

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI LAW COURTS)
JUDICIAL REVIEW DIVISION
CIVIL APPLICATION NO. E060 OF 2021
IN THE MATTER OF LAW REFORM ACT SECTION 7&8 CHAPTER 26 LAWS OF
KENYA
AND
IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES
AND
IN THE MATTER OF APPLICATION UNDER ARTICLE 1(3), 2(2), 3, 6(2),10, 11,
94,95,96, 163(3)(d)(I) & (3)174(1), 175,179(1)&(4), 183(1), 185(3) & 189(1), 200 201(d),
212,225,226(2),229 (7)&(8) AND 259 OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF CONTRAVENTION OF COUNTY GOVERNMENTS ACT
AND
IN THE MATTER OF CONTRAVENTION OF THE PUBLIC FINANCE
MANAGEMENT ACT 2012
AND
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
BETWEEN

REPUBLICAPPLICANT

VERSUS

THE SENATE OF THE REPUBLIC OF KENYA..... 1ST RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF MOMBASA2ND RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF KWALE.....3RD RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF KILIFI.....4TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF TANA RIVER5TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF LAMU.....6TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF TAITA/TAVETA.....7TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF GARISSA8TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF WAJIR.....9TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF MANDERA.....10TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF MARSABIT.....11TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF ISIOLO.....12TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF MERU.....13TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF THARAKA NITHI14THRESPONDENT
SPEAKER, COUNTY ASSEMBLY OF EMBU.....15THRESPONDENT
SPEAKER, COUNTY ASSEMBLY OF KITUI.....16TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF MACHAKOS.....17TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF MAKUENI.....18TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF NYANDARUA..... ..19THRESPONDENT
SPEAKER, COUNTY ASSEMBLY OF NYERI20THRESPONDENT
SPEAKER, COUNTY ASSEMBLY OF KIRINYAGA.....21STRESPONDENT

SPEAKER, COUNTY ASSEMBLY OF MURANG'A.....	22 ND RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF KIAMBU	23 RD RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF TURKANA.....	24 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF WEST POKOT.....	25 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF SAMBURU.....	26 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF TRANS NZOIA.....	27 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF UASIN GISHU.....	28 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF ELGEYO/MARAKWET..	29 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF NANDI.....	30 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF BARINGO.....	31 ST RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF LAIKIPIA	32 ND RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF NAKURU.....	33 RD RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF NAROK.....	34 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF KAJIANDO.....	35 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF KERICHO.....	36 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF BOMET.....	37 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF KAKAMEGA.....	38 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF VIHIGA.....	39 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF BUNGOMA.....	40 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF BUSIA	41 ST RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF SIAYA.....	42 ND RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF KISUMU.....	43 RD RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF HOMA BAY.....	44 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF MIGORI.....	45 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF KISII.....	46 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF NYAMIRA.....	47 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF NAIROBI.....	48 TH RESPONDENT
COUNTY ASSEMBLY OF MOMBASA	49 TH RESPONDENT
COUNTY ASSEMBLY OF KWALE.....	50 TH RESPONDENT
COUNTY ASSEMBLY OF KILIFI.....	51 ST RESPONDENT
COUNTY ASSEMBLY OF TANA RIVER	52 ND RESPONDENT
COUNTY ASSEMBLY OF LAMU.....	53 RD RESPONDENT
COUNTY ASSEMBLY OF TAITA/TAVETA.....	54 TH RESPONDENT
COUNTY ASSEMBLY OF GARISSA	55 TH RESPONDENT
COUNTY ASSEMBLY OF WAJIR.....	56 TH RESPONDENT
COUNTY ASSEMBLY OF MANDERA.....	57 TH RESPONDENT
COUNTY ASSEMBLY OF MARSABIT.....	58 TH RESPONDENT
COUNTY ASSEMBLY OF ISIOLO.....	59 TH RESPONDENT
COUNTY ASSEMBLY OF MERU.....	60 TH RESPONDENT
COUNTY ASSEMBLY OF THARAKA NITHI	61 ST RESPONDENT
COUNTY ASSEMBLY OF EMBU.....	62 ND RESPONDENT
COUNTY ASSEMBLY OF KITUI.....	63 RD RESPONDENT
COUNTY ASSEMBLY OF MACHAKOS.....	64 TH RESPONDENT
COUNTY ASSEMBLY OF MAKUENI.....	65 TH RESPONDENT

COUNTY ASSEMBLY OF NYANDARUA.....	66 TH RESPONDENT
COUNTY ASSEMBLY OF NYERI	67 TH RESPONDENT
COUNTY ASSEMBLY OF KIRINYAGA.....	68 TH RESPONDENT
COUNTY ASSEMBLY OF MURANG'A.....	69 TH RESPONDENT
COUNTY ASSEMBLY OF KIAMBU	70 TH RESPONDENT
COUNTY ASSEMBLY OF TURKANA.....	71 ST RESPONDENT
COUNTY ASSEMBLY OF WEST POKOT.....	72 ND RESPONDENT
COUNTY ASSEMBLY OF SAMBURU.....	73 RD RESPONDENT
COUNTY ASSEMBLY OF TRANS NZOIA.....	74 TH RESPONDENT
COUNTY ASSEMBLY OF UASIN GISHU.....	75 TH RESPONDENT
COUNTY ASSEMBLY OF ELGEYO/MARAKWET.....	76 TH RESPONDENT
COUNTY ASSEMBLY OF NANDI.....	77 TH RESPONDENT
COUNTY ASSEMBLY OF BARINGO.....	78 TH RESPONDENT
COUNTY ASSEMBLY OF LAIKIPIA	79 TH RESPONDENT
COUNTY ASSEMBLY OF NAKURU.....	80 TH RESPONDENT
COUNTY ASSEMBLY OF NAROK.....	81 ST RESPONDENT
COUNTY ASSEMBLY OF KAJIANDO.....	82 ND RESPONDENT
COUNTY ASSEMBLY OF KERICHO.....	83 RD RESPONDENT
COUNTY ASSEMBLY OF BOMET.....	84 TH RESPONDENT
COUNTY ASSEMBLY OF KAKAMEGA.....	85 TH RESPONDENT
COUNTY ASSEMBLY OF VIHIGA.....	86 TH RESPONDENT
COUNTY ASSEMBLY OF BUNGOMA.....	87 TH RESPONDENT
COUNTY ASSEMBLY OF BUSIA	88 TH RESPONDENT
COUNTY ASSEMBLY OF SIAYA.....	89 TH RESPONDENT
COUNTY ASSEMBLY OF KISUMU.....	90 TH RESPONDENT
COUNTY ASSEMBLY OF HOMA BAY.....	91 ST RESPONDENT
COUNTY ASSEMBLY OF MIGORI.....	92 ND RESPONDENT
COUNTY ASSEMBLY OF KISII.....	93 RD RESPONDENT
COUNTY ASSEMBLY OF NYAMIRA.....	94 TH RESPONDENT
COUNTY ASSEMBLY OF NAIROBI.....	95 TH RESPONDENT

AND

COUNCIL OF GOVERNORS	1 ST INTERESTED PARTY
ATTORNEY GENERAL	2 ND INTERESTED PARTY

EXPARTE:

CHARLES ONGARO KIAGE	1 ST APPLICANT
RICHARD OSEKO OGETO.....	2 ND APPLICANT
CPA BENSON ORINA BOSIRE.....	3 RD APPLICANT
WILLIAM ANDREW KINANGA OBAGA.....	4 TH APPLICANT
JARED MOMANYI.....	5 TH APPLICANT

APPLICANTS' SUBMISSIONS

Introduction

1. Your Ladyship, at the heart of the dispute in this Judicial Review are two cornerstones of governance in Kenya - the rule of law and devolved governance. The rule of law prescribes that state organs can only exercise powers granted to them by the law, and such law as grants powers to state organs must be in conformity with the Constitution. The Applicants challenge the Constitutionality of the 1st Respondent to summon County Executives. They allege that the provisions of the constitution do not grant the Senate mandate to summon the County Executives and their continued actions amounts usurpation of powers granted to County Assemblies.
2. Your ladyship, the 2010 Constitution of Kenya introduced a system of devolved governance, the impetus behind which is to ensure accountability in the use of state resource and to curb misuse of state power. The Applicants allege that the impugned actions of the 1st Respondent are in conflict with the system of devolved government and will have the effect of giving the 1st Respondent an unconstitutional say in County affairs.

Background

3. The Senate of the Republic of Kenya by a Notice to appear, published in the Standard Newspaper on 23rd April 2021 summoned for questioning the Chief

Executive Officers of the 47 County Government Executive on the Reports of the Auditor General on Financial Statements for the financial year 2018/2019 by the Senate County Public Accounts and Investment (CPA&I) Committee.

4. The applicant considers the move as null and void and therefore vide a leave granted on 7th May 2021, the filed the Notice of Motion seeking an order of Prohibition directed at the Senate of the Republic of Kenya Committee of the County Public Accounts and Investment(CPA&I) or full plenary from summoning for questioning the Chief Executive Officers of the 47 County Government Executive for consideration of Reports of the Auditor General on the Financial Statements for the financial year 2018/2019.
5. The applicants are also seeking an order of Mandamus directed to the Respective County Assemblies (the 49th to 95th Respondents) to debate and consider the Reports of the Auditor General on the Financial Statements and take appropriate action and recommendations as required by article 229(7) & (8) of the constitution of Kenya.
6. The applicants are further seeking for a declaration that the Speakers of the respective County Assemblies (the 2nd to 48th Respondents) who have not periodically complied with the provisions of Article 229(8) of the constitution of Kenya by ensuring that all the reports of the Auditor General on the Financial Statements are debated and recommendations made within the constitutional

timelines are in breach of their constitutional and statutory duty and are therefore unfit to continue holding public office.

Issues of Determination

7. Your Ladyship, the applicants through the motion raise the following issues for determination by this Honorable Court:

- (a) Are county assemblies Constitutionally empowered with a role in evaluation of Reports of the Auditor General of Financial statements of the county government and making recommendations?**
- (b) Whether the Senate is clothed with similar powers and if so is it by the constitution or implied from court interpretation?**
- (c) Whether the County Assemblies have been discharging their functions with regards to Reports of the Auditor General as mandated by the constitution?**
- (d) Who is liable when the County Assembly does not discharge their Mandate?**
- (e) Whether the Senate oversight for the last eight years has achieved the intention of the constitution and or added value to the public by purporting to evaluate the reports in discharge of the impliedly concurrent jurisdiction as conferred by various courts.**

Are the county Assemblies performing their functions on County finance oversight as per the constitution?

8. Section 30(3) (f) of the County Governments Act of 2012 provides that; the County Governor shall be accountable for the management and use of County resources. A County Assembly, while respecting the principle of the separation of powers, may exercise oversight over the County Executive Committee and any other County Executive organs.

9. The Chief Executive Officers of the County Government Executive who are also the Accounting officers, by virtue of Article 226(2) are accountable to the County Assemblies. By implication, this provision means that the County Governor as the overall head of the County is accountable for the utilization of County resources including the National revenue allocated to his or her respective County. Since the accounting officers at the County are directly answerable to the County Assembly for the management of financial resources under the Public Finance Management Act 2012,
10. According to the constitution, the Chief Executive Officer to the County Government Executive/unit is expressly answerable to the County Assembly on issues financial resource management and therefore by dint of Article 6(2) and Article 189(1), that function needs to be exercised by the rightful authority. The Constitution of Kenya (2010) therefore grants the County Assembly financial role over fiscal duties.
11. Besides, the interrogation of the reports of the Auditor General on financial statement of County entities is not the only oversight role; there is a Systems Audit, value for money and evidence of execution of works which have overreaching value than Reports of financial statements which has been assigned to a specific body.
12. *Article 259* requires the Constitution to be interpreted in a manner that promotes its purpose, values and principles and that it is good governance, integrity,

transparency and accountability that form part of the national values and principles of governance.

(b) Whether the Senate is clothed with similar powers and if so is it by the constitution of implied from court interpretation?

13. In the present case the Senate of the Republic of Kenya through the Clerk has by a notice published in the Standard Newspaper of 23rd April 2021 issued a Notice to Appear before the County Public Accounts and Investment (CPA&I) Committee of the Senate in the months of May, June, July, August and September directed to the Chief executive Officers of the 47 County Government Executive to appear before the said committee but does not have the requisite constitutional authority as envisaged in Article 2(2) and 226(2) of the Constitution.

14. Article 96(1) gives power to the Senate to;

- a. It represents the Counties and serves to protect the interests of the Counties and their Governments.*
- b. It participates in law making function of Parliament by considering, debating and approving bills concerning counties.*
- c. It determines the allocation of National Revenue among Counties and exercises oversight over National Revenue allocated to the County Governments*

d. *It 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.*

15. The responsibilities of the Senate committee are enshrined in the public finance management act of Kenya and these include to-

Present to the Senate, subject to the exceptions in the Constitution, the proposal for the basis of allocating revenue among the Counties and consider any bill dealing with county financial matters;

Review the County Allocation of Revenue Bill and the Division of Revenue Bill in accordance with Article 218(1)(b) of the Constitution at least two months before the end of the financial year;

Examine financial statements and other documents submitted to the Senate under Part IV of the Public Finance Management (PFM) Act, and make recommendations to the Senate for improving the management of government's public finances; and

Monitor adherence by the Senate to the principles of public finance set out in the Constitution, and to the fiscal responsibility principles of the PFM Act.

16. It cannot operate besides or outside the four corners of the Constitution.

Therefore, while Article 229 (7) requires the Auditor general to submit their reports to Parliament or the relevant County Assembly,

17. It's the applicants' submission that parliament in this context cannot be interpreted to include the senate. It is our position that Parliament as contemplated under article 229(7) of the constitution refers to the National Assembly which oversees National entities. Any funds budgeted for by the County Executives, and debated and approved by the County Assembly, ought

to be over sighted by the County Assembly as Article 226 and not by the Senate as it is this case.

18. It is our further submission that, by dint of Article 2(2) of the constitution, the Senate should not assume the overall mandate of summoning the County Chief Executives as it is expressly authorized by the constitution .
19. further that Article 189(1) that function needs to be exercised by the rightful authority and there is need to have respect of functional and institutional integrity of County Government.
20. In determining which matters concern County Government “ that would warrant Senates legislative input; in the Supreme Court Advisory Opinion No. 2 of 2013 the Court stated that:

*It emerges that a matter qualifies to be regarded as one of county government where: that is the case in **the terms of the Constitution**; 372 it is the case in the **terms of statute law**; (In this case The County Government Act and the Public Finance Management Act of 2012).It is the case in **the perception of the Court**, in view of the function involved or the relation created as between **the national government and its processes**, on the one hand, and the **county governments and their operations**, on the other. In the last instance, the Court will conscientiously consider the relationship between the two units as this emerges from the governance operation in question, or from any pertinent scenarios of fact.*

21. Lady Justice. Njoki however in her dissenting judgment argued that, there are other two ways in which the Senate can canvass for the **expansion of its constitutional role including calling for referendum**. The court also has a **leeway to interpret what constitutes matters concerning county government**.
22. Article 229 of the Constitution of Kenya stipulates that the Auditor General shall submit Audit Reports to Parliament or relevant County Assembly, which shall within three months of receipt debate and consider the report.
23. In the Supreme Court in the case of *Speaker of the Senate and Anor Vs Attorney General and 4 others [2013]*.

The court observed that*“The persons sought to be questioned by the 1st Respondent are the Chief Executive Officers of the County Government Executive who are also the accounting officers and by virtue of Article 226(2) are accountable to the County Assemblies”*

24. The Reports sought to be evaluated and or discussed are foreign to the senate as the same is prepared by the Auditor General and submitted to the County Assembly as per the provisions of Article 229(7) as read with Article 226(2) as contra-distinguished with Article 93 of the Constitution.

25. In the unlikely event of the court finding that the senate may have jurisdiction then in the case of **Kyalo Kamina V Senate and 3 others** Honorable E. Muriithi and Mwita J. when faced with the question of concurrent jurisdiction of Senate and County Assembly in consideration of auditor General report had this to say;

.....*“While the two organs may have concurrent jurisdiction to consider an Auditor’s Report, the two have different scopes of consideration so that one, the Senate, has a more expansive jurisdiction to protect the interests of counties and their county governments including the County Assembly and an oversight of national revenue to the county governments of which the County Assembly is part. Accordingly, while the two organs have a concurrent jurisdiction under Article 229 (7) to consider the Auditor’s report, their scope of consideration is not coordinate”*

26. The County Assembly for example has no mandate to oversight the County Executive on conditional grants or projects directly funded by the National government or donor funded but managed by the County Executive or jointly

with the funding entity. This is the mandate of the Senate, as in the recent case of COVID 19 Funds, where the senate requested the Auditor General to undertake a Special Audit which has since been tabled in the Senate and its currently under discussion. The national revenue allocated to the County Government.

27. In the **Kyalo Kamina** case, the court failed to consider the fact that the Constitution has consistently referred to the oversight of the national revenue allocated to county governments and no reference is made to the county own generated revenue.

28. We submit that although the Senate and the County Governments are supposed to work together to ensure that the purpose of devolution is achieved and that the two bodies should work together, the oversight mandate can at the very least be extended to interrogating the County Chief executives on the funds received from the National level. On the County own generated funds, accountability has to come from a body within the County level, thus, the County Assembly as per article 226(2) of the constitution of Kenya 2010.

29. While considering the doctrine of separation of powers among entities, in the case *Mumo Matemu v Trusted Society of Human Rights Alliance and 5 Others*, *Civil Appeal No. 290 of 2012*, the court had this to say;

..... *Separation of power does not only proscribe organs of Government from interfering with the others functions. It also entails empowering each organ of Government with countervailing powers which provide checks and balances on actions taken by other organs of Government. Such powers are, however, not a license to take*

over functions vested elsewhere. There must be judicial, legislative and executive
deference to the repository of the function.

Whether the County Assemblies have been able to discharge their functions as mandated?

30. The answer is in the negative unless the contrary is proved.

31. We submit that, although the law on separation of powers and functions is not well settled, and where there is express Authority, implied authority cannot override. It is our position that the Senate has usurped the powers of the 47 County Assemblies the 49th to 95th Respondents and purports to take up a function of the devolved units.

32. In its opinion, the Supreme Court in **Re Speaker, County Assembly of Embu(2018)e KLR** stated that;

....."as the custodian of the integrity of the Constitution, it bears the obligation to interpret the Constitution holistically in order to achieve its declared principles and to ensure that other organs of the government are able to discharge their mandates in line with the Constitution itself".....

33. The court explained 'holistic interpretation of the Constitution' to mean "interpreting the constitution in context; that is, "it is the contextual analysis of a constitutional provision, reading it alongside 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.

Who is liable when the County Assembly does not discharge their Mandate?

34. The 2nd to 48th respondent are holders of Constitutional office established under Article 178(1).
35. The Constitution calls for personal responsibility for state officers who commit and or fails to discharge.
36. The office holder is bestowed with the authority to preside over a County Assembly pursuant to Article 178 (2) (a). In *Coalition for Reform and Democracy (CORD) & 2 Others v. Republic of Kenya and 10 others (2015)* Eklr, the High Court examined the extent to which a court may inquire into the conduct of parliamentary proceedings. The court held that, as Article 165(3) (d) clothed it with powers to determine the constitutionality of a given act, the doctrine of separation of powers does not preclude it from examining acts of the Legislature or the Executive. The Court thus observed (paragraph 172):

....“(1) In a jurisdiction such as ours in which the Constitution is Supreme the court has jurisdiction to intervene where there has been a failure to abide by Standing Orders which have been given Constitutional underpinning under the said Article. However, the court must exercise restraint and only intervene in appropriate instances, bearing in mind the specific circumstances of each case” (emphasis supplied)”. The Speakers of the various county assemblies are mandated by constitution to oversee the conduct of the County assemblies”

37. The practice and conduct of the Senate has led to the Speakers of the various County Assemblies to abdicate their roles as mandated by the Constitution which would have led to closer assessment and inquiry while serving the citizenry, development and enhancement of capacity to interrogate financial statements, budgets and audit reports in contravention of Article 73 of the Constitution which vests responsibility to serve the people.
38. Your ladyship, Kenya's legislative bodies bear an obligation to discharge their mandate in accordance with the terms of the Constitution, and they cannot plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation.
39. Article 93(1) establishes Parliament which includes the Senate and National Assembly.
40. Article 93(2) provides that the National Assembly and the Senate shall perform their respective functions in accordance with the Constitution.
41. It is therefore clear that while the oversight mandate lies with Parliament, the same is to be exercised subject to the dictates of the Constitution. While Parliament is within its general legislative mandate to establish procedures of how it conducts its business, it has always to abide by the prescriptions of the Constitution.
42. In *Council of Governors & 5 others v The Senate & another* [2019] eKLR. While noting the difficulties raised by Article 229 (7) and (8) of the Constitution, the court of appeal observed that;....

....."the provision requires the Auditor General to submit audit reports to Parliament or the relevant County Assembly, and within three months after receipt of the report, Parliament or the County assembly is required to debate and consider the report and to take appropriate action. In fulfilling this constitutional imperative, the Senate not only requires to table and debate its own accounts, but also discharge its oversight mandate under Article 96 (3) by debating 47 audited county reports, if need be. At the same time, the county assemblies in exercise of their oversight mandate are required to debate their respective reports within the stipulated period. Since the process requires to be completed within three months of receipt of the report, dependent on when the reports are presented to the Senate and the county assembly, it is clear that enormous pressure is placed on both Parliament and the assembly to comply with this stringent constitutional timeline, particularly where, at the same time, the Senate may call upon the governor to answer queries in respect of the same audit reports. **To overcome this clash of oversight mandates,** the Constitution enjoins parties to take cognizance of Article 189 (1) (a) and (2) which provides that;

"Government at either level shall –

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

In the same vein Article 189 (2) provides;

“Government at each level, and different governments at county levels, shall co-operate in the performance of functions and exercise of power and, for that purpose, may set up joint committees and joint authorities.”

d) Whether the Senate Oversight has added Value to the Public

43. The primary role of the Senate is to safeguard the interest of the public. While it has been working on financial reports for the past 8 years, the Senate in its oversight role should have provide recommendations that lead to development and safeguard of public finance as envisaged by the constitution.
44. This However is not the case as the Senate’s recommendations are similar to those given by the Auditor General.
45. The continued execution of the subject decision has led to wastage and or imprudent use of public resources whereby there is duplication of roles leading to loss of public funds by way of travel, accommodation to and from Nairobi for the Governor together with the Executive Committee and their handlers, and the Committee of the Senate in the event the Senate conducts the sittings at the County level. Wastage of time which could have otherwise used to serve the citizenry contrary to the provisions of Article 201(d) of the Constitution. Without clear Operational Guidelines, there is an overlap in performance of duties bringing forth the wastage of resources.
46. Notwithstanding the erroneous acts of the various committees of the 1st respondent, in the past eight years there has been no recommendations to ride

home about emanating therefrom hence the exercise can only be said to be a public embarrassment process, potential extortion and muscle flexing opportunities which is not a worth investment of public money.

47. While the law on separation of powers and functions is not well settled, where there is express Authority, implied authority cannot override.

48. The Senate has usurped the powers of the County Assembly and purports to take up a function of devolved units without undertaking a referendum under Article 225 and the speakers (the 2nd to 48th Respondents) have willingly allowed the same to happen.

49. If the interpretation of the constitution is supposed to be purposeful. Article 201(e) of the constitution provide for principles of Public Finance including the use of public Money in a prudent and responsible way. The County Assembly should be compelled to carry out their constitutionally mandated functions, while the Senate overlooks what the assembly has done in giving its recommendations.

50. In effect, Parliament and the county assemblies can overcome the operational quagmire of considering the audited accounts by working together to develop frameworks and guidelines to assist them carry out their respective responsibilities. Guidelines identifying their individual areas of jurisdiction would go a long way towards expediting the oversight processes, and would prevent them from venturing into unauthorized or undesignated territory. More importantly, they would assist in fostering a conducive and mutually respectful

working environment between the Senate and the county assemblies, as was intended by the Constitution.

51. Therefore, it is our submission the court makes the orders sought in the motion.

We so submit

DATED at NAIROBI this20TH..... day of ...MAY..... 2021

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke, is centered on the page.

OMARIBA & COMPANY
ADVOCATES FOR THE APPLICANTS
LSK/2021/2530 P.105/4394/01

DRAWN AND FILED BY

Omariba & Company
Advocates,
Tetu Housing Co-Operative Flats,
Block D Suite D1,
Ralph Bunche Road
P.O. Box 2012-00100,
Nairobi.

TO BE SERVED UPON: -

The Senate of the Republic of Kenya
Parliament
Nairobi.

Speakers of the 47 Counties (through their respective offices)

County Assembly of Mombasa
P.O BOX 90440-80100
Mombasa
Email: info@mombasaassembly.go.ke
Tel; +254 41 2311 025
Kwale County Assembly
P.O BOX 231-80403
Email; countyassemblyofkwale@gmail.com
Tel: 0721883464

County Assembly of Kilifi
P.O BoX 332-80200
Malindi
Phone Number: +254 20 217 122 0
Email: info@kilifiassembly.go.ke

County Assembly of Tana River
P.O Box 113 -70101
Hola
Email: info@tanariverassembly.go.ke
Tel;

County Assembly of Lamu
P.O BOX 74-80500
Lamu
Email: info@lamu.go.ke
Tel; 0715 555111/0758005005

County Assembly of Taita/Taveta
P.O BoX 1142-80304
Wundanyi
Phone Number: +254718703359 / 732604811
Email: informationdesk@taitatavetaassembly.go.ke

County Assembly of Garissa
P.O BoX 57-70100
Garissa
Phone Number:
Email: clerk@garissaassembly.go.ke / countyassembly@gmail.com

County Assembly of Wajir
P.O BoX 9-70200
Wajir

Phone Number: [0464421297](tel:0464421297)
Email: assembly@wajirassembly.go.ke

County Assembly of Mandera
P.O BoX 13-70300
Wajir
Phone Number: +254 723-577-006
Email: info@manderaassembly.go.ke

County Assembly of Marsabit
P.O Box 29-60500.
Marsabit
Phone Number:
Email:

County Assembly of Isiolo
P.O Box 195-60300
Isiolo.
Email: info@assembly.isiolo.go.ke
Phone Number: 0725624489

County Assembly of Meru
P.O. Box 3 60200,
Meru.
Email: assembly@meru.go.ke;
Phone: 064-30040/064-30042; Mobile: 0708 777 000

County Government of Tharaka Nithi
P.O BOX 684- 60406,
Chuka
Email: clerk@tharakanithica.go.ke
Tel;

County Assembly of Embu
Embu.
Email: info@embuassembly.go.ke.
Mobile No. 0734 867 105. Landline . 068 02231208.
County Assembly of Kitui,
P.O BOX 694 - 90200,
Kitui, Kenya.
Email: kituiassembly@gmail.com

County Assembly of Machakos,
Along Mwatu wa Ngoma Road,
P.O. Box 1168 - 90100
Machakos.
Phone: 020 2100981
Email: info@machakosassembly.com

County Assembly of Makueni
Assembly Buildings
P.O. Box 572 - 90300 Wote, Makueni
Tel.: 020 2393005
Mobile: 0714392799, 0735660505, 0731663505
Email: info@makueniassembly.go.ke

County Assembly of Nyandarua
County Assembly Chambers, Ol'Kalou
Office Tel: 0743079333
P.O. Box 720-20303- OL KALOU
email:nyandaruaassembly@gmail.com
info@nyandaruaassembly.go.ke
clerk@nyandaruaassembly.go.ke

County Assembly Of Nyeri
P O Box 162 - 10100,
Nyeri
Tel: +061 2037100
Email: Info@nyeriassembly.go.ke

County Assembly Of Kirinyaga
Kiang'ombe Road, Kerugoya
Tel;(020) 200 8563, (+254) 79 052 3397
Email: info@kirinyagaassembly.go.ke

County Assembly of Murang'a
P.O BOX 731-10200
Email info@assembly.muranga.go.ke
Tel . 0719 802495

County Assembly of Kiambu
Assembly Buildings,
Kiambu County
Phone:+254 (067) 586-0000

Email: info@kiambuassembly.go.ke
kiambucountyassembly@gmail.com

County Assembly of Turkana,
P.O. Box 25-30500,
Lodwar, Kenya.
Tel 0705 896983
Email: info@turkanaassembly.go.ke

West Pokot County Assembly.
P.O. Box 6 - 30600.
Kapenguria.
Phone: 053-201-5000.
Email: info@westpokotassembly.go.ke

County Assembly of Samburu,
P.O. Box 3 - 20600
Maralal, Kenya.
Phone: +254 065 62456, +254 65 62075.
Email: info@samburuassembly.go.ke.

County Assembly of Trans Nzoia.
P.O. Box 4211-30200,
Kitale, Kenya.
Email: assembly@transnzoia.go.ke.

County Assembly of Uasin Gishu.
P.O. Box 100 30100,
Eldoret, Kenya.
Email: ugcountyassembly@gmail.com

County Assembly of Elgeyo Marakwet.
P.O. Box 53 - 30700,
Iten Town
Email; info@emcassembly.go.ke

County Assembly of Nandi
P.O Box 802-30300
Kabsabet
Email; info@nandiassembly.go.ke

County Assembly of Baringo,
P.O BOX 159-30400,

Kabarnet.
Telephone:
E-mail: info@baringoassembly.go.ke
baringocountyassembly@gmail.com

County Assembly of Laikipia
P.O Box 487-10400
Nanyuki
Phone Number 0740 031 031
Mail: info@laikipiaassembly.go.ke

County Assembly of Nakuru
P.O BOX, 907-20100
Email : info@assembly.nakuru.go.ke

County Assembly of Narok
Mau Narok Road
Narok, Kenya
Assembly Info@narokassembly.go.ke

County Assembly of Kajiado
Email: info@kajiadoassembly.go.ke

County Assembly of Kericho,
P.o.Box 1526 - 20200,
Kericho.
Telephone : 0745169000
info@assembly.kericho.go.ke

County Assembly of Bomet
P.O BOX 590-20400 Bomet, Kenya
info@bometassembly.go.ke

County Assembly of Kakamega
P.O. Box 1470 - 50100
KAKAMEGA, KENYA.
Tel; 0715-251211
EMAIL: info@kakamega-assembly.go.ke
kamegacountyassembly@gmail.com

TELEPHONE:

The County Assembly of Vihiga
Majengo Town, Opp law Courts
P. O. Box - 50300
+254 0720 375 045
info@vihigacountyassembly.or.ke

County Assembly of Bungoma,
P.O Box 1886-50200
Phone Number :
Email: info@bungomaassembly.go.ke

County Assembly of Busia
Tel: +254 723 174 098
Email: info@busiaassembly.go.ke
Busia Liaison Office: +254 724 546 092

County Assembly of Siaya
P.O BOX 7 - 40600, Siaya
Mobile: .
Email: siayaassembly.go.ke.

County Assembly of Kisumu
Uhuru Road Opp. Haki House
P.O. Box -40100, Kisumu.
E-mail: kisumuassembly.go.ke

County Assembly of Homa-Bay
P.O Box: 20-40300,
Homa-Bay , Kenya.
TEL; 0706511947
Email: homabayassembly.go.ke

County Assembly of Kisii
P.O. Box 4550-40200
Kisii, Kenya
+254 5820 30005/208
Email; info@kisiiassembly.go.ke

County Assembly of Nyamira,
P.O Box 590 - 40500,
Nyamira.
TEL:.
Email: info@nyamiraassembly.go.ke.

Nairobi City County Assembly
P.O. Box: 45844 - 00100
Phone Number: (+254) 700 330846/7
(+254) 731 808078
Email: clerk@nairobiassembly.go.ke
City Hall - Nairobi, City Hall Way

The Council of Governors
Delta House
Westlands
Nairobi

The Attorney General
Sheria House, 7th Floor
Harambee Avenue,
P.O. Box 40112-00100
Nairobi