultra vires action when added to the determined lack of public participation is another compelling reason to invalidate the impugned Act.
169. In the course of the proceedings and by pleadings filed, the 2nd Respondent and the 4th Interested Party have argued that there is violation of Articles 27 and 43 of *the Constitution*. They have contended that State Officers under the County Government are entitled to social security in terms of Article 43(e) of *the Constitution*.
170. Under Gazette Notice Nos 8794 and 8795 of 27th July 2022, the State Officers serving in the County Government have been provided retirement benefits. The two (2) Notices provide for pension and gratuity. The subject State Officers serving or appointed for a fixed term of office are entitled to gratuity at the rate of 31 per cent of the annual pensionable emoluments for the term served. The subject State Officers therefore have been provided with social security within the context of Article 43 (e) of *the Constitution* and consequently there has been no infringement of the aforesaid Article.
171. On Article 27 of *the Constitution*, it is submitted that State Officers serving at the National Government, namely the President, Deputy President, the Speakers of National Assembly and Members of Parliament have a pension scheme while the State Officers under the County Government have been relegated to mere gratuity. It is argued that this differentiation is discriminatory and thus a violation of Article 27 of *the Constitution*.
172. Articles 27 (1), (2), (4) and (5) of *the Constitution* provide as follows:-
1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.
 2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
 3. ...
 4. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
 5. A person shall not discriminate directly or indirectly against another person on any of the grounds specified in clause(4)”.



173. While addressing itself to the above sub-articles of Article 27 of *the Constitution*, the Court of Appeal in Mohammed Abduba Dida vs Debate Media Limited & Another [2018] KECA 642 (KLR) observed as follows:

“A broad and liberal interpretation of the provisions would mean that not only is discrimination on the grounds classified or specified prohibited, so too are any other grounds not specifically referred to by the provisions. So that discriminatory conduct would not merely be limited to the classifications set out, but could also include, any other ground, not specified by Article 27 (4) and (5).”

174. The discrimination in this case is on retirement benefits and pursuant to the above finding, it is the nature of discrimination contemplated under Article 27 of *the Constitution*.

175. There is no dispute that the Designated State Officers are entitled to pension under the *Presidential Retirement Benefits Act* and the *Retirement Benefits (Deputy President and Designated State Officers) Act*, just as Members of Parliament are entitled to retirement benefits under the *Parliamentary Pensions Act*. In contradiction, those serving under the County Governments are only paid gratuity on retirement.

176. Black’s Law Dictionary, 9th Edition defines “discrimination” as,

“Differential treatment; a failure to treat all persons equally when there is no reasonable distinction between those favoured and those not favoured.”

177. The subject of differential treatment has been the subject of many past decisions of the courts. In Mohammed Abduba Dida vs Debate Media Limited & Another (Supra), the Court of Appeal went on to cite the decision of Kedar Nath vs State of W.B. (1953) SCR 835 (843) where it was held that:-

“Mere differentia or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislation has in view.”

178. The Court of Appeal added as follows:

“From the above cited authorities two fundamentals become apparent, one is that provisions or rules that create differences amongst affected persons do not of necessity give rise to the unequal or discriminatory treatment prohibited by Article 27, unless it can be demonstrated that such selection or differentiation is unreasonable or arbitrary and created for an illegitimate or surreptitious purpose. And the second is that, whether or not there has been a violation of *the Constitution* should be determined by applying a three-stage enquiry to the circumstances of each case. The three stage enquiries are; firstly, whether the differentiation created by the provision or rules has a rational or logical connection to a legitimate purpose; if so, a violation of Article 27 will not have been established. If not, a second enquiry would be undertaken to determine whether the differentiation gives rise to unfair discrimination. If it does not, there is no violation of *the constitution*. But if the selection or differentiation gives rise to unfair discrimination, then the third enquiry would be necessary to determine whether it can be justified within the limitation provisions of *the constitution*.”



179. In the present case, the court observes that the Petitioner, 1st 2nd and 3rd Interested Parties failed to address themselves to the justification for the differential treatment. Consequently, the basis of the differentiation has not been laid out and the court is not in a position to determine whether the differentiation was justified. Consequently, it is the court's finding that the conferment of the retirement benefits on the basis of Gazette Notice Nos 8794 and 8795 of 27th July 2022 constitute a violation of Article 27 of *the Constitution* as against the subject State Officers.
180. Having found that the subject State Officers have been subjected to unfair discrimination, the court views that the injustice be brought to an end. To ensure that no further violation of Article 27 of *the Constitution* persists, the court directs that Parliament takes immediate steps in any event, not later than twelve (12) months from today, to enact legislation as would be appropriate to provide a uniform retirement benefits scheme for State Officers in County Governments.

When does the declaration of unconstitutionality take effect?

181. As a general rule, a declaration that a statute or statutory provision is unconstitutional takes immediate and retrospective effect, as such a law is void ab initio. This principle is anchored in Article 2(4) of *the Constitution*, which provides that any law inconsistent with *the Constitution* is void to the extent of its inconsistency.
182. Consequently, an unconstitutional enactment confers no rights and imposes no obligations from the outset unless the court expressly suspends the effect of its declaration. The Supreme Court exemplified this in *Francis Karioko Muruatetu & Another vs Republic* [2017] eKLR where it declared the mandatory death sentence for murder unconstitutional and the decision applied retrospectively.
183. Nonetheless, courts retain discretion to suspend the effect of a declaration of invalidity to prevent disruption of governance or to allow for legislative regularisation. This doctrine of suspended invalidity was applied in *Senate of the Republic of Kenya & 4 Others vs Speaker of the National Assembly & Another; Attorney General & 7 Others (Interested Parties)* [2020] eKLR where the court declared twenty-three (23) statutes unconstitutional for want of Senate involvement as required under Article 110(3) of *the Constitution*. The court, however, suspended its orders nullifying the impugned Acts for a period of nine (9) months to enable compliance and regularisation, failing which the statutes would stand nullified.
184. Thus, while the default position is immediate and retrospective invalidity, courts may suspend such effect in the interests of justice, orderly governance and to preserve a benefit derivable from the statute, which is otherwise desirable, but invalid for a rectifiable lapse.
185. In this matter, there was a prayer for mandamus to compel the refund or recovery of sums of money or other property received by the subject State Officers on the strength of the impugned Act. The record of the court revealed that when the parties appeared in court on 23rd May 2023, the counsel for the 2nd Respondent confirmed to court that no benefit had since been paid to any of the subject State Officers. On that assurance, the court issued interim orders.
186. Without any benefits having been paid out, there would be no justification to consider granting the orders of mandamus sought.

Reliefs

187. Flowing from the foregoing conclusions and determinations, it is now time to determine the appropriate reliefs to grant in the circumstances of this case. In so doing, the court is guided by the provisions of Article 23(3) of *the Constitution*.



188. The orders that commend themselves to the court are as follows:-

- a. A declaration be and is hereby granted that the setting and regular review of remuneration and benefits, including retirement benefits, for State Officers in the County Government is a function that is exclusively vested in the Salaries and Remuneration Commission by dint of Article 230(4) of *the Constitution*.
- b. A declaration be and is hereby granted that the setting and regular review of remuneration and benefits, including retirement benefits, for State Officers in the County Government of Kakamega is a function that is exclusively vested in the Salaries and Remuneration Commission by dint of Article 230(4) of *the Constitution*.
- c. A declaration be and is hereby granted that the Respondents in enacting the Kakamega County (State Officers) Pension Scheme Act, 2022 acted in excess of legislative authority conferred on County Assemblies under Article 185 and the Fourth Schedule of *the Constitution*.
- d. A declaration be and is hereby granted that the Respondents in enacting the Kakamega County (State Officers) Pension Scheme Act, 2022 violated and contravened the provisions of Part II of the Fourth Schedule of *the Constitution*.
- e. A declaration be and is hereby granted that the Respondents in failing to conduct stakeholder engagement and public participation before conferring retirements benefits to persons who hold the Office of Governor, Deputy Governor, Speaker and Members of County Assembly from 8th August 2017, violated and contravened the provisions of Article 10 of *the Constitution*.
- f. A declaration be and is hereby made that the Kakamega County (State Officers) Pension Scheme Act, 2022 is unconstitutional, null and void ab initio.
- g. The court directs that Parliament takes immediate steps in any event, not later than twelve (12) months from today, to enact legislation as would be appropriate to provide a uniform retirement benefits scheme for State Officers in County Governments.

Costs

189. On the issue of costs, the court is of the view that imposing costs in public interest cases could deter future litigation and weaken judicial scrutiny, justifying a departure from the general rule that “costs follow the event.”
190. Finally, the court must take this opportunity to thank all the counsel in this Petition. Mr Sitienei and Mr Wahome for the Petitioner, Mr Malenya, Mr Chimei and Miss Karue for the 1st Respondent, Ms Anami for the 2nd Respondent, Mr Nyauma for the 1st and 2nd Interested Parties, Ms Rasugu for the 3rd Interested Party, Mr Lawi, Mr Kataka and Ms Ngata for the 4th Interested Party for their invaluable submissions to the development of jurisprudence in this important area of law on devolution. We must appreciate them for their well-reasoned arguments.

DATED AND DELIVERED ONLINE THIS 18TH DAY OF SEPTEMBER 2025

J. KAMAU JUDGE

P.J.O.OTIENO JUDGE

S. CHIRCHIR JUDGE

