



**In re Application by the County Assemblies of Kericho and Nandi Counties for an Advisory Opinion Under Article 163(6) of the Constitution of Kenya & In re Application by the Governor, Makueni County for an Advisory Opinion Under Article 163(6) of the Constitution the Governor, Makueni County (Reference 3 & 4 of 2020 (Consolidated)) [2021] KESC 61 (KLR) (16 March 2021) (Ruling)**

*In the Matters of an Advisory Opinion under Article 163(6) of the Constitution [2021] eKLR*

Neutral citation: [2021] KESC 61 (KLR)

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

**REFERENCE 3 & 4 OF 2020 (CONSOLIDATED)**

**PM MWILU, AG.CJ & AG. P, MK IBRAHIM, SC  
WANJALA, NS NDUNGU & I LENAOLA, SCJJ**

**MARCH 16, 2021**

**IN THE MATTER OF AN APPLICATION BY THE COUNTY ASSEMBLIES  
OF KERICHO AND NANDI COUNTIES FOR AN ADVISORY OPINION  
UNDER ARTICLE 163(6) OF THE CONSTITUTION OF KENYA;**

**AS CONSOLIDATED WITH**

**REFERENCE 4 OF 2020: IN THE MATTER OF AN  
APPLICATION BY THE GOVERNOR, MAKUENI COUNTY  
FOR AN ADVISORY OPINION UNDER ARTICLE 163(6) OF  
THE CONSTITUTION THE GOVERNOR, MAKUENI COUNTY**

**Principles governing the exercise of the Supreme Court's advisory opinion jurisdiction.**

*The Supreme Court laid out the principles on the exercise of the Supreme Court's advisory opinion jurisdiction.*

Reported by Beryl Ikamari

***Jurisdiction*** - jurisdiction of the Supreme Court - advisory opinion jurisdiction - principles governing the exercise of advisory opinion jurisdiction - effect of filing an advisory opinion reference at the Supreme court where matters raised in the reference were under consideration in matters filed at the High Court.

**Brief facts**

The applicants sought an advisory opinion from the Supreme Court with respect to questions relating to proposed amendments to the Constitution through a popular initiative under article 257 of the Constitution. The Supreme Court was to render an advisory opinion in relation to two consolidated references – Reference No 3 of 2020 and Reference No 4 of 2020.

In Reference No 3 of 2020, the question was about the meaning of the term "approval" as related to approval by a county assembly of a constitutional amendment Bill proposed through popular initiative. In that regard, there were various questions raised. The questions included whether the legislative process for such a Bill



was similar to that of all other county assembly legislation in terms of public participation, allowance for amendments by county assemblies and passage by a simple majority. They also raised questions about the legislative process applicable to the Bill at Parliament. Further, they asked questions about how a Bill that had a mixture of issues, some of which required a referendum while others did not, would be handled. They also asked whether the public would have to vote separately for each issue or subject matter raised in the Bill.

Reference 4 of 2020 raised an issue about the meaning of the term "a proposed amendment" as used in article 255(1) and 255(2) of the Constitution. They asked the court to render advice on whether such a Bill should contain one issue or whether it could be an omnibus Bill containing various in related issues. They also asked the court to consider whether the Government at the national or county level or a state organ or a state officer of public officer could initiate such a Bill and use public resources to finance processes related to initiating the Bill. They also asked the court to advise on whether public officers or state offices could be used to collect the signatures referred to in article 257(4) of the Constitution.

The court considered the question as to whether its jurisdiction to render an advisory opinion had been invoked properly.

### Issues

- i. What were the principles governing the exercise of the Supreme Court's advisory opinion jurisdiction under article 163(6) of the Constitution?
- ii. What was the effect of filing a reference for an advisory opinion before the Supreme Court, while High Court matters that raised issues similar to those raised in the reference were pending hearing and determination?

### Held

1. The principles related to the exercise of the Supreme Court's advisory opinion jurisdiction under article 163(6) of the Constitution were the following: -
  - a. For a reference to qualify for the Supreme Court's advisory opinion discretion, it had to fall within the four corners of article 163(6) of the Constitution - it had to be a matter concerning county government. The question as to whether a matter was one concerning county government, would be determined by the court on a case by case basis.
  - b. The only parties that could make a request for an advisory opinion were the National Government, a state organ, or county government. Any other person or institution could only be enjoined in the proceedings with leave of the court, either as an intervener (interested party) or as *amicus curiae*.
  - c. The court would be hesitant to exercise its discretion to render an advisory opinion where the matter in respect of which the reference had been made was a subject of proceedings in a lower court. However, where the court proceedings in question had been instituted after a request had been made to the court for an advisory opinion, the court could if satisfied that it was in the public interest to do so, proceed and render an advisory opinion.
  - d. Where a reference had been made to the Supreme Court and its subject matter was also pending in a lower court, the court could nonetheless render an advisory opinion if the applicant could demonstrate that the issue was of great public importance and it required urgent resolution through an advisory opinion. In addition, the applicant could be required to demonstrate that the matter in question would not be amenable to expeditious resolution through adversarial court process.
  - e. Although no preliminary objection had been raised to challenge the Supreme Court's jurisdiction, the court had to be satisfied that the references met the threshold for purposes of the court's advisory opinion jurisdiction.
2. Reference No 3 of 2020 had applicants who were state organs within the meaning of article 163(6) of the Constitution and they sought an advisory opinion about matters that concerned county



- governments. Similarly, Reference No 4 of 2020 was filed by the Governor of Makueni County and sought an opinion that was about matters that were of concern to county governments.
3. The court would be hesitant to render an advisory opinion with respect to matters that were pending in a lower court. The exceptions to that principle were situations where the matter before the lower court was instituted after the reference or where in the opinion of the court, the matter was urgent and its resolution was in public interest.
  4. There were allegations that the matters raised in the two references were similar to those in seven constitutional petitions pending before the High Court but there was no agreement about that amongst the parties. To determine whether the issues raised at the High Court were similar to those in consideration at the Supreme Court, the Supreme Court had to peruse the High Court records *suo moto*.
  5. The High Court had been moved by the parties under article 165 (d) of the Constitution. They sought a number of far-reaching declarations which could only be made after a rigorous and extensive interpretation of the relevant provisions of the Constitution whose meaning had been called into question. The High Court petitions were filed before the two references that sought the Supreme Court's advisory opinion.
  6. The High Court could not determine the issues before it without venturing into questions that were similar to those that were pending before the Supreme Court. Given the timing of the proceedings before the two courts, there was a distinct possibility that the orders from the courts could be issued at the same time. There was a likelihood that the scenario would cause confusion and anxiety in the public mind and a potential threat to the principles of certainty and finality in judicial pronouncements.
  7. The matters raised before the two courts were of great public importance and they required urgent resolution. The issues before the High Court had not been raised in an adversarial posture such as to embolden the Supreme Court to render an opinion. The High Court was called upon to exercise its original jurisdiction and interpret the Constitution. The Supreme Court saw no justification to usurp the High Court's role as clearly provided for under the Constitution.
  8. The Supreme Court had jurisdiction to render the advisory opinion sought by the parties but declined to exercise discretion in favour of rendering the opinion.

### **Orders**

*The Supreme Court had jurisdiction but it declined to exercise it and allowed the High Court to make the relevant determinations.*

### **Citations**

#### **Statutes**

None referred to

#### **Advocates**

None mentioned



## RULING

### A. Introduction

1. Before this Court are two References seeking an Advisory Opinion in response to a number of questions/issues posed by the applicants. The applications are brought pursuant to the provisions of Article 163 (6) of the Constitution. The said Article provides that:

“The Supreme Court may give an advisory opinion at the request of the national government, any state organ, or any county government with respect to any matter concerning county government.”

2. Reference No. 3 of 2020 is dated 20th November, 2020 and filed on 24th November 2020, while Reference No. 4 of 2020 is dated 30th November 2020, and filed on 2nd December, 2020. The Law Society of Kenya filed an application dated 8th December 2020, on even date, seeking admission as *amicus curiae*.

### B. Background

3. The two References were first mentioned before the Court on 9th December 2020, during which; the Attorney General, the Senate, the National Assembly, and the Independent Electoral and Boundaries Commission, were admitted as necessary participants in the References. The applicants were directed to seek the Attorney General’s advice within seven (7) days; the Attorney General was directed to issue the advice within seven (7) days from the date of receiving the applicants’ request; any party wishing to be enjoined to the References as *amicus* was directed to make a formal application, accompanied with the *amicus* brief, within fourteen (14) days; and Reference No. 3 of 2020 and Reference No. 4 of 2020 were consolidated, with Reference No. 3 of 2020 as the primary file.
4. Subsequently, the applicants sought the Attorney General’s advice via a letter dated 11th December, 2020. The Attorney General issued his advice dated 21st December, 2020 and filed in Court on 22nd January, 2021. Two motions seeking admission as *amici curiae* were also filed. On 25th January 2021, this Court delivered a Ruling admitting the Law Society of Kenya as *amicus curiae*. The Court subsequently mentioned this matter on 25th January 2021, when it dismissed the other two applications seeking admission as *amici curiae*, for having been filed out of time. The applicants were directed to respond to the Attorney General’s advice within seven (7) days thereof. The 3rd applicant (the Governor Makeni County) responded to the Attorney General’s advice on 1st February 2021. The 1st and 2nd applicants (County Assemblies of Kericho and Nandi) filed their submissions on the Reference and in response to the Attorney General’s advice dated 2nd February, 2021 on 3rd February, 2021.
5. The matter was further mentioned on 9th February, 2021 to confirm compliance with the Court’s Directions. At the Mention, the Court admitted the 1st and 2nd applicants’ response to the Attorney General’s advice as having been filed on time; directed the Independent Electoral and Boundaries Commission and any other party wishing to respond to the Reference, to do so, by the 12th February 2021; and directed any party wishing to file a rejoinder, to do so, by the 16th February, 2021. The matter was scheduled for further mention on 19th February, 2021.
6. On 19th February 2021, the Court admitted the Independent Electoral and Boundaries Commission’s submissions filed on 16th February 2021, as having been filed on time and directed the applicants to file



their submissions in response, by 23rd February, 2021. The matter was further scheduled for mention, on the 16th March 2021.

### C. The Issues

7. In Reference No. 3 of 2020 by the County Assemblies of Kericho and Nandi Counties, the applicants seek an Advisory Opinion on the following questions/issues:
  - (a) What does the term “approves” in Article 257(6) of the Constitution mean? More specifically does approval by County Assembly of a Constitutional Amendment Bill proposed through a popular initiative under Article 257 of the Constitution:
    - (i) Require a County Assembly to process the Bill in accordance with the standards of processing and passing of bills of the Assembly, including the mandatory number of times of reading of regular bills of the County Assembly and the attending processes thereto?
    - (ii) Require a County Assembly to undertake adequate public participation in respect of the bill in accordance with Articles 10 and 118 of the Constitution before approval?
    - (iii) Permit a County Assembly to amend the Constitutional Amendment Bill to align with the contribution by Members of the County Assembly as well as to incorporate relevant views received from the public during the process of public participation?
    - (iv) Require passage by simple majority of Members of County Assembly present at the time of voting or; by a vote of not less than half of all members of the Assembly, or; through a vote supported by not less than two-thirds of all members of the County Assembly?
  - (b) What is the process envisaged by the Constitution in regard to Parliament for the consideration of a Constitutional Amendment Bill presented under Article 257 and specifically, Is the procedure stipulated in Article 256 and specifically Sub-article 256(1) through 256(3) the proper and correct procedure that Parliament must use in consideration and passage of the Constitutional Amendment Bill that relates to the popular initiative under Article 257 of the Constitution?
  - (c) What is the requirement of the Constitution in regard to referendum, and specifically:
    - (i) If a Constitutional Amendment Bill contains a mixture of matters/issues some requiring referendum under Article 255 (1) and others not requiring referendum is:
      - (a) the entirety of the bill presented to the people for a vote at a referendum?
      - (b) If only those issues implicating Article 255(1) are presented for a vote at a referendum, is the entirety of the Constitutional Amendment Bill defeated if some or all the issues presented to referendum fail?
    - (ii) If a single Constitutional Amendment Bill proposes to amend numerous provisions of the Constitution, does the Constitution require a single or multiplicity of questions to be presented for vote at the referendum, especially delineated on the basis of:
      - (a) each provision sought to be amended;
      - (b) provisions grouped on the basis of subject matter implicated; or



- (c) on the basis of other objectively articulable criteria that aligns with the Constitutional Amendment Principle of "unity of content"
8. In Reference no. 4 of 2020, by the Governor of Makueni County, the applicant seeks an advisory opinion on the following questions/issues:
- (i) What is meant by the phrase "a proposed amendment" in Article 255(1) and 255(2) and specifically:
    - (a) Does the Constitution require that a "Bill" to amend the Constitution, referred to severally in Article 256 and 257, should only contain one matter/issue of amendment of the Constitution?
    - (b) Relatedly, can "a Bill to amend" the Constitution referred to in Article 256(1) of the "draft bill" to amend the Constitution under Article 257 (3) be in the form of an omnibus bill to amend various unrelated constitutional matters?
  - (ii) Can a government at the national or county level, a state organ, a state or public officer:
    - (a) Initiate a constitutional amendment through popular initiative under Article 257 of the Constitution?
    - (b) If the answer to question 2(a) is in the affirmative, is it constitutionally permissible and especially under Articles 257, 201 (d) and (e), 174, 73, 75 and 10 of the Constitution for a government, state organ, the state or public officer to:
  - (iii) Use government or state resources to support or finance the process initiating (or processes incidental thereto) a popular initiative contemplated in Article 257(1) through (4) and 257(10) & (11) of the Constitution?
    - (a) To deploy state and public officers for purposes of collecting or facilitating the collection of signatures referred to in Article 257(4) of the Constitution?

#### **D. Determination on Jurisdiction**

9. During the Mention on 19th February 2021, the Court issued further directions, in which it informed the parties that it would deliver a Ruling on whether to render an Advisory Opinion as sought by the parties or not. The Court also indicated that were it to be inclined towards rendering an Opinion, it would have to delineate specific issues to be addressed by the parties. This Ruling is therefore, an affirmation of the foregoing directive.
10. At the outset, we have to determine whether, the jurisdiction of this Court to render an advisory Opinion has been properly invoked, and if so, whether the Court should exercise its discretion to render the Opinion as prayed. Towards this end, it is instructive to recall our decision in *Re Matter of Gender Representation to the National Assembly & Senate*; Advisory Opinion No. 2 of 2012, [2012] eKLR; wherein the following principles were laid down to guide the Court on the exercise of its jurisdiction under Article 163 (6) of the Constitution. At paragraph 83, the Court stated:
- (i) For a reference to qualify for the Supreme Court's Advisory-Opinion discretion, it must fall within the four corners of Article 163(6): it must be "a matter concerning county government." The question as to whether a matter is one "concerning county government", will be determined by the Court on a case-by-case basis.



- (ii) The only parties that can make a request for an Advisory Opinion are the national government, a State organ, or county government. Any other person or institution may only be enjoined in the proceedings with leave of the Court, either as an intervener (interested party) or as amicus curiae.
  - (iii) The Court will be hesitant to exercise its discretion to render an Advisory Opinion where the matter in respect of which the reference has been made is a subject of proceedings in a lower Court. However, where the Court proceedings in question have been instituted after a request has been made to this Court for an Advisory Opinion, the Court may if satisfied that it is in the public interest to do so, proceed and render an Advisory Opinion.
  - (iv) Where a reference has been made to the Court the subject matter of which is also pending in a lower Court, the Court may nonetheless render an Advisory Opinion if the applicant can demonstrate that the issue is of great public importance and requiring urgent resolution through an Advisory Opinion. In addition, the applicant may be required to demonstrate that the matter in question would not be amenable to expeditious resolution through adversarial Court process.
11. While taking cognizance of the fact that, no Preliminary Objection has been raised challenging this Court’s jurisdiction to render an Opinion, we nonetheless must satisfy ourselves that the two References meet the threshold set out in the four governing principles. In this regard, we have no doubt that Reference no. 3 by the County Assemblies of Kericho and Nandi, satisfies the conditions set out in Principles (i) and (ii) above. There can be no denying that the two applicants are “state organs” within the meaning of Article 163 (6) of the Constitution. Nor can there be any doubt that the matters in respect of which they seek an Advisory Opinion are ones that concern County Government.
  12. Regarding Reference No. 4, we note that the same has been lodged by the Governor of Makueni County. We are similarly in no doubt, that the matters in respect of which the applicant seeks an opinion, are those that squarely concern County Government. Thus far, we see no reason to belabour the point.
  13. We now turn to Principles Nos. (iii) and (iv) regarding the exercise of jurisdiction as enunciated by the Court in *Re Matter of Gender Representation to the National Assembly & Senate* [Supra]. The Court signaled that it would be hesitant to render an Advisory Opinion if the matter(s) in respect of which the Reference is made, is pending before a lower court. There are two exceptions to this principle, in that, this Court can render an opinion if the matter before the lower court was instituted after the Reference, or if in the opinion of the Court, the matter is urgent and that its resolution would be in the public interest.
  14. It has come to the attention of this Court, through notification by Mr, Bitta on behalf of the Attorney General, that the matters raised in the two References before us, are similar to those in seven consolidated Petitions pending before the High Court. However, Mr. Ongoya, counsel for the applicants in Reference No. 3, is categorical that there is no substantive affinity between the issues in the References and those pending before the High Court. In the *Matter of the Principle of Gender Representation in the National Assembly and the Senate* [Supra]; at paragraph 17, the Court re-emphasized that:

“Only a truly deserving case will justify the Court’s Advisory Opinion, as questions amenable to ordinary litigation must be prosecuted in the normal manner; and the Supreme Court ought not to entertain matters which properly belong to first-instance-Court litigation. Only by due deference to the assigned jurisdiction of the different Courts, will the Supreme



Court rightly hold to its mandate prescribed in Section 3(c) of the Supreme Court Act, 2011 (Act No. 7 of 2011), of developing “rich jurisprudence that respects Kenya’s history and traditions and facilitates its social, economic and political growth.”

15. Faced with the two conflicting opinions by counsel, as to whether the issues raised in the References, bear any similarity to those pending at the High Court, the only cause of action open to this Court, was to peruse the relevant records at the High Court Suo Motu. Pursuant to such perusal, we find that in *David Ndi & Others v. Attorney General & Others*, Petition No. E282 of 2020; the High Court delivered a ruling on 8th February 2021, in which the learned judges identified and set down for determination the following issues inter alia:
- (a) Whether in the process of formulating the Constitutional Amendment Bill, the provisions of Articles 27 and 47 of the Constitution as read with Section 4 of the Fair Administrative Action Act were adhered to;
  - (b) Whether the entire BBI process culminating with the launch of the Constitutional Amendment Bill was undertaken constitutionally having regard to Articles 1, 2, 3, 10, 255 and 257 of the Constitution;
  - (c) Whether the Constitutional Amendment Bill is a Popular initiative as envisaged under Article 257 of the Constitution and if not, whether the process chosen to enact the constitutional amendment is fundamentally flawed and constitutionally infirm;
  - (d) Whether at the time of launch of the Constitutional Amendment Bill and the collection of endorsement signatures, there was a legislation governing the collection, presentation, and verification signatures or a legal framework or administrative structure to govern the conduct of referenda in the Country, and whether the absence of such legal and administrative framework is fatal for the Constitutional Amendment Bill under consideration;
  - (e) Whether the 3rd Respondent, the Independent Electoral and Boundaries Commission (the Commission), and the County Assemblies can exercise their powers under Article 257 of the Constitution to receive, verify and approve the Constitutional Amendment Bill in the prevailing circumstances;
  - (f) Whether, by dint of Article 257 (5) and (7) of the Constitution, the County Assemblies and Parliament have the power to alter and or improve the contents of the Constitutional Amendment Bill so as to incorporate divergent views raised through public participation;
  - (g) Whether Article 257(10) requires all the specific proposed amendments to the Constitution to be submitted as separate and distinct referendum questions to the people in the referendum ballot paper;
  - (h) Whether the constitutional edict does empower the National Executive or any State organ, as opposed to Parliament, to pursue or initiate any amendment to the Constitution without petitioning Parliament;
    - (i) Whether in a popular initiative to amend the Constitution, the National Executive may use public resources, including deploying public and State officers to either collect signatures or popularize any intended amendments to the Constitution;
  - (j) Whether the intended constitutional amendment processes are in conformity with the National Values in Article 10 of the Constitution;
  - (k) Whether the Commission is legally constituted to carry out the referendum;



(i) Whether there has been public participation in the constitutional amendment process.

16. We have critically considered, in analytical terms, the import of the issues raised in the two References and those pending for determination at the High Court as quoted above. The High Court has been moved by the parties under Article 165 (d) of the Constitution. They seek a number of far-reaching declarations which in our view, can only be made after a rigorous and extensive interpretation, of the relevant provisions of the Constitution whose meaning has been called into question. We also note that the High Court petitions were filed before the two References seeking this Court’s advisory opinion.
17. Coming to the critical question as to whether the issues pending before the two courts, bear any substantive similarity as to put us on a trajectory of restraint, we have come to the conclusion that, indeed this is the case. We do not see how the High Court can determine the issues before it without venturing into similar questions now pending before us in the two References. Given the timing of the proceedings before the two courts, there is a distinct possibility that the advisory opinion and declarations from the Supreme Court and High Court respectively, could issue at the same time. Such a scenario is likely to cause confusion and anxiety in the public mind, not to mention the potential threat, to the principles of certainty and finality in judicial pronouncements.
18. Should this Court down its tools to await the High Court’s determination of the petitions pending before it, or should we go ahead and render an opinion well aware that a similar subject matter is pending in a lower Court? In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [Supra] at paragraph 18, the Court stated:

“The Court recognizes, however, that its Advisory Opinion is an important avenue for settling matters of great public importance which may not be suitable for conventional mechanisms of justiciability. Such novel situations have clear evidence under the new Constitution, which has come with far-reaching innovations, such as those reflected in the institutions of county government... This is the typical situation in which the Supreme Court’s Advisory- Opinion jurisdiction will be most propitious; and where such is the case, an obligation rests on the Court to render an opinion in accordance with the Constitution.”

19. We have already noted that the matters before the two courts, are of great public importance, requiring urgent resolution. Yet we do not think that the issues before the High Court, have been lodged in an adversarial posture, such as would embolden this Court to proceed and render an opinion as signaled in the quoted Paragraph above. On the contrary, the High Court is being called upon, with attendant tones of urgency, to exercise one of the most important aspects of its original jurisdiction, i.e, to interpret the Constitution. In the circumstances, we see no justification to usurp that Court’s role as clearly constructed in our constitutional set-up.

## **E. Disposition**

20. While it is our finding that this Court has jurisdiction to render an Advisory Opinion as prayed in the two References, we nonetheless decline to exercise our discretion in favour of rendering such opinion as sought by the applicants, on grounds of the reasons given in paragraphs 17, 18, and 19 of this Ruling.

**DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MARCH, 2021.**

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**P. M. MWILU**

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



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**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

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**S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

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**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

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**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

Registrar Supreme Court of Kenya

