IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: GITHINJI, OKWENGU & G.B.M. KARIUKI, JJ.A)

CIVIL APPEAL NO. 92 OF 2015

BETWEEN

THE NATIONAL ASSEMBLY OF KENYA……..……...…APPELLANT

AND

THE INSTITUTE FOR SOCIAL ACCOUNTABILITY.....1ST RESPONDENT

CENTRE FOR ENHANCING DEMOCRACY AND GOOD GOVERNANCE……...2ND RESPONDENT

THE SENATE…….…...…..3RD RESPONDENT

THE ATTORNEY GENERAL…….…….4TH RESPONDENT

THE CONSTITUENCY DEVELOPMENT FUND BOARD…….5TH RESPONDENT

COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION…….……...…6TH RESPONDENT

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (**Lenaola, Mumbi & Majanja, JJ.**) delivered on 20th February, 2013*

in

H.C. Petition No. 71 of 2013
****

CONSOLIDATED WITH
CIVIL APPEAL NO. 97 OF 2015
****

BETWEEN

THE CONSTITUENCY DEVELOPMENT FUND BOARD…...APPELLANT

AND

THE INSTITUTE FOR SOCIAL ACCOUNTABILITY.....1ST RESPONDENT

CENTRE FOR ENHANCING DEMOCRACY AND GOOD GOVERNANCE……...2ND RESPONDENT

THE NATIONAL ASSEMBLY …….…...3RD RESPONDENT

THE SENATE …….……..…..4TH RESPONDENT

THE HON. THE ATTORNEY GENERAL …….5TH RESPONDENT

COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION…….……...…6TH RESPONDENT

JUDGMENT OF THE COURT

INTRODUCTION

[**1**] The two consolidated appeals arise from the judgment of High Court – Constitution and Human Rights Division (Lenaola, Mumbi Ngugi & Majanja, JJ.) that was in the following terms:

> ***"(a) A declaration is hereby issued that the Constituencies Development Fund Act, 2013 is unconstitutional and therefore invalid.***
>
> ***(b) The order of invalidity above is suspended for a period of twelve (12) months from the date of judgment.***
>
> ***(c) The National Government may remedy the defect within that period and the Constituencies Development Fund Act shall stand***

invalidated at the expiry of the twelve (12) months or may be earlier repealed whichever comes first.

(d) Each party shall bear its own costs."

[**2**] On 3rd February, 2013, **The Institute for Social Accountability** (**TISA**), 1st respondent, filed Petition No. 71 of 2013 in the High Court, Nairobi, alleging that the Constituency Development Fund Act, 2013 (CDFA) was in breach of the Constitution for various reasons, and sought injunctive orders to restrain disbursement of Kshs. 10.1 billion to Constituency Development Fund Board and various declarations.

[**3**] On 10th May 2015, the Centre for Enhancing Democracy and Good Governance (hereinafter referred to as CEDGG) filed a constitutional Petition No. 16 of 2013 in the High Court at Nakuru, alleging that the CDFA was unconstitutional and sought reliefs, inter alia, for striking down of the Act for being unconstitutional. The Nakuru petition was later transferred to Nairobi and consolidated with the Nairobi Petition. On 2nd August 2013, the Chairperson of Constituency Development Fund Committee – Mr. Moses Lessonet caused to be published the Constituency Development Fund (Amendment) Act – No. 36 of 2013 which commenced on 1st October, 2013. Thereafter the petitioners filed an amended petition in the consolidated petitions.

GENERAL LEGAL FRAMEWORK

[**4**] The High Court arrived at the impugned decision after an extensive examination of the law followed by the interpretation of various provisions of the Constitution in contradistinction to the provisions of CDFA, particularly in relation to devolution, principles of Public Finance and the principle of separation of powers. It is therefore desirable to set out in broad outline the relevant provisions of the law.

[**5**] By the Constitution of Kenya, 2010, Kenya is a Republican State and the President is the head of State and Government. The government has been constitutionally devolved into fourty seven county governments each consisting of a county assembly and county executive, a Governor being the Chief Executive of each County Government. However, the governments at national and county levels are distinct and interdependent and are to conduct their mutual relations on the basis of consultations and cooperation (See Article 6(2) and (189). By Article 186(1), the function and powers of the national government and county governments are as set out in the Fourth Schedule to the Constitution. Where a function or power is conferred on both governments, it is within the concurrent jurisdiction of both levels of government [Article 186(2)] and where a function or power is not assigned to a county government, it is a function or power of the

national government (Article 186(3). Further, by Article 187(1), a national government can transfer a function or power within its jurisdiction to a county government by mutual agreement and vice versa.

[**6.1**] One of the principles of Public Finance is that public finance shall promote an equitable society by ensuring that revenue raised nationally is shared equitably among national and county governments (Article 201(b)(ii). Furthermore, Article 202 provides:

(1) revenue raised nationally shall be shared equitably among the national and county governments.

(2) County governments may be given additional allocations from national governments share of the revenue, either conditionally or unconditionally.

The criteria for determining the equitable share is specified in Article 203(1) and Article 203(2) provides:

> ***"For every financial year, the equitable share of revenue raised nationally that is allocated to county governments shall not be less than fifteen percent of all revenue collected by the national government."***

[**6.2**] The Constitution has created the Commission on Revenue Allocation as an independent commission with the function, *inter alia*, of making recommendation to the Senate, National Assembly, the National Executive, County Assemblies and

County Executives concerning the basis for equitable sharing of revenue raised by the national government between the national government and county government (Article 216(1) (a).

Before the end of each financial year, a Division of Revenue Bill is introduced in Parliament [Article 215(1)(a)]. The Bill is considered by the Commission on Revenue Allocation and its recommendations to the National Assembly and Senate are tabled in Parliament for consideration by each House before voting on the Bill (Article 205).

[**6.3**] By Article 219, the county's share of equitable revenue is required to be transferred to the county without delay and without deductions. The powers, functions and responsibilities of county governments are specified in the County Government Act, 2012 (CGA).

[**7**] The Constitution by Article 93 establishes a Parliament of Kenya consisting of the National Assembly and the Senate. The role of the National Assembly is to represent the people of the two hundred and ninety constituencies and the special interests (Article 95(1) and has power, *inter alia*, to exercise oversight over national revenues and expenditure (Article 95(4) (c)) and oversight of state organs (Article 95(5)(b)). On the other hand, the Senate represents the counties, and,

amongst other things, protects the interests of the counties and their governments (Article 96(1)).

[**8**] As a framework of Public Finance, the Constitution establishes the Consolidated Fund into which all monies raised or received by or on behalf of the national government, except the money specified therein, is paid. The withdrawal from the Fund is restricted to cases where, *inter alia*, the money is a charge against the Fund as authorised by the Constitution or by an Act of Parliament and then only with the approval of the Controller of Budget. Article 206(3) provides:

> ***"Money shall not be withdrawn from any national public fund other than the Consolidated Fund, unless the withdrawal of the money has been authorised by an Act of Parliament."***

Article 225 contains provisions for the control of public money and empowers Parliament to enact legislation for establishment of National Treasury and to ensure both expenditure control and transparency in all governments and establish mechanisms to ensure their implementation.

Pursuant to that Article, Parliament enacted the Public Finance Management Act, 2012 (PFMA).

Section 24(4) of PFMA provides:

> ***"The Cabinet Secretary may establish a national government public fund with the approval of the National Assembly."***

CONSTITUENCY DEVELOPMENT FUND

[**9.1**] Turning to the CDFA, the Constituencies Development Fund (CDF) was established in 2000 when Parliament passed a private members' motion requiring the Government to set aside 2.5% of the ordinary revenue for constituencies based development projects. However, the decision was not implemented and in 2002 a Private Members Bill was passed leading to the enactment of the CDF Act, 2003, and the CDF came into operation in 2004. The Act was amended in 2007 and in 2013, following the recommendations of a Task Force, the new CDF Act, 2013 was enacted.

[**9.2**] The object and purpose of the CDFA 2013, is to ensure that a specific portion of national annual revenue is devoted to the constituencies for purposes of infrastructural development, wealth creation, and in the fight against poverty at constituency level (section 3). Section 4 establishes the Constituencies Development Fund (CDF) which shall, *inter alia*,

> ***"(a) be a national fund consisting of monies of an amount of not less than 2.5% (two and half per centum) of the national government ordinary revenue collected in every financial year."***

Section 4(2) which provided that all the money allocated under the Act is additional revenue to the county governments under Article 202(2) of the

Constitution was deleted and replaced by the constituencies Development Fund (Amendment) Act No. 36 of 2013 which commenced on 1st October, 2013.

[**9.3**] The new section 4(2) provides:

> ***"All monies allocated under this Act shall be considered as funds allocated to constituencies pursuant to Article 206(2)(c) of the Constitution to be administered according to section 5"***

The annual allocation of funds to each constituency is done by the Cabinet Secretary in charge of CDF with the concurrence of the relevant parliamentary committee in accordance with the criteria specified in section 20 (S.10)

[**9.4**] The account of the Fund is maintained at the Central Bank of Kenya [S.43(ii)] and for purposes of the disbursement of the funds to each constituency, a constituency bank account is maintained at a commercial bank approved by the Cabinet Secretary (S.42(ii)).

[**9.5**] The administration of the Act is entrusted to four institutions; namely:

(i) The Constituency Development Fund Board (CDFB), a body corporate whose functions include, *inter alia*, to withdraw and disburse the funds to constituencies and consider and approve project proposals submitted from various constituencies (S.5 and 6).

(ii) Constituency Development Fund Committee (CDFC) for every constituency. The functions of CDFC include receiving a list of priority projects from the wards, approval of the projects, submitting a list of projects to the CDFB for approval, withdrawal and disbursements of the funds, implementation of projects and the monitoring of the implementation of the projects.

The CDFC comprise ten members including eight persons, thus – three men and three women nominated by ward development committee, one person with disability and one person nominated from the active non-governmental organizations in the constituency. The eight persons are appointed by a Member of Parliament (MP) in consultation with the officer of CDFB and sub-county administrator. The six representatives of the wards are appointed by the MP from the list of persons elected by each ward at an open public meeting. Each CDFB elects its chairman and secretary. The MP is an ex-officio member of CDFC.

(iii) County Projects Committee's (CDC) main function is to coordinate the projects financed by the Fund. The members of this committee include the Senator, MPs from the county, County Women Representative, Governor, Chairperson of CDFC (S.36). The

chairperson of each CDFC is required to table a list of projects for the constituency respectively at a meeting of CDC convened for that purpose and submit it to county assembly in order to align the projects with county development plans and policies (S.38). The CDC is required to ensure that no duplication of projects occurs (S. 39).

(iv) National Assembly Select Committee (NASC) (S.28) is the committee of National Assembly established in accordance with its standing orders. The functions of NASC are to oversee the implementation of the Act; receive monthly reports from the CDFB regarding status of the projects and disbursements, submit reports to National Assembly, oversee the policy framework and continually review the framework for efficient delivery of development programmes financed through the Fund.

Finally, Section 47(1) provides:

"The provisions of this Act shall be complimentary to any other development efforts by the national government, county governments, or any other agency and nothing in the Act shall be taken or interpreted to mean that an area may be excluded from any other development programmes."

FINDINGS OF THE HIGH COURT

[**10**] TISA and CEDGG urged in their written submissions that were filed in the High Court that CDFA was unconstitutional because:

(i) It assigns functions that are the exclusive responsibility of the counties to the National Government.

(ii) It violates the principle of separation of powers because the National Assembly which legislated CDFA would also be implementing and overseeing these functions.

(iii) It purports to characterize the monies it allocates as conditional funds even though the money cannot be treated as additional revenue to counties because the money earmarked for local projects must be given to the county governments and not to any other party.

(iv) It requires that the 2.5% of the annual revenue allocated to CDF be extracted from the total revenue before the 15% minimum to be allocated to the counties is calculated.

(v) Parliament exceeds its powers by purporting to allocate the monies rather than the executive arm of the national government.

(vi) The design of CDFA is such that it locates the CDF projects outside the county planning processes which will likely waste public

resources through duplication and conflict with the county's plan, as required by the Constitution and County Governments Act. In addition, Article 201 of the Constitution enshrines the prudent and responsible use of public funds as a principle of public finance.

(viii) The National Assembly failed to facilitate any meaningful participation contrary to Article 10 and 11 of the Constitution.

[**11**] The High Court considered the respective pleadings and submissions and identified four key issues for determination thus:

(a) whether the process leading to the enactment of CDFA is constitutional
(b) whether CDFA offends the principles of public finance and division of revenue provided under the Constitution.
(c) whether the CDFA violates the division of functions between the national and county governments and
(d) whether CDFA offends the principles of separation of powers.

[**11.1**] Under the first key issue, i.e. procedural omission, the first question raised by the appellants involved consideration whether the CDF (Amendment) Act was unconstitutional for failure by the National Assembly to facilitate public participation and whether CDF (Amendment) Act was unconstitutional for failure to involve the Senate in its consideration, deliberation and passage. On the

question of public participation, the court made a finding that the public was involved in the enactment of the Act through the Task Force and review panel earlier set up by CDF Board.

[**11.2**] Regarding procedural omission to involve the Senate in the amendment legislation, the High Court held at para 138 of the judgment:

> ***"In terms of Article 96(2) and 110 of the Constitution, the CDF (Amendment) Bill as legislation affecting the functions and powers of the county governments qualifies as, 'a bill concerning county government' within the meaning of Article 110(1) and ought to have been passed by the senate. The purpose of the CDF (Amendment) Act was to amend a law that as we have found violates the division of functions between the national and county governments. Thus, an amendment to the Act would have necessitated the input of the senate.***
>
> ***….***
> ***An amendment to the Act affecting the manner in which money is allocated to the CDF is the core part of the Act. As availability of the money affects the financing and implementation of projects that fall within the competence of county government, the provision cannot be severed without undermining the entire Act. The CDF (Amendment) Bill is not an unsubstantial amendment."***

[**11.3**] On the third key issue, the High Court made a finding at para 139(c) that the purpose and design of CDFA is constitutionally flawed as the Act establishes CDF as a mechanism that runs parallel to the constitutionally recognised governance structures and by charging it with local projects under section 22 CDFA threatens to upset the division of functions between the national

and county levels of governments and to interfere with the county government autonomy. In this respect the High Court said in part at para 109:

> ***"the national government, while free to infiltrate its policies at county levels, must do so through the structures recognised under the Constitution and not run parallel them. If it so desires, the national government may channel grants whether conditional or unconditional to the county governments as additional revenue within the meaning of Article 202 and not any other entity which performs the functions allocated to the county by the Constitution."***

[**11.4**] With respect to fourth key issue, the High Court held that by involving members of Parliament in the planning, approval and implementation of CDF Projects, the CDFA violates the doctrine of separation of powers between the executive and legislative functions, and also undermines some key national values and principles of governance including devolution of power, accountability and good governance.

[**12**] The decision of the High Court is assailed by the appellants on numerous identical grounds.

PRELIMINARY OBJECTION: MOOTNESS

[**13**] The first two respondents (TISA and CEDGG) have raised a preliminary objection to the two appeals based on the doctrine of mootness. The Court has given a procedural direction as follows:

> ***"The 1st and 2nd respondents preliminary objection filed in both appeals to be argued as a ground of opposition of the appeals save that the court shall determine in the judgment the legal issues raised in the preliminary objection before determining the other issues raised in the appeal, if necessary."***

Thus, the Court is required to consider and determine the preliminary objection at the threshold. The main ground of preliminary objection has been framed in the terms:

> ***"Whether the appeal has been rendered moot following the repeal of the constituency Development Fund Act, 2013 and the enactment into law of the National Government Constituency Development Fund, 2015."***

The other issues framed are incidental and consequential to the main issue.

[**13.1**] The preliminary objection is supported by the written submissions and the oral submissions of Waikwa Wanyoike – learned counsel for TISA and CEDGG. It is submitted that the repeal of CDFA, 2013 and the enactment of the National Government Constituencies Development Fund Act, 2015 (NGCDFA) rendered the appeal moot, leaving no controversy requiring adjudication; that there is no continuing violation under CDFA 2013; that there is no public interest that justifies the Court to exercise its discretion; and that if the court hears the appeal it would only be offering legal advice.

[**13.2**] The respondents rely on several authorities viz, **JT publishing (proprietary) Limited v Minister of Safety and Security 1996** 12 BCLR 1599. **Legal Aid South Africa v Magidiwana and Others** [2015] ZACC 28, **Minister of Justice Canada v Borowski** (1981) 2 SCR 575, **Defunis v Odegaard 416 US 312, Wanjiru Gikonyo and 2 Ors v The National Assembly of Kenya & 4 Others** [2016] eKLR.

The two appellants contended that the CDFA 2013 ceased to operate as a result of the judgment appealed from, that the NGCDFA did not repeal the 2013 Act; that if the appeal succeeds, Parliament will amend and harmonize them; that the appeal raises important constitutional issues transcending the 2013 Act and which will assist in laying jurisprudence and legal position on aspects beneficial to public at large and to prosperity.

[**14**] The mootness doctrine is entrenched in the common law. The Black's Law Dictionary, Ninth Edition, defines a moot case as:

> ***"A matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights."***

In an article entitled "**Federal Jurisdiction to Decide Moot Cases**" published in the University of Pennsylvania Law Review [1946] Vol. 94 – No. 2, the author, **Sidney A. Diamond** explains the essence of the doctrine thus:

> ***"Common – law courts have long recognized the strict requirement that permits only cases presenting judicial controversies to be decided. This is a jurisdictional limitation. If the parties are not adverse, if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief, the case is moot and the court is without power to render a decision."***

[**14.1**] In the United States of America, it is a constitutional requirement that federal judicial power extends to "cases" and to "controversies" [section 2(1) of Article 111 of the American Constitution]. Neither our Constitution nor our laws explicitly prohibits the courts from determining abstract, hypothetical or contingent cases or appeals. If follows that the common law is the exclusive source of the mootness doctrine in our jurisdiction. The doctrine is based on judicial policy whose main functions are to protect the functional competence of the courts to make law by ensuring adequate adversity of the parties and judicial economy – that is, rationing scarce judicial resources amongst competing claimants.

[**14.2**] Authorities show that mootness is a complex doctrine which should be applied with caution and not mechanistically in every factual situation and that there is no sharp demarcation between moot and live controversies. The mootness doctrine and the relevant factors in the application of mootness doctrine as an aid to judicial economy were considered in the Canadian case of **Borowski v The Attorney General of Canada [1989] 1 SCR 342.** In the furtherance of judicial

economy, a court will sustain a suit or appeal and find against mootness where factual situation has disappeared but functional competence of the court remains, if *inter alia,* the probability of recurrence is high, the temporary cessation or abandonment of the conduct is capable of repetition yet evasive of judicial review; continued uncertainty in law will have a harmful effect on the society, and, court's determination of the questions of law for future guidance of the parties is desirable; public interest is served by judicial decision and, recurrence may result in parallel litigation of the same question at an increased cost of judicial resources.

[**14.3**] The Supreme Court of the **Philippines-Manilla in Greco Antonious Bedo B Belgila and four others v Honourable Executive Secretary Paquito N. Ochoa JR and two others – GR No. 208566 consolidated with G-RNo. 208493 & 209251** after a finding against mootness continued:

> ***"Even on assumption of mootness, jurisprudence, nevertheless, dictates that "the moot and academic principle" is not a magic formula that can automatically dissuade the court in resolving a case. The court will decide cases, otherwise moot, if, first, there is a grave violation of the Constitution; second, the exceptional character of the situation and paramount public interest is involved, third, when the constitutional issue raised requires formulation of the controlling principles to guide the bench, the bar, and the public; and fourth, the case is capable of repetition yet evading review."***

[**14.4**] From the above analysis, it is clear that the mootness doctrine, is not an abstract doctrine. Rather, it is a functional doctrine founded mainly on

principles of judicial economy and functional competence of the courts and the integrity of judicial system. In the application of the doctrine to the wide ranging and varying factual situations, the court will inevitably consider the extent to which the doctrine advances the underlying principles, the certainty and development of the law particularly the Constitution Law and the public interest.

[**14.5**] Returning to the facts of the instant case, it is contended the appeal has been rendered moot by the repeal of CDFA, 2013 and the enactment of NGCDFA, 2015. However, a consideration of NGCDFA shows that there is no express repeal. The correct position is that the court declared the entire CDFA 2013 unconstitutional and suspended the declaration of unconstitutionality for 12 months to give the government a window to remedy the defects. The CDFA, 2013 stood invalidated at the expiry of the period. The declarations of invalidity were made on 20th February 2015 and the present appeals were filed in April 2015 within two months of the declaration. The NGCDA, 2015 became operational on 19th February, 2016, the last day of the 12 months window.

Mr. Waikwa Wanyoike has candidly disclosed that a petition has been filed in the High Court to challenge the constitutionality of NGCDFA, 2015 – **Wanjiru Gikonyo and another v. The National Assembly and 4 others - Petition No. 17 of 2016**. Wanjiru Gikonyo is the National Coordinator of TISA.

The NGCDFA, 2015 has established the same Fund (CDF) allocated to constituencies to be managed and implemented by the same institutions and in the same manner as in CDFA 2013 to the extent that the two Acts are substantially the same.

The MPs have been given a role in respect of the Fund by the NGCDFA. Broadly speaking, an action to enjoin the enforcement of a statute becomes moot when the statute is repealed. The situation here is different as the statute in question has not been expressly repealed and the provisions of the statue which was declared violative of the Constitution have been re-enacted in a new statute. The appellants have appealed against the declaration of invalidity and persist in their assertion that the statute is constitutional. The cessation of the operation of CDFA is not by voluntary act of the appellants but by the pronouncement of the court.

Moreover, parallel litigation has ensued over the very issues raised in this appeal. It is therefore a reality that the constitutional controversy has recurred and is thus a continuing controversy.

Furthermore, the subject matter of the appeal - the management and implementation of CDF projects is of great public importance as it affects the beneficiaries of the Fund in the entire country. A determination of the dispute

would be essential for the administration of the national governments programmes in the constituencies.

Lastly, the constitutional questions raised in the appeal go to the very heart of the Constitution itself – the interdependence of the national and county governments, the separation of powers, the legislative authority of the National Assembly, the representation of people, the role of MPs in development programmes countrywide and the role of the Senate in the enactment and amendment of the laws relating the National Government's Funds. There can be no doubt that the present determination of all those important constitutional principles will forestall parallel future litigation.

[**14.6**] In conclusion, we find and hold that in the circumstances of this case, the intervening legislation has not rendered the appeal moot. The parties are still there. The controversy is still raging. The appeal raises matters of great public interest and of constitutional magnitude. The principle of judicial economy will be better served by hearing the questions raised in this appeal rather than by postponing the determination to a future date. It follows that the preliminary objection is dismissed. The court will proceed to determine the appeal on the merits.

DIVISION OF FUNCTIONS

[**15.1**] It is convenient to consider first the appeal against the finding that CDFA is unconstitutional as it violates the division of functions between the national and county governments. As stated earlier, the court seemingly laid a principle that the national government can only infiltrate its policies at county level by channelling funds through the established county government structures and not through a mechanism that runs parallel to the constitutionally recognized governance structures. That is a fundamental principle on which the finding of violation of equitable sharing of revenue depended. Both appellants challenge the findings on identical grounds.

[**15.2**] The appellants contend, amongst other things, that the limitation imposed by the court on the projects to be undertaken by each level of government do not exist under the Constitution and that the court failed to appreciate that:

(i) the functions of national government are far more than that of county government;

(ii) it is impracticable to clearly demarcate development projects without avoiding an overlap;

(iii) the national government can delegate the performance of its functions to the constituency as a unit of implementation of its functions and that national functions cannot be performed by a county government.

(iv) a constituency is part of national government structure and cannot be part of a county.

(v) Parliament may legislate for Republic in any matter.

(vi) Counties are not independent but part of national government.

[**15.3**] On the other hand, the 1st and 2nd respondents (TISA and CEDGG) contend, *inter alia*, that:

(a) violation on division of functions relates to whether there is unconstitutional intrusion by one level of government on the functions constitutionally designed to another level of government.

(b) the fact that CDFA sought to undertake local development which included issues involving infrastructural development, wealth creation and fight against poverty was offensive to functional integrity of counties.

(c) the vagueness over breadth of what is intended to be implemented through CDFA would in effect interfere with function of counties.

(d) a constituency is a political unit for electoral and representative purposes and cannot be a unit for demarcating and implementing executive functions or demarcating a third level of government.

[**15.4**] The violation of division of functions as advanced comprises two aspects, firstly, encroachment of the functions of the county government reserved by the Fourth Schedule to the Constitution and secondly, locating CDF projects outside the county governments planning process.

[**15.5**] On the first aspect, section 3 of CDFA provides that the funds are for purposes of infrastructural development, wealth creation and the fight against poverty. While section 22(1) thereof provides that projects under the Act shall be community based, Article 186(1) of the Constitution provides:

> ***"Except as otherwise provided by the Constitution, the functions and powers of the national government and county governments, respectively, are as set out in the Fourth Schedule."***

The Fourth Schedule distributes the functions between the national government and county government. TISA and CEDGG submitted in the High Court that the Fourth Schedule establishes a principle of exclusivity in regard to the powers assigned to each level of government and that the effect of section 3 and 22(1) of the CDFA is to ensure that any projects undertaken through CDF are local and

geographically specific and not those that are national in scope, and, thus, CDF Board had encroached on the functions of the county government.

[**15.6**] The High Court observed that the Act is not clear about the projects to be funded by CDF. Later at para 120, the court made a finding partly thus:

> ***"the purpose of the Act, coupled with the target projects under section 22 are vaguely worded, and absent a specific cause, it is premature to categorically class the enumerated projects as falling either under the national or county government. It is nevertheless a safe inference to make at this point that the reference to "community based projects" within the wording of section 22 would at the very least cause a functional overlap with those of county governments."***

[**15.7**] As regards the second aspect, the case of TISA and CEDGG was that under the County Government Act and the Constitution, a county government has the executive and legislative authority to plan for all its functions under the Fourth Schedule and therefore it was a violation of the Constitution for the national government to establish a parallel development scheme implementing county governments' functions that are outside the county governments functions but which disregard and are outside the county governments development plans.

[**15.8**] On this issue, the High Court held, among other things, that it is only county governments that has constitutional power to execute development within the county except for projects reserved for national government by the Fourth

Schedule and that the national governments can infiltrate its policies through the structures recognised under the Constitution and not through parallel entities.

[**16**] The finding of the High Court particularly on the mechanisms for executing national government's programmes has apparently confused the appellants. For instance, the CDF Board, states in ground 14 of the appeal thus:

> ***"The superior court erred in law by holding that projects within a constituency must be implemented through the respective county governments thereby creating the absurd inference that national governments can only implement its functions through county governments when such limitation does not exist under the constitution."***

In this respect, the Board submitted that the administration and development agendas of a constituency falling under the administration of a county government is limited only to those projects assigned to county governments under the Fourth Schedule of the Constitution and that functions that are assigned to the national government to be implemented in the constituencies cannot be under the administration of the county government.

On the other hand, the National Assembly in ground 14 of the appeal partly stated that the judges erred in law in finding that the only way that the national government can infiltrate its policies at county level is through county government. It is clear from the wording of that ground of appeal that the appellants construe

the judgment of the court to mean that national government can only implement its projects through respective county governments and not directly.

[**17**] It is necessary to quote in full the part of judgment which relates to the execution of county governments functions. Para 109 of the judgment states:

> ***"The upshot of the foregoing is that we are in agreement with petitioners that the national government may only provide grants to county government or additional revenue but it is only the county government that has constitutional power to execute development within the county except for the projects reserved for national government as provided for under the Fourth Schedule to the Constitution. Put another way, the national government, while free to infiltrate its policies at the county levels must do so through the structures recognised under the Constitution and not run parallel them. If it so desires, the national government may channel grants whether conditional or unconditional to the county governments as additional revenue within the meaning of Article 202 and not any other entity which performs the functions allocated to the county by the Constitution. The national government cannot purport to channel grants to an entity whose intended projects effectively undermine the role of the government at county level unless the projects are specifically defined to exclude them from the ambit of Part 2 of the Fourth Schedule."***

[**18**] That excerpt exempts projects reserved for national government under the Fourth Schedule from execution by a county government. Secondly, it refers to provision of grants to county governments or additional revenue within the meaning of Article 202 which provides:

> ***"(1) revenue raised nationally shall be shared equitably among the national and county governments.***

> ***(2) County governments may be given additional allocations from the national governments share of the revenue, either conditionally or unconditionally."***

The court was responding to the provisions of S.4 (2) of CDFA before it was amended which provided that money allocated under the Act was additional revenue to county governments under Article 202(2) of the Constitution. It was specifically dealing with the CDF as an additional allocation to county governments. Thus, this court interprets the finding of the High Court to mean that in general, it is only the county government which has constitutional power to execute development projects within the county funded by money received from national government under article 202 either as an equitable share of revenue or additional allocation and that national government can only implement projects in the counties relating to functions allocated to it under the Fourth Schedule. In other words, the court did not stop the national government from carrying out functions assigned to it by the Fourth Schedule in the counties.

[**19**] Nevertheless, the High Court held that the CDFA was constitutionally flawed for:

> ***"By charging it with local projects under S.22 of the CDFA threatens to upset the division of functions between the national and county levels of governments and interfere with the county government autonomy"***

It is necessary to clarify at the outset that the entire controversy is not about the establishment of the CDF and the constitutionality of the appropriation of CDF from the Consolidated Fund, nor is it about the national government's social and economic policy that led to the establishment of the Fund. The latter would indeed fall within the political question doctrine which is normally outside the scope of judicial review. Rather, the dispute concerns the mechanisms for management and implementation of the national government projects in counties in relation to principles of public finance, devolution and separation of powers.

[**20**] However, it is pertinent to state that he national government has power through the Cabinet Secretary in charge of the docket under section 24(4) of PFMA with the approval of National Assembly to establish CDF and to appropriate from the Consolidated Fund by an Act of Parliament under Article 206(2) (a) or 206(2) (c). The CDFA as amended authorise appropriation under Article 206(2) (c) – that is;

> ***"as a charge against the Fund authorised by this Constitution or by an Act of Parliament"***

[**21**] The jurisdiction of the High Court was not questioned. Under Article 165(3)(d), the High Court has power to hear any question respecting the interpretation of the Constitution including whether any law is inconsistent with or

in contravention of the Constitution and whether anything said to be done under the authority of the Constitution or any other law is inconsistent with or in contravention of the Constitution and also any matter relating to the constitutional relationship between levels of government.

[**22**] By Article 174, the principles of devolution of government are:

(a) to promote democratic and accountable exercise of power;

(b) to foster national unity by recognizing diversity;

(c) to give power of self-governance to the people and enhance the participation of the people in the exercise of the powers of State and in making decisions affecting them;

(d) to recognise the right of communities to manage their own affairs and to further their development;

(e) to protect and promote the interests and rights of minorities and marginalised communities;

(f) to promote social and economic development and the proximate, easily accessible services throughout Kenya;

(g) to ensure equitable sharing of national and local resources throughout Kenya;

(h) to facilitate the decentralization of state organs, their functions and services from capital of Kenya; and

(i) to enhance checks and balances and the separation of powers"

Further, the sharing and devolution of power is one of the national values and principles of governance under article 10 of the Constitution.

Article 6(2) provides:

> ***"The governments at the national and county levels are distinct and interdependent and shall conduct their mutual relations on the basis of consultation and cooperation."***

[**23**] Furthermore, Article 189 provides for co-operation between national and county governments. It requires Government at either level in the performance of its functions to respect the functions and institutional integrity of the other and constitutional status and institutions of the government at the other level, assist, support and consult as appropriate, implement the legislation of the other level of government, liaise for purposes of exchanging information, coordinating policies and administration, and enhancing capacity; co-operate in the performance of functions and exercise power of and for that purpose may set up joint committees and joint authorities.

Article 189(3) requires both governments to make every reasonable effort to settle disputes between the governments and Article 189(4) provides for enactment of a

national legislation to provide procedure for settling inter-governmental disputes. That legislation – the Inter-governmental Relations Act – Act No. 2 of 2015 has been enacted.

[**24**] It is quite obvious and indeed clear from the foregoing that although Kenya is a constitutionally devolved State, it does not have a federal constitution and that the county governments are not independent but semi-autonomous and an integral part of the unitary State, exercising delegated sovereign power for purposes of governance.

[**25**] Reverting to the distribution of functions between the national and county governments, it is clear from the impugned judgment that the High Court did not make a specific and unequivocal finding that the projects funded by CDF are in fact within the functions allocated to county governments by the Fourth Schedule. On the contrary the court said that such a finding would be premature but nevertheless inferred that the reference to "***community based projects***" in section 22 of CDFA would cause a functional overlap.

[**26**] The distribution of function in the Fourth Schedule is not static, comprehensive, inflexible or exclusive. By Article 186(2), a function may be conferred on both levels of government in which case it is within the concurrent jurisdiction of both governments.

By Article 186(3), a function which is not assigned to a county is a function or power of the national government. The Fourth Schedule does not demarcate exclusive functions, concurrent functions and residual function. Furthermore, the category of function in the Fourth Schedule, are described in broad terms and the breadth of each category is not defined.

In some categories, the word "including"' and the phrase "including in particular" are used, which connote that each category may include several functions. Article 168(3) also shows that apart from the Constitution, a function or power may be conferred by a national legislation and Article 186(4) provides:

> ***"For greater certainty, Parliament may legislate for the Republic on any matter."***

[**27**] Article 191 provides for conflict of laws between national and county legislation in respect of matters falling with the concurrent jurisdiction. By Article 191(2) as read with Article 191(3), national legislation prevails over county legislation if, inter alia, the national legislation applies uniformly through Kenya and is necessary for promotion of equal opportunity or equal access to government services. The National government has the overall responsibility to provide economic development of the whole county including securing economic and social rights guaranteed by Article 43.

In relation to the facts of this case, the functions under the CDFA which provides for a National Fund would prevail over the County Government Act in respect of functions assigned to the county governments.

[**28**] Furthermore, Article 187 permits the inter-governmental transfer of functions and powers by agreement of two governments.
Additionally, by section 17(2) of the CDFA, the Constituency Development Fund Board only approves project proposals which are consistent with the Act. It follows that until the Board has approved the list of project proposals in accordance with section 17(2), it cannot be said conclusively that the CDFA has violated the distribution of functions under the Fourth Schedule.

[**29**] From the foregoing we find that TISA and CEDGG did not prove that the functions performed by the national government through CDF are exclusively within the jurisdiction of county government and that the High Court erred in finding sections 3 and 22 of CDFA to be unconstitutional.

As a sequel, it is not unconstitutional for national government to perform CDF services inside the administrative structures of county governments. By way of analogy, Article 204(3)(b) permits the national government to use Equalisation Fund to provide basic services to marginalized areas in the counties either ***directly***

or ***indirectly*** through conditional grants to counties in which marginalised communities exist.

[**30**] The violation of division of function was the main reason why CDFA was declared to be unconstitutional. Having made a determination on that issue, we now consider other grounds which led to the declaration of invalidity.

[**31**] The High Court held that the CDFA is unconstitutionally flawed as it establishes CDF as a mechanism that runs parallel to the constitutionally recognised governance structures and variously described the CDF development scheme as a '*third tier'*, '*third entity'* or '*parallel entity'*.

The Fund is described by CDFA as "Constituency Development Fund". The CDFA defines a "constituency" thus:

> ***"has a meaning assigned to it in the Elections Act, 2011".***
>
> The Elections Act 2011 states that a "*constituency*" means one of the constituencies into which Kenya is divided under Article 89 of the Constitution.
>
> On its part, Article 189(1) provides:
>
> ***"There shall be two hundred and ninety constituencies for purposes of election of the members of the National Assembly provided for in Article 97(1)(a)."***

The County Governments Act does not define a constituency but provides in section 48(1) in part:

> ***"Subject to subsection (3), the functions and provisions of services of each county government shall be decentralised to***
>
> ***(a) …***
>
> ***(b) the sub-counties equivalent to the constituencies within the county established under Article 89 of the Constitution."***

The Black's Law Dictionary, Ninth Edition defines a 'constituency' as

> ***"the body of citizens dwelling in a defined area and entitled to elect a representative"***

and a "County" as :

> ***"The largest territorial division for local government within a state, generally considered to be a political sub-division and a quasi-corporation"***

[**32**] The High Court construed a "constituency" as a unit of representation of the people but within the executive authority of a county government. Mr. Anthony Njoroge, learned counsel for the National Assembly, submitted that as a constituency forms the basis on which a Member of Parliament is elected the National Assembly is part of National Government and a constituency cannot be part of a county government. On the other hand, the counsel for the CDF Board submitted that the administration and development agenda of a constituency falling

under the administration of county government is limited only to functions assigned to county government.

Mr. Waikwa Wanyoike for TISA and CEDGG submitted that a constituency is a political unit for electoral and representation purposes and cannot be taken as a unit for demarcating and implementing executive functions or, as CDFA did, demarcation of a third level of government.

[**33**] Respectfully, the classification of a constituency as falling within the jurisdiction of national government for purposes of disbursement and implementation of CDF is artificial as a part of a county cannot fall under the administrative jurisdiction of two different governments.

By section 48 of the County Governments Act, a sub-county is equivalent to a constituency and for purposes of functions and provision of services the constituency falls under the administrative jurisdiction of a county government.

Furthermore, no practical purpose would be served by distinguishing between constituency as an electoral unit and a sub-county as an administrative unit because the same people who are governed by a county government in a sub county are the same people who elect a Member of Parliament. The important consideration is whether CDF scheme falls within the administration of national government or county government.

[**34**] As we have already stated, CDF is not an additional allocation to county governments. It is a national Fund established by a national legislation which straddles all constituencies and which complements the development efforts by national and county government. The fact that the CDF scheme services may cause an overlap of functions does not ipso facto bring the CDF services within the administration of the county governments, since a function may fall within the concurrent jurisdiction of both governments in which case the national legislation takes precedence.

[**35**] We hold therefore that CDF does not fall within the administrative function of the county government and that it can only be statutorily administered by the national government.

IS CDFA THIRD ENTITY?

[**36**] We next consider whether the CDF scheme is unlawful third entity. The High Court reasoned that the Constitution creates national and county governments and that CDFA establishes a mechanism that runs parallel to constitutionally recognised governance structures.

Articles 6(3) and 176(2) respectively require the national government and county governments to decentralise their services where practicable and appropriate.

[**37**] The county governments have decentralized their services through section 48 of the County Governments Act. Similarly, the national government has decentralized its services through the instrumentality of the National Government Co-Ordination Act – Act No. 1 of 2015 (NGCA). The national government has appointed administrative officers for a county, sub county, ward, location and sub location (section 15(2)) and has power under section 14 to established national government service delivery units headed by the respective administrative officers.

The CDF is established by a Cabinet Secretary under section 24(2) of PFMA and section 24(5) that Act provides:

> ***"The Cabinet Secretary shall designate a person to administer every public fund established under subsection (4)."***

Article 260 of the Constitution defines a "*person*" as '***including a company, association or other body of persons incorporated or unincorporated'***.

Therefore, the CDF Board is such a person referred to in section 24(5) of PFMA,

The functions of the Board include, ensuring timely and efficient disbursement of funds, efficient management of funds and to consider and approve project proposals.

The powers of the Cabinet Secretary to appoint a person to administer the Fund has not been challenged.

[**38**] It is not unconstitutional for Parliament through CDFA to empower the national government to establish a statutory body as an agent of national government to administer the Fund. The money committed to the Fund annually is a colossal sum running to billions of Kenya shillings. The numerous projects, range and magnitude of projects justify the establishment of a distinct entity for administrative management and implementation. The majority of CDF committee members who implements the projects in the constituencies are elected representatives of the constituencies who are not national government employees. Those committees fit in the description of the national government services delivery units.

It is pertinent to quote **Prof. Kivutha Kibwana,** the Governor of Makueni, who has established several development projects in his county who recently said:

> ***"We have three governments; a citizen's government, county government and the national government and they all work in harmony."***

[**39**] It is clear from the foregoing that the CDF Committee and the project management committee are citizens' development committees who have been empowered by the community to implement the projects. The CDFA directly gives the community resources, self governance, power to participate in decision

making, power to select the priority projects and power to implement projects for their social and economic development.

That is the purest form of devolution and it is in harmony with the principles of devolution. It is further clear, contrary to the finding of the High Court, that the administration of the Fund, management and implementation of the projects is done by the national government through the agents established by the Act who are not in law third entities.

CONFLICT OF ROLES

[**40**] The finding that section 3 and 24 of CDFA introduces a conflict of roles particularly with respect to county planning is not supported by the law.

By section 105 of County Governments Act, the county planning unit is inter alia – required to ensure linkages between county plans and national planning framework.

Section 7 of Inter-governmental Relations Act establishes the National and County Governments Co-ordinating Summit whose functions include the monitoring the implementation of national and county development plans and co-ordinating and harmonizing the development of county and national government policies.

At county government level, section 54 of CGA establishes a county inter-governmental forum chaired by a Governor whose functions include, coordination of inter-governmental functions pursuant to, amongst other provisions, Article 186(1) and the Fourth Schedule to the Constitution. Further, by section 38 of CDFA, the Chairman of the CDFC is required to submit a list of the projects for the constituency to County Assembly in order to align the projects with the County's Development Plans and Policies.

Additionally, section 187(1) of PFMA establishes an Inter-governmental Budget and Economic Council whose members include the chairperson of the Council of County Governors and County Executive Committee Member for Finance whose purpose is to provide a forum for consultation and cooperation between national and county governments on, *inter alia*, matters relating to:

> ***"budgeting, the economy and financial management and integrated development at the national and county level."***

All those bodies ensure consultation, cooperation and coordination of inter-government policies and activities for economic development. It is thus improbable that CDF would interfere with county governments planning or autonomy.

DIVISION OF REVENUE

[**41**] The next set of grounds of appeal for consideration relates to the issue whether CDFA offends the principles of Public Finance and division of revenue. When considering this issue, the High Court reframed the issue to be whether section 4 of CDF (Amendment) Act offends the principles of Public Finance and division of revenue. Article 202(1) provides that *revenue raised nationally* shall be shared equitably among the national and county governments. By Article 203(2), the equitable share of revenue raised nationally, shall not be less than fifteen per cent of all revenue collected by the national government. Article 202(2) further provides that county governments may be given additional allocations from the national government's share of revenue either conditionally or unconditionally.

[**42**] As stated earlier, it is the Commission on Revenue Allocation which makes recommendations on equitable sharing of revenue to the Senate, National Assembly, National Executive, County Assemblies and County Executives. The Division of Revenue Bill is required to be introduced to Parliament at least two months before the end of each financial year. We have also referred to Article 205 which requires the Commission on Revenue Allocation to make recommendations on Division of Revenue Bill to the National Assembly and to the Senate which

recommendations are tabled in Parliament and considered before voting on the Bill.

There is a further step to be followed in the process of sharing revenue in section 191(4) of PFMA, that before submission of the Division of Revenue Bill to Parliament, that the Cabinet Secretary shall notify the inter-governmental Budget and Economic Council and the Commission on Revenue Allocation.

On the other hand, Section 4(1) of CDFA provides that the CDF is a national Fund comprising of an amount of not less than 2.5% of ***all the national government ordinary revenue*** collected in every financial year. Subsection 4(1) (c) states that the Fund shall be disbursed by the national government through the Board to constituencies as a grant.

TISA and CEDGG submitted in the High Court that the phrase ***all national government revenue collected in every financial year*** used in section 4(1)(a) bears the same meaning as the phrase "**revenue raised nationally**" or ***of all revenue collected*** by the national government used in Article 202(2) and 203(2) respectively and therefore section 4(1)(9) is unconstitutional as it requires that 2.5% of annual revenue be extracted from local revenue before the 15% equitable share.

[**43**] The High Court agreed that the phrase used in section 4(1)(a) introduces ambiguity but appreciated that not all ambiguity necessarily rendered a statute unconstitutional. The court made a finding that it was not clear from the phrase used in section 4(1)(a) whether the money is after deduction of the equitable share or not. The court then said that the question whether s. 4(1)(a) violated the formulae of equitable share can only be properly assessed after establishing whether or not CDF is a conditional grant as envisaged under Article 202(2). Subsequently, the court made a finding that CDF is not a conditional grant and was not even expressed to be such.

The court then considered the provisions of section 4(1)(c) which refers to CDF as a "**grant**" and made finding that describing CDF as a grant was problematic. The court concluded that the constitutionality or otherwise of subsection 4(1)(c) of section 4 can only be appreciated by examining the manner of the implementation of the Fund under CDFA. After considering the issue whether CDFA violates the division of functions and coming to the conclusion that there was violation of division of functions, the court held that there was a violation of both the principles of Public Finance and division of revenue.

[**44**] The rationale for finding that CDF violates the principles of Public Finance is not clear. It seems, however, that the court reasoned that such a Fund should

either be in the form of a grant as conditional revenue to county governments or the funded projects should be implemented through the existing structures of county governments.

The decision of the court is faulted on several grounds, the main one being failure to appreciate that the funds for CDF are allocated after the division of revenue between the national and county governments. As we have shown above, the High Court did not make a definitive finding that the phrase *"**of all the national government ordinary revenue collected in every financial year"*** means that the CDF has to be allocated before the equitable share of revenue between the national government and county governments is determined. The court said:

> ***"Again, it is not clear whether the money is after deduction of equitable share or not. The principle that must come out clearly is that the revenue raised nationally within the wording of Article 202 is the revenue raised by the national government and that the same is only shareable between the two levels of government recognized under the Constitution which are the national and county governments."***

[**45**] That, with respect, is the correct interpretation of Articles 201(1) as read with Articles 203(2) and 218. Moreover, it was not the appellant's case that the allocation of CDF takes precedence over the equitable sharing of the national revenue.

The equitable sharing of national revenue between the two levels of governments is a constitutional imperative which is given effect by the submission of annual Division of Revenue Bill which leads to enactment of Division of Revenue Act. As we have shown above, there is a specialized independent constitutional Commission which makes recommendations which are to be submitted to, and considered, by all relevant institutions including county assemblies and county executives. The Division of Revenue Bill goes through a rigorous process before it is passed. Even before the Bill is submitted to Parliament, the elaborate budget making process stipulated in the PFMA has to be followed. It is not necessary to consider the budget making process. What is clear and, as correctly submitted by the appellants, is that, the equitable sharing of revenue through the Division of Revenue Bill - later an Act precedes all other statutory allocations and appropriations in the Budget statement policy and in the national government budget.

[**46**] As Article 221 clearly shows, it is the budget estimates of the national government which are incorporated in the Appropriation Bill and when passed, in the Appropriation Act, which is a separate and distinct Bill or Act from the Division of Revenue Bill and Act. Furthermore, it is not the CDFA which determines the principle of equitable sharing of revenue. Section 189 of PFMA

explicitly provides that the process of sharing the revenue shall be done in accordance with the Constitution and the Act.

Additionally, the contention that S.4(1) (a) upsets the formula for equitable sharing of revenue, is hypothetical as it was not shown empirically that the constitutional formula was jettisoned in favour of provisions of S. 4(1)(a) or that the county governments received less than the constitutional share in the financial year 2013/2014 or in any other year subsequent.

Although section 4(1) (a) is not a model of clarity, it is not unconstitutional in its effect.

Lastly, since we have already made a finding that CDFA does not violate the division of functions, the real basis on which the High Court declared section 4(1)(a) to be unconstitutional – that is, the manner of the implementation of CDFA is fallacious.

ROLE OF THE SENATE

[**47**] The next subject for consideration is the finding that CDFC (Amendment) Bill concerns county government and is unconstitutional on the ground that the Senate was not involved in its enactment.

It is contended by the appellants that the High Court misdirected itself and erred in law in so finding and, also, in failing to appreciate that the CDFA and CDF (Amendment) Bill were passed under different constitutional regimes.

[**48**] Before the current Constitution of Kenya, 2010 came into force on 27th August 2010, Parliament consisted of a single chamber – the National Assembly. The current Constitution created a bicameral Parliament consisting of the National Assembly and the Senate. However, the provisions of Chapter Eight of the Constitution which created the National Assembly and the Senate were suspended until after the final announcement of all results of the first general elections for Parliament under the current Constitution - (Section 2(1) of the Transitional and Consequential Provisions). In the meantime, the existing National Assembly was to continue and perform the functions of the Senate - (Section 10 and 11) - The Transitional and Consequential Provisions). The first elections under the current Constitution were held in March 2013.

The CDFA was assented to by the President on 14th January 2013 but it was to come into operation immediately after the first election for Parliament under the current Constitution. It is clear, therefore, that the CDFA was passed by the National Assembly under the repealed Constitution when the Senate was not in existence.

[**49**] In the petition filed by CEDGG on 16th May 2013 (Nakuru) - Petition No. 16 of 2013) the petitioner averred, amongst other things, that, section 4(2) of CDFA was unconstitutional for providing that all monies allocated under the Act was additional revenue to county governments which was not the case. This was appreciated to be an error and the CDF (Amendment) Bill, 2013 was published. The memorandum of objects and reasons of the Bill states:

> ***"The principle object of this Bill is to amend the Constituency Development Fund Act 2013 so as to clarify that the Constituency Development Fund is not additional revenue to county governments under Article 202(2) of the Constitution as erroneously stipulated in the Act….***
>
> ***The Bill does not concern county governments in terms of Article 109(3) of the Constitution and does not affect the functions and powers of county governments recognized in the Fourth Schedule of the Constitution.***
> ***This Bill is not a money Bill within the meaning of Article 114 of the Constitution…"***

The Bill was enacted by the National assembly and commenced on 1st October 2013. As adverted to earlier, the Amendment Act deleted section 4(2) and replaced it with a provision that money allocated under the Act is a charge on the Consolidated Fund.

Following the amendment, CEDGG amended its petition to say that although the Bill deleted subsection 2 of section 4, the purpose and functions for which the funds were to be used was never changed and specifically that:

> ***"Subsection 4(2) of the CDFA (before it was amended) designated the moneys allocated though CDFA as additional revenue to county government. The Amendment Bill was never submitted to nor considered for debate by the Senate. The Amendment Act is therefore unconstitutional…"***

[**50**] By Article 110(4) and 110(5), a Bill concerning county government is required to be passed by both Houses. A "*Bill concerning county government*" is defined in Article 110(1) and includes a bill containing provisions affecting the functions and powers of county government set out in the Fourth Schedule and a Bill affecting the finances of county governments.

Article 110(3) provides that before either House considers a Bill the Speakers of National Assembly and Senate shall jointly resolve any question whether it is a Bill concerning counties, and whether it is a special or an ordinary Bill.

Hon. Moses Lessonent, an MP and the sponsor of the Bill, swore that the two Speakers of Parliament resolved that the Bill was not a Bill concerning county government and hence did not require the consideration of the Senate. The High Court accepted that position but stated that the resolution by the two Speakers did

not oust the power of the court where a question is raised regarding the true nature of the legislation.

The court then reviewed the substance of the CDF Act particularly with regard to the division of function and equitable sharing of national government's revenue and made a finding at para 138 thus:

> ***"We have analyzed the CDF Act and concluded that CDF and the manner it is administered and projects implemented impacts functions allocated to the County under the Fourth Schedule to the Constitution. In terms of Article 96(2) and 110 of the Constitution the CDF (Amendment) Bill as a legislation qualifies as "a Bill concerning county government" and ought to have been passed by the Senate"***

[**51**] In the **Speaker of Senate & Another v Attorney general & 4 Others [2013] eKLR**, the Supreme Court in the majority 'Opinion' partly said in para 131:

> ***"Where the Speakers determine that a Bill is not one concerning county government", such a Bill is then rightly considered and passed exclusively by the National Assembly and then transmitted to the President for assent. The emerging, broader principle is that both Chambers have been entrusted with the people's public task, and the Senate, even when it has not deliberated upon a Bill at all relevant stages, has spoken through its Speaker at the beginning, and recorded its perception that a particular Bill rightly falls in one category, rather than the other. In such a case, the Senate's initial filtering role, in our opinion, falls within the design and purpose of the Constitution, and expresses the sovereign intent of the people; this cannot be taken away by either Chamber or either Speaker thereof."***

As provided by Article 112(1)(a) and 113, if a dispute between the two Houses regarding a Bill concerning county government arises, the two Speakers are required to appoint a mediation committee consisting of equal number of members of each House to attempt to develop a version of the Bill acceptable to both Houses. Article 113(4) provides that if the mediation committee fails to agree or if the version proposed by the committee is rejected the Bill is defeated.

At para 145 of the Speaker of the Senate case, the majority 'Opinion' was partly thus:

> ***"It is clear to us, from a broad purposive review of the Constitution that the intent of the drafters, as regards the exercise of legislative powers, was that any disagreement as to the nature of Bill should be harmoniously settled through mediation. An obligation is thus placed on the two Speakers, where they cannot agree themselves, to engage the mediation mechanism."***

[**52**] In that case, **Ndungu Njoki, SCJ** rendered a dissenting opinion on a wide range of issues of constitutional law. In reference to the interpretation of a Bill concerning county government the learned Judge said at para 268:

> ***"I am persuaded that for a Bill to be deemed as one concerning county government, it must specifically affect the functions and powers of the County Governments as set out in the Fourth Schedule of the Constitution. In addition, the provisions of the Bill must be limited to the ambit of part 2 of that Schedule which provides for the functions and powers of County Governments. In the event that such a Bill goes beyond the scope of part 2 of that Schedule, it cannot in any way be deemed to a Bill concerning County Government. Accordingly, a Bill that concerns the funding***

> ***of functions outside of those specified to counties under the Fourth Schedule such as the Division of Revenue Bill would in my opinion fail the test of being considered as a Bill relating to County Government. To my mind allowing the Senate to participate in the enactment of a Bill that goes beyond the parameters of what counties may do within the Fourth Schedule, would certainly then be unconstitutional."***

[**53**] By Article 10(1), the national values and principles of governance bind all state organs, state officers, public officers and all persons wherever any of them applies or interprets the Constitution, enacts or applies any law or makes or implements public policy decisions. Referring to that provision, Ndungu Njoki SCJ, said in the **Speaker of the Senate** case at para 256:

> ***"The interpretation of the Constitution, therefore, is not an exclusive duty and preserve of the courts but applies to all State organs including Parliament. What is exclusive to Courts is interpretation of the Constitution within a legal dispute brought in a normal manner before a superior court and which is afforded the necessary processes of appeals, right to the Supreme Court. Disputes, however, do exist in other forms that require not judicial intervention and determination, but rather resolution of a political nature."***

[**54**] In the instant case, it is apparent that the court arrived at the conclusion that the Amendment Bill should have been considered by the Senate only after interpreting the CDFA. In other words, it is the finding that the CDFA violated the division of functions in the Fourth Schedule and the equitable sharing of national revenue that led the court to find that the Amendment Bill concerned county

governments. By importing the provisions of CDFA into the Amendment Bill the interpretation of the decision of the court, is in essence, that the Senate should have reviewed the entire CDFA. Yet the Senate had no legislative role in the enactment of CDFA as it was passed before it came into existence. The court should have independently considered the provisions of the Amendment Bill and make a finding based on its provisions whether or not it concerned county governments.

Regarding the contents of the Bill, the Bill in its object indicated that it did not concern county governments or affect the powers and functions of county governments. The object of the Bill was to clarify that the Fund was a charge on the Consolidated Fund and not an additional revenue to county governments. Contrary to the court's finding that this was not an insubstantial amendment, the amendment did not have any positive effect either on the allocation of the equitable share of national revenue or on the functions and powers of county governments.

Furthermore, the Speakers of the two Houses had resolved that the Bill did not concern county governments. It is a constitutional condition precedent in the legislative process that the Speakers of both Houses resolve the question whether a Bill concerns counties before it is considered. It is also a constitutional requirement that if a dispute arose, it should be resolved through mediation. The Constitution has assigned the role of resolving disputes of this nature in the

legislative process to the Speakers and to Committees of both Houses. As failure to resolve the dispute leads to the rejection of the Bill, it is imperative that their decision should be given due deference.

[**55**] In this case, there was, in fact no dispute between the two Houses. The Senate did not question the amendment Bill in the High Court. In the absence of any controversy pertaining to the amendment Bill between the stakeholders, the court not only engaged itself in a theoretical exercise but also usurped the constitutional role of competent institutions in the legislative process.

Lastly, as we have already held that the CDFA does not violate the division of functions or the equitable sharing of national government revenue, the decision of the High Court has no foundation and is therefore erroneous.

SEPARATION OF POWERS

[**56]** The findings of the High Court on the principles of separation of powers are challenged mainly on the ground that the court erred in law by taking a restrictive impractical view of the separation of powers and in failing to appreciate that there is no absolute separation of powers. It was submitted, amongst other things, that the Constitution does not prescribe a pure separation of powers; that it would not be unconstitutional for Members of Parliament to play a role in implementing

CDFA; that Members of Parliament do not play an executive role but merely play their role as representatives of the people and that the role of National Assembly Select Committee as envisaged in CDFA is that of oversight which does not amount to involvement in the administration of CDF.

[**57**] The issues raised in the appeal have to be resolved in the context of the Constitution of Kenya in relation to the provisions of CDFA while taking cognizance of the general principles under the doctrine of separation of powers. By Article 94(1), the legislative authority of the Republic is derived from the people and, at national level *"is vested in and exercised by Parliament"*. By Article 185(1), the legislative authority of a county is vested in, and is exercised by its County Assembly.

By Article 159(1), the judicial authority is derived from the people and *"vests in and shall be exercised by the courts and tribunals established by or under the Constitution"*. By Article 129(1), the executive authority derives from the people and *"shall be exercised in accordance with the Constitution"*. Further, Article 179 (1) provides that the executive authority of the county *is vested in and exercised* by a county executive committee.

[**58**] It is clear that, while the Constitution vests legislative power and judicial power on Parliament and the court and tribunals respectively and provides that the power has to be exercised by these institutions, it does not, except in the case of county executive, vest executive power on any single institution. Instead, the executive power is distributed to the national executive and to the independent Commissions and independent Offices established by Article 248.

In the matter of the ***Interim Independent Electoral Commission*** **[2011] eKLR,** the Supreme Court said in part at para 531-

> ***"Separation of powers is an integral principle in Kenya's Constitution.***

At para 54, the Supreme Court said in part –

> ***"The essence of separation of powers, in this context, is that the totality of governance powers is shared out among different organs of government, and these organs play mutually – countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation."***

[**59**] It is often said that the Constitution of the United States of America provides for a rigid separation of powers. For example, Article 1 Section 6 provides in part-

> ***"No Senator or representative, shall during the Time for which he was elected, be appointed to any Civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time;***

> ***and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."***

In ***Buckley v Valeo 424 U.S.*** **1 [1976] U.S. Supreme Court** said at para 121 –

> ***"Yet it is also clear from the provisions of the Constitution itself, and from the Federalist Papers, that the Constitution by no means contemplates total separation of each of these essential branches of Government. The President is a participant in the law making process by his virtue of his authority to veto bills enacted by Congress. The Senate is a participant in the appointive process by virtue of its authority to refuse to confirm persons nominated to the office by the President. The men who met in Philadelphia in the Summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively."***

In that case, the U.S. Supreme Court at para 122 quoted with approval the judgment of Mr. **Justice Jackson** in **Youngstown Sheet & Tube Co. v Sawyer, 343 U.S. 579, 635 (1952**) thus –

> ***"While the Constitution diffuses power the better to secured liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."***

[**60**] The Kenya Constitution does not contain the so called "*ineligibility*" and "*incompatibility*" clause evident in Article 1 Section 6 of the U.S.A. Constitution.

Instead, the Constitution provides for national values and principles of governance in Article 10 which includes rule of law, democracy, good governance, transparency and accountability. The Constitution also contains the Leadership and Integrity principles in Chapter Six to bind all State Officers in the execution of their duties.

Article 77 under Chapter Six contains restrictions on the activities of State Officers. The Leadership and Integrity Act has been enacted under the Constitution to give effect to Chapter Six.

[**61**] We have referred to the national values and principles of governance and to the principles of leadership and integrity because the definition of "State Officer" under Article 260 includes some members of the three branches of government such as members of national and county executive, independent commissions and offices; Members of Parliament and Judges and Magistrates.

In deciding whether a member of any of the three branches of government can perform a function other than the one specifically designated by the Constitution, the doctrine of separation of powers is not the only determinant. The inquiry must extend to the consideration of the other constitutional principles such as the national values and principles of governance and leadership and integrity, where

appropriate, to find out whether the performance of the function is restricted by the Constitution.

[**62**] In relation to the facts of this case, there is nothing in the Constitution or in Leadership and Integrity Act which restricts a Member of Parliament from involvement in development activities in his constituency. The Member of Parliament is a leader in his own right and represents the constituents both inside and outside Parliament. What the court characterised as unconstitutional is the involvement of Members of Parliament in the planning, approval and implementation of CDF Projects.

[**63**] We have studied the CDFA. The key institution under the Act is the CDFC. It is this body which is charged with the responsibility of initiating the process for identification and prioritization of the projects; employment of staff, allocation of funds to various projects, tabling of reports and monitoring the implementation of the projects. Two of its members are among the three signatories to the bank account. The Projects Implementation Committee which implements the projects works under its direction.

The CDFC has eleven members including the MP who is an ex-officio member and the quorum of the Committee is half of total membership. The MP appoints eight of the ten members.

The Black's Law Dictionary defines an '*ex-officio member'* as a member appointed by virtue or because of an office and explains that an ex-officio member is a voting member unless the applicable governing document provides otherwise. As CDFA does not provide otherwise, an MP who is member of the committee by virtue of his office as an MP is a voting member. From that analysis, it is evident that it is the MP who controls the Committee and therefore influences the selection, prioritization of projects, allocation of funds and also monitors the implementation of the projects. Those are no doubt executive duties.

Thus, the National Assembly by Section 24 (3)(c) and 24(3)(f) of CDFA retained the power to appoint an MP to execute the CDFA and indeed appointed MPs to perform duties reserved for the executive arm of the government. The power of the appointment of staff of CDF rested with the Cabinet Secretary or the Board. The executive functions performed by the MP could properly have been assigned to the sub-county administrator as an officer of national government. The appointment of MPs to perform purely executive duties of enforcing CDFA is violative of the Constitution and principles of Separation of Powers and of National Values and Governance.

[**64**] The same reasoning applies to the appointment of county projects committee which is given the role for coordinating the implementation of the projects.

Section 37(1) (a) which appoints elected leaders, except for the appointment of the Governor, is similarly unconstitutional.

As regards the National Assembly Select Committee established under Section 28, the court did not specifically find that it is involved in the planning, approval and implementation of the projects. That Committee is established by the National Assembly in accordance with its standing orders and its functions are stipulated under section 28 (5). The National Assembly oversight role is stipulated in Article 95 and includes exercise of oversight over national revenue and its expenditure; and oversight over State organs.

The oversight role of the Select Committee under the Act is broadly similar to the oversight responsibilities of the National Assembly Budget Committee over public finance matters established under section 7 of the Public Finance Management Act.

The National Assembly Select Committee is far removed from the management and implementation of the Fund and is mainly concerned with broad policy matters relating to the better administration of the Fund. Those are functions which the National Assembly has power to delegate to its own Committees to exercise oversight.

[**65**] It is not unconstitutional for the National Assembly under section 28 of CDFA to require the National Assembly to appoint a National Assembly Select Committee to perform an oversight role over the Fund, which oversight role it could have delegated to one of its own Committees.

DOCTRINE OF RIPENESS AND POLITICAL QUESTION

[**66**] We have endeavoured to resolve the issues which were in contention. However, there is a lingering doubt as to whether, except the question of separation of powers, the other issues were justiciable at the time they were brought to court either because of the principle of ripeness or of the political question doctrine. We are cognizant of the fact that the question of justiciability was not raised by any of the appellants.

[**67**] The consolidated petitions were brought by TISA – a registered Trust and CEDGG – a grass root civil society organization. By Article 3(1), every person has an obligation to respect, uphold and defend the Constitution. Further, Article 258(1) provides –

> ***"Every person has a right to institute court proceedings claiming that this Constitution has been contravened, or is threatened with contravention."***

Thus, both TISA and CEDGG has *locus standi* to defend the Constitution including the right to invoke the jurisdiction of the High Court with a view to stop the contravention or threatened contravention of the Constitution. More specifically, they described the case as intended to protect the integrity and proper implementation of devolution. It cannot be gainsaid that the two entities have a right to institute court proceedings to protect the constitutional principles of devolution. However, Article 6(2) provides in part that the national and county governments;

"shall conduct their mutual relationships on the basis of consultation"

The requirement for co-operation is further reiterated in Article 189(1) and 189(2). The Constitution therefore entrenches the principle of consultation and co-operation in inter-governmental relations.

[**68]** The Constitution also provides for a dispute resolution mechanism between the two levels of government. Article 189(3) provides that in any dispute between the governments, the governments shall, make every reasonable effort to settle the dispute including by means of procedures provided by national legislation. Further, Article 189 (4) provides that national legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms including negotiation, mediation and arbitration.

We have already referred to section 54 of the County Governments Act which establishes an inter-governmental Forum shared by a Governor. Section 187 of PFMA which establishes the Intergovernmental Budget and Economic Council and to the provisions of the Intergovernmental Relations Act (IRA) which establishes, *inter alia*, National and County Governments Co-ordinating Summit and Council of County Governors. The preamble to IRA states that it is an Act to establish a framework for consultation and co-operation between the national and county governments and to establish mechanisms for the resolution of inter-governmental disputes pursuant to Article 6 and 189 of the Constitution. Section 31 of IRA provides –

> ***"The National and County Governments shall take all reasonable measures to –***
>
> ***(a) Resolve disputes amicably; and***
>
> ***(b) Apply and exhaust the mechanisms for alternative dispute resolution provided under this Act or any other legislation before resorting to judicial procedures as contemplated in Article 189(3) and (4) of the Constitution"***

In addition, section 35 of IRA provides –

> ***"where all efforts of resolving a dispute under this Act fail, a party to the dispute may submit the matter to arbitration or institute judicial proceedings"***

Article 259 (1) provides that the Constitution shall be interpreted in a manner, *inter alia*, that promotes its purposes, values and principles and also contributes to good governance. The Supreme Court has given guidance on the relevant principles for the interpretation of the Constitution in several decisions.

[**70**] **<u>In the Matter of the National Land Commission</u> – Advisory Opinion No.2 of 2014; [2015] eKLR,** the Supreme Court said at para 281:

> ***"The Constitution is to be interpreted in a holistic manner that entails reading it alongside other provisions and considering the historical perspective, purpose and interest of the provisions in question."***

And in the Re **The Matter of Interim Independent Electoral Commission** – application No.2 of 2011; [2011] eKLR, the Supreme Court said para 86 in part:

> ***"The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Article 20(4) and 259(1). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction"***

It follows that Article 3(1) and Article 258 and indeed Article 165 (3) (d) which confers jurisdiction upon the High Court to interpret the Constitution should be read together with Articles 6(2), 110(1)(a), 110(3) and 113.

[**71**] The principle of consultation and cooperation between national and prescribed county governments and the dispute resolution mechanism should be accorded their constitutional status and functional significance.

The Constitution lays down at least three principles to govern inter-governmental relations. Firstly, the mutual relations must be conducted on the basis of consultation and co-operation, secondly, in case of a dispute, the governments must make every reasonable effort to settle the dispute, and, thirdly, the disputes must be settled by means including alternative dispute resolution mechanisms, including negotiation, mediation and arbitration. The Constitution provides that a dispute on whether a Bill concerns a county government should be resolved by the Speakers of the two Houses and in case of disagreement be mediated upon. The County Governments Act and the PFMA have established institutions for resolving certain specific disputes and the IRA which is enacted under the Constitution has set up institutions and procedures for resolving intergovernmental disputes and has specifically provided that the mechanisms for alternative dispute resolution should be exhausted before resorting to judicial proceedings.

[**72**] The broad questions which were raised in the consolidated petitions, namely, – division of functions, powers and authority; the equitable sharing of revenue of national government, whether the Amendment Bill concerned county

government and the role of the Senate in the legislative process, are questions which relate to inter-governmental relations and which should have been raised by either government in the appropriate forum and in case of a dispute such a dispute should have been resolved by the designated institutions through the prescribed mechanism. This is one peculiar case where the Constitution stipulates that a dispute should be in existence and be resolved by other institutions through a prescribed mechanism before the jurisdiction of the High Court can be invoked.

[**73**] Since there was no actual live dispute between the national and county governments about CDF and if any, the mechanisms for resolving such disputes was not employed, the questions which were brought to High Court for determination had not reached constitutional ripeness for adjudication by the court. In reality, TISA and CEDGG invented a hypothetical dispute which was brought to court in the guise of unconstitutionality of CDFA.

[**74**] Furthermore, questions such as division of functions, division of revenue, legislative process and budget process are essentially political questions which fall within the political question doctrine; and which the Constitution has assigned to other political institutions for resolution and created institutions and mechanisms for such resolution.

[**75**] The principle of avoidance or constitutional avoidance is also relevant. It was enunciated by the Supreme Court in the **Communications Commission of Kenya & 5 Others and Royal Media Services & 5 Others [2014] eKLR at para 256**.

By that doctrine the court will not determine a constitutional question where there is some other basis upon which the question could have been disposed of. In the matter before us, the Constitution has provided some other mechanisms for the resolution of the questions raised by the petition which the High Court should have taken into account before assuming jurisdiction.

CONCLUSION

[**76**] From the foregoing, we have reached the conclusion that contrary to the finding of the High Court, the CDF Amendment Bill was passed in accordance with the Constitution; that CDFA does not violate the principles of Public Finance division of revenue and the principle of division of powers and functions. We have however found that sections 24(3)(c) 24 (3)(f) and section 37 (1) (a) of the CDFA violates the principle of separation of powers. We have also reached the conclusion that, except for the issue of separation of powers, the questions raised had not reached constitutional ripeness for adjudication and also raised political questions which were outside the jurisdiction of the court.

[**77**] On the question whether the entire CDFA is unconstitutional for violation of the doctrine of the separation of powers, the U.S. Supreme Court stated the principle of severability in **Buckley Valeo** (supra) at page 424: 1: 108, thus –

> ***"unless it is evident that the legislature would not have enacted those provisions which are within its power independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."***

The provisions of CDFA which violate the doctrine of separation of powers have been clearly identified. The remaining provisions of the Act still gives effect to the main objective of the Act and are implementable and fully operational as a law. Those provisions of the CDFA are therefore severable from the other valid provisions of the Act.

DECISION

[**78**] For the foregoing reasons, the appeal is allowed to the extent that the declaration that the Constituencies Development Fund Act, 2013 is unconstitutional in its entirety and invalid, is set aside and in lieu thereof, a declaration is hereby made that sections 24(3)(c), 24(3)(f) and 37(1)(a) of the Constituencies Development Act, 2013 are unconstitutional and invalid for violating the principle of separation of powers, and are hereby struck

down from the Constituencies Development Fund Act, 2013. The rest of the orders made by the High Court have been overtaken by events.

Each party to the appeals shall bear its own costs of the appeals.

Dated and delivered at Nairobi this 24th day of November, 2017.

E. M. GITHINJI

.....
JUDGE OF APPEAL

H. M. OKWENGU

.....
JUDGE OF APPEAL

G.B.M. KARIUKI SC

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR