



**National Assembly of Kenya & another v Chamao & 14 others (Civil Appeal (Application) E427 of 2025 & Civil Application E366 of 2025 (Consolidated)) [2025] KECA 1366 (KLR) (25 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1366 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E427 OF 2025 & CIVIL  
APPLICATION E366 OF 2025 (CONSOLIDATED)  
DK MUSINGA, P NYAMWEYA & GV ODUNGA, JJA**

**JULY 25, 2025**

**BETWEEN**

**THE NATIONAL ASSEMBLY OF KENYA ..... APPLICANT**

**AND**

**ISSA ELANYI CHAMA O ..... 1<sup>ST</sup> RESPONDENT**

**KARANI EKIRAPA ..... 2<sup>ND</sup> RESPONDENT**

**PAUL NGWENYWO KIRUI ..... 3<sup>RD</sup> RESPONDENT**

**INTERNATIONAL LEGAL CONSULTANCY GROUP LIMITED .... 4<sup>TH</sup>  
RESPONDENT**

**COUNCIL OF COUNTY GOVERNORS ..... 5<sup>TH</sup> RESPONDENT**

**KENYA ROADS BOARD ..... 6<sup>TH</sup> RESPONDENT**

**CABINET SECRETARY, NATIONAL TREASURY AND ECONOMIC  
PLANNING ..... 7<sup>TH</sup> RESPONDENT**

**CABINET SECRETARY, ROADS & TRANSPORT ..... 8<sup>TH</sup> RESPONDENT**

**MINISTRY OF ROADS & TRANSPORT ..... 9<sup>TH</sup> RESPONDENT**

**URBAN ROADS AUTHORITY ..... 10<sup>TH</sup> RESPONDENT**

**KENYA RURAL ROADS AUTHORITY ..... 11<sup>TH</sup> RESPONDENT**

**THE ATTORNEY-GENERAL ..... 12<sup>TH</sup> RESPONDENT**

**COMMISSION ON REVENUE ALLOCATION ..... 13<sup>TH</sup> RESPONDENT**

**THE SENATE ..... 14<sup>TH</sup> RESPONDENT**



INTERGOVERNMENTAL RELATIONS TECHNICAL COMMITTEE .... 15<sup>TH</sup>  
RESPONDENT

AS CONSOLIDATED WITH  
CIVIL APPLICATION E366 OF 2025

BETWEEN

KENYA ROADS BOARD ..... APPLICANT

AND

ISSA ELANYI CHAMAO & 15 OTHERS ..... RESPONDENT

*(Being an application for conservatory orders/stay of execution and implementation of the Judgment and Decree of the High Court of Kenya at Nairobi (L. Mugambi, J.) delivered on 5th June 2025 in Constitution Petition No. E423 of 2024)*

RULING

1. Apportionment of public resources between the national and county governments has been a source of contention and legal challenges, primarily stemming from disagreements over the allocation of funds and the implementation of devolution. County governments have often accused the National Assembly of frustrating devolution by misallocating financial resources, thus adversely affecting their service delivery. The facts that preceded the dispute between the parties herein is one such occurrence. This ruling is in respect of two related applications, No. E427 of 2025 and E366 of 2025, which arise from the judgment of L. Mugambi, J. delivered on 5<sup>th</sup> June 2025 in High Court Constitutional Petition No. E423 of 2025.
2. The background that gave rise to the said judgment is that the 1<sup>st</sup> to 5<sup>th</sup> respondents filed the said petition in the High Court in which they assailed the National Assembly's decision dated }28<sup>th</sup> September 2023 and 13<sup>th</sup> August 2024 that unilaterally excluded county governments from the Road Maintenance Levy Fund (RMLF) allocations for road maintenance in their respective counties. The other respondents in that petition were The Kenya Roads Board, Cabinet Secretary, National Treasury and Economic Planning, Cabinet Secretary, Roads and Transport, Ministry of Roads and Transport, Kenya Urban Roads Authority, Kenya Rural Roads Authority and the Attorney General, who are all named as respondents herein. The Commission on Revenue Allocation, the Senate and the Intergovernmental Relations Technical Committee were named as interested parties. The petitioners contended that the respondents' action violated the constitutional principles of devolution and equitable allocation of resources in respect of the county governments.
3. The petitioners also contested the constitutionality of the [Kenya Roads Act](#) and the [Kenya Roads Board Act](#) on the basis that they do not conform to [the Constitution](#), in particular the Fourth Schedule of [the Constitution](#). They argued that the respondents had violated the provisions of Articles 6(1), 10, 118, 186 of [the Constitution](#) and section 18 of Part 1 of the Fourth Schedule of [the Constitution](#). The petitioners sought the following reliefs:
  - a. A declaration that given the territorial boundaries of county governments as provided in Article 6(1) of [the Constitution](#) as read with the division of functions in Article 186 and the



Fourth Schedule of *the Constitution*, the classification of public roads as national roads, rural and urban roads under section 47 of the *Kenya Roads Act*, No. 2 of 2007 undermines the objectives of devolution and the Fourth Schedule of *the Constitution*.

- b. A declaration that section 47 of the *Kenya Roads Act*, No. 2 of 2007 as read with the First Schedule of the *Kenya Roads Act*, No. 2 of 2007 is unconstitutional for violating Article 186 and section 18 of Part 1 of the Fourth Schedule to *the Constitution*.
- c. A declaration that section 6 of the *Kenya Roads Board Act*, 1999 is unconstitutional for violating the provisions of Articles 6, 10, 186 and section 18 of Part 1 of the Fourth Schedule of *the Constitution*.
- d. A declaration that the decision of the National Assembly dated 28<sup>th</sup> September 2023 to unilaterally remove or fail to recognize County Governments as beneficiaries of funds of the Road Maintenance Levy Fund ('RMLF') in the financial year 2024/2025 and 2025/2026 and another decision of 13<sup>th</sup> August 2024 to further remove County Governments as beneficiaries of Kshs.10,522,211,853.00 conditional grants from funds derived from Road Maintenance Levy Fund ('RMLF') in the financial year 2024-2025- are illegal and unconstitutional for violating Article 10, 118, 186 and Section 18 of Part I of Fourth Schedule of *the Constitution*.
- e. An order of Certiorari to quash the decision of the National Assembly of 28<sup>th</sup> September 2023 that unilaterally removed and/or failed to recognize County Governments as beneficiaries of funds of the Road Maintenance Levy Fund ('RMLF') in the financial year 2024-2025 and another decision of 13<sup>th</sup> August 2024 to further remove county governments as beneficiaries of Kshs.10,522,211,853.00 conditional grants from funds derived from Road Maintenance Levy Fund ('RMLF') in the year 2024/2025.
- f. A mandatory order directing the Kenya Roads Board to the Cabinet Secretary, National Treasury and Economic Planning, Cabinet Secretary, Roads and Transport and Parliament to take appropriate budgetary measures to include County Governments as beneficiaries of funds of the Road Maintenance Levy Fund ('RMLF') in the financial year 2024/2025, 2025/2026, and all subsequent years.
- g. A mandatory order directing the Kenya Roads Board to disburse to the county governments the sum of Kshs.10,522,211,853.00 due to them for the financial year 2024/2025.
- h. A mandatory order directing the Kenya Roads Board, Cabinet Secretary Roads and Transport, Attorney General and parliament to take appropriate measures to amend the *Kenya Roads Board Act* of 1999 to include County Governments as beneficiaries of funds of the Road Maintenance Levy Fund forthwith.
- i. An order directing the Cabinet Secretary, Roads and Transport and the Attorney General to take appropriate measures within 12 months to reclassify all roads in Kenya to accord to the constitutionally permissible framework, that is to say, national trunk roads and county roads.
- j. An order directing the Cabinet Secretary, Ministry of Roads and Transport Attorney General and Parliament to take appropriate measures within 12 months to amend the Kenya Roads Fund Act to align with *the Constitution* relating to the functions of the County Governments in the transport and roads sector.
- k. A permanent injunction against the respondents in the petition from removing county governments as beneficiaries of funds of the Road Maintenance Levy Fund.



- l. A permanent injunction against the Kenya Roads Board to restrain it from funding Kenya Urban Roads Authority and Kenya Rural Roads Authority from the Road Maintenance Levy fund,
    - m. Costs of the petition.
4. The petition was opposed by the National Assembly, (the applicant) through an affidavit sworn by Mr. Samuel Njoroge, the Clerk of the National Assembly, and the Kenya Roads Board, the 6<sup>th</sup> respondent herein. In brief, the National Assembly argued, inter alia, that Article 202 of *the Constitution* provides that revenue raised nationally is to be shared equitably between the national and county governments; that county governments can get additional allocations either conditionally or unconditionally; that county governments are entitled to the equalization fund which is primarily used to cater for water, roads, health facilities and electricity; that other than the monies provided for in law, county governments are not entitled to demand additional funds; that RMLF is a special fund that is provided under the Roads Maintenance Levy Fund Act and allocated to the designated roads agencies.
5. The applicant further stated that county governments first became beneficiaries of the RMLF as a conditional grant from the national government in 2015/2016 financial year; that this was based on the need to support counties to maintain their local roads as contained in the County Allocation of Revenue Act; that on that premise the Kenya Roads Board allocated 15% of the RMLF for six (6) years from that financial year until the 2020/2021 financial year; that during consideration and approval of the third generation revenue sharing formula, as envisaged under Article 217 of *the Constitution*, the conditional grant drawn from RMLF was stopped because the maintenance of county roads was incorporated into the equitable revenue share; that during the 2021/2022 and 2022/2023 financial years, county governments were not issued with any conditional grants from the RMLF and have not been so issued since then; that in lieu thereof, the government dropped the conditional share from the RMLF and increased the county equitable share from Kshs.316.5 billion to Kshs.370 billion, which decision was guided by the need to ensure that no county would get less funds in the 2021/2022 financial year than what they had been allocated in the 2020/2021 financial year; that to attain the 17% increase without interfering with other government operations, a decision was made to absorb the granted RMLF into the equitable revenue share as part of the Kshs.53.5 billion increase and following that, each county government is required to utilize the allocated share to maintain their roads; that county governments continue to receive adequate funds as allocated through the Division of Revenue Act and subsequently apportioned through the County Allocation of Revenue Act; that the national government consistently allocates to county governments revenue exceeding the minimum 15% stipulated in Article 203(2) of *the Constitution*, including supplementary funds from the National Government's revenue share under Article 202 of *the Constitution*, and financial support in the form of loans and grants from development partners
6. The National Assembly therefore opposed the allegation of discrimination in allocation of RMLF.
7. The Kenya Roads Board (the 6<sup>th</sup> respondent herein), also opposed the petition through an affidavit sworn by its Deputy Director, Legal and Board Services, Catherine Kassim. Kenya Roads Board argued, inter alia, that the RMLF is a special fund that is not part of the consolidated fund provided under article 206(1) of *the Constitution*; that section 7 of the Road Maintenance Levy Fund Act excludes proceeds from the fuel levy imposed under section 3 of the Act from being paid into the consolidated fund; that under section 6(2)(c) of the *Kenya Roads Board Act* it is required to allocate 50% of the monies to the RMLF for maintenance, rehabilitation and development of road network; that the other 50% as guided under section 32(A)(2) of the *Kenya Roads Act* is set aside as security to meet financial demands for the said objectives; that *the Constitution* classifies roads into two categories



namely, trunk roads (Class S, A, B and C) maintained by the National Government, and county trunk roads (Class D, E, F and G) maintained by the respective county governments; that following the passing of the County Allocation Revenue Act in 2015, counties became beneficiaries of the RMLF through conditional grants issued by the Board from 2015 – 2021 which constituted 15% of the funds paid into RMLF; that these funds were eventually incorporated into the counties equitable revenue share in the 2021/2022 financial year bringing to an end the conditional grant under the RMLF; and that the Board had therefore carried out its mandate as provided in law.

8. On their part, the 7<sup>th</sup> to 12<sup>th</sup> respondents herein filed a notice of preliminary objection to the petition on grounds that the petition offends the doctrine of constitutional avoidance and the doctrine of exhaustion that demands that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion; that the High Court had no jurisdiction to hear the petition as per section 20 of the *Intergovernmental Relations Act* No. 2 of 2012; that the petition was premature and a gross abuse of the court process for want of compliance with Article 189(3) of *the Constitution* as read together with sections 30, 31, 32, 33 and 34 of the *Intergovernmental Relations Act*, No. 2 of 2012.
9. The trial court heard submissions by all the parties' advocates and formulated four issues for determination which were: (i) whether the court had jurisdiction to entertain the petition (ii) whether the National Assembly's impugned decisions dated 28<sup>th</sup> September 2023 and 13<sup>th</sup> August 2024 constitute threat to devolution hence unconstitutional, (iii) whether section 6 of the Kenya Roads Board 1999, section 47 of the *Kenya Roads Act*, 2007 and section 7 of the Roads Maintenance Fund are unconstitutional, and (iv) whether the petitioners were entitled to the reliefs sought.
10. In its determination, the court held that it had jurisdiction to hear the petition; that the impugned decisions by the National Assembly not only threaten but actually undermine devolution and are, therefore, unconstitutional and any further action arising from the said decisions is illegal, null and void; that sections section 6 of the Kenya Roads Board 1999, section 47 of the *Kenya Roads Act*, 2007 and section 7 of the Roads Maintenance Fund are unconstitutional for undermining devolution as envisaged under Articles 6 and 186 of *the Constitution*
11. In view of the above findings the court granted the following reliefs:
  - a. A declaration that the classification of public roads as national roads, rural and urban roads under section 47 of the *Kenya Roads Act*, No. 2 of 2007 as read with the First Schedule of the *Kenya Roads Act*, No. 2 of 2007 not only undermines the objectives of devolution but is also unconstitutional for violating Article 186 and section 18 of Part 1 of the Fourth Schedule of *the Constitution*.
  - b. A declaration that section 6 of the *Kenya Roads Board Act*, 1999 is unconstitutional for violating the provisions of Articles 6, 10, 186 and section 18 of Part 1 of the Fourth Schedule of *the Constitution*
  - c. A declaration that the decision of the National Assembly dated 28<sup>th</sup> September 2023 to unilaterally remove and/or fail to provide for the county governments as beneficiaries of funds of the road maintenance levy fund in the financial years 2024/2025 and 2025/2026 and its further decision of 13<sup>th</sup> August 2024 to further remove county governments as beneficiaries of Kshs.10,522,211,853.00 conditional grants from funds derived from Road Maintenance Levy Fund in the financial year 2024/2025 amounts to a threat to undermine devolution and is thus unconstitutional for violating Articles 10, 118, 186 and section 18 of Part 1 of the Fourth Schedule of *the Constitution*.



- d. A declaration that any appropriation of funds from road maintenance levy by the National Assembly that does not provide for the county governments as beneficiaries of the RMLF undermines the principles of devolution is unconstitutional and unenforceable, illegal, null and void. The court made no orders as to costs.
12. Aggrieved by the said decision, the National Assembly as well as the Kenya Roads Board preferred appeals to this Court. The National Assembly filed an application dated 9<sup>th</sup> June 2025 seeking, pending hearing and determination of the appeal, conservatory orders and/or an order of stay of execution and implementation of orders Nos. (a), (b), (c) and (d) of the judgment of the High Court and conservatory and/or an order of stay of execution and implementation of the of the order of the unconstitutionality of the County Government Additional Allocations *Act, No. 3 of 2025*, so that the county governments should continue enjoying the additional allocations and disbursements contained in the First and Second Schedules of the Act.
13. The application is supported by an affidavit sworn by Samuel Njoroge, the Clerk of the National Assembly. Mr. Njoroge states inter alia, that the Roads Maintenance Fuel Levy was initially a conditional allocation to county governments for the maintenance of county roads; that it was an additional allocation to counties as a conditional grant under Article 202(2) of *the Constitution* through the yearly Division of Revenue Acts since the financial years 2015/2016; that the last disbursement of the funds to counties as conditional grants was in the financial year 2020/2021; that between the years 2013 and 2019 the Roads Maintenance Fuel Levy was given to county governments as additional allocations as grants through a schedule to the County Allocation of Revenue Act; that in the financial 2021/2022 during the approval of the Third basis, (The County Allocation of Revenue Act-Formula), part of the conditional allocations to county governments, including funds for county roads, were folded up to be part of county governments' equitable share which set a precedent for the financial years 2022/2023 and 2023/2024 in that the amounts allocated to county governments as equitable share included funds for county roads.
14. He stated that in 2023 the Council of County Governors filed petition No. 252 of 2016 at the High Court challenging implementation of additional allocations and the High Court allowed the petition, which led to the birth of County Governments Additional Allocation Act; that in the financial year 2021/2022, the funds for county roads were incorporated into the Division of Revenue Bill following recommendations of the Commission on Revenue Allocation during negotiations for the Third Revenue Sharing Formula, and accordingly, a sum of Kshs.9.8 billion was appropriated through the Division of Revenue Bill.
15. He further stated that in the financial year 2023/2024 the National Treasury in the proposal for the equitable share for counties demonstrated that the allocation of Kshs.385.4 billion as county equitable share for financial year 2022/2023 had been made; that the Division of Revenue Act, 2023 included the allocation of Kshs10.9 billion; that the proposal by the Treasury was that in arriving at the equitable share of 2024/2025, Kshs.10.9 billion be netted off from the Kshs.385.4 billion to a new base of Kshs.375.4billion, and allocate the funds for county roads to counties through the County Governments Additional Allocation Bill 2024, but during the approval of the Division of Revenue Bill by Parliament, the amount of Kshs.10.4 billion was not netted off as proposed.
16. In view of the foregoing, the National Assembly argued, the implementation of the impugned judgment that county governments should still be allocated the Roads Maintenance Fuel Levy through conditional grants and through receiving funds for county roads through the equitable share of revenue will lead to double allocation of funds to county governments and disenfranchise national government road agencies. The applicant further argued that the High Court declared section 47 of the



- Roads Act and section 6 of the *Kenya Roads Board Act* as unconstitutional for violating the provision of Articles 6, 10, 186 and Section 18 of Part 1 of the Fourth Schedule of *the Constitution* instead of construing the said provisions with the necessary alterations, adaptations and qualifications to bring them into conformity with *the Constitution* as required under paragraph 7 of the Fourth Schedule of *the Constitution*, or issuing a structural interdict to allow for any amendment of the said provisions, without creating a lacuna in law.
17. The applicant further argued that section 47 of the *Kenya Roads Act* is the basis for the classification of all public roads in Kenya, while section 6 of the *Kenya Roads Board Act* sets out the functions of the Kenya Roads Board and the manner in which it shall manage the Kenya Roads Board fund that is created under section 31 of the Act; that RMLF is only a part of the Kenya Roads Board fund; that the said provisions have been in place for the past 16 years and continue being implemented with the necessary alternations, adaptations and qualifications to bring them into conformity with *the Constitution* in so far as the management of public roads as between the national and county governments is concerned.
  18. The applicant further stated that its decisions of 28<sup>th</sup> September 2023 and 13<sup>th</sup> August 2024 did not remove county governments as beneficiaries of RMLF but decided that because RMLF was initially granted to county governments as conditional grants between the financial years 2015 to 2021 and later funds for county roads were incorporated into the Counties equitable revenue share for the financial year 2021/2022, and therefore county governments could no longer benefit from RMLF as a conditional grant under Article 202(2) of *the Constitution*.
  19. The applicant contends that its appeal has high chances of success; that unless the orders sought are granted, irreversible harm will be caused to the operations of the national government road agencies, the Kenya Roads Board, and the public by the nullification of the two decisions by the National Assembly, section 47 of the *Kenya Roads Act* and section 6 of the *Kenya Roads Board Act*; that public interest dictates the continuation of statutory regime to govern the public road sector; and that without such a regime, there will be total chaos and disorder which will cause considerable and irreversible loss, misery and harm to the public, and to the operations of the national government road agencies and the Kenya Roads Board.
  20. In his further affidavit sworn on 30<sup>th</sup> June 2025, Mr. Njoroge stated that following delivery of the impugned judgment, the Chairperson of the Council of County Governors wrote to the County Governors (the 5<sup>th</sup> respondent), requesting to, among others, the enactment of a legal frame work to anchor the road maintenance levy fund in accordance with section 18 of Part 1 of the Fourth Schedule of *the Constitution* and the judgment of the High Court; that by a letter dated 12<sup>th</sup> June 2025, the Attorney General wrote to the Cabinet Secretary for National Treasury and Economic Planning, the Cabinet Secretary, Ministry of Roads and Transport and the Clerk of the National Assembly, giving some guidance on the apportionment of funds from the RMLF which stated, inter alia, “as guided by stakeholder consensus on the allocation model of the funds, we guide that the appropriations ought to be structured to take into account the following settlement framework: (i) thirty percent (30%) to be held by the national government (ii) thirty five percent, (35%) to be disbursed by the county governments and (iii) thirty five percent (35%) to be disbursed by the national government roads agencies.”
  21. He continued to state that in order to implement the proposal, the said respondents and the applicants need to develop an appropriate legislative framework to anchor the proposed structure, and other measures necessary to enhance the implementation of the Road Maintenance Levy in accordance with section 18 of Part 1 to the Fourth Schedule of the Constitution, which process requires at least 6 months’ period for the necessary public participation and stakeholder engagement; that on 25<sup>th</sup> June



- 2025 the applicant convened a consultative meeting with the Kenya Roads Board and the Ministry of Roads and Transport to chart a way forward in formulating the necessary legislative framework.
22. Appreciating all that needs to be done, the applicant urged this Court, pending hearing and determination of the appeal, to issue conservatory orders as sought. Lastly the deponent stated that the public interest will be served by averting the crisis, a lacuna that has befallen the public road management and maintenance sector, as no statutory framework currently exists following the lapse of the stay orders issued by the High Court on 5<sup>th</sup> June 2025.
  23. On its part, the Kenya Roads Board filed a notice of motion dated 12<sup>th</sup> June 2025. It sought two substantive prayers being: a conservatory order to temporarily suspend the declaration of unconstitutionality and invalidity of section 6 of the *Kenya Roads Board Act* pending hearing and determination of the appeal, and a conservatory order temporarily suspending the declaration of unconstitutionality and invalidity of section 47 of the *Kenya Roads Act* as well as the First Schedule of the Act pending hearing and determination of the appeal.
  24. The affidavit in support of the application was sworn by Catherine Kassim, the Corporation Secretary and Secretary to the Board. The arguments raised by Kenya Roads Board are or more less the same as those of the National Assembly.
  25. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> respondents, who were the petitioners before the High Court, filed grounds of opposition to the applications and replying affidavits. The 5<sup>th</sup> respondent's replying affidavit was sworn by Mary Mwiti, the Chief Executive Office of the Council of County Governors. In her affidavit, the deponent states, inter alia, that the Kenya Roads Board administers the RMLF which raises an average of Kshs.80 billion annually; that after an elaborate inter- governmental process that involved the Summit that is chaired by the President of the Republic of Kenya and the Commission of Kenya Revenue Allocation, it was determined that for the financial year 2024/2025, county governments would get Kshs.10,522,211,853 to maintain county roads; that subsequently the Senate allocated to county governments the said sum; that however, the two decisions of 28<sup>th</sup> September 2023 and of 13<sup>th</sup> August 2024 by the National Assembly removed County governments as beneficiaries of Kshs.10, 522,211,853 Road Maintenance Levy Funds for the year ending 30<sup>th</sup> June 2025; that on 19<sup>th</sup> August 2024 the High Court issued conservatory orders freezing funds held by the Kenya Roads Board, collected as Road Maintenance levy fund in the financial year 2024/2025 to the extent of Kshs.10,522,211,853 being the allocation meant for the county governments; that the conservatory orders lasted until 5<sup>th</sup> June 2025 when the Court delivered the impugned judgment; that vide a letter dated 9<sup>th</sup> June 2025 addressed to the Chairperson, Kenya Roads Board and copied to the Speaker National Assembly, Speaker of the Senate and the Director General and the Kenya Roads Board, the Council of Governors requested the Kenya Roads Board to release the aforesaid sum to county governments; that in a further letter dated 10<sup>th</sup> June 2025 the Council of County Governors forwarded the impugned judgment to the Cabinet Secretary, Ministry of Roads and Transport and copied the Speaker of the National Assembly, Speaker of the Senate and the Chairperson, Kenya Roads Board; that in an interesting turn of events, some leaders in the National Assembly tried to push the Council of County Governors to accept a reduced figure of 35% of the figure Kshs.10,522,211,853 (Kshs.3,682,774,149) which they said will be immediately disbursed by the Kenya Roads Board and the rest of the money would be used ostensibly for constituency roads; that on 11<sup>th</sup> June 2025 the National Assembly's legal counsel forwarded to the Council of County Governors a unilaterally drafted consent for the reduced amount, which the petitioners rejected as being unconstitutional and untenable; that in total disregard of the judgment and extreme manifestation of impunity, the custodian of the funds, Kenya Roads Board, disbursed to county governments the sum of Kshs.3,682,774,150 on 17<sup>th</sup> June 2025; that in effect Kshs.6,839,437,703 has not been disbursed to county governments as decreed



by the High Court; and the petitioners are apprehensive that the said sum has been disbursed to constituency roads in contravention of the judgment of the High Court and *the Constitution* of Kenya.

26. The 5<sup>th</sup> respondent indicated that in the main appeal, it will be seeking by way of a cross-appeal to compel the Kenya Roads Board to disburse the sum of Kshs.6,839,437,703 to county governments. The 5<sup>th</sup> respondent further contended that this Court cannot grant stay or conservatory orders to stop the implementation of the decree of the High Court because the decree had been partially implemented when Kenya Roads Board disbursed Kshs.3,682,774,150 to county governments on 17<sup>th</sup> June 2025; that this Court cannot grant stay or conservatory orders to stop the implementation of the decree of the High Court because the Attorney General and the National Assembly have begun amending section 47 of the *Kenya Roads Act*, No. 2 of 2007 and section 6 of the *Kenya Roads Board Act*, 1999 that the High Court found to be unconstitutional; that applying the doctrine of proportionality and public interest in the context of the constitutional commitment to protect devolution, this Court should not grant any conservatory orders to stop the implementation of the impugned judgment because the two sections of the *Kenya Roads Board Act*, 1999 that were found to be unconstitutional have existed in our Statute books for more than 14 years after promulgation of the 2010 Constitution, with the full knowledge of the Attorney General, the National Assembly and the Kenya Roads Board, but not having taken any precipitate action to amend them; that the declaration of unconstitutionality of the two sections of the said law is what has prompted the quest to amend the law; and that staying the decree of the High Court would leave the National Assembly with no incentive to amend the law.
27. Lastly, the 5<sup>th</sup> respondent argued that the Kenya Roads Board in collusion with the National Assembly, having disbursed Kshs.3,682,774,150 to county governments as opposed to Kshs.10,522,211,853, they have “dirty” hands and cannot considerably benefit from stay of conservatory orders from this Court, which are inherently discretionary remedies; and bearing in mind the public interest, the constitutional values and the proportionate magnitude and priority levels attributable to this case, the applicants have not met the entire and complete test for the grant of stay of conservatory orders.
28. The applicants as well as the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents filed submissions that were highlighted by their respective advocates. Dr. Otiende Amollo, Senior Counsel, together with Mr. Peter Kaluma, Mr. Mwendwa and Mr. Mbarak Awadh appeared for the National Assembly, while Mr. Wanyama appeared for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> respondents. Mr. Issa Mansur appeared for the Kenya Roads Board, Mr. Marwa for the Cabinet Secretary, National Treasury and Economic Planning, Ms. Opiyo for the Attorney General, the 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 13<sup>th</sup> respondents and also held brief for Mr. Weche for the Cabinet Secretary, Roads and Transport.
29. Counsel briefly highlighted their written submissions.

Regarding arguability of the appeal, counsel for the applicants referred to their memorandum of appeal which they contended discloses several arguable grounds, among them being: that the High Court erred in finding that it had jurisdiction to determine the petition contrary to Article 189(3) of *the Constitution* and section 31 of the *Intergovernmental Relations Act*, which provides that disputes between the two levels of government must first be resolved amicably before the jurisdiction of the High Court is invoked; that the High Court erred in finding that an agreement was reached between the applicant and the 1<sup>st</sup> to 5<sup>th</sup> respondents leading to withdrawal of Petition E456 of 2023; that the funds the counties were to lose for being removed as beneficiaries of RMLF would be compensated through allocation of conditional grant of Kshs.10,522,211,853 when no evidence of the agreement was adduced; and that the High Court erred in finding that consultations and agreements made between the National Government and County Governments on sharing of national resources without a law in place are binding on the applicant, which finding contravenes Parliament’s exclusive mandate to



determine the allocation of national revenue between the two levels of government under Articles 95(4) (a), 217 and 218 of *the Constitution*.

30. Regarding nugatory and public interest arguments, the applicants submitted that the High Court has effectively invalidated the existing statutory framework for classification of public roads and management of RMLF with effect from 19<sup>th</sup> June 2025. That decision has irreversible effects to the operations of the State and the public interest. If implementation of the impugned judgment is not stayed, the effects include:
- a. Section 6 of the *Kenya Roads Board Act* allows for securitization of the 50% of the Kenya Roads Boards Fund to meet financial demands for maintenance, development and rehabilitation of roads under section 32(a) of the Act. Without section 56 the national government cannot continue with securitization under section 32(a) of the Act. Most of the ongoing road construction in various parts of the country are financed through loans raised from the said securitization.
  - b. Section 6 of the *Kenya Roads Board Act* provides the formula for sharing of the Kenya Roads fund (including RMLF) among the road agencies. These funds are utilized by the road agencies for maintenance, rehabilitation and development of the road network. Without section 6, the road agencies will not be able to maintain, rehabilitate and develop the road networks within their respective mandates.
  - c. Section 6 of the *Kenya Roads Board Act* allows the roads board, Kenya National Highways Authority, Kenya Urban Roads Authority, and Kenya Rural Roads Authority to utilize part of their respective shares from the fund for operational and administrative expenses. Without it, the said road agencies will not be able to fund their operational and administrative expenses.
  - d. Section 47 of the *Kenya Roads Act* provides the legal framework for the current classification of all public roads in Kenya. Without it, the current road classification will stop being operational and there will be confusion regarding classification of roads.
  - e. The High Court's declaration that the purported decision of the National Assembly dated 13<sup>th</sup> August 2024 is unconstitutional has effectively nullified the county governments Additional Allocations *Act, No. 3 of 2025*. If that declaration is not stayed, county governments will not be able to continue enjoying the additional allocations contained in the First and Second Schedules of the Act amounting to Kshs.50 billion or thereabout.
31. The 1<sup>st</sup> to 5<sup>th</sup> respondents filed grounds of opposition and submissions. They submitted that the appeal is not arguable; that the appeal will not be rendered nugatory if stay of implementation of the judgment is not granted since the orders issued are declaratory in nature and they impose no coercive, mandatory or monetary obligations upon the appellants; that the High Court merely called upon Parliament to align legislation with *the Constitution* and that obligation cannot be stayed by a judicial order; that the implementation of the impugned judgment would not invalidate existing projects, contracts or disrupt governance; that the judgment did not create a legal lacuna as alleged by the applicants; and that the court did not nullify the entire Roads Act but only provisions that are inconsistent with devolution.
32. The 1<sup>st</sup> to 5<sup>th</sup> respondents further submitted that public interest lies in ensuring that devolved functions are performed and funded by the proper level of government, and that the judgment upholds that constitutional obligation.
33. However, in his oral highlights of the foregoing submissions, Mr. Wanyama conceded that the Court may stay section 6 of the Kenya Roads Boards Act but for a limited period of time to enable the National Assembly take appropriate action as directed by the High Court. Counsel opposed stay of



- all the other declarations because doing so would perpetuate the unconstitutionality that had been pointed out by the High Court.
34. Having considered the lengthy contents of these two applications and all the submissions by parties, this being essentially an application under rule 5(2)(b) of this Court's Rules, the applicants must satisfy the Court that the appeal or intended appeal is arguable, and that if the Court does not grant the orders sought, the appeal, if successful, shall be rendered nugatory. See *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR. The Court must also consider whether it is in the public interest to grant or refuse the orders sought.
  35. Having perused the judgment and the memorandum of appeal, we are satisfied that the appeals are arguable. An arguable appeal is not one that must succeed, it is one that raises serious issues that require full consideration by the Court. We need not say more regarding arguability as that may embarrass the bench that will eventually hear the appeal.
  36. Turning to the nugatory and public interest aspects, it is not in dispute that the impugned judgment has far reaching ramifications with regard to the operations of road agencies in this country, that is, the Kenya National Highways Authority (KeNHA), Kenya Rural Roads Authority (KeRA), and the Kenya Urban Roads Authority (KURA).
  37. Section 6 of the Kenya Roads Board allows for: securitisation of 50% of the Kenya Roads Board Fund to meet financial demands for maintenance, development and rehabilitation of roads. The section also provides the formula for sharing of RMLF among the said road agencies and the Kenya Wildlife Services. It is not possible for these agencies to fund their operational and administrative expenses if the section became totally inoperative, without any appropriate legal framework in its place. That would occasion considerable deterioration of our road network.
  38. It is also not in dispute that section 47 of the *Kenya Roads Act* provides the legal framework for classification of all public roads in Kenya. Without it, the road classification will be inoperative and there would be chaos and disorder between national and county governments as to which roads fall under which level of government.
  39. As regards the declaration that the National Assembly's decision dated 13<sup>th</sup> April 2024 in unconstitutional, the effect thereof was to nullify the County Governments Additional Allocations *Act, No. 3 of 2025*. Unless that declaration is stayed pending appeal, County Governments will not be able to get the additional allocations contained in the First and Second Schedules to the Act, said to be amounting to Kshs.50 billion or thereabouts. That will exacerbate service delivery in all the counties. The public should not be made to suffer when there are available financial resources that cannot be apportioned due to absence of an enabling legal framework.
  40. There are instances when a court may suspend a declaration of unconstitutionality of a statute, like when such declaration creates or is likely to create a legal vacuum, or causes significant public suffering or disruption in provision of services or administration of justice. The suspension should be for a limited period of time to enable the legislature address the constitutional issue. In doing so, the Court must consider, inter alia, the broader public interest; the potential harm to the public from the immediate invalidation of the law vis-à-vis continued application of the unconstitutional law, albeit for a limited period of time.
  41. In *Cabinet Secretary for the National Treasury and Planning & 4 Others v Okoiti & 52 Others* (Petition E031, E032, & E033 of 2024, (consolidated) [2024] KESC 47 (KLR) (20 August 2024) Ruling, the Supreme Court considered the difficulty that would arise in the operations of government, coupled with the uncertainty about revenue raising measures and the potential challenges that both levels of



government would face as a result of declaration of the Finance Act, 2023 as unconstitutional and issued a conservatory order suspending and staying this Court’s judgment that had affirmed the High Court’s judgment. See also *Cabinet Secretary Ministry of Health v Aura & 13 Others (Civil Application E583 of 2023)* [2024] KECA 2 (KLR) (19 January 2024) Ruling.

42. In the petition, the 1<sup>st</sup> to 5<sup>th</sup> respondents had urged the High Court, upon declaring sections 47 of the *Kenya Roads Act*, Cap 408 and section 6 of the *Kenya Roads Board Act*, Cap 408 A unconstitutional, to grant the legislature a period of at least 12 months to implement any legislature interventions.
43. Taking into consideration all the relevant factors that we have pointed out, we are satisfied that the applicants have demonstrated that the orders sought in the consolidated applications are merited. The appeal and the intended appeal are arguable. The appeals shall be rendered nugatory unless the orders sought are granted. Public interest also favours grant of the orders sought. We therefore grant conservatory orders and/or stay of execution and implementation of orders numbers (a), (b), (c) and (d) of the High Court judgment, for a period of twelve (12) months to enable the appellants prosecute their appeal before this Court.
44. It is not in dispute that subsequent to delivery of the impugned judgment, but within the 15 days’ period of stay of execution of the judgment granted by the High Court, a sum of Kshs.3,682,774,150 was paid by the Kenya Roads Board to county governments. We shall not make an order for payment of the balance of Kshs.6,839,437,703 as urged by counsel for the 1<sup>st</sup> to 5<sup>th</sup> respondents because, firstly, there was no directive by the High Court compelling payment of any amount, and secondly, there is a cross appeal by the 1<sup>st</sup> to 5<sup>th</sup> respondents regarding payment of the said sum.
45. In light of the timelines we have prescribed, we direct the applicants to ensure that their records of appeal together with their written submissions are filed and served within 30 days. The respondents to file and serve their written submissions within 14 days of service thereof. Thereafter, the matter be listed for case management before the Deputy Registrar of this Court.
46. This being public interest litigation, parties shall bear their own costs of the application.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JULY 2025.**

**D. K. MUSINGA (PRESIDENT)**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

