Council of Governors & 5 others v Senate & another (Civil Appeal 204 of 2015) [2019] KECA 704 (KLR) (7 June 2019) (Judgment)

Council of Governors & 5 others v The Senate & another [2019] eKLR

Neutral citation: [2019] KECA 704 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 204 OF 2015

MSA MAKHANDIA, DK MUSINGA, AK MURGOR, JO ODEK & S OLE KANTAI, JJA

JUNE 7, 2019

BETWEEN

COUNCIL OF GOVERNORS ..... 1ST APPELLANT

PATRICK SIMIYU KHAEMBA ..... 2ND APPELLANT

AHMED ABDULLAHI MOHAMED ..... 3RD APPELLANT

WYCLIFE OPARANYA ..... 4TH APPELLANT

JAMES OMARIBA ONGWAE ..... 5TH APPELLANT

MARTIN NYAGA WAMBORA ..... 6TH APPELLANT

AND

SENATE ..... 1ST RESPONDENT

ALFRED MUTUA ..... 2ND RESPONDENT

(Appeal from the judgment and decree of the of the High Court of Kenya at Nairobi (Lenaola (as he then was) Mumbi Ngugi and Odunga, JJ.) delivered on 24th June, 2015 in Petition No 413 of 2014)

Senate has no constitutional power to pass a resolution to stop the transfer of funds, constituting national revenue allocations, to county governments.

The appeal challenged the resolution passed by the Senate recommending that the Cabinet Secretary for Treasury stop the transfer of funds to the some county governments whose governors had failed to honour summons from the Senate. The Senate had also urged the Controller of Budgets to decline to approve withdrawal of public funds by those county governments. The court held that the power to stop the transfer of funds was held by the Cabinet Secretary for Finance and that in passing a resolution for the stoppage of transfer of funds, the Senate had

overstepped its mandate. The court further held that in making the resolution, the Senate usurped the powers of the Controller of Budgets.

Reported by Beryl A Ikamari

Civil Practice and Procedure *- institution of suits - suits against the Government - necessary parties in a suit against the Government - Attorney General as a party to a suit by or against the Government - where different levels of Government were the parties to a suit and it was impractical for the Attorney General to be a party in place of the disputing parties - whether the Attorney General was a necessary party to the suit in such circumstances - Government Proceedings Act (Cap 40), section 12.*

Civil Practice and Procedure *- institution of suits - suits against the Government - issuance of 30 days' notice of intention to institute proceedings against the Government - effect of failure to issue the notice - whether without the issuance of that notice, the High Court had no jurisdiction to entertain a suit - Government Proceedings Act (Cap 40), section 13A.*

Constitutional Law *- Parliament - parliamentary privileges and immunities - duty of the High Court to interpret the Constitution and determine whether actions done by Parliament were constitutional - whether parliamentary privileges and immunities would prevent the High Court from hearing a suit which challenged the validity of a resolution passed by the Senate.*

Constitutional Law *- Parliament - Senate - powers of the Senate to summon persons - where the Senate summoned governors to respond to queries relating to the financial management of their county governments, in order undertake oversight over the national resource allocation to county governments - whether the Senate had the mandate to summon the county governors - Constitution of Kenya 2010, article 96(3); County Governments Act, No 17 of 2012, section 30 (3) (f).*

Constitutional Law *- Parliament - Senate - resolutions passed by Senate-constitutionality of the resolutions passed by Senate - where Senate passed a resolution requiring the Cabinet Secretary for the Treasury to stop the transfer of funds to certain county governments and for the Controller of Budgets to disallow withdrawal of public funds by certain County Governments - whether the Senate had constitutional power to pass such a resolution - Constitution of Kenya 2010, articles 225 & 228(4); Public Finance Management Act, No 18 of 2012, sections 96(1), 93 & 94.*

Constitutional Law *- devolution - county government resources - extent of the oversight role of the Senate with respect to national revenue allocation made to the county governments - whether oversight over national revenue allocation made to county governments was within the exclusive competence of the Senate while oversight over county revenue from sources other than the national revenue allocation, including grants and county government fees, was within the competence of the county assemblies-Constitution of Kenya 2010, article 96(3).*

Brief facts

On February 8, 2014, the Senate Committee on Finance, Commerce and Economic Affairs, summoned 15 County Governors to respond to queries related to a report of the Controller and Auditor General for the financial year ended 2012/2013. All of the Governors, except four appeared before the Committee. The four were aggrieved by the summons and they filed High Court Petition No. 8 of 2014, *International Legal Consultancy Group v The Senate and the Clerk of the Senate*. The High Court made a determination that it was within Senate's mandate to summon County Governors and the County Executive members of finance. Following the determination, Senate issued fresh summons to the four County Governors but they refused to appear before Senate.

Senate responded to the refusal of the four Governors to honour summons through measures that would affect the finances of the concerned County Governments. Senate passed a resolution recommending that under section 96 of the Public Finance Management Act, the Cabinet Secretary for the Treasury should stop the transfer of funds to the concerned County Governments. They also urged the Controller of Budgets to decline to approve withdrawal of public funds by those County Governments. The affected county governors filed a petition seeking various reliefs against the resolution of Senate.

The High Court's finding was that Senate could issue summons for the members of the County Executive Committee and the chief officers responsible for finance in counties to answer queries on county government finance. Additionally, the High Court found that the Senate did not have the constitutional powers to direct the National Treasury and the Controller of Budget not to release funds to the counties without first complying with the provisions of article 225 of the Constitution, and issued an order of *certiorari* to quash the resolution of the Senate issued on August 7, 2014. An appeal was lodged at the Court of Appeal against the High Court decision.

In an appeal filed at the Court of Appeal, the appellants contended that provisions of the Constitution had been misinterpreted and that there had been a failure to appreciate devolution and the distinction between the two levels of government which would have led to the finding that Senate had no mandate to summon county governors or accounting officers of a county. The appellants also stated that the Constitution, with respect to the oversight role of the County Assemblies over national revenue allocated to counties had been misinterpreted. They explained that county assemblies had an oversight role in relation to revenue allocated to counties and that it was incorrect to find that the National Assembly and the Senate had exclusive oversight functions over revenue allocation.

The respondent filed a cross-appeal against the decision of the High Court to issue a *certiorari* to quash the Senate's resolution that the Cabinet Secretary for the Treasury should stop the transfer of funds to certain counties. They also questioned the finding that Senate had no mandate to direct the Controller of Budgets not to allow certain counties to withdraw public funds.

Issues

i. Whether the High Court lacked jurisdiction over a suit involving the Government as a party where there was failure to comply with section 12 of the Government Proceedings Act, which required that civil proceedings by or against the Government had to be instituted by or against the Attorney General.

ii. Whether the High Court's jurisdiction was ousted by a failure to comply with section 13A of the Government Proceedings Act which required the issuance of 30 days' notice of intention to institute proceedings against the Government.

iii. Whether parliamentary privileges and immunities could prevent the High Court from entertaining a suit in which the legal validity of a resolution of the Senate was in question.

iv. Whether the Senate had the constitutional mandate to summon governors and county accounting officers to account for resource management by the County Government.

v. Whether the Senate had power to stop the transfer of public funds, which were part of the national revenue allocated to counties, by the Treasury and the Controller of Budgets to county governments.

vi. Whether the National Assembly and the Senate had an exclusive oversight role, to the exclusion of County Assemblies, as concerned the management of county resources.

Held

1. Without jurisdiction, a court had no mandate to hear and determine a suit. The jurisdictional issues raised by the respondents related to the effect of failure to comply with the requirements of sections 12 (1) and 13 A of the Government Proceedings Act and whether parliamentary privileges and immunities should have prevented the Court from entertaining the suit.

2. Section 12 (1) of the Government Proceedings Act specified that civil proceedings by or against the Government had to be instituted by or against the Attorney General. Article 156 (4) of the Constitution and section 5 (1) (i) of the Office of the Attorney General Act were to the effect that the Attorney General had the duty of representing the National Government in all civil and constitutional matters. There was a distinction between the National Government and the County Governments. However, section 12 of the Government Proceedings Act envisioned a situation where the Attorney General would represent both levels of Government.

3. In situations where different levels of governments were disputing parties, it was unclear which party the Attorney General would institute the suit for and whether after instituting suit a suit, the Attorney General could also defend the suit. A strict application of section 12 of the Government Proceedings Act in the circumstances of the case could give rise to an absurdity that was not intended by the Constitution. Therefore, for purposes of the appeal, it was not mandatory for the Attorney General to be the plaintiff or the defendant and failure by the Attorney General to represent the parties to the suit would not render the suit incompetent.
4. Failure to issue the 30 days' notice required under section 13A of the Government Proceedings Act would not render a suit incompetent. The decision of the High Court that section 13A of the Government Proceedings was unconstitutional had not been overturned on appeal and another court of concurrent jurisdiction, *Joseph Nyamamba v ILR* [2015] eKLR, endorsed the decision.
5. Notwithstanding the doctrine of separation of powers, where parliamentary proceedings and decisions violated the Constitution or the statutes, the courts would lift the veil of parliamentary privilege to stop unconstitutional excesses.
6. Whether the Senate resolution on stoppage of transfer of funds to counties where governors failed to honour Senate's summons, was lawful depended on a consideration of the relevant legal provisions. Under article 225 of the Constitution, it was the Cabinet Secretary responsible for finance that could stop the transfer of funds to a state organ or public entity. However, not more than 50% of the funds could be affected, and transfer of funds could be stopped only for sixty days and with parliamentary approval being granted within 30 days of the making of the decision. Section 96 (1) of the Public Finance Management Act stipulated that the Cabinet Secretary could stop the transfer of funds, in accordance with article 225 of the Constitution, where a county government was in serious or persistent breach of its obligations or financial commitments.
7. The power to stop the transfer of funds was held by the Cabinet Secretary for Finance. In passing a resolution for the stoppage of transfer of funds, the Senate had overstepped its mandate. Similarly, in making that resolution, Senate usurped the powers of the Controller of Budgets as stipulated under article 228 (4) of the Constitution.
8. It did not matter that what was quashed was a resolution, opinion or proposal and not a decision. What mattered was that the resolution had no basis in law as it did not conform to the requirements of the Constitution and sections 93 and 94 of the Public Finance Management Act. It was therefore unlawful and unenforceable. Therefore, the High Court rightfully issued orders of *certiorari* to quash the resolution in question.
9. Article 259 (1) of the Constitution stipulated that the Constitution should be interpreted in a manner that promoted its purposes, values and principles, advanced the rule of law, and human rights and fundamental freedoms in the Bill of Rights, permitted the development of the law and contributed to good governance. Therefore, in construing the Constitution, its provisions had to be given a holistic and contextual interpretation.
10. The entire Constitution had to be read as an integrated whole and no one particular provision could destroy the other, all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument. The Constitution should be given a generous and purposive interpretation. The Constitution should be read as a whole in light of its history, the issues in dispute and the prevailing circumstances.
11. To determine the nature, scope and extent of the oversight function of the Senate over the county governments, an appreciation of their relationship within the context of devolution was essential. Devolution under the Constitution was anchored on the transfer of various functions and resources from the National Government to the counties and their governments. Articles 10, 174, 175 and chapter 6 of the Constitution specified the values, objects and principles of devolution. Under article 174 of the Constitution, the objectives of devolution were *inter alia*, to promote national unity, to cede

self-governance to the people and enhance their participation in the exercise of power, to recognize the rights of communities to manage their own affairs, to promote social and economic development and to ensure equitable sharing of national and local resources.

12. Article 96 of the Constitution provided for the responsibilities of Senate. The distinct role of the Senate was to protect and oversee devolution.
13. Article 176 (1) of the Constitution provided for the establishment of the county governments and a county executive for each county. Article 185 established the County assemblies and set out their responsibilities. The responsibilities of county assemblies included law making, exercising oversight over the county executive committee and any other county executive organs and also receiving and approving plans and policies on management and exploitation of the county's resources and the development and management of infrastructure and institutions.
14. County executive committees were established under article 183 of the Constitution. Their functions, in summary entailed providing the County Assembly with full and regular reports on matters relating to the County.
15. The relationship between Senate at the national level and the county governments, at the county level, was intended to ensure that counties were protected and represented by the Senate at the national level. The Senate had a role in the division and sharing of national revenue between the national and county governments, as prescribed by articles 202 and 203 of the Constitution. Senate also had the role of supervising the usage and management of the resources in question to ascertain compliance with relevant laws. Senate served as a link between county governments and the National Government. The link ensured that counties were not isolated, ignored or starved of national revenue, while, at the same time, allowing for enquiry by the Senate into the use and management of such resources by the counties.
16. The Oxford English Dictionary defined “oversight” as “the action of overseeing or supervising”. The same dictionary defined “accountable” as “required or expected to justify actions or decisions; responsible, able to be explained or understood”. Of more relevance to the public sector was the fact that the concept of “accountability” primarily involved entrusting public resources to government officials, who then had a responsibility to render accounts.
17. The Senate’s role was to oversee or supervise the management and expenditure of national revenue allocated to the County, and it included a duty to seek justification for expenditure incurred. While the accounting officer’s role under article 229 of the Constitution, was the rendering of county revenue accounts, monitoring, evaluating and overseeing the management of their public finances, promoting transparency, effective management and accountability with regard to the use of their finances amongst other duties. The roles were dissimilar-one involved overseeing of accounts and the other involved undertaking the process of accounting. The Senate's role could not be equated to the accounting role of an accounting officer.
18. Article 96 (3) of the Constitution provided that one of Senate's responsibilities was oversight over national revenue allocated to the counties. Further, in accordance with article 217 of the Constitution, Senate had the responsibility of ensuring that county governments received revenue from the National Government and also the duty of supervising the usage and management of the funds. That supervision would entail an interrogation of accounts and audit reports, including the Auditor General’s report to satisfy itself that expenditure was both authorised and justified.
19. Article 96 (3) of the Constitution restricted the Senate’s oversight role to the supervision of national revenue allocated to counties, and it was clear that the provision did not authorize the Senate to oversee county resources other than revenue from the National Government. That was noteworthy as the County Government Act and the Public Finance Management Act allowed county governments to raise revenue from grants, donations and other sources. The County Assembly had an oversight role in relation to the management and expenditure of locally generated revenues.

20. There were two levels of oversight in relation to county resources. At the national level, the Senate had oversight over national revenue and at the county level, the county assemblies retained oversight over revenues generated within the county. Those oversight roles were intended to be separate and distinct. Under article 6 (2) of the Constitution, the two distinct levels of government were to complement each other.
21. Article 229 (2) of the Constitution provided that the accounting officer of a national public entity was accountable to the National Assembly for its financial management, and the accounting officer of a county public entity was accountable to the County Assembly for its financial management. The duties of an accounting officer were provided for in section 147 of the Public Finance Management Act. It was clear that a county accounting officer was accountable for the management of finances at the county level and it was not provided that he was accountable to the Senate. However, such an accounting officer could appear before the Senate with the Governor and the Member of the County Executive Committee responsible for matters of finance. Appearing before Senate was not the same thing as being accountable to the Senate. The High Court correctly made the finding that it was proper, legal and constitutional for members of the executive committees and the Chief Officers responsible for finance to appear before the Senate or any of its committees.
22. The Constitution made provision for oversight of county revenue at two levels; by the county assemblies in respect of revenue generated at the county level, and by the Senate over national revenue allocated from the National Government to the county governments as stipulated by article 96 (3). County Assemblies had no oversight in relation to national revenue allocation and if the Constitution intended for such oversight to exist, it would have said so.
23. Under section 30 (3) (f) of the County Governments Act, the Governor had to be accountable for the management and use of county resources. Additionally, under article 96 (3) of the Constitution the Senate was charged with oversight over national revenue. Therefore, the inescapable conclusion was that the Governor as the chief executive of the County Government was accountable to the Senate for the management of the portion of county resources that comprised of national revenue horizontally allocated by the Senate to the County. It was the Governor who would have to answer queries in connection with that revenue.
24. Article 125 of the Constitution, set out in clear and unqualified terms that either House of Parliament could summon any person to appear before either House to give evidence, or provide information on matters in which they were constitutionally mandated to inquire into. Such a person would include a governor. Therefore, the High Court was right in finding that Senate was within its constitutional mandate when it summoned the recalcitrant governors to address the audit queries, and matters related to utilization of national revenue allocated to their counties.
25. There could be instances where the Governor would be unable to provide sufficient information concerning the management and usage of national revenue. The solution under article 179(6) of the Constitution, which stipulated that members of an executive committee were accountable to the Governor, was that a technocrat such as an officer in charge of finance could appear before Senate with the Governor and assist in providing information required by Senate.
26. Article 229 (7) and (8) of the Constitution, required the Auditor General to submit audit reports to Parliament or the relevant county assembly, and within three months after receipt of the report, Parliament or the County Assembly was required to debate and consider the report and to take appropriate action. In fulfilment of that requirement, Senate would table and debate its own accounts and also discharge its oversight mandate by debating 47 audited county reports, if need be. Additionally, county assemblies, in exercise of their oversight mandate were required to debate their respective reports within the stipulated period. The requirement that the process would have to be undertaken within three months placed enormous pressure on Parliament and the county assemblies

to comply with the stringent constitutional timeline. That was so particularly because the Senate could call upon a governor to answer queries with respect to audited reports.

27. Article 189 (1) (a) and (2) of the Constitution required both levels of government to respect the constitutional status and institutions of government at either level and to co-operate in the performance of functions and exercise of power. For purposes of co-operation, they could set up joint committees and joint authorities. Effectively, Parliament and county assemblies could overcome the operational quagmire of considering the audited accounts by working together to develop frameworks and guidelines to assist them carry out their respective responsibilities.

28. The issue concerning the taking over of the assets and liabilities of the defunct local governments by the county governments and whether the High Court erred when it declined to order the governors to respond to queries on the financial affairs of defunct local authorities during the financial year 2012/2013, were not in the pleadings and neither did the parties canvass them during submissions. As such the issues were not competently before the Court for determination. The High Court misdirected itself when it deliberated upon issues that were not before it.

Appeal and cross-appeal dismissed.

Citations

East Africa

1. *County Assembly of Kisumu & 2 others v Kisumu CountyAssembly Service Board & 6 others,* Civil Appeal No 17 and 18 of 2015(Consolidated) ;[2015] eKLR-(Followed)

2.*In re Kenya National Human Rights Commission* & 2 others [2014] 2 KLR 356 –(Followed)

3.*International Legal Consultancy Group v Senate & another Petition* No 8 of 2014; [2014] eKLR-(Explained)

4.*Judicial Service Commission v Speaker of the National Assembly & another* Petition No 518 of 2013; [2013] eKLR –(Explained)

5.*Judicial Service Commission v Speaker of theNational Assembly & 8 others* Petition No 518 of 2013;[2014] eKLR –(Followed)

6.*Kenya Bus Service Ltd & another v Minister for Transport and 2 others* Civil Suit 504 of 2008;[2012] –(Explained)

7.*Kenya NationalExamination Counsel v Republic of Kenya Exparte Geoffrey Gathenji Njoroge & 9 others* [1997] KLR- 480 (Explained)

8.*Kigula & others v AttorneyGeneral* [2005] 1 EA 132 at page 133-(Followed)

9.*Matemu v TrustedSociety of Human Rights Alliance & 5 others* [2014] 2 KLR 368 -(Explained)

10.*Murang'a County PublicService Board v Grace Makori & 178 others* Civil Appeal No 37 of 2015;[2015] eKLR-(Explained)

11.*Nyamamba, Joseph & 4 others v Kenya Railway Corporation* Civil Appeal No 235 of 2009; [2015] eKLR –(Explained)

12.*Oparanya, Wycliffe v Director of Public Prosecution & another* Consitutional Petition 561 of 2015,Judicial Review 335 & 418 of 2016(Consolidated) ;[2017] eKLR –(Explained)

13.*Owners of the Motor Vessel Lillian*'S' v *Caltex Oil Kenya Limited* [1989] eKLR) –(Mentioned)

14.*Re the Matter of the Interim Electoral and Boundaries Commission* Consitutional Application No 2 of 2011; [2011] eKLR-(Explained)

15.*Republic v Cabinet Secretary for Internal Security ex parte Gregory Oriaro Nyauchi & 4 others* Judicial Review No 292 of 2017; [2017] eKLR –(Explained)

16.*Selle v Associated Motor Boat Co* [1968] EA 123 –(Mentioned)

17.*Speaker of the Senate & another v Attorney General & 4 other*s Advisory Opinion, Reference No 2 of 2013; [2013] eKLR-(Followed)

South Africa

1. *Doctors for Life International v Speaker of the National Assembly & others* (CCT12/05) [2006] ZACC 11; 2006 (912) BCLR 1399(CC); 2006(6) SA 416 (CC)-(Explained)

Statutes

East Africa

1.Constitution of Kenya, 2010 articles 6(6); 10(2)(c); 95(4)(c); 96(3)(4); 117(2); 125; 156(4)(a)(b); 159(2)(d); 174(1)(4)(6); 175; 176(1); 179(2); 183; 185(3); 189(1)(a)(2); 202; 203; 217; 225; 226(2); 228(4); 229(1) (7)(8); 259(3); Chapter 6 –(Interpreted)

2.Attorney General Act, 2012 (Act No 49 of 2012) section 5 (1) (i) –(Interpreted)

3.County Governments Act, 2012 (Act No 17 of 2012) section 30(3) (f) –(Interpreted)

4.Government Proceedings Act (cap 40) section 12 (1); 13A (1) –(Interpreted)

5.National Assembly (Powers and Privileges) Act sections 12,14,15,23(a); 29 –(Interpreted)

6.Public Finance Management Act, 2012 (Act 18 of 2012) sections 7,93,94, 96,102,124,147,148,149 –(Interpreted)

Texts & Journals

1. Flower, HW., (Ed) (2011) *Concise Oxford English Dictionary* London:Oxford University Press 12th edn

JUDGMENT

1. At the core of this appeal is the constitutional question of whether the National Assembly and the Senate have oversight functions over the national revenue allocated to counties, and in conjunction with this, is the issue of whether the Senate can summon governors to answer questions on County public finance management.

2. By a summons dated February 8, 2014, 15 County Governors were summoned by the Senate Committee on Finance, Commerce and Economic Affairs to respond to queries regarding a Report of the Controller and Auditor General for the financial year ended 2012/2013. Following the summons a number of County Governors appeared before the committee to respond to various queries raised in the report regarding the Financial Operations of the County Governments and their defunct Local Authorities for the year under review. But four County Governors expressly declined to honour the summons to attend before the Committee. Being aggrieved by the summons, they filed High Court Petition No. 8 of 2014, International Legal Consultancy Group vs The Senate and the Clerk of the Senate which was determined by a three- judge bench on April 16, 2014, where the court held that the Senate was well within its constitutional mandate to summon the County Governors and the County Executive members of finance. Following that determination fresh summonses were issued to the County Governors, out of which four flatly refused to attend. These County Governors included; Isaac Ruto of Bomet County, William Kabogo of Kiambu County, Mwangi wa Iria of Murang'a County and Jack Ranguma of Kisumu County, who were to appear before the Committee on 26th August 2014.

3. Their refusal prompted the Senate to pass a resolution recommending that, in accordance with section 96 of the Public Finance Management Act, the Cabinet Secretary for the Treasury stop the transfer of funds to the concerned County Governments. The Controller of Budgets was also urged to decline to approve the withdrawal of public funds by the County Governments.

4. The County Governors were aggrieved by the Senate's resolutions and filed petition dated 14th August 2014 which was supported by an affidavit of even date sworn by Isaac Ruto, the then Governor for

Bomet County and a further affidavit sworn by William Kabogo, the then Governor for Kiambu County, on August 22, 2014, seeking the following orders;

A. A declaration that in view of the provisions of Article 6(2) of the *Constitution* which provides that the governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation, the Senate cannot exercise powers under Article 125 of the Constitution in a manner that cripples county governments.

B. A declaration that the Senate is bound by the provisions of Article 189(1) of the Constitution to perform its functions and exercise its powers, in a manner that respects the functional and institutional integrity, as well as the constitutional status and institutions at the County level.

C. A declaration that resonating the intention of Article 96 of the Constitution and 226(2) of the Constitution of Kenya and section 148 of the *Public Financial Management Act* 2012, the Senate cannot summon Governors to personally appear before it to answer questions on county government finances in total disregard of the procedures and requirements of public finance management that is stipulated by the Public Finance Management Act 2012.

D. A declaration that the Senate is bound by the methods, procedures and requirements of the Public Finance Management Act 2012 when undertaking its oversight and summoning powers.

E. A declaration that resonating the intention of Article 96 of the Constitution and 226(2) of the Constitution of Kenya and section 148 of the Public Financial Management Act 2012 it is proper, legal, and Constitutional for Members of the Executive Committee responsible for finance and the Chief Officer responsible for finance to appear before the Senate or any of its Committee to answer on county government finances and to generally provide information that helps the Senate to undertake its oversight functions as stipulated in Article 96 of the Constitution.

F. A declaration that resonating the intention of Articles 6(2), 96,174,185 (3) and 226 (2) of the Constitution of Kenya, the Senate cannot summon an accounting officer of the County Government to answer questions on county financial management, at the first instance. It must first allow the oversight and legislative mechanisms at the County level to be concluded given that these governments are functional (sic) distinct and are based on the principles of Separation of Powers.

G. A declaration that resonating the intention of Article 6(2), 96, 174,185(3), and 189 of the Constitution and within the meaning of Article 226 (2) and Article 96 (4) of the Constitution of Kenya, the Senate's oversight role over nationally collected revenue to counties is not identical to the county Assembly's oversight over the executive.

H. A declaration that resonating the intention of Article 96(4) of the Constitution and in view of the provisions of Article 185 (3) and Article 226 (2) of the Constitution of Kenya the Senate's power is limited to oversight over national agencies which manage national revenue allocated to counties such as the National Treasury.

I. A declaration that resonating the intention of Article 6(2), 189(I), 174 and 96 (4) of the Constitution and in view of the provisions of Article 185 (3) of the Constitution of Kenya the County Assembly is the sole organ that can undertake oversight over the County Executive.

J. A declaration that the Senate can only exercise its powers under Article 125 of the Constitution to scrutinize county financial and other records for purposes of making a determination with regard to an impeachment, intervention in a county, suspension of a county, or for purposes of developing national legislation necessary for more prudent management of finances at the county level.

K. A declaration that the Senate does not have sole constitutional powers to direct National Treasury and Controller of Budget not to release funds to Counties without following the provisions of Article 225 of the Constitution.

L. A declaration that stoppage of funds to a county public entity can only be done by following the provisions of Article 225 of the Constitution.

M. A permanent injunction be issued to restrain the Senate from summoning County Governors to appear before it to answer questions on county public financial management.

N. A permanent injunction be issued to restrain the Senate from summoning accounting officers at the County level to appear before it to answer questions on county public finance management.

O. An order of certiorari to quash the Resolution of the Senate issued on 7th August, 2014 that purports to direct the National Treasury and the Controller of budget not to release funds to Kiambu, Bomet, Kisumu and Murang'a counties."

5. Consolata Waithera Munga, the Senior Deputy Clerk of the Senate swore a replying affidavit on 22nd August 2014 opposing the application on behalf of the respondent.

6. After considering the pleadings and the submissions of counsel, the High Court determined that the Senate in the exercise of its oversight role can summon the governors as well as the accounting officers to personally appear before it to answer to questions on County Government finances. The court declined to issue a permanent injunction to restrain the Senate from summoning the governors and the accounting officers to appear before it to answer questions on County public finance management.

7. The trial court nevertheless ordered that it was proper, legal and constitutional for the members of the Executive Committee and the Chief officers responsible for finance to appear before the Senate or any of its Committees to answer to queries on County Government finances, the court further found that the Senate did not have the constitutional powers to direct the National Treasury and the Controller of Budget not to release funds to the Counties without first complying with the provisions of Article 225 of the Constitution, and issued an order of certiorari to quash the resolution of the Senate issued on 7th August 2014 that purported to direct the National Treasury and the Controller of Budget not to release funds to the Counties.

8. The appellants were aggrieved by the judgment of the High Court and filed this appeal on grounds that the learned judges erred in interpreting the provisions of Article 96 of the Constitution by failing to consider or give effect to the provisions of Article 6 (2) and 189 of the Constitution that affirm that the two levels of government are distinct and therefore the Senate had no jurisdiction to summon governors; in holding that Article 185 (3) of the Constitution is limited in scope and application as regards the national revenue allocated to counties; in holding that pursuant to Articles 95 (4) (c), 96 (3) and 226 (2) of the Constitution the County Assemblies have no oversight role over national revenue allocated to Counties; in holding that pursuant to Articles 95 (4) (c), 96 (3) and 226 (2) of the Constitution the National Assembly and the Senate have exclusive oversight functions over the national revenue allocated to the counties; in holding that there is no distinction between the meaning

of 'accountable' as provided for in Article 226 (2) of the Constitution and 'oversight' as provided in Article 96 of the Constitution.

9. The learned judges were further faulted for failing to properly distinguish the oversight roles of the Senate and that of the County Assemblies over revenue allocated to counties, and for holding that an accounting officer of a county is accountable to the Senate for the management of county resources; for finding that the Senate can summon Governors to account for management of county resources without taking into account Article 174 (i) of the Constitution when interpreting the powers of the Senate over the management of county resources; that the learned judges failed to appreciate the constitutional structure and design of devolution thereby reaching the wrong conclusion on the mandate and jurisdiction of the Senate; and for failing to apply the correct principles when interpreting the Constitution.

10. The respondent also filed a cross appeal against the decision of the High Court thus;

    1) The learned judges erred in law in issuing an order of certiorari to quash a resolution of the Senate issued on 7th August 2014.

    2) The learned judges erred in law in holding that the Senate has no power to direct stoppage of funds to a county government.

    3) The learned judges erred in law in holding that governors should not be called upon by the senate to answer questions on the financial affairs of counties during the financial year 2012/2013.

    4) The learned judges erred in failing to appreciate that parliamentary privileges and immunity from legal proceedings is anchored in Article 117 of the Constitution and the Court should not have entertained the legal proceedings in the first place.

    5) The learned judges erred in law in holding that a litigant under the 2010 Constitution need not comply with the mandatory provisions of Section 12(I) of the Government proceedings Act.

    6) The learned judges erred in law in citing with approval the decision in the case of Kenya Bus Service Ltd & another vs Minister for Transport and 2 Others in holding that Section 13A (I) of the Government Proceedings Act violates Article 48 of the Constitution."

11. The appellants filed written submissions, and in highlighting them before us, learned counsel Mr. P. Wanyama begun by stating the appeal raised fundamental issues of law regarding the over sight role of the Senate in relation to the oversight powers of the County Assemblies, which the judgment of the High Court failed to properly address or provide guidance on the scope of their respective powers.

12. Counsel submitted that the pronouncement by the High Court that the oversight powers of the County Assemblies is discretionary was incorrect, as Article 229 of the Constitution specified that the Auditor General prepared the accounts and reports to relevant County Assemblies; that whereas the Senate has oversight powers, the audited accounts are submitted to the County Assembly and not to the National Assembly or the Senate, and so the latter cannot assume oversight over the county government's audited accounts. It was further submitted that in the case of *Wycliffe Oparanya vs DPP & the Senate* [2017] eKLR an active conflict in oversight had resulted, where the Senate disregarded the fact that the matter was pending in the county Assembly, and yet still went ahead to summon the Governor. It was argued that the court found that the Senate cannot act in a manner that would cripple the operations of the County Assemblies, which was good law, as County Assemblies are fully empowered to manage their affairs without being subjected to the Senate's oversight.

13. Counsel went on to submit that the High Court wrongly distinguished the meaning of the words 'accountable' and 'oversight' when in effect, there was no difference between them; since a person or an entity would normally be accountable to an oversight entity; that a plain reading of the Constitution requires that the words be read together. Counsel questioned whether the Senate's oversight powers should be exercised in a manner that threatens devolution. He argued that since both institutions have oversight powers, the Senate could not summon the governors to respond to audit queries, particularly when the same accounts are under consideration by the County Assemblies. It was however conceded that the Senate can summon the concerned county officials after the assemblies have deliberated upon and addressed the issues in question.

14. Further, counsel submitted, the powers of the Senate to compel a summoned person to give evidence or information under Article 96 of the Constitution was limited to representing and protecting the interest of the counties and their governments, considering, debating and approving Bills concerning counties, determining the allocation of national revenue among counties, as provided in Article 217 of the Constitution, exercising oversight over national revenue allocated to the county governments and participating in the oversight of State officers, so that governors should only be summoned as witnesses to give information on matters relating to the Senate's functions under Article 96 of the Constitution; that in accordance with Article 185 (3) of the Constitution, the County Assembly has oversight over the county executive committee, and by issuing summons to the governors, the Senate was usurping the powers of County Assemblies under Article 185 of the Constitution.

15. Counsel next addressed the issue of whether the National Assembly and the Senate have an exclusive oversight function over national revenue allocated to counties to the exclusion of the County Assemblies. In this regard, counsel argued, the oversight role of the National Assembly is set out in section 7 of the Public Finance Management Act, while the oversight role of the County Assembly is provided for in sections 102 to 124 of the same Act; that the Senate and National Assembly are institutions at the national level of government, and are compelled by Article 189 of the Constitution to respect the institutional integrity of organs at the county level. In support of this contention counsel cited *Murang'a County Public Service Board vs Grace Makori & 178 others* [2015] eKLR, where it was held that the Senate's oversight role was limited to the mandate set out in Article 96 (3) regarding resources disbursed to the county governments, in the equitable division and allocation of national revenue to the 47 counties, as set out in the Articles 203, 217 and 218 of the Constitution.

16. As to whether an accounting officer of a county government is accountable to the Senate for management of county resources, counsel took the view that according to Article 226 (2) of the Constitution a county accounting officer is answerable only to the county government, and therefore the exercise by the Senate and the National Assembly of powers contrary to Articles 226 (2) and 259 (3) is unconstitutional. Counsel cited the case of *Republic vs Cabinet Secretary for Internal Security ex parte Gregory Oriaro Nyauchi & 4 others* [2017] eKLR, where the court observed that, "...where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation." Counsel faulted the High Court for finding that an accounting officer of a county government is subject to the authority of the National Government.

17. In response to the cross appeal, counsel submitted that only the Cabinet Secretary of Finance with the approval of Parliament could stop the transfer of funds to counties, which procedure is set out in section 97 of the Public Finance and Management Act; that, it was not within the Senate's remit to order the Cabinet Secretary to stop or withdraw funds from the county governments, nor did the Controller of Budget have powers to stop the transfer or withdrawal, unless satisfied that it was so authorized by the law.

18. Turning to whether parliamentary privileges and immunity from legal proceedings can prevent a court from entertaining the proceedings, counsel submitted that it is trite that where the Senate or the National Assembly or any other body violates the Constitution, the courts must not hesitate to lift the veil of parliamentary privilege to stop such excesses; that sections 12 and 29 of the *National Assembly (Powers and Privileges) Act* does not oust the jurisdiction of the court to enquire into the constitutionality of proceedings and decisions of Parliament or its members. In support of this proposition counsel cited the case of *Judicial Service Commission vs Speaker of the National Assembly & 8 others* [2014] eKLR where it was stated that;

> " We acknowledge that there is Parliamentary privilege which covers debate and deliberation within the precincts of Parliament, and we believe that this Court is not being called upon to restrain Parliament debate in the course of its lawful business. That does not however limit the Court's jurisdiction to deal with matters where allegations are made regarding violation of the Constitution."

19. On the issue of whether litigants must comply with section 12 (1) and 13A of the *Government Proceedings Act*, counsel asserted that a petition challenging the constitutionality of an Act of Parliament is not a civil matter as contemplated under the Government Proceedings Act, and therefore does not fall with the ambit of section 12 of the Act.

20. The respondent also filed written submissions which were highlighted on its behalf by learned counsel Mr. Kilukumi, who submitted that the Senate's power to summon governors or any other witness flowed directly from the Constitution, and that the power to summon every person possessed of evidentiary materials was not limited, restricted or otherwise qualified by the existence of the two levels of government, the concept of devolution or the existence of county assemblies as postulated by the appellants; that furthermore section 23 (a) of the National Assembly (Privileges and Powers) Act makes it a criminal offence to disobey summons issued by any House of Parliament, and that the powers to summon witnesses, were similar to the powers of the High Court to enforce attendance, examination on oath and the production of documents.

21. It was further submitted that governors are State officers vested with public trust and a constitutional duty to promote public confidence in the integrity of the office they hold; that the defiance of witness summons was inconsistent with the constitutional principles of leadership and integrity. Furthermore, it was asserted, that the county executive committee member in charge of finance who designates the accounting officer is an appointee of the governor who is the chief executive officer of the county, and is directly answerable to him or her; that the governor is in turn answerable to the Senate for the national resources horizontally allocated to the counties and that the buck stops at the governor's office; so that, governors take personal responsibility for the reasonably foreseeable consequences of any actions or omissions, including misuse of public funds, arising from the discharge of the duties of the office of the governor.

22. It was argued that on the other hand, the Senate in the execution of its constitutional mandate under Article 96 (3) of the Constitution, which is " to protect the interest of the counties and their governments" and to exercise "oversight over national revenue allocated to the county governments" can summon county governors to answer to queries on financial prudence and probity in the usage of public funds. It was however observed that governors may not have detailed information pertaining to the financial status of the county, but, it was for that reason that the Senate had specified that, the governors be accompanied by such finance officers, including accounting officers who may assist in responding to the queries raised.

23. Mr. Kilukumi next turned to the cross appeal, and submitted, the High Court was wrong to issue an order of certiorari to quash the resolution of the Senate issued on August 7, 2014 that directed the National Treasury and the Controller of Budget not to release funds to the concerned county governments for reasons that, a resolution of Parliament is a declaration of opinion or purpose, which could not be challenged in a court of law and further that an order of certiorari under judicial review was incapable of quashing a resolution.

24. Counsel went on to assert that the Constitution created three (3) co-equal arms of government and the doctrine of separation of powers ensured that none of the three arms of government trespassed into the constitutional territory of the other; that Parliament was not subordinate or inferior to the High Court, and therefore an order of certiorari which historically was directed at subordinate courts or tribunals could not be issued against Parliament. Furthermore, counsel argued, the Senate did not act in violation of the Constitution or in excess of its jurisdiction, as the opinions or intentions encapsulated in the resolution were aimed at persuading the Cabinet Secretary and the Controller of Budget to invoke their powers to stop the transfer of funds to the concerned county governments.

25. Counsel contended that by virtue of order 50 of the Senate Standing Orders, a resolution of the House cannot be reversed in the preceding six months or in the same session without the permission of the Speaker and that a notice of a motion is required to rescind a resolution, or to expunge or alter votes, proceedings or journal entries; for reasons that, under parliamentary rules the rights of the majority should prevail.

26. It was counsel's submission that Article 117 (2) of the Constitution, that sections 12, 14, 15 and 29 of the National Assembly (Privilege and Powers Act were enacted to prohibit courts from entertaining suits that questioned proceedings or decisions of Parliament, particularly in cases where no violations of the Constitution existed.

27. Regarding the court's decision which declined to order governors to answer queries on the assets and liabilities of defunct counties, counsel asserted that the decision inferred that County Governments were not accountable for the defunct local authority assets which they had taken into their custody; yet they were accountable for the assets and liabilities that were transferred to them from 4th March, 2013 to June 30, 2013.

28. Finally, counsel submitted that the Notice of Motion dated 14th August 2013 was incompetent as sections 12 (1) and 13A (1) of the Government Proceedings Act were not complied with. Counsel stated that Article 156 (4) (a) and (b) of the Constitution, and the provisions of the *Office of the Attorney General Act*, 2012, stipulated that the proper party to be sued was the Attorney General; that the High Court ought to have declined jurisdiction in the suit since the appellants had failed to comply with this requirement.

29. On the question of the unconstitutionality of section 13A (1) of the Government Proceedings Act, counsel pointed out that Majanja, J's decision in the case of *Kenya Bus Service Ltd & Another vs Minister for Transport & 2 others* [2012] eKLR that found section 13A (1) of the Government Proceedings Act was unconstitutional as it denied access to justice was reached per incuriam, that is, without the court having heard opposing arguments from the parties. Counsel argued that procedural norms that required adherence to stipulated timeframes cannot be equated with denial of access to justice, and Article 159 (2) (d) of the Constitution should not have been invoked to excuse noncompliance with substantive provisions of the law that are anchored in the Constitution. Counsel cited *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR in support of the case that procedural timelines must be adhered to. Counsel also asserted that, other eminent judges had not found section 13A (1) to be in violation of the repealed constitution.

30. We have considered the memorandum of appeal and the cross appeal, the pleadings, the submissions of counsel and the law and are of the view that the following issues are for determination;

    i) whether the High Court's jurisdiction was ousted by the failure of the appellants to comply with sections 12 (1) and 13 A of the Government Proceedings Act;

    ii) whether Parliamentary privileges and immunity from legal proceedings should have prevented the court from entertaining the suit;

    iii) whether the Senate is constitutionally mandated to summon governors and county accounting officers to account for management by the County Government of its resources;

    iv) whether the National Assembly and the Senate have exclusive oversight functions over national revenue allocated to the counties to the exclusion of county assemblies;

    v) whether the Senate has power to stop the transfer of funds to a county government; and

    vi) whether the court was wrong in declining to order governors to answer queries on the financial affairs of the defunct counties.

31. We begin by addressing the jurisdictional and procedural issues raised by the respondent, as without jurisdiction, a court has no mandate to hear and determine the issues in contention. (See- *The Owners of the Motor Vessel Lillian 'S' vs Caltex Oil Kenya Limited* [1989] eKLR). These issues are whether the failure by the appellants to comply with the requirements of sections 12 (1) and 13 A of the Government Proceedings Act rendered the suit incompetent, and whether Parliamentary privileges and immunity from legal proceedings should have prevented the court from entertaining the suit.

32. The first of these issues is concerned with the failure by the appellants to comply with the requirements of sections 12 (1) and 13 A of the Government Proceedings Act. The appellant argue that this failure rendered the petition incompetent as a result of which, the High Court lacked jurisdiction to determine the application.

33. In addressing the issue, the learned judges observed that though the Constitution of Kenya, 2010 allows the Attorney General the right to represent the National Government in Court proceedings, suing and being sued in one's name was different from representation, so that any government organ that was minded to seek the Attorney General's representation was at liberty so to do.

34. Article 156 (4) of the Constitution provides that the Attorney General;

    (a) is the principal legal adviser to the Government;

    (b) shall represent the national government in court or in any other legal proceedings; and

    (c) perform any other functions conferred on the office by an Act of Parliament or by the President."

35. Pursuant to the Constitution, the Office of the Attorney General Act, 2012 was enacted. Section 5 (1) (i) of the Act stipulates that in addition to the functions of the Attorney-General under Article 156 of the Constitution, the Attorney-General shall be responsible for "...representing the national Government in all civil and constitutional matters in accordance with the Government Proceedings Act."

36. In contrast, the impugned provision, that is, section 12 (1) of the Government Proceedings Act specifies that civil proceedings by or against the Government shall be instituted by or against the Attorney General.

37. When section 12 (1) is considered alongside Article 156 (4) (b), and section 5 (1) (i) of the Office of the Attorney General Act 2012, it becomes apparent that an anomaly is created. While the Constitution specifies that the Attorney General's duty as one of representation of 'the national government', section 12 refers to the instituting of proceedings by the Attorney General by or against 'the government'.

38. Under the current Constitution a distinction is made between the national and county governments. Article 6 (2) of the Constitution is specific. It states that, "...the governments of the national and county level are distinct and interdependent...". No such distinction was envisioned under the repealed constitution or the Government Proceedings Act when section 12 was enacted. So that by implication section 12 would require proceedings by or against both governments to be instituted or defended by the Attorney General on their behalf.

39. In the case of Judicial Service Commission vs Speaker of the National Assembly & others (supra) it was stated thus;

> " The Constitution does not define the national government, but it is implicit in its provisions that the national government is the national Executive, the Legislature and the Judiciary as opposed to the County or devolved government."

40. We would agree and adopt this distinction, as without it, the question that begs in a case such as this is, in respect of which government would the Attorney General institute proceedings, the national or the county, given that, in a case such as this where the disputing parties are on either side, the Attorney General cannot, in the same suit, institute proceedings against one, and defend the other. The only summation would be that, a strict application of section 12 to the peculiar circumstances of this case gives rise to an absurdity not intended by the Constitution. For this reason, and for the purposes of this case, we do not consider it mandatory for the Attorney General to be the plaintiff or the defendant in all cases, and consequently, the failure by the Attorney General to represent the parties herein did not render the suit incompetent.

41. Next, we turn to whether failure to serve a 30 days notice as required by section 13A of the Government Proceedings Act rendered the suit incompetent. Our view in respect of counsel's assertion that the declaration by Majanja, J in the case of Kenya Bus Service Ltd & Another Minster for Transport & 2 others (supra), that the provision was unconstitutional is that, much as this may have been the case, the decision has not been overturned on appeal. It therefore remains a valid decision, and courts are at liberty to cite it with approval, as was in the case of *Joseph Nyamamba vs ILR* [2015] eKLR where this Court endorsed the reasoning and holding in that case. This being a decision of this Court, though differently constituted, we see no reason to depart from that decision, and therefore we find that the failure to comply with section 13 A did not render the suit incompetent.

42. Another challenge to the court's jurisdiction was that the Judicial review application was incompetent as, the order of certiorari that was to issue was incapable of quashing a resolution of the Senate. Mr. Kilukumi's submission was that a Parliamentary resolution was an opinion or proposal of the House, and not a decision liable to be quashed under judicial review proceedings; that since there was no decision, there was nothing for the order of certiorari to quash. Counsel cited the case of *Kenya National Examination Counsel vs Republic of Kenya Exparte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR where it was stated that;

> " Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reason".

43. In respect of the contention that Article 117 of the Constitution, the provisions of the National Assembly (Powers and Privileges) Act, and the doctrine of separation of powers precluded the courts from interfering with proceedings and decisions of Parliament, the courts have variously stated that, notwithstanding the doctrine of separation of powers, where parliamentary proceedings and decisions violate the Constitution or the statutes, it will lift the veil of parliamentary privilege to stop the unconstitutional excesses.

44. In the case of *Doctors for Life International vs Speaker of the National Assembly and others* (CCT12/05) [2006] ZACC 11; 2006 (912) BCLR 1399 (CC); 2006(6) SA 416 (CC) the court emphasized that;

> " What should be made clear is that when it is appropriate to do so, courts may – and if need be must – use their powers to make orders that affect the legislative process. Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of a Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty. As O'Regan J explained in a recent minority judgment, "the legitimacy of an order made by the court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution." In order for the founding values that lie at the heart of our Constitution to be made concrete, it is particularly important for this Court to afford a remedy, which is not only effective, but which should also be seen to be effective. The provision of section 172(1) (a) are clear, and they admit of no ambiguity; "[w]hen....."

45. The Supreme Court in the case of Speaker of the *National Assembly vs Attorney General and 3 others* (2013) eKLR stated thus;

> " Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering its opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act."

The court concluded;

> " Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signaled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that

the ultimate judge of "right" and "wrong" in such cases, short of a resolution in plebiscite, is only the Courts."

46. In determining the constitutionality of the process and manner of the appellant's appointment in the case of Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [2013] eKLR, this Court observed;

> " In our considered opinion, the petition before the High Court was not instituted as a removal procedure nor as a complaint against the appellant in his capacity as a State Officer. The petition was a challenge to the constitutionality of the process and manner of the appellant's appointment. This Court takes the view therefore that it is not the outcome of litigation that is determinative of its nature, but its substance at the time of seizure and proceedings. Viewed thus, an order setting aside the appointment of the appellant flows from a judicial finding of the unconstitutionality of the process and manner of appointment, not as a consequence of a removal procedure."

47. The High Court, in the instant case, found that the Senate's proceedings which culminated in a resolution that directed the Cabinet Secretary of the National Treasury and the Controller of Budget to stop the transfer to and withdrawal of funds by the concerned counties to be contrary to the strictures of section 93 and 94 of the Public Finance Management Act and therefore unlawful. The court considered the concerned provisions which clearly specified the grounds upon which funds to the counties could be stopped and found that the refusal by the governors to honour the summons was not one of them.

The resolution provided in relevant part;

> " Motion Stoppage Of Transfer Of Funds To Counties Due To Governors'failure To Honour Senate Summonses
>
> "...and Pursuant ToArticle 125 of the Constitution, the Senate Public Accounts Committee invited the following Governors, in their capacity, in accordance with Article 179(4) of the Constitution, as the chief executive officers of their respective Counties, to appear before it to respond to audit queries raised by the Auditor-General pursuant to Article 229 of the Constitution-
>
> (1) Governor Isaac Ruto of Bomet County;
>
> (2) Governor Jack Ranguma of Kisumu County;
>
> (3) Governor William Kabogo of Kiambu County; and
>
> (4) Governor Mwangi wa Iria of Murang'a County;
>
> And Whereas, despite invitation by the Committee, the said Governors, who were duly invited, have, failed and or refused to appear before the Committee to answer the audit queries raised by the Auditor-General with respect to whether or not public monies have been applied lawfully and in an effective manner by the respective County Governments;
>
> Now Therefore, the Senate resolves that pursuant to Article 228(4) and (5) of the Constitution, the Controller of Budget should not authorize any withdrawal of public funds by the following County Governments until the County Governments have responded to the audit queries to the satisfaction of the Senate-
>
> (1) The County Government of Bomet;

(2) The County Government of Kisumu;

(3) The County Government of Kiambu; and

(4) The County Government of Murang'a and the national Treasury, pursuant to Article 225 of the Constitution and section 96 of the Public Finance Management Act, 2012 shall stop forthwith the transfer of funds to the said county governments."

48. Whether the above resolution was lawful requires to be considered against the relevant legislation. Article 225 specifies;

(3) Legislation under clause (2) may authorize the Cabinet Secretary responsible for finance to stop the transfer of funds to a State Organ or any other public entity;

(a) Only for a serious material breach or persistent material breaches of the measures established under that legislation; and

(b) Subject to the requirements of Clause (4) to (7).

(4) A decision to stop the transfer of funds under Clause (3) may not stop the transfer of more than fifty percent of funds due to a county government.

(6) A decision to stop the transfer of funds as contemplated in clause (3).

(a) shall not stop the transfer of funds for more than sixty days; and

(b) may be enforced immediately, but will lapse retrospectively unless, within thirty days after the date of the decision, Parliament approves it by resolution passed by both Houses..."

Section 96 (1) of the Public Finance Management Act stipulates;

"Where the Cabinet Secretary finds a State organ which is a county government entity to be in serious or persistent breach of its obligations or financial commitments, the Cabinet Secretary shall in accordance with Article 225 of the Constitution immediately stop the transfer of funds".

49. From the above, there can be no question that the Senate overstepped its powers and ventured into the remit of the Cabinet Secretary for Finance. Any stoppage of funds to the county governments is within the powers of the Cabinet Secretary and not the other way round. Similar reasoning would be applicable to the attempt by the Senate to usurp the Controller of Budget's powers as stipulated under Article 228 (4) of the Constitution.

50. When the Senate's resolution is considered against the backdrop of whether the High Court had the jurisdiction to entertain the suit and issue an order of certiorari, it matters not that the outcome of the proceedings was a resolution, or opinion or proposal, and not a decision as suggested by counsel for the respondent, what matters is that the resolution had no basis in law since it did not conform to the requirements of the Constitution and sections 93 and 94 of the Public Finance Management Act. It was therefore unlawful and unenforceable. As such, the High Court was right to entertain the proceedings and issue the order of certiorari quashing that decision.

51. Having found as we have that the above procedural and jurisdictional challenges did not render the suit before the High Court incompetent, we are satisfied that the High Court had the requisite jurisdiction to entertain the petition, and we can now proceed to determine other issues outlined in this appeal.

52. Before we do so, we consider it necessary to bear certain principles in mind. Firstly, as this is a first appeal, it is our duty to analyze and re-evaluate the evidence on record and reach our own conclusions. We can only interfere with a finding of fact by the High Court where the finding is based on no evidence, or a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in arriving at that finding. (See *Selle vs Associated Motor Boat Co.* [1968] EA 123).

53. Secondly, as the issues herein require the interpretation of certain provisions of the Constitution, it is necessary to set out the principles of interpretation specified by the Constitution which we are enjoined to adopt.

54. Article 259 (1) of the Constitution stipulates that the Constitution should be interpreted in the manner that promotes its purposes, values and principles, advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights, permits the development of the law; and contributes to good governance. So that in construing the Constitution, its provisions must be given a holistic and contextual interpretation. As stated by the Supreme Court *In the Matter of Kenya National Human Rights Commission*, Supreme Court Advisory Opinion Ref. No.1 of 2012 that;

> "...It is a 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".

55. And as was expounded in the case of *Kigula & Others vs Attorney General* [2005] 1 E.A. 132 at page 133 in the interpretation of the Constitution, the widest construction possible should be given to the ordinary meaning of the words used, and "...the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other, all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument, the Constitution should be given a generous and purposive interpretation..."

56. Applying the above principles to the instant appeal, we begin with the question of whether the Senate exercises an oversight role over the county governments.

In this regard the High Court stated;

> "...while the Senate has an oversight role over national revenue allocated to County Governments, the issue in that regard, as we understand it, is the scope, extent and nature of the said oversight role.

(126) In answering that question, we must first explain the meaning of the word, "oversight", in its ordinary English meaning before we determine the extent of its applicability. The plain English meaning of the word "oversight" as defined in the Concise Oxford English Dictionary, 10th Edition is; "the action of overseeing". "Oversee" has then been defined by the same dictionary as, "supervise" or "look at from above".

The court observed that;

[127.] Taking the above meanings and as can be seen in the context of Article 96(3) of the Constitution, in our interpretation, oversight implies a procedural and substantive function

for the Senate. Procedural in the sense that the Senate is involved in the process leading to division and sharing of national revenue as between the National and County Governments as envisaged under Articles 202 and 203 of the Constitution. The Senate thus gets involved in the enactment of the legislation contemplated in that regard and in particular as provided for under Article 205 of the Constitution - See Speaker of the Senate & Another v Attorney General, Advisory Opinion No. 2 of 2013.

[128.] After allocation of national revenue to Counties, the Senate exercises what we would call substantive oversight by ensuring that the revenue so allocated has been disbursed to the Counties in accordance with the law and that County financial operations are going on as normally as possible. Substantive oversight would also, in our view, mean that the Senate would be mandated to get explanations on how Counties spend the National revenue allocated to them in the event audit queries are made by the Auditor General in his report made pursuant to the provisions of Article 229 of the Constitution."

57. To determine the nature, scope and extent of the oversight function of the Senate over the county governments, an appreciation of their relationship within the context of devolution is essential.

58. Devolution under the Constitution was anchored on the transfer of various functions and resources from the national government to the counties and their governments. Articles 10, 174, 175 and Chapter 6 of the Constitution specify the values, objects and principles of devolution. Under Article 174 of the Constitution, the objectives of devolution are inter alia, to promote national unity, to cede self-governance to the people and enhance their participation in the exercise of power, to recognize the right of communities to manage their own affairs, to promote social and economic development and ensuring equitable sharing of national and local resources.

59. To support the objectives of devolution, the Senate was established to represent the counties at national level, and to protect their interests and autonomy from interference by the national government. Its responsibilities are set out in Article 96 of the Constitution which stipulates that;

(1) The Senate represents the counties, and serves to protect the interests of the counties and their governments.

(2) Participating in the law-making function of Parliament by considering, debating and approving Bills concerning counties.

(3) The Senate determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments.

(4) The Senate participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article 145."

60. As was emphasized by the Supreme Court in the Advisory Opinion in the case of *Speaker of the Senate & another vs Attorney General & 4 others* [2013] eKLR that, "Article 96 of the Constitution represents the raison d'etre of the Senate as "to protect devolution".

61. In the Supreme Court's Advisory Opinion, Reference No. 2 of 2013, Speaker of the Senate & Another vs The Attorney General & Another, former Chief Justice Willy Mutunga in appreciating the distinct role assigned to the Senate in overseeing devolution in Kenya, observed thus;

> " The current devolution provisions in Chapter 11 of the new Constitution are a major shift from the fiscal and administrative decentralisation initiatives that preceded it. It

encompasses elements of political, administrative and fiscal devolution. There is a vertical and horizontal dispersal of power that puts the exercise of State power in check. Importantly, the Constitution has created a Senate, an institution that enjoys direct legitimacy and a popular mandate, commanding it to be the protector of devolution."(Emphasis ours)

62. To pursue the objectives of devolution, the Constitution created the county governments which were provided with immense powers and a sufficient mandate to carry out their duties and responsibilities. Article 176 (1) of the Constitution provides for the establishment of the County Governments and a county executive for each county. Article 185 established the County assemblies and set out their responsibilities as follows;

(1) ....

(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.

(3) A county assembly, while respecting the principle of the separation of powers, may exercise oversight over the county executive committee and any other county executive organs.

(4) A county assembly may receive and approve plans and policies for—

(a) the management and exploitation of the county's resources; and

(b) the development and management of its infrastructure and institutions."

63. To complete the organizational hierarchy of the County government, the county executive committees were established under Article 183 of the Constitution. Their functions are in summary to, "...provide the county assembly with full and regular reports on matters relating to the county."

64. The onerous powers of the county assemblies was appreciated by this Court in the case of *County Assembly of Kisumu & 2 others vs Kisumu County Assembly Service Board & 6 others*, Civil Appeal No 17 and 18 of 2015 (Consolidated) when it stated thus;

> " By the Constitution they gave themselves on 27th August 2010, the Kenyans prescribed the rules by which they should be governed. The County Assemblies, of which the 1st Appellant is one, came into existence courtesy of that Constitution. The self same Constitution admittedly confers enormous powers upon them. But they should understand that they are required to exercise those powers within the confines of the provisions of that same Constitution or the statutes made pursuant to it."

65. From the above, it cannot be gainsaid that the architecture of the Constitution established a clear nexus between the Senate at the national level and the county governments at the county level, which relationship is aimed at ensuring that there was an organ at the national level that would be responsible for protecting and representing the counties interests. This includes the division and sharing of national revenue between the national and county governments, as prescribed by Articles 202 and 203 of the Constitution. And following disbursement of national revenue to counties, the Senate supervises the usage and management of such resources to ascertain compliance with relevant laws.

66. The Constitution deliberately created a relationship of expediency between the Senate and the counties; a clear manifestation that though they were to be independent from interference of the national government, it was always intended that the Senate would remain the link between them and the national government. The link was purposed to ensure that the counties would never be isolated,

ignored or starved of national revenues, while at the same time allowing for enquiry by the Senate into the use and management of such resources by the counties. This essential check that was built into the architecture of Constitution was specifically aimed at safeguarding and protecting devolution.

67. Bearing the above in mind, we now return to the Senate's oversight role over the counties. The appellant's grievances with the High Court's judgment is that, i) the learned judges failed to appreciate that there was a distinction between 'accountable' as provided for in Article 226 (2) of the Constitution and 'oversight' as provided in Article 96 of the Constitution, and also that it failed to distinguish between the oversight role of the Senate and that of the County Assembly; ii) that the learned judges wrongly concluded that the National Assembly and the Senate have exclusive oversight functions over national revenue allocated to county assemblies; and iii) that they wrongly found that a county accounting officer is accountable to the Senate for management of county resources.

68. Beginning with whether there is a distinction between 'accountable' and 'oversight', the appellant's submission is that though the High Court found that the terminologies were different, in effect, there was no apparent distinction between the oversight role of the Senate and the accounting officer.

69. It is worthy of note that within the context of the oversight roles of the Senate and the County Assemblies, courts have since the promulgation of the Constitution of Kenya 2010, grappled with defining the nature of these terms. For instance, in the case of Judicial Service Commission vs Speaker of the National Assembly & others, [2013] eKLR in seeking to construe the meaning of oversight, the court relied on a report commissioned by the South African Legislatures' Secretaries" Association (SALSA) and entitled "Oversight Model of the South African Legislative Sector" which interpreted the term "oversight" as follows;

> " In the South African context, oversight and accountability are constitutionally mandated functions of legislatures to scrutinize and oversee executive action and any organ of State. Oversight entails the informal and formal, watchful, strategic and structured scrutiny exercised by legislatures, including Parliament, in respect of the implementation of laws, the application of the budget, and the strict observance of statutes and the Constitution. In addition, and most importantly, it entails overseeing the effective management of government departments by individual members of relevant executive authority in pursuit of improved service delivery for the achievement of a better quality of life for all people." (available online at sals.gov.za)

70. And in the case of International Legal Consultancy Group vs The Senate, Kerugoya High Court Petition No. 8 of 2014, the court interpreted the oversight role of the Senate in this way;

> " ...in our interpretation, oversight implies a procedural and substantive function for the Senate. Procedural in the sense that the Senate is involved in the process leading to division and sharing of national revenue as between the National and County Governments as envisaged under Article 202 and 203 of the Constitution. The Senate thus gets involved in the enactment of the legislation contemplated in that regard and in particular as provided for under Article 205 of the Constitution...substantive oversight would also, in our view, mean that the Senate would be mandated to get explanations on how Counties spend the National revenue allocated to them in the event audit queries are made by the Auditor General in his report made pursuant to the provisions of Article 229 of the Constitution".

71. The *Oxford English Dictionary* defines "oversight" as "the action of overseeing or supervising". While the words 'accountable" and accountability" have been variously defined, the same dictionary defines "accountable" as "required or expected to justify actions or decisions; responsible, able to be

explained or understood". Of more relevance to the public sector, as is the case here, the concept of "accountability" primarily involves the entrusting of public resources to government officials, who then have a responsibility to render accounts.

72. When the plain and ordinary meaning of "oversight" under Article 96 of the Constitution is construed within the context of the Senate's role, it is to oversee or supervise the management and expenditure of national revenue allocated to the county, and includes a duty to seek justification for expenditure incurred. While the accounting officer's role under Article 229 of the Constitution, refers to the rendering of county revenue accounts monitoring, evaluating and overseeing the management of their public finances, promoting transparency, effective management and accountability with regard to the use of their finances amongst other duties, as we shall see later. So that, when the two roles are compared, it is evident that they are dissimilar in nature. One involves overseeing of accounts, and the other undertaking the process of accounting, so that, in no way can the Senate's oversight role be equated to the accounting role of the accounting officer, and we so find.

73. The appellant also submitted that the Senate's oversight role was limited to ensuring that the disbursement of funds to county governments is in accordance with the criteria set out in Article 203 of the Constitution, and the revenue division between the national and county governments and the equitably sharing of national revenue to all 47 counties under Articles 202 and 203 of the Constitution, and that its oversight was limited to national agencies, such as the National Treasury which manage national revenue allocated to counties.

74. But from a plain reading of Article 96 (3) of the Constitution, nothing could be further from the truth. This is because the provision specifically identifies one of the Senate's responsibilities as oversight over national revenue allocated to the counties. And since protection of devolution is one of the Senate's core oversight functions, it is no wonder that following the apportionment or division of national revenue between the national government and the counties in accordance with Article 217 of the Constitution, the Senate was charged with the responsibility of ensuring that county governments received revenues from the national government, and thereafter, supervising the usage and management of such funds. We venture to suggest that the latter would entail an interrogation of accounts and audit reports, including the Auditor General's report to satisfy itself that expenditure was both authorised and justified. In effect, what is clear is that the Constitution intended that the Senate be endowed with powers that enabled it to holistically participate in ensuring that county governments received and accounted for the resources from the national government.

75. But having said that, it is incontrovertible that Article 96 (3) restricts the Senate's oversight role to the supervision of national resources allocated to counties, and it is clear that the provision does not authorize the Senate to oversee county resources other than revenues from the national government. We say this because with regard to other resources, the County Government Act and the Public Finance Management Act enables county governments to raise revenues and resources, including grants and donations from other sources, and since Article 185 (3) vests the county assemblies with an oversight role over the county executive committee and any other county executive organs, it means that county assemblies are mandated to oversee the management and expenditure of locally generated revenues through county executive organs within the county.

76. The inference here would be that there are two levels of oversight, that is— at the national level with the Senate commanding oversight over national revenues, and at the county level where the county assemblies retains oversight over revenues generated within the county. Hence the observation of the court in International Legal Consultancy Group vs The Senate, (supra) that, "... the Constitution provides for oversight of county public finances at two levels; by the County Assemblies at the county level, and the Senate at the National level."

77. We see nothing complicated or untoward about this arrangement. As observed by the Supreme Court in the case of *Re the Matter of the Interim Electoral and Boundaries Commission* [2011] eKLR;

> " Many offices established by the Constitution are shared by the two levels of government, as is clear from the Fourth Schedule...We have taken note that the Senate which brings together the county interests at the national level) and the National Assembly (a typical organ of national government) deal expressly with matters affecting county government; and that certain crucial governance functions at both the national and county level— such as finance, budget and planning, public service and land ownership and management, elections administration of justice— dovetail into each other and operate in unity."

78. No doubt, the drafters of the Constitution intended that there would be two levels of oversight of county resources, where revenue from the national government would be supervised by the Senate at the national level, and revenues collected from within the county would be supervised by the county assemblies at the county level. Both roles were intended to be separate and distinct, and as prescribed by Article 6 (2) of the Constitution, devised in a manner as to be complementary to each other.

79. Concerning the next contestation that the accounting officer is not accountable to the Senate, the appellants submitted, that under Article 229 (2) of the Constitution a county accounting officer is only answerable to the county government, and not to the Senate, and that any exercise of power by the National Assembly or the Senate to hold a county accounting officer accountable at the national level was contrary to the provisions of Articles 229 (2) and 259 (3) of the Constitution and therefore unconstitutional; that the trial court was wrong in concluding that the accounting officer at county level is accountable to the National government.

80. We have considered Mr. Wanyama's submissions on this point, and it would seem that counsel may have misunderstood the trial court's conclusions on the issue. This is because in determining the question whether the accounting officer is accountable to the Senate, the High Court adopted and upheld the position taken by the court in the case of International Legal Consultancy Group vs The Senate & Clerk of the Senate (supra) which case concerned similar circumstances, and went on to state that;

> "... In so appearing before the Senate's Committee, a governor may appear with such officers as he deems necessary to answer the relevant questions under considerations (sic) In our view, such officers include the Executive Committee Member responsible for matters of finance and the designated accounting officers as they are the persons whom the Constitution has mandated to deal with financial matters."

81. Essentially, Article 229 (2) of the Constitution provides that, the "...accounting officer of a national public entity is accountable to the National Assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management."

82. Additionally, section 147 of the Public Finance Management Act, which further defines the accounting officer's duties, specifies that;

(1) Subject to the Constitution, the accounting officer of a county assembly shall monitor, evaluate and oversee the management of their public finances, including –

(a) promoting and enforcing transparency, effective management and accountability with regard to the use of their finances;

(b) ensuring that accounting standards are applied;

(c) implementing financial policies in relation to their finances;

(d) ensuring proper management and control of, and accounting for, their finances in order to promote the efficient and effective use of budgetary resources;

(e) preparing annual estimates of expenditures;

(f) acting as custodian of the entity's assets except as may be provided by other legislation or the Constitution;

(g) monitoring the management of their finances and their financial performance;

(h) reporting regularly to the county assembly on the implementation of their budget; and

(i) take such other action, not inconsistent with the Constitution, as will further the implementation of this Act".

And section 148 of the Public Finance Management Act provides that;

(1) A County Executive Committee member for finance shall, except as otherwise provided by law, in writing designate accounting officers to be responsible for managing the finance of the county government entities as is specified in the designation.

(2) Except as otherwise stated in other legislation, the person responsible for the administration of a county government entity, shall be the accounting officer responsible for managing the finances of that entity."

83. From the above role description, it cannot be denied that the county accounting officer is accountable for the management of finances at the county level, and there is nowhere that it has been provided that the officer is accountable to the Senate. But this notwithstanding, there is nothing that stops the accounting officer from appearing before the Senate with the governor and the Member of the County Executive committee responsible for matters of finance. Appearing before the Senate cannot be construed to mean that the accounting officer is accountable to the Senate. In any event, in its final orders, the court did not find that the accounting officer was accountable to the Senate, but found it proper, legal and constitutional for members of the executive committee and the Chief Officers responsible for finance to appear before the Senate or any of its Committees, which is contrary to the appellant's assertions. Accordingly we find that the trial court did not in any way misconstrue the mandate of the accounting officer, and this contestation therefore fails.

84. This leads us into the next issue of whether the National Assembly and the Senate have exclusive oversight functions over national revenue allocated to the counties, to the exclusion of county assemblies. The appellants' complaint stems from the trial court's judgment where the learned judges observed as follows;

> " In our view, a Constitution does not subvert itself and we therefore find that it would be completely out of order given the clear provisions of Article 95(4) (c), 96(3) and 226 (2) of the Constitution to allude that County Assemblies exercise an oversight role over national revenue allocated to the Counties to the exclusivity of the Senate. This therefore in our view means that a County Assembly does not have the mandate to exercise oversight over the national revenue allocated to the counties because that is the exclusive mandate of the National Assembly and the Senate..."

85. As shown above, the Constitution makes provision for oversight of county revenue at two levels, by the County Assemblies in respect of revenue generated at the county level, and by the Senate over national revenue allocated from the National government to the county governments as stipulated by Article 96 (3). Having so found, we agree with the trial court that had the drafters of the Constitution intended it to be that, "...a County Assembly would exercise an oversight role over national revenue allocated to Counties nothing would have been easier than for them to say so." This means that this complaint is also without merit.

86. We now turn to address the gravamen of this appeal. Can the Senate summon the governor to respond to queries in respect of that revenue? In determining the issue, the trial court once again relied on the case of International Legal Consultancy Group vs The Senate, (supra) where it agreed that, since the County Governors are not answerable to the County Assembly in terms of fiscal management of the County resources under section 149 of the Public Finance Management Act 2012, they must be held to account by the Senate for the National revenue allocated to their respective counties in view of the provisions of section 30(3) (f) of the *County Governments Act*, 2012.

87. Before determining the issue, we consider it worthwhile to interrogate the scope of the county governor's role as designated by the Constitution and legislation.

88. As seen earlier Article 179 of the Constitution established and vested executive authority of the county in the county executive committees. Sub Article (2) specified that the county executive committee comprised of the county governor, the deputy county governor, and members appointed by the county governor with the approval of the assembly. Of importance is Sub Article (4) which stipulates that the county governor and the deputy county governor are the chief executive and deputy chief executive of the county. Sub Article (6) requires members of a county executive committee to be accountable to the county governor for the performance of their functions and exercise of their powers.

89. In conjunction with the above provisions, section 30 (2) and (3) of the County Governments Act enumerates the governor's job which includes amongst other responsibilities, executing the functions and the exercise of authority provided for in the Constitution and legislation, and chairing meetings of the county executive committee. But of relevance to the issue in question is section 30 (3) (f) of the same Act that is concerned with the financial management of the county. It specifies that the governor shall "...Be accountable for the management and use of county resources."

90. In the case of International Legal Consultancy Group vs Senate & Clerk of the Senate (supra) the court stated;

> " We have also examined Section 30(3) (f), the County Governments Act of 2012. The same states that the County Governor shall be accountable for the management and use of county resources. By implication, this provision means that the county Governor as the overall head of the county is accountable for the utilization of county resources including the National revenue allocated to his or her respective County. Since the accounting officers at the County are directly answerable to the County Assembly for the management of financial resources under the Public Finance Management Act 2012, who then is the Governor accountable to under Section 30(3) (f)? In our considered view, since the County Governors are not answerable to the County Assembly in terms of fiscal management of the County resources under Section 149 of the Public Finance Management Act 2012, they must be held to account by the Senate for the National revenue allocated to their respective Counties in view of the provisions of Section 30(3) (f) of the County Governments Act, 2012 as read together with Article 10(2) (c) on the National values and principles of governance. The Governors

being State Officers are bound by the national values of transparency, accountability and observance of good governance when performing their duties as the Chief Executive Officers of the County Governments." (Emphasis ours)

91. Simply put, if according to Article 174 (4) of the Constitution the governor is the chief executive of the county, and under section 30 (3) (f) of the County Government Act the governor is accountable for the county's resources, a large part of which comprises national revenue allocated to the county, it is incontrovertible that he or she must be held to account for national revenue received by the county. And since under Article 96 (3) of the Constitution the Senate is charged with oversight over national revenue, then, the inescapable conclusion is that the governor as the chief executive of the county government is accountable to the Senate for the management of that portion of county resources that comprises national revenue horizontally allocated by the Senate to the county. So that where queries arise in connection with such revenue, none other than the governor can be called upon to respond to those queries.

92. Of course there is Article 125 of the Constitution that sets out in clear and unqualified terms, that either House of Parliament may summon any person to appear before either House to give evidence, or provide information on matters in which they are constitutionally mandated to inquire into. In this case, any person would include a governor. So that in the exercise of its oversight mandate under Article 96 (3) of the Constitution, it is the governor that the Senate is mandated to summon to answer queries concerning national revenues. The High Court was therefore right in finding that the Senate was well within its constitutional mandate to summon the recalcitrant governors to address the audit queries, and matters related to utilization of national revenues allocated to the county.

93. That said, it is appreciated that there will be instances when the governor may not be in a position to provide sufficient information on intricate financial accounting information concerning the management and usage of national revenues. But having said that, the architecture of the Constitution has provided a solution to this situation in Article 179 (6) which stipulates that members of the executive committee are accountable to the governor, and therefore it is possible for a committee technocrat, such as the officer in charge of finance, to appear with the governor and assist in providing such information as may be required of them by the Senate. After all, Article 10 (2) (c) of the Constitution requires all public officers, irrespective of the level of government, to adhere to the national values and principles of good governance, integrity, transparency and accountability in the conduct of their duties which would include occasions when they are called upon to provide technical support to the governor on a matter in which the Senate is seized.

94. At this juncture we consider that it would be remiss of us not to address the difficulty raised by Article 229 (7) and (8) of the Constitution. This provision requires the Auditor General to submit audit reports to Parliament or the relevant county assembly, and within three months after receipt of the report, Parliament or the County assembly is required to debate and consider the report and to take appropriate action.

95. In fulfilling this constitutional imperative, the Senate not only requires to table and debate its own accounts, but also discharge its oversight mandate under Article 96 (3) by debating 47 audited county reports, if need be. At the same time, the county assemblies in exercise of their oversight mandate are required to debate their respective reports within the stipulated period. Since the process requires to be completed within three months of receipt of the report, dependent on when the reports are presented to the Senate and the county assembly, it is clear that enormous pressure is placed on both Parliament and the assembly to comply with this stringent constitutional timeline, particularly where, at the same time, the Senate may call upon the governor to answer queries in respect of the same audit reports.

96. To overcome this clash of oversight mandates, the Constitution enjoins parties to take cognizance of Article 189 (1) (a) and (2) which provides that;

> " Government at either level shall—
>
> "(a) perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of the government at the other level, and respect the constitutional status and institutions of government at the other level and, in the case of county government, within the county level."

In the same vein Article 189 (2) provides;

> " Government at each level, and different governments at county levels, shall co-operate in the performance of functions and exercise of power and, for that purpose, may set up joint committees and joint authorities."

97. The intention behind these provisions was aptly explained by this Court in the case of Murang'a County Public Service Board vs Grace N. Makori & 178 others [2015] eKLR when it stated that;

> " It is clear that our constitutional architecture did not create, in the name of devolution, a wall of separation – high and impregnable – between national and county governments, with the latter being enclaves of insularity. Rather it created a bridge – strong and vibrant – to ensure and encourage constant communication, consultation, and co-operation within a diverse, devolved but united nation, between amongst and within the levels of government."

98. In effect, Parliament and the county assemblies can overcome the operational quagmire of considering the audited accounts by working together to develop frameworks and guidelines to assist them carry out their respective responsibilities. Guidelines identifying their individual areas of jurisdiction would go a long way towards expediting the oversight processes, and would prevent them from venturing into unauthorized or undesignated territory. More importantly, they would assist in fostering a conducive and mutually respectful working environment between the Senate and the county assemblies, as was intended by the Constitution.

99. Finally, on the issue that the lower court found that there was no evidence that any of the County Governments have taken over the assets and liabilities of the defunct local governments, and that the High Court was wrong to decline to order governors to respond to queries on the financial affairs of defunct local authorities during the financial year 2012/2013, we have reviewed the pleadings, and find that, notwithstanding the High Court's decision, this was not a matter that was competently before court. And neither did the parties canvass it in their submissions. As such, it was not a matter for determination. We find that the High Court misdirected itself when it deliberated upon and determined an issue that was not before it.

100. In view of the above, save for the final issue on the queries concerning the defunct local governments which the High Court was not mandated to determine, we find that the appeal and the cross appeal are without merit, and are accordingly dismissed. We order each party to bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JUNE, 2019.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

OTIENO- ODEK

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR