REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Maraga CJ & P; Mwilu DCJ & V-P; Ibrahim, Ojwang, Wanjala, Njoki & Lenaola, SCJJ)

REFERENCE NO. 2 OF 2017

IN THE MATTER OF: **AN APPLICATION BY THE COUNCIL OF GOVERNORS FOR AN ADVISORY OPINION UNDER ARTICLE 163(6) OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF: **THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF: **THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012**

AND

IN THE MATTER OF: **THE INTERGOVERNMENTAL RELATIONS ACT 2012**

AND

IN THE MATTER OF: **THE DIVISION OF REVENUE ACT, 2014**

AND

IN THE MATTER OF: **THE COUNTY ALLOCATION OF REVENUE ACT, 2014**

AND

IN THE MATTER OF: **THE PUBLIC FINANCE MANAGEMENT ACT 18 OF 2012**

AND

IN THE MATTER OF: **THE SUPREME COURT ACT NO. 7 OF 2011 (CAP 9A)**

BY

THE COUNCIL OF GOVERNORS .... APPLICANT

AND

ATTORNEY GENERAL ....1ST INTERESTED PARTY

THE SENATE .... 2ND INTERESTED PARTY

LAW SOCIETY OF KENYA ....3RD INTERESTED PARTY

INTERGOVERNMENTAL RELATIONS TECHNICAL COMMITTEE .... 4TH INTERESTED PARTY

COMMISSION ON REVENUE ALLOCATION .... 5TH INTERESTED PARTY

CONTROLLER OF BUDGET .... 6TH INTERESTED PARTY

COUNTY ASSEMBLY FORUM .... 7TH INTERESTED PARTY

KATIBA INSTITUTE .... 8TH INTERESTED PARTY

RULING

I. BACKGROUND

[1] The Applicant, the Council of Governors (CoG), moved the Court on 26th April, 2017 by filing a Reference dated 19th April, 2017 invoking this Court's Advisory Opinion jurisdiction under Article 163(6) of the Constitution.

[2] In laying a basis for the Reference, the Applicant averred that it receives funding from the Exchequer through allocations for operationalization of devolution activities from the Ministry of Devolution and Planning (MoDP) informed by Section 37 of the Intergovernmental Relations Act No 2 of 2012 (IRA). It however contended that the funds received are inadequate to finance all its activities and to bridge this financing gap, it works in partnership with the County Governments and development partners. However, it was contended that County Governments have been facing challenges in justifying the intergovernmental relations contributions to the Applicant and most recently the Senate Public Accounts and Investments Committee in a Report, recommended ten (10) Governors for prosecution for violating the law by making payments to the Applicant.

[3] As a consequence thereof, the Applicant has sought an advisory opinion of this Honourable Court on the following matters:

(a) Whether the functions of the Council of Governors as stipulated under Section 20 of the Intergovernmental Relations Act No. 2 of 2012 is of a similar nature or in tandem with the functions of the County Government as enshrined in the Fourth Schedule, Part 2 of the Constitution 2010.

(b) Whether the intergovernmental relations contributions made by the County governments to the Applicant are unconstitutional.

(c) Whether pursuant to Section 37 of the Intergovernmental Relations Act, the fundings for the activities of the Council of Governors are restricted to annual allocations from the National Government notwithstanding the inadequacy of the said fund.

(d) Whether on the strength of Section 37 of the Intergovernmental Relations Act the national government is under obligation to provide adequate financial provisions for operations of the Applicant.

[4] The Reference application was supported by an affidavit sworn by one, Peter Gatirau Munya (the then Chairperson of the Applicant) on 19th April, 2017.

II. PRELIMINARY OBJECTION(S)

[5] In making the Reference, the Applicant described itself as follows: *"[t]he Applicant herein is the Council of Governors created under the provisions of Articles 6, 175(b), 189, 190, 200 of the Constitution and section 19(1) of the Intergovernmental Relations Act and a State organ within the meaning of Article 260 of the Constitution."* Suffice it to say that the Applicant regards itself a State organ, hence a competent person to seek an advisory opinion under Article 163(6) of the Constitution. However, some interested parties thought otherwise.

[6] On 14th June, 2017, the Senate, having been listed as the 2nd Interested Party, filed a Notice of Preliminary Objection dated 13th June 2017 stating that it will raise a preliminary objection, to be determined *in limine*, on the grounds that:

(1) The Applicant is neither the national government, county government nor state organ within the meaning of Article 163(6) as read with Article 260 of the Constitution and therefore lacks the requisite locus standi to request for an advisory opinion.

(2) By reason of the Applicant's lack of locus standi to request for an advisory opinion, this Honourable Court lacks jurisdiction to hear or to continue to entertain these proceedings any further.

(3) The Applicant seeks an interpretation of various constitutional and statutory provisions. These are matters falling within the High Court's original jurisdiction under Article 165(3) of the Constitution.

(4) The Applicant has not complied with the mandatory requirements of Article 189(3) of the Constitution as read with section 31 of the Intergovernmental Relations Act (Cap. 5G) for reference of disputes between governments to alternative dispute resolution mechanisms before instituting Court proceedings.

[7] Subsequently, the Attorney General, listed as the 1st Interested Party, on his own behalf and on behalf of the 4th, 5th and 6th Interested Parties (Intergovernmental Relations Technical Committee, Commission on Revenue Allocation, and the Controller of Budget) also filed a Notice of Preliminary Objection dated 1st August 2017, on the following grounds:

1. *THAT this Honorable Court lacks jurisdiction to entertain this Reference from the Applicant.*
2. *THAT the Applicant lacks locus standi to request for an advisory opinion from this Honourable Court under Article 163(6) of the Constitution.*
3. *THAT the Applicant is not the National Government, a State Organ or County Government within the meaning of Article 260 and therefore does not meet the threshold of a party who may request an advisory opinion from this Honourable Court, as envisaged under Article 163(6).*

[8] Having perused the Notices aforesaid, it became clear to this Court that there was a fundamental jurisdictional question that needed to be determined in *limine*, before the consideration of the substantive Reference. Parties were thus directed to file their submissions on the Preliminary Objections, which were subsequently canvassed before this Court on 17th July, 2018.

III. SUBMISSIONS

a) 1st, 4th, 5th and 6th Interested Parties'

[9] These parties filed their Written Submissions, dated 1st August, 2017, on the 3rd of August 2017. Their case was argued before the Court by Counsel Mr. Sekwe together with Ms Michelle Omum.

[10] It was submitted that the Applicant has no locus standi to seek an advisory opinion under Article 163(6) of the Constitution. That under this constitutional provision, the Supreme Court may "*give an advisory opinion at the request of the national government, any State organ, or any County government with respect to any matter concerning County government."* They argued that a State organ is defined by Article 260 of the Constitution as "*a Commission, office, agency or other body established under this Constitution"* and that the Applicant is not a creature of the Constitution but rather a creation of an Act of Parliament, specifically, Section 19(1) of the Intergovernmental Relations Act and that the Applicant had not indicated where it gets its locus.

[11] They further submitted that the Applicant's locus standi is a substantive issue for determination and not a procedural issue. They cited the case of ***Samuel Kamau Macharia v Kenya Commercial bank and 2 others***, [2012] eKLR in urging that the issue whether a Court has jurisdiction to entertain a matter before it, is not a mere procedural technicality but an issue that goes to the very heart of the matter and is a substantive issue. They referred to the case of ***Council***

of Governors v Senate & another [2014] eKLR where the Court held that the locus standi of the Applicant is a substantive issue and stated:

> ***"… whether the Applicant is a public entity is debatable as questions have been cast on its locus standi: whether it is a body competent to request for an advisory opinion. Since this a substantive question, it does not fall for determination now that the Reference has been withdrawn."***

[12] As regards the subject matter of the Applicant's Reference, it was urged that the IRA does not provide a formula to determine fund allocation to the Applicant and that under Section 37 of the Act, the National Government has the discretion to determine the quantum of the allocation. Consequently, it was urged that where Statute gives discretion to a statutory body in the performance of its functions, courts cannot dictate how the discretion is exercised. Reference in that regard was made to the case of ***Abdikadir Salat Gedi v Principal Registrar of Persons & Another*** [2014] eKLR, where it was held that:

> ***"The discretion to issue [the] Applicants with identity cards rests with relevant authorities. They receive applications, screen applications and ascertain that the set criteria for issuing identity cards are met. This court cannot tell them how to exercise that discretion."***

[13] Hence, it was urged that the issues raised are not within the purview of this Court in exercise of its Article 163(6) jurisdiction to render an advisory opinion.

[14] It was further submitted that Section 30 of the Act provides for the manner of dispute resolution between the national and county governments. That if the Applicant is therefore aggrieved, it should explore the Alternative Dispute Resolution (ADR) mechanisms under Section 30 and not approach this this Court directly. That it is only where ADR fails that a party can institute a case in court. It was thus urged that the matters raised are not constitutional issues but are general

issues dwelling on budgetary allocation for the Applicant's operational expenses, which can be well addressed by ADR mechanisms, embraced under Sections 30-34 of the Act. Further, that Section 187 of the Public Finance Management Act establishes the Intergovernmental Budget and Economics Council which can adequately address any concerns raised by the Applicant.

[15] The Interested Parties further submitted that under Article 165(3)(d)(iii) and (iv) of the Constitution it is the High Court that has jurisdiction to hear and determine any question relating to the interpretation of the Constitution including the determination of any matter relating to Constitutional powers of State organs in respect of County Governments; any matter relating to the constitutional relationship between the two levels of government and any question relating to conflict of laws under Article 165 of the Constitution. In this regard, it was urged that the Applicant has not demonstrated why it has preferred an advisory opinion as opposed to the normal course of litigation in the High Court.

[16] Consequently, they urged that the Reference was founded on a misconception of the law and amounted to an abuse of court process and should be dismissed with costs.

b) 2nd Interested Party's

[17] The 2nd Interested Party, the Senate, filed its composite Written Submissions dated 10th July 2017, on both the Preliminary Objection and the substantive Reference on the even date. As regards the preliminary objection, it cited the cases of ***Mukisa Biscuit Co Ltd v West End Distributors Ltd*** [1969] 1EA 696 and ***Hon. (Lady) Justice Kalpana H. Rawal v Judicial Service Commission & 2 Others,*** Civil Application No. 11 of 2016 & ***Justice Philip Tunoi & anor. v Judicial Service Commission & anor*** Civil Application No. 12 of 2016 to urge that its Preliminary objection raises points of law purely on the basis of the material placed before this Court by the Applicant. Further, citing the case of ***The***

Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited [1989] 1KLR, it urged that it is trite that a jurisdiction issue should be determined in *limine* whenever raised.

[18] In principle, the Senate reiterated the 1st, 4th, 5th, and 6th Interested Parties' submissions on the Applicant's lack of *locus standi* to seek an advisory opinion from this Court. It thus asserted that this Court's jurisdiction to render an advisory opinion under Article 163(6) was interpreted in ***Re the Matter of the Interim Independent Electoral & Boundaries Commission*** [2011] eKLR and under the three categories of persons who can seek an advisory opinion, to wit, the national government, a State organ or county government, the Applicant is none of them.

[19] Citing also the cases of ***Alfred Njau & Others v City council of Nairobi*** [1982-88] 1 KAR 229, ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*** [2014] eKLR; and ***Rajesh Pranjivan Chadasama v Sailesh Pranjivan Chuda Sama*** [2014] eKLR it was urged that the issue of locus standi raises a point of law that touches on the jurisdiction of the court. Thus, as the Applicant lacks locus standi, the Court lacks jurisdiction to determine the Reference before it.

[20] It was further submitted that this Court's jurisdiction to render an advisory opinion is discretionary as was held in ***Re the Matter of the Interim Independent Electoral & Boundaries Commission (supra***). As such, it is not automatic that the Court will always or must render an advisory opinion when moved. Consequently, the Senate urged this Court not to exercise its discretion in this matter as the Applicant had not exhausted the mandatory dispute resolution framework under the Constitution and the IRA.

[21] The Senate furthermore urged that the ADR mechanism is a principle that the Constitution, under Article 159(2)(c), encourages and this Court is bound to enforce it in exercise of its judicial authority. In this regard, it was submitted that

the Applicant has not complied with the mandatory requirements of Article 189(3) of the Constitution as read with Section 31 of the IRA for reference of disputes between the two levels of governments to ADR mechanisms before instituting Court proceedings.

[22] As regards the subject matter on which the advisory opinion was sought, it was submitted that this Court lacks jurisdiction to render an opinion on those issues. It was contended instead that the Applicant is in essence seeking interpretation of various constitutional and statutory provisions which issues fall within the High Court's original jurisdiction under Article 165(3) of the Constitution.

c) Applicant's submissions in opposition to the Preliminary Objections

[23] The COG has in reply urged that it has the requisite *locus standi* to seek the Court's advisory opinion. It filed it submissions dated 1st September 2017 on the 25th of September 2017 and its case was presented before the Court by Counsel Messrs Benjamin and Makokha. The Applicant was assertive that the dispute at hand is clear and it is in the best interest of the public that this Court assumes jurisdiction and clarifies the matters in contention.

[24] It was thus urged that the Applicant is a State organ as defined by Article 260 of the Constitution because it is *'an agency'* which agency, relying on the Merriam-Webster Dictionary, is described as *'the office or function of an agent.'* or '*a person or thing through which power is exerted or an end is achieved.'* Further, relying on Black's Law Dictionary, it was submitted that an agency can be defined as *" a relation, created either by express or implied contract or by law, whereby one party (called the principal or constituent) delegates the transaction of some lawful business or the authority to do certain acts for him or in relation to his rights or property, with more or less discretionary power, to another (called the*

agent, attorney, proxy, or delegate) who undertakes to manage the affair and render him an account thereof."

[25] On this basis, it was submitted that the Applicant is established under Section 19(1) of the IRA with its functions spelt out in Section 20 thereof, as an agency of the county governments. That the Applicant provides a forum for championing the interests of all counties, hence, it is obligated to bring action(s) on general issue(s) that affect all the counties. It does so as an agent of the 47 counties. Counsel also submitted that the alternative will be to have all the 47 counties come to this Court with a similar application which is inelegant.

[26] It was submitted furthermore that the IRA was enacted pursuant to Article 189(4) of the Constitution, hence it is an Act sanctioned by the Constitution and the organs established under it have a constitutional backing. Hence a body established under that Act, is a body established under the Constitution. The Applicant thus agrees with the argument that a State organ must be established by the Constitution itself. They urged in that regard that an interpretation of words used in Article 260 in defining a State organ shows that the use of 'OR' connotes a disjunctive effect as opposed to use of 'AND' which has a conjunctive effect. Hence, it urged for a purposive interpretation of Article 260 as was held in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*** [2014] eKLR and ***In the Matter of Kenya National Human rights Commission,*** Supreme Court Advisory Opinion Ref. No. 1 of 2012.

[27] It was in addition urged that in considering a constitutional interpretation, the spirit of the Constitution is constantly at play and requires consideration. In this regard, the Applicant urged that the purpose and spirit of the Constitution must be to encourage an aggrieved party, whether by itself or by its agent or representative, to seek redress before Court.

[28] Further, it was submitted that the Applicant is a State organ because it is funded by the State itself. Asked by the Court (the Chief Justice) during the hearing

whether it is a state organ or an agency Counsel for the Applicant replied that under Article 260 of the Constitution, an agent of a State organ is a State organ.

[29] It was also submitted that the issues raised in the Reference are of great public importance requiring urgent resolution through an advisory opinion. The Applicant thus sought to distinguish the holding in ***Re the Matter of the Interim Independent Electoral Commission [2011]*** eKLR that this Court had no jurisdiction to render an opinion because the High Court has jurisdiction to interpret the Constitution. It was submitted that in appropriate cases, where similar questions are raised at the High Court and before this Court, then the Reference before this Court should be admitted for the process before the High Court would not be amenable to expeditious resolution, hence this Court should intervene to expeditiously resolve the issue.

[30] As regards the submissions to resolve this matter through ADR mechanisms, it was submitted that this is not a dispute as anticipated by Article 189(3) of the Constitution that is one of an adversarial nature, but an advisory opinion is sought on the meaning and obligation created, if any, by Section 37 of the Act as applied within the framework of the Constitution. Further, that the Constitution did not anticipate the total ouster of any reference to the Supreme Court on matters concerning County Government where the same could put the County Governments into conflict with the National Government. The applicant thus reiterated that this Court is best suited to adjudicate on disputes of monumental public interest like the present one, as was held in ***Speaker of the Senate & another v Attorney General & 4 Others*** [2013] eKLR.

d) Katiba Institute, in opposition to the preliminary objections

[31] Katiba Institute (Katiba) supported the Applicant in opposing the preliminary objections. It filed its written submissions on 18th October 2017 in which it urged that the Applicant is a State organ. It submitted that while the Applicant is not

explicitly established as a body corporate with powers to sue and to be sued, it has participated in various cases before courts such as: ***County Secretary of Uasin Gishu & others v Salaries and Remuneration Commission and another*** [2017] eKLR, and ***Kenya National union of Nurses v Samuel Kambi Kazungu (Cabinet Secretary, Ministry of Labour, Social Security and Services and 4 Others)*** [2017] eKLR. Without objection hence, Katiba urged that Courts have, by conduct, accepted the participation of the Applicant in matters affecting county governments.

[32] It was Katiba's submission that under Article 260 of the Constitution 'State Organ' is defined as a "Commission, office, agency or other body established under this Constitution'. It therefore urged that the use of the phrase *'under this Constitution'* and not *'by this Constitution'* is instructive as it means that a State organ need not be explicitly established in the Constitution. It gave the example of the Ethics and Anti-Corruption Commission (EACC) that is established by statute but its role is contemplated under Article 79 of the Constitution.

[33] It was also submitted that the role of the Applicant is envisioned under Articles 6(2), 189(c), 189(2), 189(3), and 189 (4) of the Constitution and that these provisions emphasize consultation and cooperation between and among the national and county governments. Katiba in that regard urged that the import of the functions of the Applicant in Section 20 of the Act is to further the objectives of Article 189 of the Constitution, hence the Council of Governors is a 'State organ' for purposes of this Reference.

[34] Counsel for Katiba, Mr. Waikwa, reiterated that the Applicant was a State Organ and argued that in determining whether indeed it was a State Organ, two questions are to be answered: the jurisdictional question and the substantive question. That while the first question is mandatory in that under Article 163(6) a body must meet the criteria therein, the second question on the substantive issue is discretionary. He therefore urged that under Article 260 of the Constitution, the

Applicant can be said to have been established either expressly or impliedly. That under Article 189 of the Constitution, the Applicant is a body anticipated to be established and Section 19 of the Act, when read alongside the Constitution, is enough to find that the Applicant is a State organ impliedly established under Article 189.

[35] Submitting on the second question, Counsel urged the Court to exercise its discretion and accept to render the advisory opinion sought because of the importance of devolution and the need to facilitate ADR. Counsel thus urged that the Court needs to clarify whether Article 163(6) is to exist within the context of ADR. That is, that Article 163(6) takes a pacified approach to clarify devolution issues in an ADR context. In essence, it was his submission that under Article 163(6), jurisdiction to render an advisory opinion is a form of ADR as envisioned under the Constitution.

[36] In a nutshell, it was Counsel's submission that Article 260 of the Constitution should be interpreted broadly so as to find that even if the Applicant is not expressly established, then it is impliedly established under the Constitution as a body contemplated by Article 189 of the Constitution. Further, that even if the Applicant does not meet this threshold, then the Court ought to exercise discretion and render the advisory opinion since the subject matter in issue, devolution, is a matter of great public interest to governance.

e) Replies

[37] In reply, Mr. Sekwe for the Attorney General, urged that while the CoG had submitted that there was no dispute between parties so as to remove the matter within the realm of advisory opinion jurisdiction of this Court and subject it to the normal litigation process, the same was not true as the Reference itself in paragraph 12 was clear that there was a dispute between the CoG and the Auditor

General among other bodies. He reiterated that Article 260 of the Constitution was very clear that the Applicant was not a State Organ.

[38] In reply also, Mr. Mbarak for the Senate, urged that where the Constitution has left Parliament to establish a body, it has done so expressly and no such power has been provided in the Constitution as regards the establishment of the CoG. On the question of funds allocated to the Applicant, Counsel argued that under Section 119 of the Act, Parliament is to pass a law to address that issue. He therefore urged that the Applicant should go to Parliament for redress as this was a structural legislative problem.

IV. ANALYSIS & DETERMINATION

[39] In our view, there is only one fundamental question to answer: whether the Applicant, COG, is a State Organ within the provisions of Article 260 of the Constitution so as to be clothed with the *locus standi* to seek an advisory opinion before this Court.

a) Is the Applicant a state organ?

[40] The provisions of Article 163(6) of the Constitution as regards this Court's jurisdiction have been settled in a number of cases. In ***Re the Matter of the Interim Independent Electoral Commission*** the Court, for the first time, expounded on this provision as follows [para.83]:

> ***"(i) For a reference to qualify for the Supreme Court's Advisory-Opinion discretion, it must fall within the four corners of Article 163(6): it must be 'a matter concerning county government.' The question as to whether a matter is one 'concerning county government' will be determined by the Court on a case-by case basis.***

(ii) The only parties that can make a request for an Advisory Opinion are the national government, a State organ, or a county government. Any other person or institution may only be enjoined in the proceedings with leave of the Court, either as an intervener (interested party) or as *amicus curiae.*

(iii) The Court will be hesitant to exercise its discretion to render an Advisory Opinion where the matter in respect of which the reference has been made is a subject of proceedings in a lower Court….

(iv) Where a reference has been made to the Court the subject-matter of which is also pending in a lower Court, the Court may nonetheless render an Advisory Opinion if the Applicant can demonstrate that *the issue is of great public importance and requiring urgent resolution through an Advisory Opinion*. ***In addition, the Applicant maybe required to demonstrate that*** *the matter in question would not be amenable to expeditious resolution through adversarial Court process.*"

[41] In this matter, it is common ground that CoG is neither the national government nor is it among the 47 county governments as known to the Constitution. While it insists, with the support of Katiba, that it is a State organ as it is a body established under the Constitution and/or is an agency of the 47 county governments, the other parties are adamant that it is not a State organ. Who then is a State organ? Article 260 defines a State organ in the following terms:

" 'State organ' means a commission, office, agency or other body established under this Constitution"

Does the Applicant meet this definition? Again, quite clearly, the Applicant is not a commission or an office under the Constitution. This leaves us with the single thread that the Applicant and Katiba are hanging on; that it is a body or agency

established under the Constitution. In so doing, they have rendered a lot of premium on the phrase "under this Constitution". This calls for determination of the question whether there is indeed a need to define this phrase as urged by the Applicant.

[42] Under Article 2(1), the Constitution is the Supreme law of the land. Article 259 of the Constitution then gives the approach to be adopted in interpreting the Constitution, basically in a manner that promotes its purposes, values and principles. Suffice it to say that in interpreting the Constitution, the starting point is always to look at Article 259 for it provides the matrix, or guiding principles on how it is to be interpreted and then Article 260 where specific words and phrases are interpreted. It is imperative to note that while Article 259 deals with construing of the Constitution and outlines the principles that underpin that act; Article 260 deals with interpretation, that is, it is explicit in assigning meaning to the words and phrases it addresses. Hence the opening words in that Article are: *"In this Constitution, unless the context requires otherwise-"*.

[43] Consequently, in search of the meaning assigned to some words and phrases as used in the Constitution, one needs to consult Article 260 to find out if that particular term or phrase has ALREADY been defined. It is only where the same has not been defined that the Court will embark on seeking a meaning by employing the various principles of constitutional interpretation. So that in looking for the meaning of a particular word or phrase in the Constitution one will go to Article 260 for 'Interpretation". For example in defining the word 'adult', the Constitution states thus: *"adult" means an individual who has attained the age of eighteen years*. As explicit as that is, the search for the meaning of the word 'adult' will end there. Where the meaning is provided in terms of a collectivity of acts and things, the Constitution in Article 260 is also clear, for instance: *"affirmative action" includes any measure designed to overcome or ameliorate an inequity or system denial or infringement of a right or fundamental freedom"*. So that in

giving meaning to words and phrases under the Constitution, Article 260 is direct in using the term '*means'* and also deductive in using the term '*includes*'.

[44] With this clear provision in the Constitution, we would have thought that the definition of a State organ was clear and settled by the definition in the Constitution. However, the Applicant and more so, Katiba seem to have a different opinion. They call upon us to define the term "established under this Constitution" broadly.

[45] But even as we consider the Applicant's and Katiba's invitation aforesaid, we cannot disengage from the guiding principles in Article 259 of the Constitution on how our Constitution should be construed. The centrality of Article 259 has been aptly stated in the persuasive decision of the High Court in ***Apollo Mboya v Attorney General & 2 others*** [2018] eKLR, thus:

> ***"20. It is useful to bear in mind that Article*** *259* ***of the Constitution introduced a new approach to the interpretation of the Constitution. It obliges courts to promote*** **'the spirit, purport, values and principles of the Constitution, advance the rule of Law, Human Rights and fundamental freedoms in the Bill of Rights and contribute to good governance,** ***an approach has been described as <u>'a mandatory constitutional canon of statutory and Constitutional interpretation'.</u> The Article imposes a mandatory duty upon everyone to adopt an interpretation that conforms to Article*** *259.*
>
> ***21. It is also an established principle of interpretation that Constitutional provisions must be construed purposively and in a contextual manner. Courts are constrained by the language used. Courts may not impose a meaning that the text is not reasonably capable of bearing. In other words, interpretation***

should not be "unduly strained." It should avoid "excessive peering at the language to be interpreted."

[46] This Court indeed alluded to the purposive interpretation of Statute in the case of ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others***, [2014] eKLR, where it opined that a purposive interpretation should be given to statutes so as to reveal their true intention. The Court observed as follows:

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

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

[47] The persuasive decision of the Court of Appeal in ***County Government of Nyeri & Another v Cecilia Wangechi Ndungu*** *[2015]* eKLR is also illuminating where it was held that:

> ***"Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by referen1ce to its particular factors."***

[48] Consequently, laying credence to Article 259 of the Constitution in this matter, we place specific emphasis on Article 259(2) which provides:

> ***"If there is a conflict between different language versions of this Constitution, the English language version prevails."***

In citing Article 259(2), we are not in any way suggesting that there are different language versions of the Constitution that have been submitted before us. On the contrary we are only noting the significance of the English language as the authoritative language to the interpretation of the Constitution. Hence words have to be assigned their meaning as assigned in the English language. It therefore also follows that where a word is used in the Constitution and it appears that a different meaning is created to the known English meaning, then one has to fall back to the known English version meaning of that word. It is on this basis that, as a Court we

fall back to the dictionary English meaning of the word 'under' as used in Article 260 of the Constitution.

[49] Collins English Dictionary defines 'something under a law', which is equivalent to 'under the Constitution' used in Article 260, as something that happens under a law. In the Concise Oxford English Dictionary, 12th Edition the word "under" is defined inter alia, "as provided for by the rules of, in accordance with."

[50] The upshot is that the word 'under' is an English word whose meaning is discernable from English dictionaries. Having said that, an invocation of the literal meaning to interpretation of legal words and phrases also leads us to the conclusion that English words should be given their natural meaning. Other rules of interpretation (the Golden and the Mischief) are only resorted to where there is an ambiguity.

[51] Considering the above definitions in the dictionaries, we find that the word 'under' cannot be said to be ambiguous so as to call for invocation of the general doctrine of interpretation. It is a common word used daily by English speakers and its meaning is plain and known. A word, such as 'include' is also a *noun* whose interpretation does not need any construction and construing, unless used in a sentence or a phrase. It is on this basis that we decline any invitation to the deductive interpretation of clear English words. This approach cannot be resorted to with the aim of founding or donating jurisdiction where clearly none exists.

[52] We have also noted the ancient persuasive jurisprudence in ***River Ware Commissioners v Adamson:*** HL 1877, (1877) 2 App Cas 743 where Lord Blackburn was emphatic that the role of a judge was not to legislate, but simply to declare the intention of Parliament even if that intention appears injudicious. It was thus noted that absurdity cannot be in the use of one word. It can only be where more words are used so that in the construction of a sentence, some ambiguity results where the intention is lost and leads to a result not in line with the purpose.

[53] Hence in interpreting Article **260** of the Constitution, this Court is not to re-write the Constitution but to declare what the drafters stated and intended. It is clear what the drafters intended and achieved in stating with precision what constitutes a State Organ. This Court will not expand that meaning by defining what 'under' is used in Article 260, for its meaning is plain in English. State organs are those commissions, offices agencies or bodies established under the Constitution. That is, those institutions that are established in the Constitution. For emphasis, it is important that we refer to some of the Institutions which have been expressly established under the Constitution, namely the Constitutional Commissions which include:

- Under Article 59 – Kenya National Human Rights and Equality Commission.
- Under Article 67 – National Land Commission.
- Under Article 88 - Independent Electoral and Boundaries Commission.
- Under Article 215 – Commission on Revenue Allocation.
- Under Article 230 – Salaries and Remuneration Commission.
- Under Article 233 – The Public Service Commission.
- Under Article 127 - Parliamentary Service Commission.
- Under Article 171 - The Judicial Service Commission.
- Under Article 237 -Teachers Service Commission.
- Under Article 246 – National Police Service Commission.

The establishment of any state organ must be traceable to the Constitution. There are other independent offices whose establishment can be traced to the Constitution e.g. The Office of Auditor General and that of the Controller of Budget.

[54] We therefore must distinguish the Applicant's and Katiba's submission that Ethics and Anti-Corruption Commission is not established by the Constitution but is a State Organ. Such an assertion is misplaced. EACC is a constitutional

commission expressly decreed by the Constitution. The founding basis for the EACC is in Article 79 of the Constitution thus:

> ***"Parliament shall enact legislation to establish an independent ethic and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter."***

There is no equivalent constitutional provision for the establishment of the Applicant, which is purely a statutory creature. Article 189 that the Applicant alludes to does not provide for creation of the Applicant as an entity. It advocates for procedures for settling disputes as between the national and county governments. Article 189(4) provides:

> ***"National legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration."***

It therefore follows that even where National legislation, under Article 189(4), creates a body in which it vests the procedures for settling inter-governmental disputes, such a body does not acquire the status of a State Organ.

[55] Hence we find that the definition of a State Organ under Article 260 to include agency or other body established under this Constitution, does not cover the Applicant. It is thus clear that the Applicant is not a commission, office, agency or body established under the Constitution. The constituting statute is the IRA which by any definition cannot grant the Applicant constitutional credentials.

[56] This constitutive Statute, IRA, does not in fact help the Applicant's case in this matter. A perusal of the Act reveals that, the Applicant's legal status is ambiguous. Section 19 provides:

"***19. Establishment of the Council***

(1) There is established a Council of County Governors which shall consist of the governors of the forty-seven counties.

(2) The Council shall elect a chairperson and a vice-chairperson from amongst its members.

(3) The chairperson and vice-chairperson of the Council shall serve for a term of one year and shall be eligible for re-election for one further term of one year."

Beyond the above, the legal status of the Applicant was not legislated upon. This position leaves many questions unanswered such as whether for example, it has the capacity to sustain these proceedings.

[57] It is also instructive to note that while no court has addressed the question of the legal status of the Applicant, it has been an issue that has lingered in legal corridors for sometime. The issue was noted by this Court in the case of ***Council of Governors v Senate & another*** [2014] eKLR, though not addressed then, thus:

> ***"… whether the Applicant is a public entity is debatable as questions have been cast on its locus standi: whether it is a body competent to request for an advisory opinion. Since this a substantive question, it does not fall for determination now that the Reference has been withdrawn."***

[58] Suffice it to say that consequent upon our findings above, the Applicant is not a state organ under Article 260 of the Constitution and as such, it has no capacity to seek an advisory opinion under Article 163(6) of the Constitution.

b) CoG as an agent of County governments

[59] It was also submitted that the Applicant lodged the Reference as an agent of the forty-seven counties to champion the course of devolution. We find that this line of submission is not tenable as a measure of locus standi. The agency referred to in Article 260 of the Constitution in defining a State organ is not the classical 'agent' in the principal-agent relationship in the law of agency, more profound in commercial law. To understand the agency alluded to in the Constitution, it is important to look at some Statutory provisions. For instance, under the Office of the Director of Public Prosecutions Act, 2013 an investigative agency is defined as follows:

> ***" 'Investigative Agency' in relation to public prosecutions means the National Police Service, Ethics and Anti-Corruption Commission, Kenya National Commission on Human Rights, Commission on Administration of Justice, Kenya Revenue Authority, Anti-Counterfeit Agency or any other Government entity mandated with criminal investigation role under any written law;"***

[60] It clearly emerges that agency as used in the Constitution, in Article 260 or in statute, correctly construed, refers to government institutions charged with the performance of a particular mandate such as investigation and/or prosecution. It refers to an entity rather than a relationship. Hence it does not refer to the agent-principal relationship in the law of agency as the Applicant may want this Court to interpret. Hence the Applicant cannot acquire locus before this Court as an agent of the county governments.

c) CoG participation in previous cases

[61] Katiba also urged us to allow the Applicant's Reference for determination since it had previously participated in matters before other courts affecting county

governments. In this regard, it cited two decisions of the ELRC, namely, ***County Secretary of Uasin Gishu & Others v Salaries and Remuneration Commission and Another [2017]*** eKLR and ***Kenya National Union of Nurses v Samuel Kambi Kazungu, Cabinet Secretary, Ministry of Labour, Social Security and Services & 4 Others, [2017]*** eKLR**.** As the Supreme Court charged with protecting the supremacy of the Constitution as stated in Section 3 of the Supreme Court Act, we have no hesitation in dismissing Katiba's submissions in this regard. This is the ultimate Court charged with settling the law. Where an act was omitted or committed by the lower courts, it is this Court that corrects it. In any event, decisions of other Courts do not bind this Court as is the law under Article 163(7) of the Constitution. We have also perused those two decisions referred to and it is clear that, first, the Applicant, CoG, was in most cases not the main party and secondly, the question of its status in law was never in issue.

d) Invocation of the 'deem principle'

[62] Another peculiarity with the submissions of Katiba was that because of the objectives of the Applicant in Section 20 of the Act, which functions, it submitted further the objectives in Article 189 of the Constitution, then the Applicant should be deemed a State Organ "for purposes of this Reference". What we understand the Interested Party to have been saying is that even though the Applicant is not a State Organ, for the sake of the issues before this Court, we ought to deem it a State Organ. In ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others*** [2014] eKLR**,** this Court alluded to the so called "deem principle" and stated that it has no place in law. Something is either legal or not, either legitimate or not. It cannot be deemed to be what it is not. Further, the Interested Party is urging this Court to go against its own jurisprudence in ***Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others*** [2012] eKLR case, not to assume

jurisdiction by judicial craft and clothe the Applicant with locus it does not have so as to assume jurisdiction. That, this Court will not do.

e) *Fidelity to Article 159(1)(c) of the Constitution*

[63] We have reached a verdict that indeed the Applicant is not a State Organ. Further, that as established, its status in law is amorphous. Consequently, the Court has no basis and/or justification to go into the merits of the other issues raised beyond this finding. Be that as it may, we find that there is an issue that has emerged that we think is imperative for this Court to address. This is the place of ADR in governance as enshrined in Article 159(2)(c) of the Constitution.

[64] We reiterate that Article 159(2)(c) is an important pillar of the Constitution. It is trite law that the Constitution is a living document in which life should constantly be breathed into. The provisions of the Constitution are not mute but should be nourished and sustained by our courts among other entities. Consequently, the need to encourage ADR in dispute resolution cannot be gainsaid. This burden rests on all persons and government entities by virtue of Article 2(1) of the Constitution which provides that the Constitution binds all.

[65] Consequently, having perused the Reference before us and paying attention to the issues therein, it is our opinion that given the provisions of the IRA and the ADR constitutional principle in Article 159(2)(c), even if this Reference would have survived the Preliminary Objections herein, this Court would have recommended that this matter be remitted back for the parties concerned to undertake ADR. In so doing, this Court would be informed by a number of factors.

[66] First, in giving life to Section 31 of the IRA which recommends ADR to be exhausted before pursuing the matter in Court, this Court will be giving credence to the doctrine of subsidiarity as regards legislations that are more particular on how constitutionally recommended norms have to be actualized. Hence, to

actualize ADR in Article 159(2)(c) of the Constitution, it would be proper that this Court allows Section 31 of the Act to be pursued first.

[67] Secondly, co-operation among various State functionaries is key. Article 189 of the Constitution provides for cooperation between the two levels of governments: national and county governments. That in case of a dispute between the two levels of government, every effort to settle the dispute under the national law should be pursued. Hence this Court would not allow such a requirement of the Constitution to be abdicated.

[68] Lastly, recommending that the matter be referred back to pursue ADR will be in line with the precedent of the Court. First under Rule 3 of the Court Rules, this Court has jurisdiction to make any order it deems fit in the interest of justice. Hence, we would have held that despite having jurisdiction to render an advisory opinion in this matter, the appropriate remedy would be that the parties might to go and pursue ADR which will have led to a win-win outcome to all parties involved, given that as the two levels of government, they are constitutionally in a continuing relationship.

[69] Be that as it may, ***In the Matter of the National Gender and Equality Commission*** [2014] eKLR matter, this Court held that the jurisdiction to render an advisory opinion is discretionary. Hence, even where the Court has jurisdiction to admit a matter for an advisory opinion, it may decline to render such an opinion if in its opinion there is a more viable cause of action with an appropriate remedy. In that case, the Court stated thus:

> ***"[35] Article 163(6) of the Constitution specifies who can seek an advisory opinion, and in what kind of matters such opinion may be sought. <u>It is worth noting that this jurisdiction even where it exists is a discretionary jurisdiction. Not all cases qualify for rendering of an advisory opinion. The Court is alive to the danger of such a jurisdiction being perceived as a normal</u>***

<u>litigation mandate.</u> The Court thus cautioned itself in the Advisory Opinion No. 2/2012, where it observed:

> *"[17] In the earlier Advisory-Opinion matter, this Court had elected to proceed with caution in such cases. Only a truly deserving case will justify the Court's Advisory Opinion, as questions amenable to ordinary litigation must be prosecuted in the normal manner; and the Supreme Court ought not to entertain matters which properly belong to first-instance-Court litigation. Only by due deference to the assigned jurisdiction of the different Courts, will the Supreme Court rightly hold to its mandate prescribed in section 3(c) of the Supreme Court Act, 2011 (Act No. 7 of 2011), of developing 'rich jurisprudence that Kenya's history and traditions and facilitates its social, economic and political growth.'*
>
> *"[18] The Supreme Court must also guard against improper transformation of normal dispute-issues for ordinary litigation, into Advisory-Opinion causes: as the Court must be disinclined to take a position in discord with core principles of the Constitution, in particular, a principle such as the separation of powers, by assuming the role of general advisor to Government".*

[70] The upshot is that had this Court held that it has jurisdiction, in that the Applicant has the requisite locus to seek the advisory opinion it sought, it would nevertheless had exercised its discretion and declined to assume that jurisdiction and instead referred the matter to ADR.

[71] It is in the same breadth that we dismiss Katiba's submissions that the Court considers the role of the Applicant's Secretariat, of managing intergovernmental relations as a basis for granting the Applicant "State organ status". No amount of stretching and judicial crafting, as we have already alluded to, can clothe a party with status it does not have.

f) Costs

[72] Before making the final orders, we would like to briefly render ourselves on the issue of costs. It is a general rule that costs follow the event and a successful litigant will in most cases be awarded costs. However, as this Court has observed severally, a court retains the discretion to award costs as it sees to be just. In this matter, we have considered the nature of all parties involved as being public institutions, hence expending public resources. We have also considered that save for the legal hurdle of lack of locus by the Applicant, there is a legitimate issue in controversy that is neither vexatious nor frivolous. There is an apparent legal issue that warrants determination within the correct legal parameters. We have also considered the need to foster cohesion and dialogue among public institutions, hence the recommendation for ADR, in the spirit of Article 159(2)(c) of the Constitution. We therefore see no need to condemn any party to bear costs.

[73] In any event, as we have held that the Applicant has no legal status known in law and that the suit was *ab initio* unsuited, it would be preposterous for this Court to make an order of costs, or any order for that matter, against it or any other party. Consequently, taking into account all the foregoing, we find that it is only just and fair that we make no order as to costs in this matter.

V. ORDERS

[74] Consequently, we make the following orders:

(i) ***The 2nd Interested Party's Notice of Preliminary Objection dated 13th June, 2017 is hereby allowed.***

(ii) ***The 1st, 4th, 5th and 6th Interested Parties' Notice of Preliminary Objection dated 1st August 2017 is hereby allowed.***

(iii) It is hereby declared that the Applicant, Council of Governors, is not a State Organ, hence has no capacity (locus Standi) to seek an advisory opinion before this Court.

(iv) The Applicant's Reference dated 19th April, 2017 is hereby disallowed for want of jurisdiction.

(v) Each Party shall bear its costs.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **18th** Day of **October, 2019.**

……………………………………………
D.K. MARAGA
CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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

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M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

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J.B. OJWANG
JUSTICE OF THE SUPREME COURT

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S.C. WANJALA
JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

……………………………………………
I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA