

**REPUBLIC OF KENYA**  
**IN THE SUPREME COURT OF KENYA**  
**PETITION NO.                      OF 2017**

**BETWEEN**

**THE INSTITUTE FOR SOCIAL ACCOUNTABILITY.....1<sup>ST</sup> APPELLANT**  
**CENTRE FOR ENHANCING DEMOCRACY**  
**AND GOOD GOVERNANCE.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**THE NATIONAL ASSEMBLY OF KENYA.....1<sup>ST</sup> RESPONDENT**  
**THE SENATE.....2<sup>ND</sup> RESPONDENT**  
**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**  
**THE CONSTITUENCY DEVELOPMENT FUND BOARD.....4<sup>TH</sup> RESPONDENT**  
**COMMISSION FOR THE IMPLEMENTATION**  
**OF THE CONSTITUTION.....5<sup>TH</sup> RESPONDENT**

*(Appeal from the Judgment of the Court of Appeal of Kenya at Nairobi (Githinji, Okwengu & G.B.M Kariuki JJ.A) in Civil Appeal No. 92 of 2015 as Consolidated with Civil Appeal No. 97 of 2017) dated 24<sup>th</sup> November 2017)*

(Under Article 163(4) (a) of the Constitution of Kenya 2010, Section 15(2) of the Supreme Court Act No. 7 of 2011 and Rule 33 of the Supreme Court Rules, 2012)

**PETITION OF APPEAL**

**A. INTRODUCTION**

The humble petition of the Institute for Social Accountability and the Centre for Enhancing Democracy and Good Governance (the Appellants) is as follows:

1. The 1<sup>st</sup> Appellant is the Institute for Social Accountability (TISA). It is a Trust registered under the laws of Kenya. Its objectives are to: promote good governance in the use of

devolved public funds for tangible social and economic development; promote transparency and accountability mechanisms in local governance and in utilization of financial resources; and do all such things that are incidental to or conducive to the attainment of any of the Trust's objectives.

2. The 2<sup>nd</sup> Appellant, the Centre for Enhancing Democracy and Good Governance, (CEDGG), is a grass root civil society organisation based in Nakuru County. It was founded in 2001 with the objective to enhance democracy and good governance, including empowering vulnerable and marginalized citizens to claim their rights in local development and good governance processes.
3. The 1<sup>st</sup> Respondent, the National Assembly, forms part of the Legislature, an arm of Government, established under Chapter 8 and Article 93 of the Constitution. Its roles are set out in Article 95 of the Constitution, which includes representing people in constituencies and enacting legislation.
4. The 2<sup>nd</sup> Respondent, the Senate, forms part of the Legislature, an arm of government established under Chapter 8 and Article 93 of the Constitution. Its roles are set out in Article 96 of the Constitution, which includes to represent the counties and their governments and to enact legislation concerning counties. The 2<sup>nd</sup> Respondent never entered appearance either in the High Court or the Court of Appeal.
5. The 3<sup>rd</sup> Respondent, the Attorney General, is established under Article 156 of the Constitution and is the Principal Legal Adviser to the national government.
6. The 4<sup>th</sup> Respondent, the Constituencies Development Fund Board (CDF Board), is a body corporate established under Section 5 of the Constituencies Development Fund Act No. 30 of 2013 (CDF Act, 2013). Its mandate is to ensure timely and efficient disbursement of funds to every constituency, ensure efficient management of the fund and receive and address complaints and disputes and take any appropriate action.

## **B. FACTS**

7. In 2003, Parliament enacted legislation dealing with Constituencies Development Fund (CDF) - the now repealed Constituencies Development Fund Act, 2003 (CDF Act, 2003). The CDF Act, 2003 provided that Government was to set aside at least 2.5% of its ordinary revenue and channel it to the Constituencies Development Fund (CDF). The funds were to be utilized at the constituency level and this meant that a constituency became a development unit.
8. In 2007, the CDF Act, 2003 was amended. It established a national CDF Board at the constituency level to replace the National Committee and CDF Committees were established with the respective Members of Parliament being the constituency's CDF Committee patron.
9. In January 2013, the CDF Act, 2013 was enacted to repeal and replace the CDF, Act 2007.

### **- Procedural Posture**

#### ***i. The High Court***

10. On 3<sup>rd</sup> February 2013 the 1<sup>st</sup> Appellant launched and filed a constitutional challenge against the CDF Act 2013 - ***Nairobi Petition No. 71 of 2013***. Soon thereafter, the 2<sup>nd</sup> Appellant also filed a case dated 10<sup>th</sup> May 2013 also challenging the CDF Act, 2013 in ***Nakuru Petition No. 16 of 2013***. On 15<sup>th</sup> May 2013, the 2<sup>nd</sup> Appellant's petition was transferred to Nairobi. On 22<sup>nd</sup> May 2013, the parties consented to have both the Nairobi and Nakuru petitions consolidated.
11. On 2<sup>nd</sup> August 2013, the CDF (Amendment) Bill was published. On 6<sup>th</sup> August 2013, the 1<sup>st</sup> Respondent, the National Assembly, passed the Constituencies Development Fund (Amendment) Act No. 36 of 2013 (CDF (Amendment) Act). The amendment to the CDF Act, 2013 triggered the 1<sup>st</sup> and 2<sup>nd</sup> Appellants to seek leave of the High Court to amend their consolidated petition in order to include the CDF Amendment Act.

12. The High Court granted the Appellants leave to file an amended petition, which they did, dated 29<sup>th</sup> January 2014. In the amended petition, the Appellants challenged the provisions of both the CDF Act, 2013 as well as the CDF (Amendment) Act.
13. At the High Court, the Appellants had sought orders that—
- (a) A declaration be issued under Articles 1, 2, 6(2), 10(1)(a), 186, 189(1)(a), 202 (2) and the Fourth Schedule to the Constitution that the Act is unconstitutional because it offends the principles of public finance, division and separation of powers.
  - (b) A declaration be issued that the numerous provisions of the Act that violate the Constitution cumulatively render the entirety of the Act untenable and therefore constitutionally invalid ab initio.
  - (c) A declaration be issued that any organ or body purportedly established by this Act is illegal as it is created without the authority of the law.
  - (d) A declaration be issued that the failure to involve the Senate in the consideration, deliberation and passage of the CDF (Amendment) Act, 2013 was unconstitutional and therefore renders the CDF (Amendment) Act, 2013 invalid.
  - (e) A declaration be issued that failure by the National Assembly to provide reasonable opportunity for members of the public to provide their views on the CDF (Amendment) Act, 2013 and failure by the National Assembly to facilitate public participation in the passage of the CDF (Amendment) Act, 2013 is unconstitutional and therefore renders the CDF (Amendment) Act, 2013 invalid.
  - (f) An order issue striking down the Act for being unconstitutional and so as to pave way for the enactment of a valid legislation to administer conditional grants allocated to counties by the national government.
  - (g) The costs of and incidental to this petition be awarded to the petitioner against the respondents.
  - (h) This Honourable Court be pleased to grant such further orders as may be just and appropriate.

14. In a nutshell, at the High Court, the Appellants argued that the CDF Act, 2013 was unconstitutional because:
- a. it assigned functions that are the exclusive responsibility of the counties to the national government;
  - b. it violated the principle of separation of powers because the National Assembly would be both implementing and overseeing these functions;
  - c. it purported to characterize the monies it allocated as conditional funds even though this money could not be treated as additional revenue to the counties (as the Act says) because any such money must really be given to the county governments and not to someone else;
  - d. it required that the 2.5% of the annual revenue allocated to the CDF be extracted from the total national revenue before the 15% minimum to be allocated to the counties is calculated;
  - e. Parliament exceeded its powers by purporting to allocate the monies rather than the executive arm of the national government;
  - f. the design of CDFA is such that it locates the CDF projects outside the county's planning processes and this is likely to cause wastage of public resources through duplication and conflict with the county's plan – which is required by the County Government Act;
  - g. the Emergency Fund (5% of that allocated to any constituency) is likely to cause further waste and confusion in the light of the County Emergency Fund under the Public Financial Management Act (PFMA).

15. The High Court outlined four main issues for determination:

- a. *whether the process leading to the enactment of the CDF Act is unconstitutional;*
- b. *whether the CDF Act offends the principles of public finance and division of revenue provided under the Constitution;*
- c. *whether the CDF Act violates the division of functions between the national and county government;*  
*and*
- d. *whether the CDF Act offends the principle of separation of powers.*

- *High Court Judgment*

16. In a Judgment dated 20<sup>th</sup> February 2015, the High Court (*Lenaola, Mumbi Ngugi & Majanja JJ*) arrived at the following key determinations on each of the issues:

- a. *whether the process leading to the enactment of the CDF Act is unconstitutional;*
  - that the CDF (Amendment) Bill was one concerning county government and it was unconstitutional because the Senate was not involved in the enactment of the Bill.
  - that there was sufficient public participation in the process leading up to the enactment of the CDF (Amendment) Act. The Court also said that there was no violation of Section 14 of the Sixth Schedule of the Constitution regarding the prerequisite consultation with the Commission on the Implementation of the Constitution and the Commission on Revenue Allocation.
- b. *whether the CDF Act offends the principles of public finance and division of revenue provided under the Constitution;*
  - the Court held that the CDF is not a conditional grant to the county governments within the meaning of Article 202(2) of the Constitution. This is because Article 202 envisages equitable sharing of the national government revenue between the national and county governments and if national government desired it could at its discretion grant additional revenue whether conditionally or unconditionally through the county governments.
- c. *whether the CDF Act violates the division of functions between the national and county government;*
  - that the purpose and design of the CDF Act, 2013 was unconstitutional because it establishes the CDF as a mechanism that runs parallel the constitutionally recognized governance structures. Further it observed that Section 22 of the CDF Act, 2013 also threatens to upset the division of functions between the national and county levels of governments and interfere with county government's autonomy.

- d. *whether the CDF Act offends the principle of separation of powers.*
  - that the CDF Act, 2013 offends the principle of separation of powers, specifically between the Executive and the Legislature when it involves Members of Parliament in the planning, approval and implementation of the CDF projects.
- e. *Whether CDF Act in its entirety is unconstitutional*
  - The Court held that the core defect of the CDF Act, 2013 related to the establishment of the Fund and the manner in which it was administered and applied, the substance of the Act was therefore lost rendering the CDF Act, 2013 invalid in its entirety.

17. The Court made the orders in the following terms:

- a. A declaration that the Constituencies Development Funds Act, 2013 is unconstitutional and therefore invalid.
- b. The order of invalidity is suspended for a period of twelve (12) months from the date of judgment [20<sup>th</sup> February 2015].
- 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.

## ***ii. The Court of Appeal***

18. Aggrieved by the decision of the High Court, the 1<sup>st</sup> Respondent, the National Assembly, filed an Appeal at the Court of Appeal dated 16<sup>th</sup> April 2015 (Civil Appeal No. 92 of 2017). Equally, the 4<sup>th</sup> Respondent, The Constituency Development Fund Board filed an Appeal (Civil Appeal No. 97 of 2015) raising similar Grounds as those raised by the National Assembly. In its Memorandum of Appeal, the 1<sup>st</sup> Respondent raised 23 grounds of appeal summarized as follows: That the Learned Judges of the High Court erred in law and in fact:

- i. in finding that the CDF Act, 2013 ought to have been considered by the Senate prior to its enactment yet the Senate was not yet in existence. Further that the Judges of the High Court failed to appreciate that the CDF Bill No. 87 of 2012, which became the CDF Act 2013, was passed by the National Assembly pursuant to Section 10 of the Sixth Schedule to the Constitution.

- ii. when they failed to appreciate that the CDF (Amendment) Bill, 2013 was not a bill concerning counties under Article 110(1) of the Constitution.
- iii. in failing to appreciate that the CDF (Amendment) Bill, 2013 was a Money Bill in terms of Article 114(3) of the Constitution, which only the National Assembly could pass.
- iv. in finding that 2.5% of the revenue collected nationally is deducted by the national government and placed in CDF before the balance of the revenue is shared between the national government and the county government pursuant to Article 203(2) of the Constitution.
- v. by interpreting Article 203(2) of the Constitution as sacrosanct without considering the Equalization Fund established under Articles 204 and 206(1)(a) of the Constitution which allows Parliament to establish other public funds intended for specific purposes.
- vi. in finding that the CDF Act, 2013 set out parallel structures to the county governments.
- vii. in finding that the CDF violates the division of functions between the national and county governments.
- viii. in finding that the CDF violates the principle of separation of powers.

19. The 1<sup>st</sup> Respondent also prayed that the appeal be allowed with costs awarded to it and that the whole judgment/orders of the High Court be set aside or vacated in its entirety.

- *Court of Appeal Judgment*

20. In summary, in a Judgment dated 24<sup>th</sup> November 2017, the Court of Appeal (*Githinji, Okenwengu and G.B.M. Kariuki JJA.*) allowed the appeal in part by holding that “to the extent that the CDF Act, 2013 is unconstitutional in its entirety is set aside.” However they also found that Sections 24(3)(c), 24(3)(f) and 37(1)(a) of the CDF Act are unconstitutional and invalid for violating the principle of separation of powers. The Court of Appeal further determined that “the rest of the orders made by the High Court have been overtaken by events.”

21. The Court of Appeal had to first determine a preliminary objection raised by the Appellants herein in which they had argued that the appeal was moot. They argued that this was because the High Court decision had declared the CDF Act unconstitutional and there was a

consequent enactment of the National Government Constituencies Development Fund Act, 2015 (NGCDF, 2015). As such, the Appellants contended that the effect of this new legislation was that there was no pending controversy requiring adjudication, no continuing violation of the CDF Act, 2013 and no public interest requiring the Court to make a determination of the Appeal on the merit.

22. In a nutshell, the Court of Appeal made its determination under the following headings:

- a. whether the appeal was moot;
- b. whether the CDF Act contravened the division of functions between the national and county governments;
- c. whether the CDF scheme is an unlawful third entity created for revenue collection; & whether Section 4 of the CDF (Amendment Act) offends the principles of public finance and division of revenue;
- d. whether Sections 3 and 24 of the CDF Act introduces a conflict of roles particularly with respect to county planning;
- e. whether the CDF Amendment Bill was a Bill concerning county government which requires the participation of the Senate;
- f. whether the CDF Act contravenes the constitutional doctrine of separation of powers; and
- g. whether other issues in the petition were constitutionally ripe for determination.

23. The Appellants now set out in details the findings of the Court of Appeal against each of the issues the Court of Appeal framed:

- a. whether the appeal was moot;*

24. The appellate Court dismissed the preliminary objection on grounds that the passage of the National Government Constituencies Development Fund Act, 2015 (NGCDF) had not rendered the appeal moot. In this regard, the Court held that this was because the parties were still in existence; the controversy was alive; and it was a matter of general public importance and of constitutional magnitude, which required the Court to decide. Therefore the principle of judicial economy favoured a determination of the matter then rather than at a later stage.

*b. whether the CDF Act contravened the division of functions between the national and county governments;*

25. The Court of Appeal found that Fourth Schedule does not provide for exclusive, concurrent and residual functions and that the division of functions between the two levels of government is not static. Therefore the CDF Act, 2013 is not unconstitutional when it provides that the national government could carry out and administer CDF services within the administrative structures of the county government. In addition it held that the CDF Act, 2013, which provides for a national fund takes precedence over the County Government Act in respect of functions assigned to county governments.

26. The Court of Appeal held that due to the magnitude of projects envisioned under CDF, it was not unconstitutional for Parliament, through the CDF Act, 2013, to empower the national government to establish a statutory body, which is a distinct entity to administer the fund.

*c. whether the CDF scheme is an unlawful third entity created for revenue collection & whether Section 4 of the CDF (Amendment Act) offends the principles of public finance and division of revenue;*

27. As to whether the CDF Act, 2013 violates the principles of public finance, the appellate Court held that the CDF is allocated after the division of revenue between the national and county governments. Therefore the High Court erred when it held that section 4(1)(a) of the CDF Act was unconstitutional because the manner in which the fund was implemented ought to have been in the form of a grant as conditional revenue to county governments or through existing county government structures.

*d. whether Sections 3 and 24 of the CDF Act introduces a conflict of roles particularly with respect to county planning;*

28. The Court of Appeal further observed that from a reading of the Inter Governmental Relations Act, the County Governments Act and the Public Finance Management Act, it was improbable that CDF would interfere with county governments' planning or autonomy.

- e. *whether the CDF Amendment Bill was a Bill concerning county government which requires the participation of the Senate;*
29. The Court of Appeal held that the High Court had usurped the role of the Legislature when it determined that the CDF (Amendment) Bill was a Bill concerning county government, which the Senate should have participated in. This was after the Speakers of the Senate and the National Assembly had already resolved that it was not classified as such.

- f. *whether the CDF Act contravenes the constitutional doctrine of separation of powers;*
30. The Appellate Court held that the appointment of Members of Parliament to perform purely executive duties of enforcing the CDF Act, 2013 was contrary to the principle of separation of powers and of the national values and governance. However, the Court of Appeal declined to hold that Section 28 of the CDF Act, 2013 was unconstitutional for requiring that the National Assembly should appoint a National Assembly Committee to perform and oversight role over CDF, which could be delegated to one of the Committees.

- g. *whether other issues in the petition were constitutionally ripe for determination.*
31. The Court of Appeal held that only the issue touching on separation of powers was justiciable before the court. It also found that the appellants' petition before the High Court only raised political questions, which could only be resolved by other institutions as well as hypothetical questions because neither the national nor county governments raised any live dispute about the CDF. As such, the matter was not constitutionally ripe for adjudication before the Court.

### **C. GROUNDS OF THE PETITION**

32. The appellants are dissatisfied with the decision of the Court of Appeal except for that part that holds that some sections of the CDF Act are unconstitutional for violating the principle of separation of powers. They filed a Notice of Appeal dated 29<sup>th</sup> November 2017.
33. This petition of appeal is anchored on Article 163(4)(a) of the Constitution and the appellants rely on the following grounds of appeal as presented under the formulated broad subheadings:

## **I. Mootness, justiciability and political question doctrine**

- a. The learned judges of the Court of Appeal erred in law and fact in their determination on mootness:
  - i. in finding that the Appeal was not moot on the basis that the CDFA had not been repealed because they failed to appreciate that CDFA had been repealed by operation of the law or its existence had no legal effect;
  - ii. in finding that the Appeal was not moot because “parallel litigation has ensued over the very issues raised in this appeal” and as a result a “constitutional controversy has recurred and is thus a continuing controversy” and that the determination of the Appeal would “forestall parallel future litigation” because they unfairly and without material facts prejudged the dispute relating to NGCDF Act before the High Court.
  
- b. The learned judges of the Court of Appeal erred in law and in fact in their determination on **justiciability and political question doctrine** because:
  - i. they failed to appreciate that the political question doctrine is not applicable under Kenya’s constitutional regime or cannot be applicable or used as a shield against judicial review when what is contested is a product of the exercise of or subject to constitutional or statutory powers;
  - ii. they failed to appreciate that the principle of justiciability had no application on the dispute before them or at the High Court, given the nature of dispute and provisions of Article 165(3) and more specifically, Articles 165(3)(d);
  - iii. they stated the matters were not ripe, justiciable or were insulated from judicial review by operation of the political question doctrine yet went on to extensively make determination on the constitutionality or lack thereof on the same matters.

## **II. Intergovernmental relations dispute resolution mechanism, ripeness and doctrine of avoidance**

- c. The learned judges of the Court of Appeal erred in law and in fact in their determination on issues of intergovernmental relations dispute mechanism (IGR), ripeness and doctrine of avoidance because:
- i. they misapprehended the law and the nature of dispute as one capable of being resolved through an IGR mechanism yet the dispute was one on the constitutionality of a law;
  - ii. they failed to appreciate that only the Courts could authoritatively resolve a question whether a law is unconstitutional and hence the intergovernmental dispute resolution mechanism was not a proper and competent forum to resolve the question whether CDF Act was unconstitutional.
  - iii. they failed to appreciate that IGR processes are only available in a dispute between governments and hence there was no legal basis or procedure for private citizens or not-state bodies to invoke the IGR process;
  - iv. they misapprehended the applicability of the doctrine of avoidance, since the doctrine could not be invoked given the operative constitutional scheme and the facts of the case;
  - v. they misapprehended the nature of dispute in deciding that the matter was not ripe for judicial consideration in that the dispute was not only anchored in the manner the CDF Act was being implemented but, and in fact largely, on the specific constitutionally offensive provisions of CDF Act as well as the entire architecture and of CDF Act.
  - vi. They misinterpreted and misapplied the constitutional principles of cooperative government, intergovernmental relations and consultation, and conflict of laws which are established by Articles 6(2), 189 and 191 of the Constitution.

### **III. Division of functions, constitutional status and powers of county governments**

- d. The learned judges of the Court of Appeal erred in law and in fact in their determination of the questions relating to division of functions, constitutional status and powers of county governments by:
- i. wrongly finding that Kenya is a unitary state under which county governments exercise delegated sovereignty;
  - ii. failing to find that the CDF Act, 2013, through the language it employed, enabled the national government to encroach upon the constitutional functions of the county governments.
  - iii. failing to clearly and fully identify the specific issues for determination, in respect of the constitutional division of functions between the national and county levels of government and even where the Court identified such issues, it failed to clearly and conclusively determine them.
  - iv. misapprehending the law or failing to appreciate that Article 186 of the Constitution recognizes that the Fourth Schedule provides for both exclusive and concurrent functions. The Court further erred by failing to recognize the need to examine and interpret the functions in the Fourth Schedule in order to determine— (a) the exclusive functions of the national government; (b) the exclusive functions of the county governments; and (c) the concurrent functions of the national and county governments in respect of resolving the question whether the functions contemplated under CDF Act violated the division of functions between the two levels of government.
  - v. misapprehending the law or failing to appreciate that the Constitution imposes limitations upon the functions of the

national government in a number of respects. These include the principle of cooperative government, the principle of distinct and interdependent government and that Article 186(4) does not confer on national government unlimited legislative powers as this will convert the county's exclusive legislative powers into concurrent functions.

- vi. failing to recognize that the constitutional obligations for securing economic and social rights set out by Article 43 of the Constitution fall upon both the national and county governments.
- vii. misapplying Article 191 of the Constitution and finding that the CDF Act, 2013 prevails over the County Government Act in respect of functions assigned to county governments.
- viii. finding that the issue of violation of the distribution of functions among the two levels of government only arise after the Board has approved projects. The Court of Appeal failed to recognize the principle of rule of law, which requires clarity in the law to enable those governed by the law to plan their actions and or omissions.
- ix. finding that only the interference with exclusive functions of county governments can render the CDF Act unconstitutional.
- x. finding that the violation of the division of functions was the main reason why CDF Act, 2013 was declared unconstitutional. This is because the learned judges of the High Court also held that the deduction of the 2.5% from revenue raised nationally before the vertical division of revenue between the national governments was a major ground for the unconstitutionality of the CDF Act, 2013.
- xi. finding that the law does not support the High Court's finding that CDF Act, 2013 introduces a conflict of roles particularly with respect to county planning.

#### **IV. Violation of principles of public finance**

- e. The learned judges of the Court of Appeal erred in law and in fact in their examination of the questions relating to the principles of public finance in that:
- i. they misinterpreted the meaning to be given to the phrase “all national government revenue collected in every financial year” in Section 4(1) of the CDF Act, since the only reasonable meaning that can be given to that phrase is equivalent to “revenue raised nationally” under Articles 201(b)(ii), 202(1) and 203(1) in the constitution since any revenue collected by national government is subject to equitable division under Article 202.
  - ii. they failed to appreciate that, in effect, CDF Act introduced a third entity to compete for financial resources with the national and county governments effectively and unconstitutionally introducing a third-tier of devolution.

#### **- Involvement of Senate**

- f. The learned judges of the Court of Appeal erred in law in their examination of the constitutional provisions and law relating to the determination of whether or not the CDF (Amendment) Bill 2013 was a Bill concerning counties that required the consideration, debate and approval of the Senate.

#### **- Separation of powers**

- g. The learned judges of the Court of Appeal misapprehended the law and facts, and effectively minimized the extent through which CDF Act violated the principle of separation of powers, in that:
- i. they failed to appreciate that the entire architecture of the CDF Act was such that it placed a Member of National Assembly at the heart of its existence and implementation and as such the reach of violation went beyond the provisions isolated by the learned judges;

- ii. they failed to appreciate the violation on separation of powers was not only horizontal (as regards the national government) but was also vertical in respect of county governments (both the executive and the legislature)

- **Cumulative effect of violations**

- h. The learned judges of the Court of Appeal failed to appreciate that the violations (even if limited to those they identified) rendered the operation of CDF Act untenable.

**D. THE LAW**

**i. The Nature of Devolution & Division of Functions**

- 34. Article 1 of the Constitution recognizes that the sovereign power of the people is exercised at both national and county level.
- 35. Article 6(1) of the Constitution states that the governments at the national and county level are distinct and interdependent and must conduct their mutual relations on the basis of consultation and cooperation. Distinctiveness connotes that county governments are not subservient to the national government.
- 36. Article 10 of the Constitution is instructive that devolution is a national value and principle of governance so too are good governance and rule of law. Article 174 sets out the objects of devolution.
- 37. Article 186 is the principal constitutional provision that offers guidance in regard to determination of the respective functions and powers of national and county governments. The Fourth Schedule to the Constitution lists the roles and functions assigned to the national government and county governments. This Schedule must be read with Article 2(2) of the Constitution that restricts persons from exercising State authority except as authorized by the Constitution. This includes a level of government exercising the functions donated to another level of government. Further Article 189(1) of the Constitution explicitly commands government at either level to perform its functions and exercise its powers in a manner that respects the functional and institutional integrity of the other level of government.

38. Article 191 is the go-to provision whenever there is a need to resolve a conflict relating to the hierarchy or applicability of laws of national and county governments.

**ii. Relevant Constitutional Provisions on Public Finance**

39. Articles 201(b)(ii) and 202(1) states that revenue, which is raised nationally must be shared equitably among national and county governments. Article 202 (2) further provides that county governments may be given additional allocations from the national government's share of the revenue, either conditionally or unconditionally.

40. Article 203 of the Constitution indicates the criteria for sharing the equitable share available including the requirement that for every financial year the equitable share raised nationally that is allocated to county government must not be less than 15% of all revenue collected by the national government. It further provides for “the need to ensure that county governments are able to perform the functions allocated them”.

41. Article 201 of the Constitution requires that public money be used in a prudent and responsible way. Prudent use of public money would be undermined by the duplication of functions within the two levels of government.

**iii. Role of Parliament/Separation of Powers**

42. Article 93 establishes Parliament constituting National Assembly and the Senate and requires them to perform their respective functions in accordance with the constitution. Article 94(4) requires Parliament to protect the constitution and promote Kenya's democratic governance.

43. Article 96 provides that “Senate represents the counties, and serves to protect the interests of the counties and their governments.” Article 96(2) is particular that Senate participates in law-making by considering, debating and approving bills concerning counties.

**iv. Jurisdiction of the High Court**

44. Article 165 provides the powers of the High Court and states in the relevant parts:

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil

matters;

...

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191

45. Article 189 relates to intergovernmental relations and provides:

189. (1) Government at either level shall—

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

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

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

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

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

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

46. The legislation referred to in Article 189(4) is the Intergovernmental Relations Act, which provides in the relevant sections:

31. 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 proceedings as contemplated by Article 189(3) and (4) of the Constitution.

...

33.(1) Before formally declaring the existence of a dispute, parties to a dispute shall, in good faith, make every reasonable effort and take all necessary steps to amicably resolve the matter by initiating direct negotiations with each other or through an intermediary.

(2) Where the negotiations under subsection (1) fail, a party to the dispute may formally declare a dispute by referring the matter to the Summit, the Council or any other intergovernmental structure established under this Act, as may be appropriate.

## **E. ISSUES FOR DETERMINATION**

47. The main issues that arise for determination are:

- a. Whether the Court of Appeal erred in finding that the matter was not moot, or even if moot, was a proper matter to be determined substantively;
- b. Whether the Court of Appeal erred in finding that the matter (or part of it) was not justiciable on the basis of political question doctrine;
- c. Whether the Court of Appeal erred in finding that the resolution of the dispute was amenable and should have been subjected to the intergovernmental relations (IGR) dispute resolution mechanism;

- d. Whether the process leading to the enactment of the CDF (Amendment) Act, 2013 was unconstitutional for failure to involve the Senate;
- e. Whether the CDF Act offends the principles of public finance and division of revenue under the Constitution;
- f. Whether the CDF Act violates the division of functions between the national and county government;
- g. Whether the CDF Act offends the principle of separation of powers;
- h. Whether the architecture and cumulative violations of the CDF Act offends the constitutional devolution design rendering the entirety of the Act unconstitutional;
- i. What are the appropriate remedies the Supreme Court should issue;
- j. Who should bear the costs of this Appeal and of the processes below.

## **F. RELIEFS**

48. The appellants seek orders in the following terms:

- 1) This appeal is allowed.
- 2) The judgment and orders of the Court of Appeal (*Githinji, Okwengu and G.B. M. Kariuki JJ.A*) dated 24<sup>th</sup> November 2017 be overturned save for the declaration that Sections 24(3)(c) and (f) and 37(1)(a) of the Constituencies Development Fund Act, 2013 violates the principle of separation of powers.
- 3) A declaration be issued that under Articles 1, 2, 6(2), 10(1)(a), 93(2), 94(4), 174, 186, 189 (1)(a), 191, 201(b)(ii), 201(d)-(e), 202(1) and the Fourth Schedule of the Constitution the Constituencies Development Fund Act 2013 as amended by the Constituencies Development Fund (Amendment) Act 2015 is unconstitutional since offends the principles of public finance, division of revenue and the division of functions of the national government and county governments.

- 4) A declaration that failure to involve the Senate in the passage of the Constituency Development Fund (Amendment) Act 2013 was unconstitutional.
- 5) A declaration be issued that the numerous provisions of the Constituencies Development Fund Act, 2013 that are unconstitutional cumulatively render the entirety of the Act untenable and therefore constitutionally invalid *ab initio*.
- 6) A declaration be issued that any organ or body purportedly established by the Constituencies Development Fund Act, 2013 is illegal as it is created without the authority of the law.
- 7) An order issue striking down the CDF Act, 2013 for being unconstitutional.
- 8) The 1<sup>st</sup> to 4<sup>th</sup> Respondents bear the costs in this Court and the Courts below.
- 9) Any other or further orders as this Honourable Court may deem appropriate to grant in the circumstances of this case.

#### **G. SCHEDULE OF DOCUMENTS**

34. Below are two tables describing the documents supporting this petition of appeal.

#### **Petition of Appeal and supporting documents**

<b>ITEM NO.</b>	<b>DESCRIPTION OF DOCUMENT</b>
1.	Petition of Appeal.
2.	Notice of Appeal dated 29 <sup>th</sup> November 2017.
3.	Letter requesting certified copies of the judgment dated 27 <sup>th</sup> November 2017.
4.	Certified Copy of the judgment dated 24 <sup>th</sup> November 2017.

**Record of Appeal**

ITEM NO.	DESCRIPTION OF DOCUMENT
<b>VOLUME I</b>	
1.	Memorandum of Appeal at the Court of Appeal dated 16 <sup>th</sup> April 2015.
2.	Petition dated 5 <sup>th</sup> February 2013
3.	Replying Affidavit sworn by Charles Kimeli dated 13 <sup>th</sup> February 2013
<b>VOLUME II</b>	
4.	Replying Affidavit sworn by Clarah Kimeli dated 13 <sup>th</sup> February 2013
5.	Notice of Appointment of Advocate by S.M. Mwendwa for the 1 <sup>st</sup> Respondent dated 14 <sup>th</sup> May 2013
6.	Notice of Appointment of Advocate by Naikuni Ngaa & Miencha for the 3 <sup>rd</sup> Respondents dated 14 <sup>th</sup> May 2013
7.	Notice of Motion filed by the 1 <sup>st</sup> Respondent dated 15 <sup>th</sup> May 2013
8.	Notice of Appointment of Advocate by Nderitu & Partners for the Interested Party dated 23 <sup>rd</sup> May 2013
9.	Replying Affidavit sworn by Yusuf Mbuno on 24 <sup>th</sup> May 2013
10.	2 <sup>nd</sup> Respondent's Grounds of Opposition dated 24 <sup>th</sup> May 2013
11.	Written Submissions on behalf of the Interested Party dated 27 <sup>th</sup> May 2013
12.	1 <sup>st</sup> Respondent's List of Authorities dated 27 <sup>th</sup> June 2013
13.	Chamber Summons by Intended Interested Party dated 4 <sup>th</sup> June 2013
14.	Written Submissions of the Petitioners dated 22 <sup>nd</sup> July 2013
<b>VOLUME III</b>	
15.	Replying Affidavit of the 3 <sup>rd</sup> Respondent sworn by Hon. Moses K. Lessonet dated 23 <sup>rd</sup> July 2013
16.	Written submissions of the 3 <sup>rd</sup> Respondent dated 22 <sup>nd</sup> July 2013

17.	Affidavit of Wanjiru Gikonyo sworn on 4 <sup>th</sup> September 2013
18.	Petitioner's written submissions on the Motion dated 29 <sup>th</sup> August 2013
19.	List of Authorities by the Hon. Attorney General dated 16 <sup>th</sup> September 2013
	<b>VOLUME IV</b>
20.	Affidavit of Wanjiku Gikonyo sworn on 16 <sup>th</sup> October 2013
21.	Amended Petition dated 29 <sup>th</sup> January 2014
22.	Replying Affidavit by the 4 <sup>th</sup> Respondent to the Amended Petition sworn by Yusuf Mbuno on 5 <sup>th</sup> March 2014
23.	Notice of Appointment of Advocates for the 1 <sup>st</sup> Respondent dated 6 <sup>th</sup> March 2014
24.	Replying Affidavit of the 1 <sup>st</sup> Respondent to the Amended Petition sworn by Hon. Moses K. Lessonet on 3 <sup>rd</sup> April 2014
25.	Petitioner's Further Written Submissions dated 30 <sup>th</sup> April 2013
26.	The 1 <sup>st</sup> Respondent's Supplementary written submission dated 14 <sup>th</sup> May 2014
27.	The Supplementary written submissions of the 4 <sup>th</sup> respondent dated 22 <sup>nd</sup> August 2014
28.	The 1 <sup>st</sup> Respondent's Further Supplementary written submissions dated 25 <sup>th</sup> August 2014
27.	Judgment dated and delivered at Nairobi on 20 <sup>th</sup> February 2015
28.	Notice of Appeal dated 23 <sup>rd</sup> February 2015
29.	Letter to the Deputy Registrar dated 23 <sup>rd</sup> February 2015 requesting for the certified copies of the proceedings
30.	Letter to the Advocates on record dated 25 <sup>th</sup> February 2015 requesting approval for the draft Decree
31.	Letter from the Petitioner's Advocate dated 26 <sup>th</sup> February 2015 forwarding the approved copy of the draft Decree

32.	Letter from the Deputy Registrar dated 4 <sup>th</sup> March 2015 informing Advocates for the 1 <sup>st</sup> Respondent to collect copies of the proceedings and the judgment
33.	High Court proceedings
34.	Decree Issued on 5 <sup>th</sup> March 2015

**Dated at NAIROBI this.....day of December 2017.**

**WAIKWA WANYOIKE  
ADVOCATE FOR THE APPELLANTS**

**Drawn and filed by:**

Waikwa Wanyoike, Advocate,  
C/O Katiba Institute  
Rose Avenue, Off Argwings Kodhek Road, Hurlingham  
P.O. Box 26586-00100,  
**Nairobi**  
waikwa@katibainstitute.org  
Tel: +254731870875

**To be served upon:**

1. Anthony Njoroge, Advocate  
13<sup>th</sup> Floor, Protection  
House P.O. Box 41842-  
00100 Tel: 0723365410  
**Nairobi**
2. The Honourable Attorney Genral  
State Law Offices,  
Sheria House, Harambee House,  
**Nairobi**
3. Naikuni, Ngaah & Miencha & Co.  
Advocates, 1<sup>st</sup> Floor, Embassy House,  
Harambee Avenue  
**Nairobi**

LODGED in the Registry at Nairobi on this .....day of .....2017.

**THE DEPUTY REGISTRAR  
SUPREME COURT OF KENYA**

**Drawn and Filed by:**

Waikwa Wanyoike, Advocate,  
C/O Katiba Institute  
Rose Avenue, Off Argwings Kodhek Road, Hurlingham  
P.O. Box 26586-00100,  
**Nairobi**  
waikwa@katibainstitute.org  
Tel: +254731870873