**REPUBLIC OF KENYA**
**IN THE SUPREME COURT OF KENYA**
*(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Wanjala, Njoki & Ouko, SCJJ)*

**PETITION NO. 1 OF 2018**

**BETWEEN**

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

**AND**

**THE NATIONAL ASSEMBLY & 3 OTHERS..................1ST RESPONDENT**
**THE SENATE............................................................2ND RESPONDENT**
**ATTORNEY GENERAL...............................................3RD RESPONDENT**
**THE CONSTITUENCY DEVELOPMENT FUND**
**BOARD......................................................................4TH RESPONDENT**
**THE COMMISSION FOR THE IMPLEMENTATION**
**OF THE CONSTITUTION...........................................5TH RESPONDENT**
**KATIBA INSTITUTE ....................................................6TH RESPONDENT**

*(Being an Appeal from the Judgment of the Court of Appeal at Nairobi (Githinji, Okwengu & G.B.M Kariuki JJA) in Civil Appeal No. 92 of 2015 delivered on 24th November 2017)*

**JUDGMENT OF THE COURT**

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## A. INTRODUCTION

**[1]** The petition of appeal before the Court is dated 29th December 2017 and lodged on 2nd January 2018. It is brought under the provisions of Article 163 (4) (a) of the Constitution, Section 15 (2) of the Supreme Court Act, No. 7 of 2011, and Rule 33 of the Supreme Court Rules, 2012 (repealed). The appeal challenges the judgment and orders of the Court of Appeal *(Githinji, Okwengu & G.B.M Kariuki JJA)* in Civil Appeal No. 92 of 2015 delivered on 24th November 2017, which partially allowed an appeal against the decision of *(Lenaola (as he then was), Mumbi (as she then was) & Majanja, JJ)* in High Court Petition No. 71 of 2013. On its part,

the 1st respondent filed a ***Cross-Appeal*** vide its Notice of Cross-Appeal dated 6th December 2019 also partially challenging the appellate court's finding.

## B. BACKGROUND

**[2]** The genesis of this matter can be traced to the introduction of the Constituencies Development Fund (**CDF Fund**) in 2003 vide the now-repealed Constituencies Development Fund Act, 2003 (**CDF Act, 2003**) which provided that the government was to set aside at least 2.5% of its ordinary revenue and channel it to the CDF Fund to be utilized at the constituency level. In 2007, the CDF Act 2003, was amended to establish the National CDF Board at the constituency level to replace the National Committee. CDF Committees were also established with respective Members of Parliament being the Constituency Committee patrons. On 14th January 2013, the CDF Act 2013 was enacted and in doing so, repealed the CDF Act 2007.

**[3]** Aggrieved by the enactment of the CDF Act 2013, two (2) petitions were filed at the High Court. The 1st appellant filed its petition in the High Court at Nairobi as *Petition No. 71 of 2013, Institute for Social Accountability vs. The Attorney General & another* while the 2nd appellant filed its petition in the High Court at Nakuru as *Petition No. 16 of 2013, Centre for Enhancing Democracy and Good Governance vs. Parliament of Kenya & 2 Others*. Both petitions challenged the constitutionality of the CDF Act 2013. On 15th May 2013, with the consent of the parties, the 2nd appellant's petition was transferred to Nairobi and on 22nd May 2013, the two petitions were consolidated.

**[4]** On 1st October 2013 during the pendency of the case, the Constituency Development Fund (Amendment) Act No. 36 of 2013 (**the CDF (Amendment) Act, 2013**) was enacted. The appellants, with leave of the High Court, amended their consolidated petitions to also challenge the CDF (Amendment) Act of 2013.

The CDF Act 2013, and the CDF (Amendment) Act of 2013 are hereinafter collectively referred to as the ***CDF Act 2013.***

**[5]** At the High Court, four key issues were identified for determination:

i. *Whether the process leading to the enactment of the CDF Act 2013 was constitutional;*
ii. *Whether the CDF Act 2013 offended the constitutional principles of public finance and division of revenue provided for under the Constitution;*
iii. *Whether the CDF Act 2013 violated the division of functions between the two levels of government; and*
iv. *Whether the CDF Act 2013 offended the principles of separation of powers.*

**[6]** The trial court vide a judgment delivered on 20th February 2015 determined that the CDF Act 2013 was unconstitutional and as a result, granted the following orders;

i. *A declaration that the CDF Act 2013 was unconstitutional and therefore invalid.*
ii. *The order of invalidity above was suspended for a period of twelve (12) months from the date of judgment.*
iii. *The national government could remedy the defect within the period of suspension and the CDF Act 2013 would stand invalidated at the expiry of the twelve (12) months or could be earlier repealed whichever came first.*
iv. *Each party to bear its own costs.*

**[7]** On the *question as to whether the constitutionally prescribed process was adhered to during the enactment of the CDF Act 2013,* the trial court held that the

CDF Act 2013 was passed without the involvement of the Senate and that concurrence of the Speakers of both Houses of Parliament that a Bill concerns county government or not is neither conclusive nor decisive as to whether the legislation affects county government. The trial court also found that there was public participation through a task force and review panels set up, *inter alia* public engagement.

**[8]** On whether *Section 4 of the CDF (Amendment) Act, 2013 offended the constitutional principles of public finance and division of revenue*, the trial court established that the CDF was not a conditional grant to the county governments within the meaning of Article 202(2) of the Constitution and that Article 202 set out structures for equitable sharing of the national government revenue between the national and county governments. The court further found that if the national government so desired, it could at its discretion grant additional revenue, whether conditionally or unconditionally through the county governments, but such grants must respect the structures established under the Constitution.

**[9]** On whether *the CDF Act 2013 violated the division of functions between the county and national government,* the court found that in as much as the national government is free to infiltrate its policies at the county levels, it must do so through the structures recognized under the Constitution and those that do not run parallel to them. The court also noted that charging the CDF with implementing local development projects under Section 22 of the CDF Act 2013 upset the division of functions between the two levels of government.

**[10]** On *whether the CDF Act offended the principle of separation of powers*, the court determined that by involving Members of Parliament in the planning, approval, and implementation of the CDF projects, the CDF Act 2013 had violated the doctrine of separation of powers and undermined key national values and

principles of governance as enshrined in several Articles of the Constitution including devolution of power, accountability, and good governance.

**[11]** Aggrieved with the judgment of the High Court, the 1st respondent filed *Civil Appeal No. 92 of 2015* dated 16th April 2015 while the 4th respondent filed *Civil Appeal No. 97 of 2015* before the Court of Appeal. The two appeals were consolidated and heard together. The respondents raised 23 similar grounds of appeal stating in summary that the learned Judges erred in law and fact:

a. *In finding that the CDF Act 2013 ought to have been considered by the Senate prior to its enactment yet the Senate was not yet in existence, and the CDF (Amendment) Act, 2013 was enacted pursuant to section 10 of the Sixth Schedule to the Constitution;*
b. *In failing to appreciate that the CDF (Amendment) Bill, 2013 was not a bill concerning counties under Article 110 (1) of the Constitution;*
c. *In failing to appreciate that the CDF (Amendment) Bill, 2013 was a money Bill in terms of Article 114(3) of the Constitution, which only the National Assembly could pass;*
d. *In finding that the 2.5% of the revenue collected nationally is deducted by the national government before the balance of the revenue is shared between the national governments and the county government pursuant to Article 203 (2) of the Constitution;*
e. *In interpreting Articles 203(2) of the Constitution as sacrosanct without considering the Equalization Fund established under Articles 205 and 206(1)(a) of the Constitution which allows Parliament to establish other public funds intended for specific purposes;*
f. *In finding that the CDF Act 2013 sets out parallel structures to the county governments;*
g. *In finding that the CDF violates the division of function between the two levels of government; and*

h. *In finding that the CDF violates the principle of separation of powers.*

**[12]** The appellants raised a preliminary objection to the two appeals challenging the Court of Appeal's jurisdiction on the ground of the doctrine of mootness. They urged that the appeals had been rendered moot following the repeal of the CDF Act 2013 and the enactment of the National Government Constituency Development Fund, 2015 (hereinafter ***"NGCDF Act, 2015"***). Consequently, it was argued that there was no controversy requiring adjudication or any continuing violation of the Constitution by the CDF Act 2013. On the other hand, the 1st respondent argued that the NGCDF Act, 2015 did not repeal the CDF Act 2013, but the CDF Act 2013 ceased to operate as a result of the High Court Judgment, and if the appeal succeeded, Parliament would amend and harmonize the two Acts. The appellate court directed that the preliminary objection be determined together with the substantive appeals.

**[13]** Having considered the issues, the Court of Appeal delivered a judgment on 24th November 2017, partially allowing the appeal, by declaring Sections 24(3)(c), 24(3)(f), and 37(1)(a) of the CDF Act 2013 unconstitutional and invalid for violating the principle of separation of powers. The court also overturned the declaration, that the CDF Act 2013 was unconstitutional in its entirety and held that the rest of the orders made by the trial court had been overtaken by events.

**[14]** On the question of *mootness,* the court observed that the NGCDF Act, 2015 did not expressly repeal the CDF Act 2013 and that the High Court declared the entire CDF Act 2013 unconstitutional and suspended the declaration of unconstitutionality for 12 months to give the government a window to remedy the defects. Therefore, the CDF Act 2013 stood invalidated at the expiry of that period. It was the appellate court's opinion that the declaration of invalidity was made on 20th February 2015; the appeals before it, were filed in April 2015 within the 12 months of suspension; and the NGCDF Act, 2015 became operational on 19th February 2016, the last day of the suspension period. The Court of Appeal

concluded that an action to enjoin the enforcement of a statute becomes moot when the statute is repealed and that the cessation of the operation of the CDF Act 2013 was not by the voluntary act of the appellants but by the pronouncement of the court. It was further observed that there was parallel litigation in High Court *Petition No. 17 of 2016, Wanjiru Gikonyo and another vs. The National Assembly and 4 others (**Wanjiru Gikonyo case**)* regarding the constitutionality of the NGCDF Act, 2015 on the very issues raised in the appeal, therefore, the same constitutional questions remained controversial. Consequently, the Court of Appeal dismissed the preliminary objection on the grounds: that the controversy was still raging; the appeal raised matters of great public interest and constitutional magnitude; and the principle of judicial economy was better served by hearing the questions raised in the appeal rather than by postponing the determination to a future date.

**[15]** On the issue of *division of functions between the two levels of government,* the Court of Appeal held that the appellants did not prove that the functions performed by the national government through CDF are exclusively within the jurisdiction of the county government. The Court also found that the High Court erred in declaring Sections 3 and 22 of the CDF Act 2013 unconstitutional. It observed that it was not unconstitutional for the national government to perform CDF services inside the administrative structures of county governments. By way of analogy, the Court pointed out that Article 204(3)(b) of the Constitution permits the national government to use the Equalization Fund to provide basic services to marginalized areas in the counties either ***directly*** or ***indirectly*** through conditional grants to counties in which marginalized communities exist.

**[16]** On whether *Section 4 of the CDF (Amendment) Act, 2013 offends the principles of Public Finance and division of revenue*, the appellate judges determined that this contention was hypothetical as it was not empirically demonstrated that the constitutional formula for division of revenue was

jettisoned in favour of the provisions of Section 4 (1) (a) of the CDF Act 2013 or that the county governments received less than their rightful constitutional share of budgetary allocation in the financial year 2013/2014 or any other subsequent year.

**[17]** On the *constitutionality of the CDF Act 2013 for failure to involve the Senate in its enactment,* the Court of Appeal found that the Senate had no legislative role in the enactment of the CDF Act 2013 as it was passed before the Senate came into existence. Furthermore, it was determined that the Speakers of the two Houses of Parliament resolved that the subject CDF (Amendment) Bill, 2013 did not concern county governments (since it is a constitutional condition precedent in the legislative process that the Speakers of both Houses must resolve the question of whether a Bill concern the counties before it is considered). As such the decision of the Speakers ought to have been given due deference.

**[18]** On the *doctrine of separation of powers*, the Court of Appeal found that it was not unconstitutional for the National Assembly under Section 28 of the CDF Act 2013 to require the National Assembly to appoint a National Assembly Select Committee to perform an oversight role over the Fund, which oversight role it could have delegated to one of its own Committees. It further held that the CDF did not fall within the administrative function of the county government and that it could only be statutorily administered by the national government.

**[19]** On the *doctrines of ripeness and political question,* even though the Court of Appeal acknowledged that it was not an issue raised by any of the appellants, it proceeded to address the same. The appellate court noted that there was no actual live dispute between the national and county governments about CDF and if any, the mechanisms for resolving such disputes were not employed and, the questions which were brought to the High Court for determination had not reached constitutional ripeness for adjudication by the court. In effect, the Court of Appeal

concluded that the appellants invented a hypothetical dispute which was brought to court in the guise of the unconstitutionality of the CDF Act 2013.

**[20]** Dissatisfied with the Court of Appeal's decision, the appellants filed an appeal before this Court as alluded to in the opening paragraph of this judgment whereby they are seeking, *inter alia*, the following orders:

*i.* *The appeal be allowed;*

*ii.* *The Judgement and Orders of the Court of Appeal (Githinji, Okwengu & Kariuki, JJA) dated 24th November 2017 be overturned, save for the declaration that sections 24 (3) (c) and (f) and 37 (1) (a) of the CDF Act 2013 violates the principle of separation of powers;*

*iii.* *A declaration be issued that under Articles 1, 2, 6(2), 10 (1) (a), 93(3), 94 94 (4), 174, 186, 189 (1) (a), 191, 201 (b) (ii), 201(d)-(e), 202(1) and the Fourth Schedule of the Constitution, the CDF Act 2013 as amended by the Constituencies Development (Amendment) Act 2015 [sic] is unconstitutional for offending the principles of public finance, division of revenue and division of functions of the National and County Governments;*

*iv.* *A declaration be issued that failure to involve the Senate in the passage of the Constituency Development Fund (Amendment) Act, 2013 was unconstitutional;*

*v.* *A declaration be issued that numerous provisions of the CDF Act 2013 are unconstitutional and cumulatively render the entirety of the Act untenable and therefore unconstitutionally invalid ab initio;*

*vi.* *A declaration be issued that any organ or body purportedly established by the CDF Act 2013 is illegal as it was created without the authority of the law;*

*vii.* *An order do issue striking down the CDF Act 2013 for being unconstitutional; and*

viii. *The 1st to 4th respondents to bear the costs in this Court and the courts below.*

**[21]** Also dissatisfied with the decision of the Court of Appeal, the 1st respondent filed a notice of Cross-Appeal dated 6th December 2019 seeking *inter alia* that:

i. *The Cross-Appeal be allowed.*
ii. *The order of the Court of Appeal (Githinji, Okwengu and G.B.M Kariuki JJA) declaring that sections 24 (3) (c) and (f) and 37 (1)(a) of the Constituencies Development Fund Act, 2013 are unconstitutional for violation of the doctrine of separation of powers be overturned.*
iii. *The rest of the judgment of the Court of Appeal (Githinji, Okwengu & G.B.M Kariuki JJA) be upheld.*
iv. *The Petition of Appeal dated 29th December 2017 and filed in Court on 2nd January 2018 be dismissed with costs to the 1st respondent.*

## C. PARTIES SUBMISSIONS

### *a. The appellants*

**[22]** The appellants' submissions are dated 5th February 2020 and filed on 6th February 2020. On the issue of *mootness,* the appellants' Counsel submitted that the National Assembly enacted the NGCDF Act, 2015 to replace the CDF Act 2013. As found by the Court of Appeal, the two Acts cover the same subject matter and establish the same fund allocated to constituencies to be managed and implemented by similar institutions. Counsel urged that the CDF Act 2013 was impliedly repealed by the NGCDF Act, 2015. To support this assertion, the appellants relied on the English case of ***Elle Street Estates Limited Vs Minister of Health*** [1934] 1KB 590. In the alternative, they argued that the CDF Act 2013 was expressly repealed by the High Court and therefore, the Act had ceased to exist rendering the appeal moot. The appellants relied on this Court's

decision in ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed & 3 Others***, SC Petition No. 7 of 2018 [2019] eKLR, and the High Court's decision in ***Evans Kidero v Speaker of Nairobi City County Assembly & another***; [2015] eKLR to urge this point.

**[23]** On the issue of *justiciability*, the appellants argued that the Court of Appeal erred in the court's approach to the justiciability question which it addressed under the twin limbs of the principle of ripeness and the political question doctrine. On the principle of ripeness, it was the appellants' case that the Court of Appeal erred by concluding that the appellants had invented and filed a hypothetical case on the ground that neither the national nor county governments had any actual live dispute about the CDF Act 2013. In addition, the appellants faulted the appellate court's reasoning that if there was a dispute, it was an inter-governmental dispute and the mechanisms for resolving such a dispute were not employed, therefore, the questions which were brought to the High Court for determination were not ripe for adjudication by the courts.

**[24]** Furthermore, the appellants faulted the Court of Appeal for misinterpreting and misapplying the provisions of Articles 165(3)(d) and 258 of the Constitution by introducing an alien rule on *locus standi*. They asserted that the appeal and petition before the High Court was not an inter-governmental dispute but of private citizens under Article 165 (3) (d) of the Constitution. They relied on the decisions in ***Isiolo County Assembly Service Board & Another vs Principal Secretary (Devolution) Ministry of Devolution and Planning & another***; [2016] eKLR; ***William Odhiambo Ramogi & 2 others v Attorney General & 6 others***; [2018] eKLR; and ***Kenya Ports Authority vs William Odhiambo Ramogi & 8 others***; [2019] eKLR to bolster their argument.

**[25]** On the *political question doctrine*, the appellants submitted that Articles 10, 23, 165 (3) (d), and 258 of the Constitution require the High Court to determine

the constitutionality of any policy or law, as well as that of anything, said to be done under Constitution. It was further submitted that these Articles oust the application of the political question doctrine in Kenya. They relied on this Court's decisions in ***Communications Commission of Kenya & 5 others vs Royal Media Services Limited***, SC Petition No. 14 of 2014 as Consolidated with Petition 14A & 14B OF 2014 [2014] eKLR; Court of Appeal, ***Martin Nyaga Wambora & 3 others vs Speaker of the Senate & 6 others***; [2014] eKLR; and High Court, ***Kanini Kega v Okoa Kenya Movement & 6 others***; [2014] eKLR. They cited various decisions from the Philippines, South Africa, and Canada to reinforce their argument that constitutional democracies with progressive Constitutions have moved away from the political question doctrine.

**[26]** In the alternative, it was the appellants' submissions that even if the political question doctrine was applicable in Kenya, the dispute does not present a political question as it fails to meet the six elements for a political question as settled in the United States' Supreme Court case of ***Baker vs Carr***, 369 U.S 186, 82 S. Ct 691, 7 L. Ed. 2d 663 (1962) that is*: textually demonstrable constitutional commitment of the issue to a coordinate political department; lack of judicially discoverable and manageable standards for resolving it; the impossibility of deciding without initial policy determination of a kind clearly for non-judicial discretion; the impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of government; an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.*

**[27]** On the issue of *whether the CDF (Amendment) Act, 2013 was unconstitutional for the failure to involve the Senate in the process of its enactment*, the appellants contended that an examination of the CDF (Amendment) Act, 2013, the legislative intent behind it, as well as its purpose and

effect demonstrates that the Bill was one concerning county government. Furthermore, it was submitted that the allocation of money under the CDF Act is tied to the Division of Revenue process, itself a matter concerning county governments.

**[28]** On the issue of *whether the CDF Act 2013 was unconstitutional for offending the constitutional design, division of functions, principles of public finance, and separation of powers,* the appellants submitted that the Kenyan constitutional design changed from political unitarism to federalism and that the dispersal of power through devolution is an integral part of the system of federal constitutional design under Articles 1(1), 2 (1) (2) (4), 3 (2), 6 (2), 10(1), 94(1)(4), 96 (1) (2) (3), 174 (1), 175, 176(1), 183(3), 185(1) and 189(1) and the Fourth Schedule of the Constitution. They, therefore, urged this Court to find that its decision ***In the Matter of Interim Independence Electoral Commission***; SC Constitutional Application No. 2 of 2011 [2011] eKLR ***(Re IIEC case)*** was *per incuriam* and against the set-out Articles of the Constitution. They further submitted that the CDF Act 2013 upsets the principles of public finance and division of revenue for reasons that Articles 201 (b) (ii), 202 (1), and 203 (1) of the Constitution establishes a detailed formula for equitable sharing of revenue raised nationally between the two levels of government and that the import of the provisions of Section 4 (1) (a) of the CDF Act 2013 was to establish a Fund which is a third entity unknown to the Constitution in the context of the revenue sharing framework.

**[29]** It is the appellants' further case that contrary to the provisions of Article 6 of the Constitution, Section 3 of the CDF Act 2013 requires that a specific portion of the national annual revenue be devoted to the constituencies for purposes of infrastructural and community developments as detailed under Section 22 of the Act, which, therefore, establishes a third level of government and threatens the functional autonomy of county governments. They also submitted that Articles 95

and 96 of the Constitution specifically grant and define legislative powers to the two Houses of Parliament and that the involvement of Members of Parliament in the implementation of CDF violates the principle of separation of powers and to this extent the CDF Act 2013 is unconstitutional. They relied on this Court's decision ***Re IIEC case*** and ***In the Matter of the National Land Commission***, SC Advisory Reference No. 2 of 2011 [2015] eKLR and urged that Sections 28, 29, 30, and Part VII of the CDF Act 2013 are also unconstitutional for violating the principle of separation of powers.

***b. The 1st respondent's case***

**[30]** The 1st respondent filed a Cross-Appeal on 18th December 2019 challenging the Court of Appeal's decision on grounds that the learned judges erred in law: in adopting a restrictive and impractical view of separation of powers and failing to appreciate that there is no absolute separation of powers; in failing to appreciate the limited role that the Members of Parliament play in the CDF Fund, where they act as ex-officio members of the CDF Committee, and a link between the people that they represent and the Committee; in failing to appreciate that the representation by elected representatives includes allowing the representatives to articulate issues on behalf of the electorates; in finding that the Members of Parliament are involved in the implementation and administration of CDF projects whereas the role of Members of Parliament under the CDF Act 2013 is limited to coordination and consultation with both National and County Government; and in making a declaration that Sections 24 (3) (c) and (f) and 37 (1) (a) of the CDF Act 2013 are unconstitutional.

**[31]** The 1st respondent relies on its submissions filed on 24th January 2020. On the question of mootness, it was submitted that the NGCDF Act, 2015 did not repeal the CDF Act 2013 or any section thereof. The application of the CDF Act 2013 ceased by operation of law as per the judgment of the High Court. In addition,

it was submitted that a case is not moot as long as a party continues to have an injury for which the Court can award a remedy even if the primary relief has been mooted but there is still an injustice and a contravention of the doctrine of separation of power. To support this assertion, the 1st respondent relied on the decision of the Supreme Court of the United States in ***Chafin vs Chafin*** 133 S. Ct 1017 (2013). It further urged that the constitutional controversy before the Court of Appeal was continuing as the 1st appellant, through its employee, had filed a petition before the High Court, ***Petition No. 178 of 2016 Wanjiru Gikonyo and another vs The National Assembly and 4 others***, challenging the constitutionality of the NGCDF Act, 2015 and raising the same issues as raised in the appeal.

**[32]** On the *doctrine of ripeness and political question,* it was submitted that Article 189 (3) & (4) of the Constitution and Section 31 of the Inter-governmental Relations Act, 2012 require county governments and the national government to make every reasonable effort to settle disputes between them before resorting to judicial proceedings. They also contended that disputes between the two levels of government should not be determined in court in the first instance. Furthermore, it was submitted that there was no dispute between the national government and county governments about CDF, therefore, the issues raised by the appellants are imaginary.

**[33]** On the *political question doctrine*, it was submitted that the issues raised are political questions that must be left for resolution by other organs and offices other than the courts. It relied on the dissenting opinion by *Njoki SCJ* in ***The Speaker of the National Assembly*** Advisory Opinion Reference No. 2 of 2013 [2013] eKLR and the Court of Appeal's decision in ***Pevans East Africa Limited & Another vs Chairman Betting Control & Licensing Board & 7 others*** [2017] eKLR.

**[34]** On the *division of functions and constitutional status and powers of the county governments*, it was the 1st respondent's submission that the CDF is a constitutional fund recognized under Article 206 (1) (a) of the Constitution. It was also urged that under Article 186 (4) of the Constitution, Parliament can legislate for the Republic on any matter and that the CDF Act 2013 is one such legislation. On the *involvement of the Senate* in the legislation of the CDF Act 2013, it was the 1st respondent's submission that the CDF Act 2013 was assented to on 14th January 2013, prior to the first General Elections and the Senate was not in existence. It further urged that with regards to the CDF (Amendment) Act, 2013 which was published when the Senate was in existence, the requirement under Article 110 (3) of the Constitution did not apply as there was no question or doubt whether a bill concerned counties. It relied on the High Court's decision in ***Nation Media Group Limited & 6 others vs The Attorney General & 9 others*** [2016] eKLR

**[35]** On the *violation of principles of public finance*, it was submitted that the CDF Act 2013 did not interfere with county planning but only provided for consultation, cooperation, and coordination of inter-governmental policies, similar to what is provided for under Section 7 of the Inter-Governmental Relations Act, Section 54 of the County Governments Act, and Section 187(1) of the Public Finance Management Act, 2012. The 1st respondent, therefore, urged that the declaration of invalidity of the few sections of the statute as was the holding of the Court of Appeal cannot render the entire Act unconstitutional but can be cured by the doctrine of severability enunciated in the case of the ***Attorney General for Alberta vs Attorney General for Canada*** [1947] AC 503.

**[36]** Concerning the Cross-Appeal, the 1st respondent submitted that the appellate court's interpretation of the principle of separation of powers is restrictive, impractical, and erroneous for failing to hold that there is an overlap of function between the arms of government. It contended that the Constitution does not

prescribe a system of pure separation of powers, it relied on this Court's decision in ***Re IIEC Case*** and urged that independence of a branch of government does not mean detachment, isolation, or disengagement from other players in public governance. The 1st respondent in the comparative analysis relied on decisions and statutory provisions from India, the United States, and Germany and contended that no absolute separation of power exists anywhere in the world.

**[37]** In conclusion, the 1st respondent submitted that the appellate court erred in failing to appreciate that Members of Parliament in the CDF were ex-official members, without voting rights and that the representation of the electorates includes allowing the elected members to articulate the issues and views of their electorates. They submitted that according to Section 24 of the CDF Act 2013 the role of Members of Parliament in the CDF is limited to consultation and coordination and not the implementation of projects**.**

c. ***The 4th Respondent's case***

**[38]** The 4th respondent opposes the petition through its submissions dated 30th August 2020. On the issue of *mootness*, it was submitted that the constitutional controversy is still alive creating the need to substantially and conclusively determine the matter. On the *issue of justiciability*, it was urged that there is no actual dispute raised by the appellants touching on the CDF Act 2013 but a hypothetical dispute disguised as a constitutional petition. The 4th respondent contended that even if there was a dispute, the same ought to be resolved through the designated constitutional mechanisms. They cited the decision of the High Court in ***County Government of Migori & 4 Others vs privatization Commission of Kenya & another*** [2017] eKLR to support this submission.

**[39]** On *the political question doctrine issue* it was urged that the courts have consistently found that notwithstanding the High Court's jurisdiction under Article 165 of the Constitution, they will not delve into determination of hypothetical issues by virtue of the ripeness, separation of powers, and political

question doctrines. It relied on the decisions in ***Law Society of Kenya vs Attorney General & another*** [2020] eKLR; ***Reform & Democracy & 2 others vs Republic & another*** HCCC of 2014 [2015] eKLR; and ***Yusuf Gitau Adballa vs Building Centre (K) Limited & 4 others*** [2014] eKLR to support this argument.

**[40]** The 4th respondent submitted that the CDF Bill, 2013 the precursor of the CDF Act 2013 concerned the funding of functions outside those specified under the Fourth Schedule and therefore, failed the test of being considered as one relating to county government. It cited the case of the ***Speaker of the Senate & another vs the Attorney General & 4 others*** [2013] eKLR to support its case. It also submitted that the assertion that Kenya is a federal state and that the CDF Act 2013 offended the constitutional devolution structure is erroneous. The 4th respondent agrees with the 1st respondent's contentions on the issues of division of function between the two governments, separation of powers, and the Cross-Appeal.

## D. ANALYSIS AND DETERMINATION

**[41]** Having considered the respective parties' pleadings and submissions in the appeal and cross-appeal before us, the following issues emerge for determination;

- ***i.*** *Whether the appeal before the Court of Appeal was moot;*
- ***ii.*** *Whether the CDF Act 2013, as amended by the CDF (Amendment) Act, 2013 is unconstitutional on account of procedural lapses in the law-making process?*
- ***iii.*** *Whether the CDF Act 2013 offends the constitutional design?*
- ***iv.*** *Whether the CDF Act 2013 offends the division of functions between the national and county governments?*
- ***v.*** *Whether the CDF Act 2013 offends constitutional principles on the division of revenue?*

**vi.** *Whether the CDF Act 2013 offends constitutional principles on public finance?*

**vii.** *Whether the CDF (Amendment) Act, 2013 offends the principle of separation of powers?*

### *i. Whether the appeal before the Court of Appeal was moot?*

**[42]** The question of mootness first arose at the Court of Appeal, where the court had to determine whether the enactment of the NGCDF Act, 2015 rendered the appeal moot, leaving no live controversy requiring adjudication. The Court of Appeal found that the enactment of the NGCDF Act, 2015 did not render the appeal moot for the reasons that: the NGCDF Act, 2015 did not contain an express repeal clause that would conclusively show that the Legislature intended to repeal the CDF Act 2013; and the provisions of the statute which were declared violative of the Constitution in the CDF Act 2013 had been re-enacted on the NGCDF Act, 2015. Moreover, the Court of Appeal emphasized that the appellants before that court had appealed against the declaration of invalidity and persisted in their assertion that the statute is constitutional.

**[43]** The Black's Law Dictionary 9th Edition defines mootness as *"having no practical significance; hypothetical or academic (the question on appeal became moot once the parties settled their case)."*

**[44]** A number of courts have considered the import of the doctrine of mootness. It is therefore appropriate that we consider comparative jurisprudence in order to appreciate the contours of its application by various courts. The Constitutional Court of South Africa in the case of ***National Coalition for Gay and Lesbian Equality and Other v Minister of Home Affairs and Others*** (CCT10/99) [1999] ZACC 17 stated as follows in respect to the doctrine:

*"A case is moot and therefore not justiciable* ***if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law****."* *[Emphasis added]*

**[45]** Similarly, *Lenaola SCJ* in the case of ***Attorney General & 3 Others vs. David Ndii & 73 Others: Prof. Rosalind Dixon & 7 others (Amicus Curiae)*** (SC Petition 12, 11 & 13 of 2021 (Consolidated) [2022] KESCA 8 (KLR) (Constitutional and Human Rights) (31 March 2022) (Judgment) (with dissent), quoted with approval the decision of the High Court of South Africa in ***Afriform NPC and Others v. Eskom Holdings SOC Limited and Others*** 3 All SA 663 (GP) where it stated:

> *"The mootness barrier therefore usually arises from events arising or occurring after an adverse decision has been taken or a lawsuit has got underway,* ***usually involving a change in the facts or the law****, which allegedly deprive the litigant of the necessary stake in the pursued outcome or relief. The doctrine requires* ***that an actual controversy must be extant at all stages of review and not merely at the time the impugned decision is taken or the review application is made."*** [Emphasis added]

**[46]** The Supreme Court of Canada canvassed the circumstances that render a dispute moot in the case *of* ***Borowski v. Canada (Attorney General)*** [1989] 1 SCR 342 where it found that: a repeal of a bylaw being challenged; an undertaking to pay damages regardless of the outcome of an appeal; non-applicability of a statute to the party challenging the legislation; or the end of a strike for which a prohibitory injunction was obtained were some of the circumstances that render an appeal moot. The court further devised a two step-analysis to determine whether a matter is moot or not. First, it is necessary to determine whether the

requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case.

**[47]** The common thread from the above decisions is that a matter is moot when it has no practical significance or when the decision will not have the effect of resolving the controversy affecting the rights of the parties before it. If a decision of a court will have no such practical effect on the rights of the parties, a court will decline to decide on the case. Accordingly, there has to be a live controversy between the parties at all stages of the case when a court is rendering its decision. If after the commencement of the proceedings, events occur changing **the facts or the law** which deprive the parties of the pursued outcome or relief then, the matter becomes moot.

***Was there a live controversy at the Court of Appeal?***

**[48]** We start interrogating this question by noting that at the time the appeals were filed in April 2015 at the Court of Appeal, there existed a live controversy between the parties. However, the appellants argued that the enactment of the NGCDF Act, 2015 on 15th December 2015 during the pendency of the appeal, did extinguish a live controversy between the parties therein rendering the appeal moot.

**[49]** In a persuasive decision, the Supreme Court of the United States in ***New York State Riffle & Pistol Association & 3 Others vs The City of New York & another*** 140 S. Ct. 1525 (2020) has stated in this respect that:

> *"an intervening change in law entitling the plaintiffs to everything they seek is a classic event that renders litigation moot…*
>
> ***The new state legislation unequivocally allows plaintiffs to do everything they ask for****…These new amendments also operate*

*notwithstanding any inconsistent state or local law.* ***They accordingly moot the case all on their own."*** [Emphasis added]

**[50]** Also, in ***Hall v. Beals***, 396 U.S. 45 (1969) a challenge to a Colorado voter residency requirement of six months was held moot, due to a legislative change in the law removing the plaintiff from the application of the statute. The United States' Supreme Court observed that the amendment of the residency statute, under which appellants could have voted in the 1968 election, mooted the case.

**[51]** Similarly, the Supreme Court of the United States in the decision of the ***United States Department of Treasury v. Galioto***, 477 U.S. 556 (198) held that:

> *"The equal protection and "irrebuttable presumption" issues are now moot because, after this Court noted probable jurisdiction over this appeal and heard arguments,* ***Congress amended 925(c) to afford the administrative remedy contained therein to former mental patients' ineligible to purchase firearms."*** *[Emphasis added]*

**[52]** The emerging general principle flowing from the above decisions is that where a new statute is enacted that unequivocally and clearly addresses the concerns that are at the heart of a dispute then such a dispute will be moot. It is therefore important to examine whether the controversies raised by the appellants herein at the High Court and the respondents' contention at the Court of Appeal were unequivocally addressed by the NGCDF Act, 2015. We note that the CDF Act 2013 was invalidated by the High Court on the grounds that: the Act was passed without the involvement of the Senate; the CDF Act 2013 was not a conditional grant to the county government within the meaning of Article 202 (2) of the Constitution and that Article 202 set out structures for equitable sharing of the national revenue between national and county governments and that the national

government can only add additional revenue through the structures established under the Constitution; charging CDF with local projects under Section 22 of the CDF Act 2013, upset the division of functions between the national and county governments; and that the involvement of the Members of the National Assembly violated the principle of separation of powers.

**[53]** We further note that these declarations formed the basis of the grievances by the respondents at the Court of Appeal. The question we ask is, whether the NGCDF Act, 2015 unequivocally addressed these issues? A plain reading of Section 3 of the NGCDF Act, 2015 reveals that it recognizes a constituency as a unit for performance and implementation of national government functions including infrastructural development. We note this provision mirrors Section 3 of the CDF Act 2013 which provides that a section of the national annual budget is devoted to the constituencies for purposes of infrastructural development.

**[54]** In addition, one of the appellants' contention at the High Court concerned the 2.5% allocation to the CDF, we note that the provision still found itself under Section 4 of the NGCDF Act, 2015 albeit on different terms. This new provision does not cure the contention as there exists some level of controversy regarding the same.

**[55]** The doctrine of separation of powers was one of the contentious issues both at the High Court and the Court of Appeal. We note that Section 53 of the NGCDF Act, 2015 establishes a Constituency Oversight Committee consisting of '***the constituency member of the National Assembly',*** among others. This means that there is still a raging controversy over the separation of powers concerns regarding the role of Members of National Assembly in the Fund as structured in the CDF Act 2013 and replicated in the NGCDF Act, 2015.

**[56]** To our minds, the highlighted provisions contain some of the pertinent issues that were still raging controversies before the Court of Appeal for determination even after the coming into force of the NGCDF Act, 2015. Moreover, given that the impugned provisions of the CDF Act 2013 had also been re-enacted in the NGCDF Act, 2015, it did not unequivocally settle the issues in dispute between the parties. As such, there was still live controversy between the parties and therefore it was in the public interest to have the questions that were still raging adjudicated and determined by the Court of Appeal. In this regard, we are persuaded by the decision of the Constitutional Court of South Africa in ***AAA Investments (Pty) Limited v Micro-Finance Regulatory Council & Another*** **2007 (1) SA 343 (CC), 2006 (11) BCLR 1255 (CC)** where it was held at para 27 that even in cases that can be said to be technically moot, it is good practice for the court to seize jurisdiction in a matter where the law on a particular issue is not settled and the question is of critical import to the operation of government.

**[57]** In light of the above, we agree with the reasoning of the Court of Appeal that the same violative provisions have been re-enacted into the NGCDF Act, 2015. Therefore, the intervening legislation did not render the appeal moot because the legislation did not unequivocally address the issues raised by the appellants. Consequently, we affirm the finding of the Court of Appeal that the appeal before that court was not moot.

***ii. Whether the CDF Act 2013, as amended by the CDF (Amendment)Act, 2013 is unconstitutional on account of procedural lapses in the law-making process?***

**[58]** A primary contention in this matter is that the CDF Act 2013 was unconstitutional on the ground that the National Assembly failed to involve the Senate when enacting it. The opposing argument to this position is that the original Bill that led to the enactment of the CDF Act 2013 on 14th January 2013 was not

considered by the Senate as the Senate was not in existence at the time of its enactment, therefore, it could not be involved in the process of its enactment.

**[59]** In addressing this question, the Court of Appeal held as follows:

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

**[60]** This Court in the case of ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others***, SC Petition No. 26 of 2014 [2014] eKLR, opined that a purposive interpretation should be given to statutes to reveal its intentions. We observed as follows:

> *"In Pepper V. 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****.*" [Emphasis added]

**[61]** Relevant to the determination of this question is Section 25 of the Interpretation and General Provisions Act, Cap. 2 which provides that:

> **"Where one written law amends another written law, the amending written law shall, so far as it is consistent with the tenor thereof, and unless a contrary intention appears, be construed as one with the amended written law."** [Emphasis added]

**[62]** A perusal of Section 2 of the CDF (Amendment) Act, 2013 reveals that the amendment sought to substitute Section 4 (2) of the CDF Act 2013 by inserting a new provision that reads:

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

**[63]** Applying a purposive interpretation, we are of the view that the amendment touched on the main object and purpose of the CDF Act 2013 which is to ensure that a specific portion of the national annual budget is devoted to the constituencies for *inter alia* community projects and infrastructural development. Essentially, the amendment had the effect of changing the constitutional basis for the Fund from being an additional revenue to the county governments from the national government under Article 202 (2) of the Constitution; to transforming the

CDF into a fund of the national government under the Consolidated Fund established under Article 206(2) of the Constitution.

**[64]** Drawing from the above analysis, we fault the appellate court's restrictive approach in interpreting the law to hold that the Bill in its objects indicated that it did not concern county governments or affect the powers and functions of the county governments. It is our considered view, that the replacement of Article 202 (2) of the Constitution with Article 206 (2) had an effect on the allocation of revenue to the county governments. Consequently, we find that the CDF (Amendment) Act, 2013 had an effect on the functioning of county governments.

**[65]** Having found that the CDF (Amendment) Act, 2013 concerned county governments, was the CDF Act 2013 unconstitutional for failure to involve the Senate in its enactment? In construing whether a statute or statutory provisions offend the Constitution, this Court set out the guiding principles in the case of ***Law Society of Kenya v Attorney General & another***, Sup. Ct. Petition 4 of 2019; [2019] eKLR. Therein, we observed that:

> *"[37] ... In construing whether statutory provisions offend the Constitution, courts must therefore subject the same to an objective inquiry as to whether they conform with the Constitution....*
> *[38] In addition to the above, and to fully comprehend whether a statutory provision is unconstitutional or not**, its true essence must also be considered. This gives rise to the second principle which is the determination of the purpose and effect of such a statutory provision. In other words, what is the provision directed or aimed at? Can the intention of the drafters be discerned with clarity?"*** [emphasis added]

**[66]** Similarly, in the ***Senate & 2 others v Council of County Governors & 8 others*** (SC Petition 25 of 2019) [2022] KESC 7 (KLR) (Constitutional and Human Rights) (17 February 2022) (Judgment) we observed as follows:

> *"In other words, for the purpose of this Appeal, both the purpose and effect are relevant in determining whether or not the amendment was constitutional; an unconstitutional purpose or an unconstitutional effect can lead to the invalidation of a legislation. The words used and the language of the provision or provisions in question must be given literal meaning and the court must seek to identify the mischief sought to be remedied by considering the historical background of the legislation."* [Emphasis added]

**[67]** Coming to the issue at hand, Article 96 of the Constitution spells out the role of the Senate as follows:

> **"(1) The Senate represents the counties, and serves to protect the interests of the counties and their governments.**
>
> **(2) 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.**
>
> **(3) The Senate determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments**."[Emphasis added]

**[68]** Article **109(3)** and **(4)** of the Constitution provides that:

> **"(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."**

**[69]** Under **Article 110(1)** of the Constitution **'a Bill concerning county government'** means;

**a. A Bill containing provisions affecting the functions and powers of the County Governments set out in the Fourth Schedule**
**b. A Bill relating to the election of members of a county assembly or a county executive; and**
**c. A Bill referred to in Chapter Twelve affecting the finances of county governments.**

**[70]** In ***Re the Matter of the Interim Independent Electoral Commission***, *Sup. Ct. Const. Appl. No. 2 of 2011 [2011] eKLR at para. 40* we stated:

*"We consider that the expression 'any matters touching on county government'* ***should be so interpreted as to incorporate any national-level process bearing a significant impact on the conduct of county government."*** [emphasis added]

**[71]** This Court's jurisprudence is to the effect that a matter touching on county government incorporates any national-level process bearing a significant impact on the conduct of county government. As such, it is important to consider the functions that would be funded by the money derived from the new constitutional basis for the CDF under the amended Section 4(2) of the CDF Act. As stated elsewhere in this judgment, Section 3 of the CDF Act 2013 provides that "the object

and purpose of the Act is to ensure that a specific portion of the national annual budget is devoted to the constituencies for purposes **of infrastructural development, wealth creation, and the fight against poverty at the constituency level.”** Therefore, some of the functions contemplated under Section 3 of the CDF Act 2013 such as infrastructural development and the fight against poverty are also functions bestowed upon the county government under Part 2 of the Fourth Schedule to the Constitution. Infrastructural development such as roads, health, agriculture, and trade are functions that are conferred upon both the national and county governments. We however note that these functions are distinct with each level of government given a specific area of operation. This Court in ***Base Titanium Limited v County Government of Mombasa & another*** **(SC Petition 22 of 2018) [2021] KESC 33 (KLR) (16 July 2021) (Judgment)** quoted with approval the decision in High Court in Petition No. 472 of 2014, ***Council of County Governors v Attorney General & 4 others*** [2015] eKLR where the court clarified that the County governments will be in charge of Class D, E, F and G (County Roads), whilst the National government is in charge of Class A, B, and C (National Trunk Roads).

**[72]** From the above, it is clear that some of the functions contemplated by Section 3 of the CDF Act 2013 concern county governments. Therefore, the CDF (Amendment) Act, 2013 should have been tabled before the Senate in accordance with Article 96 of the Constitution for consideration.

**[73]** The 1st respondent also argued that the Speakers of the National Assembly and the Senate resolved that the Constituency Development Fund (Amendment) Bill, 2013 did not concern counties, therefore, did not require to be considered by the Senate in accordance with Article 110 (3) of the Constitution.

**[74] Article 110 (3**) of the Constitution states:

**"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."**

**[75]** We agree with the reasoning adopted by the High Court that 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 regarding the true nature of legislation in respect to **Article 110(1)** is raised.

**[76]** Consequently, we find that the CDF (Amendment) Bill, 2013 involved matters concerning county governments and therefore the Bill should have been tabled before Senate for consideration, debate, and approval in accordance with Article 96 of the Constitution. Failure to involve the Senate in the enacting of the CDF (Amendment) Act, 2013 renders the CDF Act 2013 unconstitutional.

***iii. Does the CDF Act 2013 offend the constitution design?***

**[77]** In their Appeal before this Court, the appellants faulted the Court of Appeal for holding that Kenya is a unitary State. It was the appellants submission that Kenya's devolution model is founded on a federal and not a unitary system of government given that there are two levels of government: the national and county governments. Furthermore, they submitted that there is a formal constitutional distribution of legislative authority and allocation of revenue resources between national and county governments, ensuring some areas of genuine autonomy at each level.

**[78]** ***In the Matter of Interim Independent Electoral Commission,*** Constitutional Application No. 2 of 2011 [2011] eKLR this Court expressed its opinion on this question stating that;

> *"On the question whether election date is a matter of "county government', we have taken a broader view of the institutional arrangements under the Constitution as a whole; and it is clear to us that an independence of national and county governments is provided for through* ***a devolution-model that rests upon a unitary, rather than a federal system of government****….[We] have taken note too that the Senate (which brings together County interests at the national level) and the National Assembly (a typical organ of national government), deal expressly with matters affecting county government; and that certain crucial governance functions at both the national and county levels…dovetail into each other and operate in unity."* [Emphasis added]

**[79]** A similar position was adopted by this Court ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate***, [2012] eKLR and ***Senate & 2 others v Council of County Governors & 8 others*** (Petition 25 of 2019) [2022] KESC 7 (KLR) (Constitutional and Human Rights) (17 February 2022) (Judgment) where it held that no additional material has been presented to the Court to enable it to reconsider the position, **that the Constitution does not create a federal State**.

**[80]** In light of the above decisions, we cannot fault the Court of Appeal's decision that the Constitution does not create a federal State but a unitary system of government that decentralizes key functions and services to the county unit. We therefore dismiss this limb of the appellants' argument.

***iv. Whether the CDF Act 2013 offends the division of functions between the national and county governments?***

**[81]** It should be noted at the outset that Article 6(2) of the Constitution provides that the governments at the national and county levels are distinct and interdependent and shall conduct their mutual relations on the basis of consultation and cooperation. In addition, Article 186 (1) of the Constitution states that the functions and powers of the national government and county governments shall be as set out in the Fourth Schedule.

**[82]** Parliament is one of the arms of the government under the Constitution. It consists of the Senate and National Assembly. The legislative remit of the National Assembly falls under the national government in the vertical division of powers between the national government and the county governments. This is evident from Article 95 which provides for the roles of the National Assembly as follows:

> **(1) The National Assembly represents the people of the constituencies and special interests in <u>the National Assembly</u>.**
> **(2) The National Assembly deliberates on and resolves issues of concern to the people.**
> **(3) The National Assembly enacts legislation in accordance with Part 4 of this Chapter.**
> **(4) The National Assembly --**
>
> > **(a) <u>determines the allocation of national revenue between the levels of government</u>, as provided in Part 4 of Chapter Twelve;**
> > **(b) appropriates funds for expenditure by the national government and other national State organs; and**

**(c)** **<u>exercises oversight over national revenue and its expenditure.</u>**

**[83]** It is clear from the above provision that the Constitution does not grant the National Assembly the power to implement projects as a service delivery unit at the county level. Members of the National Assembly are granted the mandate to legislate and oversight the national revenue and its expenditure.

**[84]** The appellants assert that contrary to this constitutional position, the CDF Act 2013 fails to respect the vertical division of functions between the national government and the county governments as envisaged under the devolved system of government. They also submit that the impugned statute involved Members of the National Assembly in the CDF Committees, all instrumentalities and agencies of the National government in undertaking the functions and powers vested in county governments contrary to the terms of the Constitution.

**[85]** In determining the question posed, it should be appreciated that Article 1(4) of the Constitution stipulates that the sovereign power of the people is exercised at the national level, and the county level. In addition, the Constitution establishes the County Executive Committee as the executive authority in the County government. Article 179 (1) states that the executive authority of the County is vested in, and exercised by, a County Executive Committee. It means that the service delivery mandate, which in its essence is an executive function, relating to functions assigned to the county governments ought to be exercised by the County Executive Committee. In contrast, it ought to be appreciated that the Members of National Assembly's legislative mandate is linked or tied to the national government and not the county governments. Therefore, where a Member of the National Assembly is allowed to play a role related to functions vested in devolved units, then this will compromise the vertical division of powers between the national and county governments.

**[86]** Determinative of this question is the interpretation of Section 22(1) of the CDF Act 2013 which in listing the projects for which the Fund is to be deployed stipulates as follows:

> **"Projects under this Act shall be community-based in order to ensure that the prospective benefits are available to a widespread cross-section of the inhabitants of a particular area."**

**[87]** The determinative phrase "community-based" is not defined anywhere in the statute. However, Bryan A. Garner (ed.), **Black's Law Dictionary**, 7th ed. (West Group, 1999) at page 273 defines "community" as follows:

> *"1. A neighborhood, vicinity, or locality; 2. A society or group of people with similar rights or interests."*

There is an evident connection between "community" that is the target of the CDF projects and "local".

**[88]** A similarly important provision to the determination of this question is Section 3 of the CDF Act 2013 quoted in paragraph 71 of this Judgment. A look at the Fourth Schedule of the Constitution (pursuant to the terms of Article 186(1) of the Constitution) that distributes functions between the national government and the county governments, shows that it is the county governments that are allocated most of the functions and powers that can be said to be "community" or "local" in orientation. Examples of such functions and powers include those relating to county health services, county transport, trade development, county public works and services, pre-primary education, and village polytechnics, amongst others. In contrast, to a large extent, the functions and powers of the national government with respect to most of these functions relate to policy formulation. This approach in the Fourth Schedule of the Constitution resonates with the principle of "subsidiarity" which underpins the division of powers under devolved systems of

government. Subsidiarity is the broad presumption that sub-national governments ought to be assigned those functions and powers which vitally affect the life of the inhabitants and allow the development of the country in accordance with local conditions of sub-national units, while matters of national importance concerning the country as a whole and overarching policy formulation are assigned to the national government. It follows and we so find that the implementation of community-based projects envisaged under Section 22 and the infrastructural development projects envisaged under Section 3 of the CDF Act 2013 would inevitably cover and target the functions assigned to county governments.

**[89]** This paves the way for us to determine the question initially posed which is whether by straying into functional areas assigned to county governments, the CDF Act 2013 violates the division of power between the two levels of government as provided for under the Constitution.

**[90]** We note that Court of Appeal found that the CDF did not violate the division of powers between the two levels of government, and alluded to the possibility that CDF amounted to an inter-governmental transfer of functions. With tremendous respect to the learned Judges, we do not think the CDF amounts to an inter-governmental transfer of functions. In our considered opinion, the Constitution pays keen attention to ensure that the national government does not usurp the mandate of county governments by specifying a clear process for the transfer of functions from a county government to the national government. Article 187(1) of the Constitution stipulates that a function or power of government at one level may be transferred to a government at the other level by agreement between the governments. The dispute subject herein certainly does not involve the transfer of functions by agreement between governments as contemplated under Article 187(1). Instead, it is a dispute about alleged constitutionally forbidden

encroachment by an agency of the national government onto the terrain of the county governments.

**[91]** A related question arose with regards to the place of the constituency as a "third level" of government beyond the county and the national level that has a service delivery mandate. In answer to this, we reiterate the terms of Article 1(4) of the Constitution that ***"The sovereign power of the people is exercised at – (a) the national level; and (b) the county level."*** The functions of service delivery which is the character and nature of "community-based" projects targeted by the CDF Act 2013 are by nature executive functions. Accordingly, by nature they should be discharged by the executive structures of the appropriate level of government in terms of Article 1(3) (b) of the Constitution which vests executive functions in *"the national executive and the executive structures in the county governments"*.

**[92]** We say so because the constituency as conceptualized in the 2010 Constitution is tied to political representation. Article 89(1) of the Constitution provides: "**There shall be two hundred and ninety constituencies for the purposes of the election of the members of the National Assembly".** Throughout the Constitution, the idea of constituency whenever it is used is linked to being an electoral unit for political representation. In its true essence, a constituency is a form of territorial districting that defines how voters are grouped for the election of Members of Parliament and are not conceptually envisaged to be service delivery units. This leads to an ineluctable conclusion that the role that a constituency as an electoral unit discharges and its place within the constitutional scheme is tied to the functions constitutionally vested in the Member of the National Assembly. That role is a legislative role and not a service delivery mandate. Therefore, we find that the constituency under the constitutional scheme

is tied to the election of representatives to the legislature and representation of the people of the constituency at the National Assembly.

**[93]** It is true as pointed out by the Court of Appeal that Article 6(3) of the Constitution provides that a national State organ, national agencies and institutions will decentralize their functions to ensure reasonable access to their services. Article 176(2) also encourages the county governments to decentralize their functions and provision of their services. However, these twin constitutional provisions are not a license to create a "third" or "parallel" level of government as done by the CDF Act 2013 at the constituency. The decentralization of service delivery must be undertaken within the confines of the structures of the national government or county governments, not parallel to these two levels of government. Therefore, we see a "third" or "parallel" structure of government as altering the basic premises of the system of government created by the Constitution and as distorting the devolved structure of government. This is more so in a context such as the CDF Fund which has the effect of creating structures that are incompatible with the nature of the distribution of functions between the two levels of government.

**[94]** To this end, we conclude that the CDF Act 2013 violates the division of functions between the national and county levels of government; and we do reverse the finding of the Court of Appeal and restore the finding of the High Court on this question.

***v. Does the CDF Act 2013 offend the constitutional principle on the division of revenue?***

**[95]** The gist of the dispute between the parties revolves around the interpretation of Article 201 (b) (ii) which provides that revenue raised nationally shall be shared equitably among national and county governments against Section 4 of the CDF

Act 2013 which establishes a Constituency Development Fund and which indicates that it is a national fund consisting of monies of an amount not less than 2.5% of all the national government ordinary revenue collected every financial year. The money is to be disbursed by the national government through the CDF Board as a grant to be channeled to the constituencies in the manner provided for by the Act.

**[96]** In interpreting Article 202(1) of the Constitution which stipulates that 'revenue raised nationally shall be shared equitably among the national and county governments', we need to bear in mind that a key concern behind the enactment of the provision was to ensure the optimal funding and working of the devolved system of government. In addition, we need to adopt a harmonious interpretation of the Constitution as one whole. Pursuant to this interpretive approach, we need to take into account Article 218(1)(a) which provides for the manner of enacting the Division of Revenue Bill. It provides that 'a Division of Revenue Bill, shall divide revenue raised by the national government among the national and county levels of government in accordance with this Constitution'.

**[97]** Our understanding of what is contemplated by Articles 202 (1) and 218(1)(a) of the Constitution is that 'revenue raised nationally' is all the revenue accruing from all the revenue-raising powers of the national government. 'Revenue raised nationally' is synonymous with what is termed 'equitable share' and is allocated between the two levels of government. Prior to allocation, this revenue is not yet available to the national government to allocate to its agencies. Only after the national government has received its portion of the equitable share under the Division of Revenue Act as envisaged in Article 218(1)(a), will it be in a position to allocate funds to agencies and instrumentalities falling under its mandate.

**[98]** It follows that the national government and county governments are the only entities entitled to participate in the vertical division of the "revenue raised

nationally". To allow an agency of the national government or a "third" structure whose location within the constitutional system is unclear to participate in the sharing of the "revenue raised nationally" is a clear case of violation of not only Article 202(1) but also Article 218(1) (a) of the Constitution.

**[99]** From the foregoing provisions, we find that Section 4 of the CDF Act 2013 violates the provisions of the Constitution as it seeks to disrupt the revenue sharing formula by directly allocating 2.5% of all the national revenue while the Constitution requires that the revenue raised shall be shared equitably among the national and county governments. It is further our considered opinion that if at all any monies is to be deducted from the national revenue, the money should be granted from the national government revenue as a grant but not directly from the national revenue.

**[100]** Consequently, we find that the CDF Act 2013 violates the principles of the division of revenue as stipulated in Article 202(1) of the Constitution. We, therefore, reverse the finding of the Court of Appeal on this question and restore the finding of the High Court that the CDF Act 2013 violates the constitutional principle on the division of revenue.

***vi. Does the CDF Act 2013 offend the constitutional principle on public finance?***

**[101]** Article 201 of the Constitution in entrenching the principles of public finance, embodies the promise of fiscal discipline and accountability in the management of public finances in Kenya. It seeks to re-engineer the management of public resources, especially public finances by enshrining principles to guide and inform all dealings with public finance. Crucial to the current dispute, is Article 201(d) which directs that "public money should be used in a prudent and responsible way". *Dr. John Mutakha Kangu in 'Constitutional Law of Kenya on*

*Devolution'* (Strathmore University Press, Nairobi, 2015) at page 240 remarks on the normative demands of this provision as follows:

> *"'Prudent' here connotes a measure of carefulness, precaution, wisdom and good judgment in the expenditure and use of money. It calls for sensible, economical and frugal use of public funds. As used in this provision, the term embodies the concept of value for money and use of money for the right purposes. 'Responsible', on the other hand, involves the quality of being accountable for one's actions and responsive to the needs of the people. The two terms imply avoidance of wasteful use of funds and the choosing of priorities that are beneficial to the people."*

**[102]** We take the view that Article 201 expresses the idea of responsible governance. It envisages that the two levels of government will manage fiscal resources prudently by putting in systems that ensures that the implementation of projects aimed at delivering a public good and service is cost-effective. It also embodies the desire for fiscal efficiency which speaks to the need to eliminate wastages in service delivery and provision of public good and service. It means that where it is a policy objective of the government to deliver a particular public good or service then the system for delivery of that policy objective should be designed in a manner that ensures that public funds are not wasted or abused.

**[103]** The implication of the principle of prudent and responsible management of public money for questions of inter-governmental relations is that there should be clarity in the allocation and assignment of tasks to avoid duplication in the deployment of resources. This will avoid the problem of the two levels of the government ending up directing and spending resources on the same project. *John Mutakha Kangu in 'Constitutional Law of Kenya on Devolution'* (Supra.) at page 177 aptly captures this concern as follows:

*"It is important to have clarity about which level of government is empowered to do what. This avoids confusion and duplication of mandates and responsibilities, and allows for proper accountability to citizens in respect of service delivery……when there is no clarity, blame can easily be shifted from one sphere of government to the other."*

**[104]** It is against this context, that we must determine the question posed as to whether Section 22(1) of the CDF Act 2013 allowing the CDF to fund "community-based projects" that veer to the functional competence of the county governments threatens or violates the principle of prudent and responsible management of public funds enshrined in Article 201(d) of the Constitution.

**[105]** Taking into account that we have already made a finding that the wide reach of the Fund under Section 22(1) of the CDF Act 2013 will inevitably involve the fund in the implementation of functions constitutionally assigned to the county governments, we find that there is a real threat of the Fund creating confusion as to which project is being implemented by which level of government. In addition, it creates the prospect of duplication of funding for the same project leading to wastage of scarce public resources. Lastly, it creates a state of lack of clarity as to which level of government is responsible for which particular project therefore compromising on accountability.

**[106]** While we appreciate the concerns that motivated the creation of the CDF and public support for it, there are more effective ways of decentralizing funding to the local level without compromising on key constitutional principles like those of public finance. For example, it is possible to channel the funding through the two governmental structures provided in the Constitution, for example, to the county governments as conditional or unconditional grants as envisaged in Article 202(2); or, through the structures of the national government at the local levels as

contemplated in Article 6(3). We further note that even though the CDF (Amendment) Act, 2013 provides that the monies under the Act shall be considered as funds allocated under Article 206 (2) (c), under Section 10 of the CDF Act 2013, the Cabinet Secretary in allocating the fund for each financial year must seek concurrence of the relevant Parliamentary Committee. This clearly violates the principles of accountability and integrity due to likely conflict of interest. This is because a Member of Parliament cannot oversee the implementation or coordination of the projects and at the same time offer oversight over the same projects. To this end, we find that the CDF as structured under the CDF Act 2013 violates the constitutional principles on public finance, particularly the principle of prudent and responsible management of public funds as enshrined in Article 201(d) of the Constitution.

### *vii. Whether the CDF Act 2013 offends the constitutional principle of separation of powers?*

**[107]** The doctrine of separation of powers is a fundamental principle of law that requires the three arms of government to remain separate, and that one arm of government should not usurp functions belonging to another arm. Article 1 (3) of the Constitution delegates power vertically and horizontally to State organs namely, Parliament and the legislative assemblies in the county governments, National Executive and the executive structures in the county governments, and Judiciary and the independent tribunals. Therefore, the Constitution requires that each level of government have both institutional and functional distinctiveness from each other. In that regard, Article 1(3) of the Constitution states as follows:

> **"Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution–– (a) Parliament and the legislative assemblies in the county governments; (b) the national executive and the executive structures in the**

**county governments; and (c) the Judiciary and independent tribunals."**

**[108]** Coming to the issue at hand, the appellants' bone of contention relates to Articles 95 and 96 of the Constitution that specifically grant and define legislative powers to the two levels of parliament and that the involvement of Members of the National Assembly in CDF implementation violates the principle of separation of powers, and to this extent the CDF Act is unconstitutional.

**[109]** Conversely, the 1st respondent faulted the Court of Appeal for failing to appreciate that Members of Parliament in the CDF were ex-officio members, without voting rights and that the representation of the electives includes allowing the elected members to articulate the issues and views of their electorate. They submitted that according to Section 24 of the CDF Act 2013 the role of Members of the National Assembly in the CDF is only limited to consultation and coordination and not the implementation of projects. It also asserts that the Constitution does not envisage a pure separation of powers but an overlap of functions by the three branches of government.

**[110]** The diametrically opposed submissions by the parties address the place of the principle of separation of powers within the post-2010 constitutional scheme. It is important to point out that a number of provisions in the Constitution and its overarching structural arrangement give textual markers that separation of powers is a key organizational framework for governance under the Constitution.

**[111]** Article 94(1) vests the legislative authority of the Republic at the national level in Parliament, while by dint of Article 185(1) vests legislative authority at the county level in the County Assembly. An integrated structural reading of Articles 129 and 130, located within Chapter Nine on the Executive, shows that executive

authority at the national level is vested in the National Executive whilst Article 179(1) vests the executive authority at the county level on the County Executive Committee. Similarly, Article 159(1) vests judicial authority on the Courts and Tribunals established by or under the Constitution. In addition, Article 175(a) explicitly indicates that "county governments shall be based on democratic principles and the separation of powers". Further, Article 176(1) stipulates that a county government shall consist of a County Assembly and a County Executive.

**[112]** The palpable spirit of dividing power between the three branches of government has led this Court to observe ***In the Matter of the Interim Independent Electoral Commission***, Application No. 2 of 2011; [2011] **eKLR,** at paras. 53 -54 as follows:

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

**[113]** However, more important to the resolution of the present dispute is the assertion by the 1st respondent that the Constitution does not envisage a 'pure' separation of powers and there are often overlaps in the discharge of mandates by the different branches of government. An oft'-cited depiction of the so-called 'pure' version of the separation of powers doctrine is that found in the classic treatise by *M.J.C. Vile, '**Constitutionalism and the Separation of Powers'** 2nd edition (Liberty Fund, Indianapolis, 1998)* at page 14 where it has been observed as follows:

> *"A 'pure doctrine' of the separation of powers might be formulated in the following way: It is essential for the establishment and maintenance of*

*political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State."*

**[114]** It is however important to point out that modern democracies do not all employ the same form of separation of powers structuring. For example, while presidential systems typically involve a sharp distinction between executive and legislative power, parliamentary systems do not. Indeed, constitutional systems range in a spectrum from those with a strong separation of powers (for example, the United States) to those with a greater fusion of powers (for example, the United Kingdom), with many falling somewhere in the middle. Therefore, we agree with the assertion by the 1st respondent that it is important to recognize that separation of powers is never conceived as involving a perfect and hermetically sealed division of responsibility between the three branches of government.

**[115]** The preceding qualification aside, the doctrine must still have an analytical bite and there will be instances when it can be concluded that structuring of governmental powers does violate or fail to embody the ethos represented by the doctrine of separation of powers. What this means is that while modest modifications and deviations from the "pure" version would not infringe the doctrine of separation of powers, where the Legislature structures a public agency

or institution in a manner that deviates too far from the "pure" version then it is likely that the separation of powers will have been violated. It follows that whilst the 1st respondent is right in submitting that the "pure" version of the doctrine of the separation of powers is not adhered to in practice, it still remains true that it does represent a "bench-mark" or an "ideal-type". We, therefore, endorse the view expressed *by Aharon Barak, former President of the Supreme Court of Israel, in* ***'The Judge in a Democracy'*** (Princeton University Press, 2006) at pages 36-37 thus:

> *"the modern principle of separation of powers is based on the concept of reciprocal relations between the different branches of power such that each branch checks and balances the other branches. The meaning of this modern principle is threefold:* ***first, each branch of government has a function that is, its major function. Its nucleus should not be impinged upon.*** *Second, each branch should perform its function according to its outlook and its discretion. Third, balancing and review between the three branches is needed.*" [Emphasis added]

**[116]** In the Kenyan context, the Constitution consciously provides for a structure of government consisting of three balanced branches within the framework of a representative democracy. The scheme of separation of powers provided under the 2010 Constitution is neither an accident nor the product of purely abstract reasoning. Rather, Kenyans having witnessed excesses of absolute power vested in the Executive branch which operated with abandon and riding roughshod over other state institutions sought to constrain and temper the exercise of public power. Citizens during the pre-2010 dispensation chose to respond to excesses of that legacy by explicitly dividing state power into three branches of government to preclude the exercise of arbitrary power. Therefore, the separation of powers ought not to be treated or viewed as an end in itself but aimed at the fulfilment of the form of governance and vision of the state that Kenyans aspired to as represented

in the national values and principles of governance under Article 10 of the Constitution.

**[117]** We remind ourselves that ours is a value-based Constitution [see ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate***, Advisory Opinion No. 2 of 2012; [2012] eKLR, at para. 54]. Therefore, the organizational framework of governance serves the purpose of furthering the goal of realization of the national values and principles articulated in the Constitution. This is so because the values and principles are not self-executing, rather they are realized through the institutional fabric woven throughout the Constitution including through the separation of powers that undergirds the organizational structure of governmental power. This makes the question as to whether the legislative structure of an institution reinforces/promotes or detracts from the national values and principles articulated in the Constitution to have a bearing on whether the separation of powers is violated or not.

**[118]** Given the foregoing analysis, we now adopt a two-pronged test to be used in assessing whether a particular allocation of mandate, function, or power to a public agency or institution amounts to an unconstitutional intrusion that threatens or violates the separation of powers. The two limbs of the test are:

(a) Whether the mandate, functions or powers of the subject state agency, or institution unjustifiably strays into the nucleus, core functions, or pre-eminent domain that are the exclusive competence of another branch of government from a functional point of view? and

(b) Whether the exercise of the subject assigned mandate, functions, or powers will harm or threaten the realization of the national values and principles articulated in the Constitution?

**[119]** It is the application of the foregoing test to the circumstances of the present case that we now turn to the question before us that is, the role played by the Members of the National Assembly in the CDF; and whether it is incompatible with the scheme of horizontal separation of powers between the Legislature and the Executive branches of government. The essence of the appellants' submission is that the CDF Act 2013 vests a service delivery mandate, which is a typical executive branch role on Members of the National Assembly, a deviation from their constitutional mandate which is a legislative mandate.

**[120]** The constitutional mandate of Parliament is provided for under Article 94 of the Constitution. Further, Article 95 as quoted in paragraph 82 of this Judgment, stipulates the role of the National Assembly to include: representation of the people of the constituencies and special interest in the national assembly; **determine the allocation of national revenue between the levels of government, as provided in Part 4 of Chapter Twelve; and exercise oversight over national revenue and its expenditure.** It is clear to us that these are legislative functions in nature, that is, *representation, legislation,* and *oversight* over the national government. There is no service delivery mandate envisaged in these roles.

**[121]** By contrast, the contentious Section 24 (3) of the CDF Act 2013 provides as follows:

> **"24 (3) The eight persons referred to in subsection (2) (b), (c), (d), and (e) shall be nominated through the following procedure-**
>
> > **(a) within forty-five days of being sworn in, each Member of Parliament for a particular constituency shall convene open public meetings of registered voters in each of the elective wards in the constituency;**

**(b) each ward shall then elect five persons whose names shall be forwarded to the officer of the Board in the constituency;**

**(c) upon receiving the names from all the wards in the constituency, the Member of Parliament in consultation with the officer of the Board and the sub county administrator for the constituency, shall appoint eight persons to the Board, taking into account the geographical diversity within the constituency, communal, religious, social and cultural interests in the constituency and the requirements of gender, youth and representation of persons with disabilities;**

**(d) the eight persons appointed under: subparagraph (c) shall elect from among themselves one person to be the, chairperson of the Constituencies Development Fund Committee for the constituency;**

**(e) upon conclusion of the election of the chairperson in the manner stipulated in paragraph (d) the officer of the Board shall forward the names of the ten members of the Constituencies Development Fund Committee to the chief executive officer of the Board for onward transmission to the Cabinet Secretary for gazettement;(f) <u>The Member of Parliament for the constituency shall be an ex-officio member of the Committee.”</u>**

**[122]** The impugned Section 22(3)(c) of the CDF Act 2013 envisages that the Member of the National Assembly is to appoint eight (8) of the ten (10) members of the Constituency Development Fund Committee. This is in addition to Section 24(3) (f) of the CDF Act 2013 which makes the Member of the National Assembly an ex-officio member of the Committee. We also endorse the finding by the Court of Appeal that:

*“The Black’s Law Dictionary defines an ‘ex-officio member’ as a member appointed by virtue or because of an office and explains that an ex-officio member is a voting member unless the applicable governing document provides otherwise. As CDFA does not provide otherwise, an MP who is a member of the committee by virtue of his office as an MP is a voting member.”*

**[123]** It is the Constituency Development Fund Committee that is vested with the responsibility of initiating the process for identification and prioritization of the projects, employment of staff, allocation of funds to various projects, the tabling of reports, and monitoring the implementation of the projects. Two of its members are among the three signatories to the bank account. The Projects Implementation Committee which implements the projects works under its direction. These are typical service delivery mandates that fall within the constitutional mandate of the Executive branch.

**[124]** The power of appointment of the Members of the Constituency Development Fund Committee and being an ex-officio member of the Committee leads to the inevitable conclusion that the Member of the National Assembly is in effective control of the Constituency Development Fund Committee and that means that he/she influences the selection, prioritization of projects, allocation of funds and also monitors the implementation of the projects. This means that the Fund, as conceived under the CDF Act 2013, vested in the Legislature and its personnel – being the Members of the National Assembly, functions that typically fall within the nucleus, core function, or pre-eminent domain of the Executive branch.

**[125]** But that is not all. We also need to address the concern relating to the impact of this legislative scheme on national values and principles enshrined in the

Constitution that are promoted and realized through the doctrine of the separation of powers. Here we have in mind the values and principles of accountability, and good governance provided in Article 10(2)(c) of the Constitution.

**[126]** The idea of separating the functions and personnel of the three branches of government is intended to give effect to the related concept of 'checks and balances' which is linked to the constitutional principles and values of accountability and good governance. This ensures that a branch can oversight the discharge of the mandate by a different branch thereby providing restraint on the exercise of public power, for example, the Legislature should oversight the discharge of functions by the Executive branch.

**[127]** The national values and principles idea of good governance and accountability represent the aspiration that a person in a position of public trust should not make decisions regarding questions on which they have an interest. Put differently, all State and public officers should avoid 'conflict of interest' in the discharge of their mandate. It is obvious that as conceived and structured under the CDF Act 2013, Members of the National Assembly will have a personal interest or stake in the determination and implementation of projects by the Fund in their constituencies. The perceived failure or success of the Fund within their constituency will also influence their prospects of re-election. What this state of affairs does, is, it creates a conflict of interest with the Member of Parliament's oversight role. The very fact that the success or failure of the CDF Fund will be linked to the Member of the National Assembly creates a perverse incentive of self-interest in the Members of the National Assembly not to undertake the robust oversight mandate- envisaged by the Constitution over the Fund thus inimical to the national values and principles of accountable and good governance.

**[128]** Given the constitutional edict in Article 259(1) (a) and (d) that the Constitution should be interpreted in a manner that promotes its purposes, values, and principles, and contributes to good governance; it is our view that adopting an interpretation that allows conflict of interest undermines the oversight role of the Legislature. It follows that allowing Legislators any role, even a merely ceremonial role in discharging a mandate that belongs to the executive branch at either the national or the county level, would promote conflict of interest and compromise their oversight role. Therefore, it follows that the CDF Act 2013 violates the values and principles of accountability and good governance.

**[129]** We, therefore, find that a Fund operating outside the strictures of separation of powers and the system of checks and balances would not be constrained given the absence of legislative oversight and therefore would be prone to be abused. In effect, a Fund that allows personnel from the Legislative branch to exercise executive powers is problematic from a constitutional lens. In the context of this case, we adopt the view that the constitutional scheme on separation of powers should be upheld given its implication for underlying constitutional values; that is, the maintenance of accountability and good governance. Were we to adopt a contrary approach, as urged by the respondents, even for the best of policy reasons, these constitutional values and principles will be eroded.

**[130]** It will also naturally follow that given the constitutional scheme on separation of powers; Members of legislative bodies, being Members of the National Assembly, Senators, County Women Representatives, and Members of County Assemblies ought not to be involved in the implementation of any service-based mandates which are a preserve of the Executive branch. This is the only way to respect the constitutional scheme on separation of powers and ensure that the Legislators' oversight mandate is not compromised through conflict of interest. Tolerating a contrary position would harm the Constitution's value system,

particularly the national values and principles of accountable and good governance.

**[131]** Regarding what the appellants' characterized as the violation of the vertical separation of powers, we earlier discussed and found that the CDF Act 2013 violates the division of functions between the national government and county governments. We therefore find that the Fund as structured violates the vertical separation of powers.

**[132]** Before concluding on this part, it is important to point out that the longevity of a practice does not cloak the practice with constitutional legitimacy. It is only when the courts pronounce themselves on the constitutionality of a legislation or a conduct that their constitutionality can be established. Therefore, the fact that the CDF has been operational in this country since 2003 is not a good enough answer to the question on the constitutionality of the Fund in the post-2010 constitutional dispensation. A Fund directed at service delivery mandate can only be constitutionally complaint if structured in a manner that does not entangle members of Legislative bodies and Legislative bodies in the discharge of the service delivery mandate however symbolic. Such funds ought to be integrated and subsumed within the structures of either the county executive or the national executive.

**[133]** In conclusion, we agree with the reasoning adopted by the High Court to the effect that the CDF Act 2013 violates the principle of separation of powers and that the ***CDF Act 2013*** is unconstitutional. We also agree with reasoning of the Court of Appeal, but only to the extent that it upholds the position of the High Court. In doing so, as we have faulted and reversed the Court of Appeal's restrictive approach in interpreting the law in relation to powers and functions of the county governments; its finding that the CDF did not violate the division of powers

between the two levels of government; and its interpretation that the CDF amounted to an inter-governmental transfer of functions. We have also reversed the Court of Appeal on its findings on the issue of CDF and division of revenue, and have restored the finding of the High Court, that the CDF Act 2013 violates the constitutional principle on the division of revenue.

**[134]** Finally, on the issue of costs, we direct that this being a matter of public interest, each party shall bear their own costs.

**[135]** Having fully considered all the issues delineated by this Court for determination as above, we find as follows:

a. *The appeal before the Court of Appeal was not moot.*
b. *The CDF Act 2013, as amended by the CDF (Amendment) Act, 2013 is unconstitutional on account of procedural lapses for failing to involve the Senate in its enactment.*
c. *The CDF Act 2013 does not offend the constitutional design.*
d. *The CDF Act 2013 offends the division of functions between the national and county governments.*
e. *The CDF Act 2013 offends constitutional principles on the division of revenue.*
f. *The CDF Act 2013 offends constitutional principles on public finance.*
g. *The CDF Act 2013 offends the constitutional principle of separation of powers.*

## E. ORDERS

**[136]** Consequently, we issue final orders as follows:

1. ***The appeal dated 29th December 2017 is allowed.***
2. ***The cross-appeal dated 6th November 2019 is disallowed.***

3. ***A declaration is hereby made that the Constituency Development Fund Act, 2013 is unconstitutional.***
4. ***Each party to bear their own costs.***

**[137]** It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this **8th** day of **August, 2022.**

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**M.K KOOME**
**CHIEF JUSTICE & PRESIDENT**
**OF THE SUPREME COURT**

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**P.M MWILU**
**DEPUTY CHIEF JUSTICE &**
**VICE PRESIDENT OF THE**
**SUPREME COURT**

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**S.C WANJALA**
**JUSTICE OF THE SUPREME**

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**NJOKI NDUNGU**
**JUSTICE OF THE SUPREME COURT**

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**W. OUKO**
**JUSTICE OF THE SUPREME COURT**

**I certify that this is a true copy of the original**

**REGISTRAR**
**<u>SUPREME COURT OF KENYA</u>**