



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 368 OF 2014

IN THE MATTER OF AN APPLICATION BY THE SPEAKERS OF THE 47 COUNTY ASSEMBLIES OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ARTICLES 1,2,3,6,10,19,20,22,23(1) & (3), 27(1), 27(4), 27, 43, 47, 73, 159, 160, 165, 174, 175, 176, 179(1), 185, 186, 189, 190, 194, 201, 205, 207, 209, 210, 216, 224, 225, 228, 259 & 260 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF RULES 23 AND 24 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF COUNTY GOVERNMENTS ACT NO.17 OF 2012

AND

IN THE MATTER OF SECTIONS 117, 125,129, 131, 133 AND 134 OF THE PUBLIC FINANCE MANAGEMENT ACT, CAP 412C, LAWS OF KENYA

BY

THE SPEAKER, NAKURU COUNTY ASSEMBLY.....1ST PETITIONER

THE SPEAKER, MOMBASA COUNTY ASSEMBLY2ND PETITIONER

THE SPEAKER, KWALE COUNTY ASSEMBLY3RD PETITIONER

THE SPEAKER, KILIFI COUNTY ASSEMBLY4TH PETITIONER

THE SPEAKER, TANA RIVER COUNTY ASSEMBLY5TH PETITIONER

THE SPEAKER, LAMU COUNTY ASSEMBLY6TH PETITIONER

THE SPEAKER, TAITA-TAVETA COUNTY ASSEMBLY7TH PETITIONER

THE SPEAKER, GARISSA COUNTY ASSEMBLY8TH PETITIONER

THE SPEAKER, WAJIR COUNTY ASSEMBLY9TH PETITIONER

THE SPEAKER, MANDERA COUNTY ASSEMBLY10TH PETITIONER

THE SPEAKER, MARSABIT COUNTY ASSEMBLY11TH PETITIONER

THE SPEAKER, ISIOLO COUNTY ASSEMBLY12TH PETITIONER

THE SPEAKER, MERU COUNTY ASSEMBLY13TH PETITIONER

THE SPEAKER, THARAKA NITHI COUNTY ASSEMBLY14TH PETITIONER

THE SPEAKER, EMBU COUNTY ASSEMBLY15TH PETITIONER

THE SPEAKER, KITUI COUNTY ASSEMBLY16TH PETITIONER

THE SPEAKER, MACHAKOS COUNTY ASSEMBLY17TH PETITIONER

THE SPEAKER, MAKUENI COUNTY ASSEMBLY18TH PETITIONER

THE SPEAKER, NYANDARUA COUNTY ASSEMBLY19TH PETITIONER

THE SPEAKER, NYERI COUNTY ASSEMBLY20TH PETITIONER

THE SPEAKER, KIRINYAGA COUNTY ASSEMBLY21ST PETITIONER

THE SPEAKER, MURANG'A COUNTY ASSEMBLY22ND PETITIONER

THE SPEAKER, KIAMBU COUNTY ASSEMBLY23RD PETITIONER

THE SPEAKER, TURKANA COUNTY ASSEMBLY24TH PETITIONER

THE SPEAKER, WEST POKOT COUNTY ASSEMBLY25TH PETITIONER

THE SPEAKER, SAMBURU COUNTY ASSEMBLY26TH PETITIONER

THE SPEAKER, TRANS NZOIA COUNTY ASSEMBLY27TH PETITIONER

THE SPEAKER, UASIN GISHU COUNTY ASSEMBLY28TH PETITIONER

THE SPEAKER, ELGEYO MARAKWET COUNTY ASSEMBLY.....29TH PETITIONER

THE SPEAKER, NANDI COUNTY ASSEMBLY30TH PETITIONER

THE SPEAKER, BARINGO COUNTY ASSEMBLY31ST PETITIONER

THE SPEAKER, LAIKIPIA COUNTY ASSEMBLY32ND PETITIONER

THE SPEAKER, NAROK COUNTY ASSEMBLY	33 RD PETITIONER
THE SPEAKER, KERICHO COUNTY ASSEMBLY	34 TH PETITIONER
THE SPEAKER, KAJIADO COUNTY ASSEMBLY	35 TH PETITIONER
THE SPEAKER, BOMET COUNTY ASSEMBLY	36 TH PETITIONER
THE SPEAKER, KAKAMEGA COUNTY ASSEMBLY	37 TH PETITIONER
THE SPEAKER, VIHIGA COUNTY ASSEMBLY	38 TH PETITIONER
THE SPEAKER, BUNGOMA COUNTY ASSEMBLY	39 TH PETITIONER
THE SPEAKER, BUSIA COUNTY ASSEMBLY	40 TH PETITIONER
THE SPEAKER, SIAYA COUNTY ASSEMBLY	41 ST PETITIONER
THE SPEAKER, KISUMU COUNTY ASSEMBLY	42 ND PETITIONER
THE SPEAKER, HOMABAY COUNTY ASSEMBLY	43 RD PETITIONER
THE SPEAKER, MIGORI COUNTY ASSEMBLY	44 TH PETITIONER
THE SPEAKER, KISII COUNTY ASSEMBLY	45 TH PETITIONER
THE SPEAKER, NYAMIRA COUNTY ASSEMBLY	46 TH PETITIONER
THE SPEAKER, NAIROBI COUNTY ASSEMBLY	47 TH PETITIONER

AND

COMMISSION ON REVENUE ALLOCATION.....	1 ST RESPONDENT
CONTROLLER OF BUDGET.....	2 ND RESPONDENT
THE ATTORNEY GENERAL.....	3 RD RESPONDENT
COUNCIL OF GOVERNORS.....	INTERESTED PARTY

JUDGMENT

Introduction

1. This Petition concerns the budgetary and related processes in County Governments. All the Petitioners are State Organs established under the provisions of **Article 178(1)** of the **Constitution** with their mandate set out under **Article 178(2)** of the **Constitution** and include *inter-alia* to preside over the sittings of their respective County Assemblies. They have brought this Petition pursuant to the provisions of **Articles 1,2,3,6,10,19,20,22,23(1) & (3), 27(1), 27(4), 27, 43, 47, 73, 159, 160, 165, 174, 175, 176, 179(1), 185, 186, 189, 190, 194, 201, 205, 207, 209, 210, 216, 224, 225, 228, 259 & 260** of the **Constitution** of Kenya and **Rules 23 and 24** of the **Constitution** of

Kenya (**Protection of Rights and Fundamental Freedoms**) Practice and Procedure Rules, 2013 and Sections 117, 125, 129, 131, 133 and 134 of the **Public Finance Management Act, Cap.412C, Laws of Kenya** on their own behalf and on behalf of all the Forty Seven Counties created under **Article 6(1)** of the **Constitution** as read together with the **First Schedule** to the **Constitution**.

2. On or about 22nd April, 2014 vide a circular Reference No. CRA/CGM/Vol.III/99 addressed to all County Governments, the 1st Respondent recommended a ceiling on allocation for all County Assemblies and all County Executives in County budgets for the financial year 2014/2015. Thereafter, the 2nd Respondent on diverse dates vide various circulars addressed to the County Governments allegedly reinforced the 1st Respondent's circular aforesaid and demanded that the County Assemblies' budget allocations should comply with the aforesaid Circular failure to which the 2nd Respondent would not approve withdrawals from the County Revenue Fund or any other fund by County Governments. That at the date of the impugned Circulars, none of the County Governments had passed its **County Finance Act** for the financial year 2014/2015 to enable implementation of its budget. The Petitioners therefore claim that the 2nd Respondent acted *ultra vires* its mandate in issuing the said circulars to the Counties.
3. The Petitioners have also filed this Petition claiming a violation of **Articles 73, 185, 189, 207, 216 and 228** of the **Constitution** by the Respondents and are further seeking to enforce their fundamental rights and freedoms under **Articles 27 and 47** of the **Constitution**. In their Petition dated 23rd July 2014, they therefore seek the following orders;

“(a) A declaration that the Circulars that the 1st and 2nd Respondents, jointly and severally, and either by themselves, assigns or any person claiming through them, issued to any County Government in the Republic of Kenya on various dates between the 22nd day of April, 2014 to the 16th day of July 2014, or any other date, to prescribe and or put mandatory ceilings to financial allocation to any County Assembly in a County Budget for the Financial year 2014/2015 breached the Petitioners' constitutional rights under Articles 27(1), 27(4), 27(5), 43 and 47(1) of the Constitution of Kenya, and were null and void for all intents and purposes.

(b) Judicial Review order of Certiorari to remove into this Honourable Court and quash the Circulars that the 1st and 2nd Respondents, jointly and severally, and either by themselves, assigns or any person claiming through them, issued to any County Government in the Republic of Kenya on various dates between the 22nd day of April, 2014 to the 16th day of July 2014, or any other date, to prescribe and or put mandatory ceilings to financial allocations to any County Assembly in a County Budget for the Financial Year 2014/2015.

(c) Judicial Review orders of Mandamus to remove into this Honourable Court and compel the 2nd Respondent to oversee the implementation of the budgets of County Governments in Kenya for the financial year 2014/2015 in terms of Article 228(4) of the Constitution of Kenya once County Governments pass their respective budgets for the Financial Year 2014/2015.

(d) Judicial Review orders of Mandamus to remove into this Honourable Court and compel the Respondents, jointly and severally, and either by themselves, assigns or any person claiming through them, to approve and disburse Funds as provided for in every County Government's budgetary allocations as set out in the County's Budgets estimates of Revenue and Expenditure for the Financial year 2014/2015, County's appropriation Acts for the Financial year 2014/2015 and or County's Finance Acts for the Financial year 2014/2015.

(e) Costs of and incidental to this Petition and;

(f) Any other order that this Honourable Court deems fit and just to grant in the circumstances.”

The Petitioners’ case

4. Prof. Ojienda, Senior Counsel, presented the Petitioners’ case and the gist of their case was that the impugned Circulars were issued without authority and are in breach of the legislative authority of County Assemblies under the provisions of **Articles 185(1) and (2) of the Constitution**. That in issuing the said Circulars the 1st and 2nd Respondents also violated **Article 189 (1) of the Constitution** as they failed to consult the County Assemblies on the matter while the same fell within the latter’s mandate. They further claimed that in doing so, the 1st and 2nd Respondents violated the fundamental right of County Assemblies under **Article 47 of the Constitution** to administrative action that is lawful, reasonable and procedurally fair.
5. It was also the Petitioners’ contention that the impugned Circulars targeted only votes on account of County Assemblies and County Executives for the financial year 2014/2015 by creating budgetary ceilings while the Respondents wholly protected budgets for the National Executive, the National Assembly, the Senate, the Judiciary and the twelve Commissions and Independent offices listed in **Article 248 of the Constitution**. As such they claimed that the impugned Circulars breached the fundamental rights of County Assemblies to the fundamental and inalienable right to equal protection and equal benefit of the law and not to be discriminated against, directly or indirectly, as provided for under **Article 27(1), (4) and (5) of the Constitution**.
6. On the latter issue, Prof Ojienda submitted that the term ‘administrative action’ refers to broad areas of governmental activity in which the repositories of power are exercised by statutory bodies, including the adoption of policy making and issuance of a specific direction and application of a general rule to a particular case in accordance with requirements of policy, expediency or administrative practice. He relied on the South African case of **President of the Republic of South Africa and Others vs South African Rugby Football Union and Others (CCT 16/98) 2000 (1) SA 1** which discussed the normative content of the right to administrative action. It was therefore Prof. Ojienda’s submission that since the 1st and 2nd Respondents purported to direct County Assemblies on how to legislate, their actions amounted to unlawful and unfair administrative action and thus violated **Article 47 of the Constitution** on three fronts;
7. Firstly, that the notices are *ultra vires* the mandate of the 1st and 2nd Respondents as set out under **Articles 216(2) and 228 (4) of the Constitution**.
8. Secondly, that the legislative authority of Counties vests in County Assemblies by dint of the provisions of **Article 185(1) and(2) of the Constitution**. In that regard, that County budgets are estimates of revenue and expenditure by Counties in a given financial year and constitute plans for management of County resources and that approval of County budgets is an express constitutional mandate of County Assemblies under the provisions of **Article 184(4) (a)**. Further, that the Constitution has not apportioned the legislative authority of County Assemblies to approve County budgets as a shared mandate between County Assemblies and the 1st and 2nd Respondents nor does legislative authority to determine votes on accounts in County budgets vest in the 1st and 2nd Respondents, jointly or severally. It was therefore his submission that the Circulars are unconstitutional, unlawful and a manifest of anarchy in the operationalization of the principle of devolution.
9. Thirdly, that the impugned Circulars breach the procedures, time-lines and systems of checks and balances required to be observed by County Assemblies in enacting county budgets as is envisaged under **Article 201 of the Constitution** and under **Sections 117, 125, 129 and 131 of the Public Finance Management Act 2012**. He claimed in that regard that in their budgetary

processes, each of the County Assemblies must enact and pass certain instruments before passing its County budget.

10. In addition, that each of the instruments is progressive of and dependent on the previous instruments and it would be illegal to adopt a County Budget Estimates of Revenue and Expenditure that is not consistent with the financial outlook of a County as determined by each of the aforementioned instruments. That at the time of filing this Petition, all Counties had complied with the requirements of the Constitution and the **Public Finance Management Act** and had enacted County budgets for the financial year 2014/2015 and had adopted their respective County Fiscal Strategy Papers, approved their County Budget Estimates of Revenue and Expenditure by the 30th June 2014 and enacted their **Appropriations Acts** for the financial year 2014/2015. It was therefore Prof. Ojienda's contention that for the Counties to comply with the Circulars as issued, they had to restart the entire process of reviewing and adopting the Fiscal Strategy Paper, Budget Estimates of Revenue and Expenditure, Appropriations Bills and Acts as well as Finance Bills and Acts which actions would have gone beyond the mandatory statutory timelines set out under the **Public Finance Management Act** and hence create the risk of invalidating the consequent budgets that they would pass.
11. The Petitioners further contended that the mandate of the 1st Respondent is circumscribed in **Article 216** of the **Constitution** that mandate is to recommend on matters concerning financing and financial management by the Counties. That the Constitution does not allow it to decide on matters concerning financial management by the Counties and while relying on the Canadian cases of *R vs Mac Farlane (1923) HCA 36* and *Thomson vs Canada (Deputy Minister of Agriculture) (1992) 1 SCR 385*, the Petitioners distinguished a “**recommendation**” from a “**decision**” and stated that a recommendation does not have any binding force and does not impose obligations and therefore a “**recommendation**” connotes advice which the recipient may be at liberty to accept or disregard.
12. It was also the Petitioners' submission that the mandate of the 2nd Respondent under **Article 228** of the **Constitution** is to oversee the implementation of the budgets of the National and County Governments through its authorization to withdraw from the Equalization, Consolidated and Revenue Funds and Prof. Ojienda further submitted that the said mandate in relation to Counties is limited to ascertaining that withdrawals from Revenue Funds under **Article 207** of the **Constitution** is done only in accordance with the legislation enacted by County Assemblies or an Act of Parliament.
13. It was Prof. Ojienda's further submission that there is no law in Kenya that mandates any of the Respondents to approve budgets or determine votes on account of budgets and to do so would amount to usurpation of powers of the County Assemblies. While relying on the case of *Okuya Omtatah Okoiti & 3 Others vs Attorney General & 5 Others Petition No.227 of 2013 (2014) eKLR* and the Supreme Court decision in *Re Matter of the Interim Independent Electoral Commission, Constitutional Application No.2 of 2011 (2011) eKLR*, he submitted that all constitutional organs are obliged to stick to their mandates as stipulated in the Constitution and do no more.
14. It was also the Petitioners' contention that the impugned Circulars violated their right not to be discriminated against as provided for under **Article 27(1), (2) (4) and (5)** because they only targeted votes on account of County Assemblies in County budgets for 2014/2015 and that they were therefore a premeditated and decided target. That while the 2nd Respondent oversees the implementation of the budgetary allocations to other State Organs such as the County Executive, National Executive, the National Assembly, the Senate, the Judiciary and the twelve Commissions and Independent Offices, they have not seen a single circular to these other organs faulting their votes for the financial year 2014/2015. In fact they claimed that the Respondents are all deliberately protecting those budgetary allocations in a conspiratorial manner.
15. It was the Petitioners' further contention that the **Division of Revenue Act 2014** and the **County**

Allocation of Revenue Act, 2014 contains block figures of revenue that goes to each County Government and that none of these statutes have any provision for the budgetary ceilings set by the 1st and 2nd Respondents vide the impugned circulars.

16. Further, that Parliament did not set a law sanctioning the impugned budgetary ceilings and the Senate in its oversight role dismissed the intended ceilings as is evident in the Hansard of 5th August 2014 and 2nd September 2014. It was therefore Prof. Ojienda's submission that the Respondent breached **Article 73(1)(a) and (2) (b) and (c) of the Constitution** which enjoins all State Officers, including the Respondents, to exercise public authority as a public trust in a manner that brings honour to the office and promotes public confidence in the integrity of the office. He claimed in that regard that the acts of the 1st and 2nd Respondents in colluding with, obtaining and acting upon directions of the National Executive and purporting to set votes on account of County Assemblies offends **Article 249(2) of the Constitution**.

17. Lastly, Prof Ojienda urged the Court to find that the impugned Circulars violate the Constitution and grant the Prayers in the Petition as set out above.

The 1st Respondent's case

18. The 1st Respondent, the Commission on Revenue Allocation, is a constitutional commission established under **Article 215 of the Constitution** and whose functions are set out under **Article 216 of the Constitution, the Commission for Revenue Allocation Act and the Public Finance Management Act**. Those functions include making recommendations concerning the basis for the equitable sharing of revenue raised by the National Government between the National and County Governments and among County Governments. The Commission is also mandated to make recommendations on other matters concerning the financing of, and financial management by County Governments and fiscal prudence as required by the Constitution and national legislation.

19. It opposed the Petition through the affidavit of George Ooko, the Commission Secretary, sworn on 28th August 2014. In his Affidavit, he deponed that the 1st Respondent had not violated the Constitution in any way or as alleged by the Petitioners.

20. In the said Affidavit, Mr. Ooko stated that County Governments and Assemblies must comply with the law in their budgetary processes and any County budget that does not do so is illegal and unconstitutional.

21. He claimed that the 1st Respondent's Circular Reference No. CRA/CGM/VOL. III/99 dated 22nd April 2014 did not recommend new budget ceilings for County Assemblies and County Executives. It merely restated the advice that the 1st Respondent had rendered to Parliament as provided by **Article 205 of the Constitution** and Parliament, while taking into consideration the recommendation, made by the 1st Respondent as provided for by **Article 218(1)(a) and (b) of the Constitution**, enacted the **Division of Revenue Act** and the **County Allocation of Revenue Bill**. That therefore the budgetary ceilings are as a result of existing legislation and not the 1st Respondent's Circular as alleged. Further, that the 1st Respondent did not seek to micro-manage the County budgetary process in issuing the Circular neither did it seek to legislate on allocations to the County Assemblies and County Executives as alleged by the Petitioners because the legislative role in the County budgetary process is purely a function of Parliament and County Assemblies and that the total amount of revenue available to each County Government was done by Parliament through the **Division of Revenue Act** pursuant to **Article 218(1)(a) of the Constitution**.

22. It was his further deposition that no County had submitted copies of the County development plans, debt management strategies or any other information to the 1st Respondent as required by

- law. Further, that no County Treasury had sought the recommendation of the 1st Respondent, as mandatorily required by **Section 117(5)** of the **Public Finance Management Act**, in preparing the County Fiscal Strategy Paper.
23. It was also his contention that there was no discrimination meted out to County Assemblies because budget ceilings are lawfully set by Parliament for all arms of Government, all levels of Government and independent bodies and Commissions and that all the other Government agencies had complied with their set budget ceilings except County Assemblies which deliberately made budgets over and above those ceilings.
24. Mr. Oraro, appearing for the 1st Respondent, also submitted that the provisions of the **Division of Revenue Act, 2014** and the **County Allocation of Revenue Act, 2014** are in conformity with the Constitution and that Parliament sets ceilings for County budgets via these two legislations as required by **Article 218** of the **Constitution** while under **Article 216**, thereof, the 1st Respondent is granted the constitutional mandate of ensuring that County budgets are in compliance with the **Division of Revenue Act** and the **County Allocation of Revenue Act**.
25. It was his position therefore that the impugned Circulars are constitutional and lawful and the 1st Respondent acted within its mandate under the Constitution and the **Public Finance Management Act**, and related legislation.
26. He went on to submit that the various **County Appropriation Acts** were unconstitutional as they are in conflict with the **Division of Revenue Act, 2014** and **County Allocation of Revenue Act, 2014** and as such, under **Article 191(2)** of the **Constitution**, these two legislations prevail over the **County Appropriations Acts**. He thus urged the Court to find the **County Appropriations Acts** as unconstitutional and on the reliefs sought by the Petitioners, Mr. Oraro submitted that they are moot as the recommendations made by the 1st Respondent to County Governments have already been taken into account by Parliament while passing the **Division of Revenue Act, 2014** and **County Allocation of Revenue Act, 2014**.
27. Lastly, it was Mr. Oraro's submission that the Petitioners are State Organs as created under **Article 178(1)** of the **Constitution** and the Counties are also State Organs and further that the Petitioners in their official capacity and the forty seven Counties are not persons within the meaning of the Constitution and therefore they are incapable of enjoying/enforcing any right under the Bill of Rights. In that regard, he relied on the case of *County Government Meru vs Ethics and Anti-Corruption Commission (2014) e KLR* where it was held that a County Government was not a person capable of enforcing fundamental rights and freedoms and for the above reasons, he urged the Court to find that the Petition lacked merit and ought to be dismissed in its entirety.

The 2nd Respondent's case

28. The 2nd Respondent, the Controller of Budget, is an office established under **Article 228** of the **Constitution** and its mandate is to oversee the implementation of the budgets of the National and County Governments by authorizing withdrawals from public funds and also to bar any withdrawal from a public fund unless he is satisfied that the withdrawal is authorized by law.
29. It opposed the Petition through the Affidavit of Mr. Waweru Tuti, its Legal Officer, sworn on 12th September 2014. Mr. Arwa appeared for the 2nd Respondent and argued its case.
30. In his affidavit Mr. Waweru deponed that for any withdrawals to be authorized by law, the budgetary process as envisaged by the Constitution and the **Public Finance Management Act**, must be adhered to.

31. That the 2nd Respondent, before approving any withdrawal from the County Revenue Fund, interrogates the budgetary process to establish whether the requirements of the law have been met and that in the financial year 2013/2014, County Assemblies approved flawed budgets and thereafter their Appropriation Acts were based on the said flawed budgets and consequently, requests for withdrawals from the County Revenue Fund was not approved and the same were referred back to the County Assemblies for rectification and/or incorporation of details and or information that had been omitted thus resulting in the delay of withdrawals of any money from the Fund which in turn stalled the operations of County Governments. That to avoid similar situations, the 2nd Respondent advised County Assemblies to present their proposed budgets ahead of time for advise on what additional information ought to have been incorporated in them before presentation of the budget estimates to the 2nd Respondent. The 2nd Respondent upon being presented with the proposed budgets by each of the County Assemblies for comments prior to enactment of the Appropriation Act, wrote letters to the 47 Counties on diverse dates between 5th June 2014 and 16th June 2014 briefly indicating what requirements of law their budgets had to satisfy before any withdrawal from the County Revenue Fund would be allowed. That the County Assemblies disregarded the recommendations and circulars sent to them and prepared budgets without due consideration to the recommendations made and therefore the Budgets presented to the 2nd Respondent were not prepared in line with the Programme Based Budget Approach as required by the **Public Finance Management Act**, and the Transition Authority Circular dated 12th, March 2014 which required all County Governments to implement Programme Based Budgets with effect from the financial year 2014/2015.
32. Further, that the Budget prioritization documents presented by each of the Petitioners were inconsistent with the devolved functions as stipulated under the Fourth Schedule to the Constitution and that the budgets presented did not show the allocation of development projects in the County. In particular, that the geographical distribution of the projects could not be ascertained by examining the particular budget estimates and that the budgets presented did not disclose the comparative data for the development expenditure of the prior year, thus limiting the ability to assess whether enough money had been allocated to complete those projects. Further, that the sub-items in the budget had no codes according to the Government Financial Statistics coding that provides that every item must have a code and lastly, that the Counties had allocated monies that exceeded the monies in the County Revenue Fund and the County Assemblies ignored the recommendations of the 2nd Respondent in the whole budget process.
33. Mr. Waweru thus concluded that there was need to observe the principles of Public Finance as enshrined in **Article 201** of the **Constitution** and ensure prudent and responsible use of money and avoid wastage as was clear in the financial year 2013/2014 where members of County Assemblies made several foreign trips which were unnecessary and a waste of public funds. That the reason why the Petitioner's budgets were therefore not approved was because they had not satisfied the requirements of law in their enactment and that is why they could not be approved as submitted and not because they had exceeded the ceilings set by the 1st Respondent as contended by the Petitioners.
34. Mr. Arwa added that the Petitioners had not been discriminated against as alleged and that the ceilings were made based on an existing legal framework which had to be followed by all agencies including the Petitioners. He thus urged the Court to dismiss the Petition with costs.

The 3rd Respondent's case

35. The 3rd Respondent, the Attorney General, is established under the provisions of **Article 156(1)** of the **Constitution** with its mandate set out under **Article 156(4)(b)** of the **Constitution** including to represent the National Government in Court or in any other legal proceedings to which the National Government is a party.

36. The Attorney General opposed the Petition and Mr. Moimbo presented his case and while associating himself with the submissions of the 1st and 2nd Respondent, he added as follows;
37. That the generation of budgets at the National and County levels is a process that is strictly guided by both the **Constitution** and the **Public Finance Management Act** and as such, any budget based on budget estimates outside the provisions of the **Constitution** and **Public Finance Management Act** is unconstitutional and untenable in law.
38. On the issue of the alleged recommendations by the 1st Respondent, he submitted that under **Sections 25(5)(a)** and **117(5)** of the **Public Finance Management Act**, the National Treasury and the County Treasuries are enjoined to seek and take into account the views of the 1st Respondent while preparing the Budget Policy Statement and the County Fiscal Strategy Paper. He thus submitted that the recommendations made by the 1st Respondent are binding on the Petitioners and that they have the force of law because **Article 216(3)(a)** of the **Constitution** removes the basis of such recommendations from the wisdom of the 1st Respondent and places it on the mandatory criteria of equity under **Article 203** of the **Constitution**. That a finding by this Court that the recommendations made by the 1st Respondent are not binding would render the 1st Respondent functionally ineffective and would render **Article 203(1)** and **216(3) (a)** inoperative and useless.
39. As regards the 2nd Respondent, Mr. Moimbo submitted that it can only oversee the implementation of budgets of the National and County Governments, by authorizing withdrawals from public funds under **Articles 204, 206** and **207** and that under **Article 228(5)** such withdrawals can only be made within the law and it is within the mandate of 2nd Respondent to stop a withdrawal that is not legal.
40. Mr. Moimbo thus urged the Court to dismiss the Petition.

The Interested Party's Case

41. The Interested Party, the Council of Governors, opposed the Petition. Mr. Wanyama presented its case and his submissions were that County Assemblies were not persons capable of enjoying rights under the Bill of Rights. That while the provisions of **Article 20(1)** of the **Constitution** recognize both horizontal and vertical application of the Bill of Rights, the Constitution has not given State Organs, such as the Petitioners, the power to petition this Court over a violation enshrined in the Bill of Rights. He relied on the case of *Kenya Bus Service Ltd and Anor vs Minister for Transport and 2 Others (2012) eKLR* where it was held that state organs are not entitled to the protection of the Bill of Rights and cannot therefore claim a violation of fundamental rights and freedoms.
42. It was his further submission that the impugned Circulars are binding on the Petitioners and that under the provisions of **Section 2 of the Interpretation and General Provisions Act (Cap 2) Laws of Kenya**, the Circular is a form of subsidiary legislation since the 1st Respondent was acting within its powers under **Article 216** of the **Constitution** and **Section 10(c)** of the **Commission on Revenue Allocation Act**.
43. He submitted further that in any event, if there was conflict between County legislation and National legislation, National legislation prevails as provided for under **Article 191(2)** of the **Constitution**. That because the **Commission on Revenue Allocation Act** is also a National legislation that has donated powers to the 1st Respondent to make recommendations on how funds should be spent at the County Government, the recommendations made thereunder amount to subsidiary legislation and therefore prevails over County legislation. He claimed further that the fact that County Appropriation Bills as passed exceeded the ceilings imposed by the recommendations of the 1st Respondent shows that they are contrary to the law and in any event,

under **Article 191(2)(b)** of the **Constitution**, the suspended County Assemblies budgets prejudice the National economic policy and as such are void.

44. He therefore urged the Court to find that the 1st and 2nd Respondent have not violated the Constitution in any way and have instead acted in accordance with the law by issuing the impugned Circulars to the Petitioners. He urged the Court to dismiss the Petition for the above reasons.

Determination

45. Having set out the Parties' submissions as above and looking at the pleadings and submissions before me, I am of the view that there are two main issues for determination in this Petition. Firstly, whether the impugned Circulars were issued in breach of the law and the legislative authority of County Assemblies. To answer that issue I must also consider the budgetary making process and the mandates of County Assemblies as well as that of the 1st Respondent and 2nd Respondent in the said budgetary making process. Secondly, whether the Petitioners' fundamental rights under **Article 27** and **47** of the **Constitution** have been violated by the Respondents, jointly or severally. Lastly, I will consider what remedies are available to the Petitioners, if any.

Whether the impugned circulars were issued in breach of the law and the legislative authority of County Assemblies

46. As already stated, in order to determine the dispute before me, it is important to analyse and confirm the budget making process as outlined in the Constitution and in the **Public Finance Management Act** *vis-a-vis* the mandate of the County Assemblies as well as the 1st and 2nd Respondent in that process. If I understood Prof. Ojienda well, his submission was that the Constitution does not allow the 1st Respondent to decide on matters concerning financing and fiscal management by Counties and that its mandate is limited to making recommendations on the basis of equitable sharing of finances while that of the 2nd Respondent is to ascertain the lawfulness of withdrawals from Revenue Funds created under **Article 207** of the **Constitution**. It was therefore his submission that there is no known law presently that mandates any of the Respondents to approve budgets or determine votes on account of budgets of County Assemblies and to do so would amount to usurping the powers of the County Assemblies and therefore the ceilings recommended by the 1st Respondent through Reference No. CRA/CGM/Vol. III/99 are illegal.

47. It is important to state from the outset that the budgetary process in Kenya is undertaken both at the National Level and at the County level. At the National level, the process is managed by the National Treasury while at the County level it is managed by the County Treasury. That being so, the first principle in the budgetary process is to be found in **Articles 201(b)(ii)** and **202(1)** of the **Constitution** which provide that revenue collected nationally shall be shared equitably between the National and County Governments. As to how and the manner in which that revenue is to be shared, **Article 218 (1)(a)** of the **Constitution** is important as it directs that at least two months before the end of each financial year, there shall be introduced into Parliament, a **Division of Revenue Bill** which shall divide revenue raised by the National Government among the two levels of Government.

48. The National budgetary process proper then starts with the preparation of a Budget Policy Statement by the National Treasury as is provided for in **Section 25(1)** of the **Public Finance Management Act**. **Section 25(4)(c)** of the same Act requires that the Budget Policy Statement must include the amount of indicative transfers of funds from the National Government to the County Governments. **Section 25(5)(a)** of the same Act enjoins the National Treasury in its preparation of the Budget Policy Statement to seek and take into account the views of the 1st Respondent, County Governments, Controller of Budget, the Parliamentary Service Commission, the Judicial Service Commission, the public and any other interested persons or

groups. **Section 25(7)** of the **Act** then provides that Parliament, within fourteen days of submission to it of the Budget Policy Statement, shall table and discuss its recommendations and pass a resolution to adopt it with or without amendments. Thereafter, under the provision of **Section 25(8)** of the Act, the Cabinet Secretary for Finance shall take into account the resolutions passed by Parliament and finalize the budget for that financial year. Lastly, under **Section 25(9)** of the Act, the National Treasury shall publish and publicize the Budget Policy Statement not later than fifteen days after submission of the said Statement to Parliament.

49. Of importance in this Petition is that the National Treasury indeed prepared the 2014 Budget Policy Statement and presented the same to Parliament and that it was adopted by Parliament on 20th March 2014. In accordance with **Article 218(1)(a)** of the **Constitution** which directs that at least two months before the end of each financial year there shall be introduced in Parliament a Division of Revenue Bill which shall divide revenue raised by the National Government among the National and County levels of Government, Parliament enacted the **Division of Revenue Act, 2014** which was assented to by the President on 30th July, 2014 and which came into effect on 4th August 2014. **Section 3** of that **Act** provides as follows;

“The object and purpose of this Act is to provide for the equitable division of revenue raised nationally between the national and county levels of government for the financial year 2014/2015 in accordance with Article 203(2) of the Constitution”.

Further and in the above context, **Article 218(1)(b)** provides for the enactment of the **County Allocation of Revenue Act** which provides for the equitable allocation of revenue raised by the National Government among the 47 Counties. In that regard, the **County Allocation of Revenue Act, 2014** in **Section 3** states it objects as follows;

“(a) provide, pursuant to Article 218(1)(b) of the Constitution, for the allocation of the equitable share of revenue raised by the National Government among the County Governments in accordance with the resolution approved by Parliament under Article 217 of the Constitution for the financial year 2014/2015;

(b) provide, pursuant to Articles 187(2) and 201(2) of the Constitution, for conditional additional allocations for the financial year 2014/2015; and

(c) facilitate the transfer of allocations made to the County Governments under this Act from the Consolidated Fund to the respective County Revenue Funds.”

50. The National Budgetary process effectively ends when transfers are made to the respective County Revenue Funds and before I start on the budgetary process at the County Level, I am aware that the Petitioners’ case is pegged on the import to be attached to Circular Reference as CRA/CGM/VOL.III/ 99 issued by the 1st Respondent to all the Governors and County Executive Committee Members of Finance in all the 47 Counties. In that regard, it was Prof. Ojienda’s submission that the said Circular is void on two fronts. Firstly, that it was issued without authority and in breach of the legislative authority of County Assemblies under the provisions of **Articles 185(1) and (2)** of the **Constitution**. Secondly, that in issuing and acting on the said Circular, the 1st Respondent violated **Article 189 (1)** of the **Constitution** as it failed to consult County Assemblies on a matter that fell within their mandate and would in effect affect them.

51. For avoidance of doubt that impugned Circular reads as follows;

“COMMISSION ON REVENUE ALLOCATION

Our Ref: CRA/CGM/VOL.III/99

22nd April, 2014

- All governors

- County Executive Committee members – Finance

RE: RECOMMENDED BUDGET CEILINGS FOR COUNTY ASSEMBLY AND COUNTY EXECUTIVE BASED ON RECOMMENDED BUDGET ON COSTS OF NEW COUNTY STRUCTURES OF KSHS.30,232 MILLION

Attached please find CRA recommended ceilings for County Assembly and County Executive with accompanying notes.

Please note that where budget exceeds the recommended ceilings, it would be at the expense of the costed devolved services which will consequently affect service delivery.

Yours sincerely,

SIGNED

George Ooko

COMMISSION SECRETARY

cc - Controller of Budget

- Clerk of the Senate
- Ag. CEO, Council Of Governors.” (Emphasis added)

Three facts can be clearly discerned from a plain reading of the Circular. Firstly, it was issued by the 1st Respondent. Secondly, it was directed at Governors and County Executive Committee members in all the 47 Counties and lastly, it recommended budget ceilings for County Assemblies and County Executives and in that regard a question arises whether the 1st Respondent had powers to issue the Circular and lastly, if so, whether the recommended ceilings were within the law.

52.The 1st Respondent is an Independent Commission established under **Article 248(2)** of the **Constitution**. Its functions are stipulated under **Article 216(1)and (2)** of the **Constitution** as follows;

“(1) The principal function of the Commission on Revenue Allocation is to make recommendations concerning the basis for the equitable sharing of revenue raised by the National Government-

(a) between the National and County Governments’ and

(b) among the County Governments’.

(2) The Commission shall also make recommendations on other matters concerning the financing of, and financial management by, County Governments’ as required by this Constitution and National legislation.” (Emphasis added)

In addition to the above provisions, **Section 10(1)**of the **Commission on Revenue Allocation Act,Cap.5E**provides as follows;

“(1) In addition to its principal function under Article 216(1) of the Constitution, the commission shall, in accordance with clause (2) of that Article –

(a) Make recommendations for consideration by Parliament prior to any Bill appropriating money out of the Equalization fund is passed in parliament.

(b) Upon request from the Senate, make recommendations on the basis for allocating among the counties the share of National revenue that is annually allocated to the County levels of Government.

(c) Submit recommendations to the Senate, National Assembly, National Executive, County Assembly and County executive on the proposals made for equitable distribution of revenue between the National and County Governments and amongst the County Governments taking into account the criteria set out in Article 203 of the Constitution, including recommendations on the amounts earmarked for specific purposes such as the constituency development fund, among others; and

(d) Perform such other functions as are provided for by the Constitution or any other written law.” (Emphasis added)

53. Looking at the above provisions and all of them read together, the 1st Respondent is the body charged with the responsibility of making recommendations *inter-alia* to the Senate, the National Assembly, the National Executive, County Assemblies and County Executives on the basis upon which revenue would be shared equitably between the National and County Governments. It also recommends how the revenue allocated to the County Government level would be shared among the County Governments. It also makes recommendations on matters concerning the financing and financial management by the County Governments. None of the Parties disputed these facts but the point of disagreement is whether those recommendations are binding on all the organs to which they are made. Mr. Moimbo for example warned this Court against any interpretation that would mean that the recommendations aforesaid are not binding. What is the law on the subject?

54. The Concise Oxford English Dictionary defines “recommend” as;

- “(i) put forward with approval as being suitable for a purpose or role***
- (ii) Advise as a course of action”.***

Taken in its ordinary English meaning, it would therefore mean that ‘recommendations’ do not have a binding effect on the person or body to whom they are made. Recommendations are not the same as ‘directives’ or ‘directions’ which are certainly binding on those to whom they are addressed, - See Re Thomson (supra). However, in the context of the Petition before me and in order to interpret ‘recommendations’, the Constitution must be read as a whole in order to ascertain its aim and object so as to establish the aim of the drafters of the Constitution - See Kigula and Others vs The Attorney General (2005) AHGRLR 197 (Ug CC 2005). Heed must therefore be paid to the language used and the context of the specific provision under consideration.

55. In that regard and further to what I have stated above, **Article 217** of the **Constitution** states that;

“(1) Once every five years, the Senate shall, by resolution, determine the basis for allocating among the Counties the share of National revenue that is annually allocated to the County level of Government.

(2) In determining the basis of revenue sharing under clause (1), the Senate shall—

(a) take the criteria in Article 203 (1) into account;

(b) request and consider recommendations from the Commission on Revenue Allocation;

(c) consult the County Governors, the Cabinet Secretary responsible for finance and any organisation of County Governments; and

(d) invite the public, including professional bodies, to make submissions to it on the

matter.

(3) Within ten days after the Senate adopts a resolution under clause (1), the Speaker of the Senate shall refer the resolution to the Speaker of the National Assembly.

(4) Within sixty days after the Senate's resolution is referred under clause (3), the National Assembly may consider the resolution, and vote to approve it, with or without amendments, or to reject it.

(5) If the National Assembly—

(a) does not vote on the resolution within sixty days, the resolution shall be regarded as having been approved by the National Assembly without amendment; or

(b) votes on the resolution, the resolution shall have been—

(i) amended only if at least two-thirds of the members of the Assembly vote in support of an amendment;

(ii) rejected only if at least two-thirds of the members of the Assembly vote against it, irrespective whether it has first been amended by the Assembly; or

(iii) approved, in any other case.

(6) If the National Assembly approves an amended version of the resolution, or rejects the resolution, the Senate, at its option, may either—

(a) adopt a new resolution under clause (1), in which case the provisions of this clause and clause (4) and (5) apply afresh; or

(b) request that the matter be referred to a joint committee of the two Houses of Parliament for mediation under Article 113, applied with the necessary modifications.

(7) A resolution under this Article that is approved under clause (5) shall be binding until a subsequent resolution has been approved.

(8) Despite clause (1), the Senate may, by resolution supported by at least two-thirds of its members, amend a resolution at any time after it has been approved.

(9) Clauses (2) to (8), with the necessary modifications, apply to a resolution under clause (8).” (Emphasis added)

57. The bonding of nature of a resolution above is quite different, obviously, from a mere recommendation. Important is also **Article 218 (2)** of the **Constitution** which provides as follows;

“(1) ...

(2) Each Bill required by clause (1) shall be accompanied by a memorandum setting out—

(a) an explanation of revenue allocation as proposed by the Bill;

(b) an evaluation of the Bill in relation to the criteria mentioned in Article 203 (1); and

(c) a summary of any significant deviation from the Commission on Revenue Allocation's

recommendations, with an explanation for each such deviation.” (Emphasis added)

The import of the above provisions is that a recommendation made by the 1st Respondent to the Senate is not binding but for good order, reasons for a deviation must be given.

58. As to who the recommendations are generally made to, **Article 218(5)** proves as follows;

216 “(1) ...

(2) ...

(3) ...

(4) ...

(5) ***The Commission shall submit its recommendations to the Senate, the National Assembly, the National Executive, County Assemblies and County Executives.***”

Reading **Articles 216, 217 and 218** of the **Constitution** as well as **Section 10(1)** of the **Commission on Revenue Allocation Act, Cap.5E**, a number of facts can be distilled viz;

(i) The principle function of the 1st Respondent is to make recommendations to the Senate, the National Assembly, the National Executive, County Assemblies and County Executives.

(ii) By the very nature of recommendations, they are persuasive but not binding on the person or body to which they are directed.

(iii) Its principal functions in **Article 216(1) and (2)** of the **Constitution** are to be supplemented by legislation and hence **Section 10(1)** of the **Commission on Revenue Allocation Act**, which has been reproduced elsewhere above.

(iv) The impugned Circular if looked at in the context of **Article 216(1) (2) and (5)** of the **Constitution** and **Section 10(1)** aforesaid cannot be said to be unlawful or unconstitutional as argued by the Petitioners because it was made well within the mandate of the 1st Respondent.

But that is not the end of the matter because it has been argued that the Circular has breached the legislative authority of the County Assemblies. How has that been done? The Petitioners have stated that the Circular had the effect of invalidating their County Fiscal Strategy Papers, County Budget Estimates of Revenue and Expenditure, Appropriation Bills and Finance Acts but I am at pains to understand that argument because while the circular was issued on 22nd April 2014, the law providing for budgetary ceilings, being **Section 12** of the **County Allocation of Revenue Act, 2014** came into force on 5th September 2014 while this Petition was filed on 23rd July 2014.

Section 12 aforesaid provides as follows;

“Section 107 of the Public Finance Management Act is amended by inserting the following new Subsection immediately after subsection (2) –

(2A) pursuant to Articles 201 and 216 of the Constitution and notwithstanding Subsection (2), the Commission on Revenue Allocation shall recommend to the Senate the budgetary ceilings on the recurrent expenditures of each County Government.” (Emphasis mine)

Prof. Ojienda in the above context, submitted that neither the **Division of Revenue Act, 2014** nor the **County Allocation of Revenue Act, 2014** contained block figures of revenue that goes to each

County government as budgetary ceilings set by the 1st Respondent vide the impugned Circulars. I have again looked at the impugned Circular and the accompanying notes which provide for budget ceilings in block figures to each County. Where then is the dispute? Whether the Petitioners acted on the circular is a non-issue because in fact it was not binding on them or Parliament. That issue is moot because once I have found that the recommendations made are not binding, then it follows that any complaint by the Petitioners ought to be directed at the State Organs with the final say on the budgets i.e. Parliament. There is no argument before me that the **County Allocation of Revenue Act, 2014** is unconstitutional or that **Section 12** which introduced budgetary ceilings is unconstitutional. I have also not seen any argument that **Section 107** of the **Public Finance Management Act, Cap.142** is unconstitutional. That **Section** for avoidance of doubt proves as follows;

“(1) A County Treasury shall manage its public finances in accordance with the principles of fiscal responsibility set out in subsection (2) and shall not exceed the limits stated in the regulations.

(2) In managing the county Government’s public finances, the County Treasury shall enforce the following fiscal responsibility principles-

(a) the county Government’s recurrent expenditure shall not exceed the County Government’s total revenue;

(b) over the medium term a minimum of thirty percent of the County Government’s budget shall be allocated to the development expenditures;

(c) the County Government’s expenditure on wages and benefits for its public officers shall not exceed a percentage of the County Government’s total revenue as prescribed by the County Executive member for finance in regulations and approved by the County Assembly;

(d) over the medium term, the Government’s borrowings shall be used only for the purpose of financing development expenditure and not for recurrent expenditure;

(e) the County debt shall be maintained at a sustainable level as approved by County Assembly.

(f) the fiscal risks shall be managed prudently; and

(g) a reasonable degree of predictability with respect to the level of tax rates and tax bases shall be maintained, taking into account any tax reforms that may be made in the future.

(3) For the purposes of subsection (2) (d), short term borrowing shall be restricted to management of cash flows and shall not exceed five percent of the most recent audited County Government revenue.

(4) Every County Government shall ensure that its level of debt at any particular time does not exceed a percentage of its annual revenue specified in respect of each financial year by a resolution of the County Assembly.

(5) The regulations may add to the list of fiscal responsibility principles set out in subsection (2).”

Read together with **Section 12** aforesaid, the above principles are crucial in the management of funds allocated to County Governments and I see no reason in the circumstances to delve into them in the circumstances of the Petition before me because there is no issue raised with regard to them.

Without **Section 12** or **Section 107** above being declared unlawful, I do not see the value of any case made out of a non-binding Circular while the law that came subsequent to it remains intact.

59. Notwithstanding my findings above, I also understood one of the Petitioners' complaints to be that the 1st Respondent issued the impugned Circular without having involved and consulted them. I shall now turn to consider this submission.

60. The 1st Respondent is an Independent Constitution Commission and as such under, **Article 249(2)**, it is not subject to the direction or control of any person or authority. The Supreme Court in **Re Matter of the Interim Independent Electoral Commission (supra)** expressed itself in the following terms as regards independent commissions;

“While bearing in mind that the various commissions and independent offices are required to function free of subjection to “direction or control by any person or authority”, we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit. These Commissions or independent offices must, however, operate within the terms of the Constitution and the law; the “independence clause” does not accord them carte blanche to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law.”

The Court went further to state that;

For due operation in the matrix, “independence” does not mean “detachment”, “isolation” or “disengagement” from other players in public governance. Indeed, for practical purposes, an independent commission will often find it necessary to co-ordinate and harmonise its activities with those of other institutions of Government, or other Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of Government, or other commissions, so as to maximize results, in the public interest. Constant consultation and co-ordination with other organs of Government, and with civil society as may be necessary, will ensure a seamless, and an efficient and effective rendering of service to the people in whose name the Constitution has instituted the safeguards in question.

It then concluded as follows;

The moral of this recognition is that commissions and independent offices are not to plead “independence” as an end in itself; for public-governance tasks are apt to be severely strained by possible “clashes of independences.”

61. I am duly guided on the interpretation of the law as above and it is clear to me that the 1st Respondent ought to perform its functions as provided for under the four corners of the Constitution and the law. Further, in meeting its objectives it is bound by the provisions of **Article 249 (1)** which are as follows,

“(1) The objects of the commissions and the independent offices are to—

(a) protect the sovereignty of the people;

(b) secure the observance by all State organs of democratic values and principles; and

(c) promote constitutionalism”.

Some of the democratic values and principles which also bind the 1st Respondent are those stated at **Article 10** of the **Constitution** are as follows;

“(1) ...

(2) The National values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power ,the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and State and religion. National symbols and national days. National values and principles of governance.

(d) sustainable development.”

62.Further, under **Article 216(3)** of the **Constitution**;

“(3) In formulating recommendations, the Commission shall seek—

(b) to promote and give effect to the criteria mentioned in Article 203 (1);

(c) when appropriate, to define and enhance the revenue sources of the national and county governments; and

(c) to encourage fiscal responsibility.”

63.In addition to the above, **Section 10(2)** of the **Commission on Revenue Allocation Act** provides that;

“In making recommendations under this Section, the Commission shall take into consideration such facts or information as may be given to it by a County Government”.

64.Having rendered the law as I have done above, did the 1st Respondent seek any information from County Governments before making the recommendation for budgetary ceilings and was it obligated to do so? I do not think so and I say so because I have no evidence to the contrary. **Section 10(2)** above creates no obligation in the manner suggested by the Petitioner although the information required may be useful to the 1st Respondent. It is a matter wholly of discretion on its part.

65.I reiterate that the 1st Respondent was not bound by the Constitution and the Act to seek information and representations from the County Government before making its recommendations on budget ceilings. I say so well aware that the principles in **Article 189** of the **Constitution** encourage consultation between the two levels of Government and I dare add that the same principles would apply to relations between the levels of Government and Independent Commissions and Offices. That Article provides as follows;

“(1) Government at either level shall—

(a) perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level;

(b) assist, support and consult and, as appropriate, implement the legislation of the other level of government; and

(c) liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.

(2) Government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities.

(3) In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.

(4) National legislation shall provide procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.”

66. In addition to the above, I am aware of the provisions of **Section 25 (5)** of the **Public Finance Management Act** which provides that;

“(1) ...

(2) ...

(3) ...

(4) ...

(5) In preparing the Budget Policy Statement, the National Treasury shall seek and take into account the views of –

(a) the Commission on Revenue Allocation;

(b) County Governments;

(c) Controller of Budget;

(d) The Parliamentary Service Commission;

(e) The judicial Service Commission;

(f) The public; and

(g) Any other interested persons or groups;”

67. All the above provisions read together would point to the fact that in the entire budgetary process, the views of County Governments and Assemblies are important and ought to be considered and taken seriously in making the Budget Policy Statement which would be used in preparing the National Annual Budget but I am not prepared to hold that it is a mandatory obligation to do so on the part of the 1st Respondent. I say so because while it is a good practice to consult and in terms set out in **Article 189** above, failure to do so cannot amount to a violation of any law or the Constitution itself. The point is that out of respect for each other's roles and expertise, each organ should not off-handedly dismiss any suggestions or information obtained from the other but failure to do so cannot attract this Court's sanctions.

68. Having found as I have, I must now consider the other interrelated issue on whether the 1st and 2nd Respondents usurped the legislative mandate of the County Government in the County budgetary process. Prof. Ojienda strenuously submitted on this point and argued that the Circular is unconstitutional, unlawful and manifests anarchy because approval of County budgets is within the mandate of County Assemblies and it is not within the 1st and 2nd Respondents' mandate to determine particular votes on County Budgets.

69. In that regard, under the provisions of **Section 104(1)(a)(b)** of the **Public Finance Management Act**, it is the responsibility of the County Treasury to prepare the Annual Budget for a County and co-ordinate the preparation of Estimates of Revenue and Expenditure of a County Government. The procedure for the budgetary process under **Section 117** of the **Public Finance Management Act** therefore starts with the preparation of a County Fiscal Strategy Paper which is then submitted for approval by the County Assembly by 28th February of each financial year. In preparing the County Fiscal Strategy Paper, the County Treasury is obligated to specify the broad strategic priorities and policy goals that will guide the County Government in preparing its budget for the coming financial year. Thereafter, under **Section 118** of the Act, the County Treasury prepares a County Budget Review and Outlook Paper in respect of the County for each financial year and submits the paper to the County Executive Committee by 30th September of that year. The County Executive Committee then is obligated to discuss that Outlook Paper and after approval it is laid before the County Assembly before it is published and publicised.

70. The County Government budget process therefore consists of the following stages as stipulated under **Section 125(1)** of the **Public Finance Management Act**;

“(1) ...

(a) Integrated development planning process which shall include both long term and medium term planning;

(b) Planning and establishing financial and economic priorities for the County over the medium term;

(c) Making an overall estimation of the County Government's revenues and expenditures;

(d) Adoption of County Fiscal Strategy Paper;

(e) Preparing budget estimates for the County Government and submitting estimates to the County Assembly;

(f) Approving of the estimates by the County Assembly;

(g) Enacting an appropriation law and any other laws required to implement the County Government's budget;

(h) Implementing the County Government's budget; and

(i) Accounting for, and evaluating, the County Government's budget revenues and expenditures.

(2) The County Executive Committee member for Finance shall ensure that there is public participation in the budget process.”

71. As can be seen and above, one can only but agree with Prof. Ojienda for the Petitioners that it is within the mandate of the Treasury, County Executive and County Assembly to prepare and approve budgets for a County. However, that process cannot be read in isolation of other

processes because I have already found that it is within the mandate of the 1st Respondent to recommend to the Senate, the National Assembly, the County Assembly and the County Government on equitable sharing of revenue between the two levels of Government and as between County Governments. By so recommending, the 1st Respondent would in essence be performing its obligations under **Article 216** of the **Constitution** and I therefore reiterate that even if the 1st Respondent had recommended budgetary ceilings in the County Budgets for 2014/2015 financial year, that action does not violate the Constitution. I further reiterate that it is actually the core responsibility of the 1st Respondent to recommend the manner in which the National Revenue is to be shared between the two levels of Government and among the Counties and such recommendation may include prescribing ceilings. However it must do so in the framework and in accordance with the Constitution and the law as I have found elsewhere above.

72. Before I conclude on this issue, I recall that by Prof. Ojienda submitted that there are strict timelines and systems of checks and balances required to be observed by County Assemblies in enacting County budgets. In that regard, under the provisions of **Sections 117, 125, 129 and 133** of the **Public Finance Management Act**, the following instruments must be passed during the budgetary process in each financial year;

(i) A County Fiscal Strategy Paper, which, pursuant to the provisions of **Sections 117(1) and (6)** of the **Public Finance Management Act** must be submitted to a County Assembly by the County Treasury by 28th February each year, and adopted by the County Assembly by 14th March each year. It is the County Fiscal Strategy Paper that presents the financial outlook of a County with respect to County Government revenues, expenditures and borrowing for the coming financial year and over the medium term;

(ii) A County Budget Estimates of Revenue and Expenditure, which, pursuant to the provisions of **Sections 125(2) (a), 129(6) and 131(1)** of the **Public Finance Management Act**, must be presented to a County Assembly by the County Executive Committee Member for Finance by 30th April each year and approved by the County Assembly promptly and in any event before 30th June each year;

(iii) A **County Appropriations Act** which the County Assembly must consider and enact by 30th June each year; and

(iv) A **County Finance Act**, which pursuant to the provisions of **Section 133** of the **Public Finance Management Act**, a County Assembly must consider and enact by 30th September each year.

73. In the above context, I note that the impugned Circular is dated 22nd April 2014. As can be seen from the provisions of **Section 117** of the **Public Finance Management Act**, the County Fiscal Paper ought to be prepared by 28th of February in each financial year. I must therefore agree with Prof. Ojienda that for Counties to comply with the Circular as issued by the 1st Respondent, they had to restart the budgetary process with the preparation and adoption of the Fiscal paper. But to my mind the issue is moot considering that the **Allocation of Revenue Act, 2014** is in operation and it is the one that creates the offending ceilings even if it is based on non-binding recommendations from the 1st Respondent. I will say no more on the subject because that Act is not the subject of challenge in this Petition.

74. The last issue I will deal with on this question regards the submission made by the Petitioners that it is the constitutional duty of the County Assemblies to approve budgets for County Assemblies and as such the 2nd Respondent acted *ultra vires* its mandate by purporting to approve the said County Budgets.

75. In that regard, under **Article 228(4)** of the **Constitution**, the mandate of the 2nd Respondent is to

oversee the implementation of the budgets of the National and County Governments by authorizing withdrawals from public funds under **Articles 204, 206 and 207** of the **Constitution**. Under **Article 228(5)**, the Controller of Budget shall not approve any withdrawal from a public fund unless that withdrawal is authorized by law.

76.If I understood Mr. Arwa properly, his submission was that the 2nd Respondent had failed to authorize withdrawals from the County Revenue Fund mainly because the County Assemblies had disregarded the recommendations made in the respective Circulars issued to them on diverse dates between 5th June 2014 and 16th June 2014. The question I must therefore answer is whether the 2nd Respondent acted *ultra vires* its mandate by so doing.

77.In that context, I recall Mr. Waweru, the Legal Officer for the 2nd Respondent stated in his Affidavit that in the financial year 2013/2014, the County Assemblies approved flawed budgets and thereafter their Appropriation Acts were rendered on rendered equally flawed and as such withdrawals from the Revenue Fund were not approved. That in order to avoid a similar situation for the financial year 2014/2015, the 2nd Respondent advised County Assemblies to present budget estimates to the 2nd Respondent for comments prior to the enactment of the Appropriation Acts and that the budget estimates were thereafter submitted and the Controller of Budget wrote letters on diverse dates between 5th June and 16th July 2014 advising the County Governments on what items their budgets ought to have included before their finalization and ultimately enactment of the Appropriation Acts; Was that a lawful action on the part of the 2nd Respondent? I think not.

78.I say so because the law on the subject is very clear. **Section 102** of the **Public Finance Management Act** sets out the principles that County Governments must adhere to in respect of public finances. They are as follows;

“(1) Each County Government shall ensure adherence to—

(a) the principles of public finance set out in Chapter Twelve of the

(b) the fiscal responsibility principles provided in section 107 under this Act;

(c) national values set out in the Constitution; and

(d) any other requirements of this Act.

(2) The County Executive Committee shall observe principles of collective responsibility in exercising their functions under this Act.

(3) In making decisions a county assembly shall take cognisance of Article 216(2) of the Constitution.”

79.As regards the responsibility of a County Treasury with respect to County public funds, **Article 207(1)** of the **Constitution** as well as **Section 109** of the **Public Finance Management Act** establishes a County Revenue Fund for each County Government and the fund is to be administered by the County Treasury. Under **Section 109(4)** of that **Act**, the County Treasury shall arrange for the fund to be kept in the Central Bank or an account approved by the County Executive Committee member responsible for finance. Under **Article 207(2)(3)** as well as **Section 109(6)** of the **Public Finance Management**, the County Treasury shall obtain the approval of the Controller of Budget before withdrawing money from the County Revenue Fund under the authority of an Act of the County Assembly appropriating money for a public purpose, an Act of Parliament or county legislation that imposes a charge on that fund or in accordance with the provision of **Section 134** and **135** of the **Public Finance Management Act**.

80.Prior to the above processes and as stated earlier, the budget process in a County starts with the

preparation of the County Fiscal Strategy Paper by the County Treasury. Under **Section 117 (2)** of the **Public Finance Management Act**, the County Treasury ought to align its County Fiscal Strategy Paper with the national objectives in the Budget Policy Statement. The County Treasury shall in that regard, include in its County Fiscal Strategy Paper the financial outlook with respect to county government revenues, expenditures and borrowing for the coming financial year and over the medium term. Under **Section 117 (5)** of that Act, in preparing the County Fiscal Strategy Paper, the County Treasury shall seek and take into account the views of the Commission on Revenue Allocation, the public, any interested persons or groups and any other forum that is established by legislation. Under **Section 126** of that Act, in developing the County Fiscal Strategy paper, the County Treasury consults with and takes into account the recommendations of the 1st Respondent and not the 2nd Respondent. Similarly, in developing the County Development Plan, the County Treasury sends the approved copy by the County Assembly.

In addition, **Section 131(1)** of the **Public Finance Management Act** provides that;

“the County Assembly shall consider the county government budget estimates with a view to approving them, with or without amendments, in time for the relevant appropriation law and any other laws required to implement the budget to be passed by the 30th June in each year.”

81. I have deliberately reproduced the above sections of the **Public Finance Management Act** to demonstrate that nowhere in the law is any role created for the 2nd Respondent and specifically for it to review budgets of County Governments before they are enacted. Fiscal reporting mechanisms are clear at the National level and so are they in the County level with the County Executive, County Treasury and County Assemblies each charged with the responsibility of ensuring accountability and transparency in utilization of County resources and specifically, the mandate of approving County Budgets is the responsibility of a County Assembly. I must therefore agree with the Petitioners that the 2nd Respondent obviously encroached on their mandate when it sought to get involved in their budgetary processes. I have read the affidavits of Mr. Waweru Tuti and Mr. George Ooko and whereas I note their concerns about the alleged untidy spending habits of County Governments and alleged claims of misuse of public funds as well as the need to ensure prudent utilization of public funds, good faith and meaningful intentions are worthless if those objects and designs are constitutionally and statutorily objectionable.

82. Before I conclude on this issue, I also recall the submission made by Mr. Oraro that the various County Appropriation Acts are invalid as they are in conflict with the Constitution and as such are not enforceable.

83. It is indeed true that under **Article 191(2)** of the **Constitution**, National legislation prevails over County legislation. However, in terms of the Petition before me, and as I have found elsewhere above, I have not seen any law authorizing the 2nd Respondent to undertake the function of approving County Budgets. **Article 228** is very clear that the 2nd Respondent only oversees the implementation of budgets. In that regard, the importance of the Appropriation Act is obvious and cannot be understated. The argument made by the Respondents that the 2nd Respondent would only authorize withdrawals from the County Revenue if the law and the budgetary process as envisaged by the **Constitution** and the **Public Finance Management Act, 2012** was adhered to is a matter of interpretation of the Constitution and Statute based on a specific set of contested facts. Who should ultimately determine alleged violations of the **Constitution** and the **Public Finance Management Act**? Who determines whether the **County Appropriation Acts** are in line with the **Constitution** and **Public Finance Management Act**.

84. The provisions of **Article 165** of the **Constitution** are clear in that regard. For avoidance of doubt it states thus;

165(3)(1) ...

- (a) ...
- (b) ...
- (2) ...
- (3) *Subject to clause (5), the High Court shall have—*
 - (a) ...
 - (b) *jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;*
 - (c) ...
 - (d) *jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—*
 - (i) *the question whether any law is inconsistent with or in contravention of this Constitution;*
 - (ii) *the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;*
 - (e) ...”

The dispute before me does not concern itself with the legality or otherwise of the **Counties Appropriation Acts** but it regards the mandate of the 1st and 2nd Respondent in the budgetary process and in overseeing the implementation of County budgets. The allegation that Counties had not submitted copies of County developments plans, debt management strategies as required by the law was not proved and given my findings as above, that issue is moot. That being the case, this Court cannot enter into such a vague dispute. It would only intervene had it been shown that the **Appropriation Acts** as enacted by the Counties violated the existing national legislation or that the Petitioners acted in contravention of the law, which is not the case before me.

85. In conclusion, the 2nd Respondent’s role is limited to overseeing the implementation of budgets including withdrawals from public funds. But having said so, as will be seen shortly, in fact this issue was not one in which any specific order was sought against the 2nd Respondent.

Whether the fundamental rights and freedoms of the Petitioners were violated

86. I now turn to consider the last issue I set out to determine which is the alleged violation of the Petitioners’ rights under **Articles 27 and 47** of the **Constitution**. In this regard, Prof. Ojienda submitted that in issuing the impugned Circular, the 1st Respondent failed to consult the Petitioners thus violating their right to fair administrative action as provided for under **Article 47** of the **Constitution**. He also claimed that the fact that the impugned Circular on budget ceilings targeted only votes on account for County Assemblies and County Executive for the financial year 2014/2015 and did not affect budgets of other State Organs such as the National Executive, National Assembly, Senate, Judiciary and the twelve Commissions and Independent offices, was discriminatory and therefore a violation of **Article 27** of the **Constitution**.

87. The 2nd Respondent on the other hand argued that there was no discrimination as alleged because budget ceilings were set for all arms of Governments and independent bodies and that all these other Government agencies had complied with their budget ceilings requirements save the Petitioners. On his part, Mr. Oraro submitted therefore that the Petitioners are State Organs under

Article 178(1) of the **Constitution** and as such they are not persons capable of enforcing any of the fundamental rights and freedoms under the Bill of Rights.

88. I will start by determining this preliminary issue and if I find that County Governments are not persons for purposes of enforcing fundamental rights and freedoms, the matter ends there. If not, I will proceed and determine the merits of the claims aforesaid.

89. It is not in doubt that the Petitioners have invoked the provisions of **Article 22** of the **Constitution** to allegedly enforce their right to protection against discrimination and right to fair administrative action as provided for under the provisions of **Article 27** and **47** of the **Constitution** respectively.

90. **Article 20(2)** of the **Constitution** is on the application of the Bill of Rights and it provides that;

“Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedoms’.

Under **Article 260** of the **Constitution** a ‘person’ includes “a company, association or other body of persons whether incorporated or unincorporated’.

The issue therefore is whether County Assemblies are persons capable of having their fundamental rights protected and enforced. In answering that question, Majanja J in County Government of Meru vs Ethics and Anti-Corruption Commission (supra) stated as follows;

“A County Government is recognized as part of the State organs that exercise the sovereign power of the people under Articles 1(4), 6 and 176 of the Constitution. Under Article 260 of the Constitution. “State”, when used as a noun, means the collectivity of offices, organs and other entities comprising the Government of the Republic under this Constitution” while the term person, “includes a company, association or other body of persons whether incorporated or unincorporated.” Under Article 21 of the Constitution, the obligations, regarding the implementation of fundamental rights and freedoms are cast on the on the State and every State organ. Article 22 of the Constitution, which has been invoked by the Petitioner, grants every “persons” the right to Institute Court proceedings claiming that a right or fundamental freedom in the bill of Rights has been denied, violated or infringes or is threatened.”

The learned judge continued thus;

“The provisions I have cited above show that there is a clear distinction between a person and a County Government which is a State organ vis-à-vis the rights and obligations under the Bill of Rights. I am doubtful, that the County Government qua County government can lodge a claim under Article 22 of the Constitution against another State organ to enforce fundamental rights and freedoms as the County Governments is not a person for purposes of the Constitution ad more particularly the Bill of Rights. I therefore find and hold that the Petitioner cannot agitate a claim for violation of fundamental rights and freedoms against the Commission. I therefore decline to grant prayer (b) of the Amended Petition.”

91. I am in agreement with the learned judge and I adopt his reasoning in the instant Petition. I do so because the Petitioners are not private individuals but officers serving in a public office as defined in **Article 260** of the **Constitution**. The Respondents are also officers and offices in the same public office and it is inconceivable how one can violate the other’s rights in the context of the Bill of rights. In any event, in the circumstances of the Petition before me, any differences regarding the fiscal and budgetary processes between affected State Organs should not be such as to attract this Court’s intervention under the Bill of Rights. Those differences are to be settled in the manner envisaged by **Article 189(4)** of the **Constitution** and not by litigation predicated on

the Bill of Rights. In addition, the dispute at hand concerns the powers of the 1st and 2nd Respondent in revenue allocation, budgetary processes and budget implementation. **Article 10** of the **Constitution** sets out the principles of rule of law, transparency, accountability and good governance as some of the national values to guide such processes. Rule of law dictates that every state organ, independent offices and Commission must apply the Constitution and the law in its affairs and it is the duty of this Court to determine the legality of their actions and that is how far the Court should go.

92. In a nutshell, I see no reason to make any finding that any rights as under **Articles 27** and **47** of the **Constitution** have been breached as far as the Petitioners are concerned and I so hold and find. All their complaints in that regard and which have been set out elsewhere above are dismissed.

Whether the orders sought can be granted

93. From what I have stated above and noting the prayers in the Petition, once I have held that the impugned Circulars were not binding yet were lawfully issued, it follows that Prayers (a) and (b) in the Petition cannot be granted and are instead dismissed.

94. As regards prayers (c) and (d), it is the duty of the 2nd Respondent to oversee the implantation of the budget in accordance with the law subject to what I have stated above. It is also not bound to follow the respective County Budgets which are themselves subject to National Revenue Allocation Laws to wit the **Public Finance Management Act**, the **Division of Revenue Act** and the **County Allocation of Revenue Act**. No challenge has been made to those laws and the powers donated to the 1st and 2nd Respondents in that regard. The prayers as crafted cannot be granted and are instead dismissed.

95. As for costs, I see no reason to award costs as this was litigation between State Organs and offices.

Conclusion

96. This case brings to the fore the need for prudence in the use of public funds and the need to follow the lawful processes set by the Constitution and relevant Statutes. It also makes urgent the need for a clear across-the-board understanding of **Chapter 12** of the **Constitution**. Although one of the most important Chapters in the **Constitution**, seldom has it been subjected to an interrogation at the practical level. The result is that each of the Organs and institutions charged with its implementation invariably find relevance in areas reserved for others. The Chapter creates distinct roles for the National Executive, Parliament, County Executives and County Assemblies, Independent Commissions and offices and in this judgment, I have attempted to demarcate those roles. Should any of them for whatever reason become rogue, and should any wrangles arise, the law has created sufficient dispute resolution mechanisms to quickly address such situations including alternative dispute resolution mechanisms as is provided for in **Article 189(3)** and **(4)** of the **Constitution**.

97. In the course of the hearing of this Petition, on more than one occasion, I directed parties to attempt a resolution of the issues raised but the little progress made only related to certain payments made to enable obligations towards salaries and sundries to be met. I encourage more and more attempt at meetings to resolve these issues and the Attorney-General ought to take a lead and not a backseat in such situations.

98. Lastly, it is time that County Executives and County Assemblies learnt that funds allocated to Counties are meant to serve legitimate and lawfully progressive purposes. It is distressing, as was said by one party to this Petition, to learn that Kenyans elected to serve in Counties may have been banned from travel for being a nuisance in certain foreign Countries. The funds used for such trips are said to be in their millions. Granted, no doubt devolution is working and indeed it must work

but wastage will only drain an already drained populace. I digress and will now proceed to make the final orders based on all the findings I have made above.

Final orders

99. It follows from the above findings that I see no merit in the Petition and the same is dismissed. Having so ordered, it follows that this Judgment is binding on **Petitions Numbers 417 of 2014** and **242 of 2014**. Both are determined in the same terms and a copy of this Judgment shall be placed in each of those files for record purposes.

100. I shall make no orders as to costs.

101. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 20TH DAY OF FEBRUARY, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Mr. Nyamodi for 1st Respondent

Mr. Arwa for 2nd Respondent

Mr. Moimbo for 3rd Respondent

Mr. Wanyama for Interested party

Mr. Okoth for Petitioner

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE