



Mwinzagu & 5 others v Parliamentary Service Commission; Onderi (Interested Party) (Petition E340 & E363 of 2023 (Consolidated)) [2024] KEHC 4073 (KLR) (Constitutional and Human Rights) (26 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4073 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E340 & E363 OF 2023 (CONSOLIDATED)**

LN MUGAMBI, J

APRIL 26, 2024

BETWEEN

**SEN.RAPHAEL CHIMERA MWINZAGU 1ST PETITIONER
SEN.CATHERINE MUYEKA MUMMA 2ND PETITIONER
SEN.TABITHA MUTINDA MUNENE 3RD PETITIONER
SEN.HAMIDA KIBWANA 4TH PETITIONER
SEN.MIRAJ ABDILLAHI ABDULRAHMAN 5TH PETITIONER**

AND

PARLIAMENTARY SERVICE COMMISSION RESPONDENT

AND

BRIAN NYABUTI ONDERI INTERESTED PARTY

**AS CONSOLIDATED WITH
PETITION E363 OF 2023**

BETWEEN

HENRY NAMITI SHITANDA PETITIONER

AND

PARLIAMENTARY SERVICE COMMISSION RESPONDENT



The exclusion of nominated senators from the Senate Oversight Function Fund was unconstitutional

The consolidated petitions challenged the constitutionality of the Senate Oversight Function Fund's operationalization, which excluded nominated Senators. The court held that the exclusion violated constitutional principles of inclusivity under article 10(2)(b) and public finance accountability under article 201(a) of the Constitution. It declared the exclusion unconstitutional and mandated that the Parliamentary Service Commission halt disbursements until regulations ensuring inclusivity, public participation, and accountability were developed. Additionally, the court recognized the collective oversight role of all senators, as outlined in article 96 of the Constitution.

Reported by John Ribia

Constitutional Law – separation of powers – judiciary vis-à-vis the legislature – judiciary oversight over constitutional bodies – under what circumstances would the High Court interfere with the duties of a constitutional organ – Constitution of Kenya, 2010, article 165.

Constitutional Law – constitutional bodies - Parliamentary Service Commission – role of initiating programmes and promoting ideals of parliamentary democracy – role to operationalize legislative funds – Senate Oversight Function Fund – identifying persons who will be able to use the fund – exclusion of nominated Senators from the fund - whether the budget for the Senate Representation Programme was a matter that fell within the mandate Parliamentary Service Commission - whether the exclusion of nominated senators from the Senate Oversight Function Fund was unconstitutional - what was the extent or the nature of the oversight function that was to be performed by the Senators through the Senate Oversight Function Fund – whether denying nominated senators facilitation from the Senate Oversight Function Fund was a violation of the Constitutional principle of inclusivity - Constitution of Kenya, 2010, articles 10, 27, 35, 90, 96, 98, 109, 113, 123, 127, 145, 201, 202, 203, 205, 206, 217, 221, 222, 223, 229 and 259.

Constitutional Law – Senate – elected Senators vis-à-vis nominated Senators – role of nominated senators - whether the role of oversight exercised by the Senate was a preserve of the elected Senators and not the nominated senators – Constitution of Kenya, 2010, articles 10(2)(d), 90 and 96.

Brief facts

The consolidated petitions stemmed from the establishment and operationalization of the Senate Oversight Function Fund, which allocated Kshs. 500,000,000 for senators to perform their oversight roles. The Parliamentary Service Commission allocated 90% of the funds to elected senators, excluding nominated senators. The petitioners argued that the exclusion violated articles 10, 27, 96 and 201 of the Constitution, emphasizing principles of inclusivity, non-discrimination and public finance accountability. The respondents justified the exclusion based on administrative challenges and constitutional distinctions between elected and nominated senators.

Issues

- i. Whether the exclusion of nominated senators from the Senate Oversight Function Fund was unconstitutional.
- ii. What was the extent or the nature of the oversight function that was to be performed by the Senators through the Senate Oversight Function Fund?
- iii. Whether the role of oversight exercised by the Senate was a preserve of the elected Senators and not the nominated senators.
- iv. Whether denying nominated senators facilitation from the Senate Oversight Function Fund was a violation of the constitutional principle of inclusivity?
- v. Whether the budget for the Senate Representation Programme was a matter that fell within the mandate Parliamentary Service Commission.
- vi. Under what circumstances would the High Court interfere with the duties of a constitutional organ?



vii. What role did nominated Senators play in the Senate?

Held

1. Courts in interpreting the Constitution were guided by the principles of constitutional interpretation stipulated under article 259 of the Constitution. The Constitution should be interpreted in context. It was the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation did not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.
2. The role of oversight was exercised by the Senate collectively and indivisibly the Senators. The role of oversight by the Senate was not assigned to the elected Senators only. The setting aside money for sharing out only to the elected Senators purportedly to exercise the oversight mandate did not align with the constitutional design, object or intent. The oversight function was collectively exercisable by all the Senators in the Senate and facilitation criteria that omitted the Nominated Senators could not be constitutionally justified as the oversight was not a preserve of elected Senators only.
3. Nominated Senators represented special interests within the Senate through which the principle of inclusivity under article 10(2)(b) of the Constitution was actualized by bringing on board persons who would otherwise had not had representation. Denying them the facilitation accorded to the elected Senators perpetuated the culture of exclusion which was contrary to the purposes, values and principles of the Constitution, and in particular, it was a direct violation of article 10(2)(b).
4. While it was within the mandate of the respondent to facilitate the Senators to carry out their Parliamentary mandate, it was equally important to do so in deference to the constitutional mandate given to the County Governments. Consequently, an implementation strategy that did not have a defined framework that outlined the scope, extent and the nature of the said oversight may be a potential risk for the devolution function by bringing in uninhibited interference with the County functions.
5. Chapter 12 of the Constitution set out the principles that guided public finance; article 206 established public funds; the Public Finance Management Act made provisions on how the government at both the national and county levels could raise and spend public funds. Section 3 of the Act guided the National and County Governments in the management of public finances while providing for the oversight authority of Parliament and county assemblies in public finance management.
6. Given the responsibility assigned by the Constitution to the Parliamentary Service Commission under article 127(6)(c) which among other matters included preparation of annual estimates of expenditure of Parliamentary Service, submitting them to the National Assembly for approval and exercising budgetary control over the service and further noting that article 127(6)(d) empowered it to undertake, singly or jointly with other relevant organizations, programmes to promote ideals of Parliamentary democracy, the budget for the Senate Representation Programme was a matter that squarely fell within the broad mandate given to the respondent under the Constitution.
7. Section 11(d) of the Parliamentary Service Act set out the functions of the Commission which *inter alia* included initiating programmes. If the Budget estimate for the “Senate Representation Programme” was considered and approved by the National Assembly in compliance with article 221 of the Constitution as read with sections 38 and 39 of the Public Finance Management Act and the Appropriation Act, 2023 as stipulated in sections 35, 36, 37, 38 and 39 of the Public Finance Management Act, the setting aside of said monies to facilitate a function fell within the broad mandate of promoting ideals of parliamentary democracy could not be said to be violation of the Constitution or the Statute.
8. A cardinal constitutional principle under article 201(a) was openness, accountability and public participation which applied to public finances. The principles did not discriminate between a public



fund or a voted allocation. The fund was acquired for Senate Representation Programmes and was subsequently christened Senate Oversight Function Fund, with the mode of utilization being sharing it out to the elected senators only. Its operationalization was not structured or defined. No rules or regulations were put in place to define the scope of activities that the said money could be applied to or a defined accountability mechanism to govern its utilization. The implementation was haphazard and that explained why some of the Senators were excluded. Given the unique nature of operations and being a new concept, the exact nature of activities to which the money could be applied ought to have been circumscribed in the Regulations. Though there may be nothing wrong with the respondent securing funds to facilitate constitutional functions of parliamentary service; the 1st respondent was duty bound by principles of openness and accountability envisaged in article 201(a) of the Constitution in operationalizing utilization of the said funds.

9. Under the principle of separation of powers, the court must refrain from interfering with the mandate and business of the Parliament. That was the case only to the extent that the Organ operated within the confines of the Constitution. Where a constitutional organ gets off-track, it became the constitutional duty of the court to remind and it get back to the track.
10. There was no fault in the introduction to facilitate Senators carry out a Parliamentary function falling within the scope of the respondent's responsibilities. However, the manner of implementation and/or operationalization raised serious constitutional questions, namely: the exclusion of nominated senators who represented special interests from being facilitated to undertake a constitutional function thereby offending the principle of inclusivity under article 10(2)(b) of the Constitution, and for the lack of a properly defined scheme spelling out the activities that the money could be applied to, the extent and the nature of oversight. The implementation was thus wanting on grounds of violating the inclusivity principle under article 10(2)(b) and for the failure to espouse the principles of openness and accountability under article 201(a) of the Constitution on public finances.

Petition allowed.

Orders

- i. *Declaration issued that the decision by the Parliamentary Service Commission to exclude Nominated Senators from the Senate Oversight Fund was unconstitutional, null and void.*
- ii. *Further, to ensure inclusivity, openness and accountability in the implementation process, an order was issued directing the respondent to immediately stop any further disbursements in respect of "Senate Oversight Fund" until it formulated, subjected it to public participation and published regulations outlining the activities that money may be applied to, included all the Senators, defined distribution criteria, set out an accountability process including general control and management to facilitated prudent utilization.*
- iii. *Each party bore its own costs.*

Citations

Cases

Kenya

1. *Commission for the Implementation of the Constitution v National Assembly of Kenya, Senate of the Republic of Kenya & Attorney General Constitutional Petition 496 of 2013; [2013] KEHC 6919 (KLR) - (Explained)*
2. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2014] KESC 53 (KLR) - (Explained)*
3. *Council of Governors & 3 others v Senate & 53 others Petition 381 & 430 of 2014; [2015] KEHC 6965 (KLR) - (Explained)*
4. *Dida, Mohammed Abduba v Debate Media Limited & another Civil Appeal 238 of 2017; [2018] KECA 642 (KLR) - (Mentioned)*



5. *Federation of Women Lawyers Fida Kenya & 5 others v Attorney General & another* Petition 102 of 2011; [2011] KEHC 2099 (KLR) - (Explained)
6. *Francis Maliti v County Assembly of Machakos, Speaker, County Assembly of Machakos & Cosmas Masesi; Governor, Machakos County (Interested Party)* Constitutional Petition 17 of 2018; [2019] KEHC 8811 (KLR) - (Explained)
7. *Kenya National Human Rights Commission* Advisory Opinion Reference No 1 of 2012 - (Explained)
8. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Explained)
9. *National Assembly of Kenya v Kina & another* Civil Appeal 166 of 2019; [2022] KECA 548 (KLR) - (Explained)
10. *Okiya Omtatah Okoiti v Attorney General, National Assembly, Senate, Parliamentary Service Commission, Law Society of Kenya & Inter-Religious Council of Kenya* Petition E364 of 2020; [2020] KEHC 10296 (KLR) - (Explained)
11. *Pevans East Africa Limited & Another v Chairman, Betting Control & Licensing Board & 7 others* Civil Appeal 11 of 20 of 2018; [2018] KECA 332 (KLR) - (Explained)
12. *Senate & 2 others v Council of County Governors & 8 others* Petition 25 of 2019; [2022] KESC 7 (KLR) - (Explained)
13. *Speaker of the Senate & another v Attorney-General & 4 others* Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR) - (Explained)

South Africa

Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 10,10(2)(b);27;27(4);35;90;96;96(3);98(1);98(b);98(c);98(d);109;113;123;123(4);127;127(6);127(6)(c);127(6)(d);145;201;201(a);202;203;205;206;217;221;222;223;229;259; Chapter 12 - (Interpreted)
2. Parliamentary Service Act section 11(d)(cap 186) - (Interpreted)
3. Public Finance Management Act (cap 412A) section 3,37,38,39- (Interpreted)
4. Statutory Instruments Act (cap 2A) In general - (Cited)

Advocates

None mentioned

JUDGMENT

Introduction

1. This is a consolidated petition merging Petitions no E340 of 2023 and E363 of 2023 in which Petition E340 of 2023 is the lead file. There are two fundamental issues that the Petitions raise: namely; first is the issue of operationalization of the Senate Oversight Function Fund that includes elected Senators and leaves out nominated senators. Second issue is that the Fund was established contrary to the principles of public finance under article 201 of the [Constitution](#) and the [Public Finance Management Act](#), 2012.
2. During the pendency of this matter, one of the consolidated petitions, Petition no E380 of 2023 was withdrawn via a written Notice dated 23rd February 2024.



Petition no E340 of 2023

3. The petition is dated September 18, 2023 and supported by the 1st petitioner's affidavit sworn on even date and a supplementary affidavit dated November 18, 2023 in response to the respondent's replying affidavit. The petitioners seek the following relief against the respondent:
 - a. A declaration be issued that the decision by the respondent to exclude nominated senators elected in accordance with article 90 of the Constitution from the Senate Oversight Fund is unconstitutional, null and void.
 - b. An order restraining the respondent from excluding nominated senators elected in accordance with article 90 of the Constitution from the Senate Oversight Fund.
 - c. Costs and interests thereof of this petition.
 - d. Such further, other and consequential orders as this court may deem fit to make.

Petitioners' Case

4. The petitioners aver that all senators are constitutionally mandated to exercise an oversight role over county affairs. To that end, the respondent established the Senate Oversight Fund to facilitate the carrying out of the function in the 2023/2024 financial year. The budget allocated for the Fund was ksh 500,000,000.
5. Initial share allocation for this Fund was 90% for elected senators and 10% for nominated senators. The Senate comprises of 67 senators, of which, 20 are nominated. However, on September 13, 2023, the respondent determined that the Fund would only be deployed to facilitate operations by 47 elected senators only thereby excluding funding towards the 20 nominated senators' operations.
6. He depones that the respondent's decision was opposed by the nominated senators on the same day and through a letter dated September 14, 2023. The respondent did not respond to this correspondence.
7. The petitioners are concerned that the respondent will proceed and operationalize the funds without establishing proper structures for the management of the Fund.
8. The petitioners content that respondent's action is in contravention of article 10 of the Constitution which guards against unfair and unjust practices contrary to national values and principles of governance. Further, it is contrary to article 96 of the Constitution which does not differentiate between the two classes of senators in performance of a senator's mandate.
9. This differentiation is in violation of article 27 of the Constitution that guards against discrimination. Moreover, the respondent's action is deemed to be a threat to article 201 of the Constitution that envisages openness and accountability in management of public funds.

Petition no E363 of 2023

10. The petition dated September 25, 2023 was amended on October 18, 2023 and is supported by the petitioner's affidavit in support of even date. The petitioner seeks the following relief against the respondent:
 - a. A declaration that the Senate Oversight Fund is a public fund as per the constitutional and statutory provisions.



- b. A declaration that the establishment of the Senate Oversight Fund lacks constitutional or Statutory basis.
- c. A declaration that the establishment of the Senate Oversight Fund was in violation of the Constitution.
- d. An order directing the Clerk, Senate to account for all monies budgeted, allocated and disbursed from the Senate Oversight Fund.
- e. Consequent to orders a, b, c and d above the Court be pleased to order that the members of the Senate to immediately and personally refund of all monies disbursed by dint of the order of the court issued on 12th October 2023.
- f. There be an order as to costs.

Petitioner's Case

11. The petitioner avers that on September 27, 2016 the respondent's Chairperson published the Parliamentary Service (Senate Monitoring and Evaluation) (Procedures for Management of Funds) Regulations. The Regulations were for the purposes of carrying out monitoring and evaluation of the respondent's budget.
12. These Regulations were afterwards placed before the National Assembly in line with the *Statutory Instruments Act*, 2013. The National Assembly's Select Committee on Delegated Legislation then issued a report dated October 17, 2016 recommending the annulment of the Regulations as they did not conform with the Public Finance Management Regulations, 2015. This recommendation was consequently adopted by the National Assembly.
13. Later on, in the year 2022, the Senate started lobbying for the establishment of the Senate Oversight Fund. This was subsequently established by the respondent in the 2023/2024 financial year budget. The petitioner takes note that establishment of the Fund has led to discord among the elected and nominated senators its share allocation among them.
14. The petitioner brings this petition against the respondent for a number of reasons. First, that the respondent established the Fund without any constitutional, statutory or regulatory framework thus violating article 10 of the *Constitution*. Furthermore, that the act is in violation of articles 127 and 201 of the *Constitution* which set out the functions of the respondent and the principles of public finance.
15. Secondly, the petitioner asserts that the Fund did not form part of the respondent's budget estimates for the medium terms as published in the 2023/2024 financial year.
16. Thirdly, that since the Fund is classified as a public fund, its information ought to have been published and publicized hence the respondent violated the citizen's right to information under Article 35 of the *Constitution*. Further, that the respondent acted ultra vires in establishing the funds without first complying with the provisions of the Public Finance Management Act.

Respondent's Case

17. In response to all the petitions, the respondent filed a replying affidavit by Noor Ghalgan, its Director, sworn on October 26, 2023.
18. In reply to Petition No E340 of 2023, he asserts that contrary to the petitioners' allegations, the mandate of the elected and nominated senators is distinct as provided under articles 98(b),(c) and (d) of the *Constitution*. In that, nominated senators represent special interest groups and marginalized groups



- while elected senators are representatives of the registered voters in each representative county. This distinction is said to be further made manifest under article 123 of the Constitution.
19. He depones that in line with article 96(3) and 127 of the Constitution, the respondent prepared the annual estimates of expenditure of the Senate under a program known as ‘Senate Representation’. Subsequently, on June 6, 2023, the National Assembly approved allocation of the ksh 500,000,000 for the Senate Oversight function for the 2023/2024 financial year. He states that soon after, the respondent vide a series of meetings considered the mechanisms that would be appropriate to operationalize the Senate Oversight function Fund.
 20. He depones that vide a circular dated September 6, 2023, the respondent informed the senators that 90% of the appropriated Fund would go to the elected senators and would be shared on the basis of the number of constituencies in each county. Additionally, that the remaining 10% would be shared equally among the nominated senators upon the development and approval of an appropriate framework.
 21. He however asserts that later on upon examination of article 123 of the Constitution, the respondent modified its earlier directive *vide* the circular dated September 15, 2023. It was noted in this directive that in implementation of the Senate Oversight Function, the nominated senators would instead be part of the respective County delegations. According to the respondent, the nominated senators’ exclusion is not novel. He notes that a similar approach has also been adopted in the National Government Constituencies Development Funds (NGCDF) and the National Government Affirmative Action Fund (NGAAF).
 22. In light of this, he argues that the petitioners’ allegation of violation of article 10 and 27 of the Constitution is unfounded. This is since the differentiation is grounded in article 123 of the Constitution. Also, the fact that nominated senators have no county offices and established administrative structures for management of the Fund. He further stresses that Funds are ordinarily disbursed based on the function. In this case the Senate Oversight Function is pegged on the number of county governments not the number of senators.
 23. In response to the allegations in Petition No E363 of 2023, he asserts that the respondent in line with article 96(3) and 127(6) of the Constitution, prepared the annual estimates of expenditure of the Senate under the ‘Senate Representation’ program and further approved by the National Assembly. As such he contends that the respondent complied with Articles 127 and 201 of the Constitution and section 37 of the Public Finance Management Act, 2012.
 24. He further depones with reference to elected senators that the respondent developed a framework for operationalization of the Fund however the same is still pending approval with regard to the nominated senators. This is because of the indicated administrative challenges.
 25. It is correspondingly asserted that the Fund contrary to the petitioner’s belief is not established as a public fund so as to be required to be compliant with the principles of public finance under the Constitution and the Public Finance Management Act. Principally, he avers that the Fund is a budgetary allocation in the budget estimates of the senate which the respondent is empowered by the Constitution to provide.
 26. Moreover, he argues that the doctrine of separation of powers demands that the court refrains from interfering with Parliament’s internal processes. Equally that the orders sought in the petition are in breach of the doctrine of separation of powers. Nonetheless, it is stated that the petitioner did not demonstrate how the Constitution was violated. This is since the Fund is aimed at enabling senators



perform their oversight role as mandated by the Constitution. For these reasons, he urges the court to dismiss the petitions with costs.

Interested Party's Case

27. The interested party in Petition No E340 of 2023, pleadings and submissions are not in the court file or CTS.

Parties' Submissions

Petitioners' Submissions (Petition no E340 of 2023)

28. Njoroge Ng'ang'a and Company Advocates for the petitioners filed submissions dated February 3, 2023. Counsel submitted on several issues. First, whether the oversight function is an exclusive mandate of elected senators; whether the respondent's decision contained in the September 15, 2023 circular excluded nominated senators from the Fund; whether there is a justification for the exclusion of nominated senators from the Fund and lastly whether the exclusion amounts to unfair discrimination.
29. To begin with, Counsel stated that article 98(1) of the *Constitution* makes clear that nominated senators are part of the Senate. Further that article 96 of the *Constitution* outlines role of the Senate as a collective function and does not distinguish between elected and nominated senators. Equally, Counsel noted that the senate has a Sessional Committee on County Public Accounts whose mandate is to exercise oversight over national revenue allocated to county governments pursuant to the provisions of article 96(3) of the *Constitution*. Counsel notes that this Committee also comprise of both the elected and nominated senators. In view of this, Counsel argued that it is apparent that oversight is not an exclusive mandate of the elected senators but a function for all senators.
30. Turning to the second issue, Counsel answered in the affirmative. This is because, the respondent in excluding the nominated senators from the Fund, abandoned the resolution by the Senate Business Committee to develop a separate framework for the operationalization of the oversight fund on their behalf. Further in doing so, the respondent designated the elected senators as heads of the county delegations, in effect relegating the nominated senators as subordinates to the elected senators. As a consequence, it is stated that the nominated senators have since implementation of the Fund, pursuant to this court's orders dated October 12, 2023, not been involved in any aspect of its operationalization.
31. According to the petitioners there is no justification for the respondent's action as article 123 of the *Constitution* does not permit discrimination of any senator. Counsel argued further that the provision relates to voting on matters under article 123(4) by all the senators and in fact has no correlation with the Senate Oversight Fund. Consequently, the provision is deemed irrelevant in light of the circumstances of this case.
32. Additionally, Counsel asserted that if the respondent was keen on establishing a fund such as the NGCDF and NGAAF referred to, the same ought to have been established in line with article 201 of the *Constitution* and the *Public Finance Management Act*, 2012. For this reason, Counsel argued that the respondent's intention was to exclude the nominated senators from the fund.
33. Inevitably the petitioners are certain that the respondent's actions amount to discrimination as guarded against under article 27 (4) of the *Constitution*. In support reliance was placed in *National Assembly*



of Kenya v Kina & another (Civil Appeal 166 of 2019) [2022] KECA 548 (KLR) (10 June 2022) (Judgment) where the Court of Appeal noted that:

“Direct discrimination arises from the unfavourable treatment of a person arising from some characteristic possessed by that person, and the protected characteristics include those listed in article 27.”

Petitioner’s Submissions (Petition no E363 of 2023)

34. This petitioner’s submissions are not in the court file or CTS.

Respondent’s Submissions

35. In the submissions dated February 12, 2024, Counsel Edward Libendi for the respondent submitted that the key issues for determination are: whether there is a legal justification for inclusion of nominated Senators as part of County delegations for purposes of the Senate Oversight Function; whether the respondent’s decision amounts to discrimination and whether the respondent established a Senate Oversight Fund.
36. Counsel on the first issue submitted that the rationale for including the nominated senators as part of the County delegation is anchored in the differentiation of their role with the elected senators per article 98(1) of the *Constitution*. It is stressed that article 123 of the *Constitution* also makes this distinction and guides that nominated senators are part of their respective county delegations when voting on matters that affect counties.
37. In addition to the averments of the respondent’s affidavit, Counsel submitted that the respondent’s decision was reasonable since without administrative structures such as a county office on the part of nominated senators, the respondent would have to develop an appropriate framework in view of the Fund. Correspondingly, it was noted that the Fund was a budgetary allocation in the 2023/2024 financial year hence an urgent need to expedite operationalization of the Fund before lapse of the period.
38. For these reasons, Counsel argued in the second issue that the respondent had not discriminated against the nominated senators. Reliance was placed in *Federation of Women Lawyers Fida Kenya & 5 Others v Attorney General & another* 2011 eKLR where it was held that:
- “Mere differentiation or inequality of treatment does not per se amount to discrimination within the prohibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any basis having regard to the objective the legislature had in view or which the Constitution had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of the *Constitution*.”
39. Like dependence was also placed in *Mohammed Abduba Dida v Debate Media Limited & another* (2018) eKLR.
40. Furthermore, on the third issue, Counsel submitted that pursuant to article 127(6) of the *Constitution*, the respondent developed a framework for implementation of the Senate Oversight Function Fund. In doing so the criteria adopted for distribution of the funds was based on geographical representation being the number of constituencies per county. To buttress the respondent’s role in the matter Counsel cited the case of *Okiya Omtatah Okoiti v Attorney General, National Assembly, Senate, Parliamentary*



Service Commission, Law Society, of Kenya & Inter-Religious Council of Kenya (2021) KEHC 439 (KLR) where it was held that:

“Having set out the establishment and mandates of the Parliament and the PSC, I will, further, look at the PSC as a constitutional Commission. Chapter 15 of the Constitution is on Commissions and independent offices. PSC is among the Commissions.

“Deriving from the foregoing, whereas the PSC's main role is to provide services and facilities to ensure the efficient and effective functioning of Parliament that does not make it subordinate to Parliament. PSC always remains independent and is only subject to the Constitution and the law”.

41. Moving to the next issue, Counsel opposed the petitioner's averment that the respondent established a Fund by setting up the Senate Oversight Fund. For context, establishment of a Public Fund must be set up in accordance with article 201 of the Constitution and the Public Finance Management Act. Counsel however submits that this Fund was not established as a public fund.
42. Counsel submits that this Fund was set up pursuant to the respondent's role under article 127(6) of the Constitution which is to prepare annual estimates of expenditure of the Parliamentary Service Commission and to exercise budgetary control over the Parliamentary Service Commission. Consequently, this Fund was set up under the Senate Representation Programme. This was tabled before the National Assembly and approved pursuant to article 221 of the Constitution. It is argued hence that referral of the Senate Oversight Function as a Fund does not convert this budgetary allocation into a public fund as alleged.
43. Reliance was placed in *Pevans East Africa Limited & another v Chairman, Betting Control & Licensing Board & 7 others* (2018) eKLR where it was held that:

“Where the Constitution had reposed specific functions in an institution or organs of State, the courts must give those institutions or organs sufficient leeway to discharge their mandates and only accept an invitation to intervene when those bodies are demonstrably shown to have acted in contravention of the Constitution, the law or that their decisions are so perverse, so manifestly irrational that they cannot be allowed to stand under the principles and values of our Constitution.”

44. According to Counsel the inevitable conclusion is that the petitioner has failed to demonstrate how the Constitution was violated in appropriation of the Fund for the senate oversight role. For these reasons, Counsel urged the court to exercise judicial restraint in interfering with the business of the Senate. To that end, the respondent submitted that the petitioners are not entitled to the reliefs sought.

Analysis and Determination

45. Going by the content of the two Petitions and the responses thereto as well as the submissions by the Parties, the following constitute issues for determination:
 - i. Whether the Senate Oversight Function is a collective mandate of all the senators.
 - ii. Whether or not the respondent in appropriating the Senate Oversight Function Fund to the elected senators discriminated against the nominated senators.
 - iii. Whether the Senate Oversight Function Fund is a public fund.
 - iv. Whether establishment of the Senate Oversight Function Fund was constitutional and lawful.



- v. Whether the consolidated petitions amount to an attempt to violate the doctrine of separation of powers.
46. This matter calls for an interpretation of constitutional provisions. This Court must be thus guided by the principles of constitutional interpretation stipulated under article 259 of the *Constitution*.
47. Article 259 of the *Constitution* sets out principles of interpretation of the Constitution as follows:
- a. This Constitution shall be interpreted in a manner that—
 - i. promotes its purposes, values and principles;
 - ii. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
 - iii. permits the development of the law; and
 - iv. contributes to good governance.
 - b. If there is a conflict between different language versions of this Constitution, the English language version prevails.
 - c. Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking.
48. The Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (2014) eKLR guided as follows:

“(137) This, in our perception, is an interpretive conundrum, that is best resolved by the application of principle. This Court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that the Constitution should be interpreted in a holistic manner, within its context, and in its spirit. In the Matter of the *Kenya National Human Rights Commission, Sup Ct Advisory Opinion Reference No 1 of 2012*; [2014] eKLR, this court [paragraph 26] had thus remarked:

“...But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result” [emphasis supplied].

(138) In *Speaker of the Senate & Another v Attorney-General & 4 others*, Sup Ct Advisory Opinion No 2 of 2013; [2013] eKLR, [paragraph 156], this Court further explicated the relevant principle:

“The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower Courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the court must be seized upon



as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the court to illuminate legal penumbras that Constitutions borne out of long drawn compromises, such as ours, tend to create. The Constitutional text and letter may not properly [capture] express the minds of the framers, and the minds and hands of the framers may also fail to properly mind the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the court as the searchlight for the illumination and elimination of these legal penumbras.”

49. The membership of the Senate is provided for in article 98(1) of the Constitution as follows:

The Senate consists of--

- i. forty-seven members each elected by the registered voters of the counties, each county constituting a single member constituency;
- ii. sixteen women members who shall be nominated by political parties according to their proportion of members of the Senate elected under clause (a) in accordance with article 90;
- iii. two members, being one man and one woman, representing the youth;
- iv. two members, being one man and one woman, representing persons with disabilities; and
- v. the Speaker, who shall be an ex officio member.

50. The role of the Senate is set out under article 96 of the Constitution. These roles are:

- a. The Senate represents the counties, and serves to protect the interests of the counties and their governments.
- b. 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.
- c. 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.
- d. The Senate participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with article 145.



51. Discussing the senate’s oversight role in *Council of Governors & 3 others v Senate & 53 others* [2015] eKLR the 3-judge bench observed as follows:

“

“103. ...The Senate’s role, as is evident from the provisions of article 96, is to represent the counties at the national level, and to protect their interests and governments; to participate in the law-making function of Parliament by considering, debating and approving Bills concerning counties, and to determine the allocation of national revenue to and among counties. Further, and more importantly, the Senate plays a critical oversight role with respect to the functioning of counties. In *The Council of Governors and others v. The Senate (supra)*, a three-judge bench of this Court considered the meaning of the term “oversight” and stated as follows:

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

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

104. The Court then concluded as follows with respect to the oversight role of the Senate:

[127.] “Taking the above meanings and as can be seen in the context of article 96(3) of the *Constitution*, in our interpretation, oversight implies a procedural and substantive function for the Senate. Procedural in the sense that the Senate is involved in the process leading to division and sharing of national revenue as between the National and County Governments as envisaged under articles 202 and 203 of the *Constitution*. The Senate thus gets involved in the enactment of the legislation contemplated in that regard and in particular as provided for under article 205 of the *Constitution* - See *Speaker of the Senate & Another v Attorney General*, Advisory Opinion no 2 of 2013.

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

52. Equally the Supreme Court in *Senate & 2 others v Council of County Governors & 8 others* (Petition 25 of 2019) [2022] KESC 7 (KLR) (Constitutional and Human Rights) (17 February 2022) (Judgment) stated that:

“61. Under article 96(1), the Senate represents the counties and serves to protect their interests. The Senate participates in the law-making function of Parliament by considering and approving Bills concerning counties. It has the



power to determine the allocation of national revenue among counties, and to oversight over the use of those resources. To discharge these responsibilities, the Senate is not expected to relocate to the counties to exercise supervisory powers at that level. That would be intrusive into the functional and institutional integrity of the county government and unacceptable overreach. It must not be involved in the administrative nitty-gritty details of the counties. Its oversight as indeed its legislative roles, are to be exercised in accordance with the Constitution and the law.

53. From a Constitutional view-point, the role of oversight is exercised by the Senate collectively and indivisibly the Senators. The role of oversight by the Senate is not assigned to the elected Senators only. The setting aside money for sharing out only to the elected Senators purportedly to exercise the oversight mandate does not therefore align with our Constitutional design, object or intent. The oversight function is collectively exercisable by all the Senators in the Senate and facilitation criteria that omits the Nominated Senators cannot be constitutionally justified as the oversight is not a preserve of elected Senators only.
54. Moreover, Nominated Senators represent special interests within the Senate through which the principle of inclusivity under Article 10 (2) (b) is actualized by bringing on board persons who would otherwise have not had representation. Denying them the facilitation accorded to the elected Senators is to perpetuate the culture of exclusion which is contrary to the purposes, values and principles of the Constitution, and in particular, it is a direct violation of article 10 (2) (b).
55. While at it, it important to reflect on the Supreme Court Judgment in *Senate v. Council of Governors case (supra)* where the Court remarked thus: “the Senate is not expected to relocate to the counties to exercise supervisory powers at that level. That would be intrusive into the functional and institutional integrity of the county government and unacceptable overreach. It must not be involved in the administrative nitty-gritty details of the counties. Its oversight as indeed its legislative roles, are to be exercised in accordance with the Constitution and the law.”
56. The question of the ‘manner, the extent or the nature of the oversight function that is to be performed by the Senators through this facilitation’ is of important concern. While it is within the mandate of the respondent to facilitate the Senators to carry out their Parliamentary mandate, it equally important to do so in deference to the constitutional mandate given to the County Governments. Consequently, an implementation strategy that does not have a defined framework that outlines the scope, extent and the nature of the said oversight may be a potential risk for the devolution function by bringing in uninhibited interference with the County functions.
57. According to Respondent’s Counsel, the money was allocated pursuant to the respondent’s role under article 127(6) (c) of the *Constitution* of preparing annual estimates of expenditure of the Parliamentary Service and submitting them to the National Assembly for approval, and exercising budgetary control over the service. The money was sourced for purposes of ‘Senate Representation Programme’. That it was tabled before the National Assembly and approved pursuant to article 221 of the *Constitution*. He argued that merely referring to it as ‘Senate Oversight Function Fund’ does not transform a budgetary allocation into a public fund.
58. Chapter 12 of the *Constitution* sets out the principles that guide public finance. Article 201 of the *Constitution* provides:

The following principles shall guide all aspects of public finance in the Republic-



- i. there shall be openness and accountability, including public participation in financial matters;
- ii. the public finance system shall promote an equitable society, and in particular —
 - i. the burden of taxation shall be shared fairly;
 - (ii) revenue raised nationally shall be shared equitably among national and county governments; and
 - (iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;
- (c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;
- (d) public money shall be used in a prudent and responsible way; and
- (e) financial management shall be responsible, and fiscal reporting shall be clear.

59. Article 206 of the Constitution that establishes public funds provides:

Consolidated Fund and other public funds

- a. There is established the Consolidated Fund into which shall be paid all money raised or received by or on behalf of the national government, except money that—
 - i. is reasonably excluded from the Fund by an Act of Parliament and payable into another public fund established for a specific purpose; or
 - ii. may, under an Act of Parliament, be retained by the State organ that received it for the purpose of defraying the expenses of the State organ.
- b. Money may be withdrawn from the Consolidated Fund only--
 - i. in accordance with an appropriation by an Act of Parliament;
 - ii. in accordance with article 222 or 223; or
 - iii. as a charge against the Fund as authorised by this Constitution or an Act of Parliament.
- c. Money shall not be withdrawn from any national public fund other than the Consolidated Fund, unless the withdrawal of the money has been authorised by an Act of Parliament.
- d. Money shall not be withdrawn from the Consolidated Fund unless the Controller of Budget has approved the withdrawal.

60. The Public Finance Management Act makes provisions on how the government at both the national and county levels can raise and spend public funds. Furthermore, the Act guides the national and



county governments in the management of public finances while providing for the oversight authority of Parliament and county assemblies in public finance management. This objective is set out under section 3 of the Act as follows:

The object of this Act is to ensure that—

- i. public finances are managed at both the national and the county levels of government in accordance with the principles set out in the Constitution; and
- ii. public officers who are given responsibility for managing the finances are accountable to the public for the management of those finances through Parliament and County Assemblies.

61. With regard to establishment of any public fund the Act, section 24 (3) provides as follows:

Notwithstanding any other provisions of this Act, where a Fund is established under this Act or any other law for the purposes of Parliament or a House of Parliament, the Parliamentary Service Commission shall—

- i. establish procedures and systems for proper and effective management of the monies and property of the Fund;
- ii. establish accounting procedures and systems for the Commission to properly account for the monies and property;
- iii. superintend the expenditure of the monies of the Fund to ensure that the monies are properly accounted for;
- iv. prepare and submit accounts for each financial year in accordance with the written law for the time being relating to audit for audit by the Auditor-General; and
- v. ensure that accounts prepared under paragraph (d) comply with the provisions of this Act.

62. I am persuaded by the submission of the Respondent that given responsibility assigned by the Constitution under article 127(6)(c) which among others is to prepare annual estimates of expenditure of Parliamentary Service and submitting them to the National Assembly for approval, and exercising budgetary control over the service and further noting that article 127(6)(d) empowers it to undertake, singly or jointly with other relevant organizations, programmes to promote ideals of Parliamentary democracy; the budget for the “Senate Representation Programme” was a matter that squarely fell within the broad mandate given to the Respondent under the Constitution.

63. In addition, section 11(d) of the Parliamentary Service Act sets out the Functions of the Commission which inter alia include:

- d) Initiating programmes —
 - (i) for training and capacity building of members and staff of Parliament and other persons;
 - (ii) that promote ideals of parliamentary democracy as set out in article 127(6)(d) of the Constitution; and



(iii) that promote public awareness and participation in the activities of Parliament; and

(e) do such other things as may be necessary for the well-being of the members and staff of Parliament.

64. Consequently, if the Budget estimate for the “Senate Representation Programme” was considered and approved by the National Assembly in compliance with article 221 of the Constitution as read with sections 38 and 39 of the Public Finance Management Act and the Appropriation Act, 2023 as stipulated in sections 35, 36, 37, 38 and 39 of the Public Finance Management Act, the setting aside of said monies to facilitate a function which in my view falls within the broad mandate ‘of promoting ideals of parliamentary democracy’ cannot be said to be violation of the Constitution or the Statute.
65. Nevertheless, a cardinal Constitutional principle under article 201(a) is openness, accountability and public participation which applies to public finances. These principles do not discriminate between a public fund or a voted allocation. The money subject of this Petition was acquired for “Senate Representation Programmes” and was subsequently christened “Senate Oversight Function Fund” with the mode of utilization being sharing it out to the “elected senators only.”
66. Its operationalization is not structured or defined. No rules or regulations were put in place to define the scope of activities that the said money can be applied to or a defined accountability mechanism to govern its utilization. The implementation was haphazard and that explains why some of the Senators were in fact excluded. Given the unique nature of operations and being a new concept, the exact nature of activities to which the money could be applied ought to have been circumscribed in the regulations. Clearly therefore, though there may be nothing wrong with the Respondent securing funds to facilitate Constitutional functions of Parliamentary service; the 1st Respondent is duty bound by principles of openness and accountability envisaged in article 201 (a) of the Constitution in operationalizing utilization of the said funds.
67. Finally, the respondent contended that it merely performed its function under the Constitution hence the Court must refrain from interfering with the mandate and business of the Parliament.
68. Under the principle of separation of powers, this is the case only to the extent that the Organ operates within the confines of the Constitution. Where a Constitutional organ gets off-track, it becomes the Constitutional duty of the Court to remind and it get back to the track. This principle was elaborately discussed in the South African case of *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11 where the Court stated thus:

“The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle ‘has important consequences for the way in which and the institutions by which power can be exercised’.. But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament ‘must act in accordance with, and within the limits of, the Constitution’, and the supremacy of the Constitution requires that ‘the obligations imposed by it must be fulfilled’. Courts are required by the Constitution ‘to ensure that all branches of government act within the law’ and fulfil their constitutional obligations. This Court ‘has been given the responsibility of being the ultimate guardian of the Constitution



and its values'. Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations. This section gives meaning to the supremacy clause, which requires that 'the obligations imposed by the Constitution must be fulfilled'. It would therefore require clear language of the Constitution to deprive this Court of its jurisdiction to enforce the Constitution."

69. The court went further to noted however:

"Courts have traditionally resisted intrusions into the internal procedures of other branches of government. They have done this out of comity and, in particular, out of respect for the principle of separation of powers. But at the same time they have claimed the right as well as the duty to intervene in order to prevent the violation of the Constitution."

70. This system of checks balances was well discussed in *Francis Maliti v County Assembly of Machakos & 2 others; Governor, Machakos County (Interested Party)* [2019] eKLR where the Court observed that:

"The broad principle of "separation of powers", certainly, incorporates the scheme of "checks and balances"; but the principle is not to be applied in theoretical purity for its ultimate object is good governance, which involves phases of co-operation and collaboration, in a proper case. This perception emerges from *Commission for the Implementation of the Constitution v. National Assembly of Kenya, Senate & 2 Others* [2013] eKLR where Njoki, SCJ opined that:

"The system of checks and balances that prevents autocracy, restrains institutional excesses and prevents abuse of power apply equally to the Executive, the Legislature and the Judiciary. No one arm of Government is infallible, and all are equally vulnerable to the dangers of acting ultra vires the Constitution. Whereas, the Executive and the Legislature are regularly tempered and safeguarded through the process of regular direct elections by the people, the discipline of an appointed and unelected judicial arm of Government is largely self-regulatory. The parameters of encroachment on the powers of other arms of Government must be therefore clearly delineated, [their] limits acknowledged, and restraint fully exercised. It is only through the practice of such cautionary measures, that the remotest possibility of judicial tyranny can be avoided."

71. This was as well appreciated by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* (2013) eKLR where it was stated that:

"Separation of powers does not only proscribe organs of government from interfering with the other's function, but also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. It also warned that such powers are, however, not a license to take over functions vested elsewhere, and recommended that there must be judicial, legislative and executive deference to the repository of the function."

72. In the instant Petition, the Court finds no fault in the introduction to facilitate Senators carry out a Parliamentary function falling within the scope of the Respondent's responsibilities. However, the manner of implementation and/or operationalization raises serious constitutional questions, namely: the exclusion of nominated senators who represent special interests from being facilitated to undertake a constitutional function thereby offending the principle of inclusivity under article 10(2)(b) of the *Constitution*, and for the lack of a properly defined scheme spelling out the activities that this money



can be applied to, the extent and the nature of oversight. The implementation is thus wanting on grounds of violating the inclusivity principle under article 10(2)(b) and for the failure to espouse the principles of openness and accountability under article 201(a) of the Constitution on public finances.

73. The upshot therefore is that this Petition succeeds. The Court shall therefore grant the following reliefs:
- a. A declaration be and is hereby issued that the decision by the Respondent to exclude Nominated Senators from the Senate Oversight Fund is unconstitutional, null and void.
 - b. Further, to ensure inclusivity, openness and accountability in the implementation process, an order be and is hereby issued directing the Respondent to immediately stop any further disbursements in respect of “Senate Oversight Fund” until it formulates, subjects to public participation and publishes regulations outlining the activities that money may be applied to, includes all the Senators, defines distribution criteria, sets out an accountability process including general control and management to facilitate prudent utilization.
 - c. Each Party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL, 2024.

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L N MUGAMBI

JUDGE

