



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu, DCJ & V-P, Ibrahim, Wanjala, Njoki & Ouko, SCJJ.)

REFERENCE NO. 1 OF 2021 (E001 OF 2021)

**IN THE MATTER OF: AN APPLICATION BY THE COUNTY GOVERNMENT
FOR AN ADVISORY OPINION UNDER ARTICLE
187 OF THE CONSTITUTION**

–AND–

**IN THE MATTER OF: CHAPTER 11 OF THE CONSTITUTION OF KENYA,
2010**

–AND–

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

–AND–

**IN THE MATTER OF: INTERGOVERNMENTAL RELATIONS ACT NO. 2 OF
2021**

–AND–

**IN THE MATTER OF: PUBLIC FINANCE MANAGEMENT ACT NO. 18 OF
2012**

–AND–

**IN THE MATTER OF: TRANSITION TO DEVOLVED GOVERNMENT ACT
NO. 1 OF 2012**

–AND–

IN THE MATTER OF: GOVERNMENT PROCEEDINGS ACT NO. 40 OF 2021

–BY–

THE COUNTY GOVERNMENT OF NAIROBI..... APPLICANT

–AND–

THE ATTORNEY GENERAL RESPONDENT

ADVISORY OPINION

Representation:

Prof. Tom Ojienda & Associates-No appearance at the hearing...for the Applicant
Mr. Emmanuel Bitta State Counsel.....for the respondent
(Office of the Attorney General)

A. INTRODUCTION

[1] By a Reference dated 15th July 2021, the County Government of Nairobi (the applicant herein), sought this Court's advisory opinion under Article 163 (6) of the Constitution on the following four issues, reproduced verbatim:

1. *Whether the outstanding legal debt during the transition from the National Government to the devolved government as provided under Sections 4 and 7 of the Transition to Devolved Government Act should have been absorbed by the National Government and not the County Government;*
2. *Whether the transfer of functions from the County Government to the National Government vide the Deed of Transfer dated 25th February 2020 in terms of Articles 187, 189 of the Constitution and Sections 24, 25 and 28 of the Intergovernmental Relations Act should have also included the transfer of liabilities including the Kshs. 60 billion owed in legal debt from the County Government to the National Government;*
3. *Whether the County Accounting Officers should personally be held liable for the failure of the County governments to obey orders requiring payment of any money by way of damages or otherwise, or of any costs in legal debts; and*
4. *Whether the arrest warrants issued against County Executive Officers on account of failure to pay the legal debt owed by the*

County Government violate their rights under Articles 27, 28, 29, and 48 of the Constitution.

[2] The Reference was supported by the affidavit of *Lydia Kwamboka*, the County Attorney of the applicant sworn on 15th July 2021.

B. BACKGROUND

[3] By the operation of Sections 3 (d) and 7 (2) (a) (e) (f) and (g) of the Transition to Devolved Government Act, all the assets and liabilities of its predecessor, the Nairobi County Council, were deemed to have been transitioned into the applicant's assets and liabilities register. Further, pursuant to Articles 187 and 189 of the Constitution as well as Sections 25 and 26 of the Intergovernmental Relations Act, the applicant, through a Deed of Transfer of Functions dated 25th February 2020 (hereinafter '*the Deed of transfer*') unequivocally transferred the following services to the National Government through the Nairobi Metropolitan Services (hereinafter '*NMS*'): *the county health services, county transport services, county planning and development services and county public works, utilities, and ancillary services*, but failed to transfer corresponding liabilities.

[4] The applicant now seeks clarification of an alleged ambiguity in the legal statutes and framework, affecting the settlement of debts owed by the defunct Municipal Councils including the Nairobi City Council after the transition to devolved governments, and debts and liabilities sharing between the latter and the National Government, following the execution of the Deed of Transfer and transfer of functions aforesaid.

C. PARTIES' CASES

(a) Applicant's Case

[5] The applicant's submissions are dated 12th November 2021 and filed on 16th November 2021, premised on the four issues upon which this Court's advice is sought. Turning to the first question, *whether the outstanding legal debt should have been absorbed by the National Government*, the applicant submitted that by dint of Article 176 and Section 15 (2) (b) of the Sixth Schedule of the Constitution, as read with Sections 3 (d), 4 and 7 (d) (h) (ii) and (e) of the Transition to Devolved Government Act No. 1 of 2012, it was the mandate, object and purpose of the Transition Authority to superintend the transition process and provide; the legal framework for the transition to devolved government, including the transfer of power and functions between the two levels of government; prepare and validate an inventory of all the existing assets and liabilities of the government, or public entities and local authorities; and to provide mechanisms for audit and transfer of assets and liabilities, human resources, pensions and other staff benefits to employees, amongst others.

[6] Moreover, the applicant contended that this framework was intended to ensure a seamless and practical transition of staff, assets and liabilities from the National Government to the County Government; to set out the criteria to be met before particular functions could be devolved and develop policy and operations mechanisms during the transition period for audit and verification before the transfer of functions to the National Government. The applicant relied on the High Court's Decisions in ***Republic v. County Secretary Murang'a County Government ex-parte Thiga Thuita*** [2014] eKLR and ***County Government of Busia & Another v. Julius Orina Manwari & 12 Others*** [2015] eKLR to urge that the Constitution provided for the formulation of an institutional framework to coordinate a phased transition into a devolved system

of Government but that, there is need for further clarity by this Court on that matter.

[7] It further argued that the sole purpose of the Intergovernmental Relations Act No. 2 of 2012, which it argued was the successor to the Transition to Devolved Government Act was, to assume from the Transition Authority, the co-sharing of liabilities between the County and National Governments.

[8] However, it was submitted that despite the enumerated constitutional and statutory provisions and the corresponding mandate, the Transitional Authority or its successor failed to formulate a criterion for debt sharing between the two levels of Government. The applicant also submitted that as a result of these lacunae, there was an unregulated sharing of liabilities between it and the National Government occasioning huge outstanding liabilities, including a Kshs. 60 Billion legal debt, threatening to debilitate devolution, its operations and service delivery.

[9] It was the applicant's further argument that the debts and liabilities of a defunct local authority were not automatically transferred to County governments. Furthermore that, the absence of express provisions under the Constitution to that effect was deliberate on the part of the drafters so as to consider all existing special circumstances, including instances where some defunct local authorities' boundaries transcended more than one County, an occurrence appreciated in the case of ***(Interim) County Secretary, County Government of Kakamega v. Republic ex-parte Ali Adam & Another*** [2017] eKLR.

[10] The applicant, in addition, strongly contended that without the said framework, the County Government of Nairobi had not yet been instructed or mandated to start paying debts owing from the defunct City Council. It was further argued that, until the laid down procedure was complied with; any contrary finding would be in contravention of the clear provisions of the 4th Schedule of the Transition to Devolved Government Act.

[11] On the second issue, *whether the Deed of Transfer should have incorporated the transfer of liabilities*, it was the applicant's submission that the functions transferred to the National Government via the Deed of Transfer had the biggest budgetary allocations as compared to the functions allocated to the County Government. It was expounded that NMS was allocated Kshs 27.2 Billion and was to receive a further 21.1 Billion from the applicant's revenue-generating functions, retaining a cumulative Kshs 48.3 Billion for the 2021-2022 Financial Year whilst the applicant was only allocated Kshs 20 Billion. It urged that even with the enormous budget, there was no corresponding transfer of liabilities to the National Government. Therefore, the applicant urged that the budgetary allocation connoted and imputed that NMS ought to have taken up not only County functions but also corresponding debts and liabilities.

[12] Ultimately, it was contended that according to the provisions of Article 190 (1) of the Constitution and Section 121 of the County Government Act, County Governments must be given adequate support to enable them adequately perform their functions. On this ground, the applicant affirmed that the debt facing it must be shared with the National Government.

[13] On the third question, *whether the County Accounting Officers should be held personally liable for the County Government's failure to meet its outstanding liabilities*, the applicant challenges the constitutionality of Section 21 of the Government Proceedings Act. It was contended that the said provision had been used to unjustly limit the accounting officers' rights. In this context, it was urged that the same had enabled parties with favorable judgments to get *mandamus* orders against county accounting officers and their subsequent committal to civil jail on grounds of contempt, for failure to make payment in compliance with the judgments. The applicant asserted that this was discriminatory to the officers and robbed them of their dignity.

[14] Accordingly, while citing the case of ***R v. Oakes (1986) 26 DLR*** and an article by *Kwasi H. Prempeh* titled ***Marbury in Africa: Judicial Review***

and the Challenge of Constitutionality in Africa (2006) 80 Tulane Law Review 1239, the applicant submitted that any limitation of a right must be within the reasonable test, that is, there should be a balance between the interests of an individual and the interests of a democratic society as represented by the State. Furthermore, it was upon the courts to determine whether a given limitation was justified in an open and democratic society. Applying these criteria, argued the applicant, Section 21 aforesaid should not be a quest for jailing or in any manner harassing public officers, but instead should be construed as a call for them to show cause in a situation where there has been willful neglect in fulfilling a court order.

[15] As regards the last question, *whether the arrest warrants violated the Constitution*, the applicant contended that the county accounting officers' constitutional rights under Article 27 on equality and freedom from discrimination, Article 28 on human dignity, Article 29 on freedom and security of the person, and Article 48 on access to justice were curtailed by Section 21 of the Government Proceedings Act. The applicant asserted that holding county accounting officers liable for County Government debts amounts to unfair discrimination and a violation of their right to dignity. To buttress this argument, it relied on several decisions including the Supreme Court of India's decision in ***Neeru Yadav v. State of U.P and Another*** Criminal Appeal No. 2587 of 2014 as was cited in ***Michael Rotich v. Republic*** [2016] eKLR; South African Constitutional Court's decision in ***President of the Republic of South Africa v. Hugo*** [1997] ZACC;1997 (4) SA 1(CC)1997 (6) BCLR 708 (CC) (Hugo) at para 41; and ***Ahmed Issack Hassan v. Auditor General*** [2015] eKLR.

(b) Respondent's Case

[16] The Attorney General's submissions are dated 19th November 2021 and filed on 25th November 2021. The Attorney General raised two preliminary questions. First, that the applicant failed to seek the Attorney General's advice before moving

the Court for an advisory opinion. It was urged that this was inconsistent with this Court's decisions and directions, wherein it is now settled that a party who intended to move the Court for an advisory opinion must first seek the advice of the Attorney General. The Attorney General cited Rule 53 (1) (c) of the Supreme Court Rules, 2020, and similarly relied on this Court's decision ***In the Matter of Interim Independent Electoral Commission*** [2011] eKLR wherein, it contended, this mandatory requirement was first settled.

[17] Secondly, the Attorney General submitted that despite the reference having been filed in the name of the applicant, which is a County government with the requisite *locus standi* to seek an advisory opinion, by a letter dated 4th October 2021 and copied to the Solicitor General, the applicant through the Office of the County Attorney instructed the firm of M/s Prof. Tom Ojienda & Associates, to urgently withdraw this advisory opinion for the above reason. It is further submitted that, the said firm had not withdrawn the reference and that the continuation of the instant proceedings was questionable and lacked the authority of the applicant.

[18] In addition, the Attorney General has responded to the substantive questions raised by the applicant. Concerning the first question, it was submitted that this issue did not present any legal controversy requiring this Court's advisory opinion. It was explained that the same had been long settled by the operation of law as the Transition to Devolved Government Act provided a legal framework for the transition to devolved governments under Section 15 of the Sixth Schedule of the Constitution.

[19] Moreover, the Attorney General contended that, as admitted by the applicant in paragraphs 7 and 8 of the supporting affidavit of Lydia Kwamboka, by dint of Sections 3 (d), 7 (2) (a) (e) (f) and (g) of the Transition to Devolved Government Act, the inventory of all the existing assets and liabilities of the former Nairobi County Council transitioned into assets and liabilities of the County government of Nairobi, including the Kshs 60 Billion legal debt.

[20] In any event, urged the Attorney General, the Transition to Devolved Government Act provided a specific dispute resolution mechanism under Section 34 thereof, which the applicant had elected not to pursue. And that therefore, this dispute resolution avenue was no longer available as the said Act had become obsolete by operation of law.

[21] Furthermore, it was the Attorney General's contention that the Deed of Transfer specifically provided for the requisite dispute resolution mechanisms under Article 11.2 referring any dispute arising therefrom to the National and County Government's Coordinating Summit. Additionally, pursuant to Article 189 of the Constitution, which was operationalized by the Intergovernmental Relations Act, elaborate alternative dispute resolution mechanisms are set out under Sections 30 to 34, which the applicant had not exhausted before approaching this Court.

[22] On the second question, the Attorney General urged that pursuant to Article 187 (1) of the Constitution, which provides that a function or power at one level of Government may be transferred to another level of government, by an agreement between the applicant and the National government, the applicant transferred only the enumerated functions from the Nairobi County to the National government but failed to transfer any liabilities. It was contended that this Court could not now impose other obligations to any of the two levels of government outside the Deed of Transfer. It was therefore emphasized that there was no basis for the imposition of liabilities on any party by the court.

[23] On the third question, the Attorney General asserted that this issue was ill-suited for the issuance of an advisory opinion. It was urged that as framed, the issue is a judicial decision that is to be made on a case-by-case basis. For example, how was the figure of Kshs. 60 Billion arrived at and in which claim to mention just a few absurdities that would confront the Court? The Attorney General contended that this Court was being invited to exercise its appellate jurisdiction over the determination of decisions of courts below it. Furthermore, the Attorney

General urged that there was need to hear the other parties in the proceedings where the impugned orders had been issued; that the applicant had not demonstrated why the question could not be addressed through the normal adversarial litigation process; and that the question as framed was not a matter of urgency that would necessitate the issuance of an advisory opinion.

[24] On the last issue, the Attorney General reiterated that the questions therein would best be resolved through the normal adversarial system from the High Court through the courts' hierarchy. It was cautioned that the advisory opinion jurisdiction was not one to be perceived as normal litigation jurisdiction. To buttress this submission the Attorney General cited this Court's decision in ***Kenya National Commission on Human Rights v. Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties)*** Reference No. 1 of 2017 [2020] eKLR. In conclusion, he urged this Court to decline to issue an advisory opinion on all the questions raised.

D. ISSUES FOR DETERMINATION

[25] From the pleadings and the parties' submissions, the following issues crystallize for our determination at this stage:

- (i) *Whether the advisory opinion is premature for lack of the Attorney General's advice; and*
- (ii) *Whether this Court should exercise its jurisdiction and render an advisory opinion.*

E. ANALYSIS

(i) Whether the application for an advisory opinion is premature

[26] The Attorney General's preliminary objection is two-pronged. First, it was urged that the applicant's reference was premature as the applicant had failed to seek the Attorney General's advice, before moving the Court for an advisory opinion. It was also urged that this inaction was deliberate. Consequently, the Attorney General contended that the Court's jurisdiction under Article 163 (6) of the Constitution should be ousted.

[27] Second, it was argued that the respondent, through the Solicitor General had instructed the applicant's advocates on record to withdraw the reference, as continuation of these proceedings lacks the applicant's authority. These contentions were re-emphasized when this reference came up for hearing. It is imperative to note that the applicant did not controvert this challenge in its written submissions and its advocates on record failed to appear before the Court when this reference came up for hearing to do the same.

[28] On our part, we have pronounced ourselves, as regards preliminary objections in the case of ***Independent Elections and Boundaries Commission v. Jane Chepenger and 2 Others***, SC Civil Application No. 36 of 2014; [2015] eKLR where we stated:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law...”

[29] On the same issue, this Court affirmed in *Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd. & 3 others*, SC Application No. 50 of 2014; [2015] eKLR that;

“... a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

[30] Accordingly, an objection that disputes the jurisdiction of a Court of law is one raising a pure point of law. We find that the respondent’s preliminary objection falls within these demarcations and warrants our determination at this stage.

[31] We now turn focus to the issue, *whether the advisory opinion is premature for want of the Attorney General’s prior advice*. The first point of call is Rule 53 (1) (c) of the Supreme Court Rules, 2020 which provides that:

Rule 53

(1) The Court may, after giving the parties an opportunity to be heard, reject a reference in whole or in part, if –

...

(c) the matter in respect of which the reference is made can, in the opinion of the Court, be resolved by the advice of the Attorney – General, and such advice has not been sought. [Emphasis added]

[32] We are further guided by our decision in *Re the Matter of the Interim Independent Electoral Commission* SC Application No. 2 of 2011; [2011] eKLR [*Re IIEC*] where the Court considered the question whether seeking advice

from the Attorney-General, or the requirement for seeking such advice before moving the Court for an Advisory Opinion, would be tantamount to interference with the independence of the Interim Independent Electoral Commission. The Court pronounced itself as follows:

“In the instant matter, it is our opinion that, seeking the advice of the Attorney-General, or being required to do so by a rule of procedure, does not compromise the independence of a State organ in any way, nor does it vest a veto power in that office. While the applicant after obtaining advice from the office of the Attorney-General is not necessarily bound by the same, for the purpose of this Court, the fact that such advice was sought in the first place, will demonstrate the applicant’s commitment, as well as fidelity to due process”.

[33] Consequently, in the *Matter of the National Gender and Equality Commission*, Reference No. 1 of 2013; [2014] eKLR, we directed that, even though the *locus standi* of the party, and the nature of the subject matter, are two paramount considerations, there are other factors which though essential, will be weighted on a case-by-case basis. The issue whether the opinion of the Attorney-General has been sought is one such factor. In that matter, we concluded that;

“Though there is no mandatory requirement to first seek the Attorney-General’s opinion, this Court has held that, as a matter of good practice, such opinion should be sought...

....

Consequently, as a matter of due process, we would restate that the applicant, same as other government institutions

and agents, should adopt the practice of resorting to the office of the Attorney-General first” [Emphasis added].

[34] Similarly, the need to seek the advice of the Attorney General was reiterated in the ***Matter of Speaker, County Assembly of Siaya County***, Reference No. 4 of 2017; [2020] eKLR.

[35] Flowing from the above, we see no reason to derogate from this Court’s rules and set procedure, as well as settled legal standards. We, therefore, restate that, as a matter of good practice and anchored on Rule 53 aforesaid, such opinion should be sought. We further reaffirm that in line with Rule 53 (1) (c), we may, after allowing the parties a chance to be heard, reject a reference in whole or in part, if the matter in respect of which the reference is made, can in our opinion be resolved by the advice of the Attorney General if such advice has not been sought.

(ii) Whether this Court should exercise and render an advisory opinion as sought

[36] Examining the record, reference and parties’ submissions, it is inarguably clear that the applicant has not sought the legal advice of the Attorney General. It is also evident that the applicant’s advocate on record was on various occasions, when this matter came up for compliance mentions, before the Deputy Registrar of this Court, directed to seek the Attorney General’s advice. Similarly, when this matter first came up for hearing on 25th November 2021, this Court took the liberty to grant an adjournment to allow the applicant to seek such advice. We take judicial notice that regrettably, the reasons for non-compliance with these directions have not been provided. In addition, and curiously, neither a representative of the applicant nor its counsel appeared at the hearing of the reference leading to this Judgment.

[37] Our task now is to decide whether, in the circumstances, it is our opinion that this is a matter in respect of which the reference can be resolved by the advice

of the Attorney General, as directed by Rule 53 (1) (c) of the Supreme Court Rules, 2020.

[38] Article 156 (1) (c) of the Constitution provides that, '***the Attorney General is the principal adviser of the Government***'. This mandate was appreciated by this Court in ***Re the Matter of the Interim Independent Electoral Commission*** [supra]) where it was pointed out that;

“...By Article 156(4) ... of the Constitution, the Attorney-General is designated the principal [legal] advisor of the Government It can be said that the Attorney- General bears the mantle of the “chief lawperson” of Government in its diverse dimensions. The various departments [and levels] of the Government have the liberty to seek the Attorney-General’s opinion on any legal question of relevance to their day-to-day operations.”

[39] We find that the issues raised in this advisory opinion revolve around the day-to-day operations of the two levels of Government and their departments. Moreover, how would this Court issue an advisory on transfer of debts without any evidence of how they were arrived at? These are matters for resolution, initially, through the advice of the Attorney General and the determination of debts by competent courts, respectively. Therefore, primarily, as advice aforesaid was not sought, we invoke the provisions of Rule 53 (1) (c) of the Supreme Court Rules and the jurisprudence of this Court referred to herein, and decline to exercise our discretionary jurisdiction to give an advisory opinion. We further restate our finding in ***Re Speaker, County Assembly of Siaya County*** [supra] that;

... We would, in the circumstances, like to make it clear that the Supreme Court is not a legal adviser of State organs. Further, the scope of an Advisory Opinion under Article 163(6) of the Constitution does not extend to offering legal

advice. As the provision states, the jurisdiction the Article vests in the Supreme Court is to offer Advisory Opinion, and even then, that jurisdiction is circumscribed.

[40] In any event, the Attorney General has demonstrated that the applicant, by its letter dated 4th October 2021, copied to the Solicitor General, categorically instructed the firm of *M/s Tom Ojienda & Associates* to instantly withdraw the reference, on grounds that, as drafted, it exceeded its authority and/or instructions.

[41] In the said letter, it was stated by the Attorney General;

“....

Whereas our instructions were explicit and limited to filing a reference in the Supreme Court under Article 163 (6) seeking an advisory opinion to the extent of the liberty or obligation of senior County Executive Officers in satisfying decrees and to further stay all warrants of arrest issued against such officers by various courts, the pleadings in the aforementioned advisory speak otherwise.

A look at part of the pleadings dictates a divergence from our instructions and what seems to be an attack at our co-operation partner therefore marring the gist of the advisory.

While we have had a cordial working relationship with our counterparts namely the Nairobi Metropolitan Services (NMS) to provide the residents of Nairobi County with much needed services and make the City great again, we don't encourage any attack at our partner/s.

Having said that, as a matter of urgency we do instruct that you withdraw the aforementioned advisory opinion forthwith.” Sic [Emphasis Added].

[42] The contents of this letter have not been controverted by the applicant in its written submissions. More alarming, its advocate on record failed to appear in Court when the matter came up for hearing to explain why they chose the path now leading to this judgment. Moreover, the letter was highlighted by the respondent when this reference first came up for hearing on 25th November 2021 and the applicant's advocate did not dispute its contents, but only sought time to seek further instructions.

[43] As a result of the foregoing, we agree with the respondent that first, the applicant ought to have initially sought the Attorney General's advice and second, the instant proceedings lack the applicant's authority. Consequently, it fails the test set by this Court in *Re IIEC* [supra], as to who can move it for an advisory opinion and we therefore decline to exercise our discretion nor assume jurisdiction in this matter and we accordingly dismiss it. Since the advisory opinion is hinged on public interest, we find that each party shall bear its costs.

F. FINAL ORDERS

[44] In that context, and responding to the preliminary objection before us, our Orders are as follows:

- (i) *The Preliminary Objection by the Attorney General is upheld;***
- (ii) *The Reference dated 15th July 2021 and filed on 19th July 2021 be and is hereby struck out; and***
- (iii) *Each party shall bear its costs.***

DATED and DELIVERED at NAIROBI this 14th Day of July 2023.

.....

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

.....

M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....

W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA