REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Ibrahim, Wanjala & Njoki, Lenaola & Ouko, SCJJ)

PETITION NO. 19 (E027) OF 2021

–BETWEEN–

THE SENATE ..... 1ST APPELLANT

THE SPEAKER OF SENATE ..... 2ND APPELLANT

SENATE MAJORITY LEADER ..... 3RD APPELLANT

SENATE MINORITY LEADER ..... 4TH APPELLANT

–AND–

THE SPEAKER OF THE NATIONAL ASSEMBLY ..... 1ST RESPONDENT

THE NATIONAL ASSEMBLY..... 2ND RESPONDENT

THE COUNCIL OF COUNTY GOVERNORS ..... 3RD RESPONDENT

THE ATTORNEY GENERAL ..... 4TH RESPONDENT

KENYA MEDICAL SUPPLIES AUTHORITY ..... 5TH RESPONDENT

INSTITUTE FOR SOCIAL ACCOUNTABILITY ..... 6TH RESPONDENT

MISSION FOR ESSENTIAL DRUGS AND SUPPLIES ..... 7TH RESPONDENT

KATIBA INSTITUTE ..... 8TH RESPONDENT

PHARMACEUTICAL SOCIETY OF KENYA ..... 9TH RESPONDENT

ELIAS MURUNDU..... 10TH RESPONDENT

THE COMMISSION ON REVENUE AUTHORITY ..... 11TH RESPONDENT

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*(Being an appeal from the Judgment of the Court of Appeal at Nairobi (**Murgor, Nyamweya & Lesiit, JJ. A**) delivered on 19th November, 2021 in Civil Appeal No. E084 of 2021)*

Representation:

Prof. Tom Ojienda, SC, Mr. Ian Wambua h/b
for Mr. Okong'o Omogeni, SC,
Mr. Thomas Letangule, Ms. Mercy Thanji,
Ms. Vera Lucy Owuor & Mr. Anthony Njoroge for the appellants
(*Letangule & Co. Advocates*)

Mr. Paul Muite, SC, Mr. Issa Mansur,
Mr. Mbarak Awadh & Ms. Jacinta Ahomo for the 1st and 2nd respondents
(*Issa & Company Advocates*)

Mr. Peter Wanyama for the 3rd respondent
(*Manyonge Wanyama & Associates LLP*)

Mr. Emmanuel Bitta for the 4th respondent
(*Attorney General Chambers)*

Mr. Joshua Malidzo for the 6th & 8th respondents
(*Katiba Institute*)

No appearance for the 5th, 7th, 9th, 10 & 11th respondents

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This appeal dated 23rd December, 2021 was filed by the appellants. The 6th and 8th respondents also jointly filed a cross appeal dated 8th March, 2022 while a second cross appeal dated 15th March, 2023 was filed at the instance of the 1st and 2nd respondents. It is necessary to mention that going by the date when the appeal was filed, it would have been determined way back, but was adjourned several

times to allow the parties pursue an out of court settlement which did not materialise.

[2] The gravamen of the appeal and cross appeals revolves around the question of interpretation of Article 110(3) of the Constitution. More particularly, the scope and process of concurrence or joint resolution by the Speakers of the two Houses of Parliament as to whether a Bill concerns County Government as envisaged under the said Article. Concomitantly, the legislative role, if any, that the Senate plays with regard to money Bills under Article 114 of the Constitution.

B. BACKGROUND

(i) Factual History

[3] Following the promulgation of the 2010 Constitution and the establishment of a bicameral Parliament, disputes have arisen with respect to the legislative mandate of the two Houses of Parliament, that is, the National Assembly and the Senate. Central to the matter before us, is the extent of the legislative authority of each House. In that regard, it is contended that during the 12th Parliament, the National Assembly curtailed Senate's legislative role in two significant ways. First, it passed several Bills, which were subsequently enacted into law, without the participation of the Senate contrary to the Constitution. Second, it declined to consider several Bills originating from the Senate, claiming they were money Bills that ought to originate in the National Assembly.

(ii) Litigation History

(a) At the High Court

[4] On account of the foregoing, the appellants filed a petition in the High Court at Nairobi, **HC Petition No. 284 of 2019**. The gist of their petition was that the

National Assembly had consistently and in a unilateral manner passed legislation that ought to have been considered by both Houses of Parliament. Furthermore, they claimed that, the National Assembly was bypassing the concurrence process under Article 110(3) of the Constitution which requires the Speakers of both Houses to jointly determine whether a Bill concerns County Government. Consequently, the appellants asserted that they sought this Court's Advisory Opinion with respect to the import of Article 110 (3) in the ***Speaker of the Senate & another vs. Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)*** [2013] KESC 7 (KLR) (***Senate Advisory Opinion***).

[5] Nonetheless, the appellants urged that despite this Court's edict in the ***Senate Advisory Opinion***, the National Assembly continued acting contrary to the said decision and the Constitution. It was their contention that during the 12th Parliament, the National Assembly had firstly, passed Bills which had not been subjected to the mandatory concurrence process under Article 110(3) of the Constitution. Secondly, that the National Assembly had passed Bills which concern County Governments without the same being considered by the Senate. What is more, they asserted that the said Bills were signed into Law by the President despite the absence of a certificate by both Speakers to the effect that the procedure under Articles 109-115 of the Constitution had been complied with. In that regard, the appellants listed the following 23 Acts of Parliament which were passed by the National Assembly, according to them, in contravention of the Constitution.

i. The Public Trustee (Amendment) Act No. 6 of 2018
ii. The Building Surveyors Act No. 19 of 2018
iii. The Computer Misuse and Cybercrime Act No. 5 of 2018
iv. The Statute Law (Miscellaneous Amendment) No. 4 of 2018
v. The Kenya Coast Guard Service Act No. 11 of 2018

vi. The Tax Laws (Amendments) Act No. 9 of 2018
vii. The Statute Law (Miscellaneous Amendments) Act No. 18 of 2018
viii. The Supplementary Appropriation Act No. 2 of 2018
ix. The Equalization Fund Appropriation Act No. 3 of 2018
x. The Sacco Societies (Amendment)Act 2018 No. 16 of 2018
xi. The Finance Act No. 10 of 2018
xii. The Appropriations Act No. 7 of 2018
xiii. The Capital Markets (Amendments) Act No. 15 of 2018
xiv. The National Youth Service Act No. 17 of 2018
xv. The Supplementary Appropriation Act No. 13 of 2018
xvi. The Health Laws (Amendment)Act No. of 5 of 2019
xvii. The Sports (Amendment) Act No. 7 of 2019
xviii. The National Government Constituency Development Fund Act 2015
xix. The National Cohesion and Integration (Amendment) Act 2019
xx. The Statute law (Miscellaneous Amendment) Act 2019
xxi. The Supplementary Appropriation Act No. 9 of 2019
xxii. The Appropriation Act 2019
xxiii. The Insurance (Amendment) Act 2019

[6] The appellants were apprehensive that the Parliamentary Service Bill No. 6 of 2018, which was then pending and originated by the National Assembly, would be passed into law without consideration by the Senate. They urged that the said Bill sought to repeal the Parliamentary Service Act, 2002 and affects County Governments.

[7] It was the appellants contention that the National Assembly, in an effort to circumvent the ***Senate Advisory Opinion*** and to justify its illegal conduct

amended the then Standing Order No. 121(2). They asserted that the tenor of the said amendment was that it gave the Speaker of the National Assembly the sole prerogative of determining whether a Bill concerns County Government contrary to Article 110(3) of the Constitution. Further, the appellants argued that the National Assembly amended its then Standing Order No. 143 (2) to (6), giving the Speaker exclusive mandate to determine what amounts to a money Bill under Article 114 of the Constitution. In the appellants' view, the aforementioned amendment was aimed at facilitating the National Assembly to unconstitutionally reject Bills originating from Senate and/or hold them in abeyance until their lifespan ran out.

[8] Consequently, the appellants sought the following reliefs:

i. *A declaration that pursuant to Article 110(3) of the Constitution, the Speaker of a House of Parliament must first seek the concurrence of the Speaker of the other House of Parliament as to whether a Bill is one that concerns County Governments, and if it is, whether it is a special or an ordinary Bill before it can be introduced for consideration by the originating House; one Speaker cannot unilaterally make a decision under Article 110 (3); that Articles 3, 115, 131(2) and 259 of the Constitution impose a constitutional and legal obligation on both Speakers of Parliament to demonstrate compliance with Articles 109 to 115 of the Constitution prior to submitting a Bill for the President's assent.*
ii. *A declaration that any Bill or delegated legislation that provides for the mandate of the Parliamentary Service Commission must be considered by the Senate.*

iii. *A declaration that a Bill concerning counties pursuant to Article 109(4) must be passed in accordance with Articles 110 to 113, 122 and 123 and is not subject to Article 114 of the Constitution.*

iv. *A declaration that the impugned 23 statutes are unconstitutional, null and void for violation of Articles 96, 109,110, 111, 112 and 113 of the Constitution; in the alternative, the court suspends the validity of the impugned statutes for a period of six (6) months to enable Parliament comply with the procedures set out under Articles 96 to 113 of the Constitution.*

v. *A declaration that Standing Order No. 121(2) of the National Assembly on concurrence is inconsistent with Article 110(3) of the Constitution; and that Standing Order No. 143 (2) to (6) of the National Assembly is inconsistent with the legislative process on Bills concerning counties under Articles 109(4), 110 to 113, 122 and 123.*

vi. *A declaration that where the contents of a Bill affect the functions and finances of counties, the same should be considered by the Senate pursuant to Article 110(1)(c) of the Constitution.*

[9] A second petition, **HC Petition No. 353 of 2019**, was filed at the High Court by the Council of County Governors (COG), the 3rd respondent herein. COG's grievance was with the Health Laws Amendment Act of 2019. Specifically, the amendments to Section 4 of the Kenya Medical Supplies Authority (KEMSA) Act No. 20 of 2013. The amendments prescribe that County Governments procure drugs and medical supplies only from KEMSA as well as a penalty for non-compliance. In COG's view, KEMSA could not meet the demand from counties and therefore, the restriction would jeopardize health services in the counties. In any event, it was contended that the said amendments were sneaked in on the floor of

the National Assembly and were not subjected to public participation. As such, COG sought an order declaring the amendments to Section 4 of the KEMSA Act unconstitutional.

[10] Subsequently, the two petitions were consolidated on 9th March, 2020. It is instructive to note that the 4th to 11th respondents herein were joined in the High Court proceedings as interested parties. In support of the consolidated petition, the 7th respondent herein asserted that the net effect of the amendments to Section 4 of the KEMSA Act is that it arbitrarily restricts competition in the supply of quality medical commodities. Therefore, the amendments amounted to a violation of consumer rights as enshrined in Article 46 (1) of the Constitution and the right of every Kenyan to the highest attainable standards of health care enshrined in Article 43 (1) of the Constitution.

[11] In opposing the consolidated petition, the 1st and 2nd respondents lodged a replying affidavit sworn by the then Clerk of the National Assembly, Michael Sialai. In addition, the 1st and 2nd respondents set out a cross petition within the said replying affidavit. The long and short of the 1st and 2nd respondents' reply was that the Senate's legislative role is limited unlike the National Assembly. The impugned statutes did not require the participation of Senate in their enactment since they either did not concern counties or were money Bills. Equally, that the Parliamentary Service Bill No. 6 of 2018 did not contain provisions affecting functions of County Governments and could therefore be passed by the National Assembly.

[12] Moreover, they averred that the interpretation of Article 110(3) of the Constitution had already been determined by the High Court in ***Nation Media Group Limited & 6 others vs. Attorney General & 4 others; Consumer Federation of Kenya & 4 others (Interested Parties)*** [2016] KEHC 7689

(KLR) (***Nation Media Group Case***) and as such, the issue was *res-judicata*. They asserted that the High Court in the said case correctly held that Article 110(3) only comes into play when there is a question or doubt as to whether or not a Bill concerns counties. As for the amendment of the National Assembly's Standing Orders No. 121 and 143, they maintained that it was in line with Article 124 of the Constitution. They also argued that the ***Senate Advisory Opinion*** which was based on the previous Standing Order No. 121 was not applicable following the subsequent amendment thereof. It was also their position that some of the issues raised in the consolidated petition were *sub-judice* on account of pending suits raising similar issues.

[13] The 1st and 2nd respondents urged that the repealed Standing Order No. 35 of the Senate Standing Orders was contrary to Article 121 of the Constitution as it made no express mandatory requirement for the ascertainment of quorum before the commencement of any Senate business. They also asserted that Senate had violated Articles 95(5)(b), 108 and 185(3) of the Constitution. In that, firstly, Senate had unlawfully purported to exercise oversight of state organs and officers. Secondly, Senate has established offices of the Leader of the Majority Party and the Leader of the Minority Party, which is a preserve of the National Assembly. Thirdly, Senate has established committees duplicating committees of County Assemblies and purported to exercise oversight over matters falling under the exclusive domain of County Assemblies. Towards that end, the 1st and 2nd respondents in their cross petition sought a total of 22 orders as follows:

i. *A declaration be and is hereby issued that the Speaker of the National Assembly is only required to consult the Speaker of the Senate on whether a Bill concerns counties under Article 110 (3) of the Constitution only when there is a question or doubt as to whether a Bill concerns counties.*

ii. *A declaration be and is hereby issued that Article 110 (3) of the Constitution and Standing Order No. 121 of the National Assembly Standing Orders mandates the Speaker of the National Assembly to determine, in the first instance, whether a Bill concerns County Government whenever such a question arises, and to establish an appropriate framework for the joint resolution of the question with the Speaker of the Senate.*

iii. *A declaration that under Articles 109 & 114 of the Constitution 'money Bills' shall only originate in the National Assembly.*

iv. *A declaration that the Senate has no role in the legislation, either through participation or otherwise, in the enactment of 'money Bills'.*

v. *A declaration that it's the exclusive mandate of the Speaker of the National Assembly to consider any motion that makes provision for a matter listed in the definition of a 'money Bill' under Article 114 of the Constitution.*

vi. *A declaration that the National Assembly has the exclusive role of oversight over national revenue and its expenditure, including the lawful and effective use of public funds for all state organs.*

vii. *A declaration that pursuant to Articles 95(4) & (5) of the Constitution, the National Assembly has the mandate of oversight over state organs.*

viii. *A declaration that to the extent that Standing Order No. 35 of the Senate Standing Orders has no express mandatory requirement for the ascertainment of quorum as a condition precedent before commencing its business is contrary to Article 121(1) of the Constitution, null and void.*

ix. *A declaration that to the extent Senate has been conducting its sittings without first ascertaining the mandatory quorum requirements under Article 121 (1) of the Constitution such sittings are nullity ab initio and unconstitutional.*

x. *A declaration that to the extent Senate has established committees duplicating the mandate of committees of the National Assembly and purported to exercise oversight over state organs and state officers, the Senate's actions do not accord with the functions of the County Governments and are unconstitutional.*

xi. *A declaration that to the extent that Senate has established committees duplicating the mandate of the committees in County Assemblies and purported to exercise oversight over matters that fall in the exclusive domain of County Assemblies, the Senate is in violation of Article 185 (3) and its actions are to that extent unconstitutional.*

xii. *A declaration that the Senate's purported action of establishing and facilitating and/or causing to be facilitated committees duplicating the mandate of the committees of the National Assembly and County Assemblies amounts to imprudent and irresponsible spending of public funds contrary to Article 201 of the Constitution.*

xiii. *A declaration that Article 108 of the Constitution establishes the office of the Leader of Majority Party and Minority Party in the National Assembly only.*

xiv. *An order of certiorari be issued for purposes of quashing the Senate's creation of the purported offices of Senate leader of Majority Party and Minority Party.*

xv. A declaration that Article 108 of the Constitution does not establish the office of the Senate Majority and Minority Leader or contemplates their establishment as offices equivalent to those of Leader of Majority and Minority of the National Assembly.

xvi. A declaration that to the extent Standing Orders 19 & 20 of the Senate Standing Orders purport to establish the position of Senate Majority and Minority Leader is contrary to Article 108 of the Constitution therefore unconstitutional and invalid.

xvii. A declaration that Article 132 (2) of the Constitution generally gives the National Assembly, as the only House of Parliament, the exclusive mandate of approving persons nominated by the President as State or Public Officers to State or Public Office in the National Government.

xviii. A declaration that the Senate has no role in the approval process of persons nominated by the President as State or Public Officers to State or Public Office in the National Government.

xix. A declaration that Senate has no role in the oversight of State Officers or State Organs except a limited participatory role in the oversight of State Officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article 145 of the Constitution.

xx. An order of prohibition (or alternatively by injunction or otherwise) be issued to prohibit the Senate from in any way interfering with the mandate and constitutional independence of the National Assembly.

xxi. An order of prohibition (or alternatively by injunction or otherwise) be issued to prohibit the Senate from in any way

interfering with the mandatory and constitutional independence of County Assemblies.

xxii. The court be pleased to issue any appropriate order or relief.

[14] The Attorney General (AG), the 4th respondent herein, opposed the consolidated petition through grounds of opposition. The crux of which was that, the prayers sought would occasion grave consequences on subsisting private and public arrangements or actions already undertaken pursuant to the impugned legislation; the appellants ought to have invoked Articles 112 and 113 of the Constitution and referred the dispute to a mediation committee; the appellants had not demonstrated how the impugned statutes affect the functions of County Governments; and that the Standing Orders of the National Assembly enjoy a legal presumption of constitutionality.

[15] Similarly, KEMSA, the 5th respondent herein, vide its grounds of opposition contended that, the appellants had not established that the Speakers of the two Houses failed to comply with Article 110 (3) of the Constitution; and the amendment to the KEMSA Act was a minor amendment that did not require concurrence of the Senate.

[16] By a judgment dated 29th October 2020, the High Court (*Ngaah, A. Ndungu & Matheka, JJ.*) began by determining three preliminary issues. Firstly, the court found that the representation of the appellants by Mr. Orengo, SC was proper despite his failure to file a notice of appointment. The court viewed this as a mere omission or at best a procedural lapse which was curable under the inherent powers of the court. Secondly, that while the ***Nation Media Group Case*** considered the application of Article 110 (3), this was done within the context of the Kenya Media Council Act 2013 and the Kenya Information and Communications (Amendment) Act 2013. Therefore, the court held that the extent

of the legislative roles of the two Houses of Parliament and the manner in which they ought to be exercised couldn't be said to have been conclusively determined in the aforementioned case. It is on that basis that the court found that the issues raised in the consolidated petition were not *res-judicata*. Likewise, the court found that the issues were not *sub-judice*.

[17] Turning to the substance of the consolidated petition, the High Court found that the overarching issue revolved around the import of Article 110(3) of the Constitution *vis-à-vis* the legislative functions of the two Houses of Parliament. In that regard, the court found that this Court in the ***Senate Advisory Opinion*** had rendered itself on that issue. In that, this Court unequivocally held that the concurrence of the Speakers of the two Houses as envisaged under Article 110(3) of the Constitution is a mandatory preliminary step in the legislative process. In addition, that any law passed without compliance with Article 110 (3) of the Constitution is unconstitutional. Consequently, the High Court held that the impugned statutes were unconstitutional.

[18] The High Court found that the amendment to Standing Order No. 121 (2) of the National Assembly Standing Orders was intended to circumvent the ***Senate Advisory Opinion*** and contravened Article 110 (3). It also held that, to the extent that the amended Standing Order No. 143 (2) to (6) of the National Assembly Standing Orders purported to give the Speaker of the National Assembly exclusive power to determine whether a Bill, is a money Bill or not, was unconstitutional.

[19] In the penultimate, the High Court held that it had dealt with prayers (i) to (vi) of the 1st and 2nd respondents' cross petition, which were directly in issue in the consolidated petition. As for prayers (vii) to (xxii) in the cross petition, the court found that they fell outside the scope of the consolidated petition.

[20] In the end, the High Court allowed the consolidated petition and dismissed the cross petition in the following terms:

i. *A declaration be and is hereby issued that pursuant to Article 110 (3) of the Constitution, a Speaker of a House of Parliament must first seek the concurrence of the Speaker of the other House of Parliament, as to whether a Bill is one that concerns counties, and if it is, whether it is a special or an ordinary Bill, before the Bill can be introduced for consideration in the originating House.*
ii. *A declaration be and is hereby issued that it is mandatory and a condition precedent for any Bill that is published by either House to be subjected to a concurrence process to determine in terms of Article 110 (3) of the Constitution whether the Bill is special or an ordinary Bill and that such determination is not dependent on 'a question arising' as to whether the Bill is one that concerns Counties.*
iii. *A declaration be and is hereby issued that the provisions of Article 110 (3) of the Constitution are couched in mandatory terms and is a condition precedent before any House of Parliament can consider a Bill.*
iv. *A declaration be and is hereby issued that pursuant to Article 110 (3) of the Constitution, one Speaker cannot unilaterally make a decision as to whether the Bill does or does not concern counties or whether a question as to whether the Bill is one that concerns counties does or does not arise.*
v. *An order be and is hereby issued ordering the immediate cessation of consideration of all Bills that are pending before either House, and for which joint concurrence by the Speakers of both Houses as*

to whether the Bills concern counties has not been demonstrated, to allow for such Bills to be subjected to the mandatory joint concurrence process contemplated under Article 110 (3) of the Constitution.

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

vii. *A declaration be and is hereby issued that the 23 impugned statutes passed by the National Assembly are in contravention of Articles 96, 109, 110, 111, 112 and 113 of the Constitution and are therefore unconstitutional thus null and void.*

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

ix. *A declaration be and is hereby issued that the provisions of Standing Order No. 121(2) and 143(2) of the National Assembly Standing Orders are inconsistent with Articles 109(4), 110 to 113, 122 and 123 of the Constitution and therefore null and void.*

x. *A declaration be and is hereby issued that where the Speakers of the House concur that a Bill is one that concerns counties, pursuant to Article 109(4), the Bill must be passed in accordance with Articles 110 to 113, 122 and 123 of the Constitution and the Standing Orders of both Houses and is not subject to Article 114 of the Constitution.*

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

[21] Nevertheless, the High Court suspended the nullification of the impugned statutes for a period of 9 months to enable the 1st and 2nd respondents to comply with the provisions of Article 110 (3) of the Constitution and regularise the statutes. In the event they failed to do so, the court held that the Acts would stand nullified.

(b) At the Court of Appeal

[22] Aggrieved with the High Court's decision, the 1st and 2nd respondents filed an appeal in the Court of Appeal, **Civil Appeal No. E084 of 2021**. In summary, the 1st and 2nd respondents contended that the High Court erred by, *narrowly interpreting Articles 109-114 of the Constitution with respect to the legislative mandates of the two Houses of Parliament; misapplying this Court's decision in the* ***Senate Advisory Opinion****; disregarding the principle of stare decisis by flouting the correct interpretation of Article 110 (3) of the Constitution as settled by the High Court and Court of Appeal; declaring the impugned statutes unconstitutional; violating the doctrine of separation of powers by ordering the immediate cessation of all legislative business of the House of Parliament and consideration of all Bills that were pending before either House; purporting to reverse decisions of courts of concurrent jurisdiction*; *failing to properly apply the doctrines of res-judicata and sub-judice in so far as the issues raised in the consolidated petition were concerned; and allowing unauthorised person who had not filed a notice of appointment to act for the appellants*.

[23] On their part, the appellants filed a notice of grounds affirming the High Court's decision. The notice was premised on additional grounds that were not raised in the High Court. Those grounds were to the effect that all Bills passed by the National Assembly and signed into law during the pendency of the proceedings in the High Court without complying with Articles 109-113 of the Constitution are unconstitutional; that they must be subjected to proper legislative process; the Data Protection Act, 2019 and the Parliamentary Service Act, 2019, which were passed in a manner inconsistent with the Constitution, should also be declared unconstitutional, null and void in line with the orders of the High Court.

[24] The Court of Appeal (*Murgor, Nyamweya & Lesiit, JJ.A*) in a judgment dated 19th November 2021, unlike the High Court, found that the failure by Mr. Orengo SC, to file a notice of appointment was irregular but nonetheless, held that the same was not fatal to the High Court proceedings. On the issues of *res-judicata* and *sub-judice*, the appellate court upheld the High Court's finding.

[25] On the substantive merits of the appeal, the court delineated five broad issues as arising for determination. *Whether it is mandatory and a condition precedent that any Bill published by either House of Parliament shall be subjected to the process under Article 110(3) of the Constitution; What is the nature of the Bills envisaged by the provisions in Articles 109 to 114 of the Constitution? Whether the impugned Acts and Bills were unconstitutional for want of the Senate's participation; Whether the National Assembly Standing Orders No. 121(2) is unconstitutional; and Whether the National Assembly's cross petition was competently filed, and if so properly considered*.

[26] At the outset, the Court of Appeal held that the ***Senate Advisory Opinion*** was in relation to the Division of Revenue Bill as opposed to all Bills that originate

from the two Houses of Parliament. Equally, that the question of whether all Bills are subject to the concurrence process under Article 110 (3) was not an issue in the ***Nation Media Group Case***. Consequently, the appellate court found that the High Court had abdicated its judicial responsibility of interpreting Articles 109-114 by simply relying on the ***Senate Advisory Opinion***. More so, the court held, since this Court in its ruling, which was delivered after the aforementioned advisory opinion, in ***Council of Governors & 47 others vs. Attorney General & 6 others*** [2019] KESC 65 (KLR) (***COG Ruling***) had deferred a number of issues centred on interpretation of Article 110(3) for determination by the High Court.

[27] The Court held that Article 110(3) can only be interpreted in the context of the legislative roles and procedure of the two Houses as set out in Articles 109-114 of the Constitution. In that regard, the court found that Article 109 firstly, limited Senate's law-making power to Bills concerning counties. Secondly, that it excluded Senate from the law-making process set out in Article 114 as regards money Bills. Additionally, that the role and participation of Senate in financial legislation is limited to Bills referred to in Chapter Twelve of the Constitution, namely Bills affecting finances of County Governments.

[28] Therefore, the appellate court found that the concurrence process under Article 110(3) refers to Bills concerning County Government as opposed to every Bill. Moreover, that once a Bill concerning County Government is introduced and published by each respective House, it should be placed before the Speakers of the two Houses for purposes of concurrence on the nature of the Bill. However, the court found that the mediation stipulated under Article 113 of the Constitution is not applicable to a dispute relating to the concurrence process under Article 110(3). Rather, that it applies where there is a deadlock in consideration and passing of Bills concerning County Government by the two Houses.

[29] Concerning the impugned statutes, the court held that the High Court should have looked at each statute to ascertain whether they concerned County Governments and in turn, whether they contravened Article 110(3). In particular, the court expressed the view that the High Court should have looked at first; the object(s), second, the intent and purpose by applying the pith and substance test and third, the Fourth Schedule to the Constitution so as to determine whether the impugned legislation concerned County Governments. The appellate court went on to consider each of the impugned statutes in light of the aforementioned criteria.

[30] The Court of Appeal upheld the High Court's findings on Standing Order No. 121(2) of the National Assembly Standing Orders. With respect to the propriety of the 1st and 2nd respondents cross petition, the court distinguished this Court's decision in ***Methodist Church in Kenya vs. Fugicha & 3 others*** [2019] KESC 59 (KLR) (***Fugicha Case***). In that, it was an interested party who had raised a cross petition in its replying affidavit in the aforementioned case as opposed to a primary party, as is the case in the matter before us. Besides, the court expressed that despite the want in form of the cross petition none of the parties herein raised any objection to the same. Further, that the content of the cross petition met the requirements as set out under Rules 10(2) and 15 (3) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (Mutunga Rules). Therefore, the appellate court faulted the High Court for not considering or pronouncing itself on prayers (vii) to (xxii) of the cross petition. To that extent, the court remitted the cross petition back to the High Court to consider and determine prayers (vii) to (xxii) thereof.

[31] In totality, the Court of Appeal partially allowed the 1st and 2nd respondents' appeal in the following terms:

1. *We set aside orders (i), (ii), (iii), (iv), (v), and (vi) of the judgment by the High Court dated 29th October, 2020.*
2. *We set aside the declaration by the High Court that the underlisted Acts passed by the National Assembly are in contravention of Articles 96, 109, 110, 111, 112 and 113 of the Constitution and are therefore unconstitutional thus null and void;*
    i. *The Public Trustee (Amendment) Act, No 6 of the 2018*
    ii. *The Building Surveyors Act, 2018, No 19 of 2018*
    iii. *The Computer Misuse and Cybercrime, Act, No 5 of 2018*
    iv. *The Statute Law (Miscellaneous Amendment Act), No 4 of 2018*
    v. *The Kenya Coast Guard Service Act No 11 of 2018*
    vi. *The Tax Laws (Amendments) Act, No 9 of 2018*
    vii. *The Statute Law (Miscellaneous Amendments) Act, No 18 of 2018*
    viii. *The Supplementary Appropriation Act, No 2 of 2018*
    ix. *The Finance Act, No 10 of 2018*
    x. *The Appropriations Act, No 7 of 2018*
    xi. *The Capital Markets (Amendments) Act, No 15 of 2018*
    xii. *The National Youth Service Act No 17 of 2018*
    xiii. *The Supplementary Appropriations Act, No 13 of 2018*
    xiv. *The Health Laws (Amendment)Act, No. of 5 of 2019, save for the amendments made to sections 3 and 4 of the Kenya Medical Supplies Authority Act*
    xv. *The Sports (Amendment) Act, No 7 of 2019*
    xvi. *The National Government Constituency Development Fund Act, 2015*

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

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

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

xx. *The Appropriations Act, 2019*

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

3. *A declaration be and is hereby issued that the concurrence process in Article 110(3) only applies to all Bills concerning counties within the meaning of Articles 109 to 114 of the Constitution, and as interpreted in this judgment.*
4. *We hereby uphold the declaration by the High Court that where the Speakers of the House concur that a Bill is one that concerns counties, pursuant to Article 109(4), the Bill must be passed in accordance with Articles 110 to 113, 122 and 123 of the Constitution and the Standing Orders of both Houses and is not subject to Article 114 of the Constitution.*
5. *We hereby uphold the declaration by the High Court that any Bill or delegated legislation that provides for, or touches on, mandate or powers of Parliamentary Service Commission must be considered by the Senate as it directly affects the Senate's ability to undertake its constitutional mandate including its ability to consider bills that affect counties.*
6. *We hereby uphold the declaration by the High Court that the underlisted Acts passed by the National Assembly are in contravention of Articles 96, 109, 110, 111, 112 and 113 of the Constitution and are therefore unconstitutional thus null and void;*
    i. *The Equalization Fund Appropriation Act No 3 of 2018*
    ii. *The Sacco Societies (Amendment) Act, 2018 No 16 of 2018.*

iii. The amendments made to Sections 3 and 4 of the KEMSA Act by the Health Laws (Amendment)Act, No. of 5 of 2019

7. *We hereby uphold the declaration by the High Court that the amendments to Section 4 of the KEMSA Act is contrary to Articles 6, 10, 43(1), 46(1) 73(1), 110(3), 189(1), and 227(1) of the Constitution and is therefore unconstitutional, null and void.*
8. *We hereby uphold the declaration by the High Court that the provisions of Standing Order No. 121(2) of the National Assembly Standing Orders is inconsistent with Articles 109(4) and 110 to 113 of the Constitution and is therefore null and void.*
9. *We hereby remit the appellants' cross petition filed in Nairobi H.C Constitutional Petition No 284 of 2019 back to the High Court for consideration and determination of Prayers Nos vii to xxii of the cross petition.*
10. *This being a public interest matter, each party shall bear its own costs of this appeal.*

(c) At the Supreme Court

[32] As indicated in the opening paragraph of this judgment, the appellants filed the instant appeal challenging the Court of Appeal's decision. Their appeal is anchored on 24 grounds which can be aptly condensed as, the Court of Appeal erred by; *failing to adhere to the principle of stare decisis contrary to Article 163(7) of the Constitution by not applying the* ***Senate Advisory Opinion*** *and this Court's decision* ***In the matter of Council of Governors & 47 others*** *[2020] KESC 65 (KLR) (****COG Advisory Opinion****); misinterpreting Articles 110(3) and 114 of the Constitution; failing to find that Article 115 of the Constitution imposes an obligation on both Speakers of Parliament, prior to submitting a Bill for assent, to jointly demonstrate compliance with the*

procedure in Article 110(3) of the Constitution; limiting the Senate's constitutional legislative powers; and arrogating to itself powers to determine which Bills concern County Governments thereby usurping powers constitutionally and jointly reserved for the Speakers of Parliament.

[33] Based on the foregoing, the appellants sought the following reliefs: -

i. *Setting aside of order No. 1, 2, 3 and 9 of the Court of Appeal's judgment dated 19th November, 2021.*
ii. *Affirmation of order No. 4, 5, 6, 7 and 8 of the Court of Appeal's judgment.*
iii. *Reinstatement of the judgment of the High Court dated 29th October, 2020 in its entirety.*
iv. *The notice of grounds for affirming the High Court decision dated 16th March, 2021 filed in the Court of Appeal be allowed.*
v. *The 1st and 2nd respondents' cross petition filed in the High Court be dismissed.*
vi. *Costs of the appeal before this Court, the Court of Appeal, and the proceedings before the High Court be awarded to the appellants as against the 1st and 2nd respondents.*
vii. *Any other or further orders(s) as the Court may deem appropriate to grant in the circumstances.*

[34] By their cross appeal, the 6th and 8th respondents raised some of the grounds which are germane in this appeal. In addition, they contend that the Court of Appeal erred by*; ignoring the binding precedent of this Court in the* ***Fugicha Case****, which barred the inclusion of a cross petition in a replying affidavit; holding that the Senate is excluded from considering money Bills while Article 114 of the Constitution only speaks of introduction of money Bills by the National*

Assembly; and applying the wrong standard of review as enunciated in the case of ***Selle & another vs. Associated Motor Boat Co. Ltd & others*** *[1968] EA 123, which is meant for factual errors, to an appeal requiring constitutional interpretation and application.*

[35] Consequently, the 6th and 8th respondents sought the following orders:

i. *The appeal and their cross appeal be allowed.*
ii. *An order does issue reversing orders 1, 2,3, and 9 of the Court of Appeal's judgment and affirming orders 4,5,6 and 8 thereof.*
iii. *A declaration do issue that Article 114 of the Constitution only requires money Bills to be introduced in the National Assembly but does not bar Senate from considering and debating money Bills that affect counties.*
iv. *An order for costs against the National Assembly for its repeated violation of the Constitution on the concurrence process.*

[36] On their part, the 1st and 2nd respondents vide their cross appeal contended that the appellate court erred by, *upholding the declaration by the High Court that any Bill or delegated legislation that provides for, or touches on, the mandate or powers of Parliamentary Service Commission must be considered by the Senate; exceeding its jurisdiction in making a finding that the Parliamentary Service Act, 2019 is unconstitutional yet the said Act was not one of the impugned statutes before the High Court; and failing to properly interpret the provisions of Article 114 of the Constitution.*

[37] Therefore, the 1st and 2nd respondents sought the following reliefs:

i. *Their cross appeal be allowed with costs.*

ii. *An order setting aside the finding by the Court of Appeal that the passage of the Parliamentary Service Bill was unconstitutional for want of the Senate's consideration.*

iii. *An order setting aside part of order No. 4 of the judgment of the Court of Appeal by deleting the words "and is not subject to Article 114 of the Constitution."*

iv. *An order setting aside the entire order No. 5 of the judgment of the Court of Appeal.*

v. *Such further orders as it deems necessary.*

[38] In addition, the 1st and 2nd respondents filed a notice of preliminary objection dated 28th April, 2022 challenging this Court's jurisdiction. They urged that the appellants' appeal is premature on account of their cross petition which is still pending before the High Court. In their view, the hearing of this appeal before the determination of the cross petition in the High Court would deprive them of their right to a fair hearing as enshrined under Article 50(1) of the Constitution.

C. PARTIES SUBMISSIOS

On the appellants' appeal

(i) Appellants' Submissions

[39] The appellants submitted that this Court has jurisdiction to determine its appeal by virtue of Article 163(4)(a) of the Constitution. They posited that, not only does the appeal involve the interpretation and application of various Articles of the Constitution but also the issues raised therein were canvassed in the superior courts below.

[40] It was their position that this Court in the ***Senate Advisory Opinion*** had rendered itself on Article 110(3) of the Constitution. In that, this Court resolved

with finality that Article 110(3) of the Constitution requires the two Speakers to jointly resolve the question of whether a Bill concerns County Government prior to the consideration of the Bill in the originating House. Further, that this Court held that the said sub-article applied to all Bills, and neither House could unilaterally, to the exclusion of the other, determine the nature of a Bill. Therefore, the appellants faulted the appellate court for not following the ***Senate Advisory Opinion***.

[41] Conversely, they argued that the Court of Appeal purported to rewrite Article 110(3) by holding that the nature of a Bill is to be determined from the memorandum of objects of the Bill as opposed to by the two Speakers of Parliament. In the appellants' view, the memorandum of objects is not a substantive part of a Bill but essentially an 'opinion' by the sponsor of the Bill on what the Bill is about. Therefore, they urged, that it is grossly erroneous and in contravention of Article 110(3) to substitute the opinion of the Speakers of Parliament with the opinion of the sponsor of the Bill. In any event, they faulted the Court of Appeal's review of the impugned statutes to determine whether or not they concerned counties as being a premature invocation of its jurisdiction since they had not been subjected to the process in Article 110 (3).

[42] In their view, the Constitution unequivocally distinguishes where a function or legislative authority, as in the matter before us, is to be performed by both Houses of Parliament or by one of them. Further, that where a function is the preserve of the National Assembly, the Constitution is categorically clear on that. Relying on the ***COG Advisory Opinion***, the appellants asserted that where the Constitution employs the usage of the word Parliament, then it connotes that the functions/powers therein are bestowed on both Houses. They also took issue with the suspension of the nullification of the impugned statutes by the appellate court. In their view, courts can only declare a statute unconstitutional and cannot take

any steps to amend or regularise the same as that mandate falls within the ambit of Parliament. Citing ***Macfoy vs. United Africa Co. Ltd*** [1961] 3 All ER 1169, the appellants contended that the effect of the impugned decision was to allow unconstitutional legislation to acquire legitimacy unconstitutionally.

[43] The appellants urged that Article 109(5) of the Constitution only requires that a money Bill originates from the National Assembly but does not prevent the Senate from considering the same. They went on to fault the Court of Appeal for firstly, conflating money Bills and Bills not concerning County Governments; and secondly, failing to hold that the Speakers of Parliament must address their minds as to whether a Bill is a money Bill. Further, it was their position that even where they find a Bill is a money Bill both Speakers still have to determine whether it affects counties. They maintained that it is only after jointly determining the aforementioned questions that a Bill can be processed in accordance with Article 109(5) of the Constitution.

[44] On the 1st and 2nd respondents' cross petition, the appellants submitted that it raised new issues which were distinct from the consolidated petition and therefore, the High Court could not determine the same. Accordingly, in their view, the appellate court's decision was erroneous and flew in the face of ***Fugicha Case***. In addition, it was urged that the cross petition was defective and violated the appellants' right to fair hearing and fair trial.

[45] Regarding costs, the appellants argued that this Court has rendered itself on several occasions on how Bills should be passed but the 1st and 2nd respondents deliberately chose not to adhere to the Court's decision. Consequently, they submitted that the 1st and 2nd respondent should bear the costs of the appeal.

(ii) COG Submissions

[46] COG supported the appeal on similar grounds as the appellants, and urged this Court to reinstate the High Court's judgment.

(iii) The 7th Respondent's Submissions

[47] While there was no appearance for the 7th respondents at hearing of the appeal, its written submissions which were on record, supported the appeal on more or less similar grounds as the appellants.

(iv) The 1st and 2nd Respondents' Submissions

[48] Expounding on the preliminary objection, the 1st and 2nd respondents stated that one of the prayers sought by the appellants was dismissal of their cross petition in the High Court. Therefore, they submitted that the appellants are inviting this Court to exercise its appellate jurisdiction prematurely as the cross petition has not evolved through the appropriate appellate mechanisms to reach this Court. In that regard, reference was made to this Court's decision in ***Sonko vs. Clerk County Assembly of Nairobi City & 11 others*** [2021] KESC 14 (KLR).

[49] In opposing the appellants' appeal, the 1st and 2nd respondents concurred with the Court of Appeal's findings on the interpretation of Article 110(3) and 114. They added that Senate's legislative mandate with regard to financial legislation is limited to the Division of Revenue Bill and the County Allocation of Revenue Bill. All in all, the said respondents urged that there is nothing to justify this Court's interference with the impugned judgment.

(v) The AG's Submissions

[50] Similarly, the AG opposed the appellants' appeal and concurred with the impugned judgment. The AG submitted that the architecture of the Legislature set out in the Constitution envisages a bicameral Legislature which is asymmetrical with the Senate's legislative role being restricted as opposed to that of the National Assembly. In his view, therefore, the text of Article 110(3) evinces that it is only applicable in respect to Bills concerning counties and not all Bills.

On the 6th and 8th respondents' cross appeal

(i) The 6th and 8th Respondents' Submissions

[51] The 6th and 8th respondents echoed some of the submissions advanced by the appellants. In addition, they argued that the Court of Appeal applied the wrong standard of review as enunciated in the case of ***Selle & Another vs. Associated Motor Boat Co. Ltd & Others*** [1968] EA 123 (***Selle Case***) to a constitutional appeal. As a result, they contend that the court adopted a narrow and textual interpretation of Article 110(3) of the Constitution instead of a holistic interpretation and arrived at the wrong conclusion.

(ii) The Appellants' submissions

[52] The appellants' supported the 6th and 8th respondents' cross appeal on similar grounds as the said respondents.

(iii) The 7th Respondent's Submissions

[53] Likewise, the 7th respondent in support of the cross appeal reiterated the grounds set thereunder.

(iv) The 1st and 2nd Respondents' Submissions

[54] As far as the 1st and 2nd respondents were concerned, the 6th and 8th respondents having been admitted at the High Court as interested parties lacked *locus standi* to file the instant cross appeal. To buttress their position, they relied on the ***Fugicha case***. Therefore, they urged us to strike out the cross appeal.

[55] Be that as it may, the 1st and 2nd respondents supported the Court of Appeal's finding pertaining to its cross petition before the High Court, and the interpretation of Article 110(3) of the Constitution. With respect to the standard of review applied by the Court of Appeal, it was posited that the 6th and 8th respondents had failed to demonstrate the manner in which the application of the principles espoused in the ***Selle Case*** resulted in a narrow and erroneous interpretation of the Constitution.

(v) The AG's Submissions

[56] Similarly, the AG challenged the competency of the 6th and 8th respondents' cross appeal on the same grounds as the 1st and 2nd respondents. In the AG's view, the 6th and 8th respondents are acting as co-appellants and improperly seeking to advance new and further grounds in support of the appeal. What is more, it was urged that the reliefs sought by the 6th and 8th respondents are a replica of the reliefs sought by the appellants. In any event, the AG submitted that a cross appeal should be at cross purposes with the claim of an appellant.

On the 1st and 2nd respondents' cross appeal

(i) The 1st and 2nd Respondents' Submissions

[57] According to the 1st and 2nd respondents, the constitutionality of the Parliamentary Service Act, 2019 was not one of the issues for determination before

the High Court. They submitted that at the time the petition in the High Court was filed, the Parliamentary Service Bill No. 6 of 2018 in issue was yet to be signed into law by the President. Consequently, they asserted that any challenge on its constitutionality was not ripe for determination.

[58] Nonetheless, they reiterated that the Parliamentary Service Bill did not contain provisions touching on the functions of County Governments as outlined in Part 2 of the Fourth Schedule to the Constitution. Therefore, pursuant to Article 109(3) of the Constitution, the said Bill could only be considered and passed by the National Assembly. Moreover, they posited that the Court of Appeal erred in basing its decision on the said Bill on correspondence exchanged between the two Speakers.

[59] Lastly, they urged that the superior courts below failed to properly consider the effect and import of Article 114(3), and instead attempted to confer the Senate with the mandate to enact money Bills, which is strictly reserved for the National Assembly.

(ii) The Appellants' Submissions

[60] In opposing the 1st and 2nd respondents' cross appeal, the appellants reiterated the grounds in support of their appeal.

D. ANALYSIS

[61] Having considered the pleadings, the impugned judgment, and the parties' respective submissions, we find that the following issues arise for determination:

i. *Whether this Court has jurisdiction to entertain the appellants' appeal.*

ii. *Whether the 6th and 8th respondents' cross appeal is properly before this Court.*

iii. *Whether the Constitution provides for the participation of the Senate in the consideration and enactment of a money Bill.*

iv. *Whether it is mandatory for every Bill published by either House of Parliament to undergo the joint concurrence process under Article 110(3) of the Constitution.*

v. *Whether the impugned Acts and Bills are unconstitutional for want of Senate's participation in their enactment.*

vi. *What reliefs should issue?*

i. Whether this Court has jurisdiction to entertain the appeal

[62] On this issue, it is the appellants' position that they have properly invoked this Court's jurisdiction under Article 163(4)(a) of the Constitution. However, the 1st and 2nd respondents challenge this Court's jurisdiction on the basis that it has been prematurely invoked since their cross petition is still pending before the High Court. The said respondents contend that if this Court were to consider the appellants' appeal, which also seeks striking out of their cross petition in the High Court, their right to a fair hearing and access to justice would be infringed.

[63] It is well settled that where a party invokes this Court's appellate jurisdiction under Article 163(4)(a), a mere statement to that effect by itself will not suffice. Such a party, like the appellants herein, is required to demonstrate that the appeal concerns the application or interpretation of the Constitution; and that the same had been canvassed before the superior court below. See ***Nicholus vs. Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)*** [2023] KESC 113 (KLR).

[64] Having appraised ourselves of the appeal herein, we find, that it revolves around the interpretation of Articles 110(3) and 114 of the Constitution. Further, the said Articles were also the subject of consideration by the superior courts below. In any event, we understand that the 1st and 2nd respondents' preliminary objection does not challenge that the appeal involves issues of constitutional interpretation or application. Rather, that our jurisdiction under Article 163(4)(a) has been prematurely invoked on account of the pending cross petition before the High Court.

[65] To begin with, the 1st and 2nd respondents' cross petition in the High Court sought a total of 22 prayers, as set out in the preceding paragraphs herein. With regard to the said cross petition, the High Court in its judgment dated 29th October 2022, found that prayers (i) to (vi) therein were directly in issue in the consolidated petition before it. Accordingly, that in rendering itself on the consolidated petition, it had also addressed the aforementioned prayers. However, the High Court found that prayers (vii) to (xxii) in the cross petition, were distinct and fell outside the scope of the consolidated petition. Therefore, the High Court declined to address itself on the same and dismissed the cross petition. Nonetheless, the Court of Appeal by the impugned judgment set aside the High Court's decision on the grounds that save for the want in form, the cross petition had met the requirements of a cross petition as stipulated in the Mutunga Rules. Consequently, the appellate court found that it could not consider the merits of prayers (vii) to (xxii) of the cross petition as the High Court did not pronounce itself on the same. It is on that basis that the Court of Appeal remitted prayers (vii) to (xxii) back to the High Court for hearing and determination.

[66] Based on the foregoing, it is necessary to consider the competency of the cross petition in issue as the same has a bearing on the objection to this Court's jurisdiction. In doing so, this Court will not be acting as a court of first instance on

this issue, as the competency of the cross petition was considered by the superior courts below, and has equally been raised in the appeal herein. Furthermore, we shall not delve into the merits of the said cross petition.

[67] Our perusal of the consolidated petition before the High Court reveals that the issues or cause of action therein were based on the legislative roles of the two Houses of Parliament. It is also clear that prayers (vii) to (xxii) of the 1st and 2nd respondents' cross petition, set out in the preceding paragraphs, were not anchored on the aforementioned legislative roles. Rather the said prayers were premised on allegations that the Standing Orders of Senate had not prescribed the quorum for conducting its business; the Senate had improperly established offices of Majority and Minority Leaders; and that Senate has purported to exercise oversight of state organs and officers, which is outside its mandate. It is evident that the cause of action in the cross petition is different and distinct from the consolidated petition.

[68] Rule 15(3) of the Mutunga Rules provides that in reply to a petition, a respondent may file a cross petition. The Black's Law Dictionary (11th ed) Bryan A Garner defines a cross petition as, "***a claim asserted by a defendant … for a matter relating to the subject of the action. Also known as a cross-complaint***." This definition underscores two critical elements: (i) the party asserting the claim is a defendant/respondent; and (ii) the claim must relate to the subject of the action at hand.

[69] This requirement that a cross petition should relate to the subject of the action provides a crucial interpretative foundation for determining this question. This Court in ***Independent Electoral and Boundaries Commission vs. Chege*** [2023] KESC 74 (KLR) (***IEBC Case***) stated as follows at paragraph 69:

> ***"..., <u>there is a difference between a cross appeal and a cross petition</u>. A cross appeal is an action by a respondent, who intends to counter an appellant's cause in an appeal with the view of obtaining certain relief(s) from the court. <u>A cross petition on the other hand, is an action by a defendant in first-instance claims, intending to counter the claim of a petitioner with the view of obtaining certain remedies</u>."***
> [Emphasis added]

[70] From the foregoing, it becomes evident that a cross petition is designed specifically to counter the claims made by the petitioner in a petition. It is fundamentally reactive in nature, and meant to answer or address the issues raised in the petitioner's claim, rather than to introduce entirely new, unrelated issues or questions. In practical terms, this means that a cross petition must remain tethered to the same set of facts and questions of law presented in the original petition otherwise a respondent is supposed to file another suit where those different matters can be interrogated. A respondent should not use a cross petition as a vehicle for raising unrelated claims or expanding the scope of the dispute beyond what has been framed by the petitioner. Therefore, the essence of a cross petition is that it serves as a counter to the petition, addresses the claims and seeks remedies directly related to the issues raised by a petitioner.

[71] In light of the foregoing, we find that the Court of Appeal erred in setting aside the High Court's decision on the cross petition as far as prayers (vii) to (xxii) thereof were concerned. The cross petition raised a different and unrelated cause of action from the consolidated petition that was filed before the High Court. Consequently, we find that the High Court was right in declining to address itself on the same. As a result, the 1st and 2nd respondents' objection to this Court's

jurisdiction fails. In the circumstances, we find that this Court's appellate jurisdiction under Article 163(4)(a) of the Constitution has been properly invoked.

ii. Whether the 6th and 8th respondent's cross appeal is properly before this Court

[72] This issue turns on whether the 6th and 8th respondents, who were joined in the High Court as interested parties have the requisite *locus standi* to lodge their cross appeal before this Court. This Court in ***Muruatetu & another vs. Republic; Kenya National Commission on Human Rights & 2 others (Interested Parties); Death Penalty Project (Intended Amicus Curiae)*** [2016] KESC 12 (KLR) pronounced itself on the status of an interested party joined to any proceedings as follows:

> ***"Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the court.***
>
> ***...***
>
> ***Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the court will always remain the issues as presented by the principal parties, or as framed by the court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the court***. [Emphasis added]

[73] It is common ground that the 6th and 8th respondents were joined in the High Court as interested parties. We note that one of the grounds upon which the 6th and 8th respondents' cross appeal is premised on is that the Court of Appeal applied the wrong standard of review to the matter at hand by relying on the ***Selle Case***. It is instructive to note that none of the primary parties, that is, the appellants and the 1st and 2nd respondents, raised this issue or ground in their appeal or cross appeal, respectively.

[74] In ***Macharia & another vs. Director of Public Prosecutions & 11 others*** [2022] KESC 61 (KLR), the petitioners therein, who were initially joined at the High Court as interested parties filed an appeal before this Court. In that regard, this Court expressed itself as follows:

> ***"The petitioners' stake in the proceedings has throughout remained peripheral and cannot override the stake of the primary parties, who appear not to have been aggrieved.***
>
> ***...***
>
> ***Ultimately, we respectfully agree that the petitioners, though interested parties before the superior courts below, cannot, at this juncture, have overriding interests above and beyond the primary parties or mutate from having a peripheral stake into central core parties ..."***

It follows therefore, that the 6th and 8th respondents, having been joined as interested parties at the High Court are bereft of *locus standi* to raise the issue of standard of review applied by the Court of Appeal through its cross appeal.

[75] In addition, we also note that the other grounds of appeal raised in the 6th and 8th respondents' cross-appeal are more or less similar to the grounds raised in the

appellants' appeal. As demonstrated in the ***IEBC Case***, a cross appeal is an action by a respondent, who intends to counter an appellant's cause in an appeal.

[76] Based on the foregoing, we find that the 6th and 8th respondents' cross appeal is not properly before us, and we hereby strike it out.

iii. Whether the Constitution provides for the participation of the Senate in the consideration and enactment of a money Bill

[77] The appellants contend that Article 109(5) of the Constitution only requires that a money Bill originate in the National Assembly but does not prevent the Senate from considering money Bills. In addition, they argue that Article 109(3) accords the Senate an unfettered mandate to deal with all Bills concerning counties including money Bills. They fault the Court of Appeal for failing to adopt a harmonious interpretation of the Constitution that would yield the view that where a Bill deals with financial matters and such matters affect the functions and/or powers of County Governments, such Bills must be considered by the Senate. On their part, the 1st and 2nd respondents support the Court of Appeal's holding that the Senate has no role in the consideration and enactment of a money Bill

[78] It is notable that in the ***Senate Advisory Opinion*** this Court deferred answering this question, observing at paragraph 117 thus:

> ***"It has become clear to us that a "money Bill", in a proper case, may only be introduced in the National Assembly, though it is not a settled question whether the Senate may subsequently participate in the relevant legislative deliberations."***

[79] Subsequently, *Maraga CJ & P* (as he then was) observed as follows in his concurring opinion in ***COG Advisory Opinion*** at paragraph 138:

> ***"The overlap and shared mandate is even more explicit in the two Houses' legislative role. Under article 95(3), the National Assembly enacts legislation in accordance with Part 4 of Chapter 8 of Constitution. That Part runs from articles 109 to 116 of Constitution and deals with the legislative procedure; who and where Bills can be originated; what is "a money Bill" that can only be originated and exclusively passed by the National Assembly; the definition of a "Bill concerning County Government"; special and ordinary Bills concerning counties; mediation where the two Houses of Parliament cannot agree on a Bill; Presidential assent and referral; and the coming into effect of Acts passed by Parliament."*** [Emphasis added]

[80] It is now upon this Court to settle the framed question. Article 114 of the Constitution addresses the concept of 'money Bills.' Article 114(1) stipulates that a money Bill should deal exclusively with matters falling within the prescribed definition of money Bills. Article 114(3) defines what constitutes a money Bill. While Article 114(4) clarifies that "tax" "public money" or "loan" under Article 114(3) does not include any tax, public money or loan raised by a county. It is only Article 114(2) that speaks to the procedure for enacting a money Bill by stating:

> *"If, in the opinion of the Speaker of the National Assembly, a motion makes provision for a matter listed in the definition of 'a money Bill,' the Assembly may proceed only in accordance with the*

recommendation of the relevant Committee of the Assembly, after taking into account the views of the Cabinet Secretary responsible for finance."

As is readily evident, Article 114 does not address itself to the question as to whether the Senate should participate in considering a money Bill.

[81] More to the point is, Article 96(2) of the Constitution which calibrates the reach of the Senate's law-making mandate. It stipulates that, "*The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113*." What is apparent from this provision is that it does not mention Article 114. It is Article 114 that stipulates the legislative pathway for enacting a money Bill.

[82] In addition, Article 109(5) of the Constitution also embodies this special treatment of money Bills stipulating thus:

"A Bill may be introduced by any member or committee of the relevant House of Parliament, but a money Bill may be introduced only in the National Assembly in accordance with Article 114."

[83] What emerges from a holistic consideration of these provisions, is that the Constitution excludes the Senate from the consideration and enactment of money Bills. The exclusion of Article 114 from the scope of Article 96(2) clarifies that the Senate does not participate in the enactment of money Bills. When a Bill falls within the category of a money Bill, it removes the power of the Senate to introduce and consider such a Bill.

[84] The exclusion of the Senate from participating in the enactment of money Bills is not an anomaly but deliberate as it aligns with established legislative

practices in other asymmetrical bicameral systems. Recognizing the critical role of financial legislation in ensuring the smooth functioning of the state and the effective delivery of public services, many constitutions prescribe specific legislative procedures for money Bills. These provisions are designed to avoid conflicts between the two chambers of a bicameral parliament and to prevent prolonged deadlocks over financial matters that could hinder governance and economic stability. See in this regard Thibaut Noël, ***Second Chambers in Federal Systems*** (2022, International IDEA) p. 24. Addressing this comparative practice, Elliot Bulmer, **Bicameralism** (2017, International IDEA) observes as follows at p. 23:

> "*If the executive cannot raise money, government cannot carry on. In a presidential system, failure to pass a budget can cause a shutdown of the government and might expose the state to a self-coup by the executive or other forms of extra-constitutional intervention. In a parliamentary system, the rejection of the budget will usually be regarded (depending on the precise rules in force) as a withdrawal of confidence, which may lead to the resignation of the government and/or a new general election.* ***In many jurisdictions, a special category of 'money bills' is recognized, these being bills related to taxation, loans and appropriations (spending). Given the importance of financial legislation for the day-to-day functioning of the state, money bills may be subject to a special legislative procedure, intended to prevent conflicts between the chambers over matters of finance***." [Emphasis added]

[85] Given the foregoing analysis, we come to the same conclusion as the Court of Appeal, that the Senate is not to be involved in the consideration and enactment of a money Bill.

iv. Whether it is mandatory for every Bill published by either House of Parliament to undergo the joint concurrence process under Article 110(3) of the Constitution

[86] The appellants contend that Article 110(3) of the Constitution requires as a condition precedent that before either House considers a Bill, the Speakers of the National Assembly and the Senate shall jointly resolve whether the Bill is one concerning counties. They argue that this position was endorsed by this Court in the ***Senate Advisory Opinion*** hence the Court of Appeal breached the principle of *stare decisis* by finding otherwise. On their part, the 1st and 2nd respondents as well as the AG support the interpretation by the Court of Appeal, that a question has to arise as to whether a Bill is one concerning counties for the joint concurrence process to be activated.

[87] The starting point in analysing the legislative path for Parliament is the need to appreciate the spheres of legislative competence of the two Houses of Parliament. In this respect, Article 109 in providing for the 'exercise of legislative powers' stipulates that:

> *(1) Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President.*
> *(2) Any Bill may originate in the National Assembly.*
> *(3) A Bill not concerning county government is considered only in the National Assembly, and passed in accordance with Article 122 and the Standing Orders of the Assembly.*

(4) A Bill concerning county government may originate in the National Assembly or the Senate, and is passed in accordance with Articles 110 to 113, Articles 122 and 123 and the Standing Orders of the Houses.

(5) A Bill may be introduced by any member or committee of the relevant House of Parliament, but a money Bill may be introduced only in the National Assembly in accordance with Article 114.

[88] Article 109 of the Constitution clearly establishes that while the National Assembly has the competence to consider all types of Bills, the Senate's legislative scope is limited to Bills concerning County Government. Furthermore, although the National Assembly may originate any Bill, money Bills can only be introduced in the National Assembly. This arrangement embodies what is referred to as bicameral asymmetry. As Arend Lijphart explains in ***Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*** (2nd. Ed, 2012, Yale University Press) p. 206, bicameral legislatures can be classified as either symmetrical or asymmetrical. Symmetrical chambers have equal or only moderately unequal constitutional powers, while asymmetrical chambers are characterized by significant disparities in their legislative powers and the range of subject matters they are competent to legislate on. Taking into account that the Senate's constitutional mandate is confined to legislating on matters concerning County Government, Kenya's bicameral legislature falls within the asymmetrical model of bicameralism.

[89] The fact that the law-making competence of the Senate is restricted, creates the need to determine whether a Bill being introduced in any of the Houses of Parliament is a Bill concerning County Government so as to determine whether the Senate will participate in the consideration of the Bill. The process for making this

determination is provided in Article 110(3) of the Constitution. Article 110(3) stipulates the legislative path for determining whether a Bill concerns counties that would require the participation of the Senate in its enactment. It provides:

> "*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*". [Emphasis added]

[90] The appellants contend that this Court had resolved this question in the ***Senate Advisory Opinion*** and held that concurrence by the two Speakers of Parliament was a preliminary condition before the consideration of a Bill by either House. Indeed, this was also the nub of the judgment of the High Court in the present matter. The Court of Appeal disagreed with this view, holding that this Court's Advisory was rendered in the context of the legislative path of enacting the Division of Revenue Bill and did not address the path to be followed in enacting other Bills.

[91] In our considered view, the ***Senate Advisory Opinion*** should be appreciated in its proper context. Because in it, this Court considered the role of Speakers of Parliament after addressing the question as to whether the Division of Revenue Bill is a Bill concerning County Governments. Having found that a question had arisen on whether the Division of Revenue Bill is a Bill concerning County Governments, this Court's Advisory Opinion was rendered through that particular lens and with that focus in mind. Therefore, the Court of Appeal was right in distinguishing the circumstances of the present matter which covered over twenty pieces of legislations from that in the ***Senate Advisory Opinion***, that focused on the peculiar circumstances of the legislative path attendant to enactment of the Division of the Revenue Bill.

[92] In the ***Senate Advisory Opinion*****,** this Court emphasized that in terms of the language of Article 110(3), a question must arise for the process of joint resolution of whether a Bill concerns counties. This Court observed at paragraph 130 as follows:

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

[93] The foregoing passage shows that this Court was alive to the need for a question to arise in the first place before joint resolution of such a question, which is a shared duty of the two Speakers. Article 110(3) states that the Speakers ***"shall jointly resolve any question as to whether it is a Bill concerning counties…"***. The use of the words '*resolve any question*' implies that a determination by the two Speakers is only required if there is uncertainty or disagreement about the nature of the Bill. If there is no dispute or question, the need for joint resolution does not arise. The provision inherently anticipates that

the classification of a Bill might bring up situations requiring clarification. However, this presupposes that the *'question'* must first arise before the mechanism for joint resolution is activated. For instance, if the Speakers of both Houses independently agree that a Bill concerns counties and proceed on that basis, there would be no question to resolve. Conversely, if there is doubt or conflicting positions by the two Speakers, then the joint resolution mechanism kicks in.

[94] The persuasive decision of the High Court in ***Nation Media Group Case*** emphasizes this point. There the superior court held thus at paragraph 108:

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

This was equally underscored by another persuasive decision of the Court of Appeal in ***Pevans East Africa Limited & Another vs. Chairman, Betting Control & Licensing Board & 7 others*** [2018] KECA 332 (KLR).

[95] Based on the foregoing analysis, we hold that the requirement for joint resolution by Speakers of both Houses of Parliament as to whether a Bill is one concerning counties is triggered when a question arises as to whether a Bill is one concerning counties. We therefore uphold the finding by the Court of Appeal that it was an error by the High Court to find that it is a condition precedent that all Bills published by either House have to be subjected to the concurrence process. To the contrary, we find that the concurrence process is activated only upon *a question arising* as to whether a Bill is one concerning counties.

[96] However, that is not all. Pursuant to Article 259(1)(a) of the Constitution, which requires that the Constitution be interpreted in a manner that promotes its purposes, values and principles, it follows that the obligations under Article 110(3) must be undertaken a in a way that ensures legislative harmony and cooperation between the two Houses. We note that a purposive interpretation of Article 110(3) leads to the conclusion that determining whether a Bill concerns County Government, and its nature, can only occur if the two Speakers—who are central to the concurrence process—are aware of and informed about Bills being introduced in either House. This demands a proactive approach. The Speakers must ensure transparency and clarity at the outset of the legislative process by informing the Speaker of the other House of the introduction of a Bill and the view they have taken as to whether the Bill concerns counties. Particularly, when there is potential for a question arising as contemplated in Article 110(3), even if one has not yet formally arisen. This approach minimizes unnecessary procedural interruptions or the invalidation of the legislative process at a later stage. It is in this context that this Court, in the ***Senate Advisory Opinion***, emphasized the importance of cooperative engagement by the two Speakers in undertaking their duties under Article 110(3).

[97] We therefore affirm the Court of Appeal's clarification that the Speaker of the National Assembly is under obligation to notify the Speaker of the Senate of the view they take of a Bill as to whether it concerns counties. This notification is to facilitate and enable not only the determination of any question as to the nature of the Bill, but also the concurrence process in the event of a dispute as regards the nature of a Bill.

We therefore dismiss this limb of the appeal.

v. Whether the impugned Acts and Bills are unconstitutional for want of Senate's participation in their enactment

[98] On this issue, the Court of Appeal proceeded to determine, what it considered as a central question before it, which was whether the impugned Acts and Bills were unconstitutional for want of Senate's participation in their consideration and enactment. The Court of Appeal interrogated each of the impugned Acts to determine whether the process of enacting the challenged Acts indeed contravened Article 110 (3) of the Constitution.

[99] On one hand, the Court of Appeal proceeded to hold that 21 statutes were constitutional as there was no need for Senate's participation in their enactment. Therefore, the Court of Appeal reversed the High court's finding that those statutes were unconstitutional. On the other hand, the Court of Appeal found that two of the impugned statutes as well as the amendments to Sections 3 and 4 of the KEMSA Act concerned counties, therefore it was unconstitutional that the Senate was by-passed in the process of their enactment.

[100] The foregoing findings by the Court of Appeal have been challenged before this Court. Having considered the pleadings and the impugned judgment, we note

that the Court of Appeal addressed the constitutionality of the Acts and Bills under four (4) clusters, *to wit*-

a) ***Constitutionality of Acts argued to be money Bills;***
b) ***Constitutionality of Acts argued to arise from Bills affecting the functions and powers of counties;***
c) ***Constitutionality of the Equalization Fund Appropriation Act No. 3 of 2018, and***
d) ***Whether Bills or subsidiary legislation touching on the mandate and power of the Parliamentary Service Commission should be considered by Senate.***

We will therefore proceed to determine the framed question based on these 4 categories.

a) ***Constitutionality of Acts that the Court of Appeal held were processed as money Bills***

[101] In this first cluster of statutes, the Court of Appeal held that the impugned 8 statutes were money Bills hence there was no need for them to be considered by the Senate. The 8 statutes in question are:

i. The Supplementary Appropriations (No. 3) Act of 2018 (formally National Assembly No. 42 of 2017).
ii. The Appropriations Act, 2018 (formally National Assembly No 22 of 2018).
iii. The Supplementary Appropriations (No. 2) Act of 2018 (formally National Assembly No. 15 of 2018).
iv. The Supplementary Appropriations (No. 13) Act of 2018 (formally National Assembly No. 23 of 2018).

v. The Appropriations Act, 2019 (formally National Assembly No. 46 of 2018),
vi. The Supplementary Appropriation Act, No. 9 of 2019 (formally National Assembly No. 41 of 2019).
vii. The Tax Laws (Amendments) Act, 2018 (formally National Assembly Bill No. 11 of 2018).
viii. The Finance Act, 2018 (formally National Assembly Bill No. 20 of 2018).

[102] We have in the preceding section of this judgment considered whether the Senate ought to be involved in considering and enacting a money Bill. In that regard, we agreed with the Court of Appeal's finding that the Senate is constitutionally excluded from considering money Bills. Therefore, our task is to consider whether the aforementioned impugned 8 statutes were money Bills.

[103] Article 114(3) of the Constitution, provides a self-contained definition of what 'a money Bill' is as follows:

> "*a money Bill" means 'a Bill, other than a Bill specified in Article 218, that contains provisions dealing with— (a) taxes; (b) the imposition of charges on a public fund or the variation or repeal of any of those charges; (c) the appropriation, receipt, custody, investment or issue of public money; (d) the raising or guaranteeing of any loan or its repayment; or (e) matters incidental to any of those matters.'"*

This definition is qualified in Article 114(4) which stipulates that:

> *"In clause (3), 'tax', 'public money', and 'loan' do not include any tax, public money or loan raised by a county"*. An additional qualification in Article 114(1) is that: "*A money Bill may not deal with any matter other than those listed in the definition of 'a money Bill' in clause (3)".*

[104] The *Supplementary Appropriations (No. 3) Act of 2018 (formally National Assembly No. 42 of 2017)* indicates in its long title that its primary purpose is to authorize the issue of certain sums of money out of the Consolidated Fund and their application towards the service of the year ending on the 30th June 2018, and to appropriate those sums for certain public services and purposes. Section 2 of the Act provides that the Treasury may issue the sum of Kshs. 97,364,929,464 out of the Consolidated Fund for the service of the year ending 30th June 2018. Section 3 provides for appropriation of the money granted, while Section 4 provides for appropriations in Aid. Section 5 provides that the supply granted for the services of the year ending on 30th June 2018 in accordance with the Appropriation Act, 2017 is reduced by Kshs 72,965,466,271. These provisions are in the nature of appropriation and we agree it was a money Bill as held by the Court of Appeal.

[105] The *Appropriations Act, 2018 (formally National Assembly No 22 of 2018)* indicates in its long title that its primary purpose is to authorize the allocation and withdrawal of funds from the Consolidated Fund for the fiscal year ending 30th June 2019. Section 2 grants the Treasury authority to withdraw funds from the Consolidated Fund to meet government financial obligations for the year. Section 3 addresses appropriations in Aid through a schedule that specifies allocations to Ministries, Departments, and Agencies (MDAs), separating funds into **recurrent expenditure** (e.g., salaries and operations) and **development expenditure** (e.g., infrastructure and capital projects). These provisions are appropriation in nature therefore it was a money Bill as held by the Court of Appeal.

[106] The Supplementary Appropriations (No. 2) Act of 2018 (formally National Assembly No. 15 of 2018) in its long title indicates its primary purpose being to make provision for the issue of certain sums of money from the Consolidated Fund and its application towards the supply granted for the service of the year ending

30th June 2018, and to appropriate the money granted for certain public services and purposes. Section 2 authorizes the issue of an additional sum of money out of the Consolidated Fund for the service of the financial year ending 30th June 2018. Section 3 appropriates the sums granted by Parliament towards the supply for public services purposes and expenditure in conformity with the Schedules of the Act. Section 4 provides schedules that reflects adjustments and additional allocations to identified ministries, departments, and agencies receiving supplementary allocations. These provisions are appropriation in nature and constitute a money Bill as correctly found by the Court of Appeal.

[107] The *Supplementary Appropriations (No. 13) Act of 2018 (formally National Assembly No. 23 of 2018)* indicates in its long title that its primary purpose is to authorize the issue of certain sums of money out of the Consolidated Fund and their application towards the service of the year ending on the 30th June 2019, and to appropriate those sums for certain public services and purposes. Section 2 provides that the Treasury may withdraw Kshs 47,254,066,048 from the Consolidated Fund and use it for services for the year ending 30th June, 2019. Sections 3 and 4 stipulates that the amount withdrawn will be used for the services listed in the Schedules in the Act. Section 5 provides schedules that reflect adjustments and additional allocations to identified ministries, departments, and agencies receiving supplementary allocations. These provisions are appropriation in nature hence we come to the same conclusion as the Court of Appeal that this Bill was a money Bill.

[108] The *Appropriations Act, 2019 (formally National Assembly No. 46 of 2018)* indicates in its long title that its purpose is to authorize the withdrawal of funds from the Consolidated Fund for public services for the fiscal year ending 30th June 2020, and to allocate these funds as approved by the National Assembly. Section 2 authorises the Treasury to withdraw Kshs 1.475 trillion from the Consolidated

Fund for government services for the year ending 30th June, 2020. Section 3 provides for Appropriation in Aid, while Section 4 provides for conditional appropriation. These provisions are appropriation in nature hence we agree that this Bill was a money Bill as held by the Court of Appeal.

[109] The *Supplementary Appropriation (No. 9) Act of 2019 (formally National Assembly No. 41 of 2019)* indicates in its long title that its purpose is to authorize the withdrawal of funds from the Consolidated Fund for public services and purposes for the financial year ending 30th June, 2019. Section 2 authorizes the Treasury to withdraw Kshs 107,596,179,700 from the Consolidated Fund for government services for the year ending 30th June, 2019. Section 4 provides for Appropriation in Aid, while Section 5 are schedules that reflect adjustments and additional allocations to identified ministries, departments, and agencies receiving supplementary allocations. These provisions are appropriation in nature therefore meet the criteria of a money Bill as held by the Court of Appeal.

[110] On the Tax Laws (Amendments) Act, 2018 *(formally National Assembly Bill No. 11 of 2018)* we note that it introduced several amendments to tax-related statutes. This included amending the Income Tax Act to introduce a tax on winnings and enhance the tax incentive on home ownership, amending the Stamp Duty Act to provide an incentive to first-time home owners, and amending the Value Added Tax Act to move some items from zero rate to exempt. In our assessment, these amendments related to the imposition of taxes hence falling within the definition of a 'money Bill' under Article 114(3) of the Constitution. We therefore agree with the finding by the Court of Appeal that this Act did not require consideration by the Senate.

[111] On the Finance Act, 2018 *(formally National Assembly Bill No. 20 of 2018)*, we note that it provided for amendments relating to various taxes and duties. It amended the Betting, Lotteries and Gaming Act to require that the tax collected

under Sections 29A, 44A, 55A, and 59B of the Act to be paid into the Sports, Arts and Social Development Fund. It also amended the Air Passengers Service Charge Act to include the Tourism Promotion Fund as one of the institutions to benefit from proceeds of air charge imposed under section 3(1) of the Act. It amended the Stamp Duty Act to exempt from duty all instruments executed for purposes of collection and recovery of tax. Yet another amendment was to the Kenya Revenue Authority Act to provide a legal mechanism for collection of surplus funds from regulatory bodies and payment of the same to the National Treasury. Another amendment was to the Retirement Benefits Act to deal with penalties payable for late submission of investment returns and contribution returns by Fund managers and administrators. Lastly, there was an amendment to Section 24 of the Public Finance Management Act to empower the Cabinet Secretary for the National Treasury and Planning to, through Regulations, designate an incorporated or unincorporated entity as the administrator of a national public Fund. We have looked at the provisions of the Act and in our assessment, these amendments related to the imposition of taxes hence falling within the definition of a 'money Bill' under Article 114(3) of the Constitution. Consequently, we agree with the finding by the Court of Appeal that this Act did not require consideration by the Senate.

[112] In summary, we have reviewed the 8 statutes, namely: the Supplementary Appropriations (No. 3) Act of 2018, the Appropriations Act of 2018, the Supplementary Appropriations (No. 2) Act of 2018, the Supplementary Appropriations (No. 13) Act of 2018, the Appropriations Act of 2019, the Supplementary Appropriation (No. 9) Act of 2019, the Tax Laws (Amendments) Act, 2018 *(formally National Assembly Bill No. 11 of 2018),* and the Finance Act, 2018 *(formally National Assembly Bill No. 20 of 2018)*, and we find that all these statutes were in the nature of money Bills, which did not require the Senate's

involvement in their enactment. Consequently, we affirm the Court of Appeal's decision that these 8 statutes were enacted in a constitutionally compliant manner and are therefore constitutional.

b) Constitutionality of Acts that were argued to have been Bills concerning counties

[113] The Court of Appeal considered the constitutionality of the following statutes: i) the Public Trustee (Amendment) Act of 2018 (Act No. 6 of 2018; ii) the Capital Markets (Amendment) Act No. 15 of 2018; iii) the Insurance (Amendment) Act No. 11 of 2019; iv); the National Youth Service Act No. 17 of 2018; v); the National Cohesion and Integration (Amendment) Act, 2019; vi) the Kenya Coast Guard Act, 2018; vii) the Computer Misuse and Cybercrimes Act No. 5 of 2018; viii) the Building Surveyors Act No. 19 of 2018; ix) the National Government Constituency Development Fund Act; x) the Health Laws (Amendments) Act, 2019; xi) the Sacco Societies (Amendment) Act No. 16 of 2018; xii) the Sports (Amendment) Act, 2019 xiii) the Statute Law (Miscellaneous Amendments) Act, 2018 (*formally National Assembly No. 44 of 2017);* xiv) the Statute Law (Miscellaneous Amendments) Act 2018 (No. 18 of 2018); and xv) the Statute Law (Miscellaneous Amendments) Act, 2019 *(National Assembly No. 21 of 2019)* to determine if they ought to have been considered by the Senate by dint of them falling within the rubric of Article 110(1)(a) which is "*a Bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule*".

[114] In order to determine whether the Senate ought to have been involved in the enactment of the aforementioned 15 statutes, it is important to set out the interpretative co-ordinates for construing Article 110(1)(a). In determining whether the Senate ought to have been involved in the enactment of the impugned

statutes, the starting point is Article 96(2) of the Constitution, which stipulates that '*The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113*.' The law-making mandate of the Senate is then fleshed out in Article 110 (1) which demarcates the categories of 'Bills concerning County Government'. It stipulates that;

> *"In this Constitution, "a Bill concerning county government" means—*
>
> *(a) a Bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule;*
> *(b) a Bill relating to the election of members of a county assembly or a county executive; and*
> *(c) a Bill referred to in Chapter Twelve affecting the finances of county governments.""*

The three categories listed in this Article are to be read disjunctively. Therefore, for a Bill to qualify as one concerning County Government, for the Senate's participation in the law-making process, the Bill must satisfy at least any of the three categories stipulated in the provision.

[115] The contestation on the constitutionality of the impugned Acts revolves around whether they fall under the first category of Article 110(1) (a) that is '*a Bill containing provisions affecting the functions and powers of the county governments set out in the Fourth Schedule"*. This is a textual signal that the two Speakers of Parliament have a duty to satisfy themselves, and the courts in case of litigation, that a contested Bill had provisions affecting the functions and powers of County Governments.

[116] It is notable from the language of the Constitution that the determination is focused on "*provisions*" of a Bill. This means that the inquiry has to be focused on the existence or non-existence of provisions that have an impact on the functional areas listed in the Fourth Schedule. As Dr. John Mutakha Kangu correctly notes in **Constitutional Law of Kenya on Devolution** (2015, Strathmore University Press) at page 362:

> "*The reference to provisions means that the requirement is not for the whole Bill to affect the functions and powers of the county governments. A few provisions … [are] sufficient to lead to a classification of a Bill as concerning counties, depending on its impact on the county government functions and powers.*"

[117] This approach aligns with the constitutional framework. Accordingly, we hold that in determining whether a Bill contains provisions affecting the functions and powers of County Governments as outlined in the Fourth Schedule under Article 110(1)(a), the inquiry must focus on the impact of the Bill's provisions on these functions and powers. The critical question is: *to what extent do the provisions of a Bill affect the functions and powers of County Governments?* This assessment focuses on evaluating the degree to which a Bill's provisions influence the functions and powers of County Governments. Indeed, this is evident from our approach in ***Institute for Social Accountability & another vs. National Assembly & 3 others & 5 others*** [2022] KESC 39 (KLR) where at paragraphs 71 and 72 we interrogated the provisions of the CDF Act to determine if they have an impact on the functions and powers of County Governments.

[118] Turning to the approach adopted by the Court of Appeal in the present matter, we note that the Court of Appeal, at paragraph 148 of its judgment, formulated the test to be used as follows:

> "***As discerned earlier, it is only bills concerning counties that mandatorily require to be subjected to the concurrence process. <u>Whether or not a bill concerns the counties is a matter for interpretation of the nature of the bill</u>, having regard more particularly to, those constitutional provisions dealing with enactment of legislation by the two Houses, which provisions as stated above, are to be found under Part 4 of the Constitution."*** [Emphasis added]

[119] In addition, at paragraph 149, the Court of Appeal rendered itself thus on the appropriate test:

> "***Having discerned that the Constitution provides for different categories of bills and also specifies the manner of their enactment, <u>we must now scrutinised (sic) each of impugned Acts to ascertain their true nature, at all times</u> bearing in mind that it is only bills concerning county governments that are liable to be subjected to the concurrence process. <u>At the core of our analysis is an examination of the different Acts, to discern first, their objects, second, their intent and purpose</u> <u>by applying the "pith and substance" test</u>"*** [Emphasis added]

[120] As is apparent, the test as formulated by the Court of Appeal moves away from the language of Article 110(1)(a) which is "*provisions affecting the functions and powers of county governments*" and instead shifts to "*the nature of a bill*". We therefore, hold that the Court of Appeal ought to have adhered to the language of the Constitution and focused its inquiry on whether *the provisions of the impugned Acts had an impact on the functions and powers of County Governments*. In taking this position, we reiterate the stance taken by this Court

in ***Attorney-General & 2 others vs. Ndii & 79 others; Dixon & 7 others (Amicus Curiae)*** [2022] KESC 8 (KLR) that courts ought to give effect to the explicit language of the Constitution in interpretation and not import concepts or doctrines extraneous to the text of the Constitution. The foregoing analysis paves way for us to consider whether the provisions of the impugned 15 statutes affected the functions and powers of county governments as set out in the Fourth Schedule.

[121] On the Public Trustee (Amendment) Act of 2018 (Act No. 6 of 2018), the Court of Appeal held that the statute concerns the administration of the estates of deceased persons. The court observed that a review of the Fourth Schedule discloses that, the administration of the Estate of deceased persons is not a function that was designated to either the National or County governments. However, taking into account that Article 186(3) provides that, *"A function or power not assigned by this Constitution or national legislation to a county is function or power of the national government"* this means that the Act would fall within the precincts of the National Government's powers and functions. On our part, we have reviewed the provisions of the Act and we note the following salient factors; all the seventeen provisions of the statute are focused on the administration of the Estate of deceased persons, hence would fall within the sphere of the National Government in light of Article 186(3) of the Constitution. Consequently, we find that the provisions of this Act did not affect the functions and powers of County Governments.

[122] On the Capital Markets (Amendment) Act No. 15 of 2018, the Court of Appeal held that the Act concerned the function of securities regulation which fell within the domain of the National Government's functions and powers. We have reviewed the eleven provisions of the Act and find that they are aimed at strengthening regulatory operations of issuers of securities, to ensure that licensed and approved persons and entities devise and maintain systems of internal

accounting controls, sufficient to provide reasonable assurances that transactions are recorded and permit preparation of financial statements in conformity with the International Financial Reporting Standards. Also created under the Act were offences relating to insider dealing, or the obtaining of financial or personal gain by fraud. Assessed as against the Fourth Schedule of the Constitution, the provisions would fall within the rubric of '*Monetary policy, currency, banking (including central banking), the incorporation and regulation of banking, insurance and financial corporations'* which lies in the domain of the National Government. Therefore, we find that the provisions of this Act did not affect the functions and powers of County Governments.

[123] On the Insurance (Amendment) Act, No. 11 of 2019, the Court of Appeal held that the amendments disclose that they seek to enhance regulation of the Insurance sector thereby falling within the domain of the National Government's functions and powers. On our part, we have reviewed each of the fourteen provisions of the Act and appreciate that their overarching purpose is to introduce changes to the law aimed at improving the regulation, governance, and operational practices within the insurance industry. The provisions include those providing for enhanced powers of supervision by the Commissioner of Insurance, power to settle disputes, and offences on insurance fraud. Assessed as against the Fourth Schedule of the Constitution, the provisions would fall within the rubric of '*Monetary policy, currency, banking (including central banking), the incorporation and regulation of banking, insurance and financial corporations'* which lies in the domain of the National Government. Hence, we find that the provisions of this Act did not affect the functions and powers of County Governments.

[124] On the National Youth Service Act No. 17 of 2018 the Court of Appeal held that the Act's objective was to establish the National Youth Service. The Act also provides for its functions, discipline, organization and administration with no

obligation assigned to the County Government hence fell within the domain of the National Government's functions and powers. On our part, we have looked at each of the sixty-seven provisions of the Act, and note that they are concerned with establishment and functions of the National Youth Service, discipline and offenses in the service, and financial provisions relating to the Service. All these are intended to facilitate the functions of the service listed in Section 7 of the Act that include paramilitary training of members of the Service, and co-operation with and assisting the Kenya Defence Forces, the National Police Service Commission and other public authorities during emergencies, disasters, war or insurrection or in the execution of the mandates of the public authorities as the Council may determine. Assessed against the Fourth Schedule of the Constitution, the provisions implicate functions that lie within the domain of the National Government. Therefore, we find the provisions of this Act did not affect the functions and powers of County Governments.

[125] On the National Cohesion and Integration (Amendment) Act, 2019 the Court of Appeal held that the Act focused on national cohesion, which did not fall within either the National or County Government. Therefore, in accordance with Article 186(3) of the Constitution, it found that national cohesion fell within the functions of the National Government. We have reviewed each of the 6 provisions of the Act, which principally provide for Members of the National Cohesion and Integration Commission, powers of the Chairperson, qualification of commissioners, and terms of office of commissioners. Assessed against the Fourth Schedule of the Constitution, we find that the provisions of this Act did not affect the functions and powers of County Governments.

[126] On the Kenya Coast Guard Service Act, 2018 the Court of Appeal held that the nature of the Act concerns maritime defence and national security matters that are within the exclusive functions of the National Government under Part I of the

Fourth Schedule. Upon our re- evaluation of each of the fifty-eight provisions of the Act, we note that the provisions relate to the establishment of the Kenya Coast Guard Service which is to be deployed in the country's territorial waters. The provisions are focused on the establishment and functions of the service, discipline and offenses, and financial provisions. Assessed against the Fourth Schedule of the Constitution, we find that the provisions of this Act did not affect the functions and powers of County Governments. For the avoidance of doubt, the provisions do not touch on the County Government functions of county transport including to ferries and harbours under Part 2 of the Fourth Schedule.

[127] On the Computer Misuse and Cybercrimes Act No. 5 of 2018, the Court of Appeal held that the Act pertains to the creation of computer and computer related offences. The superior court below proceeded to hold that under Part I of the Fourth Schedule, criminal laws or enactment of legislation establishing criminal offences are functions of National Government. Therefore, in so far as the Act seeks to create offences for misuse of computers and computer systems, the court held that amendments fall within the domain of criminal law which is a preserve of the National Government. On our part, we have assessed each of the seventy provisions of the statute and note that they are focused on providing for offences relating to computer systems; enabling the detection, prohibition, prevention, response, investigation and prosecution of computer and cybercrimes; and facilitating international co-operation in dealing with computer and cybercrime matters. The sections provide for the establishment of the National Computer and Cybercrimes Co-ordination Committee, create offenses, provide for investigation procedures, and create a regime for international cooperation. None of the Act's provisions affects the functions and powers of County Governments.

[128] On the Building Surveyors Act No. 19 of 2018 the Court of Appeal held that Part 2 to the Fourth Schedule makes reference to trade development and

regulation, including the issuance of trade licences by the County Governments, but expressly excludes regulation of professions which function is reserved for the National Government. As the Act deals with regulation of the profession of building surveyors, its enactment did not encroach on the functions of the counties. On our part, we have assessed each of the Act's thirty-nine provisions, and observe that they relate the registration and licencing of building surveyors and to regulate their practice. The Act provides for the establishment of the Building Surveyors Registration Board, the Registrar and Register, registration and financial provisions. Based on the foregoing, we hold that none of the Act's provisions affects the functions and powers of County Governments.

[129] On the National Government Constituencies Development Fund Act, 2015 the Court of Appeal held that it was not demonstrated how or in what way(s) the said Act impedes or affects County Governments functions. As such, the court held that there was no need for the involvement of the Senate in the enactment of the statute. We have ourselves reviewed provisions of the Act as enacted and of significance is Section 24 of the Act that provides that:

> *"A project under this Act shall only be in respect of works and services falling within the exclusive functions of the national government as provided in the Constitution".*

The other provisions reinforce this particular one, by restricting the operations of the Fund to the exclusive functions of the National Government. We therefore agree with the finding of the Court of Appeal that this statute did not affect the functions and powers of counties.

[130] On the Health Laws (Amendments) Act, 2019 the Court of Appeal noted that the amendments touched on a number of statutes to streamline the procedures for application, issuance and renewal of practicing licences of the health professionals

and health technicians, among other amendments. The concerned amendments relate to: a) the Pharmacy and Poisons Board; b) the Pharmacy And Poisons Act, (Cap 244); c) the Medical Practitioners And Dentists Act (Cap 253); d) the Nurses Act (Cap 257); e) the Kenya Medical Training College Act (Cap 261); f) the Nutritionists And Dieticians Act (No. 18 of 2007); g) the Kenya Medical Supplies Authority Act (No. 20 of 2013); h) the Counsellors And Psychologists Act (No. 14 of 2014); i) the Physiotherapists Act (No. 20 of 2014); and j) the Clinical Officers (Training, Registration And Licensing) Act (No. 20 of 2017). In addition, there were some amendments to the KEMSA Act, pointedly directing the County Governments to procure drugs and medical supplies from KEMSA. The amendment went on to create an offence where failure to adhere to the Section 4 attracted a fine of Kshs 2 million or imprisonment of five years or both.

[131] The Court of Appeal made two critical findings. First, that Part 2 of the Fourth Schedule assigns the function of county health services to the counties, thus the amendments were not in the nature of county services *per se*, but in relation to enhancing the regulatory environment of health professional Boards at the national level. As such, that the enactment of regulatory provisions for the professional boards of health professionals did not affect functions of County Governments. Second, that the amendments leading to inclusion of Sections 3 and 4 to the KEMSA Act the provisions in question concern purchase of medical supplies at the county level. Such purchases would fit within the description of health services assigned to the counties. Therefore, that the purchase of drugs and medical supplies from KEMSA was a matter that would have required the participation of the Senate.

[132] We have assessed the provisions of the Health Laws (Amendments) Act, 2019 and affirm the position taken by the Court of Appeal that the provisions relating to regulatory provisions for professional boards of various health

professionals did not affect the functions and powers of County Governments. This is so, given the fact that county health services, which is the mandate of County Governments under Part 2 of the Fourth Schedule, does not include the regulation of the various health professionals which was the focus of the amendments. Regulation of health professionals will fall under health policy which is a role vested in the national government under Part 1 of the Fourth Schedule. In addition, clause 7 of Part 2 of the Fourth Schedule, providing for trade development and regulation, explicitly excluded regulation of professions from the realm of County Government's powers and functions.

[133] Turning to the amendments the KEMSA Act, 2013 (No. 20 of 2013), Section 3 provided that:

> *"(3) A national or* ***county public health facility*** *shall, in the procurement and distribution of drugs and medical supplies, obtain all such drugs and medical supplies from the Authority…*". [Emphasis added]

In addition, Section 4 provided that:

> "*A person responsible for the procurement and distribution of drugs and medical supplies in a national* ***or county public health facility*** *and who contravenes provisions of this section, commits an offence and is liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding five years, or to both.*" [Emphasis added]

It is clear that these two provisions concern purchase of medical supplies at the county level. Such purchases would fit within the description of county health services assigned to the counties in Part 2 of the Fourth Schedule. In particular, clause 2(a) of Part 2, of the Fourth Schedule lists "*county health facilities and*

pharmacies" fall within the functions and powers of County Governments. Given that these two amendments affect the functions and powers assigned to counties, the Senate ought to have been involved in the enactment of amendments to Sections 3 and 4 of the KEMSA Act in line with dictates of Article 110 of the Constitution. Accordingly, we are in agreement with the findings by the Court of Appeal that the purchase of drugs and medical supplies from KEMSA was a matter that required the participation of the Senate.

[134] On the Sacco Societies (Amendment) Act No. 16 of 2018, the Court of Appeal held that though the provisions of the SACCO Societies Act govern a Sacco, they are registered as a cooperative society under the Co-operative Societies Act, and they do operate on the basis of co-operative principles. This would point to Saccos categorisation as a co-operative society, which function is assigned under Part 2 of the Fourth Schedule to the County Governments, specifically Clause 7(e) thereof. Given the foregoing, the Court of Appeal proceeded to hold that the subject amendments ought to have been considered by the Senate, and thus rendered the Act unconstitutional.

[135] We have considered the 9 provisions of the Sacco Societies (Amendment) Act No. 16 of 2018, and of note in the amendments include Section 3 that provides for changes in the composition of the Board of the Sacco Societies Regulatory Authority, while Section 6 changed the regime on revocation of licence to a Sacco society. Section 8 amended the regime on supervisory enforcement actions while Section 9 amended the Sacco Societies Act by providing for the usage of ICT in collecting and receiving of statutory reports by Sacco Societies, and for provision of general or specific guidelines and direction on usage of system processes, including the registration of Sacco Societies.

[136] To assess whether these amendments affected the powers and functions of counties, it is notable that Clause 7(e) of Part 2, Fourth Schedule lists the powers

and functions of counties to include *'trade development and regulation, including cooperative societies'*. Section 2 of the Sacco Societies Act No. 14 of 2008, is helpful in determining whether Sacco societies fall within the rubric of co-operative societies. It defines a "Sacco society" to be "*a savings and credit co-operative society registered under the Co-operative Societies Act, 1997 (No. 12 of 1997)*". Moreover, it defines "Sacco business" as:

> "*financial intermediation and any other activity by a Sacco society based on co-operative principles and in accordance with this Act, by way of— (a) receipt of withdrawable deposits, domestic money transfer services, loans, advances and credit facilities; or (b) receipt of non-withdrawable deposits from members and which deposits are not available for withdrawal for the duration of the membership of a member in a Sacco society and may be used as collateral against borrowings and domestic money transfer services.*"

Meanwhile, Section 2 of the Co-operative Societies Act defines a cooperative society as, "*a society registered under Section 4 of the Act*".

[137] It follows that though the provisions of the Sacco Societies Act govern a Sacco, it is registered as a co-operative society under the Co-operative Societies Act, and operates on the basis of co-operative principles. The foregoing leads to the conclusion that Sacco's fall within the category of a co-operative society. This means that they fall within the functions and powers of counties as signalled in Clause 7(e) of Part 2, Fourth Schedule which lists the powers and functions of counties to include *'trade development and regulation, including cooperative societies'*. Consequently, we uphold the determination by the Court of Appeal that the Senate ought to have been involved the consideration and enactment of the Sacco Societies (Amendment) Act No. 16 of 2018.

[138] On the Sports (Amendment) Act, 2019, the Court of Appeal held that an analysis of the nature of the amendment indicated that it was concerned with national sports as well as betting, casinos and other forms of gambling. It was the court's view that the amendments sought to repeal provisions and references to the National Sports Fund and the National Sports Fund Board of Trustees and to instead replace them with the establishment of a Sports, Art and Social Development Fund intended to provide for financing of the sporting sector and the operations of the new Fund would bear a nationalistic perspective. This led the superior court below to conclude that the amendments did not concern County Government hence were not required to be considered by the Senate.

[139] We have assessed the provisions of the Sports (Amendment) Act, 2019 and note the following salient facts. The principal object of the statute was to amend the Sports Act, 2013 to repeal provisions relating to the establishment and operation of the National Sports Fund and the National Sports Fund Board of Trustees in order to provide a more comprehensive approach to financing of the sports sector through a fund established and managed in accordance with the Public Finance Management Act, 2012. We have also evaluated each of the eleven provisions of the Act, and note that Section 2 of the Amendment Act introduced a new definition of the "Fund" thus:

> *"Fund" means 'the Sports, Arts and Social Development Fund established under regulation 3 of the Public Finance Management (Sports, Arts, and Social Development Fund) Regulations, 2018'".*

Section 4 of the Amendment Act amended Section 11 of the principal Act which makes provision for funds for Sports Kenya to provide that such funds shall include:

> "(*c) an amount out of the Fund for the promotion of and development of sports;"*. Section 5 of the Amendment Act repealed Part III of the

principal Act that had provided for the establishment of the National Sports Fund. Section 6 of the Amendment Act amended Section 38 of the principal on funds and assets of the Kenya Academy of Sports to include "*(be) an amount out of the Fund for the promotion of and development of sports".*

[140] We note that Clause 4(h) of Part 2, of the Fourth Schedule lists '*Cultural activities, public entertainment and public amenities, including— sports and cultural activities and facilities*' as falling within the powers and functions of counties. In contrast, clause 17 of Part 1, of the Fourth Schedule lists '*Promotion of sports and sports education*' as falling within the sphere of the National Government. It is in the context of these two provisions, that we have to decide whether the provisions affect the powers and functions of counties. The Court of Appeal held that there was no direct nexus demonstrated between the amendments and counties.

[141] Even before examining the nexus, we note that the amendments pertain to the establishment of *Sports, Arts and Social Development Fund* established and are managed in accordance with the Public Finance Management Act, 2012 and the appropriation of funds for the promotion of and development of sports by the Kenya Academy of Sports. Due to this and in light of our finding on *issue (iii)* above on money Bills, we are of the considered view that this falls squarely within the four corners of Article 114(3)(c) on the appropriation, receipt, custody, investment and issue of public money. Therefore, as a money Bill, it may only be introduced in and considered by the National Assembly, hence was not required to be considered by the Senate.

[142] On enactment of the Statute Law (Miscellaneous Amendments) Act, 2018 (formally National Assembly No. 44 of 2017) the Court of Appeal held that it was patently clear that objectives of these amendments were corrective in nature, and

intended purely to clarify the manner of election or appointment of the Chairpersons to the Boards established under the respective Acts, among other procedural clarification and rectifications. We have reviewed the provisions of the Act, and affirm the position taken by the Court of Appeal that these amendments did not affect the functions and powers of counties.

[143] On the enactment of the Statute Law (Miscellaneous Amendments) Act 2018 (No. 18 of 2018), the claim as filed at the High Court focused on only 5 amendments touching on amendments to the Land Act, the Wildlife Conservation and Management Act, the Registration of Persons and the National Drought Management Authority Act. The Court of Appeal reviewed the 5 impugned provisions and held that they concerned amendments that were with respect to the provisions under Part 1 of the Fourth Schedule thus fell within the sphere of the National Government. We have also assessed the impugned 5 provisions, and take the view that the amendment to the Registration of Persons Act related to the establishment of the National Integrated Identity Management System thus fell within the sphere of the National Government given that clause 11 of Part 1, of the Fourth Schedule lists "*National statistics and data on population, the economy and society generally*" as falling within the functions and powers of National Government. The amendment to the Land Act were clarificatory amendments relating to definition to 'alienation of public land'. Whilst the amendment to the Wildlife Conservation and Management Act were clarificatory of the definition of 'deal' and 'trophy', the composition and functions of Community Wildlife Conservation Committees, the Wildlife Endowment Fund, and offenses relating to endangered and threatened species. Lastly, the amendment to the National Drought Management Authority Act was clarificatory with respect to appointment to the Board of the National Drought Management Authority and the appointment of the staff of the Authority. We have reviewed these amendments and find that

none of them affected the powers and functions of counties. Accordingly, we agree with the findings of the Court of Appeal.

[144] The last statute for our consideration is the Statute Law (Miscellaneous Amendments) Act, 2019 (formerly National Assembly No. 21 of 2019). The Court of Appeal held that impugned amendments were enacted within the confines of functions assigned to the National Government under Part 1 of the Fourth Schedule, and there is nothing that is demonstrative of their interference with or that they concern the counties. On our part we have assessed the impugned amendments to; i) the Districts And Provinces Act, 1992 (No. 5 of 1992; ii) the Tourism Act, 2011 (No. 28 of 2011); iii) the Public Finance Management Act, 2012 (No. 18 of 2012); iv) the Prevention of Terrorism Act, 2012 (No. 30 of 2012); v) the Kenya Law Reform Commission Act, 2013 (No. 19 of 2013); and vi) the Wildlife Conservation and Management Act, 2013 (No. 47 of 2013) and also arrived at the same conclusion, like the Court of Appeal, that they are by nature clarificatory and do not intrude into the sphere of the functions and powers of counties.

[145] In summary, we affirm the finding by the Court of Appeal that: i) the Public Trustee (Amendment) Act of 2018 (Act No. 6 of 2018; ii) the Capital Markets (Amendment) Act No. 15 of 2018; iii) the Insurance (Amendment) Act, No, 11 of 2019; iv); the National Youth Service Act, No. 17 of 2018; v); the National Cohesion and Integration (Amendment) Act, 2019; vi) the Kenya Coast Guard Act 2018; vii) the Computer Misuse and Cybercrimes Act, No. 5 of 2018; viii) the Building Surveyors Act No. 19 of 2018; ix) the National Government Constituency Development Fund Act; x) the Statute Law (Miscellaneous Amendments) Act, 2018 (*formally National Assembly No. 44 of 2017);* xi) the Statute Law (Miscellaneous Amendments) Act 2018 (No. 18 of 2018); xii) the Statute Law (Miscellaneous Amendments) Act, 2019 *(National Assembly No. 21 of 2019););*

and xiii) *the* Sports (Amendment) Act, 2019 did not require consideration by the Senate hence were constitutionally enacted.

[146] We also affirm the finding by the Court of Appeal that the Sacco Societies (Amendment) Act, 2018, No. 16 of 2018; and the amendments made to Sections 3 and 4 of the KEMSA Act by the Health Laws (Amendment)Act, No. of 5 of 2019 affected the functions and powers of counties hence ought to have been considered by the Senate hence are unconstitutional.

c) Constitutionality of the Equalization Fund Appropriation Act, No. 3 of 2018

[147] The Court of Appeal made a finding that the concurrence of the Speakers of the National Assembly and the Senate was required before either House considers the Equalization Fund Appropriation Act in compliance with Article 110(3) of the Constitution. Accordingly, on account of the failure to adhere to this requirement, the appellate court found the passage of the Equalization Fund Appropriation Act, No. 3 of 2018 by the National Assembly to be unconstitutional. The Court of Appeal based its decision on three reasons; that is, first, the Equalization Fund Appropriation Act appropriates funds from the Equalization Fund, not the Consolidated Fund, making Article 114, on money Bills inapplicable to the Fund. Second, unlike Article 114 which is explicit on the National Assembly solely considering money Bills, Article 204 clearly requires Parliament, meaning both the National Assembly and the Senate, to pass Appropriation Bills involving the Equalization Fund. Third, the Equalization Fund directly benefits counties with marginalized areas, impacting counties, thus necessitating the Senate's involvement in its enactment.

[148] In our determination of this question, the terms of Article 204(3)(a) &(b), (4), (6) (7) and (8) of the Constitution are decisive. Article 204(3)(a) and (b) states:

> *"The national government may use the Equalisation Fund—*
>
> *(a) only to the extent that the expenditure of those funds has been approved in an* ***Appropriation Bill enacted by Parliament; and***
>
> *(b) either* ***directly or indirectly through conditional grants to counties*** *in which marginalized communities exist***"** [Emphasis added]

While Article 204(4) provides:

> "*The Commission on Revenue Allocation shall be consulted and its recommendations* ***considered before Parliament passes any Bill appropriating money out of the Equalisation Fund****."* [Emphasis added]

Article 204 (6) provides:

> "*This Article lapses twenty years after the effective date, subject to clause (7)*

Article 204 (7) provides:

> *"Parliament may enact legislation suspending the effect of clause (6) for a further fixed period of years, subject to clause (8)"*

Critically, Article 204 (8) provides:

> "Legislation *under clause (7)* ***shall be supported by more than half of all the members of the National Assembly and more than half of all the county delegations in the Senate****."* [Emphasis added]

These foregoing provisions provide that appropriations from the Equalization Fund are to be done through an Appropriation Bill considered and enacted by Parliament.

[149] Article 204 of the Constitution explicitly uses the term "***Parliament"*** rather than "National Assembly" when referring to the appropriation of the Equalization Fund. This distinction is significant, as it contrasts with other provisions on appropriation as envisaged in Article 114(3) which fall within the purview of a money Bill. The deliberate use of the broader term "Parliament" in Article 204(3)(a) and (4) suggests a bicameral legislative process, underscoring the argument that both Houses—the National Assembly and the Senate—must be involved in the appropriation of the Equalization Fund. This is so given that Article 93(1) stipulates that Parliament consists of both the National Assembly and the Senate.

[150] Furthermore, any doubt regarding the Senate's involvement in the enactment of the Equalization Fund Appropriation Act is dispelled by Article 204(8), which explicitly requires that any legislation under Article 204(7) seeking to extend the Fund's lifespan beyond twenty years must be supported by more than half of all members in both the National Assembly and the Senate.

[151] In addition, Article 204 establishes a distinct Fund aimed at enhancing county-level services by providing basic amenities such as water, roads, health facilities, and electricity to marginalized areas, functions that fall under the purview of counties. This is evidenced by Article 204(3)(b), which allows the National Government to utilize the Equalization Fund either directly or indirectly through conditional grants to counties where marginalized communities exist.

[152] Therefore, while on the surface, one might argue that the Equalization Fund Appropriation Act, No. 3 of 2018, meets the criteria of a money Bill under Article

114(3), given that it pertains to the appropriation of funds from national revenue, a closer examination reveals that the Equalization Fund differs from ordinary money Bills, which typically pertain to the National Government's budget. Article 204 creates a distinct Fund intended to benefit county-level services, hence bringing it squarely within the legislative ambit of the Senate.

[153] Given the foregoing, we affirm the finding by the Court of Appeal that the Senate ought to have been involved in the consideration and enactment of the Equalization Fund Appropriation Act, No. 3 of 2018. Therefore, the action of excluding the Senate from the enactment of the Equalization Fund Appropriation Act, No. 3 of 2018 was unconstitutional.

d) Whether Bills or subsidiary legislation touching on the mandate and power of the Parliamentary Service Commission should be considered by Senate

[154] In their cross-appeal before this Court, the 1st and 2nd respondents have challenged two aspects of the judgment of the Court of Appeal. First, that the Court of Appeal erred and exceeded its jurisdiction in making a finding that the Parliamentary Service Act, 2019 is unconstitutional, when the said Act was not one of the impugned statutes before the High Court. Second, that the Court of Appeal erred by upholding the declaration by the High Court that "*any Bill or delegated legislation that provides for, or touches on, the mandate or powers of Parliamentary Service Commission must be considered by the Senate as it directly affects the Senate's ability to undertake its constitutional mandate including its ability to consider bills that affect counties*".

[155] It is an uncontested fact that the question of the constitutionality of the Parliamentary Service Act, 2019 was not one of the issues raised in the pleadings

before the High Court, and neither did the High Court make a determination on the same. From the record, it is evident that the constitutionality of the statute arose for the first time in the judgment of the Court of Appeal, wherein, the latter determined at paragraph 178 of its judgment, that the Parliamentary Service Act, 2019 was unconstitutional.

[156] It is our considered view that the Court of Appeal conflated the Parliamentary Service Bill No. 6 of 2018 and the Parliamentary Service Act, 2019. At the time of presentation of the petition before the High Court on 18th July, 2019, the Parliamentary Service Bill No. 6 of 2018 was pending enactment. However, by the time the High Court judgment was delivered on 29th October, 2020, the Parliamentary Service Bill had received presidential assent on 16th October, 2019 and commenced on 18th October, 2019.

[157] A Bill and an Act are distinct legal instruments that require different causes of action because they exist at different stages of the legislative process and have different legal effects. A Bill is a proposed law that is still undergoing legislative scrutiny, subject to debate, amendments, and public participation before it can be enacted. At this stage, challenges to a Bill often focus on procedural irregularities, such as lack of public participation, violation of legislative processes, or failure to meet constitutional requirements before enactment. In contrast, an Act is a law that has been passed by Parliament and assented to by the President, making it legally binding and enforceable. Challenges to an Act typically focus on substantive constitutionality, questioning whether its provisions violate fundamental rights, exceed legislative authority, or contravene constitutional principles.

[158] On perusal of the judgment of the Court of Appeal, we note that the court was well aware of the change in circumstance. For instance in paragraphs 172 and 173 the Court acknowledges this change:

"172.In seeking to have this issue addressed by this court, in their Grounds Affirming the Decision, the 1st to 4th respondents sought orders for;

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

We have considered the complaint, and what we can discern is for consideration is, whether the Senate ought to have considered the Parliamentary Service Bill before its enactment because this affected its ability to undertake its constitutional responsibilities, and therefore it amounted to a bill concerning counties in terms of articles 109 to 114 of the Constitution and required its concurrence, or whether, the Senate's role in considering the Bill was limited merely to the submission of memoranda in the same way as members of the public, in order to satisfy the public participation requirement stipulated by the Constitution."

[159] This is further evidenced in the final orders by the Court of Appeal in paragraph 285(5) which does not make reference to either the Parliamentary Service Bill, 2019 or the Parliamentary Service Act, 2019. It reads as follows:

> ***"We hereby uphold the Declaration by the High Court that any Bill or delegated legislation that provides for, or touches on, mandate or powers of Parliamentary Service Commission must be considered by the Senate as it directly affects the Senate's ability to undertake its constitutional mandate including its ability to consider bills that affect counties;"***

[160] Further, there is a pending case before the High Court concerning the Parliamentary Service Act, 2019 being ***Okoiti vs. National Assembly & 3 others; Senate (Interested Party)*** (Petition E469 of 2022) challenging, among other things, its constitutionality on ground that Senate was excluded from the process of its enactment.

[161] Based on the foregoing, we find that the appellate court overstepped its jurisdiction by making pronouncements on broader issues not properly placed before it, by venturing into matters that were neither ripe for determination nor fully litigated by the parties.

[162] We are minded to heed our own caution against conflating the Parliamentary Service Bill No. 6 of 2018 and Parliamentary Service Act, 2019. Accordingly, we refrain from further comment as the matter is likely to eventually reach this Court by way of appeal. In the case ***Mohammed Mahamud Ali vs. Independent Electoral and Boundaries Commission***, SC Petition No 31 of 2018, [2019] eKLR, this Court held that questions entailing the interpretation and application of the Constitution must for good order and efficiency in the administration of justice commence at the High Court, with the effect that the interpretation of the Constitution by both the Court of Appeal and the Supreme Court are limited to the appellate stages. This stance was reiterated in ***Republic***

vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR).

[163] Pertaining to the concurrent declarations by the superior courts below that any Bill or delegated legislation affecting the mandate or powers of the Parliamentary Service Commission must be considered by the Senate as it directly impacts the Senate's ability to fulfill its constitutional mandate, including its role in considering bills that affect counties, we note that this issue is closely tied to the constitutionality of the Parliamentary Service Act, 2019. Indeed, resolving this question at this stage would, to a large extent, determine the outcome of the matter currently pending before the High Court and could prejudice the ongoing judicial process. We find it prudent that the High Court first adjudicates this issue within the context of the matter pending before it.

[164] Consequently, we partly allow the 1st and 2nd respondents' cross appeal to the extent that the Court of Appeal erred in making a determination on the constitutionality of the Parliamentary Service Act, 2019 despite the fact that it was not an issue for consideration before the High Court. As such, we find that the question of the constitutionality of the Parliamentary Service Act, 2019 was not properly before the Court of Appeal. The determination on the constitutionality of the statute should await ongoing court processes pending before the High Court.

vi. What reliefs should issue?

[165] In the preceding parts of this judgment, we have found that the Sacco Societies (Amendment) Act, 2018; Sections 3 and 4 of the KEMSA Act as amended by the Health Laws (Amendment)Act, No. 5 of 2019; and the Equalization Fund Appropriation Act, No. 3 of 2018 are unconstitutional for failure to involve the Senate in their consideration and enactment.

[166] We note that in; ***Cabinet Secretary for the National Treasury and Planning vs. Okoiti (supra)*** this Court signalled that when courts declare a particular provision or a statute as unconstitutional, it ought to consider going a step further to fashion remedies to suit the peculiar circumstances of each case. Bearing in mind that such a drastic declaration of invalidity would create a lacuna and uncertainty. Indeed, the High court was mindful of this situation when, in its discretion, it suspended the orders for a period of nine months. Back to the reasoning of this Court in the above case was predicated on the considered view that it was not enough to merely make a declaration of invalidity and leave it at that. In this context, suspension of invalidity is one such remedy that courts ought to consider in fashioning appropriate remedies. The Court proceeded in the same case at paragraph 241 to lay down considerations that a court ought to take into account when it is so minded to issuing a suspension of declaration of invalidity. These considerations are:

"

i. ***Suspension of invalidity is a remedy that ensures the just and equitable relief, while ensuring that there is no disruption to the regulatory aspects of the statutory provision that is invalidated.***
ii. ***The declaration of invalidity would result in a legal lacuna that would create uncertainty, administrative confusion or potential hardship.***
iii. ***Whether more injustice would flow from the legal vacuum created by rendering the statute invalid with immediate effect than would be the case if the measure were kept functional pending rectification.***
iv. ***Whether there are multiple ways in which the Legislature could cure the unconstitutionality of the legislation.***

v. ***The right in question will not be undermined by suspending the declaration of invalidity.***

vi. ***Whether the suspension would be in interests of justice and good government, that is, whether the declaration of invalidity causes more than an inconvenience but no go so far as to require the threat of total breakdown of government.***

vii. ***A court must balance the interests of the successful litigant in obtaining immediate constitutional relief and the potential of disrupting the administration of justice.***

viii. ***Whether there will be any countervailing considerations of hardship, prejudice or harm that would result from the continued operation of the statutes.***

ix. ***Period of suspension: under this, the court should consider the following: a. The government's conduct; b. Whether there is any legislation in the pipeline; and c. The nature and severity of the continuing infringement."***

[167] Applying the foregoing considerations to the statutes and statutory provisions we have held to be unconstitutional, we are of the view that were our orders of unconstitutionality to take effect immediately, they would cause undue hardship due to the resultant uncertainty and legal lacunae. We also note that our finding of unconstitutionality relates to the procedures for the enactment of the subject laws and not their substance, hence the danger of continued violation of rights is significantly diminished. Therefore, given these peculiar circumstances, we suspend the effect of unconstitutionality of the Sacco Societies (Amendment) Act, 2018 for a period of 18 months from the date of this judgment to give Parliament ample time to consider enacting legislation in a manner that conforms

to the constitutionally prescribed legislative process and for Senate to get the opportunity to have its input on the same.

[168] As to the finding of unconstitutionality of Sections 3 and 4 of the KEMSA Act as amended by the Health Laws (Amendment)Act, No. of 5 of 2019, and the Equalization Fund Appropriation Act, No. 3 of 2018 we do not see any unique hardship or circumstance that would justify suspension of the declaration of invalidity. Therefore, the declaration of invalidity for these provisions will take immediate effect.

E. COSTS

[169] Bearing in mind the circumstances of the matter at hand and the principles on the award of costs enunciated in ***Rai & 3 others vs. Rai & 4 others [2014] KESC 31 (KLR)***, we find that due to the public interest nature of this matter each party should bear their own costs.

F. ORDERS

[170] In the premise, we issue the following orders:

a) This Court's appellate jurisdiction under Article 163(4)(a) of the Constitution has been properly invoked by the appellants.

b) The 6th and 8th respondents cross appeal dated 8th March, 2022 is hereby struck out.

c) We uphold the following findings by the Court of Appeal:

i. The declaration by the Court of Appeal that the underlisted Acts passed by the National Assembly did not require consideration and enactment by the Senate hence are constitutional:

i) The Public Trustee (Amendment) Act, No. 6 of the 2018;
ii) The Building Surveyors Act, 2018, No. 19 of 2018;
iii) The Computer Misuse and Cybercrime, Act, No. 5 of 2018;
iv) The Statute Law (Miscellaneous Amendment Act), No. 4 of 2018;
v) The Kenya Coast Guard Service Act. No. 11 of 2018;
vi) The Tax Laws (Amendments) Act, No. 9 of 2018;
vii) The Statute Law (Miscellaneous Amendments) Act, No. 18 of 2018;
viii) The Supplementary Appropriation Act, No. 2 of 2018;
ix) The Finance Act, No. 10 of 2018;
x) The Appropriations Act, No. 7 of 2018;
xi) The Capital Markets (Amendments) Act, No. 15 of 2018;
xii) The National Youth Service Act No. 17 of 2018;
xiii) The Supplementary Appropriations Act, No. 13 of 2018;
xiv) The Health Laws (Amendment)Act, No. of 5 of 2019, save for the amendments made to sections 3 and 4 of the Kenya Medical Supplies Authority Act;
xv) The National Government Constituency Development Fund Act, 2015;
xvi) The National Cohesion and Integration (Amendment) Act, 2019;
xvii) The Statute law (Miscellaneous Amendment) Act, 2019;
xviii) The Supplementary Appropriation Act, No. 9 of 2019;
xix) The Appropriations Act, 2019; and,
xx) The Insurance (Amendment) Act, 2019;
xxi) The Sports (Amendment) Act, No. 7 of 2019.

ii. The declaration by the Court of Appeal that the underlisted Acts passed by the National Assembly are in contravention of Articles 96, 109, 110, 111, 112 and 113 of

the Constitution and are therefore unconstitutional, thus null and void;

i) ***The Equalization Fund Appropriation Act, No. 3 of 2018;***
ii) ***The Sacco Societies (Amendment) Act, 2018 No. 16 of 2018; and***
iii) ***The amendments made to section 3 and 4 of the Kenya Medical Supplies Authority Act by the Health Laws (Amendment)Act, No. of 5 of 2019.***

d) We suspend the declaration of invalidity of the Sacco Societies (Amendment) Act, 2018 for a period of 18 months from the date of this judgment.

e) The 1st and 2nd respondents' cross appeal dated 15th March, 2023 is allowed to the extent that the Court of Appeal erred in making a determination on the constitutionality of the Parliamentary Service Act, 2019 despite the fact that it was not an issue for consideration before the High Court. In other words, the question of the constitutionality of the Parliamentary Service Act, 2019 was not properly before the Court of Appeal.

f) For avoidance of doubt, any relief not expressly granted is hereby dismissed,

g) Each party will bear their own costs of the appeal and cross appeal.

h) We hereby direct that the security for costs deposited in the consolidated appeal be refunded to the depositor(s).

It is so ordered

DATED and **DELIVERED** at **NAIROBI** this **21st** day of **March, 2025.**

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

.....	.....
P.M. MWILU **DEPUTY CHIEF JUSTICE &** **VICE PRESIDENT OF THE** **SUPREME COURT**	**M.K. IBRAHIM** **JUSTICE OF THE SUPREME COURT**
.....	.....
S. C. WANJALA **JUSTICE OF THE SUPREME COURT**	**NJOKI NDUNGU** **JUSTICE OF THE SUPREME COURT**
.....	.....
I. LENAOLA **JUSTICE OF THE SUPREME COURT**	**W. OUKO** **JUSTICE OF THE SUPREME COURT**

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REGISTRAR
SUPREME COURT OF KENYA