REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Maraga (CJ &P), Ibrahim, Wanjala, Njoki & Lenaola SCJJ)

REFERENCE NO. 3 OF 2019

–BETWEEN–

COUNCIL OF GOVERNORS...1ST APPLICANT
THE COUNTY GOVERNMENT OF KAKAMEGA............2ND APPLICANT
THE COUNTY GOVERNMENT OF BUNGOMA...............3RD APPLICANT
THE COUNTY GOVERNMENT OF MURANG'A..............4TH APPLICANT
THE COUNTY GOVERNMENT OF TRANS NZOIA.........5TH APPLICANT
THE COUNTY GOVERNMENT OF WEST POKOT.........6TH APPLICANT
THE GOVERNMENT OF NAKURU.................................7TH APPLICANT
THE COUNTY GOVERNMENT OF TAITA TAVETA........8TH APPLICANT
THE COUNTY GOVERNMENT OF EMBU.......................9TH APPLICANT
THE COUNTY GOVERNMENT OF NYERI....................10TH APPLICANT
THE COUNTY GOVERNMENT OF MARSABIT............11TH APPLICANT
THE COUNTY GOVERNMENT OF SIAYA.....................12TH APPLICANT
THE COUNTY GOVERNMENT OF KISUMU.................13TH APPLICANT
THE COUNTY GOVERNMENT OF HOMA BAY............14TH APPLICANT
THE COUNTY GOVERNMENT OF BUSIA.....................15TH APPLICANT
THE COUNTY GOVERNMENT OF KILIFI....................16TH APPLICANT
THE COUNTY GOVERNMENT OF MACHAKOS..........17TH APPLICANT
THE COUNTY GOVERNMENT OF KITUI.....................18TH APPLICANT
THE COUNTY GOVERNMENT OF WAJIR....................19TH APPLICANT
THE COUNTY GOVERNMENT OF TURKANA.............20TH APPLICANT
THE COUNTY GOVERNMENT OF BARINGO...............21ST APPLICANT

THE COUNTY GOVERNMENT OF MOMBASA............22ND APPLICANT

THE COUNTY GOVERNMENT OF MANDERA............23RD APPLICANT

THE COUNTY GOVERNMENT OF GARISSA..............24TH APPLICANT

THE COUNTY GOVERNMENT OF ISIOLO..................25TH APPLICANT

THE COUNTY GOVERNMENT OF VIHIGA.................26TH APPLICANT

THE COUNTY GOVERNMENT OF NANDI...................27TH APPLICANT

THE COUNTY GOVERNMENT OF KIAMBU...............28TH APPLICANT

THE COUNTY GOVERNMENT OF KWALE.................29TH APPLICANT

THE COUNTY GOVERNMENT OF MIGORI................30TH APPLICANT

THE COUNTY GOVERNMENT OF NAROK..................31ST APPLICANT

THE COUNTY GOVERNMENT OF MARAKWET.........32ND APPLICANT

THE COUNTY GOVERNMENT OF THARAKA NITHI...33RD APPLICANT

THE COUNTY GOVERNMENT OF LAIKIPIA..............34TH APPLICANT

THE COUNTY GOVERNMENT OF SAMBURU............35TH APPLICANT

THE COUNTY GOVERNMENT OF LAMU....................36TH APPLICANT

THE COUNTY GOVERNMENT OF KAJIADO...............37TH APPLICANT

THE COUNTY GOVERNMENT OF NYANDARUA........38TH APPLICANT

THE COUNTY GOVERNMENT OF TANA RIVER.........39TH APPLICANT

THE COUNTY GOVERNMENT OF BOMET ....40TH APPLICANT

THE COUNTY GOVERNMENT OF KERICHO..............41ST APPLICANT

THE COUNTY GOVERNMENT OF KISII..................11.44ND APPLICANT

THE COUNTY GOVERNMENT OF KIRINYAGA........43RD APPPLICANT

THE COUNTY GOVERNMENT OF MAKUENI.............44TH APPLICANT

THE COUNTY GOVERNMENT OF NYAMIRA.............45TH APPLICANT

THE COUNTY GOVERNMENT OF NAIROBI CITY......46TH APPLICANT

THE COUNTY GOVERNMENT OF NYERI...................47TH APPLICANT

THE COUNTY GOVERNMENT OF UASIN GISHU......48TH APPLICANT

–AND–

THE HONOURABLE ATTORNEY GENERAL........INTERESTED PARTY

SPEAKER OF THE NATIONAL ASSEMBLY..........INTERESTED PARTY

CABINET SECRETARY,

NATIONAL TREASURY..INTERESTED PARTY

COMMISSION ON REVENUE ALLOCATION.......INTERESTED PARTY

KATIBA INSTITUTE...AMICI CURIAE

INSTITUTE FOR SOCIAL ACCOUNTABILITY................AMICI CURIAE

LAW SOCIETY OF KENYA..AMICI CURIAE

(Under Articles 1(1), 1(3), 1(4), 2(1), 2(3), 2(4), 3(1), 6,10, 73(1), 73(2), 74, 93, 94(1) &(2), 95, 96, 109, 110, 111, 112, 113, 114, 115, 116, 163(6), 174, 174, 185, 189, 201, 202, 203, 205, 206, 207, 217, 218, 219, 220, 221, 222, 223, 224, 226(5), 228(4),(5), 258, 259(1) and 259(11) of the Constitution of Kenya)

RULING ON A PRELIMINARY OBJECTION

A. INTRODUCTION

[1] This Reference is dated 15th July, 2019 and was filed by forty-seven County governments (herein *the Applicants*) seeking an Advisory Opinion, pursuant to Article 163(6) of the Constitution. The Applicants had initially sought an opinion on 14 issues which were later reframed to 8 issues by the Applicants on 29th July, 2019. The reframed issues are as follows:

a) *Whether the recommendations of the Commission on Revenue Allocation made under Articles 205 and 216(1) of the Constitution regarding the equitable share of revenue between "the national and county governments" are binding on "the Senate, National*

Assembly, the national executive, county assemblies and county executive;

b) *Whether the National Treasury and the National Assembly can formulate and publish a Division of Revenue Bill based on a share of revenue which is not based on the recommendations made by the Commission on Revenue Allocation and the criteria set out in Article 202 and 203(1) of the Constitution;*

c) *Whether the continued impasse in the enactment of the Division of Revenue Act undermines the objects of devolution and impedes county governments from executing their mandate under Article 186 as read together with the Fourth Schedule to the Constitution;*

d) *Whether the National Assembly can enact an Appropriation Act prior to enactment of a Division of Revenue Act;*

e) *Whether the failure by the National Assembly and the Senate to agree on the provisions of Division of Revenue Bill triggers a vote on account within the meaning of Article 222 of the Constitution;*

f) *Whether the Controller of Budget can approve withdrawal of funds from the Consolidated Fund and County Revenue Fund in accordance with Article 206(4) and 207 of the Constitution in the absence of a Division of Revenue Act for each financial year;*

g) *Whether the National Treasury and Parliament can allocate funds in the national government budget for functions exclusively reserved* *for county governments except as provided for in Article 206 (2) of the Constitution;*

h) *What is the reasonable period for release of the equitable share of the revenue to county governments envisaged by Article 219 of the Constitution;*

[2] The Applicants' Reference is supported by an affidavit sworn by Hon. Wycliffe Ambetsa Oparanya on 26th July, 2019 as the Governor of Kakamega County, one of the Applicants.

[3] On 19th July, 2019, the Speaker of the National Assembly, filed a Notice of preliminary objection dated 18th July, 2019 on the grounds that;

a) *The Applicants seek an interpretation of various constitutional and statutory provisions, matters falling within the High Court of Kenya's jurisdiction under Article 165(3) (b) and (d) of the Constitution of Kenya;*

b) *That the issues raised in the Reference are subject of pending proceedings before the High Court of Kenya, namely;*

(a) Nairobi High Court Petition No. 277 of 2017, Wanjiru Gikonyo v The Attorney General & Others;

(b) Nairobi High Court Petition No. 252 of 2016, Council of County Governors v The Attorney General & Others;

(c) ***Nairobi High Court Constitutional Petition No. 284 of 2019, The Senate of Kenya & 3 Others v The National Assembly of Kenya & Another;***

c) *That the county governments have not exhausted the mechanism set out in Article 189(3) of the Constitution, of making every reasonable effort to resolve any dispute before resorting to judicial proceedings.*

d) *That the Applicants have not demonstrated that they sought the advice of the Attorney General as stipulated in Rule 41(4)(c) of the Supreme Court Rules, 2012.*

[4] In response to the preliminary objection, the Applicants filed submissions dated 18th July, 2019. Other parties herein also submitted on the question of this Court's jurisdiction.

[5] We note that the question of the revenue to be allocated to counties for the financial year 2019/2020 was settled by a joint Mediation Committee set up pursuant to Article 113 and so the issue of an impasse in revenue allocation is now moot to that extent only.

B. PARTIES' SUBMISSIONS

i. The Speaker of the National Assembly

[6] The Speaker of the National Assembly submits that where the issue of jurisdiction has been raised before a Court or Tribunal, a determination on the same has to be made *in limine*. It is further submitted that the jurisdiction to render advisory opinions as set out under Article 163(6) of the Constitution has been exhaustively determined, with the guidelines in the exercise of this Court's jurisdiction in determining advisory opinions having been set out in ***In the***

Matter of Interim Independent Electoral Commission Constitutional, Application No. 2 of 2011.

[7] The Speaker also urges that the instant Reference concerns the interpretation of various statutory and constitutional provisions, a matter that falls within the purview of the High Court under Article 165(3)(b) & (d). On this point, he submitted that the Reference raises justiciable questions as to whether an act or omission done under the authority of the Constitution is in violation of the Constitution, challenges the constitutionality and legality of decisions made by constitutional bodies, namely, National Assembly and the Treasury, and challenges the constitutionality of statutes passed by the National Assembly on the ground that the Senate was not involved in passing the same.

[8] While citing this Court's decisions in ***In the Matter of Interim Independent Electoral Commission Constitutional Application No. 2 of 2011;*** [2011] eKLR and ***Harun Mwau & 2 Others v Independent Electoral and Boundaries Commission & Others*** (2017) eKLR, the Speaker of the National Assembly submitted that the issues raised in the Reference are also subject of several pending proceedings before the High Court and therefore prematurely before this Court.

[9] On the question as to whether an advisory opinion is the right process to challenge the constitutionality of statutes, actions or omissions, the Speaker of the National Assembly relied on this Court's decision in ***Speaker of the Senate and another v The Attorney General and 4 others, Advisory Opinion No.2 of 2013;*** [2013] eKLR, where we stated that there should be a safeguard against improper transformation of normal disputes issues from ordinary litigation in advisory opinion causes.

[10] The Speaker in addition has submitted that Article 189(3) & (4) of the Constitution as well as Section 31 of the *Intergovernmental Relations Act (IRA*) provide in mandatory terms, that county and national governments are required to make every reasonable step to settle disputes between them, before resorting to judicial proceedings. He further argued that under Part IV of the said Act, the national and county governments are to resolve disputes amicably through alternative dispute resolution under it, or any other legislation before resorting to judicial processes as contemplated in Sections 30 and 31 of the same Act.

[11] It is also submitted that the Reference does not serve the public interest, or the principles of good governance and accountability, and is a waste of public resources in engaging in litigation on issues which could be amicably resolved through alternative mechanisms.

[12] Finally, he urged that this Court should decline jurisdiction and allow the mechanisms provided in the Intergovernmental Relations Act to be exhausted first.

ii. The Attorney General and the Cabinet Secretary National Treasury.

[13] On the competence of the Reference, the Attorney General's position is that the Reference is *completely incompetent*. According to him, Article 163(6) of the Constitution provides that a reference for an advisory opinion may only be presented to this Court by the national government, a state organ or a county government and that the Applicants did not justify the inclusion of certain institutions such as Katiba Institute, the Institute for Social Accountability and the Law Society of Kenya in the Reference. Further, that these parties can only be properly included as parties to the Reference upon application to the Court and the

Court being satisfied that they are relevant parties that ought to be allowed to make representations on the questions as framed by the Court.

[14] While citing Article 163(6) of the Constitution and this Court's decision in Advisory Opinion Application No.2 of 2012 ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*** (2012) eKLR, the Attorney General and Cabinet Secretary, Treasury urge that the Reference contains justiciable questions that ought to be presented to the High Court for determination in the first instance**.** The Reference, it was argued, includes questions that are already before the High Court for determination in the High Court Petition No.227 of 2019 ***Wanjiru Gikonyo v Attorney General & Others*** and High Court Petition No.280 of 2017 ***Council of County Governors v Lake Basin Development Authority & 6 others.***

[15] They conclude by submitting that the Reference raises questions that have already been dealt with by this court in previous matters. Specifically, they urge that the questions raised at paragraphs 4.21 and 4.22 of the Reference have already been addressed by this court in ***Advisory Reference No.2 of 2013 Speaker of the Senate & another. v AG & 4 others*** (2013) eKLR. Similarly, the question at paragraph 4.25 on whether an advisory opinion of this Court is binding on the National Assembly and the National Treasury has been dealt with by this Court in Constitutional Application No.2 of 2011 ***In the Matter of Interim Independent Electoral Commission (2011)*** eKLR and thus should not take the Court's time.

iii. The Speaker of the Senate

[16] The Speaker of the Senate on his part urges that the Reference is properly before this Court pursuant to Articles 1(1); 2 (1), (2) and (4); 3(1), 6(1); 10; 93(1);

94 (1), (2) and (5); 110(1), (3), (4); 159; 185(2); 186(1); 187(2); 202; 205; 218; 22; and 224 of the Constitution.

[17] *On jurisdiction*, the Speaker of the Senate opposes the Preliminary Objection and submits that this Court has jurisdiction, under *Article 163 (6)* of the Constitution, to give an advisory opinion at the request of the national government, any State organ or any county government with respect to any matter concerning county governments. The Speaker anchors his submission on this Court's decision in ***the Matter of Interim Independent Electoral Commission*** [2011] eKLR. In that regard**,** the Speaker of the Senate submits that the issues for interpretation of the Constitution in the present Reference, include the parameters applicable to the *Annual Division of Revenue Act*, which Act is the precursor for counties to prepare their budgets and appropriation Bills. He maintains that the foregoing question concerns county governments, as the current situation poses a grave threat to all Counties, more so, the lack of equitable share of revenue as required in the Constitution.

[18] The Speaker of the Senate further submits that the issues before this Court are of great public importance and require urgent resolution through an Advisory Opinion. The Speaker urges that arguments made against the Reference, specifically that there are pending proceedings in courts below, ignore the public interest and urgency of the Reference. Furthermore, that the delay in passing the Division of Revenue Bill will bring the functions and obligations of County governments to a halt for lack of funds, and that it would take a long time to determine any such pending matters.

[19] While submitting on the contention by the National Assembly that the jurisdiction of this Court should be ousted on the grounds that the parties have not sought the advice of the Attorney General on this issue, the Speaker of the Senate urges that, by a letter dated 9th July 2019, the Office of the Attorney General sought the advice of the National Treasury, the National Assembly and the Senate in response to a letter dated 3rd July 2019 where the Executive had taken the view that without a Division of Revenue Act and a County Allocation of Revenue Act, it would be unconstitutional for the national government to appropriate funds.

[20] The Speaker of the Senate therefore submits that considering the Office of the Attorney General's call for advice from the National Treasury, the National Assembly and the Senate, the jurisdiction of this Court is properly invoked and that this Court is the only and proper forum to advice the concerned state organs on the constitutional issues raised.

iv. Commission on Revenue Allocation (CRA)

[21] In response to *the Preliminary Objection* filed by the National Assembly, the CRA submits that the same is at variance with the provisions of Article 159 of the Constitution and urges the Court to have it dismissed. CRA cites this Court's decisions in the cases of ***National Bank of Kenya Limited v Anaj Warehousing Limited, SC Petition No. 36 of 2014;*** [2015] eKLR and ***Speaker of the Senate & another v Attorney General & 4 others, SC Adv. Ref. No. 2 of 2013;*** [2013] eKLR. However, they urge the Court to depart from its decision in ***the Matter of the Interim Independent Electoral and Boundaries Commission, SC Const. Appl. No. 2 of 2011;*** [2011] eKLR terming it as erroneous for negating the jurisdiction of the Court under Article 163(4) of the Constitution, fettering the discretionary jurisdiction of the apex Court contrary to the decision of this Honourable Court in the case of ***Parliamentary Service Commission v Martin Nyaga Wambora & others , SC. Appl. No. 8 of 2017*****;** [2018] eKLR and limiting the capacity of this Court to exercise its discretion in giving clarity in areas outside the domain of County governments during the implementation of the Constitution.

v. Katiba Institute and Institute for Social Accountability

[22] On this Court's jurisdiction to entertain this Reference, Katiba Institute and the Institute for Social Accountability jointly submit that although the Court has the jurisdiction to offer advisory opinion, that jurisdiction is discretionary because of the wording in Article 163[6]. They thus urge that this Court has the discretion to decline to exercise this jurisdiction. In that context, they cite this Court's decisions in ***In the Matter of the Interim Independent Electoral Commission*** [2011] eKLR and ***Peter Oduor Ngoge v Francis Ole Kaparo & 5 Others*** [2012] eKLR where this Court found that it would exercise discretion to offer advisory opinion where there is "any national-level process bearing a significant impact on the conduct of a county government" and where, in the court's appellate jurisdiction, there are cardinal issues of law or of jurisprudential moment which deserve the further input of the Supreme Court. They therefore, urge that the dispute before this Court represent national level processes, particularly, passage of legislation and county financing that undoubtedly impact on county governments. They also urge that the participation of the Commission of Revenue Allocation and the Senate in the division of funds raised nationally between county and national governments is a national level process in which this Court may exercise its jurisdiction to offer an advisory opinion.

[23] As to whether the Reference creates a jurisprudential moment, the two Institutes submit that is a jurisprudential moment in the sense that the Constitution never anticipated a situation, whereby the National Assembly and the Senate would fail to agree on the Division of Revenue Bill. The two Institutes also submit that due to the limited time within which the Division on Revenue Bill needs to be approved, it will not be prudent to have the dispute settled by the High Court first before coming to this Court through the normal appellate process.

[24] They also urge that the 47 Counties have properly invoked this Court's jurisdiction and urge that the crisis resulting from the failure to pass the Division of Revenue Bill 2019/2020 presents a threat to devolution, and as such engages the subject matter jurisdiction of this Court in its advisory role.

C. ANALYSIS

[25] The prime issue for determination at this stage is *whether this Court has jurisdiction, and whether it should exercise and render an advisory opinion* as sought;

[26] The National Assembly's main argument in the preliminary objection is that this Court has no jurisdiction to entertain the Reference as filed. In that regard, we note that this Court's jurisdiction to issue advisory opinions is anchored in the Constitution as Article 163(6), stipulates that:

> ***"The Supreme Court may issue an advisory opinion at the request of the national government, any state organ, or any county government with respect to any matter concerning county government"***.

[27] Further, on this Court's jurisdiction to offer advisory opinions, the Supreme Court Act, 2011 (Act No. 7 of 2011) provides in Section 13 as follows:

> "***An advisory opinion by the Supreme Court under Article 163(6) of the Constitution shall contain the reasons for the opinion and any judges who differ with the opinion of the***

> ***majority shall give their opinions and their respective reasons***".

[28] Furthermore, the Rules of the Supreme Court also provide for the exercise of this jurisdiction. Rule 41 thus states:

> ***"The National government, a state organ or county government may apply to the Court by way of reference for an advisory opinion under Article 163(3) of the Constitution***".

[29] In several of this Court's decisions, we have emphasized that the exercise of this Court's jurisdiction in Article 163(6) of the Constitution is discretionary and only deserving matters will justify the exercise of such jurisdiction. For instance, in the ***Matter of the Principle of Gender Representation in the National Assembly and the Senate,*** Advisory Opinion No. 2/2012; [2012] eKLR, **(the *Matter of the National Gender and Equality Commission***) we observed as follows:

> ***"[17] In the earlier Advisory-Opinion matter, this Court had elected to proceed with caution in such cases. Only a truly deserving case will justify the Court's Advisory Opinion, as questions amenable to ordinary litigation must be prosecuted in the normal manner; and the Supreme Court ought not to entertain matters which properly belong to first-instance-Court*** **litigation.** ***Only by due deference to the assigned jurisdiction of the different Courts, will the Supreme Court rightly hold to its mandate prescribed in section 3(c) of the Supreme Court Act, 2011 (Act No. 7 of 2011), of developing 'rich jurisprudence***

that Kenya's history and traditions and facilitates its social, economic and political growth.

***[18] The Supreme Court must also guard against improper transformation of normal dispute-issues for ordinary litigation, into Advisory-Opinion causes*: as the Court must be disinclined to take a position in discord with core principles of the Constitution, in particular, a principle such as the *separation of powers*, by assuming the role of general advisor to Government".** [Emphasis added]

[30] The criteria for determining whether a matter is properly before this Court was also set by this Court in ***Re Matter of the Interim Independent Electoral Commission,*** Sup. Ct. Constitutional Application 2 of 2011 in which we rendered ourselves as follows:

"[83] With the benefit of the submissions of learned counsel, and of the comparative assessments recorded herein, we are in a position to set out certain broad guidelines for the exercise of the Supreme Court's Advisory-Opinion jurisdiction:

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

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

(iii) ***The Court will be <u>hesitant to exercise its discretion to render an Advisory Opinion where the matter in respect of which the reference has been made is a subject of proceedings in a lower Court.</u> However, where the Court proceedings in question have been instituted after a request has been made to this Court for an Advisory Opinion, the Court may if satisfied that it is in the public interest to do so, proceed and render an Advisory Opinion.***

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

> ***"[84] The foregoing guidelines coincide with our conviction that the plain terms of the Constitution should be read in the broader context of its spirit and philosophy; and on that basis, applications seeking Advisory Opinion shall be resolved as necessitated by the merits of each case. In view of the practical and legal constraints attendant on Advisory Opinions, this Court will, in principle, exercise that jurisdiction with appropriate restraint".***

[31] In **the *Matter of the National Gender and Equality Commission*,** this Court emphasized that the *locus standi* of an applicant and the *subject matter* of a reference are the two paramount considerations although other factors may be considered on a case by case basis.

[32] Having therefore considered the above expressions of the law as well as the provisions of Article 6 and the 1st Schedule of the Constitution, it is no doubt that the Applicants(2 – 48) are County governments, hence are qualified to seek an advisory opinion from this Court.

[33] As to whether this matter concerns county governments, we have interrogated the Applicant's reframed issues for an advisory opinion and are of the finding that the issues raised involve matters concerning county governments, namely, the formulation, publication of the Division of Revenue Bill, the reasonable period for release of the equitable share of the revenue to county governments among others and also what happens when both houses of parliament fail to agree on a Division of Revenue Bill. In ***Speaker of the Senate & another v Attorney-General & 4 others;*** Advisory Ref. o. 2 of 2013; [2013] eKLR, we found that a Division of Revenue Bill provides for sharing of revenue that is collected nationally between the two levels of governments and therefore, significantly impacts on county governments. We specifically stated as follows:

> ***[32]… "Now in the case of the Division of Revenue Bill (now an Act), it makes provision for the division of revenue that is* nationally collected*, and for its* sharing between the two levels of government. *It certainly has a* significant impact on the county governments. *We hold, in the circumstances, that the Reference herein properly falls under Article 163(6) of the Constitution, as a "matter that concerns county governments…***
>
> ***[34] It emerges that a matter qualifies to be regarded as one of county government only where: that is the case* in the terms of the Constitution*; it is the case* in the terms of statute law; *it is the case in* the perception of the Court*, in view of the function involved or the relation created as between the national government and its processes, on the one hand, and the county governments and their operations, on the other. In the last instance, the Court will conscientiously consider the relationship between the two units as this emerges from* the governance operation in question*, or from any pertinent* scenarios of fact".** [*Emphasis added*]

[34] Does the Reference raise issues that are live before the High Court? If the answer is in the affirmative, have the Applicants demonstrated that the issues raised in the Reference are of great public importance and require urgent resolution through an Advisory Opinion? On this point, the Speaker of the National Assembly alleges that the issues being raised in the reference are subject to pending proceedings before the High Court of Kenya in Nairobi High Court Petition No. 277 of 2017 ***Wanjiru Gikonyo v The Attorney General & Others***, Nairobi High Court Petition No. 252 of 2016 ***Council of County Governors v The Attorney General & Others*** and Nairobi High Court

Constitutional Petition No. 284 of 2019 ***The Senate of Kenya & 3 Others v The National Assembly of Kenya & another***. This position was also taken by the Attorney General, the Cabinet Secretary Treasury, Katiba Institute and the Institute for Social Accountability. Katiba Institute and the Institute for Social Accountability have on their part proposed that this Court should regroup issues so that those that are not pending before any court can be determined in this Reference. Although the Speaker of the Senate does not out rightly dispute the above position *that there are pending proceedings before the High Court*, he urges that the Reference raises urgent issues namely the division of revenue between the two levels of government for the financial year 2019/2020 and that further delays will bring the functions and obligations of County governments to a halt and that it would take a long time to have issues raised herein determined before the High Court. In that regard, none of the parties have annexed copies of the said petitions for us to peruse but we have nonetheless perused the Court records and note as follows;

i. In High Court Petition No. 252 of 2016 ***Senate & 3 others v Speaker of the National Assembly & 3 others***, the issues pending for determination are;

   (a) Whether the allocation of conditional grants in the Division of Revenue Act 2016 is made in accordance with Article 202(2) of the Constitution;

   (b) Whether an accounting officer of the national government can spend money for conditional grants directly in the counties to undertake devolved functions;

   (c) Whether an accounting officer of the national government can spend money on conditional grants directly in the counties to undertake devolved functions without the execution of an inter-governmental agreement under Article 187 of the Constitution;

(d) *What is the scope of the inter-governmental agreement under Article 187 of the Constitution;*

(e) *What is the meaning of 'national interest' as a criterion for revenue allocation as per Article 203(1) (a) of the Constitution;*

(f) *Whether 'national interest' means the interest of the national government and not of the county governments;*

(g) *Whether an allocation for 'national interest' should be made to the national government of functions that are not devolved;*

(h) *Whether the funds for 'national interest' ought to be allocated exclusively to the national government;*

(i) *Whether the national government can use funds for 'national interest' directly to undertake devolved functions; and*

(j) *Whether national government has a constitutional obligation to disburse to counties, as conditional or unconditional grants, money allocated as 'national interest' that are earmarked for devolved functions.*

ii. In High Court Petition No. 277 of 2019 ***Wanjiru Gikonyo v Attorney General & 8 others***, the issues pending for determination are;

(a) *Whether the passage and assent of the Appropriation Bill 2019 without incorporation and/or inclusion of the Division of Revenue Bill 2019 is illegal and unconstitutional since the process under Article 218 and 221 of the Constitution are to be conducted within the same time frames;*

(b) *Whether devolution is entirely dependent on vertical sharing of revenues in the absence of which it is not possible for the counties to deliver on their mandate and services; and*

(c) *Whether the passage of the Appropriation Bill 2019 in the absence of a Division of Revenue Act is unlawful and any action done* *under the Appropriation Act 2019 is unlawful because its enactment was done in an unlawful manner contrary to the Constitution and that it undermines the national values and principles to uphold the rule of law and contravenes the public finance principles under Article 201(1) of the Constitution.*

iii. In High Court Petition No. 284 of 2019 ***Senate & 3 others v Speaker of the National Assembly & 3 others***, the issues pending for determination are;

(a) *Whether a Speaker of a House of Parliament must first seek the concurrence of the Speaker of the other House of Parliament as to whether a bill is one that concerns counties, and if it is, whether it is a special or an ordinary bill, before the bill can be introduced for consideration in the originating House;*

(b) *Whether it is mandatory and a condition precedent for any bill that is published by either House to be subjected to a joint concurrence process to determine, in terms of Article 110(3) of the Constitution, whether the bill is a special or ordinary bill and that such determination is not dependent on a question arising as to whether the bill concerns counties;*

(c) *Whether the provisions of Article 110(3) are couched in mandatory terms and is a condition precedent before any House of Parliament can consider a bill;*

(d) *Whether a Speaker can unilaterally make a decision as to whether a bill does or does not concern counties and whether a question as to whether the bill is one that concerns counties does or does not arise;*

(e) *Whether any bill or delegated legislation that provides for, or touches on, the mandate or the 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;

(f) *Whether the Appropriation Bill 2019 is unconstitutional, null and void for violating the provisions of Articles 110(3), 218 and 222 of the Constitution;*

(g) *Whether Articles 3, 115, 131(2) and 259 of the Constitution impose a constitutional and legal obligation on both Speakers of Parliament, prior to submitting a bill for assent, must demonstrate compliance with the procedure set out under Articles 109 to 115 of the Constitution;*

(h) *Whether Standing Order 143(2) to (6) of the National Assembly Standing Orders are inconsistent with the legislative process of bills concerning counties set out in Articles 109(4), 110 to 113, 122 and 123 of the Constitution and therefore null and void;*

(i) *Whether where Speakers of both Houses 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;*

(j) *Whether or not it is a money bill where the contents of a bill affect the functions and finances of a county within the meaning of Article 114(3) of the Constitution;*

(k) *Whether where a bill deals with financial matters and such matters affect the finances and functions of county governments pursuant to Article 110(1) (c), the bill is a bill concerning county governments and must be considered by Senate; and* *(l)* *Whether an act of Parliament constitutes an act that has complied with the legislative process required by both Houses by participation of both Speakers as required under Article 110(3) of the Constitution and the bill concerns counties by consideration in the Senate as required in the Constitution.*

[35] Are there issues before the High Court which are replicated in the Reference? Having perused the relevant High Court files, we note that there are four (4) issues in the Applicants' Reframed issues that are replicated and are presently pending hearing and determination before the High Court;

1. Issues (b) and (d) in High Court Petition No. 277 of 2019 ***Wanjiru Gikonyo v Attorney General & 8 others***;

   (b) *Whether the National Treasury and the National Assembly can formulate and publish a Division of Revenue Bill based on a share of revenue which is not based on the recommendations made by the Commission on Revenue Allocation and the criteria set out in Article 202 and 203(1) of the Constitution.*

   (d) *Whether the National Assembly can enact an Appropriation Act prior to enactment of a Division of Revenue Act.*

2. Issues (f) and (g) in High Court in High Court Petition No. 252 of 2016 ***Senate & 3 others v Speaker of the National Assembly & 3 others***;

   (f) *Whether the Controller of Budget can approve withdrawal of funds from the Consolidated Fund and County Revenue Fund in accordance with Article 206(4) and 207 of the Constitution in the absence of a Division of Revenue Act for each financial year.*

   (g) *Whether the National Treasury and Parliament can allocate funds in the national government budget for functions exclusively reserved*

for county governments except as provided for in Article 206 (2) of the Constitution.

How should this Court deal with those issues?

[36] We have previously determined, in National ***Land Commission v Attorney General & 6 others, Reference no. 2 of 2014;*** [2014] eKLR, that when exercising its advisory opinion jurisdiction, it proceeds on a case-by-case basis, analyzing the subject matter of the reference, as indicated by the public interest. In ***the Matter of the Principle of Gender Representation in the National Assembly and the Senate,*** Advisory Opinion No. 2 of 2012; [2012] eKLR, we determined that the said Reference related to a matter of general public interest, as it attracted a good number of persons and organizations seeking joinder. This reference has equally attracted several participants and it involves the question of division of revenue between the two levels of governments responsible for discharging services to citizens throughout the country.

[37] As to whether the issues raised herein are of general public importance and deserving of this Court's advise, despite certain issues being live before the High Court, we agree that the issues raised in the Reference herein are of general public importance hence deserving of this Court's exercise of discretion to offer an opinion. This is what this Court found in ***Re the Principle of Gender Representation***, (para.19) when it stated thus:

> ***"The Court recognizes, however, that its <u>Advisory Opinion is an important avenue for settling matters of great public importance</u> which may <u>not be suitable for conventional mechanisms of justiciability</u>... The realization of such a devolved governance scheme raises a variety of structural, management and operational challenges unbeknown to traditional dispute settlement. This is the typical situation***

in which the Supreme Court's Advisory-Opinion jurisdiction will be most propitious; and where such is the case, an obligation rests on the Court to render an opinion in accordance with the Constitution" [*emphasis supplied*].

[38] This Court has in that context previously exercised its advisory opinion jurisdiction in ***The Speaker of the Senate***, for the public interest. We are also persuaded by the submissions by the Speaker of the Senate that certain issues being raised herein cannot await the normal appeal mechanism so as to reach this Court. This Court therefore will exercise its discretion to render an opinion as prayed, but in terms that shall be explained in directions to follow.

[39] We consequently make specific Orders in the following terms:

(a) The preliminary objection dated 18th July, 2019 is hereby disallowed.

(b) Direction on the specific issues to be addressed by parties in submissions shall be given by Deputy Registrar to the parties on 16th October 2019.

(c) There shall be no orders as to costs.

[40] Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **8th** day of **October 2019.**

....	....
D.K. MARAGA **CHIEF JUSTICE & 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

I certify that this is a true copy of the original

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