IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. E084 OF 2021

[CORAM: MURGOR, NYAMWEYA & LESIIT-JJA]

BETWEEN

THE SPEAKER OF THE NATIONAL ASSEMBLY
OF THE REPUBLIC OF KENYA……1ST APPELLANT
THE NATIONAL ASSEMBLY……2ND APPELLANT

AND

THE SENATE OF THE REPUBLIC OF KENYA……1ST RESPONDENT
THE SPEAKER OF THE SENATE……2ND RESPONDENT
SENATE MAJORITY LEADER……3RD RESPONDENT
SENATE MINORITY LEADER……4TH RESPONDENT
THE COUNCIL OF GOVERNORS……5TH RESPONDENT
THE ATTORNEY GENERAL……6TH RESPONDENT
KENYA MEDICAL SUPPLIES AUTHORITY……7TH RESPONDENT
INSTITUTE FOR SOCIAL ACCOUNTABILITY…….8TH RESPONDENT
MISSION FOR ESSENTIAL
DRUGS & SUPPLIES……9TH RESPONDENT
KATIBA INSTITUTE……10TH RESPONDENT
PHARMACEUTICAL SOCIETY OF KENYA……11TH RESPONDENT
ELIAS MURUNDU……12TH RESPONDENT
THE COMMISSION ON
REVENUE ALLOCATION……13TH RESPONDENT

(Being an appeal against the entire Judgment and Decree of the High Court of Kenya at Nairobi (Ngaah, A. Ndungu & T. Matheka, JJ.) dated 29th October 2020

in

HC Petition No. 284 of 2019
Consolidated with
HC Petition No. 353 of 2019)
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JUDGMENT OF THE COURT

Introduction

1. The genesis of this appeal are two Petitions filed in the High Court in Nairobi, namely Nairobi H.C Petition No. 284 of 2019, and Nairobi H.C. Petition No. 353 of 2019 (hereinafter referred to as the First Petition and Second Petition respectively). The First Petition was filed by the Senate, together with the Senate Speaker, Senate Leader of Majority and Senate Leader of Minority, who are the 1st, 2nd 3rd and 4th Respondents herein. The Second Petition was filed by the Council of Governors, the 5th Respondent herein.

2. The parties sued in the First Petition were the Speaker of the National Assembly and the National Assembly, who are the Appellants herein. The Council of Governors and Attorney General, who is the 6th Respondent herein, were also Interested Parties therein.

3. The National Assembly and Attorney General were the Respondents in the Second Petition, in which the Senate was also an Interested Party. Various parties subsequently applied to be joined in the said Petitions as Interested Parties, and they are named herein as the 7th to 13th Respondents. The two

Petitions were consolidated and heard together, and a judgment on the consolidated Petitions was delivered on 29th October 2020 by the learned High Court judges.

4. The main contention in the First Petition and by extension in this appeal, is the manner of the exercise of the legislative mandates of the National Assembly and Senate in the passing of Bills concerning the Counties. The Senate's contention was that as at 2nd July 2019, the National Assembly passed various Bills concerning Counties without involving the Senate, and the Speaker of the National Assembly unilaterally determined that the said Bills do not concern Counties, contrary to Article 110 (3) of the Constitution and the Supreme Court of Kenya's advisory opinion ***In the Matter of the Speaker of the Senate & Another*** ***[2013] eKLR*** **(**hereinafter **"Advisory Opinion Reference No.2 of 2013")**.

5. Further, that the National Assembly unconstitutionally amended Standing Order No. 121 to do away with the concurrence process on the question as to whether a Bill concerns counties required by Article 110(3) of the Constitution. The 1st to 4th Respondents accordingly sought among other remedies, the nullification of the Acts passed or amended by the National Assembly without reference to the Senate.

6. In the second Petition, the Council of County Governors on its part contended 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. They too sought nullification of these amendments.

7. The National Assembly in its response detailed the provisions as regards its mandate and framework for consideration of Bills concerning County Governments, including the alternative dispute resolution mechanisms for Inter-House disagreements. According to the National Assembly the ***Advisory Opinion Reference No.2 of 2013 (supra)*** was no longer applicable as it was predicated on the National Assembly Standing Order No. 121 which has since been amended to accord with Article 110 of the Constitution.

8. Both the National Assembly and Attorney General further opposed the consolidated Petitions on the ground that the Senate had a restricted role in the passing of Bills into Acts of Parliament and the National Assembly had the exclusive mandate to legislate and specifically to enact the impugned Acts of Parliament.

9. The National Assembly also included a Cross Petition, in which they sought various orders on the following averments:
   (a) That the requirement contained in Article 110 (3) of the Constitution of Kenya comes into play "when there is a question of doubt" as to whether a Bill concerns Counties.
   (b) That money Bills shall only originate in the National Assembly under Article 109 and 114 of the Constitution.
   (c) That under Standing Order No. 35 of the Senate Standing Orders there is no mandatory requirement for ascertainment of quorum as a

condition sin que nom before Senate can commence business contrary to the provisions of the Constitution.

(d) That, the Senate has irregularly unlawfully and unconstitutionally established offices of Leader of Minority and Majority contrary to Article 108 of the Constitution.

(e) That Article 132 (2) of the Constitution generally gives the National Assembly the exclusive mandate of approving persons nominated by the President of Kenya as State or Public officers.

10. After hearing the parties, the High Court allowed the consolidated Petitions and made the following orders in their judgment, which we shall quote verbatim in light of the issues raised in the present appeal:

> ***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 (hereinafter referred to as the "Impugned Acts")

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

11. The learned Judges also dismissed the Cross-Petition filed by the National Assembly.

12. The Appellants are aggrieved with the decision of the learned Judges and filed a Memorandum of Appeal dated 24th February 2021 which sets out 27 grounds of appeal, which may be summarised as hereunder:

a) That the Learned Judges erred in law in; narrowly interpreting Articles 109 to 114 of the Constitution on the respective legislative mandates of the two Houses; and misapplied the Supreme Court of Kenya Advisory opinions in ***Council of Governors and 47 other v the Attorney General and 6 others [2019] eKLR*** and ***in the Matter of the Speaker of the Senate & another [2013] eKLR,*** and the ***Supreme Court Advisory Opinion Reference No. 2 of 2013***, ***In the matter of the Speaker of the Senate and Another vs the Attorney General and 4 others [2013] eKLR.***

b) That the Learned Judges wrongly held that Bills not concerning County Governments must be subjected to concurrence by the two Speakers and considered by the two Houses contrary to the provision of Article 109 (3) of the Constitution;

c) That the Learned Judges erroneously held that the concurrence process is not dependent on a ''question arising'' as to whether a Bill is one that concerns Counties; that money Bills must be subjected to concurrence and considered by the by the two Speakers contrary to the provisions of Article 109 (5) of the Constitution.

d) That the Learned Judges erred by declaring various statutes which originated as money bills unconstitutional.

e) That the Learned Judges violated the doctrine of separation of powers by ordering the immediate cessation of all legislative business of the House of Parliament and consideration of all Bills that were pending before either Houses, thereby interfering in the operations of the Legislature.

f) That the Learned Judges erred in finding that any bill or delegated legislation that provides for, or touched on, the mandate or powers of the Parliamentary Service Commission must be considered by the Senate.

g) The Learned Judges wrongly found various Acts passed by the National Assembly (hereinafter referred to as "the impugned Acts") in contravention of Articles 96, 109, 110, 112, and 113 of the Constitution and null and void, without first considering the contents and objectives of the said Acts to determine whether the concerned Counties.

h) The Learned Judges wrongly purported to reverse the decisions in the cases of:

   a) ***Bloggers Association of Kenya (BAKE) vs Attorney General & 3 others: Article 19 East Africa & another (Interested Parties) [2020] eKLR*** and an appeal is currently pending before the Court of Appeal.
   b) ***Okiya Omtata Okoiti & 4 others v Attorney General & 4 others; Council of Governors & 4 others (Interested Party) [2020] eKLR*** and appeals are currently pending before the Court of Appeal.
   c) ***George Lesaloi Selelo & Another v Commissioner General, KRA & 4 others: Pevans EA Limited (t/a Sportpesa) & 3 others [2019] eKLR***

i) The Learned Judges failed to apply the doctrines of *res judicata* and *sub Judice* in so far as the issues raised in the consolidated Petitions were the subject of decisions in other court cases.

j) The Learned Judges erred by allowing unauthorised persons who had not filed Notice of Appointment of Advocates or demonstrated that they had instructions to act and represent the 1st and 2nd Respondents, to act during the hearings.

13. The 1st to 4th Respondents filed a Notice of Grounds for Affirming the Decision dated 16th March 2021, brought under Rule 94 of the Court of Appeal Rules, 2010. The Respondents affirming the decision on the grounds:

    a) That all Bills passed by the National Assembly and assented into law during the pendency of the proceedings in the High Court without complying with Articles 109 -113 of the Constitution are unconstitutional, and must be subjected to proper legislative process afresh.

    b) That the Data Protection Act, 2019 and the Parliamentary Service Act 2019, having passed in a manner not consistent with the Constitution ought to be declared unconstitutional, null and void in line with the orders of the High Court.

14. The said Grounds of Appeal and of Affirming the Decision will be urged under the issues arising from the appeal.

15. As this is a first appeal from the decision of the High Court, we reiterate this Court's role as expressed in ***Selle & Another v Associated Motor Boat Co. Ltd.& others*** ***(1968) EA 123*** where it was stated that;

> ***"this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally"***

16. Much as we have noted the 8th and 10th Respondents submissions that the standard of review in the ***Selle Case (supra)*** was inadequate, inappropriate, and insufficient in constitutional appeals, in our view, the principles in the ***Selle Case (supra)*** apply equally to constitutional appeals, because the same principles of retrial, evaluation and reanalysis of the evidence presented to the court are adopted in constitutional appeals. As such, this Court is not in any way precluded from applying principles of constitutional interpretation and adjudication where necessary.

17. We shall therefore proceed to reconsider the arguments and issues raised in this appeal alongside the evidence adduced in the High Court with this framework in mind. The dispute herein revolves around the interpretation

of the constitutional provisions as regards the circumstances and extent of the legislative mandate of the National Assembly and the Senate, the applicable procedures on implementation of the said mandates, and the processes of deliberation and resolution of any non-compliance with the said provisions.

18. We note that there were preliminary issues of *res judicata* and *sub judice* raised, touching on the jurisdiction of the High Court and this Court to hear specific issues concerning the constitutionality of some of the impugned Acts, and whether or not the questions surrounding the application of Article 110(3) of the Constitution have already been determined. There was also the challenge to Mr. James Orengo SC's legal representation of the 1st to 4th Respondents before the High Court and this Court.

19. On the legal representation of the 1st to 4th Respondents, the Appellants submitted that Mr. Orengo SC had not filed a Notice of Appointment of Advocates or demonstrated that he had instructions to act for the 1st to 4th Respondents, and to represent them during the hearings, which was contrary to the express provisions of **Order 9 Rule 7** of the Civil Procedure Rules, 2010. Therefore, that the High Court allowed an unauthorized person to represent the 1st to 4th Respondents.

20. The 1st to 4th Respondents in response submitted that the constitutional proceedings are not ordinary adversarial proceedings, and that orders arising from such Petition are orders *in rem* that raise weighty constitutional issues with a massive bearing on the public interest. It was for this reason

that the 1st to 4th Respondents supported the High Court's decision to invoke **Rule 3(8)** of the Civil Procedure Rules and **Article 159(2)** of the Constitution in holding that the lack of a Notice of Appointment was not sufficient reason for the court to dismiss the constitutional Petitions.

21. In its judgment, the High Court held that notwithstanding that Mr. Orengo did not comply with **Order 9 Rule 7** of the Civil Procedure Rules, the said non-compliance and irregularity would not adversely impact the consolidated Petitions, as there are no specific rules of procedure that have been prescribed for filing, service or other appurtenant procedural aspects of constitutional petitions filed outside **Article 22** of the Constitution.

22. The High Court relied on **Rule 3(8) of** the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, otherwise known as 'Mutunga Rules, that give the court the inherent power to make such orders as are necessary in order to meet the ends of justice; and **Article 159 (2)(d)** of the Constitution that enjoins Courts to exercise their judicial authority without undue regard to procedural technicalities, to find that failure to file a Notice of Appointment of Advocate, is one such procedural technicality. In addition, that the 1st to 4th Respondents at no time complained that they had not authorised Mr. Orengo SC to act on their behalf, and that in any event the issue of representation was raised too late in the day.

23. We are of the view that the failure to file the Notice of Appointment of Advocates by Mr. Orengo SC in the High Court was irregular, and that this

practice should not be encouraged. However, this notwithstanding, it was not fatal to the proceedings in the High Court for reasons that the substantive Petitions were properly filed and on record, and the High Court was well within its powers to determine the consolidated Petitions with or without representation of the 1st to 4th Respondents by Mr. Orengo SC. In any event, lapses in compliance with procedure on the part of counsel should not be visited on a party, as was emphasized by the Supreme Court in the case of ***National Bank of Kenya Limited vs Anaj Warehousing Limited [2015] eKLR***. Lastly, we also note that the continued representation of the 1st to 4th Respondents in this Court by Mr. Orengo SC was not contested by the Appellants.

24. On the preliminary issue of *res judicata* and *sub judice*, the Appellants urged that the High Court erred in its findings on **Article 110(3)** of the Constitution, whose interpretation had already been considered and determined in various cases including ***Nation Media Group & 6 Others v Hon. Attorney General & 9 others [2016] eKLR (Nation Media Group case)***. The Appellants further submitted that the constitutionality of some of the statutes declared unconstitutional by the High Court in the impugned judgment had already been settled by courts of concurrent jurisdiction, or were pending determination, and that in the premises, the doctrine of *res judicata* and *sub judice* applies.

25. The 5th Respondent supported the reasoning of the High Court, and were of the view that each court is mandated to independently apply its mind to the facts and come up with a reasoned decision. They invoked **Section 7** of

the Civil Procedure Act and the holding by this Court in the case of ***The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others, [2017] eKLR*.**

26. Given that the claims on the application of *res judicata* and *sub judice* were made with respect to decisions on specific Acts and Articles of the Constitution, the determination of whether or not the said doctrines are applicable will be addressed later on in the judgment, and the cases relied upon by the Appellants examined individually, while considering the impugned Acts and Articles. At this juncture we shall only define, albeit generically, the meaning of *res judicata* and *sub judice.*

27. The applicable principles on the doctrine of *res judicata* are found in **Section 7** of the Civil Procedure Act, 2010 provides;

> ***"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 the 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."***

28. This Court in the case of ***The Independent Electoral and Boundaries Commission vs Maina Kiai (supra)*** addressed the doctrine of *res judicata* thus:

> ***"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."

29. The Court continued:

> ***"…for res judicata to be effectively raised and up held on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;***
>
> > ***(a) The suit or issue was directly and substantially in issue in the former suit.***
> > ***(b) That former suit was between the same parties or parties under whom they or any of them claim.***
> > ***(c) Those parties were litigating under the same title.***
> > ***(d) The issue was heard and finally determined in the former suit.***
> > ***(e)The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."***

30. The Supreme Court reiterated this position in its judgment in ***John Florence Maritime Services Ltd & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others (2021) eKLR***, and held that the doctrine of *res judicata* prevents a litigant or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action and serves the cause of order and efficacy in the adjudication process. Further, that it ensures that litigation came to an end and prevents a multiplicity of suits. The Supreme Court however made an exception for constitutional matters, and held that exemptions to the doctrine of *res*

judicata should be permissible where there was real potential for substantial injustice if a constitutional matter was not heard on its merits, after examining the entirety of the circumstances.

31. We turn next to the meaning and effect of the *sub judice* rule. *Sub judice* is a Latin word meaning *"under judgment".* It denotes that a matter is being considered by a court or judge. The doctrine is codified in **Section 6** of the Civil Procedure Act which prescribes 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."***

32. The Supreme Court of Kenya in ***Kenya National Commission on Human Rights vs Attorney General, Independent Electoral & Boundaries Commission & 16 others [2020] eKLR*** had occasion to pronounce itself on the doctrine of *sub judice* thus;

> ***"The term 'sub judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of sub***

judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.'

33. In other words for the *sub judice* rule to apply, the conditions which must be met can be summarized as: i) The matter in issue must be directly and substantially in issue in a previously instituted suit or proceeding between the same parties; or, ii) The matter in issue must be directly and substantially in issue in a previously instituted suit or proceeding between parties under whom they or any of them claim, litigating under the same title, and iii) where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.

34. The court also opined that where a subsequently instituted proceeding or matter fits the above conditions, then the case that was filed subsequently must be stayed to await the outcome and final determination of previously instituted case.

35. These are the principles we shall employ later in the judgment to determine whether the doctrine of *res judicata and sub judicie* applied to the different cases referred to by the parties in this appeal.

36. Having dealt with the preliminary matters, we will now embark on the five substantive issues arising in this appeal, as follows:

    1. ***Whether it is mandatory and a condition precedent that any Bill published by either House of Parliament shall be subjected to the***

process under Article 110(3) of the Constitution? Two sub-issues arise in this issue:

- ***a) Which Bills are the subject of the process in Article 110(3) of the Constitution?***
- ***b) What is the condition precedent, if any, that is provided for under Article 110(3) of the Constitution?***

2. ***What is the nature of the Bills envisaged by the provisions in Articles 109 to 114 of the Constitution? There are three sub-issues in this issue:***
   - ***i.) What is the nature of a bill?***
   - ***ii.) What bills do not concern counties?***
   - ***iii.) What bills concern counties?***
3. ***Whether the impugned Acts and Bills were unconstitutional for want of the Senate's participation?***
4. ***Whether the National Assembly Standing Orders No. 121(2) is unconstitutional; and***
5. ***Whether the Appellants' cross-appeal was competently filed, and if so properly considered.***

37. Before considering the issues, we need to point out that the interpretation of Article 110 had also been raised in the Supreme Court in ***Council of Governors & 47 others vs the Attorney General & 3 others (Interested Parties); Katiba Institute & 2 Others (Amicus Curiae) [2020] eKLR***, and the said Court deferred consideration of a number of issues to be decided upon by the High Court in the decision appealed against herein, which matter was then pending determination. The High Court in its decision thereupon framed the issues before it as follows:

> ***"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."

38. After setting out the provisions of Article 109 and 110 of the Constitution, the submissions of the parties on the issue, the High Court pointed out that:

"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"

39. The High Court then proceeded to find as follows:

"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:….***
> ***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."***

40. It is therefore evident from the outset that the High Court did not engage in any interpretation of Articles 109 to 114, and wholly relied on the decision of the Supreme Court in ***Advisory Opinion Reference No.2 of 2013 (supra)*** to address the issue before it. It is notable in this respect that the issue, and findings by the Supreme Court in ***Advisory Opinion Reference No.2 of 2013 (supra)*** were in relation to the Division of Revenue Bill and not in relation to all Bills that are originated by the two Houses of Parliament. It is for this reason that the Supreme Court, in ***Council of Governors & 47 others vs The Attorney General (supra)*** framed some of the issues that needed to be decided by the High Court in this regard 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.

41. Had the Supreme Court decided these issues in ***Advisory Opinion Reference No.2 of 2013,*** there would have been no need to refer them back to the High Court, and the Supreme Court would simply have reiterated and reinforced its position. In our view the High Court, despite this clear reference, abdicated its responsibility in interpreting the provisions in Articles 109 to 113, and to give considered answers to the issues before it on the application of Article 110(3). This omission makes it incumbent upon us to interpret these provisions and answer the said issues, after considering the submissions thereon and applicable constitutional and legal provisions.

42. Our starting point in this regard is Article 259 of the Constitution, which obligates us to interpret the Constitution in a manner that—

> ***"(a) promotes its purposes, values and principles;***
> ***(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;***
> ***(c) permits the development of the law; and***
> ***(d) contributes to good governance."***

43. It is notable in this respect that constitutional interpretation includes both interpretation and construction. As explained by Vincent Crabbe in his text ***Legislative Drafting: Volume 1*** at pages 231 to 233, interpretation entails discovering the meaning of words used in a statutory or other written document, and is of various types. Authentic interpretation is used when the meaning of a word is expressly provided for in the document; usual or customary interpretation when based on accepted usages of the word;

doctrinal, when it is based on the grammatical arrangement of the words in a sentence; and logical, when based on the intention of Parliament. Crabbe also pointed out that logical interpretation can be liberal or strict.

44. Construction of a legal provision on the other hand is wider in scope than interpretation, and is directed at the legal effect or consequences of the provision in question. Interpretation must of necessity come before construction, and having ascertained the meaning of the words, one construes them to determine how they fit into the scheme of the law or legal document in question. Crabbe in this respect opines that a Constitution is in this respect different from an Act of Parliament, and describes it as a living organism capable of growth and development. In his words "a constitution is a mechanism under which laws are made, and not a mere Act which declares what the law should be". Therefore, that the construction of a Constitution demands a broad and liberal approach, and must be beneficial.

45. We are persuaded by this explanation, and indeed the approach suggested therein has been adopted by the Kenyan Courts. A holistic and purposive interpretation of the Constitution that calls for the investigation of the historical, economic, social, cultural and political background of the provision in question has been consistently affirmed by the courts. The Supreme Court in this respect explained the approach in constitutional interpretation in ***Council of Governors vs The Attorney General and 7 Others [2019] eKLR*** as follows:

> ***"[42] Under Article 2(1), the Constitution is the Supreme law of the land. Article 259 of the Constitution then gives the approach***

> ***to be adopted in interpreting the Constitution, basically in a manner that promotes its purposes, values and principles. Suffice it to say that in interpreting the Constitution, the starting point is always to look at Article 259 for it provides the matrix, or guiding principles on how it is to be interpreted and then Article 260 where specific words and phrases are interpreted. It is imperative to note that while Article 259 deals with construing of the Constitution and outlines the principles that underpin that act; Article 260 deals with interpretation, that is, it is explicit in assigning meaning to the words and phrases it addresses. Hence the opening words in that Article are: "In this Constitution, unless the context requires otherwise-".***
>
> ***[43] Consequently, in search of the meaning assigned to some words and phrases as used in the Constitution, one needs to consult Article 260 to find out if that particular term or phrase has ALREADY been defined. It is only where the same has not been defined that the Court will embark on seeking a meaning by employing the various principles of constitutional interpretation….."***

46. The various principles of constitutional interpretation have also been the subject of different decisions of this Court and the Supreme Court. In ***Re the Matter of Kenya National Commission on Human* Rights *[2014] eKLR***, the Supreme Court considered the meaning of a holistic interpretation of the Constitution, and stated:

> ***"[26] But what is meant by a 'holistic interpretation of the Constitution'? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result."***

47. This view was also expressed by the Supreme Court in ***Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others, [2015] eKLR,*** that "the Constitution should be interpreted in a holistic manner, within its context, and in its spirit."

48. A purposive interpretation on the other hand acknowledges that the meaning of language is imprecise, and measures words against contextual, schematic, and purposive considerations. Aharon Barak in the text "***Purposive Interpretation in Law***" at page 111 explains that:

> ***"According to purposive interpretation, the purpose of a text is a normative concept. It is a legal construction that helps the interpreter understand a legal text. The author of the text created the text. The purpose of the text is not part of the text itself. The judge formulates the purpose based on information about the intention of the text's author (subjective purpose) and the "intention" of the legal system (objective purpose)."***

49. As such, the purposive interpretation avoids the shortcomings of the literal approach, namely absurd interpretations or those that appear to run counter to the purpose and functioning of the legislative regime. The Supreme Court of Kenya in the case of ***Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others, [2014] eKLR,*** confirmed that a purposive interpretation should be given to statutes so as to reveal their true intention. The Court observed as follows:

> ***"In Pepper vs. Hart [1992] 3 WLR, Lord Griffiths observed that the "purposive approach to legislative interpretation" has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context***

underpinning the legislation. The learned Judge thus pronounced himself:

The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted'."

50. The persuasive decision of this Court in the case of ***County Government of Nyeri & Another v Cecilia Wangechi Ndungu [2015]*** **eKLR** is also illuminating, and it was held therein that:

"Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors."

51. The Constitution in this respect provides the purposes that should guide the Courts in interpreting it in Article 259, including the purpose of the specific provisions, and broader rule of law and good governance objectives.

52. It is with these principles in mind that we shall proceed to consider the issues raised in this appeal.

The Process under Article 110(3) of the Constitution

53. This first issue addresses the High Court's approach to the interpretation of Article 110(3) of the Constitution; the High Court's findings on the concurrence process set out in Article 110(3), and the application and implications of the ***Advisory Opinion Reference No.2 of 2013*** in this regard. The arguments on the interpretation and construction of Article 110(3), were presented on two fronts. First, whether Article 110(3) of the Constitution refers and applies to every and any Bill that originates and is proposed to be considered by the two Houses of Parliament, or whether it applies only to specific Bills. Second, whatever the bill, what state of affairs is required by the said Article before consideration of the Bill.

54. These questions will be considered under two sub-issues, namely, which Bills are subject of the process envisaged by Article 110(3), which is the subject of our next section; and what is the condition precedent, if any, that is provided for in the said Article, which we shall consider thereafter**.**

***Which Bills are the subject of Article 110(3)*?**

55. On the interpretation of Article 110(3) of the Constitution, the Appellants submitted that Article 159 of the Constitution decrees a broad and purposive interpretation of the Constitution to promote its purposes, values and principles. However, that the High Court made an incorrect

interpretation of the Constitution and failed to consider all the applicable Articles and the effect of Articles 109 to 114 of the Constitution on the legislative processes and mandates of the Senate and National Assembly. In effect, that the High Court only considered Article 110 (3) of the Constitution in its determination.

56. The Appellants in this respect urged that the wording of the Constitution was very deliberate with regard to the functions given to the National Assembly and the Senate in terms of representation, legislation and oversight. Further, that the Senate acknowledged its limited role in the legislative process, and made a number of proposals in this regard in the Report of the Select Committee of the Senate on Constitution and Legal Review. It was the Appellants contention in this regard that the constitutional intent in Article 96 of the Constitution is clear that the Senate participates in law-making by considering, debating and approving Bills concerning Counties as provided in Articles 109 to 113 of the Constitution, and has no role in the enactment of money Bills under Article 114.

57. The 6th Respondent, in support, also submitted that the High Court erred by interpreting the provisions of Article 110 (3) in isolation of other provisions of the Constitution that relate to the same matter, thereby arriving at the wrong decision. Further, that the High Court failed to consider the provision of Article 109, 110, 113 and 114 of the Constitution, which the court ought to have considered in arriving at its decision contrary to established principles of constitutional interpretation in Kenya.

58. For this proposition, the 6th Respondent placed reliance on this Court's decision in the case of ***Attorney General & another vs Andrew Kiplimo Sang Muge & 2 others [2017] eKLR*** for the proposition that "*no one provision of the Constitution is to be segregated from all others to be considered alone, but all provisions bearing on a particular subject is to be brought into view*" and on the case of ***Kenya Human Rights Commission & another vs Attorney General & 6 others [2019] eKLR*** for the proposition that "*all provision bearing on a particular issue should be considered together to give effect to the purpose of the instrument*".

59. The 1st to 4th Respondents on the other hand submitted that that the 2010 Constitution moved Kenya to a bicameral Parliament, and established devolution as a key pillar of the Constitution in Article 10. Further, that Article 96 of the Constitution sets out both the role of Senate and its law making functions. In addition, that the Supreme Court's ***Advisory Opinion Reference No. 2 of 2013 (supra)*** pronounced itself on role of the Senate as a fundamental part of the legislative process because is it the body at the National level that protects counties and devolution.

60. According to the 1st to 4th Respondents, and while placing reliance on Article 203 (1) of the Constitution, any legislation enacted without the involvement of the Senate and by concurrence of the Speakers on whether it is a Bill concerning County Government as required in Articles 109 (4) and 110 of the Constitution, is unconstitutional, null and void. The decision in the case of ***Advisory Opinion Reference No.2 of 2013*** was cited for this proposition.

61. The 5th Respondent on its part made reference to Article 96 of the Constitution, and placed reliance on the writings by **John Mutakha Kangu** in ***Constitutional Law of Kenya on Devolution*** at page 346 for the proposition that;-

> ***"The Senate provides a forum for the representation and protection of Counties and their governments as well their interests in the decision making processes at the national level and the participation of the Counties and indirectly their government in such processes… this creates a nexus between devolution and the Senate which provides a forum through which the Counties and their governments engage in decision making at the national level."***

62. The 5th Respondent also placed reliance on the case of ***In the Matter of the Interim Independent Electoral Commission [2011] eKLR*** where the Supreme Court expressed on the nexus between bicameralism and devolution.

63. These sentiments were echoed by the 8th and 10th Respondents, who submitted that the Senate's mandate is not limited but is broadened by Article 94 of the Constitution, and that the Supreme Court in ***Council of Governors & 47 others vs the Attorney General*** ***(supra)*** rendered an extensive and authoritative interpretation of Articles 93, 94, 95 and 96 of the Constitution. The said Respondents urged that Article 94 (4) empowers Parliament to protect the Constitution and promote the democratic governance of the Republic of Kenya, and that the Constitution, consistent with bicameralism, casts no limit on the Senate powers.

64. We have considered the arguments made by the parties on the approaches to be taken in interpreting and construing Article 110(3) of the Constitution. The starting point of our interpretation of Article 110(3) of the Constitution is its text, so as to discern its grammatical and plain meaning if possible, and to fill in the textual detail if necessary by construction. It provides as follows:

> ***"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."***

65. The subject of the sub Article is "a Bill". The word "a" when used before a noun such as "Bill" in the present appeal is an indefinite article, and defines the noun as something non-specific, generic or something mentioned for the first time. In this sense, it could refer to one, any, some or every Bill. However, the context may limit this wide interpretation with several meanings of "a Bill" in Article 110(3).

66. We are in this respect guided by the fact that the immediate context of the usage of the word "a Bill" is Article 110, whose subject is "Bill, it concerns County governments" and the manner of enactment of such a Bill. In addition, the constitutional context and purpose of the said sub- Article is the implementation of the provisions on the national legislature in Chapter Eight of the Constitution. The Chapter establishes Parliament in Article 93, which consists of two Houses, namely the National Assembly and Senate. In effect, Article 93 established a bicameral national legislature.

67. The Appellants and the Respondents in their submissions seemed to suggest that a unitary state and bicameral legislatures are mutually exclusive, and that such legislature can only exist in federal states. A bicameral legislature is simply a legislature made up of two chambers, and the purpose and composition of the second chamber differs, depending on the needs of a particular state and its political system. The second chamber can exist to provide technical review and scrutiny of legislation, to provide territorial representation of states, provinces or regions, to provide breadth of representation by including certain minority communities or by giving an institutional voice to certain social, economic and cultural interests, and to provide an additional democratic 'check and balance' to the incumbent government. (examples).

68. Our structure of government is a devolved structure with distinct national and county governments, as specifically acknowledged by Article 6 of the Constitution. Therefore, a bicameral legislature is necessary in such a structure to represent and protect the interests of the county governments at the national level, for reasons that even though we are territorially one state, the counties are constitutionally recognized as distinct political social and economic entities.

69. The representation, lawmaking functions and oversight roles of the two houses of Parliament are therefore detailed in Articles 94, 95 and 96 of the Constitution. As regards the lawmaking functions, which is the focus of this appeal, Articles 95(3) of the Constitution provides that the National Assembly enacts legislation in accordance with Part 4 of Chapter Eight, which part provides for the procedures for enacting legislation in Articles

109 to 116 of the Constitution. On the other hand, Article 96(2) of the Constitution provides that the Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113 of the Constitution.

70. These provisions were considered by the Supreme Court in ***Council of Governors & 47 Others vs The Attorney General & 3 Others*** ***(supra)*** as follows:

> ***"[138] The overlap and shared mandate is even more explicit in the two Houses' legislative role. Under Article 95(3), the National Assembly enacts legislation in accordance with Part 4 of Chapter 8 of the Constitution. That Part runs from Articles 109 to 116 of the Constitution and deals with the legislative procedure; who and where Bills can be originated; what is "a money Bill" that can only be originated and exclusively passed by the National Assembly; the definition of a "Bill concerning County Government"; special and ordinary Bills concerning counties; mediation where the two Houses of Parliament cannot agree on a Bill; Presidential assent and referral; and the coming into effect of Acts passed by Parliament.***
>
> ***[139] The Senate has been given more or less the same roles. Save for the Money Bills, the definition of which I will deal with in a moment, the Senate also participates in the legislation of all the Acts of Parliament in accordance with the self-same Part 4 of Chapter 8 of the Constitution. Article 96(2) makes this clear: "The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Article 109 to 113."***

71. It is thus evident in this respect that Article 110(3) can only be interpreted in the context of the law making roles and procedures of the Senate and National Assembly as specified in Articles 109 to 116 of the Constitution. This starting point in terms of the textual and constitutional context of

Article 110(3) is important in terms of both delineating the extent of the law making powers of the two Houses, and the nature and content of the powers as set out in Article 109 to 113 of the Constitution. Article 109 in this regard details how both the National Assembly and Senate exercise legislative powers as follows:

> "**(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."***

72. An important observation and implication in terms of context that arises from Article 109, is that the law making powers and functions of the National Assembly and of the Senate are asymmetric. A bicameral Parliament is asymmetrical when the law making powers of one of the houses is constitutionally restricted, or has limited powers over some areas of legislation and stronger powers over others. In symmetrical bicameralism on the other hand, the two houses have equal or nearly equal powers: the consent of both houses is usually needed for the enactment of laws, and the lower house cannot unilaterally override vetoes or amendments adopted by the upper house, or can do so only with difficulty normally by a supermajority.

73. It is evident from Article 109, firstly, that Senate's law making powers is limited to Bills concerning county government. Article 110 is dedicated to Bills concerning county governments, which are of two categories, namely special or ordinary Bills. Article 110(1) of the Constitution in this regard defines Bills concerning county governments as follows:

> ***"(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."***

74. The remit and character of the Bills envisaged in Article 110(1) will be further interpreted later on in this judgment. Article 110(2) specifies which of these Bills are special bills and ordinary Bills, with the special Bills being those that relate to the election of members of a county assembly or a county executive or the annual County Allocation of Revenue Bill referred to in Article 218. All other bills concerning county governments are categorized as ordinary Bills. These categorizations of the Bills concerning county governments has implications in terms of the procedure to be followed in the enactment of which is detailed and is the subject of Articles 111 to 113 of the Constitution.

75. The import of the provisions in Article 111 to 113 of the Constitution is that even though the law making powers of Senate are limited to Bills concerning county governments, the Senate also has extensive powers in relation to special Bills concerning county governments that originate from

it, as the same cannot easily be overridden or vetoed by the National Assembly. For ordinary Bills, where both Houses are not able to agree as to the Bill, it is referred to a mediation committee appointed under Article 113 to agree on a version of the Bill that shall be subjected to the voting process.

76. Secondly, Senate is specifically excluded from the law making procedures set out in Articles 114 of the Constitution as regards money Bills, being the bills related to taxation, loans and appropriations (spending). Article 109 specifically states that a money Bill can only be introduced in the National Assembly and enacted according to the procedure in Article 114, which is that the National Assembly may proceed only in accordance with the recommendation of the relevant Committee of the Assembly after taking into account the views of the Cabinet Secretary responsible for finance.

77. Money Bills are subjected to a special legislative procedure in light of the importance of financial legislation for the day-to-day functioning of the State and is intended to prevent conflicts and deadlocks in this regard. The procedure in Article 114 in this regard specifically applies to matters of finance in the national government. It is notable that the enactment process in Article 114 does not apply to money Bills concerning county government finances, which are specifically exempted by Article 114(4).

78. Lastly, the role and participation of Senate in financial legislation is limited to the Bills referred to in Chapter Twelve affecting the finances of county governments.

79. Therefore, in light of the context and purpose of the provisions of Article 110(3) of the Constitution as regards the concurrence process therein, it is the finding of this Court that the Bills referred to in Article 110(3) can only be interpreted and construed to mean Bills concerning County Government as defined by Article 110(1) and interpreted in this judgment, and not every or any Bills that originate from the National Assembly. To reiterate, this is for the reasons that a holistic, contextual and purposive interpretation of Article 110(3) limits the law making powers of Senate in this regard. This interpretation does not in any way derogate from the purpose for which the Senate exists, and its limited legislative powers must in this regard be interpreted holistically in relation to other constitutional provisions on its purpose, and its non-legislative powers of representation and oversight that are set out in Articles 93, 94 and 96 of the Constitution. Read as a whole, these provisions serve to reinforce and augment Senate's role in protecting the counties and devolution.

What is the condition precedent, if any in Article 110(3)?

80. The Appellants submitted that the Supreme Court in its ***Advisory Opinion Reference No. 2 of 2013*** provided general guidelines on the determination of a question as to whether a Bill concerns county government, and did not settle the law on the interpretation of the legislative mandate of the two Houses. According to the Appellants, the principles in the Supreme Court's ***Advisory Opinion Reference No. 2 of 2013*****,** have been considered and applied in ***Nation Media Group case (supra)*** wherein it was held that the requirements contained in Article 110 (3) only comes into play when there

is a question or doubt as to whether or not a Bill concerns Counties. This is the correct condition precedent for invoking Article 110 (3) and ***Pevans East Africa Case (supra)*** the High Court propounded the "pith and substance test" to establish whether a Bill concerns County Government.

81. The applicable procedure which was urged by the Appellants was that arising from parliamentary practice, a Bill is considered after it has been introduced in a House of Parliament by way of First Reading, therefore a proper interpretation of Article 110(3) of the Constitution would affirm the decision of the High Court in ***Nation Media Group Case (supra)*** that the obligation on the two Speakers to resolve a question on the nature of a Bill may only arise after the First Reading and where there is an 'issue arising' as to whether the Bill concerns counties.

82. Further, that an issue would only arise if the Speaker of the Senate writes to the Speaker of the National Assembly as this Court held in the case of ***Pevans East Africa Case (supra).*** The High Court in ***National Assembly of Kenya & Another vs. Institute of Social Accountability & 6 Others [2017] eKLR*** however disregarded the decision of this Court and went on to declare the impugned statutes unconstitutional despite no issue having been raised by the Speaker of the Senate after the First Reading or at all with respect to all those statutes.

83. The Appellants concluded that in light of the binding determination by this Court in ***Pevans East Africa Case (Supra)*** on the requirement for concurrence between the two Speakers where 'a question arises, the learned judges of

the High Court erred in finding that pursuant to Article 110 (3) of the Constitution it was a condition precedent for a Speaker of a House to first seek concurrence, and that concurrence process was not dependent on a question arising.

84. The 1st to 4th Respondents urged that there was no constitutional basis for the assertion that 'a question must arise' in order for the Speakers to jointly resolve the question on whether a Bill is Bill concerning counties and if it is, whether it is a special or ordinary Bill. They submit that the joint resolution of the Speakers must be done before the Bill is introduced for consideration in any House of Parliament and the High Court affirmed that the concurrence between two Speakers of the Houses of Parliament was a preliminary issue before either House of Parliament could embark on the legislative process.

85. The 1st to 4th Respondents made reference to the ***Supreme Court Advisory Opinion Reference No. 2 of 2013*;** and the case of ***National Assembly of Kenya vs Institute for Social Accountability case (supra)*** for the proposition that it is a constitutional condition precedent in the legislative process that the Speaker of both Houses resolve the question whether a Bill concerns counties before it is considered. According to the 1st to 4th Respondents, the decision in ***Nation Media Group case (supra)*** was not binding on this Court as opposed to decisions in the Supreme Court and this Court.

86. Further, that the ***Pevans East Africa Case (Supra)*** is distinguishable from the present appeal, in which the Senate has moved to Court to challenge the

Appellants' continued violations of Articles 110 (3) and 109 to 114 of the Constitution, and all Acts enacted without adherence to the Constitution. Lastly, that the Supreme Court in the ***Advisory Opinion Reference No. 2 of 2013*** settled the question of Article 110 (3) of the Constitution and it was therefore incumbent upon the Appellants herein to adhere to the Constitution and the binding decisions of the Supreme Court when processing Bill originating from the National Assembly.

87. The 5th Respondent likewise placed reliance on the Supreme Court's ***Advisory Opinion Reference No. 2 of 2013*** for the position that it is through the mandatory concurrence of the Speakers that the question of whether a Bill affecting Counties arises and is determined and the framers of the Constitution designed Article 110 (3) to cure the mischief of one house of Parliament passing bills unilaterally without involvement of the other on matters affecting county governments.

88. The 8th and 10th Respondents submissions were that the High Court and this Court are both bound by the Supreme Court's interpretation of " a Bill concerning counties" and the concurrence principle. They submitted that the Supreme Court had issued binding advisory opinions including the cases of ***Speaker of the Senate & another vs Attorney General & 4 others [2013] eKLR; In the Matter of the Interim Independent Electoral Commission (supra); National Lands Commission vs Attorney General (supra);*** *and* ***Council of Governors & 47 others vs Attorney General (supra).***

89. The finding of the High Court was as follows in this regards:

"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.

90. The High Court found in this regard that it is mandatory and 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 and specifically that such determination is not dependent on "a question arising" as to whether the Bill is one that concerns Counties; , and 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.

91. A condition ordinarily means circumstances or a state of affairs that must exist before something else is possible. A condition precedent is defined by the ***Black's Law Dictionary, Tenth Edition*** at page 355 as "an act or event, other than the lapse of time that must exist or occur before a duty to perform something promised arises". Therefore, a condition precedent in the context of section 110(3) would be interpreted to mean the state of affairs, act or event that must exist before the concurrence by the Speakers of the two Houses of Parliament as to whether a Bill is a Bill concerning counties, and if so whether it is an ordinary or special Bill.

92. It is evident that the concurrence process is the condition precedent provided for in Article 110(3). When and how that concurrence process arises and is undertaken, is ordinarily not the area of competence for the Courts, and should be the province of Standing Orders of the two Houses of Parliament to regulate the orderly conduct of their proceedings in this regard. However, in light of the perennial conflict around the issue of concurrence by the two Houses under Article 110(3), we are now obligated to provide guidance in terms of the Article's constitutional interpretation

and application. Before we do so, we need to comment on the judicial decisions relied on by the parties on the application of the concurrence process in Article 110(3).

93. It is notable that the question of whether all Bills are subject to the concurrence process in Article 110 (3) was not in issue in ***The Advisory Opinion Reference No. 2 of 2013,*** the case of ***Nation Media Group & 6 others vs Hon. Attorney General & 9 others*** and in the ***Pevans East Africa Case (supra).*** *In* ***Advisory Opinion Reference No. 2 of 2013,*** the specific Bill before the Supreme Court for consideration was the Division and Allocation of Revenue Bill and specifically whether it was a Bill concerning county government or a Money Bill. In the Nation Media Group Case. the issue before the Court was the constitutionality of the Kenya Media Council Act 2013 and the Kenya Information and Communications (Amendment) Act 2013. The High Court held as follows in the said case at paragraph 108 of its judgment:

> ***"It appears to us that this requirement contained in Article 110(3), which is part of the Article relating to Bills concerning county governments, comes into play when there is a question or doubt as to whether or not a Bill concerns counties. In that event, the Speakers of the two Houses are required to consult and resolve whether or not the matter involves counties. In the present case, given the clear definition of what amounts to a Bill concerning counties, and the clear demarcation of functions between the national and county governments in the Fourth Schedule of the Constitution, it seems to us that there was no doubt or question as to whether or not the Bills concerned counties.***

94. Therefore, the Court was not called upon to decide on how the question of whether a Bill is one concerning County Government arises under Article 110(3), since it was dealing with a Bill which was not a Bill affecting County. The Court noted as follows in this regard:

> ***"Thus, it can be properly argued, as the AG submits, that there was no question whether the Bills concerned counties, the implication being that it was clear that they were not. That being the case, in our view, there was no violation of the Constitution in the absence of consultation and a resolution between the two Speakers of the House on whether or not the two Bills concerned counties. Nor, in our view, was there a violation of the Standing Orders of either House. In our view, therefore, this challenge to the process is also without merit.***

95. Likewise, in the ***Pevans East Africa Case (supra),*** the issue before the High Court was the constitutionality of amendments made to the Betting, Lotteries and Gaming Act by the Finance Act, and Court found that imposition of taxes is a function of the national government, and it was not necessary to involve the Senate in the enactment. This Court upheld the High Court's decision that a question must arise as to whether a Bill is one concerning county government before the concurrence process under Article 110(3) applies, and held as follows:

> ***"… it must be borne in mind that Article 110 (3) of the Constitution provides a specific mechanism for settling the issue whenever the question arises as to whether any particular bill is a Bill concerning counties. In this case, the Senate, which has the constitutional mandate of representing and protecting the interests of the counties and their governments, did not raise any issue that the Finance Bill, 2017 was anything other than what it described itself to be, namely a Money Bill that did not concern the counties. As the respondents aptly point out, even when the appellants made the Speaker of the Senate a respondent to their petitions in the High Court, he did not support their view that***

> ***the Finance Bill, 2017 was a bill concerning counties. In National Assembly of Kenya & Another v Institute for Social Accountability & 6 Others [2017] eKLR, where the Senate had not questioned a Bill as one concerning county governments, this Court held that the court should not engage itself in a theoretical exercise or purport to usurp the roles of competent institutions under the Constitution."***

96. In ***National Assembly of Kenya & Another v Institute for Social Accountability & 6 Others, [2017] eKLR***, the High Court had found the Constituency Development Fund Act unconstitutional for reasons *inter alia*, that the amendment made thereto concerned county government' within the meaning of Article 110(1) and ought to have been passed by the Senate. On appeal this Court held as follows:

> ***Regarding the contents of the Bill, the Bill in its object indicated that it did not concern county governments or affect the powers and functions of county governments. The object of the Bill was to clarify that the Fund was a charge on the Consolidated Fund and not an additional revenue to county governments. Contrary to the court's finding that this was not an insubstantial amendment, the amendment did not have any positive effect either on the allocation of the equitable share of national revenue or on the functions and powers of county governments. Furthermore, the Speakers of the two Houses had resolved that the Bill did not concern county governments. It is a constitutional condition precedent in the legislative process that the Speakers of both Houses resolve the question whether a Bill concerns counties before it is considered.***

97. The circumstances in the above cases concerned the application of Article 110(3) to specific Bills and Acts, and are therefore clearly distinguishable from the one in the present appeal, which concerns the application of concurrence process in the Article 110(3) firstly to all Bills originated by the two Houses of Parliament, and secondly to all Bills that that affect county governments.

98. As to when the requirement for concurrence between the Speakers arises, Article 110(3) is specific that it before consideration of a Bill. We have already found that the Bills referred to in Article can only be interpreted to mean a Bill concerning County government as defined in Article 110(1), and as clarified in this judgement. Therefore, it was an error by the High Court to find that it is a condition precedent that any Bill published by either House be subjected to the concurrence process.

99. We are however of the view that every Bill concerning County Governments should be subjected to the concurrence process for two reasons. First, it is our view that trying to distinguish between the terms "a Bill concerning county government", and "a question whether a Bill concerns county government" would be engaging in hairsplitting, as the two terms mean one and the same thing in the context of Article 110(3).

100. Second, and more importantly a purposive construction of the Article 110(3) lends itself to the conclusion that a question as to whether a Bill is or is not one concerning Counties, and its nature, can only be made if the repositories in the concurrence process are aware of, and informed of the Bill. In our view therefore, an interpretation that the concurrence process is triggered only when such a question arises would be restrictive, and would not give effect to the purpose of the Article, particularly in Bills concerning shared and concurrent functions of the national and county governments.

101. It is thus our finding arising from the foregoing, that it not only a logical interpretation of the constitutional provisions, but also good practice for the rule of law and good governance that once a Bill concerning county government is introduced and published by each respective House, it is placed before the Speakers of the two Houses to facilitate and enable not only the determination of any question as to the nature of the Bill, and also the concurrence process in the event of a dispute as regards the nature of the Bill.

102. We however need to point out and clarify that our interpretation of Article 110(3) leads to a conclusion that the mediation process under Article 113 of the Constitution is not applicable to the concurrence process in Article 110(3). The provisions of Article 113 are clear that they only apply when there is deadlock in the consideration and passing of ordinary Bills concerning counties by the National Assembly and Senate. The mediation process therefore applies during the enactment process of a Bill, and not before consideration of a Bill, which is when the concurrence process in Article 110(3) is relevant. In our opinion, the concurrence process under Article 110(3) is one that is solely and exclusively within the mandate, powers and control of the Speakers of the two Houses of Parliament, who must resolve any question arising as to whether a Bill is one concerning Counties or not, before its consideration.

103. As regards how the concurrence process is to be conducted, this was the subject of the ***Advisory Opinion Reference No. 2 of 2013*** by the Supreme Court in paragraph 130 and 142 as follows:

[130] Is it in doubt, in view of the formal provisions of the law, when and how a question for the consideration of the two Speakers arises under Article 110(3) of the Constitution" We do not think so. As Mr. Nowrojee submitted, the requirement for a joint resolution of the question whether a Bill is one concerning counties, is a mandatory one; and the legislative path is well laid out: it starts with a determination of the question 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 a concurrence, the two Speakers are to jointly resolve the question. Both sets of Standing Orders are crystal clear on this scenario, and both, on this point, as we find, faithfully reflect the terms of the Constitution itself….

[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."

104. We can only adopt the position set out by the Supreme Court, and also note that the two Houses of Parliament have provided for the concurrence process in their respective standing orders. The Senate in Standing Order No.128 in this regard provides as follows:

"128. Concurrence on determination on Bills concerning counties Whenever the Speaker receives a communication from the Speaker of the Assembly seeking concurrence that a Bill concerns counties, including concurrence that the Bill is a special or ordinary Bill in terms of Article 110 (3) of the Constitution, or that a Bill originating in the Assembly does not concern counties, the Speaker shall convey his or her decision to the

Speaker of the Assembly within seven days of receipt of the communication.

105. The same process was initially provided for in the National Assembly's Standing Order No. 123. However, the concurrence process was changed by amendments made by the National Assembly to its standing orders, and now provides as follows in Standing Order No. 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 112 of the Constitution, in any other case.

(2) Whenever any question arises 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 and the Speaker of the Senate may agree on an appropriate framework for jointly resolving the question under paragraph (2).

106. It is notable that the constitutionality of the changes made to the concurrence process by the National Assembly Standing Order No. 121 are the subject of this appeal, and shall be addressed later on in this judgment. We shall at this stage proceed with a determination of the second issue of the nature of the Bills that are the subject of Articles 109 to 114 of the Constitution.

107. The upshot of the findings in this section is that given that there were certain errors made by the High Court in its interpretation of Article 110(3),

we cannot affirm the said decision on the ground sought by the 1st to 4th Respondents that all Bills passed by the National Assembly and assented into law during the pendency of the proceedings in the High Court without complying with Articles 109 -113 of the Constitution are unconstitutional. Likewise, we cannot for the same reasons affirm that the said Bills must be subjected to proper legislative process afresh.

The Nature of the Bills envisaged by Articles 109 to 114 of the Constitution

108. This issue arises from the High Court's determination that all Bills without distinction required to be considered by the Senate, and upon finding that the impugned Acts and Bills were not subjected to the concurrence process the Court declared all the impugned Acts to be unconstitutional. It was however the Appellants' submission that the Senate had no role in enacting all bills including those contemplated under ***Article 114*** of the Constitution. On money Bills, the Appellants asserted that ***Article 109 (5)*** of the Constitution expressly states that a "money Bill" may be introduced only in the National Assembly in accordance with ***Article 114*** of the Constitution which provides the procedure to be followed in the enactment of "Money Bills" and that, the Senate had no role to play in this process; that therefore the complaint by the 1st to 4th Respondents that the evaluation of bills by the Budget and Appropriations Committee of the National Assembly was an unconstitutional, was unfounded.

109. Supporting the Appellants' position on the issue, the 6th Respondent submitted that ***Articles 109, 110*** to ***113*** of the Constitution, limited the Senate's mandate to '*Bills concerning Counties'* and that it was never intended

to apply to all Bills of Parliament; that the High Court failed to contextualize the provisions of Article 110 of the Constitution, and in so doing failed to appreciate that money Bills may only be considered by the National Assembly. This Court's decision in the ***Pevans case (supra)*** was relied on for the proposition that money Bills were the exclusive mandate of the National Assembly.

110. The 6th Respondent also submitted that the High Court ought to have examined each of the impugned Acts to ascertain whether it concerned counties before declaring them to be unconstitutional. The case of ***County Government of Nyeri & Another vs Cecilia Wangechi Ndungu [2015] eKLR*** was cited for the proposition that "…*Interpretation of any document ultimately involves identifying the intention of Parliament, the Drafter or the parties…";* and that the High Court did not discharge the evidentiary burden of proof with regard to the unconstitutionality of the impugned Acts.

111. On their part, the 1st to 4th Respondents' submissions were that ***Article 114 (3)*** of the Constitution should not be read in isolation but must be read harmoniously with ***Articles 96 (1), (2), 109*** and ***110*** of the Constitution; that the term "a Bill concerning County governments" specified in ***Article 110 (2***), envisaged that the use of the word "affecting", did not limit the Senate to only dealing with the functions listed in Part 2 of the Fourth Schedule. Concerning money Bills and Bills concerning Counties, it was contended that the National Assembly incorrectly interpreted ***Articles 109*** and ***114*** of the Constitution and as a result, declined to consider various Bills originating from the Senate by claiming that bills originating from the

Senate were money Bills, yet the bills clearly concerned matters other than those listed in ***Article 114 (3)*** of the Constitution, and therefore were not money Bills.

112. On the question of who determined whether a bill is money Bill, the 1st to 4th Respondents further submitted that the Supreme Court's ***Advisory Opinion Reference No. 2 of 2013 (supra)*** held that the question of the nature of a bill requires to be determined by the Speaker of both Houses of Parliament jointly; that the High Court correctly interpreted the Constitution by declaring that the Speakers must determine the nature of a bill by first addressing the question of whether the Bill concerns Counties and whether the bill was a money Bill in in accordance with ***Article 109*** and ***114 of the Constitution***, which decision was binding on the courts.

113. In determining the nature of the Bills envisaged and the procedures to which they are subject under ***Articles 109*** to ***114*** of the Constitution, and therefore role played by the respective Houses of Parliament, in their enactment, we shall answer three questions: i) what is the nature of a bill; ii) what bills do not concern counties; and iii) what are bills concerning counties?

What is the nature of a bill?

114. But, before interrogating the concerned provisions, it is essential to examine what is meant by the nature of a bill. According to the ***Merriam Webster Dictionary*** the term ***"nature"*** is defined as ***"the inherent character or basic constitution of a thing"***. The nature of a bill would therefore be with reference to the inherent character or intrinsic foundation of the bill in

question. To establish the inherent character of a bill would require an analysis of the bills memorandum and objects to determine its nature and objective. Also necessary would be the application of the well settled doctrine known as the "pith and substance" test. This legal doctrine has been adopted in Canadian constitutional interpretation to determine under which head of power a given piece of legislation would fall, or put differently, to which level of government authority a matter or issue should be assigned. See ***Cushing vs Dupuy (QUEBEC) Privy Council*** **(April 15, 1880).** At its most basic, a pith and substance analysis determines what the essential character of the legislation is, the purpose and effect of the law and the appropriate jurisdiction to which it belongs arising from those identified characteristics.

115. In the case of ***R vs Morgentaler, 1993 Can LII 74 (SCC), [1993] 3 SCR 463*** the Canadian Court observed that;

> ***"A law's "matter" is its true character, or pith and substance. The analysis of pith and substance necessarily starts with looking at the legislation itself, in order to determine its legal effect. The court will also look beyond the four corners of the legislation to inquire into its background, context and purpose and, in appropriate cases, will consider evidence of the actual or predicted practical effect of the legislation in operation. The ultimate long-term, practical effect of the legislation is not always relevant, nor will proof of it always be necessary in establishing the true character of the legislation. The court is entitled to refer to extrinsic evidence of various kinds provided it is relevant and not inherently unreliable'.***

116. In our jurisdiction, this doctrine was applied by the High Court and its application was later upheld by this Court in the ***Pevans Case (supra).*** An

application of the doctrine would also involve consideration of Part 1 and 2 of the Fourth Schedule of the Constitution where different functions are assigned to the two levels of government, thereby designating responsibility for passage of each of the impugned Acts would lie.

117. Therefore, the stages necessary for determining the nature of a bill, in this case the impugned Acts are, firstly, what does the memorandum of objects of the bill specify is the bill's inherent nature, secondly, the application of the "pith and substance" test to determine the bill's true purpose and intent, and thirdly a consideration of Part 1 and 2 of the Fourth Schedule to discern to which level of government the bill will apply. In so doing, it will also be necessary to take into account ***Article 186 (3)*** of the Constitution which directs that where a power or function that has not been assigned to a county, it will be rendered a function or power of the national government. At all stages we are required to adopt an interpretation where, "…***the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other, all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument, the Constitution should be given a generous and purposive interpretation…"*** **See** ***Kigula & others vs Attorney General [2005] 1 E.A. 132*** **at** ***page 133***

What bills do not concern counties?

118. Having set the basis for establishing the nature of the impugned Acts, we turn to the Constitution to identify the nature of bills provided for under Articles 109 to 114, and the House to which responsibility is assigned for passing of the bills. ***Part 4*** of ***the Constitution*** deals with the enactment of legislation by the Houses of Parliament. **We begin** with the bills specified,

under ***Article 109 (3)*** of the Constitution as "*A Bill not concerning county government".* By implication these would be national government bills or any other bill not categorised as concerning counties and which are not money Bills. These bills are *"…considered only in the National Assembly, and passed in accordance with Article 122 and the Standing Orders of the Assembly."* By virtue of ***Article 186*** of the Constitution, Part 1 of the ***Fourth Schedule*** would require to be applied to such bills to ascertain whether the function in question was assigned to the national government. If so, then the bill was one that should be passed by the National Assembly.

119. A second category of bills are those under ***Article 109 (5)*** of the Constitution, namely money Bills, which can only be introduced in the National Assembly. ***Article 114*** of the Constitution further stipulates that money Bills can only be considered in the National Assembly. ***Article 114 (3)*** of the Constitution defines a *"money Bill"* as a bill other that those specified in ***Article 218,*** and which are concerned with (a) taxes, (b) the imposition of charges on a public fund or the variation or repeal of any of those charges; (c) appropriations, receipt, custody, investment or issue of public money; (d) the raising or guaranteeing of any loan or its repayment or (e) matters incidental to any of those matters. ***Article 218*** on the other hand provides for the procedures as regards the Annual Division of Revenue Bills and County Allocation of Revenue Bills.

120. This Court in the ***Pevans case (supra)*** held that;

> *"**The Constitution defines "a Money Bill" in Article 114 to mean a Bill,** other than a Division of Revenue Bill**, which contains provisions dealing with taxes; the imposition of charges on a***

public fund or the variation or repeal of any of those charges; the appropriation, receipt, custody, investment or issue of public money; the raising or guaranteeing of any loan or its payment; or matters incidental to the foregoing. The provision is explicitly clear that the terms "tax", "public money", and "loan" do not include any tax, public money or loan raised by a county. By dint of Article 109(5) such a bill as described above can only be introduced in the National Assembly."

121. And in the ***Supreme Court Advisory Reference No. 2 of 2013 (supra),*** the court specifically recognised the existence of money Bills when it observed that, *"It has become clear to us that a money Bill" in a proper case, may only be introduced in the National Assembly,…"* It is important to note that the Constitution goes further to make express provision for the manner of enactment of the different forms of money Bills specified in ***Article 114*** of the Constitution. With reference to taxes, under ***Articles 114 (3) (a)*** and ***209*** of the Constitution, it is provided that only the national government may impose income tax, value added tax, customs duties and other duties on import and export goods; and excise tax. And an Act of Parliament may also authorise the national government to impose any other tax or duty.

122. Regarding Appropriations, ***Article 114 (3) (b)*** of the Constitution specifically describes these as money Bills. And read together with ***Article 221*** of the Constitution, it is provided that, at least two months before the end of each financial year, the Cabinet Secretary responsible for finance shall submit to the National Assembly estimates of the revenue and expenditure of the national government for the next financial year to be tabled in the National Assembly. Also included are estimates for expenditure from the Equalization Fund.

123. It is further specified that the National Assembly shall consider the estimates submitted together with the estimates submitted by the Parliamentary Service Commission and the Chief Registrar of the Judiciary under ***Articles 127*** and ***173*** of the Constitution respectively. Before the National Assembly considers the estimates of revenue and expenditure, a committee of the Assembly shall discuss and review the estimates and make recommendations to the Assembly. In discussing and reviewing the estimates, the committee shall seek representations from the public which shall be taken into account when the committee makes its recommendations to the National Assembly.

124. When the estimates of national government expenditure, and the estimates of expenditure for the Judiciary and Parliament have been approved by the National Assembly, they shall be included in an Appropriation Bill, which shall be introduced into the National Assembly to authorise the withdrawal from the Consolidated Fund of the money needed for the expenditure, and for the appropriation of that money for the purposes mentioned in the Bill. Expenditures charged on the Consolidated Fund by the Constitution or an Act of Parliament are not included in an Appropriation Bill.

125. In addition to appropriations, ***Article 223 (1)*** and ***(4)*** of the Constitution deals with Supplementary appropriations. These are described as money that the national government may spend that has not been appropriated and the amount appropriated under the Appropriation Act is insufficient, or a

need has arisen for expenditure for a purpose for which no amount has been appropriated by that Act. When the National Assembly has approved the expenditure, an appropriation Bill shall be introduced for the appropriation of the money.

126. Again, ***Article 95 (4) (b)*** of the Constitution then stipulates that it remains the National Assembly's responsibility to appropriate funds for expenditure by the national government and other national state organs. ***Article 114 (2)*** of the Constitution further provides that if in the opinion of the Speaker of the National Assembly a motion makes provisions for matters listed in the definition of a money Bill specified in ***Article 114 (3)*** of the Constitution, the National Assembly may proceed in accordance with the recommendation of the relevant Committee of the National Assembly after taking into account the views of the Cabinet Secretary responsible for Finance. There is one caveat however, under ***Article 114 (1)*** of the Constitution, a money Bill may not deal with any other matter other than those specified in the definition provided at ***Article 114 (3)*** of the Constitution. The implication being that the inclusion of other matters in a money Bill would remove it from the purview of ***Article 114*** of the Constitution with the effect that it will no longer be enacted in accordance with the procedures of enactment reserved for money Bills.

127. The provisions of the Public Management Finance Act further reinforce the strictures of ***Article 114*** of the Constitution. Pursuant to ***section 7*** of the Act, the Budget Committee of the National Assembly is established to deal with budgetary matters and is responsible for making recommendations to

the National Assembly on "money Bills" after considering the views of the Cabinet Secretary responsible for finance and tabling a report containing the views of the Cabinet Secretary in accordance with ***Articles 114, 218*** and ***221*** of the Constitution.

128. ***Section 9*** of the Act establishes the Parliamentary Budget Office. ***Section 10*** of the Act mandates the Parliamentary Budget Office to: provide professional services in respect of budget, finance, and economic information to the committees of Parliament; prepare reports on budgetary projections and economic forecasts and makes proposals to the Committees of Parliament responsible for budgetary matters; prepare analyses of specific issues, including financial risks posed by Government policies and activities to guide Parliament; considers budget proposals and economic trends and make recommendations to the relevant committee of Parliament; establishes and fosters relationships with the National and county treasuries and other national and international organizations, with an interest in budgetary and socio-economic matters; produce, prepared and published reports.

129. What this all means in effect, is that as an initial step, the Speaker of the National Assembly will with the assistance of the Budgetary Committee ascertain whether or not a bill is a money Bill, and once determined as such, the Budget Committee considers the bill in consultation with the Cabinet Secretary, and dependent upon the outcome of the consultations, it is returned to the National Assembly for passage. It is instructive that, unlike ***Article 109 (4)*** of the Constitution where application of ***Article 110 (3)*** of the

Constitution is expressly required, in the case of enactment of money Bills, the Constitution is silent on the involvement of the Senate. As such, it is safe to conclude that all money Bills pass through the Speaker of the National Assembly whether commenced by the Senate or in the National Assembly for him or her ascertain whether or not it is a money Bill, and all money Bills subjected to the Budgetary Committee, dependent upon their outcome, are passed by the National Assembly without reference to the Senate.

130. It must be emphasised and reiterated that the provisions of Article 114 are with regard to passing of money Bills concerning financing of national government functions. As regards laws concerning the financing of the county government functions, Article 185 of the Constitution provides that the legislative authority of a county government is vested in, and exercised by, its county assembly. Sub-article (2) provides that a county assembly may make any laws that are necessary for or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule. Under Article 224 of the Constitution, each County government is required to prepare and adopt its own annual budget and annual appropriation bills in accordance with the provisions of the relevant Act.

131. Additionally, the principles of public finance in Chapter 12 of the Constitution, and the Public Finance Management Act equally apply to County governments, and the said Act in particular details the budgeting processes in county governments, and procedures for passing of the County

Appropriations Bills and County Finance Bills by the County Assemblies in sections 125 to 136 thereof. The Constitution therefore, gives the county assemblies the legislative role on all financial matters of the county governments.

What bills concern counties?

132. These are the third category of bills specified under ***Article 109 (4)*** of the Constitution. They are referred to as, "*A Bill concerning county government…"* Such bills may originate in the National Assembly or the Senate. Their passage requires to be in accordance with ***Articles 110*** to ***113, 122*** and ***123*** of the Constitution and the Standing Orders of the Houses. ***Article 110 (1)*** of the Constitution defines bills concerning county governments as a bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule; a Bill relating to the election of members of a county assembly or a county executive; and a Bill referred to in Chapter Twelve that affects the finances of county governments. A Bill concerning county governments may comprise a special Bill, which shall be considered under ***Article 111***, if it relates to the election of members of a county assembly or a county executive; or is the annual County Allocation of Revenue Bill referred to in ***Article 218***. In any other case, a bill is considered to be an ordinary bill under ***Article 112***. As concerns the powers and functions of counties, these are to be found in Part 2 of the Fourth Schedule.

133. As stated above, these bills that concern the counties are the preserve of the Senate, and by virtue of the express stipulations of ***Article 110 (3)*** of the

Constitution, they require to be subjected to the concurrence of the two Speakers jointly**.** In the case of ***National Assembly of Kenya & Another vs Institute for Social Accountability & 6 Others [2017] eKLR,*** the High Court rightly expressed itself on the definition of a bill concerning counties thus;

> ***"A "Bill concerning county government" is defined in Article 110 (1) and includes a bill containing provisions affecting the functions and powers of county government set out in the Fourth Schedule and a Bill affecting the finances of county governments."***

134. We will consider some specific bills that the Constitution has designated in the category of bills concerning counties in Chapter 12. For instance, ***Article 217 (1)*** to ***(8)*** of the Constitution makes provision for the resolution to allocate moneys to the counties. It provides that once every five years, the Senate shall, by resolution, determine the basis for allocating the Counties a share of National revenue allocated annually to the County level of Government. In determining the basis of revenue sharing the Senate shall—(a) take the criteria in ***Article 203 (1)*** of the Constitution into account; (b) request and consider recommendations from the Commission on Revenue Allocation;(c) consult the County Governors, the Cabinet Secretary responsible for finance and any organisation of County Governments; and (d) invite the public, including professional bodies, to make submissions to it on the matter.

135. Thereafter, within ten days the Senate will adopt the resolution, and the Speaker of the Senate will refer it to the Speaker of the National Assembly. Within sixty days after the Senate's resolution is referred to the National Assembly for consideration, the House shall vote to approve it, with or

without amendments, or to reject it. If the National Assembly, (a) does not vote on the resolution within sixty days, it shall be regarded as having been approved by the National Assembly without amendment; or (b) vote on the resolution, the resolution shall have been–(i) amended only if at least two-thirds of the members of the Assembly vote in support of an amendment; (ii) rejected only if at least two-thirds of the members of the Assembly vote against it, irrespective whether it has first been amended by the Assembly; or (iii) approved, in any other case.

136. If the National Assembly approves an amended version of the resolution, or rejects the resolution, the Senate, at its option, may either—(a) adopt a new resolution under clause (1), in which case the provisions of this clause and clause (4) and (5) apply afresh; or (b) request that the matter be referred to a joint committee of the two Houses of Parliament for mediation under Article113, applied with the necessary modifications. A resolution under this Article that is approved under clause (5) shall be binding until a subsequent resolution has been approved. It is to be observed that for the reason that the resolutions affect counties so fundamentally that it is noteworthy that, the Senate plays a central role in the resolution's enactment.

137. Another bill concerning counties is the Division of Revenue Bill. ***Article 218 (1)*** of the Constitution specifies that at least two months before the end of each financial year, there shall be introduced in Parliament—a) a Division of Revenue Bill, which shall divide revenue raised by the national government among the national and county levels of government in

accordance with this Constitution; and b) a County Allocation of Revenue Bill, which shall divide among the counties the revenue allocated to the county level of government on the basis of the resolution in force under ***Article 217*** of the Constitution.

138. ***Article 224*** of the Constitution then provides that, subsequently thereto, on the basis of the Division of Revenue Bill passed by Parliament under ***Article 218,*** each county government shall prepare and adopt its own annual budget and appropriation Bill in the form, and according to the procedure, prescribed in an Act of Parliament. The passage of this Act being ascribed to Parliament would infer that, the concurrence of the Senate in its enactment is essential.

139. In the case of ***Supreme Court Advisory Reference No. 2 of 2013 (supra)*** it was held that;

> ***"It is clear to us that the Senate had a clear role to play, in the processing of the Division of Revenue Bill. The Speaker of the National Assembly should have complied with the terms of Article 112 of the Constitution; and the National Assembly should have considered the deliberations of the Senate on record and, failing concurrence on legislative choices, the matter should have been brought before a mediation committee, in accordance with the terms of Article 113 of the Constitution."***

140. Yet another example of a bill concerning county governments as specified under the Constitution is the Revenue Allocation bill, to be found under ***Article 216*** of the Constitution that deals with Revenue Allocation and the functions of the Commission on Revenue Allocation on the equitable sharing of revenue raised by the national government between -a) the

national and county governments; and b) among the country governments. Additionally, under ***Article 204*** of the Constitution, the same Commission also makes recommendations for consideration by Parliament prior to any Bill appropriating money out of the Equalization Fund is passed in Parliament. The various recommendations of the Committee are submitted to the Senate, National Assembly, National Executive, County Assembly and County executive.

141. Essentially, what stands out from the above enumeration is that the Constitution clearly demarcates bills that do not concern counties, and those that do. Indeed, this is underscored by ***Articles 109 (3)*** and ***(4)*** of the Constitution, precisely because of the concurrence requirement in cases where counties are concerned. Of importance to note is that, ***Article 109 (4)*** makes it mandatory for ***Article 110 (3)*** of the Constitution to be applied to an enactment concerning the counties, while ***Article 109 (4)*** makes no reference at all to the application of ***Article 110 (3)*** of the Constitution. Additionally, ***Article 109 (3)*** assigns passage of these bills to the Assembly's Standing Orders, while ***Article 109 (4)*** assigns passage of county bills to each House of Parliament and their respective Standing Orders. Why would the Constitution correlate ***Article 110 (3)*** of the Constitution to ***Article 109 (4)*** of the Constitution but not to ***Article 109(3)*** of the Constitution? And why refer to the Standing Orders of the Assembly for passage of bills under ***Article 109 (3)*** and the Standing Orders of the two Houses in reference to ***Article 109 (4)***? The only inference that can be drawn from the distinctions is that at all times the drafters of the Constitution intended there to be a demarcation between the bills concerning counties and all other bills including money Bills, more so because of the manner of their enactment.

There can be no doubt that the drafters were conscious that not all bills would concern the counties, and, not all bills would concern the national government.

142. This divergence was highlighted in the case ***Okiya Omtatah Okoiti & 4 others vs Attorney General & 4 others; Council of Governors & 4 others (Interested Parties) [2020] eKLR***.

> ***"…the term "concerning counties" has a wide meaning. According to the Supreme Court in The Speaker of the Senate & Another and the Attorney General & Others, Advisory Opinion Reference No. 2 of 2013, the phrase "creates room for the Senate to participate in the passing of Bills in the exclusive functional areas of the national government, for as long as it can be shown that such Bills have provisions affecting the functional areas of the county governments." We, however, do not think that the jurisdiction of the Senate extends to each and every legislation passed by the National Assembly. To so hold would render Article 110 of the Constitution redundant since it is difficult to think of any law that does not touch on counties. Although the Fourth Schedule of the Constitution does indeed give a wide array of functions to the counties, it is incumbent upon the person who alleges non-compliance with Article 110 of the Constitution to demonstrate that the law in question is one that concerns county governments.***

143. In view of all that we have said above, the logical inference is that, and with respect, this is where the High Court went wrong, the express application of ***Article 110 (3)*** of the Constitution to bills concerning counties and the exclusion of the same provision from application to bills concerning the national government rendered ***Article 110 (3)*** of the Constitution applicable only to bills concerning counties, and that it is to these bills alone that the concurrence process would be subjected.

144. Furthermore, with the Constitution having prescribed the nature and effect of money Bills, it is unmistakable that the same Constitution removed money Bills from the enactment processes to which national government or bills concerning counties are subjected, including the concurrence process under ***Article 110 (3)*** of the Constitution. The High Court having failed to discern the different nature of bills defined by the Constitution, concluded that all bills, including money Bills required to be subjected to joint resolution of the Speakers under ***Article 110 (3)*** of the Constitution. And by so doing, and we so find, the High Court wrongly extended the legislative powers of the Senate beyond the limits contemplated by the Constitution.

Whether the impugned Act and Bills are unconstitutional for want of Senate's Participation

145. This issue brings us back to the central question for determination as to whether the High Court rightly declared all impugned Acts unconstitutional. It is the Appellants' complaint that the High Court declared them to unconstitutional without first ascertaining each Act separately to discern whether they concerned counties, so as to have necessitated their subjection to the concurrence process.

146. As it were, the question remains whether or not the impugned Acts were enacted in violation of the provisions of the Constitution. Given these circumstances, we subscribe to the view that even after a bill has passed into law, it can still be subjected to inquiry by a court to establish its

constitutionality. The reason for this being that, it cannot be refuted that the Senate and county governments being an integral part of the constitutional make up of this country, and the Senate bearing the responsibility for tethering the counties and their functions to the national policies and objectives set by the national government, that the Constitution intended that each one, the Senate, the National Assembly, the national government and the county governments work harmoniously together to ensure that these objectives and aspirations are engrained at into all levels of government. So that when disregarded or overlooked, it is incumbent upon courts to verify and ensure that the fundamental requirements of constitutionality are maintained in all legislative enactments.

147. In the case of ***Institute of Social Accountability & Another v National Assembly & 4 Others [2015] eKLR*** the High Court opined that:

> ***"…the issue whether the matter is one for county government is of constitutional importance and the decision of the respective speakers, while respected, cannot be conclusive and binding on the court whose jurisdiction it is to interpret the Constitution and as the final authority on what the Constitution means. Participation of the Senate in the legislative process is not just a matter of procedure, it is significant to the role of the Senate in our constitutional scheme as the Senate's legislative role is limited to matters concerning county governments….***
>
> ***69. In our view and we so hold, the fact that the legislation was passed without involving the Senate and by concurrence of the Speakers of both House of Parliament, is neither conclusive nor decisive as to whether the legislation affects county government. In other words, while concurrence of the Speakers is significant in terms of satisfaction of the requirements of Article 110(3) of the Constitution, it does not by itself oust the power of this Court vested under Article 165(3)(d) where a question is raised***

regarding the true nature of legislation in respect to Article 110(1). The court must interrogate the legislation as a whole and determine whether in fact the legislation meets the constitutional test of a matter, "concerning county government."
See also ***Okiya Omtatah Okoiti & 4 others v Attorney General & 4 others; Council of Governors & 4 others (Interested Parties) [2020] eKLR***.

148. In view of the High Court's failure to interrogate each of the impugned Acts, it becomes incumbent on this Court to determine whether the impugned Acts controverted ***Article 110 (3***) of the ***Constitution***. To do so, we will consider the complaints of the 1st to 4th Respondents as set out in the Petition dated 17th July 2019 and supporting affidavit of Hon Senator Kenneth Makelo Lusaka and the Appellants' replying affidavit as sworn by Michael Sialai, Clerk of the National Assembly as well as the parties' submissions that were before the High Court to ascertain the nature of each Acts, and whether or not they required to have been subjected to the concurrence process. As discerned earlier, it is only bills concerning counties that mandatorily require to be subjected to the concurrence process. Whether or not a bill concerns the counties is a matter for interpretation of the nature of the bill, having regard more particularly to, those constitutional provisions dealing with enactment of legislation by the two Houses, which provisions as stated above, are to be found under Part 4 of the Constitution.

149. Having discerned that the Constitution provides for different categories of bills and also specifies the manner of their enactment, we must now scrutinised each of impugned Acts to ascertain their true nature, at all times

bearing in mind that it is only bills concerning county governments that are liable to be subjected to the concurrence process. At the core of our analysis is an examination of the different Acts, to discern first, their objects, second, their intent and purpose by applying the *"pith and substance"* test and third consideration of the stipulations of Fourth Schedule so as to determine whether the impugned legislation concerned county governments.

150. Owing to the large number of impugned Acts complained of, for ease of analysis we have clustered them into three classifications, namely;

a) Appropriations, Tax and Finance
b) General Statutes
c) Statutes miscellaneous amendments

Beginning with appropriations, as discussed above, appropriations are defined as money Bills. The impugned Acts we consider would fall into this category are;

1. The Supplementary Appropriations (No. 3) Act, of 2018 *(formally National Assembly No. 42 of 2017)*,
2. The Appropriations Act, 2018 *(formally National Assembly No 22 of 2018),*
3. The Supplementary Appropriations (No. 2) Act, of 2018 *(formally National Assembly No. 15 of 2018),*
4. The Supplementary Appropriations (No. 3) Act, of 2018 *(formally National Assembly No. 23 of 2018),*
5. The Appropriations Act, 2019 *(formally National Assembly No. 46 of 2018)*
6. The Supplementary Appropriation Act, 2019*(formally National Assembly No. 41 of 2019).*

151. In so far as the above Appropriations Acts, are concerned, the Senate's case is that their enactment violated the Constitution because prior to their enactment, the National Assembly did not comply with the requirements

of ***Article 110 (3)*** particularly since they concerned county governments and, despite this, the concurrence of the Senate was neither sought nor obtained. In addition, with respect to the Appropriations Act of 2019 *(formally National Assembly No. 46 of 2018)* the 1st to 4th Respondents' complaint was that the Bill, which gave rise to the Act was allegedly introduced without the Division of Revenue Act having been enacted for the financial year 2019/2020, and that as a result ***Articles 218*** and ***222*** of the Constitution were violated.

152. The Appellants responded that the constitutionality of the Appropriation Acts did not arise because their objective was to authorise withdrawal of funds by the national government from the Consolidated Fund. It was further asserted that the periods in question have since lapsed, so that on this account, this Court no longer had jurisdiction to determine the issue. And with particular emphasis on the Appropriation Act, 2019 *(formally National Assembly Bill No. 46 of 2019)* the Appellants urged that we decline to determine the question on the Division of Revenue Bill for the reason that it was pending determination by the Supreme Court.

153. Regarding reference to the Supreme Court's decision, a review of the materials discloses that the Supreme Court rendered its Advisory Opinion on the issue on 5th May 2020. So that, in answer to this question we need go no further than the decision in the case *of* ***Council of Governors & 47 others vs Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae) [2020] eKLR*** where the court pronounced itself thus;

> ***"…Section 39 of the Public Finance Management Act leaves no doubt that the National Assembly, cannot enact an***

Appropriations Act before enacting the Division of Revenue Act. This conclusion therefore dispenses with any submissions to the contrary. Does this determination mean that the current Appropriations Act is unconstitutional? To this, our response is that, in view of the not very precise provisions of the Constitution regarding the subject matter, the effect of this determination is prospective and not retroactive. What if Parliament enacts an Appropriation Act before the Division of Revenue Act in future? Our answer is that such an Act, would be of doubtful constitutional validity."

154. On the question of our jurisdiction, we have addressed the court's duties in relation to matters such as this, and as such, we reiterate that this Court has jurisdiction to determine this issue.

155. Finally, coming to what is before us, a consideration of the record shows that the Supplementary Appropriations (No. 3) Act, of 2018 *(formally National Assembly No. 42 of 2017)*, where the memorandum of objects sought to appropriate a sum of Kshs. 97,364,929,464 for the year ended 20th June 2018, the Supplementary Appropriations (No. 2) Act, of 2018 *(formally National Assembly No. 15 of 2018)* where the memorandum of objects sought to appropriate a sum of Kshs. 88,519,977,091 for the year ended 30th June 2018, the Appropriation Act, 2018, *(formally National Assembly No 22 of 2018),* where the memorandum of objects sought to appropriate a sum of Kshs. 1,351,010,642,591 for the year ended 30th June 2019 the Supplementary Appropriations (No. 2) Act, of 2018 *(formally National Assembly No. 23 of 2018)* where the memorandum of objects sought to appropriate a sum of Kshs. 1,500,000,000 for the year ended 30th June 2019. With respect to the Appropriations Act of 2019 *(formally National Assembly No. 46 of 2019) seeking to appropriate Kshs. 1,474,787,296,764 for the year ended*

30th June 2020 and the Supplementary Appropriation Act, 2019 *(formally National Assembly No. 41 of 2019)* where the memorandum of objects sought to appropriate a sum of Kshs. 106,436,179,700 for the year ended 30th June 2019*,* are appropriations out of the Consolidated Fund for application towards the services and purposes of the national government and other state organs.

156. The purposes include, but are not limited to Police Services, Defense, Education, Research, Science Technology and Innovation, Public Finance Management, National Referral and specialized services, National Security Intelligence, and Witness Protection amongst other services and purposes. In our view, the nature of these Acts being to appropriate sums from the Consolidated Fund for national government expenditure, as their name suggests, they fall within the remit of money Bills as defined by ***Article 114 (3) (c)*** of the Constitution***,*** and in view of their nature, under ***Article 95(4)(b)*** of the Constitution, the National Assembly is empowered to appropriate funds for expenditure to the national government and other national state organs. As a consequence, it was not a requirement for the Appropriation Acts and the Supplementary Appropriations Acts to be subjected to the requirements of ***Article 110 (3)*** of the Constitution, and in so finding, the question of their unconstitutionality did not arise.

157. On the Tax Laws (Amendments) Act, 2018 - *(formally National Assembly Bill No. 11 of 2018)*, the 1st to 4th Respondents contended that the enactment of the amendments to the Tax Laws did not comply with ***Article 110 (3)*** of the Constitution. In applying the principles necessary to ascertain the

nature of this Act, the preamble of the Tax Laws (Amendment) Act, 2019, specifies that it seeks to, "introduce a tax on winnings and to enhance the tax incentive on home ownership; amend the Income Tax Act, Cap 470 and the Stamp Duty Act, Cap. 480, to provide an incentive for first-time home owners, the Value Added Tax Act to move some items from zero rate to exempt status in order to limit zero rating to exports.

158. A detailed examination of the amendments clearly evinces the imposition or exemption of tax on accrued income, derived or received in Kenya, and the exemption of supplies from taxation or zero rated supplies to public bodies, privileged persons and institutions, all of which are matters of concern to the national government. Furthermore, it was conceded that the amended Acts included the Income Tax Act, the Stamp Duty Act and the Value Added Tax Act all of which are in the nature of money Bills as defined by ***Article 109 (4)*** of the Constitution, which bills are the preserve of the National Assembly as specified by ***Article 209*** of the Constitution. Given these circumstances, we are satisfied that, the amendments were tax related and therefore did not concern or affect the functions of county governments and as such, were not required to be subjected to the concurrence process specified by ***Article 110 (3)*** of the Constitution so as to be declared unconstitutional.

159. Turning to the Finance Act, 2018 *(formally National Assembly Bill No. 20 of 2018)*, the Appellants disclosed that the constitutionality of this entire Act is currently pending in *Nairobi High Court Constitutional Petition Number 327 of 2018, Okiya Omtatah Okoiti vs The Attorney General and the National*

Assembly. Accordingly, this Court was urged to decline to determine the constitutionality or not of the Act pending the outcome of the decision of the High Court.

160. It was also argued that a Finance Bill is introduced in each year to make provision for the financing of the annual budget through various taxation measures, and that ***Article 209 (1)*** of the Constitution intended that levying of taxes remain the responsibility of the national government; that the amendment establishing the National Housing Development Fund was enacted pursuant to the national government's functions of national economic policy, and the planning and housing policy under Part 1 of the Fourth Schedule; that the amendments to the Employment Act, 2007, are to require all employers to remit employee contributions and matching employer contributions to the National Housing Development Fund for financing the national government's policy for building affordable housing units to prevent the expansion of slums and informal dwellings in major towns countrywide. It was contended that the amendments did not in any way affect the housing function and power of county governments under Part 2 of the Fourth Schedule, and neither did it constitute a Bill concerning Chapter Twelve affecting the finances of county governments or affect the housing function of county governments under Part 2 of the Fourth Schedule.

161. Our review of the record does not disclose that the pleadings for *Nairobi High Court Constitutional Petition Number 327 of 2018, Okiya Omtatah Okoiti vs The Attorney General and the National Assembly*, were included for our

consideration, and we therefore are unable to consider its contents in relation to the matters before us. We will therefore proceed and determine this issue. An examination of the Act indicates that notwithstanding that the amendments are housing related, the central theme is the establish of a National Housing Development Fund into which employer and employee contributions are to be paid, the sums of which would go towards financing the building of affordable housing units. In so far as the enactments concern the imposition of taxes under ***Article 209*** of the Constitution, which are paid into the National Housing Development Fund, we find that the national perspective upon which the housing development policy is founded is not a county function to which ***Article 110 (3)*** of the Constitution required to be applied. The High Court was therefore wrong to declare the amendment unconstitutional.

162. With reference to the impugned Equalization Fund Appropriation Act, 2018 the 1st to 4th Respondents' complaint was that it was enacted without compliance with ***Article 110 (3***) of the Constitution, and yet it concerned appropriations from the Equalization Fund which directly affected the counties; that the Fund's objective is to provide basic services of water, roads, health facilities and electricity to marginalised areas, which services are county functions and were to be provided by disbursements from the Fund; that the distribution and administration of these services affected county planning and management.

163. The Appellants argued that to the extent the Equalization Fund Appropriation Act, 2018 appropriated funds from the Fund for expenditure

by the national government directly through its ministries and state organs for provision of basic services to marginalized communities in counties as recommended by the Commission on Revenue Allocation, there was no need to apply the concurrence process in the passing of the Act; that additionally, there were no provisions in the Act that affected the counties' functions as set out under Part 2 of the Fourth Schedule, and nor did it constitute a Bill affecting the finances of county governments under Chapter Twelve. The enactment of this Act, they stated, is purely a national government responsibility.

164. ***Article 204*** of the Constitution is distinctive in nature. It deals specifically with appropriations from the Equalization Fund. ***Article 204 (2)*** of the Constitution empowers the national government to use the Equalization Fund to provide basic services including water, roads, health facilities and electricity to marginalized areas for purposes of upgrading the quality of services in those areas to conform to that of the rest of the country. Under ***Article 204 (3)*** of the Constitution expenditure involving the Fund may only be approved by way of an Appropriation Bill and moneys may be disbursed directly to the counties for development of water, roads, health facilities and electricity projects or indirectly through conditional grants to counties in which marginalized communities exist.

165. When the principles for ascertaining the nature of the Act are applied, it is clear that this Act seeks to appropriate moneys from the Equalization Fund for provision of basic services including water, roads, health facilities and electricity in marginalized areas. ***Article 204 (3)*** of the Constitution

specifies that expenditure under the Fund may only be approved by way of an Appropriation Bill. ***Sub Article (4)*** is explicit that before a bill to appropriate moneys out of the Equalization Fund is passed by Parliament, the Commission on Revenue Allocation shall be consulted. And before any money can be withdrawn, the Controller of Budget shall have approved the withdrawal.

166. It is significant that the Act in question is described as an appropriation act and seeks to appropriate moneys from the Equalization Fund. Having been so described, it begs the question whether it is a money Bill within the meaning of ***Article 114*** and therefore subject to the sole direction of the Speaker of the National Assembly and the Budget Committee, to the exclusion of the Senate?

167. Our answer to this would be in the negative. This is because, firstly, an appropriation under ***Article 204*** of the Constitution is effected from the Equalisation Fund, unlike the appropriations described earlier, which sums are appropriated from the Consolidated Fund. Secondly, ***Article 114*** of the Constitution expressly excludes appropriations out of the Equalization Fund, (that is, 'public money'), from the description of a money Bill. Thirdly, ***Article 204*** of the Constitution is explicit that before such appropriations are passed by Parliament the Commission on Revenue shall be consulted. And fourthly, the provision makes specific reference to Parliament and not solely the National Assembly, so that, any appropriation under ***Article 204*** of the Constitution would require to be passed by Parliament. Though we have not been told whether the

Commission was consulted prior to passage of this bill, this is not what is before us. What is for consideration is whether an appropriation from the Equalization Fund would call for the concurrence of the two Speakers prior to consideration by Parliament.

168. ***Article 93*** provides for the establishment of *"…the Parliament of Kenya, which shall consist of the National Assembly and the Senate".* In our view, since ***Article 204 (2)*** of the Constitution requires that an appropriation bill from the Equalisation Fund be passed by Parliament and not solely the National Assembly, unlike ***Article 114***, of the Constitution which specifies that appropriations from the Consolidation Fund are enacted by the National Assembly, it can be concluded that both the National Assembly and the Senate would require to consider and pass a bill concerning an appropriation from the Equalization Fund. We would also add that, it cannot be gain said that the appropriation being from the Equalization Fund would infer by its very nature that it is for the benefit of counties with marginalised areas within their boundaries. As such, any appropriation from the Fund would have a direct impact on or affect the counties. In the end, we have reached the conclusion that this bill required the concurrence of both Speakers jointly in compliance with ***Article 110 (3)*** of the Constitution. Accordingly, on account of the failure to adhere to this requirement, we find the passage of this Act by the National Assembly to be unconstitutional.

169. We now turn now to address the next classification of impugned Acts, which we have referred to as General Statutes. These are with respect to; i)

the Parliamentary Service Bill; ii) the Public Trustee (Amendment) Act of 2018 (Act No. 6 of 2018; iii) the Capital Markets (Amendment) Act No. 15 of 2018; iv) the Insurance (Amendment) Act, No, 11 of 2019; v); the National Service Act; vi); the National Cohesion and Integration (Amendment) Act, 2019 Act; vii) The Kenya Coast Guard Act 2018; viii) the Computer Misuse and Cybercrimes Act, No. 5 of 2018; ix) the Building Surveyors Act No. 19 of 2018; x) the Health Laws (Amendments) Act, 2019; xi) the Sacco Societies (Amendment) Act No. 16 of 2018; xii) Sports (Amendment) Act, 2019 and xiii) National Government Constituency Development Fund.

170. In a similar way we will consider each act or amendment individually to determine its nature. The 1st to 4th Respondents' complaint concerning the Parliamentary Service Bill, 2019 was that it repealed the Parliamentary Service Act, 2002 to make provision for the organisation and management of the shared Parliamentary Service Commission and Parliamentary Services; that its enactment was without reference to the Senate and or its legislative processes, and that the repeal of the 2002 Act directly affected the Senate's capacity to perform its constitutional duties; that in addition the new enactment sought to limit the term of office of the Clerk of the Assembly and the Senate.

171. Replying to the allegations, the Appellants contended that that the bill did not contain any provisions affecting the functions of county governments as spelt out in Part 2 of the Fourth Schedule or pursuant to ***Article 109 (3)*** of the Constitution, with the result that it was not mandatory for it be

considered by the Senate; that consequently, it was rightly considered and passed by the National Assembly. In determining this issue the High Court declared that;

> **"*any Bill or delegated legislation that provides for, or touched on, mandate or power of Parliamentary Service Commission must be considered by Senate as it directly affects the Senate's ability to undertake its constitutional mandate including its ability to consider bills that affect counties.*"**

172. In seeking to have this issue address by this Court, in their Grounds Affirming the Decision, the 1st to 4th Respondents sought orders for;

> ***"The Parliamentary Service Act, 2019 having been passed in a manner not consistent with the Constitution following the procedure of enactment outlined in the affidavit of Hon. Kenneth Makelo Lusaka dated 21st May 2020 which is contained in the Supplementary Record of Appeal is therefore unconstitutional, null and void."***

173. We have considered the complaint, and what we can discern is for consideration is, whether the Senate ought to have considered the Parliamentary Service Bill before its enactment because this affected its ability to undertake its constitutional responsibilities, and therefore it amounted to a bill concerning counties in terms of ***Articles 109*** to ***114*** of the Constitution and required its concurrence, or whether, the Senate's role in considering the Bill was limited merely to the submission of memoranda in the same way as members of the public, in order to satisfy the public participation requirement stipulated by the Constitution. It is significant to note at the juncture that, though the legislation in question pertains to the two Houses of Parliament, and touches on their respective administration and operations, besides the Constitution having established the Public

Service Commission under ***Article 127***, it is silent on the enactment of a bill of this nature.

174. In which case, as to whether it ought to have been enacted in the manner stipulated by ***Article 110 (3)*** of the Constitution requires that we ascertain if it was in the category of a bill concerning counties. And in answering this question, a review of the Supplementary Record of Appeal comprising a replying affidavit dated 21st May 2020, sworn by the Speaker of the Senate, Hon. Kenneth Lusaka is instructive. The record makes reference to a letter dated 18th May 2018 from the Speaker of the National Assembly, Hon. Justin Muturi seeking the Senate's concurrence in the passing of the Parliamentary Services bill. The Speaker of the National Assembly observed that the bill did not concern counties within the meaning of ***Articles 109, 110*** to ***114*** of the Constitution, but this notwithstanding, he advised that, *"the Bill ought to be considered by the Senate as it relates to the Commission which is responsible for performing functions necessary for the wellbeing of the Members of Parliament for the two Houses".* In a letter dated 18th May 2018, the Speaker of the Senate's response was that the bill concerned counties, since it affected the Senate's abilities to discharge its constitutional functions of oversight over the counties.

175. It is evident, from the above that, ***Articles 109*** to ***114*** of the Constitution more particularly relate to bills concerning the functions and powers of counties, rather than the administrative operations of the Houses of Parliament. We are of the view that, being one of the Houses of Parliament, the Senate's role did not fit within the definition of a function or power of

the counties, and the provisions of ***Article 109*** to ***114*** of the Constitution did not cover its oversight role. Clearly, the stipulations of ***Articles 109*** to ***114*** of the Constitution were incapable of providing a basis upon which the Senate could rely to participate in the enactment of the Parliamentary Services Act.

176. But having said that, it is necessary to observe that at the time of enactment of the 2002 Act, there was only one House of Parliament, the National Assembly. And at the time, it had the sole mandate to enact such legislation. Following the promulgation of the 2010 Constitution, and with the establishment of two Houses of Parliament, the situation changed. Any bills enacted to govern the administration and operations of the Houses of Parliament would of necessity require to take into account the existence of the two Houses. This is particularly because of, and we discussed this earlier, the establishment of a bicameral Parliament with two Houses of Parliament where each was accorded its own separate and distinct role to play at the national and county levels of government.

177. Indeed, if special attention was made to ensure that the composition of the members of the Parliamentary Service Commission established by ***Article 127*** of the Constitution equally represented both Houses, it would follow that both Houses required to be provided with an equal opportunity to enact legislation that would affect their joint and several operations. It was not possible for the Senate to be reduced to a bystander in the enactment of a bill that would have such a profound impact on its administrative operations.

178. With the result that in the interest of ensuring that both Houses have an equal opportunity to chart their respective destinies, it was right and just that before the bill was passed into law that the Senate was provided an opportunity to consider and pass the Parliamentary Service bill. Since the Appellants conceded that because the bill affected the workings of both Houses, that the Senate had the right to consider and pass the bill, by passing the bill into law without the Senate having had an opportunity to consider it, we find its passage to be unconstitutional for want of the Senate's consideration.

179. Regarding the Public Trustee (Amendment) Act of 2018 (Act No. 6 of 2018), the 1st to 4th Respondents' case is that the Act violates the Constitution since, prior to the enactment of the amendments the National Assembly did not to comply with ***Article 110(3)*** of the Constitution. The Appellants' response is that the Fourth Schedule does not designate either the national or the county government legislative powers over the administration of the estates of deceased persons, under ***Article 186(3)*** of the Constitution the functions under the Act would be assigned to the national government.

180. The nature of the amendment, as can be discerned from the memorandum of objects is to amend the Public Trustee Act to enhance good governance of Estates of deceased persons, expand the scope of the functions of the Public Trustee and reduce the time taken to administer such Estates. Further analysis of the objectives clearly show that the Act made provision

for, *inter alia*, the office and the manner of appointment of the Public Trustee, the procedure for reporting a death to the Public Trustee, the enhancement of the jurisdiction for Summary Administration, the maintenance of Estate funds in an Unclaimed Assets Account. The amendment includes a proviso to the effect that the provisions of the Unclaimed Financial Assets Act are precluded from being applied to those funds.

181. In addition, a review of the Fourth Schedule discloses that, the administration of the Estate of deceased persons is not a function that was designated to either the national or county governments. This notwithstanding, the anomaly is addressed by ***Article 186(3)*** which provides that, *"A function or power not assigned by this Constitution or national legislation to a county is function or power of the national government"* meaning that, the Act would fall within the precincts of the national government. On the strength of this provision, the amendment of the Public Trustee Act is a function designated to the national government and as such it was not a mandatory requirement for the enactments to be subjected to the requirements of ***Article 110 (3).*** We would add that with reference to the argument that they concerned counties there is nothing that shows that the strengthening all the office off the public trustee in any way pointed to this. Accordingly, we are not satisfied that the Act was rightly declared to be unconstitutional.

182. On the Capital Markets (Amendments) Act No. 15 of 2018, it is the Appellants' position that the nature of the amendments to the Act would

vest this function of securities regulation in the national government under Part 1 of the Fourth Schedule because it involved monetary policy, currency, and banking (including central banking), the incorporation and regulation of banking, insurance and financial corporations.

183. We agree that, the nature of the amendment as can be discerned from its objectives as, to provide for strengthening of regulatory operations of issuers of securities, to ensure that licensed and approved persons and entities devise and maintain systems of internal accounting controls, sufficient to provide reasonable assurances that transactions are recorded and permit preparation of financial statements in conformity with the International Financial Reporting Standards. Also created under the Act were offences relating to insider dealing, or the obtaining of financial or personal gain by fraud.

184. In our view the business of capital markets being part of banking and financial markets appropriately places it under the function of monetary policy, currency, and banking sector (including central banking). The legislation on regulation of the capital markets and financial securities is squarely a national government function, and a review of the amendments does not disclose that they affected or are concerned with the county governments. Based on this finding, ***Article 110 (3)*** of the Constitution was inapplicable to the enactment of the amendments to the Capital Markets legislation, and the trial court wrongly declared it to be unconstitutional.

185. In considering the Insurance (Amendment) Act, No, 11 of 2019, the 1st to 4th Respondents' complaint is that the amendments failed to comply with the ***Article 110 (3)*** of the Constitution**.** The Appellants contention is that the amendments to the Act do not concern county governments since Part 1 of the Fourth Schedule to the Constitution of Kenya unequivocally assigns the regulation of the insurance sector to the national government. It was also asserted that arising from *Nairobi Constitutional Petition No. 288 of 2019 Association of Insurance Brokers of Kenya vs Cabinet Secretary National Treasury and Planning & 3 Others* challenging the constitutionality of the amendments, the complaints herein were *res judicata* and *sub-judice*, and this Court should decline to determine their constitutionality.

186. On the question of whether the amendments are *res judicata* and *sub-judice,* we have been through the record and we are unable to find any pleading concerning this petition. As such, we will proceed and render a determination on the question that is before us.

187. Consequently, the amendments disclose that they seek to enhance regulation of the Insurance sector, by making provision for index-based insurance; enhancement of the Commissioner of Insurance's powers on group wide supervision; provide for alternative methods of delivery of a policy to a policy-holder, including, *"email or other electronic or telecommunication modes"* besides usage of postal services; permit the payment of advance premiums; and empower the Insurance Authority to settle disputes within the insurance sector. Also created under the Act were insurance related fraud offences.

188. Essentially, Part 1 of the Fourth Schedule assigns monetary policy, currency, banking, and the incorporation and regulation of all banking, Insurance and financial corporations to the national government, and additionally, there are no amendments demonstrative of enactments concerning counties or county governments. Accordingly, we are satisfied that, ***Article 110 (3)*** of the Constitution was not applicable to the amendments enacted, and the trial court was wrong to declare the amendments unconstitutional.

189. A consideration of the National Youth Service Act, No. 17 of 2018 *(National Assembly. No. 26 of 2018)* discloses that the Act's objective was to establish the National Youth Service and provides for its functions, discipline, organization and administration. The Act specifies that funds for the National Youth Service consist of monies appropriated by the National Assembly for this purposes, with no obligations assigned to the county governments.

190. It becomes clear that there are no provisions in the Act that affect the functions of county governments. Having regard to the above, we are satisfied that in so far as the nature of the Act is concerned with protection, security and defence of the international waters and water resources, these are functions and powers of national governments and the finding that the amendments should have been subjected to the requirements of ***Article 110 (3)*** of the Constitution was in error and did not arise.

191. As to whether the amendments to the National Cohesion And Integration (Amendment) Act, 2019 were required to be subjected to the requirements of ***Article 110 (3)*** of the Constitution, a review of the amendments indicates that the purpose was to provide for the membership of the National Cohesion and Integration Commission that was exclusive of the chairpersons of the Kenya National Commission on Human Rights, the National Gender and Equality Commission and the Commission on Administrative Justice as ordered by the High Court in *Constitutional Petition No. 385 of 2018.* Since the Constitution has not assigned the function of National Cohesion to either the national or county government, then in accordance with ***Article 186(3***) of the Constitution***,*** we are satisfied that it would be rendered a function of the national government.

192. Given that the nature of the amendments, as set out in the memorandum of objects was to amend the procedure and prescribe the manner of appointment of commissioners to the Commission, a matter concerning the national government functions, we are satisfied that the failure to apply ***Article 110 (3)*** of the Constitution to the enactments did not render them unconstitutional.

193. Turning to the Kenya Coast Guard Service Act, 2018 the 1st to 4th Respondents' assertion is that by enacting the Kenya Coast Guard Service Act, 2018, the National Assembly had infringed on the function of the county governments of security and general management of the beaches, ferries and harbours specified under Part 2 of the Fourth Schedule, as the Act was not subjected to the concurrence process under ***Article 110 (3)*** of

the Constitution. The Appellants countered that the principal object of the Kenya Coast Guard Act, 2018 is to establish the Kenya Coast Guard Service for formation of a disciplined organization in the exercise of the national government's exclusive function over the use and protection of international waters and water resources, including national defence services, police services, marine navigation, fishing and water protection as specified under Part 1 of the Fourth Schedule, in addition to the establishment of a disciplined uninformed Kenya Coast Guard Service.

194. Upon consideration of the provisions, it is apparent that the nature of the Act concerns maritime defence and national security matters that are within the exclusive functions of the national government under Part I of the Fourth Schedule. The objectives of the Act are the enforcement of maritime security and safety; pollution control; prevention of trafficking of the narcotic drugs, prohibited plants and psychotropic substances; prevention of trafficking of illegal goods; prevention of trafficking of illegal firearms and ammunitions; sanitation measures; prosecution of maritime offenders; port and coastal security; search and rescue; protection of maritime resources including fisheries; protection of archaeological or historical objects or sites; and the performance of any other function under the Act or other written law.

195. It is patently evident that the Act in no way affects the functions of county governments, and in particular they do not touch on the county government functions of county transport including to ferries and harbours under Part 2 of the Fourth Schedule. Having regard to the above, we are satisfied that

in so far as the nature of the Act is concerned with protection, security and defence of the international waters and water resources, it does not affect the functions and powers of county governments and therefore the failure to have subjected the Act to the requirements of ***Article 110 (3)*** of the Constitution did not render it unconstitutional.

196. As concerns the Computer Misuse and Cybercrimes Act, No. 5 of 2018 *(formally National Assembly No. 36 of 2018)*, the 1st to 4th respondents' concern was that since the Act concerned the use of computers systems in social activities at the county level it amounted to an Act that concerned county governments under ***Article 110 (3).***

197. The Appellants on the other hand contended that firstly, the issue before this Court is *res judicata* because in the case of ***Bloggers Association of Kenya (BAKE) vs Attorney General & 3 others; Article 19 East Africa & another (Interested Parties) [2020] eKLR,*** this Court found the entire Act to be constitutional, and for this reason, this Court lacked jurisdiction to hear and determine the constitutionality of the Act once again. In addition, they sought to argue that the Act made provision for offences relating to computer systems to enable the timely and effective detection, prohibition, prevention, response, investigation and prosecution of cybercrimes; to facilitate international co-operation in dealing with computer and cybercrime matters; and for connected purposes; and which functions are specified as a national government functions under Part 1 of the Fourth Schedule comprising transport and communications; that they are not

functions shared with the county governments and did not affect the county governments in any way.

198. Before determining the constitutionality or not of the Act, we will address the assertion that the Bill is *res judicata* since the issue herein was determined by this court in the ***Bloggers Association of Kenya (BAKE) vs Attorney General & 3 others case (supra).*** An assessment of the issues for determination in that case discloses that the central issue for consideration by the High Court was whether the provisions of Computer Misuse and Cybercrimes Act are constitutional and whether their enactment violated, the petitioners' fundamental rights and freedoms. Clearly, the issue in contention in the afore-cited case was starkly different from what is before us, that being whether, the Computer Misuse and Cybercrimes Act was unconstitutional for failing to comply with the stipulations of ***Article 110 (3)*** of the Constitution. In which case neither *res juducata* not *sub judice* were applicable to this case.

199. That said, the memorandum of objects of the Act, define its nature as pertaining to the creation of computer and computer related offences. Under Part I of the Fourth Schedule, criminal laws or enactment of legislation establishing criminal offences are functions of national government. In so far as the Act seek to create offences for misuse of computers and computer systems, the amendments fall within the domain of criminal law, a preserve of the national government. As such, we find that the ***Article 110 (3)*** of the Constitution did not apply to the provisions of

the Act and therefore the question of its unconstitutionality on account of non-compliance with the provision does not arise.

200. As to whether the Building Surveyors Act No. 19 of 2018 was unconstitutional for failure to comply with the strictures of ***Article 110 (3)*** of the Constitution. An examination of the principal objects of the Act indicate that it was to make provision for the registration and licensing of building surveyors, to regulate their professional practice and for connected purposes. Part 2 to the Fourth Schedule makes reference to trade development and regulation, including the issuance of trade licences by the county governments, but expressly excludes regulation of professions which function is reserved for the national government. As the Act deals with regulation of the profession of building surveyors, we are satisfied that its enactment did not encroach on the functions of the counties, and as such it was unnecessary for it to be subjected to the requirements of ***Article 110 (3)*** of the Constitution so that the failure so to do did not render it unconstitutional.

201. The Health Laws (Amendments) Act, 2019, according to the Appellants, various amendments were enacted to restructure health-related statutes, to provide for the introduction of powers and functions of the respective Boards, and to align the composition and membership of the Boards with the Mwongozo Code of Governance for State Corporations. It also sought to streamline the procedures for application, issuance and renewal of practicing licences of the health professionals and health technicians, among other amendments. The concerned amendments were in relation to:

a) the Pharmacy and Poisons Board,

b) the Pharmacy And Poisons Act, (Cap 244);

c) the Medical Practitioners And Dentists Act (Cap 253)

d) the Nurses Act (Cap 257),

e) the Kenya Medical Training College Act (Cap 261)

f) the Nutritionists And Dieticians Act (No. 18 of 2007),

g) the Kenya Medical Supplies Authority Act (No. 20 of 2013)

h) the Counsellors And Psychologists Act (No. 14 of 2014)

i) the Physiotherapists Act (No. 20 of 2014)

j) the Clinical Officers (Training, Registration And Licensing) Act (No. 20 of 2017)

202. With respect to the amendments to the Kenya Medical Supplies Authority Act, in addition to the 1st to 4th Respondents' complaint that ***Article 110 (3)*** of the Constitution was not adhered to the 5th respondent's complaint in Constitutional Petition No. 353 of 2019 was that the amendment to ***section 4*** of the ***Kenya Medical Supplies Act*** contravened ***Articles 6, 10, 43 (1), 46 (1), 73 (1), 110 (3), 189 (1)*** and ***227 (1)*** and was therefore unconstitutional, null and void; that no public participation anchored under ***Article 10 (2)*** and ***Article 118*** of the Constitution was carried out. The Supreme Court case of ***British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) vs Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (the Affected Party) [2019] eKLR*** was relied on to support the contention that public participation is a constitutional imperative.

203. It was further submitted that contrary to the specifications of ***Article 110 (3)*** of the Constitution, the National Assembly had proceeded to introduce, consider and pass the Health Law Amendment Act, 2019 without conducting broad qualitative consultations, but instead, pointedly directed County Governments to procure drugs and medical supplies from Kenya Medical Supplies Authority (KEMSA) and went on to create an offence where failure to adhere to the section 4 attracted a fine of Kshs. 2 million or imprisonment of five years or both. It was submitted that the High Court rightly found that the amendment was unconstitutional since it jeopardized health service delivery.

204. A consideration of the amendments to the Health Laws indicate that they were intended to restructure the composition of the health professionals' boards; provide for registration of health professionals, clarify the mode of appointment of the Chairperson and members of the Boards, and also to make provision for the appointment of Corporation Secretaries. Part 1 of the Fourth Schedule specifically assigns health policy, as well as the regulation of professions to the national government. When the combination of these two functions of the national government are read together, we find that the amendments which were strictly limited to the establishment of regulations for health professions, were well within the remit of the national government's functions. Though it is appreciated that Part 2 of the Fourth Schedule assigns the function of county health services to the counties, we are of the view that the amendments were not in the nature of county services per se, but in relation to enhancing the regulatory

environment of health professional Boards at the national level. As such, the enactment of regulatory provisions for the professional boards of health professionals did not contravene the requirements of ***Article 110 (3)*** of the Constitution.

205. But having said that, we would single out the amendments to the Kenya Medical Supplies Authority Act (KEMSA) where, notwithstanding that it was also concerned with the composition of the Authority, and provided for the appointment of a Corporation Secretary, the amendments went on to provide at section 3 (1) that, *"A national and county public health facility shall in the procurement and distribution of drugs and medical supplies obtain all such drugs and medical supplies from the Authority subject…"* Section 4 then further provides that*; "A person responsible for the procurement and distribution of drugs and medical supplies in a national or county public health facility and who contravenes provisions of this section commits an offence and is liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding five years or both."* (emphasis ours).

206. Unlike the amendments concerning the establishment of regulatory provisions for boards of health professionals, the provisions in question concern purchase of medical supplies at the county level *inter alia*. Such purchases would fit within the description of health services assigned to the counties. Therefore, the purchase of drugs and medical supplies from KEMSA was a matter that would have required the participation of the Senate. This is more so because, a reading of the amendment suggests that the provisions are directed at national and county public health facilities,

and the mere mention of the counties in the amendment was sufficient indication, that this particular amendment concerned counties, and therefore would elicit the involvement of the Senate, and the concurrence process. So that, in so far as ***Article 110 (3)*** of the Constitution was not complied with prior to enacted amendments comprising the inclusion of sections 3 and 4 to the Kenya Medical Supplies Act, we find the enactment of sections 3 and 4 of the Kenya Medical Supplies Authority Act to be unconstitutional.

207. Regarding amendment of the Sports Act 2019, the Appellants contended that the amendments seeks to repeal provisions and references to the National Sports Fund and the National Sports Fund Board of Trustees and to instead replace them with the establishment of a Sports, Art and Social Development Fund; that in addition, the regulations made pursuant to the Public Finance Management Act, 2012, were enacted to make provision for the introduction of a national tax to be levied under the Betting, Lotteries and Gaming Act; that the taxes levied are in exercise of the national government's powers donated by ***Article 209 (1)*** of the Constitution, as read together with the national government functions of "Promotion of sports and sports education" and "National betting, casinos and other forms of gambling" under Part 1 of the Fourth Schedule. It was also argued that the function and power of county governments relating to cultural activities, public entertainment and public amenities under Part 2 of the Fourth Schedule do not include or imply a power to impose any national taxes or to regulate the manner of application of such taxes, so that

the amendments neither contained any provision affecting the function and power of county governments.

208. An analysis of the nature of this amendment would indicate that it was concerned with National sports as well as betting, casinos and other forms of gambling. But more particularly, the memorandum of objects states that it aims at providing *"…a comprehensive approach to financing of the sports sector through a fund established and managed in accordance with the Public Finance Management Act 2012".*

209. For the benefit of doubt ***section 12 (2)*** of the amendment to the Sports Act is clear. It provides that there shall be paid;

> ***"a) into the Fund all the proceeds of any sports lottery taxes levied under the Betting, Lotteries and Gaming Act, investment and any other payments required by this Act to be paid into the Fund;***
>
> ***a) out of the Fund, financial support for sports persons and sports organizations, and any other payments required under the provisions of this Act."***

210. Though it is appreciated that under Part 2 of the Fourth Schedule counties are assigned similar responsibilities as those of the national government, that is *"…sports and cultural activities and facilities…"*, in addition to *"…betting casinos and other forms of gambling…"*, it is manifestly apparent that the Fund's operations bear a nationalistic perspective, with the focus of the amendment being on introduction of a tax derived from betting, lotteries and gaming to be paid into the Fund for the benefit of the entire sports sector countywide.

211. Having regards to the purpose and effect of the newly introduced tax for the benefit of sports in the country, the Senate did not produce any materials to show how it will affect county revenues. The amendment is clear that the tax is for very specific purposes, the sums of which are to be paid into and out of the National Sports Fund, as opposed to the Consolidated Fund. No direct nexus has been established between the amendments and the counties. Consequently, we can find nothing that is demonstrative of the amendments concerning county governments, and as therefore, the amendments to the Sports Act as enacted did not require the concurrence of the Senate, so as to render it unconstitutional.

212. The Sacco Societies (Amendment) Act No. 16 of 2018 was amended to provide for the establishment and operationalization of an electronic filing system for electronic filing of the statutory returns and documents by Sacco Societies, and for provision of general or specific guidelines and direction on usage of system processes, including the registration of Sacco Societies; that the amendment to the Act related to Sacco Societies and not Cooperative Societies, the distinction being that Cooperative Societies generally deal with the promotion of the welfare and economic interests of its members, while a Sacco Society is a savings, deposit taking and credit society whose regulation is solely vested in the national government under Part 1 of the Fourth Schedule of the Constitution in so far as it relates to monetary policy, currency, banking (including central banking), the incorporation and regulation of banking, insurance and financial corporations. The Appellants maintained that the Act does not concern the

functions of the county governments within the meaning of Part 2 of the Fourth Schedule.

213. In applying the laid down principles to discern the nature of the amendments, the memorandum of objects are explicit that its intention and purpose is to make provision for the usage of ICT in the collection and receiving of Sacco statutory reports and to make provision for a more efficient, accurate reporting, monitoring and analysis methodology for Saccos for easy access to their financial status, this being the cornerstone of the Risk Based Supervision. An analysis of the particulars of the Act show that it was to establish an oversight and management Board to regulate Saccos, including issuance and revocation of licenses, appointment of external auditors and the regular submission of information concerning Saccos to the Authority.

214. To ascertain whether the two Speakers concurrence would have been a prerequisite to passage of the amendments requires a determination of the question of whether this is a function of the national or the county governments. This is because Part 2 of the Fourth Schedule specifically designates 'Trade and regulation" of Appellants contends that a Sacco is not a cooperative society and that Saccos not having been assigned to either the national or the county government, would pursuant to ***Article 186(3)*** of the Constitution be a function assigned to the national government. In this regard, a cooperative society comprises of a group of individuals with specific common interests. It is an economic enterprise whose purpose is to improve the economic status of its owners or members. Cooperative societies have different classifications depending on the nature of the

members business. They include: Agricultural marketing, consumer cooperative, processing cooperative, transport cooperatives, insurance cooperative, housing cooperatives among others. ***Section 2*** of the ***Co-operative Societies Act*** defines a cooperative society as, a society registered under ***section 4*** of the Act.

215. On the other hand, savings and credit cooperative societies, or Saccos are registered under the SACCO Societies Act. Their main purpose is to mobilize savings and channel them to individual members as loans for specific development projects at affordable rates of interest. ***Section 2*** of the ***SACCO Societies Act*** defines a Sacco as a savings and credit co-operative society registered under the Co-operative Societies Act, and *a* ***Sacco Business*** is defined as a ***"... financial intermediation and any other activity by a Sacco society based on co-operative principles and in accordance with this Act, or in compliance with Islamic law, by way of –***

a) receipt of withdraw-able deposits, domestic money transfer services, loans, finance, advances and credit facilities; or

b) receipt of non-withdrawable deposits from members and which deposits are not available for withdrawal for the duration of the membership of a member in a Sacco society and may be used as collateral against borrowings providing finance and domestic money transfer services…" (emphasis ours)

216. In other words, though the provisions of the SACCO Societies Act govern a Sacco, it is registered as a cooperative society under the Co-operative Societies Act, and operates on the basis of co-operative principles. This

would point to its categorisation as a co-operative society, which function is assigned under Part 2 of the Fourth Schedule to the county governments. Of pertinence is that, the function deals with *"Trade development and regulation including cooperative societies".* Our reading of the amendment denotes the introduction of regulatory processes within Sacco operations including the introduction of accurate statutory financial reporting, monitoring and analysis methodologies for Saccos with the result that it is apparent that the amendments' objectives are concerned with the introduction of regulatory processes within SACCO Societies Act. In our view, with the additional regulatory function assigned to the county governments' would firmly place the concerned amendments within functions assigned to county governments. So that the amendments would have had to be subjected to the concurrence process as stipulated by ***Article 110 (3)*** of the Constitution, and the failure to have adopted this process in amending this Act has rendered it unconstitutional.

217. As pertains to the National Government Constituency Development Fund, the 1st to 4th Respondents' grievance at paragraph 224 of the Petition is that, it is unconstitutional *"…as it sets up a third level of government that is not contemplated by the Constitution which provides at Article 6 that there shall be only two levels of government, that is the national and county governments and through this structure, the National Government Constituency Development Fund Act, 2015 impedes on the county governments functions by implementing projects that the Constitution reserved for the county governments."*

218. The Appellants, also contended that the High Court failed to apply the *sub judice* rule in determining the constitutionality of the National Constituency Development Fund Act, 2015 as the constitutionality of the entire Act was pending before the High Court in ***Wanjiru Gikonyo & Cornelius Oduor Opuot vs The National Assembly, the Senate and others High Court Constitutional Petition No. 178 of 2016,*** which at the time of filing this appeal was part heard.

219. Similarly, the 5th Respondent also urged that in order for the court to determine whether conditions guiding the invocation of *sub judice* rule exist the court will have to peruse the proceedings in the files listed by the Appellants and urged that the High Court holding on this issue be affirmed.

220. We have reviewed the issues central to the concerned petition, and established that they involve a claim that the National Constituency Development Fund Act, 2015 violated the principle of separation of powers as it donates duties that are the preserve of the national government to members of Parliament and also interferes with the functions and powers of counties. In our view, these are not matters that are in any way related to what is before us. As such, *res judicata* or *sub judice* cannot be said to arise.

221. Having said that, upon examining the pleadings, it seems that the substance of the complaint is that *"…it sets up a third level of government that is not contemplated in the Constitution…"* No explanation is proffered as to what is meant by a third government or its nature or how the Act is purported to have set it up. The 1st to 4th Respondents have not advanced

any materials to show why the national government was prohibited from setting up a fund of this nature. This is pertinent since ***Article 94 (1)*** of the Constitution expressly provides that; *"The National Assembly represents the people of the constituencies and special interests in the National Assembly"*, and as such, nothing precludes the National Assembly from passing an Act that creates a Fund comprising moneys apportioned to the national government to expend on the needs of constituencies, considering that the funds will not be directly appropriated from the Consolidated Fund.

222. Since, it has not been demonstrated how or in what way the National Government Constituency Development Fund Act, 2015 impedes or affects county governments functions, we find that no proper basis has been laid for impeaching the Act, and we are satisfied that ***Article 110 (3)*** of the Constitution is, in the circumstances, inapplicable and the High Court was wrong to declare this Act unconstitutional.

223. The last classification of impugned Acts are the Statute Amendment Acts. These include; i) the Statute Law (Miscellaneous Amendments) Act, 2018 (*formally National Assembly No. 44 of 2017);* ii) The Statute Law (Miscellaneous Amendments) Act 2018 (No. 18 of 2018) and iii) the Statute Law (Miscellaneous Amendments) Act, 2019 *(National Assembly No. 21 of 2019).* The amendments complained of are comprised in the three omnibus Statute Law (Miscellaneous Amendment) Acts. The word *"miscellaneous"*, according to the ***Oxford Dictionary***, means *"consisting of mixture of various things that are not usually connected with each other",* while the ***Merrian Webster Dictionary of Law*** defines the word as *"consisting of diverse things or members:*

having various traits: dealing with or interested in diverse subject". True to their description therefore, the Acts relate to amendments pertaining to different pieces of legislation.

224. Prior to addressing these Acts it was the Appellants contention that Acts were *res judicata* because similar issues were considered in the cases of ***Okiya Omtatah Okoiti & 4 others vs Attorney General & 4 others; Council of Governors & others (Interested Parties) [2020] eKLR*** and ***Nubian Rights Forum & 2 others Attorney-General & 6 others; Child Welfare Society & 8 others (Interested Parties)***; ***Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae) [2019] eKLR*** wherein the Senate and the National Assembly were parties. Our observation, with respect to this issue is that, the petitions determined different issues. However, from an examination of ***the Nubian Case (supra)***, there is no doubt that what is before us is similar to the issue that was before the trial court. In point of fact, after considering the question within the context of that case, the court had this to say;

> ***"On whether the Bill was a Bill concerning counties, we were of the view that the jurisdiction of the Senate does not extend to each and every legislation passed by the National Assembly, and that to hold so would render Article 110 of the Constitution redundant. In addition, while the Fourth Schedule of the Constitution does indeed give a wide array of functions to the counties, in our view, these functions do not include creation and maintenance of a national population register. It was therefore our finding and holding that the enactment of the impugned amendments did not require the involvement of the Senate."***

225. Our take on the issue is that, the question of whether or not the Senate should participate in the consideration of bills is an immensely stressed

question. But as matters stand, it will continue to be placed before courts for decades to come, simply because of the importance of devolution to the country and the people of Kenya. So that for as for as long as Parliament will be making laws to address contemporary issues that arise from time to time court will be called upon to determine such issues. What is important to recognise however, is that the interpretation of bills by courts must take into consideration the context within which they are presented, before coming to the hasty conclusion that a matter is *res judicata*, or *sub judice*. We would add that counsels are agreed that the appeals in respect of those cases are yet to be determined by this Court. As such, this Court is yet to pronounce itself on the issue. Given that the matter is now before us on appeal, we will proceed and determine it within the context of this appeal.

226. On enactment of the Statute Law (Miscellaneous Amendments) Act, 2018 the 1st and 4th Respondents complained that the amendments did not comply with ***Article 110 (3),*** as their concurrence was not sought yet, it was evident that they affected functions that concerned county governments. In particular they complain that the amendments to the Pharmacy and Poisons Act, Clinical Officers (Training, Registration and Licencing) Act 1988 and the Occupational Therapists, (Training, Registration and Licencing) Act 1988, seek to regulate technical offices who are employed in County health services and facilities a function of County governments; furthermore that the amendments to the Environmental Management and Co-ordination Act 1999 relate to a shared function of environmental conservation including, soil and water conservation, which affect and concern County governments, with the effect that compliance with ***Article***

110 (3) was a necessary requirement for enactment of the amendments. Similar arguments were advanced in respect of the other Acts.

227. The amendments that were impugned were that; the Pensions Act, that comprised the amendment of the definition for the word 'Minister'. In the Clinical Officers (Training, Registration and Licencing) Act 1988 the word "Minister" was replaced with "Cabinet Secretary". In the Environmental Management and Co-ordination Act 1999 provision was made for the manner of appointment of the Chairperson of the Tribunal, and for full time Commissioners. In the Salaries and Remuneration Commission Act (No. 10 of 2011) provision was made for the President to appoint the Chairperson of the Commission, and in the Statutory Instruments Act (No. 23 of 2013) the amendment was to correct the inconsistency in ***section 11*** of the Act and allow for tabling of the statutory instruments before the relevant Houses of Parliament, and finally in the Occupational Therapists, (Training, Registration and Licencing) Act 1988 the amendment there corrected an error relating to the election of the Chairperson of the Board.

228. It is patently clear from an analysis of the objectives of these amendments that their purpose was corrective in nature, and intended purely to clarify the manner of election or appointment of the Chairpersons to the Boards established under the respective Acts, among other procedural clarification and rectifications. It is conspicuous that, besides merely stating that the ***Article 110*** (3) was violated by enactment of the amendments without concurrence of the Speakers, it was not in any way demonstrated that they

affected county governments. As such, we decline to find the Statute Law (Miscellaneous Amendments) Act, 2018 unconstitutional.

229. The 1st to 4th Respondents' claim concerning the Statute Law (Miscellaneous Amendments) Act 2018 (No. 18 of 2018) was limited to the Land Act, the Wildlife Conservation and Management Act, the Registration of Persons and the National Drought Management Authority Act, though the petition sought to impeach a startling 51 enactments carried under this Statute Law (Miscellaneous Amendments) Act. So that, we respectfully find that, the High Court needlessly, and without basis wrongly declared the enactments for which they had no complaints unconstitutional. With this in mind, we shall limit our analysis to the 5 enactments complained of.

230. On the Land Act, the 1st and 4th Respondents' asserted that the amendments directly affected the county governments. The Appellants' response was that the enactment merely sought to preclude the National Land Commission from suing for recovery of land rent arrears, and that further, since, Land Rent is a property tax levied pursuant to ***Article 209 (2)*** it concerned a function that was the sole responsibility of the national government.

231. On the Wildlife Conservation and Management Act, 2013 (No. 47 of 2013), the Appellants' position was that the amendment was to make provision for the establishment of Community Wildlife Conservation Committees, to strengthen the management and protection of wildlife with

the objective of assisting the Kenya Wildlife Service in the conservation management and protection of wildlife resources, which is a function of national government.

232. As pertains to the Forest Conservation and Management Act, 2016 (No. 34 of 2016), the 1st and 4th Respondents' argued that contrary to the previous enactment, the amendment had resulted in a petition for variation or revocation of public forest boundaries to be limited to consideration by the National Assembly without the Senate's participation, which, deprived the later of a role in the protection of public forests located in the counties. The Appellants' responded that the management, conservation and protection of public forests being a function of the national government rendered the amendments to be matters that did not concern county governments, or the Senate.

233. On the National Drought Management Authority Act 2016. The 1st to 4th Respondents complained that the amendment that provided for appointment of the Chairperson of the Authority by the President and the appointment of the Authority's members by the Cabinet Secretary without the approval of the Parliament was unconstitutional, particularly since disaster management, which is intricately connected to drought management concerned county governments and it was enacted without the Senate's participation.

234. On the Registration of Persons Act (Cap. 107), the 1st to 4th Respondents' assertion is that the amendments therein related to proof of identity of all

citizens and residents of Kenya which affected county service delivery, planning, data collection, statistics, data protection and security at the county level and therefore the Senate should have been involved, the Appellants stated that the objective of the National Integrated Identity Management System (NIIMS) amendments was to provide for the creation, management, maintenance and operation of a national population register as a single source of personal information for all Kenyan citizens and registered foreigners in Kenya, which was a function of the national government that fell under Part I of the Fourth Schedule.

235. Having examined the amendments complained of, it becomes apparent that they concerned amendments that were with respect to under Part 1 of the Fourth Schedule. More particularly, when the national government's functions of land planning, protection of environment and natural resources, the protection of animals and wildlife are combined with ***Article 186 (3)*** of the Constitution that designates any function not assigned to the counties to the national government, it becomes plain that the amendments to the Land Act; wildlife and conservation; forest conservation, and drought management were within the national government's mandate.

236. In addition, the objectives of the NIIMS amendments indicate that they were enacted to provide for the creation, management, maintenance and operation of a national population register for all Kenyan citizens and foreigners registered in Kenya. Simply put, the amendment seeks to establish a national population data system to register Kenyans and foreigners registered in Kenya. Since Part 1 of the Fourth Schedule

unequivocally provides that, *"National statistics and data on population, the economy and society generally"* is a function of the national government we have no hesitation in finding that the county governments are not affected in anyway by this amendment and the trial court having declared it to be unconstitutional was unwarranted.

237. In view of our findings above, and considering that the 1st to 4th Respondents have not demonstrated how or in what way the amendments affected county governments we decline to find the Statute Law (Miscellaneous Amendments) Act, 2018 unconstitutional.

238. With respect to the Statute Law (Miscellaneous Amendments) Act, 2019 *(National Assembly No. 21 of 2019)* the 1st to 4th Respondents impugned the amendments to; i) the Districts And Provinces Act, 1992 (No. 5 of 1992; ii) the Tourism Act, 2011 (No. 28 of 2011); iii) the Public Finance Management Act, 2012 (No. 18 of 2012); iv) the Prevention of Terrorism Act, 2012 (No. 30 of 2012); v) the Kenya Law Reform Commission Act, 2013 (No. 19 of 2013) and vi) the Wildlife Conservation and Management Act, 2013 (No. 47 of 2013) on account of their having violated ***Article 110 (3)*** of the Constitution.

239. The Appellants on their part asserted that, contrary to the 1st to 4th Respondent's claims, the amendments to the cited statutes did not concern county governments, particularly since;

i) the amendments to the Districts And Provinces Act, 1992 (No. 5 of 1992), were to empower the relevant Cabinet Secretary enact regulations for effective implementation of the provisions of the Act;

ii) the amendments to the Tourism Act, 2011 (No. 28 of 2011) were intended to regulate universities institutions offering tourism related courses since regulation of universities, tertiary educational institutions and other institutions of higher learning together with, tourism policy and development were exclusive functions vested in the national government under Part I of the Fourth Schedule;

iii) the Public Finance Management Act, 2012 (No. 18 of 2012) amendments were to provide for designation of accounting officers for the Parliamentary Service Commission by the Cabinet Secretary for Finance;

iv) the amendments to Kenya Law Reform Commission Act, 2013 (No. 19 of 2013) were to provide clarity on the composition of the members of the Kenya Law Reform Commission, and to identify the appointing authority of members of the Commission, which function was not a county government function.

v) the Wildlife Conservation and Management Act, 2013 (No. 47 of 2013) amendment provided for the appointment of members to the Wildlife Conversation Trust Fund, a function of the national government as indicated by Part 1 of the Fourth Schedule, and

(vi) the Prevention of Terrorism Act, 2012 (No. 30 of 2012) amendments were to provide for the appointment of additional security agencies as members of the National Counter-Terrorism Centre, to specify the term of office of persons nominated to represent the various agencies, and specify the Centre's additional responsibilities, since prevention of

terrorism is a function exclusive to the national government. In relation to this amendment in particular, it was alleged that a complaint against the amendments already existed in the case of *Mombasa High Court Constitutional Petition No, 134 of' 2019 Haki Africa & others vs The Speaker National Assembly & Others* challenging the constitutionality of the same amendments, so that, the issue before us was *res judicata* and *sub judice*.

240. We do not agree. Our analysis of the subject matter in the aforementioned petition shows that it related to concerns with the introduction of a regulatory framework to govern the operations of Civil Society and International Non-Governmental Organisations; that this would interfere with their right to operate freely and impede their freedom of expression which issues differs from what is before us. For this reason, we are not precluded from determining the 1st and 4th Respondents' complaint herein.

241. It is incontrovertible that the impugned amendments were enacted within the confines of functions assigned to the national government under Part 1 of the Fourth Schedule, and there is nothing that is demonstrative of its interference with or that it concerns the counties so as to require invocation of ***Article 110 (3)*** of the Constitution. For this reason, we are not persuaded that the Act ought to have been rendered unconstitutional for failure to comply with the provisions of the Constitution.

242. A final issue for our consideration is the 1st to 4th Respondents' Grounds of affirmation. It was contended that the High Court issued orders to the

effect that, *"All bills passed by the National Assembly and assented into law during the pendency of the proceedings in the High Court, without complying with Article 110 (3) be subjected to proper legislative process afresh."* It was their further complaint that the Data Protection Act was passed by the National Assembly without concurrence of the two Speakers as required under ***Article 110 (3)*** of the Constitution and that it was passed during the pendency of the proceedings in the High Court; that on this basis, the Act should be declared unconstitutional. In connection with this issue was the reluctance of the National Assembly to enact the Personal Data Protection Bill that was introduced, considered and passed by the Senate and was awaiting passage through the National Assembly.

243. Our quick answer to this issue is to be found in this Court's cases of ***Dakianga Distributors (K) Ltd vs Kenya Seed Company Limited [2015]*** *eKLR* and in the case of ***Independent Electoral and Boundaries Commission & another vs Stephen Mutinda Mule & 3 others [2014] eKLR*** citing the decision of the Malawi Supreme Court of Appeal in ***Malawi Railways Ltd vs Nyasulu [1998] MWSC 3***, which cited with approval Sir Jack Jacob's article entitled *"The Present Importance of Pleadings"* [1960] Current Legal Problems at p 174 stated that

> ***"It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a***

claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice…."

244. In the case of ***Galaxy Paints Company Limited vs Falcon Guards Limited [1998] eKLR*** this Court also emphasised that;

"…issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the Civil Procedure Rules, the trial court by dint of the aforesaid rules may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination."

245. Given the above, the High Court's order that, all bills passed by the National Assembly and assented into law during the pendency of the proceedings be subjected to proper legislative process afresh was a misdirection. We say this because, courts are not in the business of issuing non-specific, speculative orders, and the order when considered, lacked specificity as to the particular bills referred to or to their nature. As a result, the court's orders were inconsequential, null and void, and we so find.

246. As concerns the Data Protection Act, no specific orders were sought against the Act. It was not listed among the impugned Acts that were subsequently declared unconstitutional. As such, since the orders were speculative and did not attach to any bill, not even the Data Protection Bill, we find that nothing precluded the National Assembly from having enacted it.

247. Similarly, no specific orders were made in respect of the Personal Data Protection Bill, and as a consequence we have no basis on which to make

orders in respect of that bill. The most that we can do is to observe that, both the Senate and the National Assembly effectively concurred that the bill concerned counties, and, the bill having been considered and passed by the Senate, the onus now shifted to the National Assembly to enact the bill in accordance with the constitutionally laid down procedures.

Whether the National Assembly Standing Order No. 121(2) is Unconstitutional

248. A related issue raised in the Memorandum of Appeal was on the constitutionality of the National Assembly Standing Order No. 121(2). The Appellants submitted that the National Assembly's Standing Orders were made pursuant to **Article 124** of the Constitution. That it was these Standing Orders that applied during the enactment of the impugned laws. The Appellants urged that the High Court erred in finding that **Standing Order No. 121(2)** of the National Assembly Standing Orders is inconsistent with **Articles 109(4), 110 to 113, 122 and 123** of the Constitution.

249. The Appellants argued that the High Court erred in declaring **Standing Orders Nos. 121 (2)** and **143 (2) to (6)** of the National Assembly unconstitutional, yet they are a direct replica of the Constitution. They urged that **Standing Order No. 121** was amended to align it with the constitutional requirements of **Article 110** of the Constitution and the various principles developed by the courts on the question and the Supreme Court's Advisory Opinion encouraging mediation in resolving disputes between the two Houses of Parliament.

250. The 1st to 4th Respondents submitted that the National Assembly amended the then **Standing Order No. 121** to do away with the concurrence process required in **Article 110(3)** of the Constitution, and introduced the unconstitutional procedure which provides that both Speakers of Parliament 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. The 1st to 4th Respondents urged that it is on the basis of the amended **Standing Order No. 121** that the Speaker of the National Assembly reneged on the concurrence process, on the basis that a question has not arisen. The 1st to 4th Respondents urged that Standing Orders are enacted pursuant to **Article 124** of the Constitution and they must conform to the Constitution. Further they argued that the **Standing Order No. 121** is unconstitutional, ambiguous and creates uncertainty as it is not clear the point at which the 'question' is to be raised and by whom.

251. The 5th Respondent urged that **Article 124** of the Constitution forms the legal basis for each House to make Standing Orders. It urged that the effect of the amendment that was done to the **Standing Order No. 121** was meant to exclude the participation of the Senate in the legislative process, and by extension the erosion of the devolution governance. It urged that the amendment was introduced after the Supreme Court Advisory Opinion **In the Matter of the Speaker of the Senate & another**, supra.

252. The 8th and 10th Respondent submitted that **Standing Order No. 121** of the National Assembly is invalid as it was amended to defeat and side step a Supreme Court Advisory Opinion which is binding, *inter alia*, on the

parties who sought it. It urged that the Supreme Court **In the Matter of the Speaker of the Senate & another [2013] eKLR,** found the National Assembly's previous **Standing Orders No. 121(2) and 143(2) to (6)** facilitative of the joint resolution per **Article 110,** and upheld them, stating: *"the two sets of the Standing Orders are crystal clear on the scenario, and both, on this* point*, as we find, faithfully reflect the terms of the Constitution itself."* The 8th and 10th Respondent urged that the Supreme Court decision is applicable, and the Appellants cannot be heard to say that in view of the amendment, the Supreme Court decision does not apply.

253. The finding of the High Court on the issue of the **National Assembly Standing Order 121**, was as follows:

> ***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.

254. . The Superior Court, in its final orders on the **Standing Order Nos. 121** of the National Assembly held:

> **"*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.***

255. We have considered the rival arguments on **Standing Order 121(2)** of the National Assembly**.** We have considered the Order as it was before the amendment, and as it was after the amendment. Prior to the amendment, the **Standing** 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."***

256. It is instructive that it was at the wake of the Supreme Court Advisory Opinion that the National Assembly proceeded to amend **Standing Order No. 121** and came up with a version which reads as follows;

> *121**. Bills concerning county government***
>
> ***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 112 of 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) <u>Pursuant to Article 110(3) of the Constitution, the Speaker of the National Assembly and the Speaker of the Senate may agree</u> on an appropriate framework for jointly resolving the question under paragraph (2). (emphasis added)***

257. No doubt the National Assembly amended its **Standing Order No. 121** while exercising its mandate of making Standing Orders pursuant to **Article 124(1)** of the Constitution. That amendment introduced three factors that

did not exist in the same or similar form in the previous **Standing Order No. 121**. The first is a condition precedent "*Whenever a question arises*". The second removed the *"concurrence clause*" which existed there before. The third made it optional for the Speakers of the two Houses to agree on an appropriate framework for resolving "*the question*" by using the word "*may*" agree on afore mentioned framework.

258. We agree with the High Court that the rationale behind the amendment of **Standing Order No. 121(2)** of the National Assembly was to defeat the Advisory Opinion by the Supreme Court **In the Matter of the Speaker of the Senate & another**, supra, where the Supreme Court made specific mention of the two Orders in issue here, observing that they were *facilitative of the joint resolution per **Article 110,** upheld them, stating: "the two sets of the Standing Orders are crystal clear on the scenario, and both, on this point, as we find, faithfully reflect the terms of the Constitution itself..*"

259. We have also found the concurrence process on all Bills concerning counties is a condition precedent in Article 110(3) that requires the participation of, and resolution by the Speakers of both Houses of Parliament, before consideration such Bills. Further, that all such Bills must be placed before the respective Speakers of the two Houses for this concurrence process to be effective and constitutional. We therefore uphold the finding of the High Court on the unconstitutionality of **Standing Order No. 121 (2) and (3)** for these reasons.

260. We note that there was no appeal in respect of Standing Order No. 143 (2) to (6) which was also declared unconstitutional by the High Court. This being the case, there was nothing for us to determine in this regard.

On Whether the Appellant's Cross-Appeal was competently filed, and if so Properly Considered.

261. The Appellant alleged that the High Court failed to consider the Cross Petition and breached its right to a fair hearing, and submitted that the Judges of the High Court irregularly converted the Appellants Cross Petition to a response to the Consolidated Petition. The Appellants stated that the issues they raised in their Cross Petition were quite distinct, and a robust response had been filed to the consolidated Petition. Further to that, none of the issues raised in the Cross Petition by the Appellants were dealt with in the judgment, as the High Court simply dismissed the Cross Petition without a merit consideration. To this they placed reliance on the case of ***Kukal Properties Ltd vs Maloo and Others*** where the Court of Appeal held that the trial judge was in error for failing to consider all issues separately, and by omitting some issues, rendering the judgment defective.

262. On the issues raised in its Cross Petition, the Appellants submitted that **Article 108(1)** of the Constitution establishes the office of Leader of the Majority party and Leader of the Minority party in the National Assembly, but that the Constitution does not establish the office of Leader of Majority party and the Leader of Minority party, or any equivalent position in the Senate. The Appellants urged that despite the clear provisions of **Article 108** of the Constitution the Senate irregularly established offices of the

Senate Majority and Minority Leaders as equivalent positions of the National Assembly Leaders of the Majority and Minority parties, respectively through **Senate Standing Orders Nos. 19** and **20**. They urged that by recognizing and providing for delegations in the Senate of Kenya, the Constitution implicitly bars the establishment of offices for Senate Majority and Minority Leaders.

263. The Appellants urged that under **Article 124 (1)** of the Constitution Standing Orders can only prescribe procedural matters related to the business of a House of Parliament but cannot purport to create an office in the House equivalent to one created by the Constitution and to facilitate such offices. The Appellants urged that consequently the 3rd and 4th Respondents had no capacity to institute proceedings before the High Court, nor to represent the 1st and 2nd Respondents.

264. The Appellants contend that the Senate's purported participation in the approval of the appointment of persons nominated by the President as State Offices despite express provisions of the Constitution proving otherwise resulted in duplicating the process of approval of nominees, and is not only unconstitutional but also contrary to all bicameral parliamentary systems in other contemporary democracies. They therefore request that the Honourable Court considers the issued raised on the Cross Petition and the Response thereto and the detailed submissions before the High Court and render a decision thereon.

265. The 5th Respondent on its part stated that the High Court considered the Cross Petition and the Appellants were rightfully accorded the right to be heard. The 5th Respondent submitted that the Cross Petition was considered in paragraph 89 of the judgment and was dismissed for it lacked merit

266. The 8th and 10th Respondents submitted that the National Assembly wrongly included a Cross Petition in its Replying Affidavit. They urged that the High Court cannot be blamed for not assuming the replying affidavit contained a Cross Petition, for not being framed in any known form. It urged that the Cross Petition had no merit and was properly dismissed.

267. The findings of the High Court on the Appellants' Cross Petition were as follows:

> ***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***

268. We have considered the submissions of the parties on the issue of Cross Petition. We note that the High Court gave directions before the hearing that the Cross Petition be treated as a response to the Petition, having been filed together with the Appellants' (Respondents' in the Petition) replying affidavit in compliance with the court orders of 9th March 2021 which required the Respondents to file their response to the Petition within fourteen days.

269. That direction was not opposed by the appellants, that since the reliefs sought in prayers 1 to 6 of the Cross Petition were similar to the ones in the Petition, their position on the issues were already stated in the judgement. It follows that prayers 1 to 6 of the Cross Petition were therefore determined, however, prayers 7 to 22 of the Cross-Petition were not dealt with on merit. The said prayers 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, being **Standing Order No. 35** of the Senate and **Standing Order No. 121** of the National Assembly.

270. The Supreme Court in the case of ***Methodist Church in Kenya v Mohamed Fugicha & 3 others [2019] eKLR*** has set the record quite clearly on most of the issues arising from the matter under consideration. Two issues were raised, one that has to do with the form the Appellants' Cross Petition took, and if that rendered it fatally defective, and thus incapable of being considered. Second if it ought to have been considered, whether it was considered on the merits by the Superior Court.

271. On the first issue, we understand the Supreme Court as saying first that the party raising a Cross Petition should be a substantive party in the proceeding and not an interested party. The argument in favour of this position being that the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties.

272. In regard to the form the Cross Petition should take, the court ruled that an interested party may not frame its own fresh issues or introduce new issues for determination by the Court. In the Supreme Court case, it was an Interested party who raised a Cross Petition in its replying affidavit. The Supreme Court held that having raised it in the replying affidavit meant that the Petitioner was denied an opportunity to be heard on the Cross Petition, which the court should not countenance.

273. In the instant Petition, the Appellants are the ones who raised the Cross Petition. They were primary parties in the Petition. They raised it inside their Replying Affidavit, where no party raised any issues or objections in the format used by the Appellants. The Appellants submitted that the High Court irregularly converted the Appellants Cross Petition to a response to the consolidated Petition. The Appellants submitted that the issues they raised in their Cross Petition were distinct from those raised in the Petition and that by dismissing it, the High Court denied the Appellants the right to a fair hearing, and also failed to consider it on the merits.

274. The High Court in its judgment had this to say on the Appellants Cross Petition:

> ***"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."***

275. We have considered the Appellants submissions on the issue of the Cross Petition. The Appellants' complaint was that their Cross Petition was treated as a response to the Petition. We have perused the proceedings of the High Court have noted that at the pre-trial conference the Court observed that the Cross Petition was a response to the Petition and that it will be treated as such, and directed that parties file their submissions in readiness for the hearing.

276. In order to answer the question whether the Cross Petition was competently filed, we must consider what a Cross Petition is. We have looked at the Civil Procedure Rules in order to understand whether what is provided therein in terms of pleadings is comparable to a cross petition. Under Order VIII Rule 2 it provides for reply by a defendant thus:

> ***"A defendant in a suit may set off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof".***

277. The rules make it clear that in response to a suit, a defendant may set off or set up by way of a counterclaim, and that it shall have the same effect as a cross-suit. The important point to note is that it is the main parties in a suit who can raise a cross suit or counterclaim. Secondly, once a counterclaim is filed, the trial court is required to make a determination of both the original claim by the plaintiff or claimant, and the cross-claim by the defendant. Furthermore, the counterclaim can raise issues outside the suit by the plaintiff, in which case the trial court has two options. One, it has the option, on the application of the plaintiff, if it is of the view it cannot be conveniently disposed of in the main suit to direct that the counterclaim

cannot conveniently be dealt with in the pending suit decline permission to the defendant to avail himself thereof. The second option is to entertain the counterclaim and determine both the claim and the counterclaim.

278. Using this analogue to a petition, it is clear then that once a respondent in answer to a petition files a cross-petition, the cross-petition is to be regarded as a petition filed by the respondent inside the petitioner's case. It is a cross petition because it raises issues, including issues that may not have been raised in the original petition. And the court seized of such a matter has to make a determination of the petition and the cross-petition.

279. It is our view that the High Court misdirected itself when it declared the Appellants' cross-petition a response to the Respondents Petition, while in fact it carried both a response and a cross petition. As a result of the misdirection, the 1st to 4th Respondents' were not given an opportunity to file a response to the Appellants counterclaim. The Petition raised constitutional issues, and as the High Court observed, the **Mutunga Rules** were applicable in terms of giving procedural guidance. Under Rule 10 of these Rules titled *form of petition* and Rule 15 titled *reply to petition* it is provided as follows:

> ***"Form of petition.***
> ***10. 1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.***
> ***2) The petition shall disclose the following—***
> ***a. the petitioner's name and address;***
> ***b. the facts relied upon;***
> ***c. the constitutional provision violated;***

d. the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;

e. details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;

f. the petition shall be signed by the petitioner or the advocate of the petitioner; and

g. the relief sought by the petitioner.

<u>Reply to a petition</u>

15. 1) The Attorney-General or any other State organ shall within fourteen days of service of a petition respond by way of a replying affidavit and if any document is relied upon, it shall be annexed to the replying affidavit.

2) a. A respondent not in the category of sub rule (1) shall within seven days file a memorandum of appearance and either a—

i. replying affidavit; or

ii. statement setting out the grounds relied upon to oppose the petition.

b. After filing either of the documents referred to in sub rule (2) (a), a respondent may respond by way of a replying affidavit or provide any other written document as a response to the petition within fourteen days.

3) The respondent may file a cross-petition which shall disclose the matter set out in rule 10(2).”

280. The rules reveal that the content and form of a petition is similar to that expected of a cross petition. This reveals further that a cross petition is not a replying affidavit only. Looking at the Cross-Petition in question, there was a want of form for reason it ought to have been filed separately from the response to the Petition, and not within the response, as happened in this case. This was a want of form, but the substance in terms of content met the requirement of the Mutunga Rules. Furthermore, no issue of want of form was raised by any of the parties. Once the Cross-Petition was

accepted by the High Court, it had a duty to make a determination of the issues raised in it.

281. The issue is whether it was considered. The High Court in its judgment as set out above, stated that prayers (1) to (6) of the cross-petition were issues directly in issue in the Petitioners' Petition and that they had fully dealt with them in their judgment. They also stated that as far as the rest of the prayers (7 to 22) were concerned, they were outside the scope of the Petition and so were not considered.

282. Given the High Court's judgment, it only dealt with the first six issues in the Cross-Petition. The Court did not consider prayers 7 to 22 of the Cross-Petition on merit or at all. These prayers were premised on various Articles of the Constitution as hereunder:

a) **Articles 95(4)** and **(5)** where the Appellants contended that the National Assembly had the exclusive mandate of oversight of state officers;

b) Contravention of **Article 108** by establishment of the offices of the Senate Leaders of the Minority and Majority through Senate Standing Order Nos. 19 and 20;

c) **Article 132(2)** where the Appellants sought a declaration it had the sole mandate of approving persons nominated by the President as State or Public Officers to serve in state office, and public office in the National Government;

d) A declaration that the Senate had a limited role of oversight of State and State organs under **Article 145** of the Constitution

limited to considering and determining any resolution to remove the President and the Deputy President;

e) A declaration to the extent that the Senate has established committees duplicating the mandate of the committees of the County Assemblies and purported to exercise oversight over matters that fall in the exclusive domain of County Assemblies, the Senate of Kenya is in violation of **Article 185(3);**

f) A declaration that the Senate purported action of establishing and facilitating and/or causing to be facilitated committees duplicating the mandate of the committees of the National Assembly and County Assemblies amounts to imprudent and irresponsible spending of public money contrary to **Article 201** of the Constitution;

g) A declaration that the Senate Standing Order No. 35 was in violation of **Article 121(1)** of the Constitution for failing to provide for ascertainment of quorum in the Senate sittings. as prescribed under.

283. Having found that the High Court did not consider the cross petition in terms of prayers 7 to 22, we find that no determination was made on the issues raised therein. Consequently, we find that we have no jurisdiction to consider them. We are of the view that the best order to make is to return the matter back to the High Court to consider and make determination of the cross petition and the prayers nos. 7 to 22 of the cross petition.

The Disposition

284. All in all, this appeal is partially allowed, as it substantially succeeds in material respects. We also will need to reformulate certain orders in areas where the findings of the High Court have been upheld, for the reasons given in this judgment.

285. We accordingly order as follows:

1) **We set aside orders (i), (ii), (iii), (iv), (v), and (vi) of the judgment by the High Court dated 29th October 2020, delivered in Nairobi H.C Petition No. 284 of 2019 as consolidated with Nairobi H.C. Petition No. 353 of 2019.**
2) **We set aside the declaration by the High Court 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
   i. 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;
   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, save for the amendments made to sections 3 and 4 of the Kenya Medical Supplies Authority Act

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

3) **A Declaration be and is hereby issued that the concurrence process in Article 110(3) only applies to all Bills concerning counties within the meaning of Articles 109 to 114 of the Constitution, and as interpreted in this judgment.**

4) **We hereby uphold the Declaration by the High Court 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.**

5) **We hereby uphold the Declaration by the High Court 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;**

6) **We hereby uphold the Declaration by the High Court 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 Equalization Fund Appropriation Act No. 3 of 2018

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

iii. The amendments made to section 3 and 4 of the Kenya Medical Supplies Authority Act by the Health Laws (Amendment)Act, No. of 5 of 2019

7) **We hereby uphold the Declaration by the High Court that 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.**

8) **We hereby uphold the Declaration by the High Court that the provisions of Standing Order 121(2) of the National Assembly Standing Orders is inconsistent with Articles 109(4) and 110 to 113 of the Constitution and is therefore null and void.**

9) **We hereby remit the Appellants' Cross Petition filed in Nairobi H.C Constitutional Petition No. 284 of 2019 back to the High Court for**

consideration and determination of Prayers nos. 7 to 22 of the Cross Petition.

10) **This being a public interest matter, each party shall bear its own costs of this appeal.**

286. Orders accordingly.

Dated and Delivered at Mombasa this 19th day of November, 2021.

A.K. MURGOR

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR