



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, KIAGE, GATEMBU, SICHALE & OTIENO-ODEK, JJA)**

**CIVIL APPEAL No. 200 of 2015**

**BETWEEN**

**THE SENATE.....1<sup>st</sup> APPELLANT**

**THE NATIONAL ASSEMBLY.....2<sup>nd</sup> APPELLANT**

**THE SENATOR OF MOMBASA**

**COUNTY and 46 OTHER SENATORS.....3<sup>rd</sup> to 49<sup>th</sup> APPELLANTS**

**AND**

**COUNCIL OF COUNTY GOVERNORS.....1<sup>st</sup> RESPONDENT**

**BARASA KUNDI NYUKURI.....2<sup>nd</sup> RESPONDENT**

**ALBERT SIMIYU WAMALWA.....3<sup>rd</sup> RESPONDENT**

**PHILLIP WANYONYI WEKESA.....4<sup>th</sup> RESPONDENT**

**THE SPEAKER OF NAKURU COUNTY**

**ASSEMBLY and 46 OTHER SPEAKERS.....5<sup>th</sup> to 51<sup>st</sup> RESPONDENT**

**CLEMENT NYAMONGO.....52<sup>nd</sup> RESPONDENT**

**THE ATTORNEY GENERAL..... 53<sup>rd</sup> RESPONDENT**

**THE COMMISSION FOR**

**IMPLEMENTATION OF THE CONSTITUTION.....54<sup>th</sup> RESPONDENT**

**KATIBA INSTITUTE.....55<sup>th</sup> RESPONDENT**

*(Being an appeal against the judgment and decree of the High Court of Kenya*

*at Nairobi, (Lenaola, Mumbi Ngugi & G. V. Odunga JJ) dated 10<sup>th</sup> July 2015*

**in**

**Constitutional Petition No. 381 of 2014**

*as consolidated with*

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. Pursuant to **Article 1 (4) of the Constitution**, the sovereign power of the people of Kenya is exercised at the national and county levels. The governments at the national and county levels are distinct and inter-dependent and pursuant to **Article 6 (2)** they are enjoined to conduct their mutual relations on the basis of consultation and cooperation. To ensure there are no administrative or institutional holdups, **Article 189 (1)** provides that the government at either level is 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 of government at the other level. At the county level, pursuant to **Article 176 (1)**, the county government consists of a county assembly and a county executive. **Article 179 (1)** vests the executive authority of the county upon the county executive committee.

2. With the foregoing provisions in mind, Parliament enacted the **County Government (Amendment) Act 2014** (the Amendment Act) and established County Development Boards (CDB) in each of the 47 counties in Kenya. The Act was assented to by the President of the Republic on 30<sup>th</sup> July 2014 and came into effect on 18<sup>th</sup> August 2014. The Act amended the **County Government Act 2012**. Through the Amendment, **Section 91A** was introduced into the **County Government Act, 2012** establishing for each county a CDB.

3. The composition of the Board as stipulated in **Section 91A** of the Amendment Act is as follows:

**“(a) the member of Senate for the county elected under Article 98 (1) (a) of the Constitution who shall be the chairperson of the Board and convener of the Board’s meetings;**

**(b) the members of the National Assembly elected under Article 97 (1) (a) of the Constitution representing the constituencies located in the county;**

**(c) the woman member of the National Assembly for the county elected under Article 97 (1) (b) of the Constitution;**

**(d) the Governor, as the chief executive officer of the county government, who shall be the vice-chairperson of the Board, and in his absence, the deputy governor of the county shall be the vice chairperson;**

**(e) the deputy governor of the county;**

**(f) the leader of majority party in the county assembly;**

**(g) the leader of minority party in the county assembly;**

**(h) the chairperson of the county assembly responsible for finance and planning;**

**(i) the chairperson of the county assembly committee responsible for budget;**

**(j) the chairperson of the county public service Board who shall be an ex-officio member;**

**(k) the county secretary who shall be secretary of the Board and shall also provide secretariat services to the Board as an ex officio member;**

**(l) the County Commissioner as an ex-officio member and**

**(m) the head of a department of the national government or the county government or any other person invited by the Board to attend a specific meeting of the Board.”**

4. **Section 91A (2)** of the **Amendment Act** outlines the functions of the CDB. It is stated that for each county, the Board shall:

**“(a) provide a forum, at the county level, for consultation and coordination between the national government and the county governments on matters of development and projects in accordance with the Constitution and more specifically, Article 6 (2), Article 10 and Article 174 of the Constitution;**

**(b) consider and give input on any county development plans before they are tabled in the county assembly for consideration;**

**(c) consider and give input on county annual budgets before they are tabled in the county assembly for consideration;**

**(d) consider and advise on any issues of concern that may arise within the county.”**

5. Aggrieved by the enactment of the **Amendment Act 2014** (more specifically the establishment of the County Development **Board**, its

composition and functions) the respondents filed a constitutional Petition against the appellants at the High Court. In the Petition, it was contended that the **Amendment Act** was unconstitutional, null and void as it was enacted in violation of various provisions of the 2010 Constitution. Specifically, the respondents averred the **Amendment Act** violated the provisions of **Articles 6 (1), 95, 96, 174, 175, 179 (1), 179 (4), 183 (1), 85 (3) and 189 (1)** of the Constitution.

6. The respondents contend that the **Amendment Act** violates the functional distinctness of national and county governments; it violates the doctrine of separation of powers by purporting to bestow executive authority on the CDB contrary to **Article 179 (1)** of the Constitution which vests county executive authority on the county executive committee; by giving the Board the power to consider bills prior to tabling before the county assembly; the **Amendment Act** violates **Article 185** of the Constitution which vests county legislative authority upon the county assembly; the **Amendment Act** violates **Articles 6 (2) and Article 189 (1)** of the Constitution to the extent that the composition and functions bestowed upon the CDB contravene the functional and institutional integrity of the county government. It is contended the **Amendment Act** in making the Senator, Member of National Assembly, Member of the County Assembly and County Commissioner be members of the Board violate the doctrine of separation of powers and functions allocated to the executive arm of the county government.

7. In the Petition, the respondents sought orders declaring the provisions of **Section 91A** of the **Amendment Act** that establishes the CDB to be unconstitutional and the functions of the Board as outlined in **Section 91 A (2)** to be unconstitutional, null and void.

8. The appellants traversed and denied the averments in the Petition reiterating that **Section 91A** of the **Amendment Act** does not violate any Constitutional Article as alleged. In a replying affidavit deposited by **Mr. Jeremiah Nyegenye**, Clerk to the Senate, it was averred that pursuant to the provisions of **Article 96 (1)** of the Constitution, the Senate has mandate to represent and protect the interests of the counties and their governments and for this reason the Senate participated in the enactment of the **Amendment Act**; that there was public participation in the enactment of the **Amendment Act**; that the CDB is merely a consultative forum to enhance public participation; the decisions of the Board are not executive decisions that can impede performance of constitutional duties by governors, the county executive committee or the county assembly; that the **Amendment Act** simply creates a statutory participatory, consultative, advisory and recommendatory forum with no executive powers. The appellants reiterated their averment that the CDB is incapable of making any executive decisions.

9. Upon hearing all the parties by way of affidavit evidence, the learned Judges of the High Court (**Lenaola, Mumbi Ngugi & G. V. Odunga JJ**) delivered a judgment dated 10<sup>th</sup> July 2015 granting declaratory orders as prayed in the Petition. In the judgment, the Judges declared the **Amendment Act** to be unconstitutional, null and void.

## **GROUND OF APPEAL**

10. Aggrieved by the declaration of unconstitutionality of the **Amendment Act**, the appellants have lodged the instant appeal citing the following abridged grounds in the memorandum of appeal.

*(i) The learned Judges erred in holding that the County Government (Amendment) Act 2014 is unconstitutional, null and void without specifying the particular Articles of the Constitution which are inconsistent with the Act.*

*(ii) The Judges erred in holding the Amendment Act to be unconstitutional on nebulous, ubiquitous, broad and fluid grounds to wit the composition and mandate of the County Development Boards upsets and is in violation of the framework created by the 2010 Constitution with respect to devolution and separation of power.*

*(iii) The Judges erred in finding the Amendment Act effectively alters the structure of devolution by involving in its functioning and operations persons and officers from other levels of government.*

*(iv) The Judges erred in construing Article 2 (2) of the Constitution to mean that if a certain power is granted to a specific organ, body or level of government then no other entity can lawfully exercise that power.*

*(v) The Judges erred in holding that by involving the Senators in the formulation of plans and budgets for counties, the same plans and budget would thereafter be required to be subject to scrutiny exercise by the Senate in its oversight role.*

*(vi) The Judges erred in failing to appreciate that County Development Boards were intended by Parliament to be a consultative and coordination forum between the county government and the national government within the intendment of Articles 6 (2), 189 and 220 (2) (c) of the Constitution.*

*(vii) The Judges erred in finding that Section 91A of the Amendment Act 2014 creates an oversight role for the national government in counties when the express language of Section 91A is merely to create a consultative and coordination forum to input proposals.*

*(viii) The Judges erred in pursuing a puritan separation of powers to clean cut divisions of functions which is not in tandem with the governance realities and the need to embrace national values of inclusiveness, good governance, sharing of power and participation of the people.*

*(ix) The Judges erred in failing to find the Constitution does not provide for pure separation of powers.*

*(x) The learned Judges erred in construing the various Articles of the Constitution, the Judges erred in failing to adhere to the provisions of Article 259 (1) (a) and (d) of the Constitution.*

*(xi) The Judges erred in finding that Section 13A of the Government Proceedings Act is inconsistent with Article 48 of the*

Constitution.

(xii) *The Judges erred in finding that proceedings commenced by constitutional petitions challenging the constitutionality of an Act of Parliament or alleging violation of constitutional rights are not civil proceedings subject to the provisions of Section 12 (1) of the Government Proceedings Act.*

11. At the hearing of the instant appeal, learned counsel **Mr. Kioko Kilukumi** appeared for the appellants. Learned counsel **Mr. Peter Wanyama** appeared for the 1<sup>st</sup> respondent; learned counsel **Mr. Brian Ochieng** represented the 5<sup>th</sup> to 51<sup>st</sup> respondents; learned counsel **Mr. Moimbo** appeared for the Hon. Attorney General - the 53<sup>rd</sup> respondent and learned counsel **Mr. Dudley Ochiel** appeared for the 55<sup>th</sup> respondent.

12. The appellants, 1<sup>st</sup> respondent and the 55<sup>th</sup> respondent filed written submissions and lists of authorities. The Attorney General relied on submissions filed before the High Court and adopted submissions by the appellant in support of the appeal. Counsel for the 5<sup>th</sup> to 51<sup>st</sup> respondent adopted submissions by the 1<sup>st</sup> respondent in opposing the appeal. The 52<sup>nd</sup> and 54<sup>th</sup> respondents though served, did not appear.

#### **APPELLANTS' SUBMISSION**

13. Counsel for the appellant, Mr. Kioko Kilukumi, rehashed the background facts leading to the dispute between the parties. It was submitted pursuant to **Article 94 (1)** of the Constitution, legislative power is derived from the people of Kenya and at national level is vested in and exercised by Parliament; that courts have no jurisdiction to question Parliament's exercise of legislative power; courts are manned by non-elected jurists who have no role or input to play in the legislative process; that members of Parliament are well placed to understand the needs and aspirations of the people and are well placed to resolve practical problems in society; that the **Amendment Act** was enacted by Parliament to address the needs and aspirations of the people; the learned Judges erred in declaring the people's needs and aspirations as embodied in the **Amendment Act** to be unconstitutional.

14. It was urged that when the impugned **Sections 91A, 91B and 91C** of the **Amendment Act** is placed alongside or side by side with the **2010 Constitution**, it becomes apparent that the provisions of the **Amendment Act** are in complete consonance and resonate well with the Constitution as to be seamless; there is nothing unconstitutional about the provisions of the **Amendment Act 2014**. Counsel cited the decision of the USA Supreme Court in **US -v- Butler 297 US 1 (1936)** and urged this Court to adopt the US methodology of detecting and determining constitutional compliance which is

*“to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.”*

15. The appellants highlighted and stressed that the Judges erred in finding the **Amendment Act** to be unconstitutional without identifying any Article of the Constitution that was violated and without determining how the involvement of Senators could alter the structure of devolution thereby coming into conflict with the Constitution. Counsel submitted that the intention of Parliament in enacting the **Amendment Act** does not conflict with any constitutional Article or value; that the intention of Parliament was to create a consultative forum for coordination and harmonization of county development plans and projects before they are tabled in county assemblies for approval; that the structure, composition and functions of the CDBs do not in any way contravene the powers and functions of the governor, deputy governor, county executive committee or the county assembly; that the **Amendment Act** does not vest any executive power upon the CDB; that the CDBs provides a proper structural relationship between the Senate and the county government as well as the national government to facilitate access to information; and that the CDB provides an excellent forum for the Senate to obtain firsthand information at the county level on the financial requirements of the county which shall in turn inform debate at the national level when the Division of Revenue Bill and the County Allocation of Revenue Bill are being debated and passed by Parliament.

16. The appellant cited various examples of statutes that establish similar forums for consultation between the national government and county governments such as **Section 137** of the **Public Finance Management Act (PFMA)** which establishes the County Budget and Economic Forum; **Section 187** of the **PFMA** which establishes the Intergovernmental Budget and Economic Council and the **Intergovernmental Relations Act 2012** which establishes the National and County Government Coordinating Summit.

17. It was urged that the **Amendment Act** is part of the national legislation contemplated by **Article 220 (2) (c)** of the Constitution to prescribe the form and manner of consultation between the national and county governments in the process of preparing plans and budgets. For this reason, the **Amendment Act** is firmly grounded on the express provisions of the Constitution and is indeed compliant therewith. The appellants urged that the provisions of the **Amendment Act** do not alter the structure of devolution.

18. The appellants further submitted that the learned Judges erred in construing **Article 2 (2)** of the Constitution to mean that if a certain power is granted to a specific organ, no other entity or organ can lawfully exercise that power. It was urged that this interpretation and construction of **Article 2 (2)** is not in tandem with the rule of harmony in construction and interpretation of the Constitution as stated by the Supreme Court **In the Matter of the Principle of Gender Representation In the National Assembly and The Senate[2012] eKLR at para. 33**. Counsel submitted that had the learned Judges construed and interpreted **Article 2 (2)** in harmony and taking into account **Article 259** of the Constitution, the court would not have reached the conclusion that CDB were to perform powers granted to other entities in violation of **Article 2 (2)** of the Constitution.

19. The appellants further submitted that the learned Judges erred in holding that participation by individual members of the Senate, the Executive or Parliament in CDBs violates the oversight role of Senate and contravenes the doctrine of separation of powers. It was submitted that the Constitution requires mutual cooperation and interdependence between the different levels of government and the CDB does not in any way take away the executive authority of the county government.

20. The appellant also faulted the Judges for finding that **Section 13A** of the **Government Proceedings Act** is inconsistent with **Article 48** of the Constitution. **Section 13 A** provides:

**“No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing in the prescribed form has been served on the Government in relation to those proceedings.”**

21. The appellants faulted the Judges for finding that **Section 12 (1)** of the **Government Proceedings Act** does not necessarily apply to constitutional petitions. **Section 12 (1)** of the Act stipulates *inter alia*:

**“Civil proceedings by or against the Government shall be instituted by or against the Attorney General”**

22. The appellant submitted that in the instant case, the Hon. Attorney General was not properly cited as the respondent in the Petition. The Attorney General was cited as an Interested Party; that in the Petition, the Senate, the National Assembly and all elected Senators were cited as respondents instead of the Attorney General. The appellant submitted that in view of non-compliance with **Sections 13A** and **12 (1)** of the **Government Proceedings Act**, the learned Judges of the High Court erred in finding that constitutional petitions challenging constitutionality of an Act of Parliament or alleging violation of rights are not civil proceedings.

23. In this appeal, the Hon. Attorney General as the 53<sup>rd</sup> respondent, through learned counsel Mr. Moimbo associated himself with the appellants' submissions and urged us to allow the appeal.

### **1<sup>st</sup> RESPONDENT'S SUBMISSION**

24. The central theme of the 1<sup>st</sup> respondent's case is the contention that the **County Government (Amendment) Act 2014** violated the principles of separation of powers by seeking to execute the laws made by the National Assembly and Senate at the county level through the CDB. It is urged that the **Amendment Act** violates the legislative authority given to the county assembly under **Article 185** of the Constitution; the Amendment Act violates the functional integrity of executive organ of the county government contrary to **Article 179** of the Constitution; it violates **Article 179** by going against the principles of cooperative government that require respect for functional and institutional integrity of the government at the other level.

25. The respondent restated that **Article 1 (3)** of the Constitution vests the sovereign power of the Republic to the people of Kenya; that the drafters of the Constitution intended the sovereign power to be exercised at two levels of government namely at the national and county level; it is provided that the executive arm of the county government is the county executive committee. The respondent cited various comparative decisions on the concept of separation of powers (See **Marbury -v- Madison**, 5 US (1 Cranch) 137 (1803); **Bowsher -v- Synar**, 478 US 714 (1986) and **Springer -v- Government of Philippines Islands** 277 US 189 (1928)).

26. The respondent submitted that the system of government established under **Article 179 (1)** of the Constitution is that the executive authority of the county is vested in and exercised by the county executive committee and it is unlawful for members of the Senate or national government to encroach on the affairs of the county government through the CDBs. Citing the case of **Killbourn -v- Thompson**, 103 US 168 (1880), it was submitted that under the doctrine of separation of powers, persons entrusted with power in any one arm of government should not be permitted to encroach upon powers conferred to another arm or organ.

27. In challenging the constitutionality of the **Amendment Act**, the 1<sup>st</sup> respondent submitted that the functions of the County Development Boards as stipulated in **Section 91A (2)** of the **Amendment Act** violate the oversight powers of the Senate; one of the functions of Senate under **Article 96 (3)** of the Constitution is determination of allocation of national revenue among counties and to exercise oversight authority over national revenue allocated to the county governments. It was submitted that the **Amendment Act** is contrary to the oversight role of the National Assembly; pursuant to **Article 95 (5) (b)** of the Constitution, one of the functions of the National Assembly is to exercise oversight over state organs. Based on the Article, it was urged that the Constitution does not vest any oversight powers to the CDB and it is the county assembly which is charged with the responsibility of exercising oversight over the county executive committee; that **Article 185 (4)** of the Constitution provides that a county assembly may receive and approve plans and policies for the management and exploitation of the county resources and the development and management of its infrastructure and institutions. The 1<sup>st</sup> respondent submitted that the budget making process is a preserve of the county assembly and the county executive committee as provided for in **Section 117** to 134 of the **PFMA** as read with **Article 220** of the Constitution; the roles of the National Assembly and Senate in so far as the budget making process within the county is concerned ends when they enact the Division of Revenue Bill and the County Allocation of Revenue Bill into law. For this reason, it was submitted that it is unconstitutional for **Section 91A (2) (c)** of the **Amendment Act** to bestow budget functions to the CDB.

28. The 1<sup>st</sup> respondent further submitted that the composition of the CDB as per **Section 91A** of the **Amendment Act** is unconstitutional; that a Senator cannot chair a county meeting; that **Article 179 (4)** stipulates the county governor and the deputy governor are the chief executive and deputy chief executive of the county; it means they are at the top of the pyramid when it comes to coordination of matters within the counties. It was urged that **Section 91A** of the **Amendment Act** is an affront to the role of county assemblies in the exercise of oversight authority at the county level of government; the fact that the budgetary process is subject to the CDB means the constitutional authority given to the office of the governor is usurped; the budgetary making process is the preserve of the county executive committee and county assembly; that the **Amendment Act** in stipulating the county budget making process be presented before the CDB chaired by a Senator is unconstitutional. For this reason, the **Amendment Act** is unconstitutional to the extent that **Section 91A** and **91B** of the Act ousts the executive authority of the governor and the legislative making authority given to the county assemblies and thus violating **Article 189 (1)** of the Constitution.

29. The respondent submitted that the practical effect of the **Amendment Act** is an unlawful and unconstitutional amendment to the Constitution without following the procedure stipulated in **Article 255 (1) (i)** of the Constitution. In substance, **Article 255 (1) (i)** provides that any amendment that destroys or alters the structure of the county government must be subjected to a referendum. The respondent

submitted that the structure of the CDB ousts the hierarchy of powers at the county as established by the Constitution; by causing an elected Senator to chair the CDB, and by making members of the Parliament and County Commissioner members of the CDB, the Amendment Act alters the devolution structure as enshrined in the Constitution; such alteration requires a national referendum as per **Article 255** of the Constitution. Failure to follow the procedure for altering the structure of devolution as per **Article 255 (1) (i)** renders the **County Government (Amendment) Act** unconstitutional. Counsel concluded by urging that the Constitution is supreme and any law inconsistent therewith is null and void.

30. Counsel for the 5<sup>th</sup> to 51<sup>st</sup> respondents associated himself and adopted the submissions by the 1<sup>st</sup> respondent in opposing the instant appeal. Likewise, counsel for the 55<sup>th</sup> respondent, Mr. Dudley Ochiel, associated himself with submissions of the 1<sup>st</sup> respondent in opposing the appeal submitting that the Amendment Act violates the federal structure of the Constitution and interferes with the constitutional scheme of the two levels of government. Counsel submitted that the Amendment interferes with good governance, prudent use of resources and alters the structure of devolution. Counsel posed the question whether it would be constitutional for a member of a county assembly or county government to chair a Board Committee of the national government. Answering the question in the negative, counsel submitted that it is unconstitutional for a Senator to chair a Board or any meeting of the county government.

31. In reply, counsel for the appellant submitted that it was erroneous for the 55<sup>th</sup> respondent to allege that Kenya has a federal constitution - the Constitution did not established a federal state nor is it a federal constitution. On duplication of roles, it was submitted that there is no duplicity in functions between the CDB and any other organ established under the Constitution; that in case there is such duplicity, the remedy lies with the legislature to effect amendments and not on the courts to declare the **Amendment Act** to be unconstitutional.

## ANALYSIS AND DETERMINATION

32. We have considered the rival submissions by counsel and examined the record of appeal and the authorities cited. Being a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions. In **Selle -vs- Associated Motor Boat Co., [1968] EA 123**, it was stated:

**“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).”**

33. Our latitude to depart from the findings and holdings of the first instance court is wider where, as here, the case proceeded before that court on the basis of affidavit evidence and submissions as opposed to a full hearing with witness testimony.

34. At the outset, the submission by the 55<sup>th</sup> respondent that Kenya is a federal state with a federal constitution is a misreading and misapprehension of the 2010 Constitution. In the **Matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No. 2 of 2011**, the Supreme Court expressed at paragraph 39 of its judgment that “we have taken a broader view of the institutional arrangements under the Constitution as a whole and it is clear to us that an interdependence of national and county governments is provided for – through a devolution-model that rests upon a unitary, rather than a federal system of government.” Consequently, we restate and affirm the decision of this Court in **National Assembly of Kenya & another -v- Institute of Social Accountability & 6 others [2017] eKLR** where it was expressed:

**“[24] It is quite obvious and indeed clear...that although Kenya is a constitutionally devolved State, it does not have a federal constitution and that the county governments are not independent but semi-autonomous and an integral part of the unitary State, exercising delegated sovereign power for purposes of governance.**

35. On the merits of the appeal, we have considered the issues raised in the memorandum of appeal. The central issue is whether the Judges erred in declaring the **Amendment Act** as unconstitutional. Other pertinent issues include: whether the Judges erred in not citing the Constitutional Articles that are violated by the **County Government (Amendment) Act 2014**; whether the Judges erred in finding the **Amendment Act 2014** effectively alters the structure of devolution by involving in its functioning and operations persons and officers from the other level of government; whether the Judges erred in construing **Article 2 (2)** of the Constitution to mean that if a certain power is granted to a specific organ, body or level of government then no other entity can lawfully exercise that power and if the Judges erred in holding that a constitutional petition is not a civil proceeding that is subject to **Sections 12 and 13 A** of the **Government Proceedings Act**.

36. It is the appellant’s contention the learned Judges erred in not specifying the particular Articles of the Constitution which were inconsistent with the **County Government Amendment Act 2014**. We have examined the judgment of the learned Judges. In various excerpts, the learned Judges expressed themselves as follows:

**“95. It is thus evident that the powers of the Senate and the National Assembly do not include the powers to legislate at county level, which powers, under Article 185(1), are vested in the county assembly. They do not also, as is evident from Article 179 and 183, as well as the provisions of the CGA and the PFMA, include the preparation and development of plans and budgets for counties.**

**96. Further, under Article 189(1), the Constitution specifically requires the performance of functions by the two levels of government in a manner that respects their independence....**

107. *At the heart of devolution is a recognition that centralized power creates a climate for coercive state power. The people of Kenya have for long agitated for the decentralization of power, and the right to have a say in their governance and the use of their resources. It is not surprising then that one of the key pillars of the Constitution is sharing of power and devolution, a principle which is captured in the national values and principles of governance in Article 10(2) of the Constitution. Devolved government is also recognized at the outset as one of the levels of government, the institutions to which and within which the people of Kenya have delegated their sovereign power as spelt out in Article 1(3)(b) and 1(4) of the Constitution.*

108. *In addition, under Article 6 of the Constitution, national and county governments have equal status as organs of state power, and in the exercise of their respective mandates, they must do so in a spirit of mutual respect. Article 6(2) 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 co-operation”.*

110. *Thus, the structure of devolved government as envisioned by the people of Kenya and encapsulated in the Constitution cannot be altered without an elaborate amendment process that requires the direct endorsement of such a change by the people of Kenya in accordance with the requirements of Article 255(1)(i)”.*

37. From the foregoing examples, it is clear the learned Judges pointed out the Articles of the Constitution that they considered to have been violated by enactment of the **Amendment Act**. The Articles include **Articles 1 (3) (b), 1 (4), 6 (2), 10 (2), 179 (4), 183, 185 (1), 189 (1) and 225 (1) (i)**.

38. From our reading of the judgment, we are satisfied the ground of appeal that the Judges erred in not specifying the specific Constitutional Articles that were violated has no merit.

39. We now consider whether the Judges erred in not applying the correct method for analyzing constitutionality of a statute or a statutory provision.

40. The appellants contend that the Judges did not follow the principle and methodology of determining constitutionality of a statute as enunciated in the comparative USA case of **US -v- Butler 297 US 1 (1936)** which is “*to lay the Article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.*”

41. We have considered the appellant’s submissions *vis -a-vis* the analysis in the judgment of the court below. We are satisfied that the Judges in appraising the constitutionality of the **Amendment Act** considered its constitutionality under various headings while analyzing the provisions of **Section 91A** and **91B** of the **Amendment Act** through principles of devolution, separation of powers, and oversight role of the Senate as provided for in the Constitution.

Above all, we are satisfied that the Judges applied the principles applicable in determining whether an impugned legislation or part thereof meets the test of constitutionality. One of the principles applied by the learned Judges is the principle of constitutionality of statutes. The Judges expressed:

*“79. As the petitioners allege a violation of the Constitution, the presumption of constitutionality applies in this case, and the petitioners have an obligation to establish that the CGAA is unconstitutional.”*

42. The learned Judges further stated;

*“82. In the case of Institute of Social Accountability & Another vs National Assembly & 4 Others High Court Petition No. 71 of 2014 [2015] eKLR, the Court stated as follows at paragraphs 57– 60:*

*[57].……*

*[I]n determining whether a Statute is constitutional, the Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see Murang’a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 [2011] eKLR, Samuel G. Momanyi v Attorney General and Another (supra)). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect. The Canadian Supreme Court in the R –v- Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 enunciated this principle as follows; …*

*[59] Fourth, the Constitution should be given a purposive, liberal interpretation……*

*[82] (sic) At paragraph 136 of the Institute of Social Accountability case, the Court concluded as follows:*

*“[136] The Kenyan people, by the Constitution of Kenya, 2010 chose to de-concentrate State power, rights, duties, competences – shifting substantial aspects to the county government, to be exercised in the county units, for better and more equitable delivery of the goods of the political order. The dominant perception at the time of constitution-making was that such a deconcentration of powers would not only give greater access to the social goods previously regulated centrally, but would also open up the scope for political self-fulfilment, through an enlarged scheme of actual participation in governance mechanisms by the people – thus giving more fulfillment to the concept of democracy.”*

**[83] These are the principles that will guide our consideration of the question whether section 91A of the CGAA meets constitutional muster.**

**Whether the County Governments (Amendment) Act 2014 Is Unconstitutional.”**

43. Having examined paragraphs 76 to 83 of the judgment, we are satisfied the learned Judges appreciated and applied the correct principles and methodology in determining the constitutionality of a statute or statutory provision. The ground of appeal that the Judges did not apply the correct methodology or an integrated and harmonious approach to interpretation of the Constitution has no merit.

44. The next issue for our consideration is the contestation that the Judges erred in finding the **Amendment Act** violated and altered the structure of devolution under the 2010 Constitution. Devolution is a political arrangement where political, administrative and fiscal power is distributed to semi-autonomous sub-national units. (See Muia, Daniel M. “Decentralisation of governance to districts in Kenya: A Case Study” in Kibu, T.N. and Mwabu G. (eds.) “Decentralisation and decentralization in Kenya: New Approaches:” Nairobi University Press, 2008).

45. As stated in the concurring opinion of Mutunga, CJ in **Speaker of the Senate & another -v- Attorney-General & 4 others [2013] eKLR**, devolution is one of the main fulcrums on which Kenya’s 2010 Constitution turns. In arriving at our decision in this matter, we are cognizant of the decision of this Court in **National Assembly of Kenya & another -v- Institute of Social Accountability & 6 others [2017] eKLR** where it was expressed at paragraph 29 of the judgment that it is not unconstitutional for national government to perform functions inside the administrative structures of county government. In this context, we note that pursuant to **Article 186 (2)** of the Constitution, Kenya has in effect three categories of powers and functions, one for the national government, another for the counties, and the third that are concurrent. If the national and county laws clash, the national prevails in circumstances listed in Article 191 of the Constitution.

46. In this appeal, the appellant contends the **Amendment Act** does not alter the structure of devolution. The Act simply creates a forum for consultation; that pursuant to **Article 189 (2)** of the Constitution, members of the Senate, while they are part of the government at the national level, may also participate in the affairs of the county government at county level; that Article 189 (2) enjoins the Government at each level to cooperate in the performance of functions and for that purpose may set up joint committees and joint authorities. It was further submitted the **PFMA** and the **Intergovernmental Relations Act 2012** create forums for cooperation and coordination between the national and county governments and as such, the impugned Amendment Act is not unconstitutional to the extent it echoes the consultative forums embodied in the **PMFA Act** and the **Intergovernmental Relations Act**.

47. The learned Judges in arriving at the conclusion that the **Amendment Act** alters the structure of devolution expressed themselves as follows:

*109. As though to underline the critical place of devolution in the new constitutional dispensation, as well as to make specific provision with regard to the operations of county governments, the Constitution devotes to it an entire chapter, Chapter 11 of the Constitution. In Chapter 12, the Constitution sets out, among other things, the principles of public finance and the manner of sharing revenue between national and county governments. It can properly be said that the commitment to devolution and sharing of power runs throughout the entire Constitution like a golden thread.*

*111. By establishing the CDBs composed of the Senator, Members of the National Assembly and women members of the National Assembly, as well as national government officers at the county level, with the mandate to consider and make inputs into county budgets and plans, the CGAA effectively alters the structure of devolution by involving in its functioning and operations persons and officers from other levels of government. As we illustrate below, this is not the only shortcoming of this legislation. It effectively vests in the same hands the powers of planning, implementation and oversight, in clear violation of the principles of checks and balances and separation of powers, principles which we shall consider in the following section.”*

48. Given the contestation in this appeal, it is incumbent upon us to re-appraise the provisions of **Section 91A** of the **Amendment Act** to determine if indeed it alters the structure of devolved government and whether such alteration is procedurally contrary to **Article 255 (1) (i)** of the Constitution.

49. Comparatively, in the Indian case of **Keshvananda Bharti -v- Union of India (1973) 4 SCC 225** it was held that the power to amend the Constitution is subject to the basic features of the constitution; and hence, any amendment tampering with these essential features will be struck down as unconstitutional.

50. In this matter, **Article 255 (1) (i)** of the Constitution expressly states that any alteration to the objects, principles and structure of devolved governments can only be done by way of referendum. If a finding is made that the **Amendment Act** alters the structure of devolved government, it would follow that the alteration is unconstitutional as no referendum was conducted prior to enactment of the **Amendment Act**.

51. The learned Judges made a finding that the **Amendment Act** alters the structure of devolved government and violates the doctrine of separation of powers. To conclude that the structure of devolved government has been altered by the **Amendment Act 2014**, one had to first ascertain the structure of devolved government under the 2010 Constitution. The structure of devolution in Kenya is embodied and actualized by the Constitution and various legislations. It is embodied in various Articles of the Constitution, *inter alia*:

(i) **Article 1 (3) (b)**: - The sovereign power under the Constitution is delegated to the national executive and the executive structures in the county governments.

(ii) **Article 1 (4)**: - The sovereign power of the people is exercised at (a) the national level and (b) the county level.

(iii) **Article 6 (2)**: - 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.

(iv) **Article 176 (1)**: - There shall be a county government for each county consisting of a county assembly and a county executive.

(v) **Article 179 (1)**: - The executive authority of the county is vested in and exercised by a county executive committee.

(vi) **Article 179 (4)**: - The county governor and the deputy county governor are the chief executive and deputy chief executive of the county respectively.

(vii) **Article 179 (6)**: - Members of the county executive committee are accountable to the county governor for the performance of their functions and exercise of their powers.

(viii) **Article 185 (1)**: - The legislative authority of a county is vested in and exercised by, its county assembly.

(ix) **Article 189 (1) (a)**: - Government at either level shall perform its functions and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level and respects the constitutional status and institutions of government at the other level....

(x) **Article 255 (1) (i)**: Amendment to the objects, principles and structure of devolved government requires referendum.

52. In this appeal, the functions and composition of membership to the CDB as envisaged under **Sections 91A, 91B** and **91C** of the **Amendment Act** must be appraised and evaluated against the above relevant Constitutional Articles. The constitutionality of the **Amendment Act** depends on whether it violates any of the cited Articles.

53. **Section 91A (1) (a)** of the **Amendment Act** makes the elected member of Senate for the county the chairperson of the CDB and convener of its meetings. **Section 91A (1) (d)** makes the governor of the county to be the vice chairperson of the Board. A cursory examination of the composition of the CDB reveals that the composition and role of the Board ensures domination by politicians and the subordination of governors to senators. For this reason, **Section 91A (1) (a)** and **(d)** is antithetical to and violates the provisions of **Article 179 (4)** of the Constitution. The impugned section makes the elected member of the Senate chairperson and the governor of the county vice chairperson of the Board. The constitutional structure of county government under **Article 179 (4)** is that the county governor and the deputy county governor are the chief executive and deputy chief executive of the county. **Section 91A (1) (a)** in making the governor to be vice chairperson drastically and impermissibly alters the hierarchical structure of a county government. It is unlawful and unconstitutional to cause the governor of county to deputize or be vice chairperson of any committee or organ whose mandate relates to county matters. In the absence of express constitutional provision or authorization by the county government, it is unconstitutional for a person who is not a member of the county government to preside over county matters. The Constitution does not contemplate such subservience of Governors to Senators in the execution of county functions.

54. Of relevance to this appeal is the composition of the CDB. The Amendment Act vide **Section 91A (1) (a) (b) (c)** and **(l)** provides members of the Board to include the elected Senator, members of the National Assembly representing constituencies located in the county, woman member of the National Assembly for the county and the County Commissioner. **Section 91A (1) (a) (b) (c)** and **(l)** violates the provisions of **Article 176 (1)** and **179 (6)** of the Constitution. The structure of devolved government under **Article 176 (1)** is that the county government consists of a county assembly and a county executive. Senators and Members of the National Assembly and Woman Member of the National Assembly and the County Commissioner are not part of the structure of county government. It is thus a violation of the structure of devolved government to make persons who are members of the national government or Parliament to be members of a decision-making body in a county government. The said sections further violate the functional aspects of the doctrine of separation of powers.

55. **Section 91A (2)** of the **Amendment Act** itemizes the functions of the CDB. Of relevance is **Section 91A (2) (b)** and **(c)** wherein the Board is to consider and give input to any county development plans and the annual budget before they are tabled in the county assembly. Also relevant is Section 91B which provides that the operational expenses in respect of the CDB shall be provided for in the annual estimates of the revenue and expenditure of the respective county government.

56. In our view, **Section 91A (2)** and **Section 91B** of the **Amendment Act** violate the functional integrity of county governments. The sections are contrary to **Articles 179** and **185** of the Constitution. **Article 179 (1)** of the Constitution vests executive authority of the county upon the governor. Pursuant to **Article 179 (6)** members of the county executive committee are accountable to the governor. Pursuant to **Article 185 (1)**, the legislative authority of the county is vested upon the county assembly. By requiring county development plans and the annual budget to be tabled before the CDB prior to being considered by the county assembly, the **Amendment Act** restricts the functional independence of the county assembly. It is an offence under **Section 91C** of the Amendment Act for a county assembly to consider and approve its budget or a development plan before the same is tabled before the CDB. Such a scenario is a fetter, restriction and limitation to the functions and powers of the county executive committee and the county assembly. The devolved structure of the county government does not recognize such restrictions or fetters on functional independence of the county government, county executive and county assembly. To the extent that **Sections 91A (2)** and **91B** enact and impose functional restrictions on the county executive and county assembly, the said sections are unconstitutional, null and void. We find the learned Judges did not err in finding that the functions of the CDB are antithetical to the functional integrity of county government.

57. In this appeal, we have made a determination that **Sections 91A** and **91B** of the **Amendment Act 2014** alter the structure of devolved government as enshrined in the 2010 Constitution. This being so, **Article 255 (1) (i)** of the Constitution comes into play. It is not in dispute that there was no referendum held in accordance with **Article 255 (1) (i)** to alter the structure of the devolved government. To this end, the procedure for altering the structure of devolved government was not followed. Parliament cannot lawfully alter the structure of devolved government through an Act of Parliament without a referendum. Accordingly, the **Amendment Act** is unconstitutional, null and void as the procedure for altering the structure of devolved county government as stated in **Article 255 (1) (i)** was not followed.

58. In this appeal it is contended the Judges erred in finding that if a power is granted to a specific organ, body or level of government, then no other entity can lawfully exercise that power. On the issue, the learned Judges stated;

***“86. In dealing with this question, it is important to bear in mind the constitutional provisions with regard to the exercise of power by state organs. In particular, we are cognizant of the provisions of Article 10 with respect to the national values and principles that govern the exercise of state power. Among these principles is the cardinal principle of the rule of law, which requires that only powers given under the Constitution or the law is exercised by anybody or person. In this regard, Article 2(2) of the Constitution provides that “no person may claim or exercise State authority except as authorised under this Constitution”. The effect of this is that if a certain power is granted to a specific organ, body or level of government, then no other entity can lawfully exercise that power.*** (Emphasis supplied)

59. In the context of the relationship between national and county government, **Article 186 (2)** of the Constitution stipulates that a function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government. **Article 6 (2)** stipulates that the governments at the national and county levels shall perform their functions and exercise powers in a manner that respects the functional and institutional integrity of government at the other level and respects the constitutional status and institutions of government at the other level.

60. Recalling that the national and county governments are inter-dependent, it is our considered view that the statement by the learned Judges that if a power is granted to a specific organ then no other entity can lawfully exercise that power is a general rule that is subject to exceptions. One such exception is where delegation of powers or functions is permitted. We are persuaded in our view by comparative jurisprudence from India in **Ram Jawaya -v -state of Punjab AIR 1955 SC 549** where it was observed that the doctrine of separation of power does not apply in its absolute rigidity but the functions of the different parts or branches of the government have been sufficiently differentiated. To this end, the Constitution does not embody the puritan concept of separation of powers but a system of checks and balance with inter-dependence inter and intra various constitutional organs and arms of government. However, the constitution does not contemplate assumption, by one organ or part of the state, of functions that essentially belong to another. It is in this context that we affirm the decision of this Court in **National Assembly of Kenya & another -v- Institute of Social Accountability & 6 others [2017] eKLR** where it was stated it is not unconstitutional for national government to perform functions inside the administrative structures of county government.

61. Another ground in this appeal is contestation that the learned Judges erred in holding that by involving the Senators in formulation of plans and budgets for counties, the **Amendment Act** violate the Senate’s oversight role. It is further urged the Judges erred in failing to find the CDB’s function is coordination and consultative. In **Judicial Service Commission -v- Speaker of the National Assembly & 8 others (2013) eKLR (Nairobi High Court Petition No. 518)** the court ruled that ‘oversight’, which is a form of monitoring, does not entail controlling or giving instructions or ‘micro managing’; rather, it involves a regular review of progress or development of a subject.

62. Among the functions of the CDB as stated in **Section 91A (2)** of the **Amendment Act** is to consider and give input to county budget and county development plans before they are tabled at the county assembly. Prima facie, this appears to be an innocent provision. However, when read in tandem with **Section 91C** of the **Amendment Act 2014**, the decision-making mandate of the Board becomes evident as well as the enforceable requirement for the Board to consider the county budget and development plans prior to tabling at the county assembly.

63. **Section 91C** provides

***“Any person who knowingly and unlawfully obstructs, hinders, undermines or prevents the County Development Board from discharging its functions under this Act commits an offence and is liable, on conviction, to punishment by a fine not exceeding one million shillings or imprisonment for a term not exceeding one year, or both.”***

64. The coercive nature of the Board’s functions guaranteed by **Section 91C** of the **Amendment Act** transforms the CDB into a decision making organ and this violates the administrative, legislative and decision making power and authority of the county executive committee, the county assembly and the position of county governor as the chief executive officer of the county.

65. To our mind, the issue is not the functions of the CDB *per se*; the contestation is the composition of CDB. By involving the Senator, members of the National Assembly and the woman representative of the county in CDB, a conflict of interest arises between the oversight role of the Senate, the functions of the Board and the mandates of the county assembly and the county executive committee.

66. In **County Government of Kiambu & another -v - Senate & others [2017] eKLR**, Mativo, J. persuasively and correctly expressed himself as follows:

***“...The constitution does not contemplate even for a moment a scenario whereby one organ of the government usurps the functions of the other. The role of the Senate is well defined under Article 96 while the role of the county assemblies and in particular its legislative power is well defined under Article 185. Clearly, my understanding of Article 96 of the constitution is that the Senate has no oversight role in county legislation. The legislative power of counties is vested in the county assembly by the constitution. Since the role of the Senate is clearly defined in Article 96 cited above, acting outside the constitutionally laid down mandate would in my view be a violation of the letter and spirit of the constitution and this court has a constitutional duty to intervene and stop such breach of the constitution.....***

***The respective functional competencies of the national and county governments are provided under Article 186 of the Constitution as read with the Fourth Schedule. Counties have both executive and legislative powers over the functions allocated to them under the Fourth Schedule. A function or power not assigned by the Constitution or law to a county belongs to the national government. A county assembly is the legislative body of a county government. In addition to making laws, the county assembly has oversight powers over CEC members and other county executive organs. To my mind, the above provisions are clear and require no explanation. There is no mandate granted by the constitution to the Senate to scrutinize the process and***

*legality of county legislation. To me, the legality or otherwise of the county legislation can only be challenged in court.*

67. We find the learned Judges in the instant appeal did not err in finding **Sections 91A** and **91B** of the **Amendment Act** contravene the Constitution and are antithetical to the oversight role of the Senate as provided in **Article 96 (2)** and **(3)** of the Constitution as read with the legislative power of the county assembly in **Article 185 (1)** of the Constitution.

68. The appellants in concluding their submission stated that courts have no jurisdiction to question the exercise of legislative power by Parliament; that courts are manned by non-elected jurists who have no role or input to play in legislative matters; that members of Parliament are well placed to understand the needs and aspirations of the people and are well placed to resolve practical problems in society; that the **County Government (Amendment) Act 2014** was enacted by Parliament to address the needs and aspirations of the people and the learned Judges erred in declaring the people's needs and aspirations as embodied in the **Amendment Act 2014** to be unconstitutional.

69. Our consideration of the foregoing submission leads us to recall that the authority of the Judiciary to determine the constitutionality of the conduct of other branches of government is a constitutional command and has been asserted by the Supreme Court of Kenya in **The Speaker of the Senate and Another and the Attorney General and Others, Advisory Opinion Reference 2 of 2013**, at para. 58 where it is stated:

**“Parliament must operate under the Constitution which is the supreme law of the land...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.”**

70. In the persuasive case of **Council of County Governors -v- Lake Basin Development Authority & 6 others** [2017] eKLR it was correctly expressed:

**“53. .... when the constitutionality of legislation is in issue, the court is under a duty to exercise its jurisdiction under Article 165 and examine the objects and purport of the Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution. The court cannot delegate this sacrosanct constitutional mandate to another person or body. Declining jurisdiction in such a case would in my view amount to declining to exercise its constitutional mandate. It would be treason to the Constitution. The court must remain faithful to its constitutional mandate and uphold the Constitution always and not to stifle it.”**

71. Further, we are persuaded by and affirm the dicta of the High Court as stated in **Law Society -v- Attorney General & another and Centre for Enhancing Democracy and Good Governance, Petition No. 3 of 2016** where at paragraph 190 it was correctly expressed that the High Court is vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions. As provided for under **Article 165(3)** of the Constitution, the High Court has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. At any rate, it seems to us quite plain that Parliament has through the Amendment Act overreached itself beyond what the people authorized in the Constitution.

72. A procedural ground in this appeal is that the Judges erred in finding that **Section 13A** of the Government Proceedings Act is inconsistent with **Article 48** of the Constitution; the Judges erred in holding that proceedings commenced by constitutional petition are not civil proceedings subject to the provisions of **Section 12 (1)** of the **Government Proceedings Act**.

73. **Section 13A** of the **Government Proceedings Act** (GPA) require a 30-day notice to be given before any suit can be instituted against the Government. On the other hand, **Section 12(1)** of the GPA provides as follows:

**“Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be.”**

74. The High Court (Majanja, J.) in **Kenya Bus Service Limited & another v. Minister for Transport & 2 others Civil Suit No. 504 Of 2008** declared that **Section 13A** of the **Government Proceedings Act (Cap 50) (GPA)** violates **Article 48** of the Constitution of Kenya, 2010. The Judge ruled that **Section 13A** of the GPA provided an impediment to access to justice based on the fact that the law should not impose hurdles on accountability of the Government through the courts since the State is at the front, left and centre of the citizen's life. The decision of Majanja, J. on **Section 13A** of the **Government Proceedings Act** was endorsed by this Court in **Joseph Nyamamba & 4 others -v - Kenya Railways Corporation** [2015] eKLR.

75. In the instant matter, on constitutionality of **Section 13A** of the **Government Proceedings Act**, the learned Judges citing persuasive decisions of the High Court relied on the **Article 48** of the Constitution on access to justice in finding that the requirement of notice is an impediment to access to justice. (See **Orengo vs Attorney General** (supra), **Hudson Laise Walumbwa vs Attorney General HCCC No. 2714 of 1987** and **Barrack Omudho Aliwa and Another vs Salome Arodi and Another Succession Cause No.38 of 2008**).

76. The Judges stated;

**“66. It is to be observed also that only the Court can grant the relief that the petitioner is seeking in this matter, namely the declaration of invalidity of legislation on the basis that it is unconstitutional. The Attorney General could not have provided the petitioners with the relief that they seek, and even had we found that the 30-day notice was a requirement, it would have been a procedural step that would serve no purpose in a matter such as this. In the circumstances, we find no merit in the objections by the respondents with respect to the competence of the petition, which we find is properly before us.”**

77. On the issue whether a constitutional petition is civil proceedings under **Section 12** of the Government Proceedings Act, the learned Judges expressed themselves thus;

**“54. It must be observed, first, that the present matter is not a civil matter relating to “the affairs or property of governme in the manner contemplated under the provisions of the Government Proceedings Act. The petition before us seeks the interpretation of the question whether an Act of Parliament is unconstitutional for violating the Constitution. It is brought under the provisions of Article 165 and 258 of the Constitution which grant the Court the jurisdiction to interpret whether an Act of Parliament is inconsistent with or otherwise in contravention of the Constitution. It cannot therefore be deemed to be “civil proceedings” as contemplated in the Government Proceedings Act. In our view, the provisions of section 12 of the said Act do not apply to petitions alleging violation of constitutional rights or contravention of the Constitution.**

**55. However, even if the said Act was found to be applicable, we take the view that any shortcomings in terms of process is cured both by the Constitution itself and the rules of procedure made pursuant thereto. Article 156(4)(b) of the Constitution provides that the Attorney General:**

***“...shall represent the national government in court or in any other legal proceedings to which the national government is a party.”***

**56. As the national government, through the Senate and the National Assembly, is part of these proceedings, the Attorney General is constitutionally mandated to represent the national government and he is automatically part of these proceedings. In any case as this Court recently held in The Council of Governors and Others vs. The Senate Petition No. 413 of 2014:**

***“The Constitution, 2010 allows the Attorney General the right to represent the National Government in Court proceedings but does not stipulate that the Attorney General should be sued in all instances where any organ of the National Government has been sued and to say otherwise would be absurd.”***

**57. In addition, Rule 5(b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (The Mutunga Rules) states that:**

***“A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.”***

78. In the instant appeal, we have considered the reasoning and analogy by the learned Judges relating to **Sections 12(1)** and **13A** of the Government Proceedings Act. We have also taken into account the appellants’ submissions on the definition of civil proceedings under the **Government Proceedings Act** to include proceedings for recovery of fines or penalties. It is the appellants’ submission that civil proceedings include constitutional petitions and such petitions are subject to **Sections 12** and **13A** of the **Government Proceedings Act**.

79. In principle, civil proceedings are distinguished from criminal proceedings. In the broad categorization of civil proceedings are various modes of instituting civil claims by way of plaint or originating summons or a constitutional petition. Under the 2010 Constitutional framework, constitutional petitions on enforcement of fundamental rights or freedoms or petitions alleging violation of the Constitution have different procedures and framework as envisioned by **Article 22 (3)** and **(4)** of the Constitution. To this extent, we hold a constitutional petition is not civil proceedings mandatorily subject to the ordinary rules of Civil Procedure and the Government Proceedings Act. It is a procedure *sui generis* and we would be slow to admit to any procedural fetters and hurdles to access to justice in matters constitutional.

80. The upshot of our consideration of the grounds of appeal, submissions by counsel, authorities cited and applicable law is that this appeal has no merit and is hereby dismissed. Each party is to bear its own costs in this appeal and the court below.

**Dated and delivered at Nairobi this 7<sup>th</sup> day of June, 2019.**

**P. N. WAKI**

.....

**JUDGE OF APPEAL**

**P. O. KIAGE**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

.....

**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

.....

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**