REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 284 OF 2019
(AS CONSOLIDATED WITH
PETITION NO. 353 OF 2019)

IN THE MATTER OF ARTICLES 1(1) &(3), 2, 2 (2), 3 (1), 6, 9(2), 10, 23, 50 (1),73(1)&(2),89, 93(1), 94(1), (2) &(5), 96 (1) &(2), 97 (1), 98(1) (a), (b)(c) & (d), 107, 108, 109, 110, 114, 118, 124, 129(1), 159, 160 (1), 165, 174,176, 183, 185, 189, 201, 245 (2) (a), 227, 258 & 259 OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF PART XX OF THE SENATE STANDING ORDERS
AND
IN THE MATTER OF PART XIX OF THE NATIONAL ASSEMBLY STANDING ORDERS
BETWEEN
THE SENATE
OF THE REPUBLIC OF KENYA….....1ST PETITIONER
THE SPEAKER OF THE SENATE…..…….....2ND PETITIONER
SENATE MAJORITY LEADER…….....3RD PETITIONER
SENATE MINORITY LEADER……..….....4TH PETITIONER
THE COUNCIL OF COUNTY
GOVERNORS.....5TH PETITIONER
VERSUS
THE SPEAKER OF THE
NATIONAL ASSEMBLY.....….1ST RESPONDENT
THE NATIONAL ASSEMBLY
OF KENYA…….....…2ND RESPONDENT
AND
THE ATTORNEY GENERAL…....….1ST INTERESTED PARTY
KENYA MEDICAL SUPPLIES
AUTHORITY.....2NDINTERESTED PARTY

INSTITUTE FOR
SOCIAL ACCOUNTABILITY.....3RDINTERESTED PARTY
MISSION FOR ESSENTIAL DRUGS &
SUPPLIES.....4TH INTERESTED PARTY
KATIBA INSTITUTE…..……..5TH INTERESTED PARTY
PHARMACEUTICAL SOCIETY
OF KENYA….....6TH INTERESTED PARTY
ELIAS MURUNDU……..……....……7TH INTERESTED PARTY
THE COMMISSION ON
REVENUE ALLOCATION.....8TH INTERESTED PARTY

JUDGMENT

INTRODUCTION

[1] Since its inception, the Constitution of Kenya, 2010 has been a subject of litigation in courts in this country mainly on the correct interpretation of its various provisions to the extent to which they have been relevant, for instance, in the agitation of individual rights of citizens; the supremacy of the Constitution itself; the functions of state organs, and the limits imposed on such organs in the exercise of their diverse functions; the relationship among these state organs and, generally how Kenya as a nation should be governed.

[2] The present dispute pits the Senate against the National Assembly with regard to the extent of their respective legislative functions. The genesis of the dispute arises from the National Assembly's action to legislate various Acts of Parliament without reference to the Senate. To be precise, on diverse dates between the years 2017 and 2019, the National Assembly passed a total of 23 Acts of Parliament without the

participation of the Senate and unilaterally forwarded 15 others to the Senate without complying with ***Article 110 (3) of the Constitution.***

[3] The Senate was aggrieved by the National Assembly's actions and so on the 18th day of July 2019, it filed the present Petition in this Court against the Speaker of the National Assembly of the Republic of Kenya and the National Assembly of Kenya, seeking, amongst other things, the nullification of the Acts passed or amended by the National Assembly without reference to the Senate. The Petition is supported by the affidavit of the Hon. Kenneth Makelo Lusaka, the Speaker of the Senate, sworn on the 17th day of July 2019.

[4] Apart from the National Assembly, the Council of County Governors which is a statutory body established by the ***Intergovernmental Relations Act, 2012*** also filed its own Petition, vide High Court Petition No. 353 of 2019 against the 2nd Respondent and the Attorney General contending that the amendments by the National Assembly to ***Section 4 of the Kenya Medical Supplies Authority Act, No. 20 of 2013*** without regard to the Senate was unconstitutional. Like the Senate, it also asked for nullification of these amendments. Owing to similarity of constitutional issues between the two petitions, the Petition by the Council of County Governors was consolidated with the present Petition, by the order made by this Honourable Court on 9th day of March 2020.

[5] The Respondents opposed the Petition and in that respect filed a replying affidavit sworn on the 23rd day of March 2020, by Michael

Sialai, the Clerk of the National Assembly of the Republic of Kenya generally saying that the Senate has a restricted role in the passing of Bills into Acts of Parliament and the National Assembly has, more or less, the exclusive mandate to legislate and specifically to enact the impugned Acts of Parliament.

[6] More often than not, Petitions such as the present one attract the interest of other persons who may either directly or indirectly be affected by actions of the parties or are generally interested in the outcome of the Petition and to that extent they would be involved as Interested Parties.

[7] It is against this background that the 1st to 8th Interested Parties have been joined to the Petition in that capacity; in doing so, they have taken sides either with the petitioners or with the respondents depending on the nature of their interest or on their positions on the pertinent issues in the petition.

THE PETITIONERS' CASE

[8] The primary legal basis of the Petition is ***Article 110 (3) of the Constitution of Kenya, 2010.*** In violation of this Article, so the Petitioners have contended, the National Assembly has consistently passed laws which, in the Senate's view, could only have been passed by both the National Assembly and the Senate. To be precise, the Senate has from time to time faced challenges in the exercise of its mandate within our bicameral system of Parliament, particularly, with

regard to the proper procedure to be followed in the disposal of Bills concerning Counties and Money Bills.

[9] In an attempt to unravel a solution to these challenges, the Speaker of the Senate in the 11th Parliament brought this issue to the attention of the Supreme Court seeking, *interalia*, its opinion on the import of ***Article 110 (3) of the Constitution of Kenya, 2010***; this was in **Supreme Court Advisory Opinion No. 2 of 2013**, **In the matter of the Speaker of the Senate and Another vs the Attorney General and 4 others [2013] eKLR (**hereinafter '**Reference No. 2 of 2013')**.

[10] In this Advisory Opinion, the Supreme Court held that the consideration of Bills to be passed by Parliament is not a unilateral exercise exclusive to either of the two Houses; rather, the Speakers of both houses have to engage and consult and to the extent that the Speaker of the National Assembly had proceeded in passing the Division of Revenue Bill without such consultation or engagement, he had acted against the Constitution of Kenya, 2010 and in particular, ***Article 110 (3)*** thereof.

[11] Consistent with the Supreme Court's Advisory Opinion, the Court of Appeal in **National Assembly of Kenya & Another versus Institute for Social Accountability [2017] eKLR** held:

> ***"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."***

[12] To demonstrate the extent to which the National Assembly has fallen short of the threshold set out in ***Article 110 (3) of the Constitution***, the Petitioners listed 24 Bills (*although we note that one of the Bills is listed twice*) that have been presented to the President for his assent without the requisite concurrence of the Speaker of the Senate and 15 bills unilaterally forwarded to the Senate for its consideration. The Bills presented to the President for his assent have been listed in the Petition as follows:

i. ***The Public Trustee (Amendment) Act, No. 6 of the 2018***
ii. ***The Building Surveyors Act, No. 19 of 2018***
iii. ***The Computer Misuse and Cybercrime, Act, No. 5 of 2018***
iv. ***The Statute Law (Miscellaneous Amendment), No. 4 of 2018***
v. ***The Kenya Coast Guard Service Act. No. 11 of 2018***
vi. ***The Tax Laws (Amendments) Act, No. 9 of 2018***
vii. ***The Statute Law (Miscellaneous Amendments) Act, No. 1 of 2018***
viii. ***The Supplementary Appropriation Act, No. 2 of 2018***
ix. ***The Equalization Fund Act No. 3 of 2018***
x. ***The Sacco Societies (Amendment)Act, 2018 No. 16 of 2018***
xi. ***The Finance Act, No. 10 of 2018***
xii. ***The Appropriations Act, No. 7 of 2018***
xiii. ***The Capital Markets (Amendments) Act, No. 15 of 2018***
xiv. ***The National Youth Service Act No. 17 of 2018***

xv. ***The Supplementary Appropriation Act, No. 13 of 2018***

xvi. ***The Health Laws (Amendment)Act, No. of 5 of 2019***

xvii. ***The Sports (Amendment) Act, No. 7 of 2019***

xviii. ***National Government Constituency Development Fund Act, 2015***

xix. ***The National Cohesion and Integration (Amendment) Act, 2019***

xx. ***The Statute law (Miscellaneous Amendment) Act, 2019***

xxi. ***The Supplementary Appropriation Act, No. 9 of 2019***

xxii. ***The Appropriation Act, 2019***

xxiii. ***The Insurance (Amendment) Act, 2019***

xxiv. ***The National Government Constituency Development Fund Act, 2015***

[13] It is the Petitioners' case that ***the Parliamentary Service Bill, National Assembly Bill No. 6 of 2018***, which repeals the ***Parliamentary Service Act, 2002*** so as to align it with the ***Constitution of Kenya, 2010*** by providing for the organisation and management of the shared Parliamentary Service Commission and the Parliamentary Service; the ***Statute Law (Miscellaneous Amendment) Act No.4 of 2018*** which amends the Statutory Instruments Act; and, the ***Statute Law (Miscellaneous Amendment) Act 2019*** which amends the ***Public Finance Act, 2012*** have been passed with ulterior motives and in particular, it is a demonstration of attempts by the National Assembly to weaken the Senate as a House of Parliament.

[14] As far as the Parliamentary Service Bill is concerned, it is intended to shorten the term of the Secretary of the Commission and the Clerks of both Houses which is a matter of concern as this provision would affect the apolitical nature of the Parliamentary Service. Besides, although in its memoranda and reasons the Bill is indicated as not a Bill concerning County Government it still affects the County Government because it affects the functions of the Senate.

[15] As for the ***Statute Law (Miscellaneous Amendment) Act No.4 of 2018*** which, as earlier noted, amends the Statutory Instruments Act to provide that all statutory instruments must be tabled in the National Assembly, it is silent on which instruments should be submitted to the Senate.

[16] Finally, the ***Statute Law (Miscellaneous Amendment) Act 2019,*** which amended the ***Public Finance Management Act 2012,*** has a direct implication on the ability of the Senate to discharge its mandate under ***Articles 94*** and ***96 of the Constitution***.

[17] The rest of the impugned statutes were enacted in contravention of the Constitution, for either not being subjected to the mandatory concurrence process set out under ***Article 110 (3) of the Constitution*** or, in case of those that concern Counties, they were not referred to the Senate for consideration pursuant to ***Articles 96, 109,*** *and* ***110*** to ***113 of the Constitution***.

[18] The Bills alleged to have been unilaterally forwarded to the Senate for its consideration have been listed as follows:

i. **The Copyright (Amendment) Bill,** ***National Assembly Bills No. 33 of 2017***

ii. **The Physical Planning Bill,** ***National Assembly Bill No. 34 of 2017***

iii. **The Election Laws (Amendment) Bills,** ***National Assembly Bills No. 39 of 2017***

iv. **The Irrigation Bills,** ***National Assembly Bills No. 46 of 2017***

v. **The Kenya Roads Bills,** ***National Assembly Bill No. 47 of 2017***

vi. **The Petroleum (Exploration, Development and Production) Bill,** ***National Assembly Bills, No. 48 of 2017***

vii. **The Energy Bills,** ***National Assembly Bills No. 50 of 2017***

viii. **The Public Private Partnerships (Amendment) Bill,** ***National Assembly Bills no. 52 of 2017***

ix. **The Land Value Index Laws (Amendment) Bills,** ***National Assembly Bills No. 3 of 2018***

x. **The Division of Revenue Bills,** ***National Assembly Bills No. 7 of 2018***

xi. **The Government Contracts Bills,** ***National Assembly Bills No. 9 of 2018***

xii. **The County Governments Retirement Scheme Bills,** ***National Assembly Bills No. 10 of 2018***

xiii. **The Statute Law (Miscellaneous Amendments) (No. 2) Bills,** ***National Assembly Bills No. 13 of 2018***

xiv. **The Division of Revenue Bill,** ***National Assembly Bills No. 11 of 2019***

xv. **The Statute Law (Miscellaneous Amendment) (No. 2) Bill,** ***National Assembly Bills No. 13 of 2018***

[19] The Petitioners contend that in acting the way it did, the National Assembly failed to comply with **Articles 94, 96, 109, 110-113 of the Constitution** and the National Assembly's conduct is a threat to the devolution system of governance enshrined in our Constitution.

[20] They further contend that the Bills presented to the President for his assent were, in the language of **Article 110 (1) of the Constitution,** 'Bills concerning County Government' and which, for that very reason, the Senate ought to have considered before they were passed into Acts of Parliament.

[21] It is the Petitioners'contention that the net effect of the failure by the Speaker of the National Assembly to forward the Bills to the Senate for its consideration before presenting them to the President for his assent is that the ultimate laws are not applicable to the County Governments and which, in the Petitioners' view, the County Governments would be entitled to disregard.

[22] They have also averred that by ignoring the role of the Senate in the legislative process, the National Assembly has breached ***Article 96 of the Constitution*** that mandates the Senate to represent Counties and protect their interests. Further, while it is explicit that the

Constitution establishes two levels of Government, to wit, the National and the County Government, these acts by the National Assembly not only undermine the Senate's legislative functions but also undermine the objects and principles of devolution and, by extension, the interests of the people of Kenya.

[23] The National Assembly, so the Petitioners have contended, cannot bypass the Constitutional threshold set for the enactment of laws and, to the extent that they have done so, such laws are unconstitutional particularly when one considers the provisions of ***Article 2 (4) of the Constitution***; that Article provides, *inter alia*, that any law that is inconsistent with this Constitution is void to the extent of its inconsistency.

[24] Apart from the impugned Acts of Parliament, the National Assembly amended its ***Standing Order No. 121*** purporting to exercise its mandate of making Standing Orders ***under Article 124 (1) of the Constitution***. The effect of the amendment was to give the Speaker of the National Assembly the sole prerogative of determining the question whether a Bill concerns County Government; this, the Petitioners contend, is expressly inconsistent with ***Article 110 (3) of the Constitution.***

[25] According to the Petitioners, if there was any disagreement between the Speakers of the two Houses particularly on the question on Ordinary Bills concerning County Governments, there are legal mechanisms in place to resolve such disputes and in this regard they

specifically pointed out ***Standing Order No. 136 of the Senate*** and ***Standing Order No. 121 (3) of the National Assembly***. As a matter of fact, the Speaker of the Senate has, in line with these Standing Orders, sought to form a Joint Mediation Committee with the Speaker of the National Assembly for the resolution of any dispute relating to this question but the latter has spurned the efforts by the Speaker of the Senate.

[26] The Petitioners have reiterated that according to ***Article 94 (1) of the Constitution,*** the legislative authority of the Republic of Kenya is derived from the people and vested and exercised by Parliament which, according to ***Article 93,*** comprises both the Senate and the National Assembly. Reading ***Article 94 of the Constitution*** alongside ***Articles 109 to 113 of the Constitution***, the exercise of this legislative authority is not exclusive to any of the two Houses but requires their joint participation. It is in this context that they have to determine first, if a Bill is one that concerns Counties and if so, whether it is a Special or Ordinary Bill and secondly, whether the Bill should be considered in line with ***Articles 110 (3), (4) & (5) to 113 and 122 and 123 of the Constitution*** where it is a Bill that concerns Counties.

[27] Where any of the two Houses is excluded from the legislative process, the resultant Act cannot properly be regarded as an '*Act of Parliament'* since by its very definition in ***Article 93 of the Constitution***, Parliament constitutes both the Senate and the National Assembly. However, despite failure by the Speaker of the National

Assembly to present to the President a certificate bearing the signature of the Speakers of both Houses certifying that the procedure set out in ***Articles 109 to 115 of the Constitution*** has been complied with, the President has, nonetheless, assented to those Bills.

[28] In further disregard of the joint legislative authority, the National Assembly has declined to consider several Bills originating from the Senate on the pretext that those Bills are what the Constitution characterises as 'Money Bills' which, according to ***Article 109 (5) as read with Article 114 of the Constitution***, can only originate from the National Assembly. These Bills have been listed in the Petition as follows:

i. **The County Boundaries Bill, 2017*, Senate Bills No. 6 of 2017***

ii. **The Food Security Bill, 2017*, Senate Bills No. 12 of 2017***

iii. **The Office of the County Printer Bill, *Senate Bill No. 7 of 2018***

iv. **The Disaster Risk Management Bill*, Senate Bills No. 8 of 2018***

v. **The Public Participation Bill, *Senate Bill No. 4 of 2018***

vi. **The Treaty Making and Ratification (Amendment) Bill, *Senate Bills, No. 23 of 2018***

vii. **The Impeachment Procedure Bill, 2018*, Senate Bill No. 15 of 2018***

viii. **The Prevention of Terrorism (Amendment) Bill, *Senate Bill No. 20 of 2018***

ix. **The Preservation of Human Dignity and Enforcement of Economic and Social Rights Bill, *Senate Bills No. 27 of 2018***

x. **The Tea Bill, *Senate Bill No. 36 of 2018***

xi. **The Care and Protection of Older Members of Society Bills, *Senate Bills No. 17 of 2018***

xii. **The County Government (Amendment) Bill, 2018 *Senate Bill No. 13 of 2018***

[29] The Senate contends that all Bills have a monetary connotation but they are not necessarily Money Bills as defined in ***Article 114 (3) of the Constitution;*** however, the National Assembly has narrowly regarded them as Money Bills thereby deliberately declined to consider them in its efforts to further subvert the legislative function of the Senate. In the same spirit of subversion of the functions of the Senate, the National Assembly has further made ***Standing Order Nos. 143 (2) to 143 (6)*** the import of which is to give exclusive mandate to the Speaker of the National Assembly to determine what amounts to a Money bill in terms ***of Article 114 of the Constitution***. The effect of these Standing Orders is to exclude the participation of the Senate in the legislative process and by extension the erosion of devolution governance.

[30] In the affidavit in support of the Petition, Hon. Kenneth Makelo Lusaka largely reiterated the averments made in the Petition. In addition to his depositions, he exhibited on his affidavit a report of the Committee of Experts on the Constitution marked as 'KL1' to demonstrate that in endorsing the Constitution of Kenya, 2010, the people of Kenya chose the second House of Parliament to represent the devolved government at the national level. It is against this background that the Senate was recommended as a House to represent, among others, devolved government, marginalised groups, minorities, women, persons with disabilities and the youth.

[31] He also exhibited a Bill tracker for the National Assembly as at Friday July 5th 2019 basically to demonstrate how the Speaker of the National Assembly has not complied with ***Article110 (3) of the Constitution***. To this end, he has exhibited the impugned Bills which were presented to the President for his assent without seeking his concurrence as the Speaker of the Senate. The Bills have been marked as 'KL4' while the Acts themselves have been exhibited as 'KL5'.

[32] As pertains the ***Appropriations Act, 2019*** and the ***Division of Revenue Act 2019/ 2020,*** the Speaker exhibited two letters respectively dated 3rd day of July 2019 from the Office of the President to the Attorney General and 9th day of July 2019 from the Attorney General to the National Treasury, National Assembly and the Senate; in these letters, the Executive acknowledged that without the ***Division of Revenue Act*** it was unconstitutional for the National Government to

appropriate funds without the ***Division Revenue Act*** and ***County Allocation Act***.

[33] Besides the letters, the Speaker of the Senate also exhibited the ***Parliament Service Bill (National Assembly Bill 2018)*** and the extracts of the Hansard of 4th day of July 2019 respectively marked 'KL8a' and 'KL8b'. Other exhibits on the Speaker's affidavit are the ***Determination of Procedure of Bill, 2018, Senate Bill No. 30 of 2018*** marked as 'KL9'; the Extracts of Hansard of the National Assembly sitting for the 29th day of June 2019, 3rd day of July 2019 and 4th day of July 2019 respectively.

[34] The net effect of the National Assembly's conduct, so the Petitioners have stated, is its failure to adhere to the Constitution which it is enjoined to uphold, respect and defend.

[35] The 5th Petitioner's case is that the National Assembly introduced, considered and passed the ***Health Laws (Amendment) Act 2019*** which law was assented to by the President on the 13th day of March 2019; the Act took effect on 17th day of May 2019. Amongst the laws that were amended under this Act was the ***Kenya Medical Supplies Authority Act No. 20 of 2013*** and the effect of some of the amendments to this Act is to require the County Government to procure drugs and medical supplies solely from Kenya Medical Supplies Authority (KEMSA) and that any person who contravenes this specific requirement is liable to a fine of Kshs 2,000,000/- or a sentence of 5 years' imprisonment or both.

[36] The Council of County Governors further added that by restricting County Governments to procuring drugs only from KEMSA, the provision of health services in Counties would be jeopardized because of KEMSA's inability to meet the demands from all the Counties. For instance, KEMSA has never been able to meet 100% of the orders placed by the County Governments and at times there have been delays in delivery of the orders of up to two to three months. It is urged that owing to KEMSA's inability to meet the demand for drugs coupled with the delays in delivery, there is the risk, for instance, of losing lives of children under the age of 5 years who reside in malaria prone areas such as Baringo.

[37] In any event, the amendments were mischievously introduced on the floor of the House; this was so because, while the rest of the amendments were subjected to public participation before introduction of the amendment Bill into the House, the amendments to ***Section 4 of the KEMSA Act*** which, as noted, restricted the procurement of drugs from one source, and introduced penal consequences in default, were not in the Bill that was subjected to public participation. The net effect of those amendments was to substantially alter the framework of procurement of medical supplies in the Counties without the input of the stakeholders and the general public yet they are the ones who would be most affected by that amendment.

[38] An affidavit in support of the 5th Petitioner's Petition was sworn on 3rd day of September 2019 by Jacqueline Mogeni, the Chief

Executive Officer of the 5th Petitioner. In that affidavit, she deposed that the National Assembly introduced, considered and passed the ***Health Laws (Amendment) Act, 2018*** and on the 7th day of November 2018 and that the laws were forwarded to His Excellency, the President for his assent. The Bill was sent back to the National Assembly with reservations on the 12th day of February 2019 and after it was considered, it was passed on the 28th day February 2019; it was eventually assented to on the 13th day of May 2019. She exhibited a copy of the extract of the Laws Amendment Act that gives the details of the amendment as 'JM1'.

[39] To demonstrate the inability of the Kenya Medical Supplies Authority to meet the demands of Counties for supply of drugs and the delays in supplying them, Ms. Mogeni exhibited correspondences between the County Government of Taita Taveta and KEMSA; the communication from the County Government of Trans Nzoia to Council of Governors; and, communication within the County Government of Kwale marked as 'JM-2A', 'JM-2B' and 'JM -2C' respectively.

[40] Ms. Mogeni also swore that, the 5th Petitioner submitted a legislative memorandum to the 2nd Respondent on the amendments that were contained in the Bill and properly before the House; the 5thPetitioner, however, never had any opportunity to make representations on the amendments that were introduced on the floor of the House. She exhibited the memorandum, copies of the Bill that

was subjected to public participation and a copy of an extract of the Hansard of the proceedings of the National Assembly of the 7thday of November 2018 marked as JM-3A, JM -3B and JM -4 respectively.

[41] After the Bill was sent back to the National Assembly from His Excellency the President with reservations, the 5th Petitioner wrote to the 1st Respondent vide a letter dated 13th February 2019,not only expressing its concern that the Bill had not been presented to the Senate for its consideration contrary to ***Articles 96 (1) and 110 (4) of the Constitution***, but also seeking for a consultative meeting between the 1st Respondent and the Chair persons of the Health and Legal Committees to present the 5th Petitioner's submissions. The letter is exhibited to Ms. Mogeni's Affidavit as 'JM-5'.

RESPONDENTS' CASE

[42] In his Affidavit in response to the Petition, Mr. Sialai swore that in a report of the Select Committee on Constitutional and Legal Review, the Senate acknowledged that it has a restrictive legislative mandate with regard to approval of persons for appointment to public and state offices. That the report noted that, ***Article 108 of the Constitution,*** only recognised party leaders in the National Assembly. The report recommended the amendment of the Constitution to expand the legislative mandate of the Senate and recognise party leaders in the Senate. That report is exhibited as 'MS1' in the Affidavit. It is the National Assembly's case that the present Petition is an attempt to

amend the Constitution by judicial proclamation to address the limitation highlighted by the committee of the Senate

[43] As far as promotion of devolution is concerned, Mr. Sialai deposed that during the 11th and 12th Parliament, the National Assembly has considered, passed and transmitted 58 Bills to the Senate for its consideration on matters concerning County Governments. He also swore that the Senate has on its part transmitted to the National Assembly 16 Bills for its concurrence and as at the time he swore his affidavit, the National Assembly was considering 13 Bills from the Senate.

[44] During the 12th Parliament, the National Assembly has considered 5 Bills from the Senate. It has passed them with amendments and transmitted the Bills back to the Senate for its consideration. Again, the National Assembly has considered and passed 8 Bills originating in the Senate which Bills have been assented to by His Excellency the President.

[45] As far as compliance with the Advisory Opinion by the Supreme Court **Reference No. 2 of 2013** is concerned, Mr. Sialai swore that the National Assembly had amended ***Standing Order No. 121 of its Standing Orders*** in exercise of its powers under ***Article 124 (1) of the Constitution*** rendering the Advisory Opinion inapplicable. That opinion had affirmed the role of the Senate in the legislative process and, in particular, the need for a joint resolution of the Speakers

of the two Houses on the question as to whether any Bill concerns Counties.

[46] In line with the amended ***Standing Order No. 121,*** the 1st Respondent has engaged the Speaker of the Senate to establish an appropriate framework to realise their joint obligation under ***Article 110 (3) of the Constitution***. In demonstration of this fact, Mr. Sialai exhibited correspondence exchanged by the two Speakers marked on his Affidavit as 'MS1'.

[47] As far as the ***Parliamentary Service Bill 2019*** is concerned, Mr. Sialai swore that the Bill did not contain provisions affecting the functions of County Government and therefore it could be passed by the National Assembly in exercise of its powers under ***Article 248 of the Constitution*** without any reference to the Senate.

[48] At any rate, so Mr. Sialai swore, that even in cases where a Bill does not contain provisions affecting the functions of County Government, the only means through which the Senate can participate in the legislative process is through representation and submission of memoranda to the Clerk of National Assembly or relevant committee of the House. In the same breath, he stated that the Senate ought to have presented its memoranda with respect to the Parliamentary Service Bill, 2019. This, it did not do.

[49] With respect to the Acts impugned by the Petitioners on the basis that they fell short of the threshold set by the Constitution, Mr. Sialai swore that those Acts are either Acts not concerning County

Governments or are Money Bills. In other Acts, their constitutionality has already been determined by the Courts and are no longer an issue for determination. He swore further that all the statutes were publicised in the local media inviting representations and submissions of memoranda from the public and thus they complied with ***Article 118 of the Constitution*** which enjoins Parliament to embrace public participation in the legislative process. He exhibited newspaper advertisements and committee reports relating to public participation on the impugned Acts and the same were marked as 'MS1' on his affidavit.

[50] Besides the Replying Affidavit, the Respondents also filed a Cross Petition which, in their own words, is based on some of the depositions in the replying affidavit of Mr. Sialai. In that Petition they have alluded to several Articles of the Constitution which, in their view, limits the legislative functions of the Senate, and at the same time, gives the National Assembly unlimited power to legislate and undertake oversight functions over state organs. By the same token, the National Assembly is given oversight over national revenue and its expenditure.

[51] It is also the Respondents' case that the Speaker of the National Assembly is only required to consult the Speaker of the Senate on whether a Bill concerns counties under ***Article 110(3) of the Constitution*** only "when there is a question or doubt" as to whether a Bill concerns counties.

[52] Against this background, the Respondents have asked for a raft of declarations, 22 of them to be precise, which basically are in two categories. The first six revolve around the interpretation of ***Articles109 to 114 of the Constitution*** while the rest are based on ***Articles 95 (4), 95 (5), 108, 121 (1), 132 (2), 145, 185 (3), 201 of the Constitution*** and ***Standing Orders of both the Senate and the National Assembly***; in particular, ***Standing Order No. 35 of the Senate*** *and* ***Standing Order No. 121 of the National Assembly***.

[53] The Cross Petition was filed after directions on the determination of the Petition had been given on 9th day of March 2020 and so when it was brought to our attention on 3rd day of June 2020, we directed as follows:

> ***"On 9th day of March 2020 this Court issued directions on determination of this Petition. Before Covid-19 struck, the Petition was scheduled to be mentioned on 4th day of May 2020 for confirmation of whether those directions had been complied with. We intend to stick to those directions as much as possible, except perhaps for a small window for extension of time which is now necessitated by the interruptions caused by Covid-19. One of the directions we gave was that the Respondents were to file their response to the Petition within fourteen days of 9th day of March 2020. We understand from Mr. Mwendwa, Counsel for the Respondent, that they have not only filed a response but have also filed a Cross Petition. Having been filed in the context of our***

***directions, the Cross Petition shall be treated as a response to the Petition and the rest of the parties are at liberty to treat it as such.*"**

[54] Be that as it may, Hon. Lusaka swore and filed a Replying Affidavit to the Cross Petition which also doubled as a response to the Respondents' Replying Affidavit. In that affidavit, he largely reiterated his averments in the Petition and the depositions made in the Affidavit in support of the Petition.

[55] The Respondents filed a further affidavit responding to the affidavit sworn by Hon. Lusaka in response to the Cross Petition and also replying to the Respondents' Replying Affidavit. However, a copy of the affidavit on record was neither dated nor signed; it was also not commissioned.

INTERESTED PARTIES' CASE

[56] Of the 8 Interested Parties, the first among them was the Hon. Attorney General. He was initially the 2nd Respondent in Petition No. 353 of 2019 and in that regard had filed grounds of opposition in response to the Petition before that Petition was eventually consolidated with the present Petition.

[57] In those grounds, the Hon. Attorney General urged that the amendment to ***section 4 of KEMSA Act***, 2013 enjoyed a general presumption of constitutionality and which presumption would only be rebutted at the full hearing of the Petition; that the issues raised in the Petition were substantially and directly in issue in Nairobi High Court Constitutional Petition No. 284 of 2019 which is the present Petition;

that the Petitioner had failed to discharge the burden of proof on how the impugned amendment to ***section 4 of the KEMSA Act*** violates ***Article 6, 10, 73 (1), 189 (1) and 227 (1) of the Constitution;*** and, that the Petitioner had misapprehended and misapplied the nature of the distinct constitutional roles of the National and County Governments with regard to the provision of health services to the citizens.

[58] The other grounds were that, the Petitioners had misapprehended the import of ***Article 110 (3) of the Constitution*** by implying that the impugned amendment made to ***Section 4 of the KEMSA Act 2013***, ought to have been considered by both Houses of Parliament; that the Petitioners had failed to discharge the legal and evidentiary burden of proof that the said amendment Act was not subjected to public participation as required by ***Article 118 of the Constitution*** and the Standing Orders of the National Assembly; that the Petitioner had not attempted to invoke ***Article 119 of the Constitution*** and failed before it sought redress by invoking the jurisdiction of this honourable Court; and finally, that the Petition was scandalous, frivolous and bad in law and that it is a classic description of an abuse of the due process of this honourable Court.

[59] After Petition No. 353 of 2019 was consolidated with the present Petition, the Hon. Attorney General assumed the capacity of the 1st Interested Party and filed other grounds of opposition against the Petition. These grounds are: that the grant of prayers sought would present grave consequences on obtaining private and public

arrangement or actions already undertaken pursuant to the impugned legislation; that the Petitioner ought to have invoked ***Article 112 and 113 of the Constitution*** in resolving the dispute; that the National Assembly has exclusive competence in regard to Bills or Acts of Parliament falling under ***Article 186 (1)*** as read with ***186 (3) of the Constitution***; and that the Petitioners have not demonstrated how the impugned Acts have affected the functions of County Governments

[60] Other grounds are that it is the Constitutional role of the National Assembly to appropriate funds for expenditure by the National Government and other national state organs and to exercise oversight over national revenue and its expenditure as provided under ***Article 95 (4) (b) and (c) of the Constitution***; and, further that the Court has power to consider whether a Bill was one concerning Counties where both Speakers of the Senate and National Assembly have not concurred; that the National Assembly Standing Orders enjoy a legal presumption of constitutionality; that as per ***Article 114 (2) of the Constitution***, a Money Bill may only be originated from the National Assembly; that, it is a constitutional prerogative of either House of Parliament to make their respective Standing Orders; and finally, that the honourable Court should consider the matter within the context of transition from unicameral legislative arrangement to a bicameral legislative one in respect to certain specified matters and conflicts attributable to the novelty, growth and development of the new Constitution.

[61] The 2nd Interested Party is Kenya Medical Supplies Authority; like the 1st Interested Party, it filed grounds of opposition, the gist of which is that the Petition does not establish that the Speakers of the two Houses did not comply with ***Article 110 (3) of the Constitution*** and that the amendment to the ***KEMSA Act*** was a minor amendment that did not need concurrence of the Senate; that, the Petition does not establish the exhaustion of the mediation process set out in ***Articles 112 and 113 of the Constitution***; that, public participation was conducted; that, the Petition has failed to demonstrate any adverse effects of the amendments to the Petitioners and that it does not specifically plead the violations complained of in relation to the impugned Articles of the Constitution.

[62] The 4th Interested Party, Mission for Essential Drugs & Supplies, filed two affidavits sworn by Jacob Onyango who is the Head of Finance and Administration of that Party. The first of these affidavits was sworn on the 20th day of November 2019 and filed in Petition No. 353 of 2019 on the same date while the second affidavit was sworn on the 2nd day of June 2020 and filed in the current consolidated Petition. The depositions in the two affidavits are more or less in similar terms. Mr. Onyango has sworn that the legislative process leading up to the enactment of the ***Health Laws (Amendment) Act, 2019*** which effected the impugned amendments to ***section 4 of the KEMSA Act*** failed to meet the constitutional parameters of public participation espoused in ***Article 10 of the Constitution.*** It also breached ***Section 5 (1) of the***

Statutory Instruments Act No. 23 of 2013 by the failure of the Respondents to consult with the relevant stakeholders in the medical supplies sector including the 4th Interested Party; that the said amendments had direct negative effect on the business of supply of medical commodities to public health facilities in which the 4th Interested Party is involved as the amended Act now bars any other enterprises or traders except KEMSA from directly supplying medical commodities to public health facilities. The net effect of these amendments is to arbitrarily restrict competition in the supply of quality medical commodities and this will in turn have a negative effect on the quality and pricing of medical commodities offered to the Kenyan public by County Public health facilities.

[63] He deposed further that the amendments amount to violation of consumer rights of the Kenyan public as enshrined in ***Article 46 (1) of the Constitution*** and the rights of every Kenyan to the highest attainable standards of health care enshrined in ***Article 43 (1) of the Constitution***. It also contrary to ***Article 227 of the Constitution*** which requires that public procurement will be in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

[64] In proof of the inability of KEMSA to meet the orders from the counties for medical supplies, Mr. Onyango exhibited in his affidavit newspaper cuttings from three national newspapers highlighting the shortage of drugs in public hospitals which in effect had resulted in the suffering and dying of Kenyans as result of the

impugned amendments. The newspaper cuttings have been exhibited to his affidavit and marked as 'JO-1', 'JO-2' and 'JO-3'.

[65] To demonstrate the 4th Interested Party's capacity and willingness to supply the drugs to Counties, Mr. Onyango exhibited a debt ledger account showing that, unlike KEMSA, the 4th interested party is capable of offering credit facilities to counties and therefore ensuring a constant supply of drugs. The debt ledger account is exhibited in his affidavit and marked as 'JO-4'.

[66] Five Interested Parties did not file responses or grounds of opposition. These are the 3rd, 5th, 6th, 7th and 8th Interested Parties.

PARTIES' SUBMISSIONS, ANALYSES & DETERMINATIONS

[67] At the very outset, when this matter was mentioned before us on the 9th day of March 2020, we directed that the Petition be canvassed by way of written submissions and also set timelines on when those submissions were to be filed and exchanged between or amongst the parties. These timelines were later to be extended because of the interruptions caused by the COVID -19 pandemic. Except for the 2nd, 3rd and 7th Interested Parties, the rest of the Parties complied and filed written submissions.

[68] We have carefully considered the consolidated Petition, the affidavits in support of the Petition and, the responses to the Petition and the Cross Petition as well as the submissions by the learned

Counsel for the respective parties. We acknowledge and are greatly indebted to learned counsel for their industry in this respect.

[69] In our assessment, the primary legal issue that arises out of the dispute before us is the proper interpretation of ***Articles 109 to 114 of the Constitution***, with particular emphasis on the legislative functions of the two Houses of Parliament which in this context are the Senate and the National Assembly. There are, of course, other issues but which, in our humble view, are secondary to this primary issue. In our discussion of these issues we shall, as we are enjoined to, refer to the parties' pleadings, their evidence and, of course, their submissions as and when it is necessary.

[70] There are, however, preliminary points raised by the parties and which, by their very nature, should be determined at this early stage. These issues are first, whether the 1st to 4th Petitioners are properly represented in the present Petition; secondly, whether the Petition is *res judicata*; and thirdly whether this Petition is *sub judice*.

[71] On the issue of representation, Mr. Mwendwa, the learned counsel for the Respondents, sought the direction of this honourable Court on the continued representation of the 1st, 2nd and 3rd Petitioners by Senior Counsel, Mr. James Orengo. The basis of Mr. Mwendwa's contention was that Mr. Orengo SC together with other counsel appearing for the 1st to 3rd Petitioners had not filed a Notice of Appointment of Advocate to demonstrate that they had instructions to

act for those parties. The learned counsel urged that counsel could not purport to appear to act for a party without the requisite authority.

[72] In response to Mr. Mwendwa's argument, Mr. Orengo submitted that right from the beginning, he had been appearing together with other counsel for the 1st to the 4th Petitioners (the 4th petitioner being Mr. Orengo himself) and that the record would bear him out. In any event, if counsel for the Respondents had any issue with representation of the parties, that is the 1st to 4th Petitioners, he ought to have raised that issue at the earliest opportunity possible and not at the tail end of the hearing of the Petition. Counsel added that the Speaker of the Senate had vide a letter dated 27th January 2020 authorised him and other counsel to appear on behalf of the 1st, 2nd and 3rd Petitioners.

[73] We ruled that the 1st to 4th Petitioners were properly represented by Mr. Orengo and we reserved the reasons for so ruling in this judgment.

[74] Our understanding of Mr. Mwendwa's argument is that Mr. Orengo and the rest of the counsel appearing for the 1st to 3rd Petitioners have not complied with ***Order 9 rule 7 of the Civil Procedure Rules, 2010;*** that rule reads as follows:

Notice of appointment of advocate [Order 9, rule 7.]

Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order

relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.

[75] There is no dispute that no Notice of Appointment of Advocate by the 1st to 3rd Petitioner's Advocate was filed in compliance with this rule and Mr. Orengo admitted as much. However, he referred the Court to the authority by the Speaker of the Senate authorising him and other counsel to appear on behalf of the Petitioners. He stated that this authority was filed in Court on 27th day of January 2020. We have been unable to trace this authority from any of the documents filed by the Petitioners. Instead, all we have found on the record is an undated document titled '*Authority to Plead'* in which Honourable Senator Murkomen Onesimus Kipchumba and Mr. Orengo himself have granted authority to the Speaker of the Senate to plead, appear and or act for the 3rd and 4th Respondents; he must have referring to the 3rd and 4th Petitioners (sic). For better understanding it is necessary to reproduce that part of the authority here; it reads as follows:

"***AUTHORITY TO PLEAD***

WE HON. SENATOR MURKOMEN KIPCHUMBA MP., AND HON. SENATOR JAMES ORENGO MP., the holders of the offices of the 3rdRespondents respectively, do hereby grant authority to the Speaker of the Senate of Kenya, to plead, appear and act for the 3rdand 4th (sic) Respondents and the Senate of the Republic of Kenya in the Petition dated 18th day of February 2019."

The authority is signed by Hon. Senator Murkomen MP and the Hon. Senator Mr. James Orengo MP.

[76] As it appears on its face, this authority to plead certainly is not the document Mr. Orengo is referring to and, to be precise, it is not a document in which the Speaker of the Senate is authorising Mr. Orengo, or any other Counsel for that matter, to act for the 1st to 3rd Petitioners and even if it was, it would not fit the description of a Notice of Appointment of Advocate as envisaged under ***Order 9 Rule 7 of the Civil Procedure Rules, 2010.*** In short Mr. Orengo did not comply with ***Order 9 Rule 7 of the Civil Procedure Rules.***

[77] But the question we have agonised over is whether compliance with this particular rule in a constitutional Petition such as the present one is mandatory and if so whether non-compliance would render Mr. Orengo's representation of the 1st to 3rd Petitioner irregular and, by extension whether that irregularity would have any impact on the Petition itself.

[78] We must point out at the outset that there are no specific rules of procedure that have been prescribed for filing, service and other appurtenant procedural aspects of Constitutional Petitions filed outside ***Article 22 of the Constitution*** on enforcement, protection of rights and fundamental freedoms. What we mean here is that while the Chief Justice is mandated to make rules providing for Court proceedings under ***Article 22 of the Constitution*** and indeed such rules have been made, there are no similar rules that have been made for proceedings

on enforcement of other constitutional provisions outside those envisaged under ***Article 22 of the Constitution***.

[79] The question that has presented itself before us is this: in the absence of rules governing Petitions outside ***Article 22 of the Constitution,*** which rules would be most applicable for such a Petition? Related to this question is the question whether constitutional Petitions such as the present one are subject to the ***Civil Procedure Rules, 2010,*** to such an extent that noncompliance of any of those rules would expose the non-compliant party to the consequences prescribed by the rules.

[80] We are of the humble opinion that, in the absence of any express provision barring a party from invoking ***the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013,*** otherwise known as ***'Mutunga Rules'*** such a party is properly entitled to invoke them in any Petition other than a Petition filed under ***Article 22 of the Constitution*** to the extent that they are applicable**.**

[81] Having reached that conclusion, we find ***Rule 3 (8) of*** these Rules pertinent. That rule gives this Court the inherent power to make such orders as are necessary in order to meet the ends of justice. The rule reads as follows:

> ***Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be***

necessary for the ends of justice or to prevent abuse of the process of the Court.

[82] Over and above this rule, ***Article 159 (2) (d) of the Constitution*** prods this Court to exercise its judicial authority bearing in mind, amongst other principles, that justice shall be administered without undue regard to procedural technicalities. Failure to file a Notice of Appointment of Advocate, in our humble view, would be such a procedural technicality.

[83] It is based on this understanding that we found it reasonable to allow Mr. Orengo and the rest of the counsel whom he was leading to continue acting for the 1st to the 3rd Petitioners. If we have to say anything more on this, it was never suggested by Mr. Mwendwa for the Respondents that the Respondents had been prejudiced in any way either because Mr. Orengo had not filed the Notice of Appointment of Advocate or because none had been served upon counsel for the Respondents. Again, none of the parties whom Mr Mwendwa alleged were not properly represented by Mr. Orengo ever complained that they had not authorised Mr Orengo to act on their behalf.

[84] Even if there was any substance in Mr Mwendwa's argument we also found that he had brought out the issue of representation late in the day, so to speak. We say so because as early as 9th day of March 2020, Mr. Orengo together with Mr. Okong'o Omogeni and Ms. Thanji appeared for the Petitioners. Mr. Mwendwa was present in Court for the 1st and 2nd Respondent; as a matter of fact he was introduced in the

coram by Mr. Orengo. Parties took directions without any question on whether any of the parties was properly represented. The record shows that in subsequent proceedings, in which Mr. Mwendwa participated, Mr. Orengo appeared either by himself as representing the 1st to 3rd Petitioners or was, in some instances, represented by counsel who held his brief. To be precise, records will show that this matter was before Court for at least five occasions before Mr. Mwendwa brought up the issue of representation. On one of these occasions, on 1st day of July 2020, to be precise, Mr. Mwendwa himself confirmed that negotiations between his clients and the 1st, 2nd, 3rd and 4th Petitioners to resolve this petition out of court were underway and that both parties were at an advanced stage of reaching a settlement. As a matter of fact, he agreed with the Petitioners that he required more time to conclude the envisaged settlement.

[85] On the 16th day of September 2020, when he brought up this issue, the Petition was scheduled for hearing, obviously long after directions had been given on the manner in which it would be resolved. It is against this background that we are of the humble opinion that this issue of representation was not brought in good faith and we agree with Mr. Orengo that it was dilatory.

[86] We may add that while ***Order 9 Rule 7*** of the Civil Procedure Rules requires that a party to give notice of appointment of an advocate, where one has been appointed, it is our considered opinion that failure to do so in constitutional petitions such as the present one, is a mere

procedural lapse that is curable under the inherent powers of the court. Needless to say, each case depends on its specific circumstances.

[87] On this question, we are encouraged to adopt the words of the Court of Appeal in **Nicholas Kiptoo Arap Korir Salat –vs- IEBC and 6 Others [2013] eKLR** where the Court stated as follows:

> ***"Deviations from and lapses in form and procedures which do not go to the jurisdiction of the court, or which do not occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed at the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness … it ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants***

(and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why the Constitution and other statutes that promote substantive justice deliberately use the phrase that justice be done without "undue regard" to procedural technicalities."

[88] We also rely on the decision of the Court of Appeal in **Karl Wehner Claasen v Commissioner of Lands & 4 others [2019] eKLR** where the Court stated:

"However, we add that Rule 3(8) of the Practice and Procedure Rules gives the court inherent power to make such orders as may be necessary for the ends of justice and that Article 159 (2) (d) and (e) respectively obliges a court to administer justice without undue regard to procedural technicalities and to protect and promote the purpose and principles of the Constitution."

And with that we conclude the first preliminary issue on representation.

[89] The second and third issues are in a way questioning the jurisdiction of this honourable Court to determine the present Petition.

To begin with, the learned counsel for the Respondents urged that the issue before us has been heard and determined in the case of **Nation Media Group and 6 others vs the Hon. Attorney General and 9 others [2016] eKLR** in which the constitutionality of the ***Kenya Media Act 2013,*** and the ***Kenya Information and Communication (Amendment) Act 2013*** was challenged on, among other grounds, that the two legislations were enacted in violation of the Constitution and in particular, the Senate was excluded from the legislative process of their enactment into law. In that case, the Court held that the requirement contained in ***Article 110 (3) of the Constitution***, comes into play when there is a question or doubt as to whether or not a Bill concerns counties. In its view that was not the case with respect to the two bills that were in contention.

[90] It is on the basis of this finding that the Respondents urged that the question of concurrence of the Speakers as required under ***Article 110 (3) of the Constitution*** has been settled by a Court of competent jurisdiction and is thus *res judicata*. We note that the Petitioners did not directly respond to this question.

[91] The applicable principles on the doctrine of *res judicata* are found in ***Section 7 of the Civil Procedure Act CAP 21 of the Laws of Kenya*** which provides:

> ***7. Res judicata***
>
> ***No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in***

issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

[92] Elucidating on the import of the principle of *res judicata,* the Court of Appeal in the case of **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others, Nairobi CA Civil Appeal No. 105 of 2017 [2017] eKLR** held;

> ***"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."***

[93] There is no doubt that Article 110 (3) of the Constitution was considered in the ***Nation Media Group case*** (supra) but in our understanding the interpretation given by the court was restricted to the two Acts of Parliament that were in issue; viz. the **Kenya Media Act 2013** and the **Kenya Information and Communication (Amendment Media) Act 2013**. The Court reasoned that since the two Acts of Parliament did not concern counties, the Senate need not have been involved in their legislation. To answer the respondents' question on this issue of *res judicata*, the two Acts are not directly and substantially in issue in the present petition; as a matter of fact, neither of them has been faulted on any ground. And even if they were, the reference to the Supreme Court and its subsequent opinion in the case of **Council of Governors and 47 Others versus the Attorney General & 6 Others (2019) eKLR** would suggest that the proper interpretation of **Article 110 (3)** of the Constitution with respect to the legislative functions of the two Houses of Parliament has always been a subject fit for litigation in this court.

[94] As it will be noted in due course, the Supreme Court framed issues for determination by this court; those issues, to a greater degree, revolve around the proper interpretation of the legislative roles of both the Senate and the National Assembly with particular emphasis on **Article 110(3)** of the Constitution. Thus the doctrine of *res judicata* would not apply here because, while the petitioners may have been party to the ***Nation Media Group Case***, the subject of the dispute in

the present petition was not as prominent in the previous suit and, as the issues singled out by the Supreme Court for determination in the present suit would suggest, the crucial aspect of finality on determination of a previously litigated subject for *res judicata* to apply is lacking; to be precise, the extent of the legislative roles of the two Houses of Parliament and the manner in which those roles ought to be undertaken in light of Article 110(3) of the Constitution cannot be said to have been conclusively determined in the Nation Media Case.

[95] Regarding the issue of *sub judice*, it is the Respondents' case that the constitutionality of amendments to the ***Prevention of Terrorism Act No. 30 of 2012*** under ***Statute Laws (Miscellaneous Amendment) Act 2019, No. 12 of 2019*** is a matter pending in **Mombasa Constitutional Petition No. 134 of 2019 Haki Africa & Others –vs- Speaker National assembly and others.** It is urged that the constitutionality of the ***Data Protection Act*** is also a question pending before this Court in **Petition 454 of 2019 Okiya Omtata Okoiti –vs- The Speaker of the National Assembly and Others.** Further, that the constitutionality of the ***Finance Act, 2018*** is pending before this Court in **Nairobi Constitutional Petition No. 327 of 2018, Okiya Omtata Okoiti v the AG & the National Assembly** and hence the issue is *sub judice.* The same is the case for the ***National Government Constituency Development Fund, 2015***, whose constitutionality is challenged in **Nairobi Constitutional Petition 178**

of 2016, Wanjiru Gikonyo & Cornelius Oduor Opuot v the National Assembly, the Senate & Others.

[96] In their annexures to the replying affidavit, the Respondents exhibited a copy of **Constitutional Petition No. 134 of 2019 Humanity Action Knowledge Integrity in Africa Trust (HAKI Africa) v The Attorney General & Others and Kenya National Commission on Human Rights (KNHCR) and 2 others** filed on 16th day of August 2019 and **Petition No. 288 of 2019 Association of Insurance Brokers of Kenya v Cabinet Secretary for National Treasury & Planning & 2 Others** filed on 22nd day of July 2019. What comes out clearly from these Petitions is that they were filed after the Petition before us had been filed. The same case applies to **Petition No. 454 of 2019 Okiya Omtatah Okoiti v The Speaker of the National Assembly, & others**. It follows that it is those cases that were filed after the present Petition was filed that would fall on the wrong side of the *sub judice* rule, if at all there is any substance in the Respondents' arguments on this question of *sub judice.*

[97] We are well aware that the doctrine of *sub judice* prohibits courts from entertaining and adjudicating upon matters pending before courts of competent jurisdiction. The doctrine is codified in **Section 6** of the **Civil Procedure Act** as follows;

> ***6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit***

or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.

[98] In ***Edward R. Ouko v Speaker of the National Assembly and 4 Others [2017] eKLR***, the court (Mwita J) citing the decision in the High Court of Uganda in ***Nyanza Garage v Attorney General, Kampala HCCS No. 452 of 1993*** stated;

"In the interest of parties and system of administration of justice, multiplicity of suits between the same parties and under the same subject matter is to be avoided. It is in the interests of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly a multiplicity of suits clogs the wheels of justice holding up resources that would be available to fresh matters and creating and/or adding to the backlog of cases court have to deal with. Parties will be well advised to avoid a multiplicity of suits."

[99] The court further stated;

"For the doctrine to apply the following principles ought to be present;

1. ***There must exist two or more suits filed consecutively.***
2. ***The matter in issue in the suit or proceedings must be directly and substantially the same.***
3. ***The parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title.***
4. ***The suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."***

[100] We need not say anything more save to reiterate that we are satisfied that the above conditions have not been met and thus we have jurisdiction to dispose of this petition.

[101] Having dealt with the preliminary issues, the central outstanding issue of concern is the proper interpretation of ***Article 110 of the Constitution*** with specific reference to the legislative functions of the two Houses of Parliament. It is worth recalling that this question is not a novel one; rather, it has, at one point caught the attention of the Supreme Court in **Council of Governors and 47 Others versus the Attorney general and 6 others [2019] eKLR.** The Respondents in this case raised a preliminary objection that the issues raised in the reference before the Supreme Court were issues pending for determination in various Petitions pending before this court. One of the

Petitions that was singled out as pending for determination was the present petition. In a ruling on the preliminary objection dated 8th day of October 2019, the Supreme Court spelt out 12 issues that in its respectful view, ought to be determined by this court in this petition. These issues were set out in the ruling as follows;

> ***"(a) Whether a Speaker of a House of Parliament must first seek the concurrence of the Speaker of the other House of Parliament as to whether a bill is one that concerns counties, and if it is, whether it is a special or an ordinary bill, before the bill can be introduced for consideration in the originating House;***
>
> ***(b) Whether it is mandatory and a condition precedent for any bill that is published by either House to be subjected to a joint concurrence process to determine, in terms of Article 110(3) of the Constitution, whether the bill is a special or ordinary bill and that such determination is not dependent on a question arising as to whether the bill concerns counties;***
>
> ***(c) Whether the provisions of Article 110(3) are couched in mandatory terms and is a condition precedent before any House of Parliament can consider a bill;***
>
> ***(d) Whether a Speaker can unilaterally make a decision as to whether a bill does or does not concern counties and whether***

a question as to whether the bill is one that concerns counties does or does not arise;

(e) Whether any bill or delegated legislation that provides for, or touches on, the mandate or the powers of Parliamentary Service Commission must be considered by the Senate as it directly affects the Senate's ability to undertake its constitutional mandate including its ability to consider bills that affect counties;

(f) Whether the Appropriation Bill 2019 is unconstitutional, null and void for violating the provisions of Articles 110(3), 218 and 222 of the Constitution;

(g) Whether Articles 3, 115, 131(2) and 259 of the Constitution impose a constitutional and legal obligation on both Speakers of Parliament, prior to submitting a bill for assent, must demonstrate compliance with the procedure set out under Articles 109 to 115 of the Constitution;

(h) Whether Standing Order 143(2) to (6) of the National Assembly Standing Orders are inconsistent with the legislative process of bills concerning counties set out in Articles 109(4), 110 t0 113, 122 and 123 of the Constitution and therefore null and void;

(i) Whether where Speakers of both Houses concur that a bill is one that concerns counties, pursuant to Article 109(4), the

bill must be passed in accordance with Articles 110 to 113, 122 and 123 of the Constitution and the Standing Orders of both Houses and is not subject to Article 114 of the Constitution;

(j) Whether or not it is a money bill where the contents of a bill affect the functions and finances of a county within the meaning of Article 114(3) of the Constitution;

(k) Whether where a bill deals with financial matters and such matters affect the finances and functions of county governments pursuant to Article 110(1) (c), the bill is a bill concerning county governments and must be considered by Senate; and

(l) Whether an act of Parliament constitutes an act that has complied with the legislative process required by both Houses by participation of both Speakers as required under Article 110(3) of the Constitution and the Bill concerns counties by consideration in the Senate as required in the Constitution"

[102] It follows that as far as the determination of the question at hand is concerned, the Supreme Court has set out a clear path which this Honourable Court must follow. We are, of course, minded that the list of issues outlined by the Supreme Court is not exhaustive and nothing bars this Court from coming up with any other issue which, in

its view, is relevant in determination of the present Petition. We also acknowledge that some of the parties framed their own issues which, in their view, are also relevant for determination of the present dispute. By way of summary these issues are;

i. Whether there is need for concurrence between the Speakers of the two Houses of Parliament before either House considers a Bill.
ii. The meaning of a Bill concerning county government as envisaged under Article 110 (2) of the Constitution.
iii. How does the Constitution empower the Senate to protect the interest of the Counties?
iv. Whether the National Assembly Standing Orders are in line with the Constitution.
v. Whether the impugned statutes are unconstitutional.
vi. Whether certain exhibits, to the petitioner's replying affidavit to the petition and the respondent's replying affidavit sworn by Hon. Lusaka are admissible in evidence.
vii. The reliefs this court should issue.
viii. Whether the cross petition should be allowed.
ix. Whether the process that midwifed the Health Laws (Amendment) Act meet the parameters enumerated under Article 10 of the Constitution of Kenya.
x. Whether the Health Laws (Amendment) Act 2019, impedes the highest attainable standard of access to health care and

whether it infringes the economic rights of the 4th interested party and other suppliers of medical commodities to public health facilities.

xi. What is the role of Senate in the legislative making process?

xii. What is the role of the courts in nurturing devolution?

xiii. Whether the respondent's carried out adequate, qualitative and meaningful public participation in the enactment of Section 4 of the Health Laws Amendment Act, 2019.

xiv. Whether Senate was involved in the passing of the Health Laws Amendment Act, 2019.

[103] No doubt, there is an overlap of these issues and the issues set forth by the Supreme Court. What is clear and without any attempt to underestimate the weight of any other issue raised by any other party, the overarching issue revolves around the import of ***Article 110 of the Constitution*** *vis-a-vis* the legislative functions of the two Houses of Parliament. This means that the resolution of the dispute surrounding the proper and correct interpretation of ***Article 110 of the Constitution***, will automatically resolve some, if not all the issues that flow from the interpretation of the particular ***article of the Constitution***. Inevitably, the interpretation of the legislative functions of the two Houses of Parliament, in the context of the procedures laid out in ***Article 110 of the Constitution*** is an issue that naturally calls for our immediate attention. To the extent that they are relevant to the interpretation of ***Article 110 of the Constitution*** we shall have regard to ***Articles 109 to***

114 of the Constitution without necessarily excluding any other Article in the Constitution that would be deemed relevant.

[104] As far back as 2013, what now appears to be a long standing contest between the two Houses on their respective legislative functions was brought to the attention of the Supreme Court **In the matter of the Speaker of the Senate & Another [2013] eKLR**. In that Reference, the Speaker of the Senate and the Senate of the Republic of Kenya sought an advisory opinion on the constitutional propriety of the National assembly exclusively deliberating on a Bill or exclusively processing bills into law without any reference whatsoever to the Senate. The Reference was provoked by the action of the National Assembly in concluding deliberations on the ***Division of Revenue Bill 2013***, which was then transmitted to the President for his assent and later enacted into law, the ***Division of Revenue Act No. 31 of 2013***. The grievances then, were as they are in the present petition, that the National Assembly had ignored the Senate in the legislation process.

[105] As earlier noted, at the heart of the dispute between the two Houses, is the process in the exercise of legislative powers of Parliament. The functions of the two Houses in respect of the exercise of these powers have not been left to speculation; the Constitution expressly lays out the extent and the manner in which these powers ought to be exercised by either House of Parliament. Articles 109 to 114 of the Constitution lay out, what in our humble view, a clear path

for the exercise of those powers by the two Houses. That being the case, the ideal point from which we can begin interrogating this question is ***Article 109 of the Constitution***. The Article reads as follows:

> ***109. Exercise of legislative powers***
>
> ***(1) Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President.***
>
> ***(2) Any Bill may originate in the National Assembly.***
>
> ***(3) A Bill not concerning county government is considered only in the National Assembly, and passed in accordance with Article 122 and the Standing Orders of the Assembly.***
>
> ***(4) A Bill concerning county government may originate in the National Assembly or the Senate, and is passed in accordance with Articles 110 to 113, Articles 122 and 123 and the Standing Orders of the Houses.***
>
> ***(5) A Bill may be introduced by any member or committee of the relevant House of Parliament, but a money Bill may be introduced only in the National Assembly in accordance with Article 114***.

[106] Generally speaking, this Article establishes the legislative power of Parliament and, it lays out the manner in which that power is to be exercised.

[107] ***Article 110 of the Constitution,*** on the other hand, is particular about Bills concerning County Government; it defines a Bill concerning County Government; it also prescribes the procedure for the enactment of such a Bill into law. Owing to its centrality in the determination of this Petition it is necessary to reproduce that Article here verbatim:

> ***110. Bills concerning county government***
>
> ***(1) In this Constitution, "a Bill concerning county government" means—***
>
> ***(a) A Bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule;***
>
> ***(b) a Bill relating to the election of members of a county assembly or a county executive; and***
>
> ***(c) a Bill referred to in Chapter Twelve affecting the finances of county governments.***
>
> ***(2) A Bill concerning county governments is—***
>
> ***(a) a special Bill, which shall be considered under Article 111, if it—***
>
> ***(i) Relates to the election of members of a county assembly or a county executive; or***
>
> ***(ii) is the annual County Allocation of Revenue Bill referred to in Article 218; or***

(b) An ordinary Bill, which shall be considered under Article 112, in any other case.

(3) Before either House considers a Bill, the Speakers of the National Assembly and Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill.

(4) When any Bill concerning county government has been passed by one House of Parliament, the Speaker of that House shall refer it to the Speaker of the other House.

(5) If both Houses pass the Bill in the same form, the Speaker of the House in which the Bill originated shall, within seven days, refer the Bill to the President for assent.

[108] Of particular interest is ***Sub Article 3***, which, as earlier observed in this Judgment, is, to a great extent, the foundation of the dispute before us. In addressing this issue, we seek to answer the question whether concurrence of the Speakers of the two Houses is a mandatory preliminary step in the legislative process. Secondly, if the answer to this question is in the affirmative, whether any law passed without concurrence of the Speakers of the two Houses is constitutional.

[109] In their submissions, the 1st to 4th Petitioners urged that the Constitution expressly provides that the Speakers of the two Houses must jointly determine, through a concurrence process whether a Bill is a Bill concerning counties ***before*** the Bill is introduced for

consideration in any House of Parliament. It is their case, that there is no constitutional basis for the National Assembly's assertion that '***a question must arise'*** in order for the Speakers to seek concurrence. In this regard, the Petitioners relied on the opinion of the **Supreme Court Reference No. 2 of 2013.** The 5th Petitioner adopted a position similar to the position as taken by the 1st to 4th Petitioner. Except for the 1st and 2nd Interested Parties, the rest of the Interested Parties supported the position taken by the Petitioners.

[110] On their part, the Respondents cited ***National Assembly's Standing Order No. 121*** and the decision in **Nation Media Group Limited & 6 others vs the Attorney General and 9 others [2016] eKLR** for their position that the Speaker of the National Assembly is enjoined to resolve the question whether a Bill concerns County Government only when there is a question or doubt as to whether or not a Bill concerns Counties. As far as the opinion of the Supreme Court in Reference 2 of 2013 is concerned, it was their respectful view that the opinion only provided general guidelines on the determination of a question as to whether a Bill concerns County Governments. The proper law, according to them, is found in the decisions in **Nation Media Case** and **Pevans East Africa Ltd & another vs Chairman Betting Control and Licensing Board and 7 others [2017] eKLR**. They also relied on **Okiya Omutatah Okoiti & 4 other v the Attorney General& 4 others; Council of Governors & 4 others (Interested Parties) [2020] eKLR**, **National Assembly of Kenya &**

another vs Institute for Social Accountability & another [2017] eKLR for the position that ***Article 110 (3) of the Constitution*** only comes into play when there is a question on whether a Bill concerns Counties.

[111] The 1st Interested Party submitted that, looking at the text of the Constitution, it is apparent that the Senate's legislative role is limited to, considering, debating and approving Bills concerning Counties. It is his case that ***Article 110 (3) of the Constitution*** does not make provision for instances where the Speakers do not agree on whether a Bill concerns Counties; such a question, in his view, is left to either House to provide a solution in accordance with their respective Standing Orders. They also urged that the **Supreme Court's Opinion in Reference No. 2 of 2013,** must be seen within the context of the question that was before the Court and that any views the Court expressed outside the question before it, must be construed as *obiter.*

[112] To an objective reader, ***Article 110 (3) of the Constitution*** would appear to be so clear that no one would expect a dispute over its interpretation, particularly, on the role of the Speakers of the two Houses of Parliament in resolving any question as to whether a Bill is a Bill concerning Counties and, if it is, whether it is a special or ordinary Bill and, the timing of such a determination.

[113] And even if it was to be assumed that this provision of the law is not that clear, the Supreme Court has, not once, but twice deliberated and pronounced itself on the meaning and application of ***Article 110***

(3) of the Constitution. In particular, the Supreme Court has come out clearly on the legal obligations of the Speakers of the two Houses envisaged under that provision of the Constitution.

[114] In **Reference No. 2 of 2013**, the question before Court related to the Division of Revenue Bill that provided for a sharing of finances between the National Government and County Government. The National Assembly's stand was that the Bill was only concerned with the financing of County Government by the National Government and therefore was the exclusive legislative responsibility of the National Assembly. The Applicant maintained that as the County Government had a major interest in the monies in question, it ought to have involved the Senate legislative contribution and; more importantly, no valid law could be enacted without such legislative contribution. It is on that basis that the Senate and its Speaker moved the Supreme Court for its opinion.

[115] It was urged on behalf of the Speaker of the National Assembly who was party to the Reference, that, even though the Constitution referred to Parliament in relation to the initiation of legislation, this does not always point to both Chambers at the same time. Counsel for the Speaker of the National Assembly alluded to ***Article 109 (3) of the Constitution*** which shows that the mandate in the enactment of certain Bills lay with the National Assembly exclusively and that the Senate could only be concerned with matters of County Government.

[116] In its opinion, the Supreme Court, made the following observation:

> ***[139] A fundamental element in the scaffolding structure for the said constitutional principles and values, is the institutional scheme of bicameralism in the legislative arrangement; and this is the dual-Chamber set-up in the institutions of law-making. The Constitution provides for a bicameral system, with each unit playing its role as prescribed. Article 93 stipulates:***
>
> > ***"(1) there is established a Parliament of Kenya, which shall consist of the National Assembly and the Senate.***
> >
> > ***"(2) The National Assembly and the Senate shall perform their respective functions in accordance with this Constitution."***
>
> ***[140] in the operations of each of the Chambers of Parliament, the role of the presiding officer, namely the Speaker, is critical. In respect of this office, the Constitution [Article 106 (1)] thus provides:***
>
> > ***"(1) there shall be –***
> >
> > ***a. A Speaker for each House of Parliament, who shall be elected by that House in accordance with the Standing Orders, from among persons who are qualified to be elected as members of Parliament but are not such members…."***

[141] It is quite clear, though some of the counsel appearing before us appeared to overlook this, that the business of considering and passing of any Bill is not to be embarked upon and concluded before the two Chambers, acting through their Speakers, address and find an answer for a certain particular question: What is the nature of the Bill in question" The two Speakers, in answering that question, must settle three sub-questions – before a Bill that has been published, goes through the motions of debate, passage, and final assent by the President. The sub-questions are:

a. is this Bill concerning county government" And if it is, is it a special or an ordinary bill"

b. is this a bill not concerning county government"

c. is this a money Bill"

[142] How do the two Speakers proceed, in answering those questions or sub-questions" They must consider the content of the Bill. They must reflect upon the objectives of the Bill. This, by the Constitution, is not a unilateral exercise. And on this principle, it is obvious that the Speaker of the National Assembly by abandoning all engagement or consultation with the Speaker of the Senate, and proceeding as he did in the matter before this Court, had acted contrary to the Constitution and its fundamental principles regarding the harmonious motion of State institutions.

[143] Neither Speaker may, to the exclusion of the other, "determine the nature of a Bill": for that would inevitably result in usurpations of jurisdiction, to the prejudice of the constitutional principle of the harmonious interplay of State institutions.

[144] It is evident that the Senate, though entrusted with a less expansive legislative role than the National Assembly, stands as the Constitution's safeguard for the principle of devolved government. This purpose would be negated if the Senate were not to participate in the enactment of legislation pertaining to the devolved units, the counties [Article 96(1), (2) and (3)].

[145] It is clear to us, from a broad purposive view 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 a Bill should be harmoniously settled through mediation. An obligation is thus placed on the two Speakers, where they cannot agree between themselves, to engage the mediation mechanism. They would each be required each to appoint an equal number of members, who would deliberate upon the question, and file their report within a specified period of time. It is also possible for the two Chambers to establish a standing mediation committee,

to deliberate upon and to resolve any disputes regarding the path of legislation to be adopted for different subject-matter.

[117] It is apparent from these excerpts that the Supreme Court has set out in clear, unequivocal and unambiguous terms the answer to the question whether concurrence of the Speakers of the two Houses is a mandatory preliminary step in the legislative process.

[118] Contrary to the Respondents' argument that the Supreme Court's Opinion was nothing more than mere guidelines, the Supreme Court, itself has come out clearly and set the record straight that this was not just an opinion. Rather, it is an opinion with the force of law and which binds all and sundry including all state organs not least, the two August Houses. For avoidance of doubt, this was clearly stated **In the Matter of Interim Independent Electoral Commission [2011] eKLR** where at paragraphs 93 and 94 of its opinion, the Supreme Court stated as follows:

> ***"While an Advisory Opinion may not be capable of enforcement in the same way as ordinary decisions of the Courts (in the shape of Rulings, Judgments, Decrees or Orders), it must be treated as an authoritative statement of the law. The Opinion must guide the conduct of not just the organ(s) that sought it, but all governmental or public action thereafter. To hold otherwise, would be to reduce Article 163(6) of the Constitution to an "idle provision", of little juridical value. The binding nature of Advisory Opinions is***

consistent with the values of the Constitution, particularly the rule of law.

[94] For the above reasons, we decide that an Opinion of the Supreme Court is binding as much as any other decision of the Court, as herein indicated. We agree with the Chief Justice of Nauru – another common law State that provides for the advisory jurisdiction – who thus observed in an Advisory Opinion, In the Matter of Article 55 of the Constitution Reference re Dual Nationality and other Questions (Constitutional Reference No.01/2004)"

[119] We need not say anything more except, state that the answer to the question whether concurrence of the Speakers of the two Houses is a mandatory preliminary step in the legislative process is in the affirmative.

[120] This leads to the question, whether any law passed without concurrence of the Speakers of the two Houses, is constitutional. The answer to this question lies in the **Supreme Court Reference No. 2 of 2013** which we have reproduced above. For emphasis sake and owing to the importance of the Supreme Court's answer to this question, we reproduce it here:

[142] How do the two Speakers proceed, in answering those questions or sub-questions" They must consider the content of the Bill. They must reflect upon the objectives of the Bill. This, by the Constitution, is not a unilateral exercise. And on

this principle, it is obvious that the Speaker of the National Assembly by abandoning all engagement or consultation with the Speaker of the Senate, and proceeding as he did in the matter before this Court, had acted contrary to the Constitution and its fundamental principles regarding the harmonious motion of State institutions.

In short, all that the Supreme Court is saying is that any law passed without compliance with ***Article 110 (3) of the Constitution*** is unconstitutional.

[121] Apart from the Supreme Court's opinion, ***Article 2 of the Constitution*** not only asserts the supremacy of the Constitution but it also, in the same vein, removes any doubt on constitutionality of a law enacted contrary to the Constitution; it reads as follows:

"***2. Supremacy of this Constitution***

(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

(2) No person may claim or exercise State authority except as authorised under this Constitution.

(3) The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.

(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the

inconsistency, and any act or omission in contravention of this Constitution is invalid.

(5) The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

[122] Of particular relevance is ***Sub Article 4*** that any law or any act or omission in contravention of this Constitution is invalid. So the actions of the National Assembly to pass the impugned laws without reference to the Senate contrary to ***Article 110 (3) of the Constitution*** falls into this category of laws that ***Article 2 (4) of the Constitution*** frowns upon. They are simply unconstitutional.

[123] The ***Health Laws (Amendment) Act*** which was the concern of the 5th Petitioner should also be seen in the same light. We are minded that apart from non- compliance ***with Article 110 (3) of the Constitution***, the 5th Petitioner also complained about lack of public participation in the enactment of those laws contrary to the provisions ***of Articles 10 (2) and 118 (1)(a) & (b).*** They also impugned the amendments on grounds that they did not comply with ***Article 227*** on public procurement. The 4th Interested Party shared the same position with the 5th Petitioner on these constitutional breaches but added that the Respondents also violated ***Article 43 (1) (a)*** on the highest standards of health and ***Article 46(1)*** on consumer rights. While we

agree with the 5th Petitioner and the 4th Interested Parties that these breaches are in themselves a sufficient ground to annul the amendments, we must be quick to point out that the amendments would still have been nullified as long as they did not meet the threshold set out in ***Article 110 (3) of the Constitution***; the ultimate result being that they are unconstitutional.

[124] Besides the impugned Acts, the Petitioners as earlier noted, challenged the constitutionality of ***Standing Order 121 (2)*** and ***143 (2) to (6) of the National Assembly Standing Orders***. By way of recapitulation, the bone of contention against ***Standing Order 121 of the National Assembly*** was that at the end of the 11th Parliament, the National Assembly unconstitutionally amended the Standing Order to do away with the concurrence process required under ***Article 110 (3) of the Constitution*** and introduced a procedure which provides that both speakers are required to jointly resolve the *"question of whether a Bill concerns Counties"* only when a question as to the nature of the Bill arises. Prior to the amendment, ***Standing Order 121*** read as follows;

> ***"(1) Upon publication of a Bill, and before the First Reading, the Speaker shall determine whether:***
>
> ***a. It is a Bill concerning county governments and if it is, whether it is a special or an ordinary Bill or,***
>
> ***b. It is not a Bill concerning county governments.***

"(2) The Speaker shall communicate the determination under paragraph (1) to the Speaker of the Senate for concurrence.

"(3) Where the Speaker of the Senate does not concur with the determination of the Speaker under paragraph (1), the Speaker shall, jointly with the Speaker of the senate, resolve any question whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill."

[125] It is instructive to note that under ***Standing Order No. 121(2)***, before the publication of a Bill, the Speaker of the National Assembly, was required to communicate to the Speaker of the Senate, his determination whether the Bill concerned county governments and if it was, whether it was a special or an ordinary Bill. No doubt, the rationale behind sending the Bill to the Speaker of the Senate was to seek his concurrence in accordance with ***Article 110 (3) of the Constitution***.

[126] In **Reference No. 2 of 2013** the Supreme Court was of the opinion that based on ***Standing Order No. 121*** as it then stood, the requirement for a joint resolution of the question of whether a Bill is one concerning counties, is a mandatory one. And that the legislative path is well laid out. This path according to the Supreme court starts with a determination by either Speaker depending on the origin of the Bill; such a determination is communicated to the other speaker with a

view to obtaining concurrence, failing concurrence, the Speakers are to jointly resolve the question.

[127] In the wake of the opinion of the Supreme Court, the National Assembly proceeded to amend ***Standing Order No.* 121** and came up with a version which reads as follows;

> ***Bills concerning county government***
>
> ***121. (1) A Bill concerning county governments is—***
>
> ***(a) a special Bill, which shall be considered under Article 111 of the Constitution if it—***
>
> ***(i) relates to the election of members of a county assembly or a county executive; or***
>
> ***(ii) is the annual County Allocation of Revenue Bill referred to in Article 218 of the Constitution; or***
>
> ***(b) an ordinary Bill, which shall be considered as provided under Article 112of the Constitution, in any other case.***
>
> ***(2)<u>Whenever any question arises</u> as to whether a Bill is a Bill concerning county governments, the Speaker shall determine whether the Bill is a Bill concerning county governments and, if it is, whether it is a special or an ordinary Bill.***
>
> ***(3) Pursuant to Article 110(3) of the Constitution, the Speaker of the National Assembly and the Speaker of the Senate may agree on an appropriate framework for***

jointly resolving the question under paragraph (2). (emphasis added)

[128] It is clear from the amended version that the intention of the National Assembly was to exclude the Speaker of the Senate from the exercise of determination of whether a Bill is a Bill concerning County Government and if so whether it is an ordinary or special Bill. This amendment was obviously mischievous because the Supreme Court in its interpretation of ***Article 110 (3) of the Constitution*** stated in categorical terms that under that Article, it is incumbent upon both Speakers of the National Assembly and the Senate to concur and that it is not a question for determination by either of them to the exclusion of the other. So the effect of the amendment was not only to circumvent the opinion of the Supreme Court but it was also clearly inconsistent with ***Article 110 (3) of the Constitution***. It is inconceivable that the National Assembly could purport to supplant clear provisions of the Constitution with its own Standing Orders. We need not say more on this issue, other than to say that to the extent that the amendment of the ***Standing Order No. 121*** is inconsistent with the Constitution it is unconstitutional.

[129] ***Standing Order No. 143 (2) to (6)*** of the National Assembly Standing Orders, on the other hand, reads as follows;

Consideration of Bills originating from the Senate

143. (1) Whenever the Speaker receives a Bill originating in the Senate, the Speaker shall—

(a) cause the fact to be known to the House by way of a Message;

(b) cause the Bill to be read a First Time.

(2) Following First Reading, the Speaker shall, within reasonable time, pronounce his or her opinion contemplated under Article 114(2) of the Constitution.

(3) Where the opinion of the Speaker under paragraph (2) is to the effect that the Bill is not a money Bill, the Bill shall be proceeded with in the same manner as a Bill originating in the National Assembly after First Reading.

(4) Where the opinion of the Speaker under paragraph (2) is to the effect that the Bill is money Bill in terms of Article 114 of the Constitution, the Bill shall stand referred to the Budget and Appropriations Committee.

(5) The Budget and Appropriations Committee shall consider the Bill and report its recommendations to the House.

(6) Where the Budget and Appropriations Committee recommends that the House—

(a) proceeds with the Bill, the Bill shall be proceeded with in the same manner as a Bill originating in the National Assembly after First Reading in the manner recommended by the Budget and Appropriations Committee;

(b) should not proceed with the Bill, that fact shall be recorded in the journals of the House.

[130] The Petitioners' contention against this Standing Order was that the National Assembly has persistently declined to consider Bills originating from the Senate on the pretext that those Bills are Money Bills which can only originate from the National Assembly in accordance with Article 109 (5) as read with Article 114 of the Constitution. All we can say on this question is that Bills originating from the Senate are, like any other Bill, subject to the same legislative process outlined in ***Article 110 (3) of the Constitution*** and, for clarity, in **Reference No. 2 of 2013**; it is not up to the Speaker of the National Assembly to arrogate to himself the task of determining whether such Bills are Money Bills or not. And to the extent that ***Standing Order No. 143 (2) to (6)*** purports to give him such powers, it is also unconstitutional.

[131] Besides the concerns raised on the constitutionality of the impugned Acts, the petitioners also urged us to consider the question of the meaning of a Bill concerning County Government. The answer to this question is again a well-trodden path and in finding it we need not go further than the Supreme Court's opinion in ***Re the Matter of the Interim Independent Electoral Commission, Sup. Ct. Const. Appl. 2 of 2011 [para 40]*** where the court stated of this question as follows;

"We consider that the expression "any matters touching on county government" should be so interpreted as to incorporate any national-level process bearing a significant impact on the conduct of county government. However, interpretation in this category is to be made cautiously, and on a case-by-case basis, so as to exclude matters such as fall outside this Court's Advisory-Opinion jurisdiction."

[132] In this case the Supreme Court had been confronted with the question of what amounts to "Bill concerning County Government". In coming to the decision it made, the Supreme Court acknowledged that there is no definite definition of what this phrase means and that, each case must be determined on the basis of its peculiar circumstances. In fact, the Court acknowledged that there is uncertainty, as to the scope of this phrase and owing to this uncertainty the obligation is on the Court, in appropriate circumstances, to consider the facts and circumstances and to rely on established principle in establishing the situation in each case. (See paragraph 99 and 100 of **Reference No. 2 of 2013**)

[133] Before we conclude, we are minded that the Respondents filed a Cross-Petition besides responding to the Petitioners' Petition. We have, earlier in this judgment, alluded to what we deemed this Petition to be in the context of the Petitioners' Petition. But if we have to say anything more about it, it is that while addressing the Petitioners' Petition we have in the same breath dealt with the issues

raised in the Cross- Petition. In particular, the reliefs sought in prayers (1) to (6) were issues directly in issue in the Petitioners' Petition and our position on those issues are as already stated in this judgment. As far as the rest of the prayers are concerned, they are outside the scope of this Petition. When we consider the timing of the Cross Petition and the issues raised in it, we are tempted to conclude that the Cross Petition was filed to obfuscate the fundamental issue raised in this Petition, which is, the extent of the legislative functions the two Houses of Parliament.

CONCLUSION

[134] As it may have been observed, the issues raised by the Supreme Court as being pertinent to the resolution of this petition have been framed as questions whose answers can only be either in the affirmative or in the negative. In view of our analysis of the facts and the law, the answers to issues itemised as (a), (b), (c), (e), (f), (g), (h), (i), (j), (k) and (l) are all in the affirmative. As far as issue (d) is concerned, we are of the view that neither of the speakers of the two houses can decide, unilaterally whether a bill does or does not concern counties. Similarly, neither of them can decide, without consulting the other, when a question as to whether the bill concerns counties, arises.

[135] Our decision is, no doubt, heavily influenced by the opinion of the Supreme Court in **Reference No. 2 of 2013**. According to the doctrine of *stare decisis* we are bound by that opinion, not least,

because it has the force of law. But over and above being bound, we are in total agreement with the Supreme Court's pronouncement on its interpretation of the various provisions of the Constitution to the extent they are relevant to the present dispute. It is for this reason that we cannot resist echoing the court's thoughts on the supremacy of the Constitution and the obligation placed upon the courts generally to rise to the occasion and affirm this supremacy, whenever they are called upon to, and whenever this supremacy is threatened by acts of organs of the state or individuals in those organs in a purported exercise of their constitutional or statutory roles.

[136] It is in this context that we find the words of the Supreme Court in paragraphs 53 and 54 of its opinion in Reference No. 2 of 2013 quite befitting as we conclude this judgment. While quoting ***Karle Klare*** in his article, ***"Legal Culture and Transformative Constitutionalism" published in South African Journal of Human Rights, Vol. 14 (1998).*** The court noted as follows:

> ***"[53] The history of political change in South Africa will remain highly relevant for those African countries, like Kenya, seeking to evolve democratic constitutional systems out of a past of skewed and repressive governance. And by the settled technique of the comparative method in law, we draw from that country's achievements in constitutional precedent. We in this Court, conceive of today's***

constitutional principles as incorporating the transformative ideals of the Constitution of 2010: we bear the responsibility for casting the devolution concept, and its instruments in the shape of county government, in the legitimate course intended by the people. It devolves upon this Court to signal directions of compliance by State organs, with the principles, values and prescriptions of the Constitution; and as regards the functional machinery of governance which expresses those values, such as devolution and its scheme of financing, this Court bears the legitimate charge of showing the proper course.

[54] The context and terms of the new Constitution, this Court believes, vests in us the mandate when called upon, to consider and pronounce ourselves upon the legality and propriety of all constitutional processes and functions of State organs. The effect, as we perceive it, is that the Supreme Court's jurisdiction includes resolving any question touching on the mode of discharge of the legislative mandate."

[137] And to the specific questions raised in this petition the Court said at paragraphs 61 and 62 of its opinion thus:

"[61] It emerges that Kenya's legislative bodies bear an obligation to discharge their mandate in accordance with the terms of the Constitution, and they cannot plead any internal

rule or indeed, any statutory scheme, as a reprieve from that obligation. This Court recognizes the fact that the Constitution vests the legislative authority of the Republic in Parliament. Such authority is derived from the people. This position is embodied in Article 94(1) thereof. The said Article also imposes upon Parliament the duty to protect the Constitution and to promote the democratic governance of the Republic. Article 93(2) provides that the national Assembly and the Senate shall perform their respective functions in accordance with the Constitution. It is therefore clear that while the legislative authority lies with Parliament, the same is to be exercised subject to the dictates of the Constitution. While Parliament is within its general legislative mandate to establish procedures of how it conducts its business, it has always to abide by the prescriptions of the Constitution. It cannot operate besides or outside the four corners of the Constitution. This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.

[62] However, where a question arises as to the interpretation of the Constitution, this Court, being the apex judicial organ in the land, cannot invoke institutional comity to avoid its constitutional duty. We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way."

[138] We have no better way to put it than what the Supreme Court has said. However, unlike the Supreme Court which could only render an opinion, we have the constitutional mandate and indeed the obligation to decree the rights and obligations of the parties in the form of this judgment. If the respondents were ever in doubt whether they were bound by the Supreme Court's Opinion, there should not arise any doubt whether they are bound by a judgment of this Honourable Court.

[139] We were asked by the learned counsel for the respondents to consider the repercussions that may ensue if the impugned Acts are nullified, more so considering the sheer numbers involved. That indeed is a reasonable question and, at any rate, a legitimate one; however, we are of the humble view that this is not the proper forum to ask that question. We say so because had the National Assembly paused and asked itself the same question before it set out to enact laws contrary to the express provisions of the Constitution and in flagrant disregard of the Supreme Court's Opinion on the role of the Senate in the legislative process, it would have appreciated the grave consequences that were bound to arise from its actions. As a court we can do no more or less than what we are duty bound to do which is to declare the impugned laws what they are-a nullity.

[140] For the present purposes, the inevitable conclusion that we have to come to is that the Petition is merited and it is hereby allowed: accordingly, we make the following orders;

i. **A Declaration be and is hereby issued that pursuant to Article 110 (3) of the Constitution, a Speaker of a House of Parliament must first seek the concurrence of the Speaker of the other House of Parliament, as to whether a bill is one that concerns counties, and if it is, whether it is a special or an ordinary bill, before the bill can be introduced for consideration in the originating House.**

ii. **A Declaration be and is hereby issued that it is mandatory and a condition precedent for any bill that is published by either House to be subjected to a concurrence process to determine in terms of Article 110 (3) of the Constitution whether the Bill is special or an ordinary bill and that such determination is not dependent on "a question arising" as to whether the Bill is one that concerns Counties;**

iii. **A Declaration be and is hereby issued that the provisions of Article 110 (3) of the Constitution are couched in mandatory terms and is a condition precedent before any House of Parliament can consider a bill;**

iv. **A Declaration be and is hereby issued that pursuant to Article 110 (3) of the Constitution, one Speaker cannot unilaterally make a decision as to whether the Bill does or does not concern counties or whether a question as to whether the Bill is one that concerns counties does or does not arise;**

v. **An order be and is hereby issued ordering the immediate cessation of consideration of all bills that are pending before either House, and for which joint concurrence by the Speakers of both Houses as to whether the bills concern counties, has not been demonstrated to allow for such Bills to be subjected to the mandatory joint concurrence process contemplated under Article 110 (3) of the Constitution;**

vi. **A Declaration be and is hereby issued that any Bill or delegated legislation that provides for, or touches on, mandate or powers of Parliamentary Service Commission must be considered by the Senate as it directly affects the Senate's ability to undertake its constitutional mandate including its ability to consider bills that affect counties**;

vii. **A declaration be and is hereby issued that the underlisted Acts passed by the National Assembly are in contravention of Articles 96, 109, 110, 111, 112 and 113 of the Constitution and are therefore unconstitutional thus null and void;**

   i. **The Public Trustee (Amendment) Act, No. 6 of the 2018**
   ii. **The Building Surveyors Act, 2018, No. 19 of 2018**
   iii. **The Computer Misuse and Cybercrime, Act, No. 5 of 2018**

iv. **The Statute Law (Miscellaneous Amendment Act), No. 4 of 2018**

v. **The Kenya Coast Guard Service Act. No. 11 of 2018**

vi. **The Tax Laws (Amendments) Act, No. 9 of 2018**

vii. **The Statute Law (Miscellaneous Amendments) Act, No. 18 of 2018**

viii. **The Supplementary Appropriation Act, No. 2 of 2018;**

ix. **The Equalization Fund Appropriation Act No. 3 of 2018**

x. **The Sacco Societies (Amendment) Act, 2018 No. 16 of 2018**

xi. **The Finance Act, No. 10 of 2018**

xii. **The Appropriations Act, No. 7 of 2018**

xiii. **The Capital Markets (Amendments) Act, No. 15 of 2018**

xiv. **The National Youth Service Act No. 17 of 2018**

xv. **The Supplementary Appropriations Act, No. 13 of 2018**

xvi. **The Health Laws (Amendment)Act, No. of 5 of 2019**

xvii. **The Sports (Amendment) Act, No. 7 of 2019**

xviii. **The National Government Constituency Development Fund Act, 2015**

xix. **The National Cohesion and Integration (Amendment) Act, 2019**

xx. **The Statute law (Miscellaneous Amendment) Act, 2019**

xxi. **The Supplementary Appropriation Act, No. 9 of 2019**

xxii. **The Appropriations Act, 2019**

xxiii. **The Insurance (Amendment) Act, 2019**

viii. **A declaration be and is hereby issued that the amendments to Section 4 of the Kenya Medical Supplies Act is contrary to Articles 6, 10, 43(1), 46(1) 73(1), 110(3), 189(1), and 227(1) of the Constitution and is therefore unconstitutional thus null and void.**

ix. **A declaration be and is hereby issued that the provisions of Standing Order 121(2) of the National Assembly Standing Orders is inconsistent with Articles 109(4), 110 to 113, 122 and 123 of the Constitution and is therefore null and void.**

x. **A declaration be and is hereby issued that Standing Order 143(2) to (6) of the National Assembly Standing Orders is inconsistent with Articles 109(4), 110 to 113, 122 and 123 of the Constitution and is therefore null and void.**

xi. **A Declaration be and is hereby issued that where the Speakers of the House concur that a Bill is one that concerns Counties, pursuant to Article 109(4), the Bill**

must be passed in accordance with Articles 110 to 113, 122 and 123 of the Constitution and the Standing Orders of both Houses and is not subject to Article 114 of the Constitution.

xii. A Declaration be and is hereby issued that an Act of Parliament constitutes an Act that has complied with the legislative process required of both Houses by participation of both Speakers as required under Article 110 (3) of the Constitution and where the Bill concerns Counties by consideration in the Senate as required in the Constitution

[141] For the prayers that we have not granted we are of the humble view that they are either couched in such general terms that it would be difficult to enforce them or have been covered in specific terms by those prayers that have been granted.

[142] As for the Cross-Petition the same is dismissed for the reasons that we have already given.

[143] As far as costs are concerned, we think that the appropriate order to make is that parties will bear their respective costs; we make this order because, firstly, we are convinced that the matter before us is a matter of great public interest and secondly, the main protagonists are state organs; if an order of costs is made against any one of them, the burden of payment of such costs will eventually rest on the taxpayer.

[144] This would have been the perfect place to end our judgment but we are inclined to say something more considering the import of the orders we have given, in particular, those orders declaring the impugned Acts as unconstitutional. We are aware that an invalid action is invalid *ab initio* and in this regard we find the words of Lord Denning in ***Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169*** apt. He noted as follows:

> ***"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."***

[145] We are persuaded by this statement of the law and it would have, therefore, been opportune for us to leave the matter here; however, we also note that the petitioners themselves sought an alternative order which in effect would suspend the order for nullification of the impugned Acts for a period of 6 months. And we are also aware of the Supreme Court decision on this point in ***Suleiman Shahbal v Independent Electoral and Boundaries Commission and 3 Others [2014] eKLR.*** In that case, the Supreme Court stated as follows;

> ***"[42] The lesson of comparative jurisprudence is that, while a declaration of nullity for inconsistency with the Constitution annuls statute law, it does not necessarily entail that all acts previously done are invalidated. In general, laws have a prospective outlook; and prior to annulling-declarations, situations otherwise entirely legitimate may have come to pass, and differing rights may have accrued that have acquired entrenched foundations. This gives justification for a case-by-case approach to time-span effect, in relation to nullification of statute law. In this regard, the Court has a scope for discretion, including: the suspension of invalidity; and the application of "prospective annulment". Such recourses, however, are for sparing, and most judicious application – in view of the overriding principle of the supremacy of the Constitution, as it stands".***

[146] We are properly guided, and in the circumstances of this case we shall suspend our orders nullifying the impugned Acts for a period of 9 months from the date of this judgment within which period the respondents ought to have complied with the provisions of Article 110 (3) of the Constitution and regularised these Acts and in default they stand nullified. Orders accordingly.

Dated, signed and delivered in Nairobi on the 29th day of October 2020

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Ngaah Jairus
PRESIDING JUDGE

……
Anthony Ndungu
JUDGE

……
Mumbua T. Matheka
JUDGE

In the presence of:

For the 1st to 4th Petitioner Ms Thanji, for Mr Orengo SC, Mr Omogeni and Mr Kilonzo Jnr.

For the 5th Petitioner, Mr Peter Wanyama, Mr Lawi

For the 1st and 2nd Respondents, Mwendwa, Mbarak Awadh.

For the 1st Interested Party, No appearance

For the 2nd Interested Party, Mr. Donald Kipkorir

For the 3rd Interested Party, No Appearance

For the 4th Interested Party, No appearance

For the 5th Interested Party, Mr Ochiel Dudley and Mr Elisha Ongoya

For the 6th Interested Party,Mr. Akusala

For the 7th Interested Party, No appearance

For the 8th Interested Party, No appearance