



**Senate v Council of County Governors & 6 others (Petition 24 & 27 of 2019  
(Consolidated)) [2022] KESC 57 (KLR) (7 October 2022) (Judgment)**

Neutral citation: [2022] KESC 57 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
PETITION 24 & 27 OF 2019 (CONSOLIDATED)  
MK KOOME, CJ & P, MK IBRAHIM, SC WANJALA, N NDUNGU & W OUKO, SCJJ  
OCTOBER 7, 2022**

**BETWEEN**

**THE SENATE ..... PETITIONER**

**AND**

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

**PATRICK SIMIYU KHAEMBA ..... 2<sup>ND</sup> RESPONDENT**

**AHMED ABDULLAHI MOHAMED ..... 3<sup>RD</sup> RESPONDENT**

**WYCLIFFE OPARANYA ..... 4<sup>TH</sup> RESPONDENT**

**JAMES OMARIBA ONGWAE ..... 5<sup>TH</sup> RESPONDENT**

**MARTIN NYAGA WAMBORA ..... 6<sup>TH</sup> RESPONDENT**

**DR ALRED MUTUA ..... 7<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Judgment and Orders of the Court of Appeal  
of Kenya (Makhandia, Musinga, Murgor, Otieno-Odek, & Kantai, JJA)  
delivered in Nairobi Civil Appeal No. 204 of 2015 on 7th June 2019)*

**Powers of Senate to summon county governors in the performance of its oversight role over county revenue**

Reported by Kakai Toili

***Constitutional Law** - Senate - functions of the Senate - oversight functions - powers to summon county governors - whether the Senate was constitutionally empowered to summon governors to appear before it or any of its committees for purposes of answering questions and providing requisite information - whether the Senate's oversight function was limited to nationally allocated revenue - Constitution of Kenya, 2010, articles 96, 110-112; Public Finance Management Act (cap 412A) section 8.*



**Devolution** - county governments - county assemblies - oversight function of county assemblies - whether county assemblies had the power of first-tier oversight over county government revenue, whether nationally allocated or locally generated.

### **Brief facts**

On February 8, 2014, the Senate Committee on County Public Accounts and Investments summoned fifteen county governors to appear before it to answer questions on county financial management. Several county governors appeared before the Committee save for four who expressly declined to honor the summons. The four governors instead filed a petition before the High Court challenging the summons. On April 16, 2014, the High Court found that the Senate was well within its constitutional mandate to issue the summons.

Consequently, the Senate issued fresh summons to the governors, requiring them to appear before the Committee on August 26, 2014. However, the Governors of Bomet, Kiambu, Murang'a, and Kisumu Counties declined to honor the summons despite the court orders. That prompted the Senate to pass a resolution, in accordance with section 96 of the Public Finance Management Act (PFMA), recommending that the Cabinet Secretary Treasury halt the transfer of funds to the concerned county governments and the Controller of Budget withhold the approval of withdrawal of public funds by those county governments.

Aggrieved, the governors filed a second petition on among other grounds that under articles 96 and 226(2) of the Constitution of Kenya, 2010 (the Constitution) and section 148 of the PFMA, the Senate could not summon governors to personally appear before it to answer questions of county government finances.

The High Court held, among others, that the Senate could summon governors to answer questions on county public finance management and that the resolution passed by the Senate directing the National Treasury and Controller of Budget not to release funds to counties was unconstitutional. Aggrieved, the respondents filed an appeal at the Court of Appeal while the appellant filed a cross-appeal at the same court. The Court of Appeal dismissed both the appeal and cross-appeal for lack of merit and upheld the High Court judgment. Aggrieved by the Court of Appeal decision, the appellants filed the instant consolidated appeals.

### **Issues**

- i. Whether the Senate was constitutionally empowered to summon governors to appear before it or any of its committees for purposes of answering questions and providing requisite information.
- ii. Whether the Senate's oversight function was limited to nationally allocated revenue.
- iii. Whether county assemblies had the power of first-tier oversight over county governments' revenue, whether nationally allocated or locally generated.

### **Relevant provisions of the Law**

#### **Constitution of Kenya**

#### **Article 96 - Role of the Senate**

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

*(2) The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113.*

*(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.*

### **Held**

1. Article 96 of the Constitution as read together with articles 110 to 112 of the Constitution, left no doubt that the Senate was established to perform fundamental roles of governance concerning counties; they were legislative, budgetary and oversight. It had been granted considerable latitude in ensuring that county governments operated at optimal and within accountability standards, if the objectives of devolution were to be realized. There was no way by which the Senate could perform such an important role without having the powers to summon a governor and to require him/her to provide answers and offer explanations regarding the management of the county finances and related



- affairs. Without such power, the Senate would not be able to protect the interests of the counties, nor would it be able to exercise effective oversight over national revenue allocated to counties.
2. Article 96(3) of the Constitution was buttressed by section 8 of the PFMA which provided for the responsibilities of the Senate Budget Committee in public finance matters. For the Senate to perform its functions as stipulated in section 8, it had to incorporate the input of the respective chief finance officers of the counties, who were in turn appointed by the governor. The office that was ultimately answerable to the Senate was that of the governor.
  3. The Senate was constitutionally empowered, to summon governors to appear before it or any of its committees for purposes of answering questions and providing requisite information. In appearing before Senate, there was nothing to stop a governor from going on with his/her technical team from the county executive. By the same token, if the Senate was of the view that the questions to be answered or information to be provided did not need the personal input of the governor, it could restrict its summons to the relevant county official or executive committee.
  4. Article 185(3) of the Constitution provided that a County Assembly, while respecting the principle of separation of powers, could exercise oversight over the county executive committee and any other county executive organs. Article 185(3), although permissively framed, conferred powers upon county assemblies to oversee the county executive. That therefore meant that among other things, county assemblies could question the county executives' management of county affairs, including the use of revenue. What the County Assemblies could not do was to usurp the role of the county executive under the guise of oversight, for that would offend the principle of separation of powers. The County Assemblies could not for example, take over the role of implementing Government policies and projects. Their role was to provide checks and balances to the county executives so as to promote transparency and accountability in the manner county affairs were run.
  5. Article 96(2) of the Constitution, which conferred legislative powers upon the Senate regarding Bills concerning county governments, had to be read together with articles 109 to 113 of the Constitution. Those provisions entrusted the Senate with the mandate of legislating for county governments in fields that spanned the entire spectrum of governance. With regard to county finances, the foregoing provisions did not limit Senate's legislative power to the nationally allocated revenue.
  6. A holistic reading of all the relevant provisions of the Constitution and the law, put in context, led to the conclusion that both the Senate and County Assemblies had the power to oversee county revenue whether nationally allocated or locally generated. The fact that county revenue was locally generated did not remove it from the purview of Senate oversight. Such revenue fell within the rubric of public finance whose use had to remain under the radar of scrutiny and oversight by the State organs established for that purpose. Similarly, the fact that county revenue was nationally allocated did not place it beyond the oversight of county assemblies.
  7. The purpose of the Constitution was to entrench good governance, the rule of law, accountability, transparency, and prudent management of public finances at both levels of Government. Such grand purpose could not be served if either the Senate or county assemblies began to develop centres of oversight/influence. In that regard, the county assemblies provided the first tier of oversight while the Senate provided the second and final tier of oversight.
  8. By exercising its oversight role in the manner determined, the Senate could not be said to be violating the principle of separation of powers. There was no potential danger of encroachment upon the mandate of the independent offices of the Controller of Budget or the Auditor General. What the Senate could not do under the guise of oversight, was to usurp the county executives' mandates or to purport to supervise County Assemblies.

*Appeal partly allowed.*



## Orders

- i. *In the performance of its oversight role over county revenue, the Senate had powers to summon county governors to answer any questions or provide any requisite information.*
- ii. *The Senate's oversight authority was not limited to nationally allocated revenue but extended to locally generated revenue by the counties.*
- iii. *County assemblies had the power of first tier oversight over county government revenue, whether nationally allocated or locally generated.*
- iv. *No orders as to costs.*

## Citations

### Cases

#### Kenya

1. *Council of Governors & 5 others v Senate & another* Civil Appeal 204 of 2015; [2019] KECA 704 (KLR) - (Explained)
2. *In the Matter of Kenya National Commission on Human Rights* Reference 1 of 2012; [2014] eKLR - (Explained)
3. *International Legal Consultancy Group v Senate & another* Constitutional Petition 74 of 2014; [2014] eKLR - (Explained)
4. *Judicial Service Commission v Speaker of the National Assembly & 8 others* Petition 518 of 2013; [2014] eKLR - (Applied)
5. *Kenya Bus Service Ltd & another v Minister for Transport & 2 others* Civil Suit No 504 of 2008; [2012] eKLR - (Applied)

### Texts

1. Bosire, CM., (Ed) (2017), *Interpreting the power of the Kenyan Senate to oversee National Revenue allocated to the county governments : building a constitutionally tenable approach* Pretoria: Africa Journal of Comparative Constitutional Law
2. Erskine, TM., (Ed) (2015), *Treatise Upon The Law, Privileges, Proceedings and Usage of Parliament* Cambridge: Cambridge University Press
3. Kangu, JM., (Ed) (2015), *Constitutional Law of Kenya on Devolution* Nairobi: Strathmore University Press

### Statutes

#### Kenya

1. Civil Procedure Act (cap 21) sections 22(b); 24 - (Interpreted)
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 16; rules 1, 10(3) - (Interpreted)
3. Constitution of Kenya articles 6(2); 10; 48; 95(4)(c); 96(3); 109; 110; 111; 112; 113; 117; 125; 156(1); 163(4)(a); 165(3); 174; 179(6); 185(3); 189(1); 202; 203; 207; 217; 225; 226(2); 228(4)(5)(6); 229(7) (8); 259(1)(a)-(d); Schedule Sixth; section 7 - (Interpreted)
4. County Governments Act (cap 265) sections 8, 30(3)(f) - (Interpreted)
5. Elections Act (cap 7) section 85A - (Interpreted)
6. Government Proceedings Act (cap 40) sections 12(1), 13A - (Interpreted)
7. Leadership and Integrity Act (cap 185C) In general - (Cited)
8. Office of the Attorney General Act (cap 6A) section 5(1) - (Interpreted)
9. Privileges and Immunities Act (cap 179) sections 12, 14, 15, 23(a); 29- (Interpreted)
10. Public Finance Management Act (cap 412A) sections 8, 96, 148 - (Interpreted)
11. Supreme Court Rules, 2012 (9B Sub Leg Repealed) rule 31(1) - (Interpreted)

### Advocates

None mentioned



## JUDGMENT

### A. Introduction

1. Before this court are two appeals, Petition No 24 of 2019 dated July 12, 2019, and Petition No 27 of 2019 dated July 17, 2019 both filed on July 18, 2019. The appeals are brought pursuant to article 163(4)(a) of the Constitution and rule 31(1) of the Supreme Court Rules, 2012, (now repealed), challenging in part the judgment and orders of the Court of Appeal (Makhandia, Musinga, Murgor, Odek & S Ole Kantai, JJA) in Civil Appeal No 204 of 2015. By an order of this court dated February 19, 2020, the appeals were consolidated, with Petition No 24 of 2019 as the lead file. The consolidation of the two appeals, with the former being the lead file, turns the Council of Governors & 6 others, into respondents even though they were initially petitioners.

### B. Background

#### i. At the High Court

2. On February 8, 2014, the Senate Committee on County Public Accounts and Investments summoned fifteen County Governors to appear before it to answer questions on County financial management. These questions had been raised by the Auditor General in his 2012/2013 financial year report. Several County Governors appeared before the Committee save for four who expressly declined to honor the summons. The four Governors instead filed Petition No 8 of 2014, *International Legal Consultancy Group v the Senate and the Clerk of the Senate* before the High Court in Kerugoya challenging the Senate's summons. On April 16, 2014, the trial court found that the Senate was well within its constitutional mandate to issue the summons.
3. Consequently, the Senate issued fresh summons to the Governors, requiring them to appear before the Committee on August 26, 2014. However, Governor Isaac Ruto of Bomet County, William Kabogo of Kiambu County, Mwangi wa Iria of Murang'a County and Jack Ranguma of Kisumu County declined to honor the summons despite the Court Orders. This prompted the Senate to pass a resolution, in accordance with section 96 of the Public Finance Management Act, recommending that, the Cabinet Secretary, Treasury halts the transfer of funds to the concerned County Governments and the Controller of Budgets withholds the approval of withdrawal of public funds by the said County Governments.
4. Aggrieved, the Governors filed a second Petition, No 413 of 2014, *Council of Governors & 6 others v the Senate*, seeking the following declarations: that,
  - a. Under article 6(2) of the Constitution, the Senate could not exercise its powers under article 125 in a manner that cripples County Governments;
  - b. The Senate is bound by the provisions of article 189(1) of the Constitution and must perform its functions and powers in a manner that respects the County functional, institutional and constitutional status;
  - c. Under articles 96 and 226(2) of the Constitution and section 148 of the Public Financial Management Act 2012, the Senate could not summon governors to personally appear before it to answer questions of County government finances;
  - d. The Senate is bound by the procedures and requirements of the Public Finance Management Act in the discharge of its oversight powers;



- e. Under articles 96 and 226(2) of the Constitution and section 148 of the Public Financial Management Act, only members of the Executive Committee or the Chief Officers responsible for finance can appear before the senate or any of its Committee to answer any county government finances queries;
  - f. Under articles 6(2), 96, 174, 185(3) and 226(2) of the Constitution, the senate cannot summon a County accounting officer to answer questions of county financial management, at the first instance, but must first allow the oversight and legislative mechanisms at the County level as the two levels of government are separate and distinct;
  - g. The intention of articles 6(2), 96, 174, 185(3), and 189 of the Constitution, within the meaning of articles 226(2) and 96(4) of the Constitution, the Senate's oversight role over nationally collected revenue to counties is not identical to the county assembly's oversight over the executive;
  - h. The intention of articles 96(4), 185(3) and 226(2) of the Constitution, the senate's power is limited to oversight over national agencies which manage national revenue allocated to counties such as the National Treasury;
  - i. Articles 6(2), 189(I), 174 and 96(4) of the Constitution, as read with the article 185(3) of the Constitution, the County Assembly is the sole organ that undertakes an oversight authority over the County Executives;
  - j. The Senate can only exercise its powers under article 125 of the Constitution to scrutinize county financial and other records for purposes of determining an impeachment, intervention, suspension, or for purposes of developing national legislation necessary for more prudent management of finances at the county level;
  - k. 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. Stoppage of funds to a county public entity can only in accordance with article 225 of the Constitution;
  - m. Permanent injunctions restraining the Senate from summoning County Governors to appear before it to answer questions on county public financial management;
  - n. Permanent injunctions restraining the Senate from summoning accounting officers at the County level to appear before it to answer questions on county public finance management; and
  - o. an order of certiorari to quash the Senate's Resolution issued on August 7, 2014 directed to the National Treasury and the Controller of Budget.
5. The court framed five issues for determination: whether the petition was competent and whether the court had jurisdiction to determine it; whether the Senate has the mandate to summon County Governors to answer queries raised by the Auditor General; whether the resolution to the National Treasury and the Controller of Budget by the Senate withdrawal of public funds by Counties was/is constitutional; whether Governors can be lawfully held accountable for transactions in the financial years during which the defunct local authorities together with the Transition Authority (in line with the Functions under section 7 of the Transition to Devolved Governments Act 2012) were in-charge of County Resources; and what reliefs (if any) are available to the parties.



6. In a judgment delivered on June 4, 2015, the High Court (Lenaola, M Ngugi & Odunga, JJ (as they then were)) granted the following declarations:
  - a. Resonating the intention of article 96 of the Constitution and 226(2) of the Constitution of Kenya and section 148 of the Public Finance Management Act, 2012, it is proper, legal, and constitutional for Members of the Executive Committee responsible for finance and the Chief Officers 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.
  - b. The Senate does not have sole constitutional powers to direct the National Treasury and Controller of Budget not to release funds to Counties without following the provisions of article 225 of the Constitution;
  - c. Stoppage of funds to a County public entity can only be done by following the provisions of article 225 of the Constitution; and
  - d. An order or *certiorari* to quash the resolution of the Senate issued on August 7, 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.
7. On the issue of the competency of the petition, the court relied on article 156(1) of the Constitution and section 5(1) of the Attorney General Act to determine that Constitution allows the Attorney General the right to represent the National Government in court proceedings where it has been sued, but does not stipulate that the Attorney General must be joined in all instances where any organ of the National Government has been sued. The court noted that section 12(1) of the Government Proceedings Act was enacted under the retired Constitution, is subject to the Constitution as the supreme law of the land, and any inconsistency could not stand to the extent of that inconsistency. On the issue of failure to issue 30 days' notice of the intention to sue to the Attorney General, it was the court's finding that no prejudice had been suffered as the Senate had entered appearance in its own name and the failure did not impair or impede the cause of justice. The court noted that any rule of procedure that violates a party's fundamental right and freedom was not sound.
8. On whether the *Privileges Act* and Senate immunity to legal proceedings limits the court's jurisdiction, it was opined that the Constitution binds all persons and all State organs at all levels of Government. It was the court's further finding that it had the power to enquire into the constitutionality of the actions of the Senate notwithstanding the privilege accorded to its members. That finding was fortified by the principle that the Constitution is the supreme law and the Senate must function within the limits prescribed by the Constitution. The trial court determined that under the doctrine of separation of powers, Parliament as a distinct and independent organ is entitled to exercise its mandate without undue interference from other arms of Government, however, when any of the State organs steps outside its mandate, the courts would not hesitate to intervene in exercise of its powers to interpret the Constitution, and to safeguard, protect and promote its provisions in exercise of its supervisory powers under article 165(3) of the Constitution.
9. As to the place of the privileges and immunities provided for under article 117 and sections 12, 14, 15 and 29 of the Privileges Act, the court determined that the sections were enacted under the repealed Constitution. Section 7 of the sixth schedule to the Constitution provides that any law in existence before the promulgation of the Constitution 2010 must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution 2010. In that



regard, the court determined that the provisions of the Privileges Act are applicable to the Senate to the extent stipulated by section 7 of the sixth schedule.

10. On the issue as to whether the appeal was *res judicata*, the court reasoned that the parties in the petition were different from those in Kerugoya HC Constitutional Petition No 8 of 2014; that although the main issue for determination by the courts was whether the summons issued by the Senate were constitutional, new issues had been placed before it for determination; and that the general rule was that *res judicata* is applied sparingly in constitutional matters. The court determined that the question of the Senate's powers to question Governors with regard to financial management, as well as the constitutionality of the Senate's resolution directing the Controller of Budget to suspend withdrawal of funds had not been settled.
11. On the role of Senate, the court held that under the provisions of article 95(4)(c) of the Constitution, the National Assembly has the mandate to exercise oversight over national revenue and expenditure. It held that the Senate is the organ that relates with the National Government at the national level over County interests, and therefore has oversight powers over national revenues allocated to Counties. As to the County Assemblies' power to exercise oversight over County funds under article 185(3) of the Constitution, it was determined that this mandate is limited in scope and its application to the County Executive Organs and does not extend to the national revenue as provided under articles 95(4)(c), 96(3) and 226(2) of the Constitution.
12. On the scope, extent and nature of the Senate's oversight role, the court determined that the oversight entails a procedural and substantive function. Procedural oversight involving the process leading to division and sharing of national revenue between the National and County Governments as envisaged under articles 202 and 203 of [Constitution](#) and substantive oversight ensuring that the revenue so allocated has been disbursed to the Counties and spent in accordance with the law.
13. As to whether the Senate can summon Governors to answer questions on County Public Finance Management, the trial court found that the Senate's mandate and role under section 8 of the [Public Finance Management Act](#), is wide in scope including, receiving reports, examining the financial statements and documents as submitted to it, and thereafter taking appropriate action including recommendations on the accountable expenditure of public finances from the national revenue allocated to each County.
14. It determined that pursuant to article 125 of the [Constitution](#), in examining these financial statements and documents, the Senate or its Committees has the power to summon any person to appear before it for purposes of giving evidence or providing information. It reasoned that as the Chief Executive Officer, the role of the Governor under section 30(3)(f) of the [County Governments Act](#) is critical in fiscal management at the County level. However, it was clarified that governors may appear with such officers as they deem necessary to answer questions under consideration.
15. Consequently, the court determined that the resolution passed by the Senate directing the National Treasury and Controller of Budget not to release funds to Counties was unconstitutional. It however held that by virtue of article 225 of the [Constitution](#) and section 96 of the [Public Finance Management Act](#), the Cabinet Secretary responsible for matters of finance has the mandate to stop the transfer of funds to a State organ or a public entity, with the approval of Parliament and in accordance with the circumstances and the procedure established under section 92 to 99 of the [Public Finance Management Act](#). The court further held that the Senate, in exercise of its oversight role, lacks the power to direct the Cabinet Secretary to stop the transfer of funds. It was the court's further finding that the Controller of Budget under article 228(4) of the [Constitution](#) cannot approve any withdrawal from a public fund



unless satisfied that the withdrawal is authorized by law, and conversely, it was held that the Controller of Budget cannot stop a withdrawal unless such stoppage is also authorized by law.

16. On the last issue as to whether governors can be held accountable for transactions in the financial year during which the defunct local authorities together with the Transition Authority were in charge of County resources, the court determined that there was no evidence that any of the four County Governments had taken over assets and liabilities of the defunct local governments. The court opined that to call upon any Governor to answer questions on the financial affairs of local authorities during the financial year 2012/2013 which fell in Phase One of the transition period, would be an error on the part of the Senate. It directed that such questions ought to be addressed to the transition authority which had however not been joined as a party.

## ii. At the Court of Appeal

17. Aggrieved, the Council of Governors and the five Governors lodged Civil Appeal No 204 of 2015, premised on the grounds that the learned Judges erred in:
  - i. Interpreting article 96 of the Constitution by; failing to consider or give effect to the provisions of articles 6(2) and 189 of the Constitution that affirm, the two levels of Government are distinct and therefore the Senate had no jurisdiction to summon Governors;
  - ii. Holding that article 185(3) of the Constitution is limited in scope and application as regards the national revenue allocated to Counties;
  - iii. 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;
  - iv. 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;
  - v. Holding that there is no distinction between the meaning of the term accountable as provided for in article 226(2) and oversight as provided for in article 96 of the Constitution;
  - vi. Failing to properly distinguish the oversight roles of the Senate and those of the County Assemblies over revenue allocated to Counties; and holding that an accounting officer of a County is accountable to the Senate for the management of County resources; failing to consider article 174(i) of the Constitution when interpreting the powers of the Senate over the management of County resources;
  - vii. Failing to appreciate the constitutional structure and design of devolution thereby reaching the wrong conclusion on the mandate and jurisdiction of the Senate; and
  - viii. Failing to apply the correct principles when interpreting the Constitution.
18. In response, the Senate filed a cross appeal on the grounds that: the learned Judges erred in law in:
  - i. Issuing an order of *certiorari* to quash a resolution of the Senate issued on August 7, 2014;
  - ii. Holding that the Senate has no power to direct stoppage of funds to a County Government;
  - iii. 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;



- iv. 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;
  - v. Holding that a litigant under the 2010 Constitution need not comply with the mandatory provisions of section 12(I) of the Government Proceedings Act; and
  - vi. In citing with approval, the decision in the case of Kenya Bus Service Ltd & Another v Minister for Transport and 2 others; [2021] eKLR and finding that section 13A(1) of the Government Proceedings Act violates article 48 of Constitution.
19. In a Judgment delivered on June 7, 2019, the appellate court identified the following six issues for determination:
- i. Whether the High Court’s jurisdiction was ousted by the failure of the appellants to comply with sections 12(1) and 13A 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; and
  - 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 Local Authorities.
20. The learned judges considered the parties’ pleadings, written and oral arguments, and dismissed both the appeal and cross-appeal for lack of merit. The appellate court upheld the High Court on all issues, save for the issue concerning the defunct local governments, regarding which, it found the trial court lacked jurisdiction to determine. It reasoned that this was not a matter competently before the trial court, as the parties had not canvassed it.
21. On jurisdictional and procedural issues, the appellate court determined that the appellant’s failure to comply with the requirements of sections 12(1) and 13A of the Government Proceedings Act, did not render the suit incompetent. The learned Judges observed that the effect of section 13A had been determined by the High Court (Majanja, J) in Kenya Bus Service Ltd & another v Minister for Transport & 2 others; HC Civil Suit No 504 of 2008, [2012] eKLR, wherein the court had held that the said section was inconsistent with article 48 of the Constitution. It noted that this decision had not been overturned on appeal.
22. Regarding the issue of application of the doctrine of parliamentary privilege and immunity, the appellate court held that notwithstanding the doctrine, where parliamentary proceedings and decisions violate the Constitution or the statutes, a court of law ought to lift the veil of parliamentary privilege to stop the unconstitutional excesses.
23. As to whether the Senate is constitutionally mandated to issue summons against Governors and County accounting officers, the learned Judges answered in the affirmative. This conclusion was arrived at given the fact that the Governor is not only accountable for national revenue received by the County, but is also the Chief Executive of the County under article 174(4) of the Constitution. The



court further observed that the Governor is also accountable for the County's resources under section 30(3)(f) of the County Government Act. Moreover, it determined that since the Senate is charged with the responsibility of oversight over national revenue allocated to Counties under article 96(3) of the *Constitution*, the Governor could be called upon by the former to answer queries in connection regarding the use of such revenue.

24. However, the court noted that there may be instances, when the Governor may not be in a position to provide sufficient information on intricate financial issues. In such instances, opined the learned judges, article 179(6) of the *Constitution* allows members of the Executive Committee to accompany the Governor so as to furnish the Senate with the requisite information.
25. On the Senate's oversight functions, the appellate court held that a plain reading of article 96 of the *Constitution*, meant that such oversight was limited to national revenue allocated to the County, and not such other revenue generated by the County itself. The oversight responsibility over internally generated revenue, lies with the respective County Executive Committees. The appellate court agreed with the High Court in this regard.
26. As to whether the Senate has the power to stop the transfer of funds to a County Government, the appellate court held that the Senate has no such powers as the same are vested in the Cabinet Secretary for Finance. In the instant case, the court was of the view that the Senate had overstepped its powers by purporting to stop the transfer of funds to certain Counties. Such power could only be exercised by the Cabinet Secretary upon advice by the Controller of Budget.

### **(iii) At the Supreme Court**

27. Aggrieved by this Judgment, the appellants filed the two appeals before this court, citing several grounds of appeal. The appellant in Petition No 24 of 2019 relied on the following summarized grounds, that the judges of appeal erred in law in holding:
  - a. That article 96(3) of the *Constitution* restricts the Senate's oversight role to the supervision of national resources allocated to Counties, and does not authorize the senate to oversee any other County resources;
  - b. That the *Constitution* makes provision for 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 retain oversight over revenues generated within the County; and
  - c. That since article 185(3) vests the County Assemblies with an oversight role over the County Executive Committee and any other County executive organs, the County Assemblies are mandated to oversee the management and expenditure of locally generated revenues through County executive organs within the County;
28. It seeks the following declaratory orders; that:
  - a. Given that under article 207 of the *Constitution* there is only one Revenue Fund for each County Government, it is not possible, practical and constitutionally pragmatic to separate revenue that is nationally allocated from locally generated revenue for the purposes of oversight;
  - b. The Senate has oversight role over revenue locally generated in the County and its oversight role is not limited to 'national revenue allocated to the County Governments;



- c. The County Assemblies have oversight role over national revenue allocated to the County Governments and the role of the County Assemblies is not limited and restricted to revenue locally generated within the County; and
  - d. It is constitutionally permissible for a County Governor to appear before the County Assembly in the exercise of its oversight authority over expenditure of revenue whether nationally or locally generated.
29. The appellants in Petition No 27 of 2019 premised their appeal on the following summarized grounds, that the learned Judges erred in law in:
- i. Failing to understand or distinguish the oversight structure by the Senate and the County Assemblies over national resources allocated to Counties;
  - ii. Misinterpreting the provisions of articles 95(4)(c), 96(3) and 226(2) of the Constitution;
  - iii. Failing to find that County Assemblies have exclusive and dominant mandate over resources allocated and generated by Counties, contrary to articles 226(2) and 189 of the Constitution;
  - iv. Finding that there are two levels of oversight at the national level where the Senate commands oversight over national revenues, and at the County level where the county assemblies retain oversight over revenues generated within the County;
  - v. Failing to address the provisions of article 207 of the Constitution as read with section 8 of the County Governments Act, which provides that County Assemblies are entities that approve the budget and expenditure and therefore cannot be excluded from the oversight of all County Governments revenue;
  - vi. Failing to find that under article 96(3) of the Constitution, the senate has no mandate to oversight county expenditure;
  - vii. Finding that the Constitutions intended to mandate the senate to participate in ensuring that County Governments received and accounted resources received by the national Government;
  - viii. In failing to properly address the provisions of section 85A of the Elections Act as pertaining discrimination of appeals of members of the County Assembly;
  - ix. Adopting an interpretation that creates confusion in the administration and oversight of county revenue and expenditure jurisprudence and occasions an absurdity to the development of the framework of devolution;
  - x. Finding that the accounting officer of a County Government is accountable to the Senate on the management of county resources instead of the County Assembly; and
  - xi. Finding a distinction of revenue allocated to counties and generated by the counties and that there is a clash between the Senate and County Assemblies oversight authority;
30. They seek the following Orders; that, the appeal be allowed; the Judgment of the Court of Appeal be set aside and substituted with the Orders allowing the appeal; and costs of the appeal.



## C. Parties Respective Submissions

### i. Appellant's case

31. The appellant's written submissions, list and bundle of authorities, are dated October 12, 2020 and filed on even date. It is the appellant's submission that the only issue for determination is, whether article 125(1) of the Constitution grants power and authority to the Senate or any of its Committees to summon Governors as part of the exercise of its oversight role.
32. It contends that a harmonized and holistic interpretation and application of the Constitution, as required by article 259(1)(a) to (d) of the Constitution, leads to the conclusion that the Senate has the power to summon Governors or any other person. It urges that a Governor once summoned, has the duty and obligation to obey the summons, and to give evidence or provide any information as requested.
33. The appellant further submits that the powers to summon directly flows from the Constitution, and that a Governor as a state officer, is constitutionally obligated under chapter six, and the Leadership and Integrity Act, 2012 to promote public confidence in the integrity of the office and to uphold the principles of good governance set out under article 10 of Constitution. It is therefore urged that the Senate's power to summon Governors is not limited, restricted or otherwise qualified by the existence of the two levels of Government or the concept of devolution as contended by the respondents. It relies on the Court of Appeal's decision in Council of Governors & 5 others v Senate & another [2019] eKLR and the High Court's decision in International Legal Consultancy Group v Senate & Another [2014] eKLR to make the case that the Senate can constitutionally issue summons requiring the attendance of County Governors.
34. The appellant argues that section 23(a) of the Privileges Act makes it a criminal offence to disobey summons issued by any House of Parliament. Additionally, the appellant submits that any disregard of summons by Parliament constitutes punishable contempt by a court of law. It is also urged that in accordance with sections 22(b) and 24 of the Civil Procedure Act and order 16 rules 1 and 10(3) of the Civil Procedure Rules, Parliament enjoys the same powers as the High Court to enforce attendance, examine under oath and to compel the production of documents. The Senate cites Erskine May's Treatise on 'The Law, Priviledges, Proceedings and Usage of Parliament' to further persuade the court.
35. In agreement with the Court of Appeal, the appellant submits that being the County's Chief Executive, a Governor is definitely susceptible to summons by the Senate. The Governor appoints the County's Executive Committee which in turn designates the County Finance Officer. Both the Committee and the Officer are directly answerable to the Governor. As such, submits the appellant, the Governor is obliged to appear before it when summoned, to not only respond to questions, but also provide any information or evidence regarding the use of County resources.
36. Regarding the extent of the appellant's oversight authority, it is submitted that under article 96(3) of the Constitution, the Senate is the only constitutional organ vested with oversight authority over the portion of the national revenue allocated to Counties, hence no legislation can constitutionally deprive it or limit this oversight role. The appellant disagrees with the Court of Appeal's reasoning that the oversight role of the Senate is limited to the portion of revenue that is allocated at the national level and does not extend to locally generated revenue. They submit that it is impractical and constitutionally impossible to separate these two revenues in view of article 207 of the Constitution, which establishes only one common depository, that is, the County Revenue Fund. It urges that the appellate court ought to have applied the rule of harmony, taking into consideration articles 207, 218, 228(4)(5)(6)



and 229(7) and (8) of the Constitution and analyzed the full implication of demarcating the oversight roles of the Senate and the County Assemblies.

37. In conclusion, it is submitted that both the Senate and the County Assembly have the legal power and authority to oversight all the funds credited to the Counties' Revenue Fund and an effective oversight requires that the two organs concurrently oversight both nationally and locally generated funds.

## ii. 1<sup>st</sup> to 6<sup>th</sup> Respondents' Case

38. The respondents' written submissions, list and bundle of authorities are dated September 28, 2020 and filed on even date. They address the Court on the single issue, whether the Senate has an exclusive oversight role over national revenue allocated to counties, to the exclusion of County Assemblies. They rely on the definition of 'oversight' as enunciated by the High Court in Judicial Service Commission v Speaker of the National Assembly & 8 others [2014] eKLR; wherein the court had cited with approval, a Report by the South African Legislatures' Secretaries' Association (SALSA) titled "Oversight Model of the South African Legislative Sector". The said Report defines "Oversight" as entailing 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.
39. It is their submission that the Court of Appeal erred in holding that County Assemblies do not have any oversight role over national revenue allocated to Counties. They also contend that the appellant has misinterpreted the provisions of article 96(3) of the Constitution, to mean that the Senate has powers to intervene in the County's financial autonomy. It is their contention that the drafters of the Constitution intended to have two levels of Government and two levels of oversight; by the Senate at the National Government and the County Assemblies at the County level. They urge that the County Assemblies have exclusive oversight role over locally generated revenues in a County Government pursuant to article 226(2) of the Constitution.
40. The respondents further contend that under article 96(3) of the Constitution, the Senate's oversight role over national revenue allocated to County Governments is unclear in light of the provisions of Article 185(3) which establishes County Assemblies whose primary role is to oversight County Executives. It is the respondents' further argument that the Senate's oversight role is limited to soft supervision, since it does not have direct enforcement mechanisms unlike County Assemblies which can refuse to approve appointments, budgets, plans or legislations. To persuade the court, they cite Dr Mutakha Kangu in his book, Constitutional Law of Kenya on Devolution.
41. It is further urged that article 185(3) of the Constitution neither mentions nor contemplates the sharing of this constitutional oversight mandate with the Senate. It is further argued that if the Senate is left to oversee the national revenue allocated to County Governments, the oversight powers will conflict with the oversight powers constitutionally conferred on other institutions, to enforce fiscal and financial discipline by County Governments such as the Controller of Budget, Auditor General and the County Assemblies.
42. Therefore, the Court is urged to holistically and in accordance with article 259 of the Constitution, interpret articles 96(3) and 185(3) of the Constitution, to avoid an overlap of the oversight authority. To achieve this, the respondents urge the court to answer two fundamental questions, first how the Senate's oversight power over Counties fits within the overall constitutional framework, and second, whether the Senate's oversight role can be rationalized with other seemingly conflicting provisions. They rely on this court's decision in In the Matter of Kenya National Commission on Human Rights Reference 1 of 2012 [2014] eKLR, and cite Dr Conrad Bosire's Article, Interpreting the power of



*the Kenyan Senate to Oversee National Revenue Allocated to the County Governments: Building a Constitutionally Tenable Approach* to urge for a holistic approach to constitutional interpretation.

43. They also urge this court to consider the provisions of article 207 of the *Constitution* which provides for the establishment of a single County Revenue Fund for each County. They contend that it is impossible to separate locally generated and nationally allocated funds. They further contend that since County Assemblies approve County Government budget and expenditure, they cannot be excluded from the oversight of all County Government revenues.
44. In conclusion, the 1<sup>st</sup> to 6<sup>th</sup> respondents submit that by virtue of articles 6 and 189(2) of the *Constitution*, the two levels of Government are called upon to conduct their mutual relations on the basis of consultation and cooperation. They argue that the Senate, before summoning Governors, should consult and seek mediation on issues regarding the expenditure of the nationally allocated revenues. They urge that even though the Senate, pursuant to article 125 of the *Constitution*, has the power to summon any person including Governors for purposes of giving evidence or information, that power should not be exercised arbitrarily or capriciously.

### iii. 7<sup>th</sup> Respondent's Case

45. The 7<sup>th</sup> respondent submits that the primary issue for determination is the role of the Senate and the County Assemblies in the oversight of national revenue allocated to County Governments. To this end, he entirely associates himself with the 1<sup>st</sup> to 6<sup>th</sup> respondents' submissions and urges this court to provide clarity on the interpretation of article 96(3) regarding the powers of oversight by the Senate and the County Assemblies. He urges that the principle of separation of powers must be maintained at different levels of Government. This principle, submits the 7<sup>th</sup> respondent, extends to the power of oversight over county revenue.

## D. Analysis

46. After considering the parties' respective cases, based on their pleadings, submissions and list of authorities, we have identified three issues whose determination will conclusively dispose of this appeal. The said issues are as follows:
  - i. Whether the Senate is constitutionally mandated to summon County Governors in exercise of its oversight role pursuant to article 96(3) of the *Constitution*
  - ii. Whether the Senate's role of oversight is limited to the counties' nationally allocated revenue or extends to locally generated revenue
  - iii. Whether a County Assembly oversight role is limited to the County's locally generated revenue or extends to the nationally allocated revenue.

### a. On Senate's Power to Summon Governors

47. Both the Court of Appeal and High Court held that the Senate, is vested with powers to summon a County Governor either directly or through one of its Committees, to answer any question or provide any information regarding the expenditure and management of County revenue. The two superior courts based their decisions on the premise that being the County's Chief Executive, the Governor is responsible for the management of County revenue and all other resources. It is therefore only logical that he or she is accountable to Senate, which is mandated to oversight such revenue under article 96 (3) of the *Constitution*.



48. The role of the Senate is addressed by article 96 of the *Constitution*. Towards this end, sub-article (1) thereof provides that:

“the Senate represents the counties, and serves to protect the interests of the counties and their governments.”

Sub-article (2) further provides that:

“the Senate participates in the law-making function of Parliament by considering, debating and approving bills concerning counties, as provided in articles 109 to 113”.

Critically, sub-article (3) provides that:

“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.”

49. The foregoing constitutional provisions as read together with articles 110 to 112, leave no doubt that the Senate is established to perform fundamental roles of governance concerning Counties. These are legislative, budgetary, and oversight. It has been granted considerable latitude in ensuring that County Governments operate at optimal and within accountability standards, if the objectives of devolution are to be realized. There is no way by which the Senate can perform such an important role without having the powers to summon a Governor and to require him/her to provide answers and offer explanations regarding the management of the County finances and related affairs. Without such power, the Senate would not be able to “protect the interests of the Counties”, nor would it be able to exercise effective oversight over national revenue allocated to Counties”

50. Article 96(3) of the *Constitution* is buttressed by section 8 of the *Public Finance Management Act* No 18 of 2012, which provides for the responsibilities of the Senate Budget Committee in public finance matters as follows; (*inter-alia*)

“(1) The Committee of the Senate established to deal with budgetary and financial matters has responsibilities for the following matters, in addition to the functions set out in the Standing Orders—

...

- c. examine financial statements and other documents submitted to the Senate under Part IV of this Act, and make recommendations to the Senate for improving the management of government’s public finances; and
- d. monitor adherence by the Senate to the principles of public finance set out in the *Constitution*, and to the fiscal responsibility principles of this Act.”

51. For the Senate to perform its functions as stipulated in section 8 of the *PFMA Act*, it must incorporate the input of the respective Chief Finance Officers of the Counties, who are in turn appointed by the Governor. The office that is ultimately answerable to the Senate, is that of the Governor. In view of the foregoing, we have little difficulty in agreeing with the Court of Appeal, in its conclusion that the Senate is constitutionally empowered, to summon Governors to appear before it or any of its committees for purposes of answering questions and providing requisite information. Having said



that, we hasten to add that in appearing before Senate, there is nothing to stop a Governor from going with his/her technical team from the County Executive. By the same token, if the Senate is of the view that the questions to be answered or information to be provided do not need the personal input of the Governor, it may restrict its summons to the relevant County official or Executive Committee.

**b. Whether the Senate’s oversight role is limited to the Counties’ Nationally Allocated Revenue or whether it extends to Locally Generated Revenue**

52. Regarding the extent of Senate’s oversight role, the Court of Appeal held that the same is limited to the nationally allocated revenue in view of article 96(3) of the Constitution. The appellant however submits that its oversight role is not limited to the nationally allocated revenue, but extends to revenue that is locally generated by Counties. The gist of its argument is that article 207 of the Constitution establishes only one depository for County revenue, which is the County Revenue Fund. This being the case, argues the appellant, it would be constitutionally impossible to separate the two types of revenue for purposes of oversight. Therefore, in its view, both the Senate and County Assemblies have the constitutional mandate to oversee all County revenue, whether nationally allocated or locally generated.
53. On the other hand, the respondents submit that the Senate’s oversight role does not extend to locally generated revenue. According to them, such oversight role regarding this type of revenue, is the exclusive preserve of County Assemblies. They base their contention on the premise that to involve the Senate in the oversight of County generated revenue, would offend the doctrine of separation of powers. It is their submission that the devolved structure of Government under the 2010 Constitution jealously guards the local autonomy of Counties. As such, if Senate were to have powers of oversight over locally generated revenue, that would amount to an unconstitutional intrusion into the local affairs of Counties. The respondents also argue that given the fact that it is the County Assemblies that approve County budgets, they cannot be excluded from the oversight of nationally allocated revenue. We note that the appellant holds the same view regarding this particular issue.
54. It is our view that in order to answer the question before us, it is necessary to revisit a number of constitutional provisions that address the related questions of County revenue, legislation concerning County finances, and the management of County finances. This exercise should enable us to develop a holistic construction and purposive interpretation of the relevant provisions. Towards this end, we have already cited article 96(3) of the Constitution, which clearly confers powers upon the Senate to oversee nationally allocated County revenue. We do not therefore intend to belabour the question whether such oversight role reposes in the appellant.
55. Also, of relevance is article 185(3) of the Constitution which provides that:
- “a County Assembly, while respecting the principle of separation of powers, may exercise oversight over the County Executive Committee and any other County executive organs”
56. This provision, although permissively framed, clearly confers powers upon County Assemblies, to oversee the County Executive. This therefore means that among other things, County Assemblies can question the County Executives’ management of County affairs, including the use of revenue. What the County Assemblies cannot do, is to usurp the role of the County Executive under the guise of oversight, for that would offend the principle of separation of powers. The County Assemblies cannot for example, take over the role of implementing Government policies and projects. Their role is to provide checks and balances to the County Executives so as to promote transparency and accountability in the manner County affairs are run.



57. By the same token, article 96(2) of the *Constitution*, which confers legislative powers upon Senate regarding bills concerning County Government, has to be read together with articles 109 to 113. Article 110 defines “a Bill concerning County Government as meaning:
- a. a Bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule;
  - b. a Bill relating to the election of members of a county assembly or a county executive; and
  - c. a Bill referred to in chapter twelve affecting the finances of county governments.
58. These provisions entrust the Senate with the mandate of legislating for County Governments in fields that span the entire spectrum of governance. With regard to county finances, it is instructive to note that the foregoing provisions do not limit Senate’s legislative power to the nationally allocated revenue.
59. Then there is article 207(1) of the *Constitution* which provides that:
- “there shall be established a Revenue Fund for each county government, into which shall be paid all money raised or received by or on behalf of the county government except money reasonably excluded by an Act of Parliament” [Emphasis added].
60. Both parties have submitted that this provision makes it impossible for each of them to limit their oversight to either the nationally allocated or the locally generated revenue. It is a submission with which we can hardly disagree. A holistic reading of all the relevant provisions of the *Constitution* and the law, put in context, leads us to the conclusion that both the Senate and County Assemblies have the power to oversight County revenue whether nationally allocated or locally generated. The fact that County revenue is locally generated does not remove it from the purview of Senate oversight. Such revenue still falls within the rubric of “public finance” whose use must remain under the radar of scrutiny and oversight by the State organs established for that purpose. Similarly, the fact that County revenue is nationally allocated does not place it beyond the oversight of County Assemblies. Otherwise on what basis would the latter approve budgets and scrutinize their implementation?
61. The purpose of the *Constitution* is to entrench good governance, the rule of law, accountability, transparency, and prudent management of public finances at both levels of Government. Such grand purpose cannot be served if either the Senate or County Assemblies begin to develop “centres of oversight/influence”. In this regard, the County Assemblies provide the first tier of oversight while the Senate provides the second and final tier of oversight.
62. Additionally, we do not see how, by exercising its oversight role in the manner we have determined, Senate can be said to be violating the principle of Separation of Powers. Nor do we perceive a potential danger, of encroachment upon the mandate of the independent offices of the Controller of Budget or the Auditor General as contended by the respondents. What Senate cannot do under the guise of oversight, is to usurp the County Executives’ mandates or to purport to supervise County Assemblies.
63. It is obvious that the foregoing conclusions are at variance with the holding by the Court of Appeal regarding this particular issue. We do not see the need to consider the third issue as the same has been comprehensively disposed of in the nature of our analysis and conclusions deriving therefrom.

## E. Orders

64. The following declarations are inevitable:



- i. In the performance of its oversight role over County revenue, the Senate has powers to summon County Governors to answer any questions or provide any requisite information;
- ii. The Senate’s oversight authority is not limited to nationally allocated revenue but extends to locally generated revenue by the Counties;
- iii. County Assemblies have the power of first tier oversight over County Government revenue, whether nationally allocated or locally generated;
- iv. No orders as to costs.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF OCTOBER, 2022.**

.....

**M. K. KOOME**

**CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT**

.....

**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

.....

**S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

.....

**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

.....

**W. OUKO**

**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR**

**SUPREME COURT OF KENYA**

