

**MEMO**

*RT Hon Speaker  
Forwarded for your approval  
19/03/15*

*Approved  
19/3/15*

To : **The Speaker Clerk**  
Thro' : The Clerk  
From : Director, Committee Services  
Date : 19<sup>th</sup> March, 2015

**SUBJECT: REPORT OF THE SENATE STANDING COMMITTEE ON FINANCE, COMMERCE AND BUDGET ON THE MATTER OF CEILINGS ON RECURRENT EXPENDITURE FOR THE FY 2014/15.**

The Standing Committee on Finance, Commerce and Budget, would wish to table its report on the operations of the Makueni County Assembly.

This is to request for your approval for tabling of the report.



**Njenga Njuguna**

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ELEVENTH PARLIAMENT – THIRD SESSION

STANDING COMMITTEE ON FINANCE, COMMERCE AND BUDGET

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REPORT ON THE STATUS OF FINANCIAL ALLOCATION TO COUNTIES BY  
THE COMMISSION ON REVENUE ALLOCATION- THE MATTER OF  
CEILINGS ON RECURRENT EXPENDITURE FOR THE FY 2014/15  
PURSUANT TO A STATEMENT BY SEN. HASSAN OMAR, MP

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PARLIAMENT BUILDINGS  
NAIROBI

March, 2015

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## **PREFACE**

**Mr. Speaker Sir**, on behalf of the Members of the Standing Committee on Finance, Commerce and Budget and pursuant to Standing Order 203(6) of the Senate, I hereby present to this House, the Committee Report on the Status of budget ceilings on recurrent expenditure for governments at the county level for the FY 2014/2015 by the Commission on Revenue Allocation.

In deliberating on this matter the Committee has met with the following stakeholders; the County Assembly Speaker's Forum, the Controller of Budget, the Transitional Authority and the Commission on Revenue Allocation.

### **Mr. Speaker Sir,**

The Standing Committee on Finance, Commerce and Budget is established pursuant to Standing Order No. 208 and is mandated, to investigate, inquire into and report on all matters relating to coordination, control and monitoring of the county budgets and to:

- i) Discuss and review the estimates of County governments and make recommendations to the Senate;
- ii) Examine the Medium term Budget Policy Statement presented to the Senate;
- iii) Examine and report on the Budget allocated to constitutional commissions and independent offices;
- iv) Examine bills related to the Counties;
- v) Examine the Budget, including the Division of Revenue Bill; and
- vi) Examine and consider all matters related to resolutions and Bills for appropriations, share of national revenue amongst the counties and all matters concerning the National Budget, including public finance, monetary policies and public debt, trading activities and commerce, tourism, investment and divestitures policies, planning and development policy.

### **Mr. Speaker Sir,**

The Committee was constituted by the House on Thursday 13<sup>th</sup> March 2014 during the Second Session of the Eleventh (11<sup>th</sup>) Parliament and as currently constituted, comprises the following members:

1. The Hon. Sen. Billow Kerrow, MP. -Chairperson
2. The Hon. Sen. Peter Ole Mositet, MP. -Vice-Chairperson
3. The Hon. Sen. G. G. Kariuki, EGH, MP.
4. The Hon. Sen. Moses Wetang'ula, EGH, MP.

5. The Hon. Sen. Beatrice Elachi, CBS, MP.
6. The Hon. Sen. Mutahi Kagwe, EGH, MP.
7. The Hon. Sen. Boni Khalwale, MP.
8. The Hon. Sen. (Prof.) Peter Anyang' Nyong'o, EGH, MP.
9. The Hon. Sen. (Dr.) Zipporah Kittony, MP.
10. The Hon. Sen. James Mungai, MP.
11. The Hon. Sen. Catherine Mukiite Nabwala, MP.
12. The Hon. Sen. Mutula Kilonzo Junior, MP.
13. The Hon. Sen. (Prof.) John Lonyangapuo, CBS, MP.
14. The Hon. Sen. Paul Njoroge Ben, MP.
15. The Hon. Sen. (Dr.) Wilfred Machage, MGH, MP.
16. The Hon. Sen. ( Dr.) Agnes Zani, MP

Standing Order 45 (2) of the Senate Standing Orders provides that a Senator may request for a statement from a Committee Chairperson relating to matters under the mandate of the Committee. At a sitting of the Senate held on Wednesday 5<sup>th</sup> March 2015, Sen. Hassan Omar Hassan, M.P., requested for a Statement from the Chairperson of the Standing Committee on Finance, Commerce and Budget on the status of financial allocation to counties by the Commission on Revenue Allocation (CRA).

**Mr. Speaker Sir,**

It is significant to mention that the purpose of this report is to inform the House on the happenings as regards to ceilings on recurrent expenditure for County Governments for the FY 2014/2015 issued by the CRA.

**ACKNOWLEDGEMENT**

**Mr. Speaker Sir,**

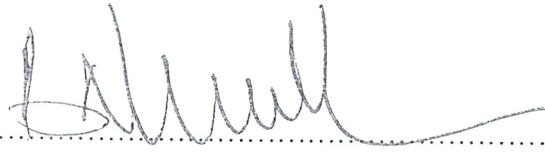
The Committee is grateful to all the stakeholders who appeared to the Committee to make presentation and respond to matters raised.

The Committee is also particularly grateful to the Offices of the Speaker, the Clerk of Senate for the support received as it discharged its mandate. I wish to thank the Senators who participated in the process of ensuring that the Committee completes its report.

**Mr. Speaker Sir,**

On behalf of the Committee, and pursuant to Standing Order 201(6), it is therefore my pleasant and honourable duty to present and lay on the table of the House the report of the Committee on Finance, Commerce and Budget regarding the status of ceilings on recurrent expenditure for the FY 2014/15

SIGNED: .....



**CHAIRPERSON -SEN. BILLOW KERROW**

DATE: .....

19/03/2015



## I. INTRODUCTION

### Mr. Speaker

At a sitting of the Senate held on Wednesday 5<sup>th</sup> March 2015, Sen. Hassan Omar Hassan, M.P., requested for a Statement from the Chairperson of the Standing Committee on Finance, Commerce and Budget on a report on the status of financial allocation to counties by the Commission on Revenue Allocation (CRA). In the Statement, the Senator sought to know whether the Chairman of the Committee is aware of the following:

- a) That, a number of County Assemblies are grinding to a halt in operations and are unable to pay their members and staff because of the budget ceiling imposed by CRA;
- b) That, the Controller of Budget has refused to finance County Assemblies unless they comply with the said ceilings;
- c) That, the High Court has ruled on the matter and though dismissing the petition by county Assemblies, the court has determined that the ceilings by CRA are not binding and can only be binding if the said ceilings are approved by Parliament;
- d) That, the ceilings are just a recommendation as determined by the court;
- e) That, the Controller of Budget is sending County Assemblies to negotiate with CRA to vary the ceilings even though the court has placed that mandate on Parliament;
- f) That, some proposed ceiling by CRA last year and the figures proposed this financial year are irreconcilable, putting into doubt the modalities and criteria used to arrive at the said ceilings; as an example, the CRA proposed a ceiling of Ksh. 191million for Tana River County Assembly last financial year and Ksh. 398 million this financial year; and,
- g) What the National Treasury is doing to ensure that the Controller of Budget releases funds to the County Assemblies on the basis of their Appropriation Acts to allow them perform their constitutional and statutory mandates.

In addition, the Speaker, Makueni County Assembly wrote to the committee vide his letter dated 3<sup>rd</sup> December, 2014 bringing to the attention of the committee concerns on financial allocation to the assemblies and challenges counties reportedly face on cash flow.

The County Assembly Forum also sought a meeting with the Committee on 24<sup>th</sup> February, 2015, and drew the attention of the Senate similar concerns. In particular, they stated that the court had ruled that budget ceilings set by the

CRA on the Assemblies were not binding, and hence urged the Senate to give appropriate direction to Controller of Budget to release their funds based on the respective appropriated amounts rather than the set ceilings.

In prosecuting the matters raised above, the Committee heard from the following key stakeholders; the County Assembly Speaker's Forum, Speaker Makueni County Assembly, the Controller of Budget, the Commission on Revenue Allocation, the Transitional Authority, the CEC Finance and Economic Planning, Makueni County Government, and hereby tables a report, containing its observations and recommendation to the House for consideration.

### **Committee Sittings**

In deliberating on matters raised and held the following sittings:

- a) On 24<sup>th</sup> February, 2015, the Committee held a meeting with the County Assemblies Leadership Forum, the following was discussed; the operations of the County Assemblies and the challenges related to the ceilings by CRA, and the High Court ruling on the ceilings.
- b) On 10<sup>th</sup> March, 2015, a consultative meeting was held with the Controller of Budget, Transition Authority, Commission on Revenue Allocation and Makueni County Assembly Speaker. The objective of the meeting was to discuss the operations of the County Assemblies and the challenges related to the ceilings by CRA, the High Court ruling on the ceilings and the operations of Makueni County Assembly.

In July, 2014, the Committee held a sitting with CRA to consider the proposed ceilings on recurrent expenditure for the FY 2014/15. CRA had requested the Committee to propose an amendment to the PFM Act, 2012 to allow CRA to set ceilings for County Governments.

The Committee further noted the contents of the House Hansard Debate of August 5<sup>th</sup>, 2014, where the Committee proposed an amendment to the PFM Act, 2012. The purport for the amendment was that the CRA had already set budget ceilings on recurrent expenditure on the budgets of each county government and had provided the schedules to both the county executive and the assemblies for the FY 2014/2015. The amendment was intended to protect counties and ensure prudent use of county resources and remedy the concerns that county assemblies have been spending huge amounts of money on very unnecessary expenditure like travel and allowances.

## II. BACKGROUND INFORMATION ON THE STATUS OF CEILINGS ON RECURRENT EXPENDITURE FOR COUNTY GOVERNMENTS FY 2014/15

- 1) **Mr. Speaker Sir**, on the 22<sup>nd</sup> of April, 2014 the Commission on Revenue Allocation (CRA) issued a circular **Ref. No. CRA/CGM/vol.III//99** addressed to all county governments which recommended a ceilings on allocation for all County Assemblies and all County Executives in county budgets for the FY 2014/15.
- 2) The CRA explained that the basis for the circular was Article 216 which gave the CRA the mandate to make recommendations on financial management,
- 3) They explained that it was necessary to set ceilings on the budget for both the County Executive and the County Assembly in each county so that there is a structured determination of how the allocation for new administrative structures in counties can be shared out. This would eliminate arbitrary allocation of funds to the Assemblies by the County Treasury as well as ensure equitable utilisation of resources. CRA also explained that it was necessary to set ceilings to minimise wastage of financial resources by both arms of government.
- 4) At its meeting held on 10<sup>th</sup> March, 2015, the Committee established that the proposed budget ceilings are appropriate in maintaining financial discipline in the counties and recommended an amendment to the PFM Act through the Allocation of Revenue Act, 2014 to give the proposed ceilings the force of law.
- 5) The Controller of Budget on diverse dates vide various circulars addressed to the county governments demanded that the respective County Assembly budget allocations should comply with the aforementioned circular issued by the CRA. In so doing the Controller of Budget further stressed that failure to comply with these ceilings would result in withdrawals from the county revenue funds or any other county government funds being declined.
- 6) Following this circular, some counties complied with the ceilings while others declined, expressing concerns that they had already approved their respective Appropriation Acts or in some cases votes-on-account and therefore had already had budgets that were valid although they did not adhere to the ceilings.
- 7) The Controller of Budget then proceeded to decline those requests for withdrawals of funds that were based on the Appropriation Bills or

votes-on-account outside of the recommendations of the Commission on Revenue Allocation.

- 8) The County Assemblies then challenged the decision by the Controller of Budget in court, through case no. 368/2014 on the legality of the circular by the Commission on Revenue Allocation setting ceilings on recurrent expenditure for County Assemblies.
- 9) A consent order between the three parties (CRA, COB and County Assemblies) allowing withdrawal of up to 50% resources based on the ceilings was filed by the Court on 25<sup>th</sup> July, 2014 allowing Counties to implement their respective budgets as they awaited their final ruling on the validity of the ceilings.
- 10) A further consent order was filed in court on 30<sup>th</sup> January, 2015 allowing counties to withdraw up to 75% of the resources due to counties based on the ceilings. The County Assemblies are left with one quarter which access has not been denied.
- 11) The final ruling on the matter was issued on 20<sup>th</sup> February, 2015 and provided that;
  - i) A declaration that the 'circulars were null and void for all intents and purposes' and should be 'quashed' were "not granted and are instead dismissed"
  - ii) That it is the duty of the Controller of Budget to oversee the implementation of respective county budgets.
  - iii) Orders that the COB should 'approve and disburse' the Assemblies funds as provided for in every County government's budget estimates and appropriation acts were "not granted" and were instead "dismissed" by the court.
- 12) As at 17<sup>th</sup> March, 2015 thirty (30) of the counties had complied with the ceilings and are drawing full budgetary provisions from the exchequer. As at the date of this report, the following counties have complied with the CRA ceilings:- Baringo, Bomet, Bungoma, Busia, Elgeyo Marakwet, Garissa, Isiolo, Kakamega, Kiambu, Kirinyaga, Kisii, Kisumu, Laikipia, Mandera, Makueni, Meru, Migori, Muranga, Nandi, Narok, Nyamira, Nyeri, Samburu, Taita Taveta, Trans Nzoia, Uasin Gishu, Vihiga, Wajir, West Pokot and Marsabit.
- 13) An additional thirteen (13) counties have held meetings with the Commission on Revenue Allocation and agreed on a need basis, where adjustments need to be made. They include; Homabay, Kajiado, Kericho,

Kilifi, Kitui, Kwale, Lamu, Machakos, Mombasa, Nyandarua, Siaya, Tharaka Nithi and Turkana;

- 14) Four (4) of the Counties including Embu, Nairobi, Nakuru and Tana River are the only counties that have neither complied nor held discussions with the CRA. However, an initial meeting with Nakuru County is scheduled for 23<sup>rd</sup> March, 2015;

#### RESPONSES TO THE STATEMENT FROM THE SENATOR

- 15) The Committee deliberated on the request for a statement by the Sen. Hassan Omar Hassan, M.P. who requested a on the status of financial allocation to counties by the Commission on Revenue Allocation. The Committee noted as follows on each of the matters;

**I. On whether the Committee is aware that County Assemblies are grinding to a halt due to the constraints of the budget ceilings imposed by the CRA.**

The Committee considered this matter and held meetings with the County Assemblies Forum, and noted that:

- a) County Assemblies do not object to the desirability of budget ceilings and more so on recurrent expenditure of county governments.
- b) Respective County Fiscal Strategy Papers were submitted by the Executives by 28<sup>th</sup> of February 2014 which was during the formulation stage of the 2014/15 financial year and they contained ceilings for every sector of the County Government, the County Assembly included.
- c) The ceilings set out in the respective county fiscal strategy papers were the basis for the appropriations acts which were not adhering to the ceilings of the Commission on Revenue Allocation.
- d) Several County Assemblies had therefore not anticipated or planned to accommodate the ceilings issued by the CRA and therefore did not budget or indeed expend within the ceilings resulting in unfinanced budgets, reallocated expenditures and budgets that were not implemented fully.
- e) A significant challenge that County Assemblies experienced beyond the ceilings issued by the Commission on Revenue Allocation was the irregular exchequer releases from some county executives once requests for resources had been made to the Controller of Budget.
- f) This was because the rules and regulations governing release of monies to the County, the County Assembly cannot send requisitions for funds directly to the Controller of Budget but through the County Executive Committee Member for Finance.

## **II. On whether the Controller of Budget has refused to finance County Assemblies unless they comply with the said ceilings**

The Committee considered the ruling by the High Court of Kenya on petition number 368 of 2014 as well as submission from the Controller of Budget and noted that;

- a) The Controller of Budget (CoB) had declined to recognize respective County Assembly Appropriation Acts that did not adhere to fiscal prudence and adherence to the ceilings issued by the Commission on Revenue Allocation.
- b) The Controller of Budget had therefore declined to release monies to County Assemblies unless they complied with the said ceilings,
- c) The County Assemblies Forum (CAF) held that CRA recommendations were not binding and the action by the Controller of Budget was not legal.
- d) The Committee further noted that the Controller of Budget had mandate under Article 228 to oversee the implementation of respective county budgets by authorizing withdrawals from respective county revenue funds.

## **III. On whether the Committee is aware that although the High Court of Kenya dismissed the petition by the County Assemblies, the court had also determined that the said ceilings were not binding and would only be binding if approved by Parliament and that ceilings are just a recommendation.**

The Committee considered the ruling by the High Court of Kenya on petition number 368 of 2014 and noted that;

- a) That the circulars on ceilings on recurrent expenditure were issued in advisory capacity granted to the Commission under article 216 of the constitution and are therefore lawful.
- b) Circulars cannot be quashed due to (a) above.
- c) However, ceilings in the circulars are not binding on County Assemblies since they are not directives and can only become binding if adopted by Parliament through the County Allocation of Revenue Act, as parliament has the final say on the matter.
- d) County budgets are subject to national legislation, being Division of Revenue Act and County Allocation of Revenue Act.
- e) Differences in regarding fiscal and budgetary processes should be settled in terms of Article 189(4) of the constitution of Kenya, by way of alternative dispute resolution mechanism and this includes reference of

the dispute to parliament which has the final say in budgetary processes in Kenya.

**IV. That the Controller of Budget is sending County Assemblies to negotiate with the CRA to vary the ceilings even though the court has placed that mandate on Parliament**

The Committee had hitherto considered this matter and had noted that;

- a) The CRA had held two consultative meetings on the 2015/16 budget ceilings with the County Executive Members for finance and County Assembly Clerks. The first meeting was held in December 2014 and the second was in March 2015.
- b) The Controller of Budget, Transition Authority, Commission on Revenue Allocation had undertaken to work together to come up with a framework for ensuring prompt and just resource allocation to counties.
- c) That it was critical for the respective County Executives, County Assemblies to build synergy with the institutions in (a) above in addressing pending issues which are affecting service delivery and monies meant for recurrent expenditure for the Assemblies should be released with immediate effect
- d) While appreciating the importance of financial accountability. The roles and independence of each arm of County Government should be respected at all times. The Senate has convened a high level workshop to discuss matters of financial accountability at governments at the County level. The Workshop is scheduled for 19<sup>th</sup> to 22<sup>nd</sup> March, 2015 as an avenue for further synergy and consultation.

**V. On whether the Committee is aware that the proposed ceilings for the 2014/15 and 2015/16 financial years were irreconcilable;**

The Committee deliberated on this and noted that;

- a) The CRA had submitted to the Committee that the ceilings were only on specific recurrent expenditures of County Assemblies and County Executives;
- b) The CRA further submitted that the ceilings were designed to curb wasteful expenditure especially on non-priority items such as foreign travel and hiring of non-core personnel.
- c) The ceilings for the 2015/16 financial year were still under deliberation and were not yet final and therefore could not be compared to the 2014/15 ceilings.

- d) The ceilings for the 2015/16 financial year would include allocations for mortgage and car loans due to constitutional office holders provided by the Salaries and Remuneration Commission.

**VI. On whether the Committee is aware of what the national treasury is doing to ensure that the COB releases funds to the County Assemblies on the basis of their respective Appropriations Acts;**

The Committee noted that:

- a) Several County Assemblies had installed an IFMIS system for financial management and opened operational accounts at the Central Bank of Kenya in an effort to gain financial autonomy but the two were not operational due to limitations from the National Treasury. In this regard County Assemblies have had to depend on the County executive for the stated services.
- b) All County Assembly in Kenya therefore operates under the mercies of the County Executive on issues of finances thus compromising their ability to discharge their mandate.
- c) Given the separation of powers between the Executive and the Assembly, the County Assembly is supposed to oversight the Executive and it's accountable to the Auditor General's Office and the Office of the Controller of Budget
- d) The Committee had directed the Commission on Revenue Allocation and Controller of Budget to liaise with the Integrated Financial Management Systems directorate to ensure that County Assemblies are connect to the IFMIS and G-pay systems to enhance resource flow, accountability and independence in financial resource

**II. OBSERVATIONS**

The Committee observed that;

- a) The Committee also observed that the CRA issued ceilings well before the amendment of section 117 of the PFM act had been done by Parliament noting that the County Allocation of Revenue Bill was passed in July, 2014.
- b) Although the Commission on Revenue Allocation had met the Committee and subsequently agreed on the importance of taming wasteful expenditure in the assemblies, the Committee did not formally submit proposals for setting the ceilings after the amendment to the PFM Act, 2012 had been passed.
- c) The Committee is convinced that the budget ceilings determined through a structured process is the most prudent way of allocating the resources between the two arms of the government. The alternative

would be an arbitrary process that would encourage wastage, and conflicts in the counties.

- d) The Committee noted that although the Controller of Budget has the mandate to oversee the implementation of respective budgets of the various county governments by authorizing withdrawals, the COB enforced the ceilings set by the CRA to promote prudent financial management, and with the concurrence of the committee.
- e) Pursuant to the court case filed by the assemblies, the court had approved withdrawals of up to 75% of the ceiling for the first three quarters of FY 2014/15 before giving the ruling that dismissed all the prayers sought in the petition. Consequently, COB can only disburse funds for the remaining quarter based on the Appropriation Act.
- f) The Committee also observed that there was no synergy in addressing matters of conflict between the County Assemblies, the County Executive, the offices of the Controller of Budget and the Commission on Revenue Allocation although the law has created sufficient dispute resolution mechanisms as provided for in Article 189(3) and (4) of the Constitution.

### **III. RECOMMENDATIONS**

The Committee therefore recommends that;

1. The County Governments should establish conflict resolution mechanisms and desist from encroaching on each other's Constitutional mandate. Conflicts regarding fiscal and budgetary processes should be settled in terms of Article 189(4) of the constitution of Kenya, by way of alternative dispute resolution mechanism. This includes reference of dispute to the Senate which has the mandate to serve to protect the interests of counties, and their governments.
2. The Senate shall establish new guidelines on the approval of requisitions as well as new structures on access to funds for the Assemblies pursuant to Art.216 of the Constitution.
3. The Senates directs that the COB, CRA and TA, in consultation with the Director of IFMIS submit a report on how County Assemblies can directly access credit requisitioned funds into their operational accounts after the exchequer release.
4. Ceilings on recurrent expenditure of the FY 2014/2015 were lawfully issued but not binding as per the court ruling. The courts had approved withdrawals of up to 75% of the ceilings for the first three quarters. Therefore, the Senate directs that the COB should, in consultation with CRA, release adequate funds to the county assemblies immediately for the fourth quarter.

5. The Senate should protect County Assemblies in accordance with its mandate in Article 96(1) of the Constitution through amendment to the PFM Act in order to ensure that the role of County Assemblies in overseeing the county executive is not compromised. Funds requisitioned by the Assemblies should be released directly from the County Revenue Fund into their operational accounts without further delay to ensure financial independence.
6. Pursuant to PFMA, the Senate should develop guidelines for approval of the recommendation of CRA in respect of budget ceiling for FY 2015/16.
7. The Committee has tasked the COB to furnish it with the status of compliance of the county executive with the budget ceilings for tabling in the House.
8. Pursuant to the court ruling the county assemblies should exercise prudence in their financial management.

**MINUTES OF THE 96<sup>TH</sup> SITTING OF THE STANDING COMMITTEE ON FINANCE, COMMERCE AND BUDGET HELD AT COUNTY HALL GROUND FLOOR BOARDROOM ON 25<sup>TH</sup> FEBRUARY, 2015 AT 9.00AM.**

**MEMBERS PRESENT**

1. Sen. Billow Kerrow -**Chairman**
2. Sen. Peter Ole Mositet -**Vice Chairman**
3. Sen. Moses Wetang'ula -Member
4. Sen. Beatrice Elachi -Member
5. Sen. Boni Khalwale -Member
6. Sen. Paul Njoroge Ben -Member
7. Sen. (Dr.) Wilfred Machage -Member
8. Sen. Zipporah Kittony -Member
9. Sen. Catherine Mukiite -Member
10. Sen. (Prof.) Anyang Nyong'o -Member
11. Sen. (Prof.) John Lonyangapuo -Member
12. Sen. (Dr.) Agnes Zani - Member

**MEMBERS ABSENT**

1. Sen. G.G. Kariuki -Member
2. Sen. Mungai James -Member
3. Sen. Mutula Kilonzo Jnr. -Member
4. Sen. Mutahi Kagwe -Member

**MEMBERS OF THE COUNTY SPEAKERS FORUM**

- 1) Hon. Dr. Nuh Hassan -Speaker, Tana River County
- 2) Hon. Abdi Sheikh -Speaker, Mandera County
- 3) Mr. Chris Kinyanjui -Clerk, Muranga County
- 4) Mr. Jacob Ngwele - Clerk Nairobi County
- 5) Mr. Martin Kariuki -Clerk Taraka Nithi, County
- 6) Mr. Elijah Mutambuki -Clerk Kitui County
- 7) Mr. Wanyoike Mboche -Clerk Lamu County

**SECRETARIAT**

1. Ms. Emmy Chepkwony -Senior Clerk Assistant
2. Mr. Peter Mulesi -Clerk Assistant
3. Mr. Chelang'a Maiyo -Researcher
4. Mr. Frank Mutulu -Media Relations Officer
5. Ms. Anne Wanjiru -Intern

**MIN. 045/2015: PRELIMINARIES**

The chairman called the meeting to order at 9.28 am followed with prayer.

He welcomed Sen. (Dr.) Agnes Zani and congratulated her on her appointment by the Rules and Business Committee (RBC) of the Senate to join the Committee.

He then called for introduction of the Members present and invited the County Assembly Speakers Forum to introduce their delegation and make their presentation.

#### **MIN. NO. 046/2015: ADOPTION OF THE AGENDA**

The agenda of the day was adopted as follows;

- 1) Prayer
- 2) Adoption of the Agenda
- 3) Meeting with County Assembly Speakers Forum (CASF) on the budget ceilings
- 4) Consideration of Committee's interim report on Narok petition
- 5) Any other Business
- 6) Adjournment and Date of next meeting.

#### **MIN NO. 047/2015: PRESENTATION BY THE COUNTY ASSEMBLY SPEAKER' FORUM**

The Chairman of the County Assemblies' Speakers Forum (CASF) thanked the Senate Standing Committee on Finance, Commerce and Budget for giving them opportunity to present their views on the compliance by counties by the budget ceilings set by the commission of Revenue Allocation (CRA). He informed the committee that their intention of appearing before the Committee was to seek the guidance of the Senate on the legality of the Circulars and allow discussions on the way forward for County Assemblies to access their budgets especially following the High Court ruling delivered by Justice Isaac Lenaola on 25<sup>th</sup> February, 2015 on the matter of budget ceilings by the CRA Circulars.

He informed the Committee that:

1. The budget ceilings on recurrent expenditure be supported by costing statistics to avoid inconsistencies in the process of service delivery to the public as envisaged by the Constitution of Kenya;
2. the County Assemblies' budgets constitute only 10% of the total county budget hence limited scope of operation as compared to the County Executive;
3. the county Appropriation Acts 2014 with respect to county finances were passed by County Assemblies with due consideration of their mandate, but these laws have been in conflict with the county Allocation of Revenue Act 2014;
4. the non-compliance by County Assemblies to the directive by the Controller of Budget on budget ceilings is the main cause of poor service delivery in the

- County Governments, to this end salary, allowances and other benefits due to county Assembly staff have not been honored for the last 6 months;
5. the Commission on Revenue Allocation (CRA) is only required to provide an advisory on the budget ceilings and the appropriateness of the ceilings on the smooth running of county governments;
  6. the timing of the CRA recommendation was difficult to implement since all the 47 County Assemblies had already passed their Financial Year 2014/15 budgets as required by law;
  7. the commission on Revenue Allocation (CRA) through a circular Ref: **NO.CRA/CGM/VOL.III/99 dated 22<sup>nd</sup> April, 2014**, recommended budget ceilings for County Assemblies and County Executive;
  8. Some County Assemblies disregarded the CRA recommendation since this was not binding and only represented an advisory on the part of county Governments. In view of non-compliance by the county assemblies, a meeting was held between the Commission of Revenue Allocation, Controller of Budget and County Assemblies Forum to look at the stalemate after the County budgets were passed;
  9. If counties are not facilitated their capacity to oversight the executive will be compromised.

**The Committee was further informed that:**

- i. The Controller of Budget did not agree on allowing county assemblies access its budgets, but until they comply with the CRA recommendations on budget ceilings;
- ii. the County Assemblies' Forum through the speakers of all the 47 County Assemblies proceeded to court seeking inter alia to quash the Commission of Revenue Allocation circular on the County Governments' budget ceilings;
- iii. the High Court dismissed the petition on the prayers to quash the circular, but the judge went further and demarcated the boundaries on the roles of the various state organs involved in the budget making process of County Governments: Parliament, Controller of Budget, and Commission on Revenue Allocation, County Treasury and County Assemblies;
- iv. in the ruling the judge stated that even though the circular was lawfully issued, the recommendations by the Commission on Revenue Allocation on budget ceilings were only advisory and should only be implemented once Parliament has approved them through the County Allocation of Revenue Act;
- v. in view of the ruling by the High Court, the County Assemblies have requested the Controller of Budget to release monies to their County accounts in line with the Appropriation Acts 2014 of County Assemblies;
- vi. However, the Controller of Budget still holds the opinion that the Circular from Commission on Revenue Allocation is binding and that County As-

- semblies have to renegotiate the budget ceilings with CRA before subsequent approval by the Controller of Budget for the release of funds;
- vii. CASF were faced with challenges related to issues of undue advantage by Governors and MCAs on matters of budget making due to political dynamics in the Counties;
  - viii. CASF is therefore, seeking intervention of the Senate within the purview of Art. 96 of the Constitution to compel the Controller of Budget to release the monies due to County Assemblies in line with the Appropriation Acts of specific County Governments;
  - ix. The Senate should check the Constitutional bodies especially those related to devolution to ensure that they do not allocate themselves powers outside the Constitution.

On the matter of ceilings, the Committee was informed that the impression by CRA that a number of County Assemblies had willingly complied with the budget ceiling and a number are negotiating is misleading. All county Assemblies who complied, had done so under duress, those that complied did so after their members and employees went without salaries for months after their county treasuries declined to release funds to the County Assemblies.

That whereas CRA purports to have recommended reasonable ceilings, a cursory look at their recommendations for FY 2014/2015 against recommendations for FY 2015/2016 proves otherwise.

From the deliberations that ensued;

The Chairman informed the CASF that the Senate passed an amendment to the County Allocation of Revenue Act to allow CRA to recommend ceilings to the Senate for approval. As a result CRA has recommended the Ceilings to the Senate although they have not been approved. There are several consultations going on the matter and the Senate will soon engage stakeholders on the matter of budget making process in the counties;

Members expressed concern that in most County Assemblies the Speakers and the Clerks of County Assemblies are arm twisted by the Members of the County Assemblies (MCA's). Concerns were also raised on the threats facing the oversight institutions at the County level and hence the need for separation of powers.

The Committee informed CASF that ceilings are principle of financial prudence and accountability;

The Committee noted with concern that ceilings were guided by complains that the County Assemblies were spending more on foreign travels hence the need for regulation of their budgets mainly to free resources for development;

The CRA should target the quality of Members of the County Assemblies (MCAs) including qualifications on who qualifies for election rather than inhibit those already elected in performing their constitutional functions;

County Assemblies have over employed staff which has bloated their payroll and therefore the need to re-examine the personnel requirements, unplanned and unjustified expenditures;

Members expressed concern that the Division of Revenue Act, 2014 allocated KES. 30 billion as the cost of new administrative structures in the Counties where KES. 16.8 and 13.2 billion were set aside for County Assemblies and County Executive, respectively. The Committee sought explanation on why CASF were then unable to pay salaries when funds had been already allocated;

Members advised that now that the case had been concluded, the monies for the counties should be released to address their needs. CASF should constantly consult, liaise and update the Senators in their respective counties on the matter.

CASF prayed to the Committee that COB be Compelled to release funds to the County Assemblies without reference to the said ceilings; and that the funds be released in accordance with the Appropriation Acts, since the County Appropriation Acts are not in conflict with the Constitution, the PFMA, The Division of Revenue Act, 2014, and the County Allocation of Revenue Act, 2014.

**It was resolved that;**

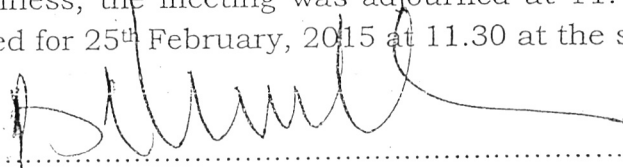
- 1) the Commission on Revenue Allocation (CRA), the Transitional Authority (TA) and the Controller of Budget be invited to a meeting of the Committee on Wednesday, 3<sup>rd</sup> March, 2015 to respond to the matters raised by the CASF;
- 2) The Committee convenes a high level workshop to deliberate on matters of accountability of public resources in the counties and invite the Auditor-General, The Salaries and Remuneration Commission, the Transitional Authority, the Commission on Revenue Allocation and the Controller of Budget (COB) as key resource persons. The workshop will be held at Enashipai Hotel and Spa, Naivasha on 12<sup>th</sup> to 15<sup>th</sup> March, 2015;
- 3) The Committee will communicate feedback after consultations with CRA, TA and COB to CASF on the way forward on the matter of Ceilings.
- 4) The Committee further resolved to invite the COB, CRA and TA to a Committee meeting on Tuesday 3<sup>rd</sup> March, 2015 to deliberate on the following:

- a. The implications of the High Court Ruling on petition no. 368 of 2014 regarding Circulars issued by the Commission on Revenue Allocation (CRA) on budget Ceilings;
- b. Failure by the Makueni County Executive to transfer funds to the County Assembly on grounds that the Assembly failed to submit its books of accounts for inspection by the County Executive;
- c. Concerns that several County Assemblies are unable to pay salaries; and,
- d. Budget making process for Isiolo County.

**MINUTE NO. 048/2015: ADJOURNMENT AND DATE OF NEXT MEETING.**

There being no other business, the meeting was adjourned at 11: 08 p.m. The next meeting was scheduled for 25<sup>th</sup> February, 2015 at 11.30 at the same venue.

SIGNED: .....



**CHAIRPERSON -Sen. Billow Kerrow**

DATE: .....

19-03-2015

**MINUTES OF THE 99<sup>TH</sup> SITTING OF THE STANDING COMMITTEE ON FINANCE, COMMERCE AND BUDGET HELD AT CONTINENTAL HOUSE RESTAURANT, PARLIAMENT BUILDING ON 10<sup>TH</sup> MARCH, 2015 AT 9.00 AM.**

**PRESENT**

- |                                |             |
|--------------------------------|-------------|
| 1. Sen. Billow Kerrow          | -Chairman   |
| 2. Sen. Peter Ole Mositet      | -Vice Chair |
| 3. Sen. Moses Wetangula        | -Member     |
| 4. Sen. Beatrice Elachi        | -Member     |
| 5. Sen. Catherine Mukiite      | -Member     |
| 6. Sen. (Prof.) Anyang Nyong'o | -Member     |
| 7. Sen. MutulaKilonzo Junior   | -Member     |
| 8. Sen. (Dr.) Wilfred Machage  | -Member     |
| 9. Sen.(Dr.) Agnes Zani        | - Member    |
| 10. Sen. John Lonyangapuo      | -Member     |

**ABSENT**

- |                          |         |
|--------------------------|---------|
| 1. Sen. Mutahi Kagwe     | -Member |
| 2. Sen. Paul Njoroge Ben | -Member |
| 3. Sen. Boni Khalwale    | -Member |
| 4. Sen. Mungai James     | -Member |
| 5. Sen. G.G. Kariuki     | -Member |
| 6. Sen. Zipporah Kittony | -Member |

**IN ATTENDANCE**

1. Mr. Micah Cheserem- Chairman, CRA
2. Mr. KinuthiaWamwangi- Chairman, Transitional Authority
3. Ms. Fatuma S. Abdikadir, Vice Chair, CRA
4. Hon. AlidanMbinda, ECM, Finance, Makueni County
5. Mr. Edward Libendi, Clerk, Makueni Assembly
6. Mr. Stephen Ngelu, Speaker, Makueni Assembly
7. Mr. Stephen Masha, Deputy CEO, COB
8. Mr. Joshua Musyimi, Director, R&P COB
9. Mr. Stephen Makori, CEO Transitional Authority
10. Ms. Lynnette Oyugi, Director, CRA
11. Mr. James Katule, Director CRA
12. Ms. Martha Maneno, Legal Officer, CRA
13. Mr. Stephen Wangaji, CMPR, COB

**SECRETARIAT**

- |                       |                               |
|-----------------------|-------------------------------|
| 1. Mr. Emmy Chepkwony | -Snr. Clerk Assistant         |
| 2. Peter Mulesi       | - Clerk Assistant             |
| 3. Mr. GichohiMwaniki | - Parliamentary Budget office |

- |                      |                              |
|----------------------|------------------------------|
| 4. Mr. Robert Nyagah | -Parliamentary Budget office |
| 5. Chelang'aMaiyo    | - Research officer           |
| 6. Ms. Anne Wanjiru  | -Intern                      |

**MIN. 058/2015: PRELIMINARIES**

The Chairman called the meeting to order at 9.26am followed by a word of prayer. He welcomed all the members and visitors to the meeting and there followed self - introduction.

The Chairman then welcomed the Speaker, the Clerk of Makueni County Assembly and the Chief Executive Officer for Makueni County Government to make presentations to the Committee.

**MIN. 059/2015: PRESENTATION BY SPEAKER AND THE CLERK OF MAKUENI COUNTY ASSEMBLY AND THE CEC MAKUENI COUNTY GOVERNMENT.**

**1) Makueni County Assembly**

The officials from the County Assembly of Makueni informed the Committee as follows: That;

1. There has been continuous financial frustration of the Makueni County assembly by the County Executive that have brought operational risks due to the insufficient and unpredictable flow of funds necessary to run the assembly to perform its constitutional mandate. According to the Controller of Budget, the County Assembly cannot send requisitions for funds directly to them but through the County Executive Committee Member for Finance. Requisitions by the County Assembly are done for every two months.
2. After doing the requisitions, especially from July, 2014, the County Assembly has been forced on numerous occasions to beg the County Executive Committee Member for Finance to submit its requisition for funds to the Controller of Budget as the Controller of Budget does not recognize direct requisition of funds from the County Assembly. Even after the requisitions are sent and approved by the Controller of Budget, the CEC Finance delays to submit Form C to the Central bank; the form which authorizes Central Bank to release funds to the County Revenue Fund. This has greatly affected operational autonomy of the County Assembly.
3. From November, 2014, the County Assembly of Makueni has had no finances to operate. Salaries of November and December were paid in mid-January, 2015 and those of January and February, 2015 were paid on Friday, 6<sup>th</sup> March, 2015. Allowances for MCAs from November had not been paid until last week Friday, 6<sup>th</sup> March, 2015.
4. On 12<sup>th</sup> November, 2014 the Clerk of the County assembly received a letter from the Executive Committee Member for Finance (ECM Finance) indicating that he had directed the Assembly Banks to freeze the Makueni County Assembly Bank Accounts. The grounds stated were that the Assembly had undertaken foreign travel without having funds for foreign travel and that

the Assembly had not given its books of account to the CECM Finance for inspection.

5. The true position is that the County Assembly had enough funds in the budget for FY 2014/2015 for foreign travel i.e. Ksh. 50 million and the same had not been exceeded.
6. The Assembly explained to the Executive that it is the Assembly that undertakes oversight over the Executive and not the other way round and we maintained that though the Assembly runs open and transparent financial systems and accounts, the books of accounts of the County Assembly are not supposed to be inspected by the CECM Finance but by the auditor general, and other government agencies like EACC and the auditor has always conducted audits on Assembly books. We also explained that the functions the CECM Finance was trying to usurp to oversight the County Assembly were functions of the Clerk of the County Assembly as given by Sections 147 and 148 of the PFM Act.
7. Suppliers of basic items to the Assembly like paper and fuel have not been paid from November, 2014. We have been forced to fund operations of the Assembly like buying photocopy paper and fuel for the generator and vehicles from our pockets which is costly.
8. The County Assembly after staying without salaries and allowances for that duration ended up passing another budget submitted by the CECM Finance to comply with the ceilings recommended by the CRA in 2014. Based on that budget, the Assembly cannot even pay the normal sitting allowances of MCAs from January onwards. The MCAs ended up even reducing the budget for basic expenses like medical insurance by half just to be in good books with the County Executive and in order to receive their salaries and allowances.
9. Because of this lack of financial autonomy, the oversight role of the County Assembly is compromised and the principal of separation of powers as contained in article 185 of the Constitution is defeated. The MCAs have now agreed to be passing any document that comes from the Governor's office without any scrutiny.
10. The Ceilings recommended by the CRA for 2014/2015 were arbitrarily issued without consultations and without due regard to the actual expenditures of the County Assemblies. In Makueni for example, the CRA recommended a ceiling of Ksh. 356 million for 2014/2015 and of Ksh. 510 million for 2015/2016; whatever has changed materially during this time, we are not aware but the County Assembly will not be able to operate with the Ksh. 356 million given until the end of the financial year. The Assembly will therefore be forced to close its operations at the end of April and wait until July to resume its operations because we shall not have funds for operations.
11. On anticipating that the Appropriations Bill, 2014 would not be passed on time (by 30<sup>th</sup> June, 2014), the County Assembly passed the Vote

on Account as required by section 134 of the Public Finance Management Act, 2014.

12. The County Assembly received an Appropriations Bill, 2014 from the County Executive Committee Member for Finance on 25<sup>th</sup> July, 2014 and proceeded to pass it and submitted the same to the Governor for assent.
13. The County Assembly of Makueni has installed an IFMIS system for financial management and opened an operational account at the Central Bank of Kenya to try gain financial autonomy but the two are not operational due to limitations from the National Treasury and Assemblies therefore have to depend on the County executive for the above services.
14. Makueni County Assembly like all county assemblies in Kenya therefore operate under the mercies of the County Executive on issues of finances thus compromising their ability to discharge their mandate.
15. Given the separation of powers between the Executive and the Assembly, the Assembly is supposed to oversight the Executive and it's accountable to the Auditor General's Office and the Office of the Controller of Budget.

They requested the Committee to;

1. intervene and get a lasting solution to this problem so that we can be sure that when we send our requisitions to the Executive to forward to the COB for release of funds, the same is done promptly so that our operations do not ground to a halt;
2. to ensure financial Independence where Assemblies can send requisitions to the COB directly and funds are released to the Assemblies directly and Since the ceilings of 2014/2015 were not tenable, there was need to revise according to the actual needs of the County Assembly.

### **Concerns Raised by Members**

Members raised concern on the following issues.

- a) The Transitional Authority to explain the role of the County Assembly and County Treasury as entities of the PFM Act (Section 127).
- b) The County Assembly of Makueni has a mandate and role in the budget making process (Section 129 (3) and should be independent in approving the budgets by the County Government.
- c) Why the County Assemblies should not get their funds directly though their own independent IFMIS. What is the justification by the COB in withholding funds meant for the Assemblies?
- d) There was concern over the number of foreign trips by the MCAs and even the County Executive which takes almost 50% of the recurrent expenditure.
- e) Whether the County Executive were spending more than the set ceilings. The COB and CRA are only keen on controlling the budgets and expenditures of the Assembly but not the Executive (**How much did the County Executive actually spent above the set limits set?**).

- f) Local Revenue collected by County Governments is not accounted for and is spend at source contrary to the PFM Act;

**MIN.060/2015: HIGH COURT RULING ON THE COUNTY BUDGET CEILINGS**

The Chairman of the CRA briefed the Committee on the High Court ruling delivered by Judge Isaac Lenaola as follows: That;

1. A petition was filed in Court by all the 47 Speakers of the Assemblies following Commission on Revenue Allocation (CRA) recommendation on budget ceilings for County Assemblies and County Executives for the FY 2014/15;
2. CRA was the first respondent, followed by the Controller of Budget and Attorney General respectively. The Council of Governors was an interested Party;
3. Art.216 (2) mandates the Commission to make recommendations on matters concerning financing of, and financial management by county governments to encourage fiscal responsibility and that the ceilings had saved the exchequer KES.10 billion from the MCAs budgets;
4. Art.249 provides that the object of independent Commissions is to protect the sovereignty of the people;
5. The PFM Act Section 117 (2A) as amended through the County Allocation of Revenue Act, 2014 mandates CRA to make recommendations on County budget ceilings through the Senate.

He informed the Committee that the Prayers of the petitioners were: That;

- a) The Court declares the Circulars void.
- b) The Court quashes the budget ceilings.
- c) The COB be compelled to implement budgets.
- d) The funds be disbursed as passed in the 47 appropriation Acts.

In interpreting the ceilings CRA informed the Committee that in dismissing petition 386 of 2014 by the County Assemblies Forum, the High Court ruled that this particular amendment was never challenged in court and it's therefore in force. The recommendations made by CRA are therefore binding to the county governments.

1. The petition was dismissed
2. The ceilings are legal
3. The County Allocation of Revenue Act, 2014 enforced the ceilings making them binding for counties to implement, and
4. No appeal has been filed challenging this ruling

The CRA Chairman in his tabled document further proposed a way forward that;

- i. The ceilings were only on specific recurrent expenditures of County Assemblies and County Executive;
- ii. Majority of county Governments have held meetings with CRA and resolved some of the challenges posed by the 2014/2015 ceiling (He tabled status on county Compliance with the ceilings);

- iii. Two consultative meetings on the 2015/16 FY budget ceilings with CECs and County Clerks in December, 2014 and March, 2015;
- iv. As provided by Section 117 (2A) of the PFM Act, CRA will recommend the ceilings for FY 2015/16 to the Senate for Approval. However, unlike during the FY 2014/2015, the process will be done much earlier to allow for more discussion, input and consensus.

### **Resolutions**

From the deliberations that ensued, it was resolved that;

1. The Senate, COB, TA, CRA to respond in writing on the standoff in Makueni to urge the CEC to release funds for the Assembly.
2. The County Assembly should appreciate the need for financial accountability. The Senate is organizing a high level workshop on Accountability of public resources on 19<sup>th</sup>- 21<sup>st</sup> March, 2015 in Naivasha.
3. The County Executive and the Assembly should work as a team to address pending issues which are affecting service delivery.
4. The CRA and COB to take keen interest in the Makueni issue and further work together and release a Circular to all the Counties on Financial Management.
5. That subject to the ceilings, money meant for recurrent expenditure for the Assembly should be released immediately.
6. The Senate to come up with new guidelines to CECs on the approval of requisitions by the Assemblies as well as new structures on access to funds by both the executive and the Assemblies pursuant to Art.216 of the Constitution.

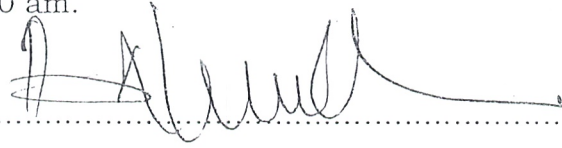
### **MIN.061/2015: ANY OTHER BUSINESS**

He informed members on the following upcoming events.

- i. The joint Committee sitting between Standing Committee on Finance, Commerce and Budget and the Sessional Committee on Devolved Government will be held on **Wednesday, 11<sup>th</sup> March, 2015** at the Committee Room 5, Main Parliament at 9.00am to meet with Sen. Anyang' Nyong'o, and the Petitioners of the Kisumu Petition.
- ii. High level workshop on Accountability and the County level of Government will be held on **19<sup>th</sup> -21<sup>st</sup> March, 2015 at Great Rift Hotel, Naivasha**. All oversight bodies including the Ethics and Anti-corruption, Commission (EACC), Controller of Budget, Transitional Authority (TA), Criminal Investigation Department (CID), Commission on Revenue Allocation (CRA) have been invited to make presentations.
- iii. A letter from Makueni County Assembly to the Speaker of the Senate stating that the County Assembly had not received money for its recurrent expenditure from the County Treasury since November, 2014 and that they were facing problems with paying staff salaries and suppliers.

**MIN.061/2015: ADJOURNMENT AND DATE OF NEXT MEETING**

Having exhausted all issues set out in the agenda, the meeting was adjourned at 11.59am. The next meeting will be on 11<sup>th</sup> March, 2015 at Main Parliament, Committee Room 5 at 9.00 am.



SIGNED: .....

**CHAIRPERSON -SEN. BILLOW KERROW**

DATE: ..... 19-03-2015 .....

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NAIROBI

**COMMISSION ON REVENUE ALLOCATION**

OUR REF. CRA/CSO/P&S/13/Vol. 7

DATE: 18<sup>th</sup> March 2015

**Mr. J. M. Nyegenye,**  
Clerk of the Senate,  
Clerk's Chambers  
Parliament Buildings  
**NAIROBI**


Dear Mr. Nyegenye,

**RE: STATEMENT BY COMMISSION ON REVENUE  
ALLOCATION ON REPORT ON THE STATUS OF  
FINANCIAL ALLOCATON TO COUNTIES FOR  
FINANCIAL YEARS 2014 /2015 AND 2015 /2016**

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Enclosed, please find CRA statement in response to the Senate letter referenced SEN/FCB/GEN-CORR.VOL2/050/2015.

Yours sincerely,

  
**George Ooko**  
**COMMISSION SECRETARY**

Tel: 254 (20) 42980000  
Email: [info@crakenya.org](mailto:info@crakenya.org)  
Website: [www.crakenya.org](http://www.crakenya.org)



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NAIROBI

## **COMMISSION ON REVENUE ALLOCATION**

18<sup>th</sup> March 2015

### **STATEMENT BY COMMISSION ON REVENUE ALLOCATION ON REPORT ON THE STATUS OF FINANCIAL ALLOCATION TO COUNTIES FOR FINANCIAL YEARS 2014/2015 AND 2015/2016**

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#### **INTRODUCTION**

This is in response to a letter from the Senate (Ref: SEN/FCB/GEN-CORR.VOL2/050/2015) dated 16<sup>th</sup> March 2015. The Commission would like to respond as follows: -

The Commission on Revenue Allocation (CRA) is established under Article 215 of the Constitution with its principal functions stated in Article 216. In recommending ceilings for recurrent expenditure for the counties, CRA was guided by the following Articles of the Constitution and the relevant Sections of other legislation.

- Article 216 (2) – *The Commission shall make recommendations on other matters concerning the financing of, and financial management by, county governments, as required by this Constitution and other relevant legislation.*
- Article 216 (3) – *In formulating recommendations, the Commission shall seek ...*
  - c) *to encourage fiscal responsibility.*
- Article 249 (1) – *The objects of the commissions and independent offices are to ...*
  - a) *protect the sovereignty of the people.*

#### **2014 / 2015 CEILINGS**

The Commission recommended Ksh279 billion be allocated to county governments for financial year 2014/15. In this allocation, the Commission

had costed the new county structures at Ksh47 billion. However, the Division of Revenue Act 2014 provided for Ksh226.7 billion for the counties. Out of this amount, Ksh30.2 billion was for the financing of recurrent expenditure for the new structures within the county governments and the rest to finance devolved functions as shown in **Table 1**. The allocation of Ksh30.2 billion provided for Ksh13.456 billion for the county executive and Ksh16.877 billion for the county assemblies as detailed in **Table 2**. It is on the basis of these amounts that the Commission made equitable allocation to individual counties and made recommendations for recurrent expenditure for both the executive and the assemblies.

From an analysis of the initial budgets submitted by the counties, the assemblies had a consolidated figure of Ksh26.876 billion while the executive had a budget of Ksh13.559 billion. If these budgets had been approved, it would mean reducing money meant for development and service provision, which would be contrary to the spirit of devolution. By setting ceilings on the recurrent expenditure, CRA was encouraging fiscal responsibility, ensuring that more resources were allocated to development and service provision.

As at March 17, 2015, thirty (30) of the counties had complied with the ceilings and are drawing their full budgetary provisions from the exchequer. An additional thirteen (13) have held meetings with CRA and agreed, on a need basis, where adjustments need to be made. Four of the counties (Embu, Nairobi, Nakuru and Tana River) are the only counties that have neither complied nor held discussions with the Commission. An initial meeting with Nakuru County is planned for March 23, 2015. (**Table 3**)

In the County Allocation of Revenue Act 2014, Parliament amended Section 107 of the Public Finance Management Act 2012 by inserting subsection (2A) ***Pursuant to Articles 201 and 216 of the Constitution and notwithstanding subsection (2), the Commission on Revenue Allocation shall recommend to the Senate the budgetary ceilings on the recurrent expenditures of each county government.***

In dismissing petition 386 of 2014 by the County Assemblies Forum, the High Court ruled that this particular amendment was never challenged in court and is therefore in force. The recommendations made by CRA are therefore binding to the county governments.

The CRA made its recommendations to the Senate through our letter REF: CRA/CSO/P&B/13/Vol.4 (1) dated 30<sup>th</sup> September 2014 (*Copy attached – Annex 1*).

### 2015 / 2016 CEILINGS

You will note that there is a substantial increase of the amounts provided for each of the counties between 2014/2015 and 2015/2016. This is because the Commission has made provisions for additional staff and additional benefits arising from circulars issued by the Salaries and Remuneration Commission in December 2014. It will also be noted that items such as Ward Offices and extra mileage which were not factored in the 2014/2015 ceilings have now been included.

In developing the recommendations for the allocation of revenue between the national and the county governments for 2015/2016 fiscal year pursuant to article 216(1a) of the Constitution, CRA has computed, in detail, the cost of recurrent expenditure for all the 47 assemblies and the county executive. In so doing, the commission has consulted with the all the county governments (Executive and Assembly) in two different forums held in Utalii Hotel (December 2014), and Maanzoni resort (March 2015), respectively and their inputs have been incorporated into the recommendations. The costing has considered all the benefit circulars issued by the Salaries and Remuneration Commission (SRC). The summary of the ceilings is attached in **Table 4**.

**TABLE 1: BUDGET ALLOCATIONS ON VARIOUS DEVOLVED FUNCTIONS YEARS: 2013/14; 2014/15; 2015/16 IN KSH. MILLIONS**

	Devolved Functions	2013/14	2014/15	2015/16
1	Health Services	55,562	62,780	69,706
2	Planning & Development	50,904	54,091	56,255
3	Agriculture, Livestock and Fisheries	15,155	16,103	19,020
4	Culture, Public Entertainment & Public Amenities	1,364	2,849	2,992
5	Youth Affairs and Sports	3,181	3,380	4,531
6	Trade, Cooperative Development & Regulation	709	4,404	4,624
7	Roads & Transport	35,916	38,164	40,072
8	Lands, Housing and Public Works	5,523	5,868	6,015
9	Natural Resources & Environment Conservation	6,337	6,734	6,902
10	Pre-Primary Education	1,938	2,059	2,265
11	<b>Sub Total Devolved Functions</b>	<b>176,588</b>	<b>196,433</b>	<b>212,381</b>
12	<b>New County Structures (County Assembly, County Executive)</b>	<b>13,416</b>	<b>30,233</b>	<b>45,627</b>
13	<b>Total Devolved Functions</b>	<b>190,005</b>	<b>226,666</b>	<b>258,008</b>

**TABLE 2: SUMMARY OF CRA RECOMMENDATION ON COUNTY GOVERNMENTS BUDGET CEILINGS ON RECURRENT EXPENDITURE FOR 2014/2015 ON NEW COUNTY STRUCTURES (KSHS. MILLIONS)**

<b>1. COUNTY ASSEMBLY</b>		
1	MCA ( Salaries, Allowances & Gratuity)	8,416
2	Speaker (Salaries, Allowances & Gratuity)	339
3	Deputy Speaker (Salaries, Allowances & Gratuity)	245
4	County Assembly- Administrative Staff (Salaries, Allowances & pension)	1,660
5	Other County Assembly Staff (Salaries, Allowances & pension)	922
6	Duty allowances and pension	471
7	Mileage for MCA	1,141
8	O&M	3,683
9	<b>Sub- Total</b>	<b>16,877</b>
<b>2. COUNTY EXECUTIVE</b>		
1	County Executive ( Salaries, Allowances & Gratuity)	1,287
2	Chief Officers (Salaries, Allowances & Pension)	946
3	County Secretary (Salaries, Allowances & Pension)	138
4	Governors & Deputy Governors (Salaries, Allowances Gratuity)	845
5	CPSB (Salaries & Pension)	975
6	PFM Staff ( Salaries and Pension)	6,134
7	O&M	3,031
8	<b>Sub- Total</b>	<b>13,356</b>
	<b>Total</b>	<b>30,233</b>

**TABLE 3: COUNTY CEILINGS COMPLIANCE LIST**

			Date: 17th March 2015
<b>A</b>	<b><u>FULLY COMPLIED</u></b>		
1	BARINGO	16	MERU
2	BOMET	17	MIGORI
3	BUNGOMA	18	MURANGA
4	BUSIA	19	NANDI
5	ELGEYO MARAKWET	20	NAROK
6	GARISSA	21	NYAMIRA
7	ISIOLO	22	NYERI
8	KAKAMEGA	23	SAMBURU
9	KIAMBU	24	TAITA TAVETA
10	KIRINYAGA	25	TRANS NZOIA
11	KISII	26	UASIN GISHU
12	KISUMU	27	VIHIGA
13	LAIKIPIA	28	WAJIR
14	MANDERA	29	WEST POKOT
15	MAKUENI	30	MARSABIT
<b>B</b>	<b><u>DISCUSSED WITH CRA BUT NOT FINALIZED</u></b>		
1	HOMABAY	8	MACHAKOS
2	KAJIADO	9	MOMBASA
3	KERICHO	10	NYANDARUA
4	KILIFI	11	SIAYA
5	KITUI	12	THARAKA NITHI
6	KWALE	13	TURKANA
7	LAMU		
<b>C</b>	<b><u>DISCUSSIONS NOT COMMENCED</u></b>		
1	EMBU	3	NAKURU ( <i>To meet on 23/03/2015</i> )
2	NAIROBI	4	TANA RIVER

**TABLE 4: SUMMARY OF CRA RECOMMENDATION ON COUNTY GOVERNMENTS BUDGET CEILINGS ON RECURRENT EXPENDITURE FOR 2015/2016 (KSHS. MILLIONS)**

<b>1. COUNTY ASSEMBLY</b>			
<b>No.</b>	<b>Item</b>	<b>No.</b>	<b>Amount</b>
1	Members of the County Assembly (MCAs)	2,227	8,715
2	Speaker	47	332
3	Deputy Speaker	47	263
4	County Assembly Staff (more than 60 Wards-120 staff, 40-<60 Wards-100 staff, 20-<40 Wards- 88 staff & Less 20 Wards gets 65 staff )	4,150	5,543
5	County Assembly Ward Staff (3 per ward)	4,350	1,197
6	Mileage for MCAs		1,429
7	Insurance (more than 60 Wards-60 Millions, 40-<60 Wards-40 Millions, 20-<40 Wards- 30 Millions & Less 20 Wards gets 20 Millions	47	1,480
8	County Assembly Service Board (CASB)	47	267
9	Operations and Maintenance (O & M)		5,768
	<b>Sub-Total</b>		<b>24,994</b>
<b>2. COUNTY EXECUTIVE</b>			
<b>No.</b>	<b>Item</b>	<b>No.</b>	<b>Amount</b>
1	Governor	47	669
2	Deputy Governor	47	451
3	CEC members	453	2,002
4	Chief Officers	453	1,291
5	County Secretary	47	226
6	Chief of Staff	47	134
7	Sub County & Ward Administrators	1,740	2,080
8	County Treasury		6,747
9	County Public Service Board (CPSB)		1,086
10	Staff- Office of the Governor		716
11	Insurance	47	470
12	Operations and Maintenance (O & M)		4,762
	<b>Sub- Total</b>		<b>20,633</b>
	<b>Total</b>		<b>45,627</b>

**CRA Recommended Budget Ceilings for County Assembly and County Executive based on Recommended budget on Costs of new County Structures of Ksh. 30,232 Million**

No.	County	County Assembly	County Executive	Total
1	Nairobi	962,450,836	294,568,636	1,257,019,472
2	Kiambu	659,316,714	294,568,636	953,885,351
3	Kakamega	651,738,361	294,568,636	946,306,998
4	Nakuru	560,798,125	294,568,636	855,366,761
5	Kisii	538,063,066	294,568,636	832,631,702
6	Meru	522,906,360	294,568,636	817,474,996
7	Migori	485,014,594	294,568,636	779,583,231
8	Bungoma	477,436,241	294,568,636	772,004,878
9	Homa Bay	477,436,241	294,568,636	772,004,878
10	Machakos	447,122,829	294,568,636	741,691,466
11	Kitui	431,966,123	294,568,636	726,534,760
12	Busia	401,652,711	294,568,636	696,221,347
13	Kilifi	401,652,711	294,568,636	696,221,347
14	Muranga	386,496,005	294,568,636	681,064,641
15	Kisumu	371,339,299	294,568,636	665,907,935
16	Baringo	363,760,946	294,568,636	658,329,582
17	Garissa	363,760,946	294,568,636	658,329,582
18	Mandera	363,760,946	294,568,636	658,329,582
19	Nandi	363,760,946	294,568,636	658,329,582
20	Siaya	363,760,946	294,568,636	658,329,582
21	Kericho	356,182,593	294,568,636	650,751,229
22	Makueni	356,182,593	294,568,636	650,751,229
23	Narok	356,182,593	294,568,636	650,751,229
24	Nyeri	356,182,593	294,568,636	650,751,229

**CRA Recommended Budget Ceilings for County Assemly and County Executive based on Recommended budget on Costs of new County Structures of Ksh. 30,232 Million**

No.	County	County Assembly	County Executive	Total
25	Turkana	356,182,593	294,568,636	650,751,229
26	Mombasa	341,025,887	294,568,636	635,594,523
27	Wajir	341,025,887	294,568,636	635,594,523
28	Uasin Gishu	333,447,534	294,568,636	628,016,170
29	Kajiado	310,712,475	280,193,680	590,906,155
30	Nyandarua	310,712,475	280,193,680	590,906,155
31	Tranzoia	295,555,769	280,193,680	575,749,449
32	Vihiga	295,555,769	280,193,680	575,749,449
33	Bomet	265,242,356	280,193,680	545,436,036
34	Taita	265,242,356	273,006,202	538,248,558
35	Embu	250,085,650	273,006,202	523,091,852
36	Kwale	250,085,650	273,006,202	523,091,852
37	Marsabit	250,085,650	273,006,202	523,091,852
38	Nyamira	250,085,650	273,006,202	523,091,852
39	West Pokot	242,507,297	273,006,202	515,513,499
40	Elgeyo/Marakwet	227,350,591	273,006,202	500,356,793
41	Kirinyanga	219,772,238	273,006,202	492,778,440
42	Samburu	197,037,179	258,631,246	455,668,425
43	Tana River	197,037,179	258,631,246	455,668,425
44	Tharaka Nithi	181,880,473	258,631,246	440,511,719
45	Lalikipia	174,302,120	258,631,246	432,933,366
46	Isiolo	151,567,061	244,256,289	395,823,350
47	Lamu	151,567,061	244,256,289	395,823,350
	<b>Total</b>	<b>16,876,992,217</b>	<b>13,355,977,396</b>	<b>30,232,969,613</b>

**NOTES**

COUNTY ASSEMBLY	
1) MCAs (Salaries, Allowances & Gratuity)	8,415,623,302
2) Speaker (Salaries, Allowances & Gratuity)	339,385,167
3) Deputy Speaker (Salaries, Allowances & Gratuity)	245,086,426
4) County Assembly-Administrative staff (Salaries & Pension)	1,659,681,036
5) Other County Assembly staff (Salaries & Pension)	922,140,000
6) Duty Allowances (Pension & Gratuity)	471,324,720
7) Mileage for MCAs	1,140,693,888
8) O & M	3,683,057,678
<b>Total</b>	<b>16,876,992,217</b>

COUNTY EXECUTIVE	
1) County Executive (Salaries, Allowances & Gratuity)	1,287,284,400
2) Chief Officers (Salaries, Allowances & Pension)	946,468,800
3) County Secretary (Salaries & Pension)	138,321,000
4) Governors & D. Governors (Salaries, Allowances & Gratuity)	845,114,050
5) CPSB (Salaries & Pension)	974,688,670
6) PFM Staff (Salaries & Pension)	6,133,556,064
7) O & M	3,030,544,412
<b>Total</b>	<b>13,355,977,396</b>

REPUBLIC OF KENYA



OFFICE OF THE CONTROLLER OF BUDGET

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Email: cob@cob.go.ke

P.O. Box 35616 - 00100, Nairobi  
Tel. 2211068, 0716274922, 318939

19<sup>th</sup> March, 2015

REF: OCOB/ SEN/002/1 (19)

**Mr. J. M. Nyegenye**  
Clerk of the Senate  
Clerk's Chambers  
Parliament Buildings  
**NAIROBI**

Dear *Mr. Nyegenye,*

**RE: STATEMENT BY THE OFFICE OF THE CONTROLLER OF  
BUDGET ON FINANCIAL ALLOCATION AND EXCHEQUER  
RELEASES TO COUNTIES FOR THE FINANCIAL YEAR  
2014/2015**

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We acknowledge receipt of your letter *Ref. SEN/FCB/GEN-CORR/VOL.2/049/2015* dated 12<sup>th</sup> March, 2015 on the above subject matter

Enclosed, herewith please find the Office of the Controller of Budget's statement in response to the issues raised.

Yours *Sincerely,*

A handwritten signature in black ink, appearing to read 'Stephen Masha'.

**Stephen Masha**  
**For: CONTROLLER OF BUDGET**

*Encls (1)*



**OFFICE OF THE CONTROLLER OF BUDGET**

**FINANCIAL ALLOCATION AND EXCHEQUER RELEASES  
TO COUNTIES FOR THE FINANCIAL YEAR 2014/2015**

**STATEMENT BY THE CONTROLLER OF BUDGET TO THE CHAIRMAN,  
SENATE STANDING COMMITTEE ON FINANCE, COMMERCE AND  
BUDGET**

**March 19, 2015**

## STATEMENT BY THE OFFICE OF CONTROLLER OF BUDGET ON FINANCIAL ALLOCATION AND EXCHEQUER RELEASES TO COUNTIES FOR THE FINANCIAL YEAR 2014/2015

Please refer to your letter Ref: SEN/FCB/Gen-Corr/Vol 2/049/2015 of 12<sup>th</sup> march 2015 on the above subject matter.

The Office of the Controller of Budget (OCOB) is an independent office established by Article 228 of the Constitution. It became operational upon the appointment of the Controller of Budget on 27<sup>th</sup> August, 2011.

**a) As an independent office, COB has the following mandate: -**

1. To oversee implementation of the budgets of the National and County Governments. (Article 228 (4)).
2. To approve and authorize withdrawals from Public Funds; Equalization Fund (Article 204 (9)), Consolidated Fund (Article 206 (4)), and Revenue Fund (Article 207 (3)) if satisfied that the same is in accordance with the law (Article 228 (5)).
3. Financial advice to parliament where a Cabinet Secretary has stopped transfer of Funds to a State Organ or Public Entity and there is need to renew the decision to stop further transfer of Funds (Article 225 (2)).
4. Quarterly reporting to the Legislature on implementation of budgets of National and County Governments (Article 228 (6)).
5. Annual reporting to Executive and Legislature (Article 254 (1)).
6. Adhoc reporting to Executive and Legislature (Article 254 (2)).
7. Publishing and publicizing reports (Article 254 (3)).
8. To conduct investigations on its own motion or on a complaint made by a member of the public (Article 252 (1)(a)).
9. To conduct Alternative Dispute Resolution Mechanisms to resolve disputes (Article 252 (1)(b)).

In carrying out its mandate, the OCOB is independent and not subject to direction or control by any person or authority which is clearly buttressed in Article 249 (2) (b) of the Constitution. The OCOB collaborates with other state agencies, including the National Treasury to ensure timely release of funds to government entities.

**b) A number of County Assemblies are grinding to a halt in operations**

The Office of the Controller of Budget approves withdrawal of funds by counties based on requests by the County Treasuries, for both the County Executive and County Assembly. The approvals are based on the following legal framework; (i) approved Appropriations Acts of county government, (ii) provisions of the Public Financial Management Act, 2012, (iii) the County Allocation of Revenue Act, 2014, and other relevant Acts of parliament. Table 1 shows the summary of exchequer releases to county government as at 17<sup>th</sup> march 2015 for the financial year 2014/2015.

**c) Controller of Budget has refused to finance County Assemblies unless they comply with the said CRA ceilings (Petition No. 368/14)**

Petition No. 368/14 was instituted by Speakers of all 47 County Assemblies on 24<sup>rd</sup> July 2014 challenging the issuance of a circular by CRA on the maximum budgetary allocations to the County Assembly and the County Executive for the FY 2014/15. The parties to the petition included the Commission on Revenue Allocation (CRA), the Controller of Budget, Council of Governors and the Attorney General.

The Petitioners sought the following orders *inter alia*:

- a. *A declaration that the circulars breached the Petitioners' constitutional rights and were therefore null and void.*
- b. *An order of certiorari to quash the circular issued by CRA*
- c. *An order of mandamus to compel OCOB to approve withdrawal of fund as provided for in every County Governments budget.*

In order to facilitate the carrying out of essential services and activities by county governments the parties entered into a consent agreement on 25<sup>th</sup> July 2014 that was subsequently varied on 1<sup>st</sup> August 2014 before the trial Judge.

A look at consent order No. 2 of 1<sup>st</sup> August 2014 reads:

***"That funds be immediately released to the counties as per section 134 of the Public Finance Management Act in respect of County Budget (Estimates) submitted to the County Assemblies for the FY 2014/15, pending the hearing and determination of the petition herein"***

Section 134 of the PFM Act, 2012 only applies in situations where a county has not enacted an Appropriations Act by 30<sup>th</sup> June. However some counties had enacted Appropriations Acts by 30<sup>th</sup> June, 2014. Therefore, there was need to vary the consent order No. 1 of 25<sup>th</sup> July, 2014. It is in this regard that the parties entered into consent order No. 2 dated 1<sup>st</sup> August, 2014, which brought those counties that had enacted their Appropriations Act into application of section 134 of the PFM Act. This allowed them to access up to 50 per cent of

their budget through to 31<sup>st</sup> December 2014. The two consent orders envisaged two categories of counties, those that had enacted and those that had not enacted their Appropriations Act as at 30<sup>th</sup> June, 2014.

For the counties that had not passed their Appropriations Act, Section 134 fully applied and the County Assemblies were required to pass a vote on account on budget estimates presented by their respective CEC Member – Finance on 30<sup>th</sup> April, 2014.

Further, Section 134 of the PFM Act, 2012 provides:

*134. (1) Subject to subsection (2), if the County Appropriation Bill for a financial year has not been assented to, or is not likely be assented to by the beginning of the financial year, a County Assembly may authorize the withdrawal of money from the County Revenue Fund.*

*(2) Money withdrawn under subsection (1) –*

*(a) May be used only for the purpose of meeting expenditure necessary to carry on the services of the county government during the financial year concerned until such time as the relevant appropriation law is passed.*

By our understanding, any requisition under Section 134 is for essential services only. Therefore, the COB released funds to counties in line with the consent orders until the judgment was delivered on 20<sup>th</sup> February, 2015 which, dismissed the petition and did not grant any of the prayers sought by the Petitioners.

Table 1 below shows Exchequer releases to the counties as of March 17, 2015.

TABLE 1: COUNTY SUMMARY OF EXCHEQUER ISSUES AS AT 17th March,2015 - FY 2014/15								
County Code	County Title	COUNTY EXECUTIVE (CE)			COUNTY ASSEMBLY (CA)			TOTAL (g=c+f)
		RECURRENT (a)	DEVELOPMENT (b)	TOTAL (c=a+b)	RECURRENT (d)	DEVELOPMENT (e)	TOTAL (f=d+e)	
301	Baringo	1,661,151,265	768,703,613	2,429,854,878	235,095,610	20,000,000	255,095,610	2,684,950,488
302	Bomet	1,021,653,665	1,345,966,997	2,367,620,662	161,248,243		161,248,243	2,528,868,905
303	Bungoma	2,494,440,950	1,921,491,728	4,415,932,678	307,618,119		307,618,119	4,723,550,797
304	Busia	1,556,369,399	945,000,000	2,501,369,399	381,630,601	5,000,000	386,630,601	2,888,000,000
305	Elgeyo/Marakwet	1,246,912,986	681,525,927	1,928,438,913	191,847,967	20,125,000	211,972,967	2,140,411,880
306	Embu	1,194,056,877	309,294,070	1,503,350,947	135,499,122		135,499,122	1,638,850,069
307	Garissa	1,977,517,190	2,060,644,899	4,038,162,089	180,644,230		180,644,230	4,218,806,319
308	Homa Bay	1,537,663,142	736,792,079	2,274,455,221	399,094,121	22,207,921	421,302,042	2,695,757,263
309	Isiolo	873,174,529	500,000,297	1,373,174,826	82,783,531		82,783,531	1,455,958,357
310	Kajiado	1,551,191,921	505,453,483	2,056,645,404	207,700,000	34,546,517	242,246,517	2,298,891,921
311	Kakamega	3,104,396,233	2,441,028,182	5,545,424,415	346,562,506	52,908,000	399,470,506	5,944,894,921
312	Kericho	1,492,877,148	587,161,137	2,080,038,285	363,691,297		363,691,297	2,443,729,582
313	Kiambu	3,797,048,877	753,507,543	4,550,556,420	484,483,188	1,556,159	486,039,347	5,036,595,767
314	Kilifi	2,219,041,144	1,958,384,899	4,177,426,043	221,008,307	162,139,008	383,147,315	4,560,573,358
315	Kirinyaga	1,440,035,431	457,806,400	1,897,841,831	207,942,879	5,141,000	213,083,879	2,110,925,710
316	Kisii	2,433,070,600	1,287,508,347	3,720,578,947	422,405,789		422,405,789	4,142,984,736

317	Kisumu	2,854,275,319	901,365,894	3,755,641,213	217,267,882	-	217,267,882	3,972,909,095
318	Kitui	2,182,220,615	1,634,738,005	3,816,958,620	387,174,813	-	387,174,813	4,204,133,433
319	Kwale	1,440,600,188	1,366,065,595	2,806,665,783	248,073,458	95,875,000	343,948,458	3,150,614,241
320	Laikipia	1,272,956,809	616,520,141	1,889,476,950	92,151,060	33,000,000	125,151,060	2,014,628,010
321	Lamu	158,821,339	58,000,000	216,821,339	108,343,925	26,750,000	135,093,925	351,915,264
322	Machakos	2,772,725,498	1,062,933,457	3,835,658,955	308,755,472	15,750,000	324,505,472	4,160,164,427
323	Makueni	2,104,175,060	806,928,129	2,911,103,189	262,192,585	35,887,492	298,080,077	3,209,183,266
324	Mandera	1,816,792,241	2,442,117,716	4,258,909,958	181,880,473	126,000,000	307,880,473	4,566,790,431
325	Marsabit	1,380,872,393	1,668,795,500	3,049,667,893	194,677,607	8,100,000	202,777,607	3,252,445,500
326	Meru	2,101,788,388	1,567,296,797	3,669,085,185	305,494,815	-	305,494,815	3,974,580,001
327	Migori	1,489,564,214	47,000,000	1,536,564,214	152,465,786	-	152,465,786	1,689,030,000
328	Mombasa	3,186,684,958	325,000,000	3,511,684,958	183,736,575	-	183,736,575	3,695,421,533
329	Murang'a	165,000,000	250,000,000	415,000,000	35,000,000	10,000,000	45,000,000	460,000,000
330	Nairobi City	6,675,489,763	190,000,000	6,865,489,763	840,050,238	-	840,050,238	7,705,540,001
331	Nakuru	3,224,617,671	7,943,251	3,232,560,922	296,642,448	50,000,000	346,642,448	3,579,203,370
332	Nandi	1,385,767,500	1,481,398,415	1,597,055,503	211,288,003	36,057,417	247,345,420	1,844,400,923
333	Narok	2,589,794,000	1,313,500,000	3,903,294,000	36,830,000	105,000,000	141,830,000	4,045,124,000
334	Nyamira	1,414,316,803	813,476,984	2,227,793,787	179,045,000	-	179,045,000	2,406,838,787
335	Nyandarua	256,603,233	355,050,422	98,447,189	256,603,233	-	256,603,233	355,050,422

336	Nyeri	2,106,105,988	667,024,480	2,773,130,468	245,770,945	30,000,000	275,770,945	3,048,901,413
337	Samburu	1,045,168,938	775,770,010	1,820,938,948	128,778,590	17,600,000	146,378,590	1,967,317,538
338	Siaya	1,377,738,472	1,058,000,000	2,435,738,472	382,311,528	47,000,000	429,311,528	2,865,050,000
339	Taita/Taveta	1,307,172,723	641,333,148	1,948,505,871	175,425,983	22,858,844	198,284,827	2,146,790,698
340	Tana River	905,000,000	1,281,780,000	2,186,780,000	159,000,000	45,800,000	204,800,000	2,391,580,000
341	Tharaka - Nithi	950,909,613	590,507,503	1,541,417,116	105,756,300	10,000,000	115,756,300	1,657,173,416
342	Trans Nzoia	1,238,125,839	1,103,267,223	2,341,393,062	170,626,261	60,648,000	231,274,261	2,572,667,323
343	Turkana	1,687,071,389	4,356,678,490	6,043,749,879	300,000,000		300,000,000	6,343,749,879
344	Uasin Gishu	1,979,108,761	1,644,262,408	3,623,371,169	227,092,456	12,500,000	239,592,456	3,862,963,625
345	Vihiga	1,367,729,771	817,856,000	2,185,585,771	157,154,229	153,260,000	310,414,229	2,496,000,000
346	Wajir	1,643,674,193	1,868,034,366	3,511,708,559	224,705,508		224,705,508	3,736,414,067
347	West Pokot	1,352,334,545	957,800,000	2,310,134,545	212,174,467	33,000,000	245,174,467	2,555,309,012
	<b>TOTAL</b>	<b>85,033,807,582</b>	<b>49,930,713,535</b>	<b>133,181,204,239</b>	<b>11,315,725,149</b>	<b>1,298,710,358</b>	<b>12,614,435,507</b>	<b>145,795,639,746</b>

**d) The High Court has ruled on the matter and though dismissing the petition by County Assemblies, the Court has determined that the ceilings by CRA are not binding and can only be binding if the said ceilings are approved by Parliament.**

After analyzing the judgment, it is our considered view that the Court held that by virtue of Article 216 of the Constitution and Section 10 of the Commission on Revenue Allocation Act, 2012, CRA was well within its mandate to issue the circular on budgetary ceilings to the County Governments.

The Court further held that recommendations by CRA, although not binding on the Counties should be given due consideration in the enactment of the budget. The Court emphasized that recommendations by CRA to the Senate should be given due consideration and reasons given for any deviation. It therefore follows that deviation by the County Assembly on the recommendations of CRA would also require such County Assembly to give reasons.

Moreover, the Court held that the recommendations by CRA became binding on the Counties once they are approved by the Senate in the County Allocation of Revenue Act, 2014. Consequently, the Court declared that since the Petitioners did not challenge the validity of CARA, 2014, it would not delve into the validity of CARA, 2014.

It is therefore our considered opinion, that since the Court did not grant any of the Petitioners prayers and held that the CRA was well within the law and its mandate in issuance of the circular, it follows that the Senate having approved the recommendations of CRA in CARA, 2014, the ceilings are binding on the Counties and should therefore be adhered to.

**e) Controller of Budget is sending County Assemblies to negotiated with CRA to vary ceilings even though the court has placed the mandate on the parliament**

Pursuant to Article 216 (1)(a), the Commission on Revenue Allocation is mandated to make recommendations concerning the basis for the equitable sharing of revenue raised by the National Government between the national and county governments. Article 216 (5) requires CRA to submit its recommendations to the Senate, National Assembly, the National Executive, County Assemblies and County Executives. Therefore, the County Governments should consult CRA and not OCOB on amendments to the budget ceilings for County Assemblies and the County Executives.

# REPUBLIC OF KENYA



## COUNTY ASSEMBLIES FORUM (CAF)

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E-mail: countyassembliesforum@gmail.com

### MEMORANDUM ON THE CEILINGS IMPOSED ON COUNTY ASSEMBLIES BY THE COMMISSION ON REVENUE ALLOCATION (CRA)

**From:** The Speakers of the County Assemblies  
**To:** The Standing Committee on Finance, Commerce and Budget  
**Date:** 24<sup>th</sup> February, 2015  
**Subject:** **The Position of the 47 County Assemblies on the Budget Ceilings Imposed by the Commission on Revenue Allocation for FY 2014/15**

At the outset, the County Assemblies do not object to the desirability of budget ceilings and the need to use public money in a prudent manner as provided for in Article 201 (d) the Constitution and the section 107 of the Public Finance Management Act.

The County Fiscal Strategy Paper, which in accordance with the Public Finance management Act, 2012, and which is submitted by the Executive by 28<sup>th</sup> of February every year contains ceilings for every sector of the County Government, the County Assembly included.

The County Assemblies have always held that ceilings ought to be a product of honest negotiations between the sectors (Assembly included) and county treasury.

In April 2014, way after those negotiations were settled and sector ceilings pegged in the

County Fiscal Strategy Paper, the Commission on Revenue Allocation (CRA) gave recommendations on ceilings on recurrent expenditure for County Assembly and County Executive (refer to Annexure 1).

These ceilings were arbitrary figures developed between CRA and the Council of Governors without consultation with the Assemblies.

In July 2014, after enactment of Appropriation Acts by County Assemblies, the Controller of Budget (CoB) declined to recognize the County Appropriation Acts, and refused to authorize withdrawals (release funds to County Assemblies) unless they complied with the ceilings, whereas the County Assemblies Forum (CAF) held that CRA recommendations were not binding. The legality of the County Appropriation Acts has not been challenged in any court in accordance with Article 165 of The Constitution.

It is on the basis of this that CAF went to court in July 2014, to seek an interpretation of the same and sought prayers to quash the circulars and term them unconstitutional and void. Whereas the court dismissed the petition to quash the circulars and termed them lawful, the court made the following determination:

1. That the circulars on ceiling were issued in the advisory capacity granted to the Commission under article 216 of the Constitution and are therefore lawful.
2. Circulars cannot be quashed due to (i) above.
3. However, ceilings in the circulars are **not binding** on County Assemblies since they are not **directives** and can only become binding if adopted by Parliament through the instrument of the County Allocation of Revenue Act, given that Parliament has the final say on the matter.
4. County budgets are subject to national legislation, being Division of Revenue Act and County Allocation of Revenue Act.
5. Differences in regarding fiscal and budgetary processes should be settled in terms of Article 189(4) of the constitution of Kenya, by way of alternative dispute resolution mechanism and this includes reference of the dispute to parliament which has the final say in budgetary processes in Kenya.

**Although Parliament amended the PFMA, and inserted a provision allowing CRA to recommend ceilings to the Senate, as it stands today, the Senate in its own wisdom has not approved the said recommended ceilings.**

In spite of this, the CoB is still declining to approve withdrawals unless the counties revised their Appropriation Acts to comply with the CRA ceilings. Further, the CoB is asking Assemblies to go to CRA and get clearance letters of compliance with the said ceilings before funds are released to them.

### FACTS ABOUT THE CEILINGS

The impression provided by CRA that a number of County Assemblies had willingly complied with the budget ceiling and a number are negotiating is misleading. All county Assemblies who complied, had done so under **duress**, those that complied did so after their members and employees went without salaries for months after their county treasuries declined to release funds to the County Assemblies.

Whereas CRA purports to have recommended reasonable ceilings, a cursory look at their recommendations for FY 2014/2015 against recommendations for FY 2015/2016 proves otherwise. The figures are irreconcilable.

Below is a list of some counties;

EXPENDITURE CEILINGS FOR COUNTY ASSEMBLIES AS SET BY THE COMMISSION ON REVENUE ALLOCATION			
NO.	NAME OF THE COUNTY ASSEMBLY	CRA RECOMENDED CEILINGS IN KSH	
		2014/2015	2015/2016
1	Lamu	151,567,061	305,000,000
2	Tharaka Nithi	181,880,473	329,000,000
3	Tana River	197,037,179	376,000,000
4	Samburu	197,037,179	358,000,000
5	Kirinyaga	219,772,238	392,000,000
6	Elgeyo Marakwet	227,350,591	399,000,000
7	West Pokot	242,507,297	417,000,000
8	Nyamira	250,085,650	415,000,000
9	Marsabit	250,085,650	483,000,000

Whereas CRA purports to set recurrent ceilings on Executive, they have not done so. CRA purports the presence of a unit/department called "new structure" in the County Executive and left out the bigger chunk of the rest of the executive departments to have unregulated recurrent expenditure. In fact, whatever is intended to be saved from ceilings in County Assemblies is not being channeled to development but to the already bloated recurrent expenditure of the executive.

With the knowledge of the budget making process, whether in the estimates, or the Appropriation Acts, budgets are made in respect of votes (read departments). There is no

vote called “new structures”, and neither is there a department known as “new structures” in the Executive arms of all the 47 County Governments.

The purported budget ceilings on County Executive are therefore not enforceable, and CRA made these provisions as public relation gimmick.

Below is a table with a comparison of the actual recurrent expenditure in the Appropriation Act, 2014, against the purported CRA ceilings for a number of County executives;

COMPARISON OF ACTUAL RECURRENT EXPENDITURES AND CRA PROPOSED EXPENDITURE CEILINGS FOR COUNTY EXECUTIVES			
	COUNTY	PURPOTED CEILINGS BY CRA	ACTUAL RECURRENT EXPENDITURE FOR EXECUTIVE IN THE APPROPRIATION ACT, 2014
1	Nairobi	962,000,000	17,845,258,242
2	Tana River	378,000,000	1,314,056,105
3	Kwale	396,000,000	3,801,304,919
4	Nakuru	455,000,000	5,595,712,384
5	Lamu	351,000,000	946,104,077
6	Wajir	408,000,000	2,792,201,855

**COUNTY ASSEMBLIES’ RECOMMENDATIONS:**

1. That the Senate confirms that the CRA recommended ceiling are not binding until approved by the Senate in accordance to PFM(Amendment )Act;
2. That the Senate confirms that they have not approved the ceilings recommended by the CRA;
3. That CoB be compelled to release funds to the County Assemblies without reference to the said ceilings;
4. That funds be released in accordance with the Appropriation Acts, since the County Appropriation Acts are not in conflict with the Constitution, the PFMA, The Division of Revenue Act, 2014, and The County Allocation of Revenue Act, 2014;

5. That there is a need to interrogate the formula used by CRA in arriving at the ceiling since there is wide discrepancies between the proposed ceiling for FY 2014/15 and those for FY 2015/16. We note that the CRA recommended ceilings for the county executive are not wholesome and therefore not enforceable.

*We attach the following annexures for your reference;*

Annex 1: CRA Recommended recurrent budget ceilings for County Assembly and County Executive for 2014/15 Kshs. 30,232 Million

Annex 2: CRA draft recommended recurrent budget ceilings, for the County government for 2015/16 (Kshs. Millions)

Annex 3: Brief of the Court judgement on High Court Petition 368 of 2014(Speakers of the forty seven County Assemblies Vs CRA &2 others)

Annex 4: The Court Judgement on High Court Petition 368 of 2014(Speakers of the forty seven County Assemblies Vs CRA &2 others)

Annex 5: The Nairobi County Appropriation Act, 2014

Annex 6: The Tanariver County Appropriation Act, 2014

Annex 7: The Makueni County Appropriation Act, 2014

Annex 8: The Kwale County Appropriation Bill, 2014

Annex 9: The Nakuru County Appropriation Act, 2014



Hon. (Dr.) Nuh Nassir

Chairman

County Assemblies Forum

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 368 OF 2014

IN THE MATTER OF AN APPLICATION BY THE SPEAKERS OF THE 47  
COUNTY ASSEMBLIES OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ARTICLES 1,2,3,6,10,19,20,22,23(1) & (3), 27(1),  
27(4), 27, 43, 47, 73, 159, 160, 165, 174, 175, 176, 179(1), 185, 186, 189,  
190, 194, 201, 205, 207, 209, 210, 216, 224, 225, 228, 259 & 260 OF THE  
CONSTITUTION OF KENYA

AND

IN THE MATTER OF RULES 23 AND 24 OF THE CONSTITUTION OF KENYA  
(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE  
AND PROCEDURE RULES, 2013

AND

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

AND

IN THE MATTER OF SECTIONS 117, 125,129, 131, 133 AND 134 OF THE  
PUBLIC FINANCE MANAGEMENT ACT, CAP 412C, LAWS OF KENYA

BY

THE SPEAKER, NAKURU COUNTY ASSEMBLY .....1<sup>ST</sup> PETITIONER  
THE SPEAKER, MOMBASA COUNTY ASSEMBLY .....2<sup>ND</sup> PETITIONER  
THE SPEAKER, KWALE COUNTY ASSEMBLY .....3<sup>RD</sup> PETITIONER  
THE SPEAKER, KILIFI COUNTY ASSEMBLY .....4<sup>TH</sup> PETITIONER  
THE SPEAKER, TANA RIVER COUNTY ASSEMBLY .....5<sup>TH</sup> PETITIONER  
THE SPEAKER, LAMU COUNTY ASSEMBLY .....6<sup>TH</sup> PETITIONER

THE SPEAKER, TAITA-TAVETA COUNTY ASSEMBLY .....	7 <sup>TH</sup> PETITIONER
THE SPEAKER, GARISSA COUNTY ASSEMBLY .....	8 <sup>TH</sup> PETITIONER
THE SPEAKER, WAJIR COUNTY ASSEMBLY .....	9 <sup>TH</sup> PETITIONER
THE SPEAKER, MANDERA COUNTY ASSEMBLY .....	10 <sup>TH</sup> PETITIONER
THE SPEAKER, MARSABIT COUNTY ASSEMBLY .....	11 <sup>TH</sup> PETITIONER
THE SPEAKER, ISIOLO COUNTY ASSEMBLY .....	12 <sup>TH</sup> PETITIONER
THE SPEAKER, MERU COUNTY ASSEMBLY .....	13 <sup>TH</sup> PETITIONER
THE SPEAKER, THARAKA NITHI COUNTY ASSEMBLY .....	14 <sup>TH</sup> PETITIONER
THE SPEAKER, EMBU COUNTY ASSEMBLY .....	15 <sup>TH</sup> PETITIONER
THE SPEAKER, KITUI COUNTY ASSEMBLY .....	16 <sup>TH</sup> PETITIONER
THE SPEAKER, MACHAKOS COUNTY ASSEMBLY .....	17 <sup>TH</sup> PETITIONER
THE SPEAKER, MAKUENI COUNTY ASSEMBLY .....	18 <sup>TH</sup> PETITIONER
THE SPEAKER, NYANDARUA COUNTY ASSEMBLY .....	19 <sup>TH</sup> PETITIONER
THE SPEAKER, NYERI COUNTY ASSEMBLY .....	20 <sup>TH</sup> PETITIONER
THE SPEAKER, KIRINYAGA COUNTY ASSEMBLY .....	21 <sup>ST</sup> PETITIONER
THE SPEAKER, MURANG'A COUNTY ASSEMBLY .....	22 <sup>ND</sup> PETITIONER
THE SPEAKER, KIAMBU COUNTY ASSEMBLY .....	23 <sup>RD</sup> PETITIONER
THE SPEAKER, TURKANA COUNTY ASSEMBLY .....	24 <sup>TH</sup> PETITIONER
THE SPEAKER, WEST POKOT COUNTY ASSEMBLY .....	25 <sup>TH</sup> PETITIONER
THE SPEAKER, SAMBURU COUNTY ASSEMBLY .....	26 <sup>TH</sup> PETITIONER
THE SPEAKER, TRANS NZOIA COUNTY ASSEMBLY .....	27 <sup>TH</sup> PETITIONER
THE SPEAKER, UASIN GISHU COUNTY ASSEMBLY .....	28 <sup>TH</sup> PETITIONER
THE SPEAKER, ELGEYO MARAKWET COUNTY ASSEMBLY ..	29 <sup>TH</sup> PETITIONER
THE SPEAKER, NANDI COUNTY ASSEMBLY .....	30 <sup>TH</sup> PETITIONER
THE SPEAKER, BARINGO COUNTY ASSEMBLY .....	31 <sup>ST</sup> PETITIONER
THE SPEAKER, LAIKIPIA COUNTY ASSEMBLY .....	32 <sup>ND</sup> PETITIONER
THE SPEAKER, NAROK COUNTY ASSEMBLY .....	33 <sup>RD</sup> PETITIONER
THE SPEAKER, KERICHO COUNTY ASSEMBLY .....	34 <sup>TH</sup> PETITIONER
THE SPEAKER, KAJIADO COUNTY ASSEMBLY .....	35 <sup>TH</sup> PETITIONER
THE SPEAKER, BOMET COUNTY ASSEMBLY .....	36 <sup>TH</sup> PETITIONER
THE SPEAKER, KAKAMEGA COUNTY ASSEMBLY .....	37 <sup>TH</sup> PETITIONER
THE SPEAKER, VIHIGA COUNTY ASSEMBLY .....	38 <sup>TH</sup> PETITIONER
THE SPEAKER, BUNGOMA COUNTY ASSEMBLY .....	39 <sup>TH</sup> PETITIONER
THE SPEAKER, BUSIA COUNTY ASSEMBLY .....	40 <sup>TH</sup> PETITIONER
THE SPEAKER, SIAYA COUNTY ASSEMBLY .....	41 <sup>ST</sup> PETITIONER

THE SPEAKER, KISUMU COUNTY ASSEMBLY .....42<sup>ND</sup> PETITIONER  
THE SPEAKER, HOMABAY COUNTY ASSEMBLY .....43<sup>RD</sup> PETITIONER  
THE SPEAKER, MIGORI COUNTY ASSEMBLY .....44<sup>TH</sup> PETITIONER  
THE SPEAKER, KISII COUNTY ASSEMBLY .....45<sup>TH</sup> PETITIONER  
THE SPEAKER, NYAMIRA COUNTY ASSEMBLY .....46<sup>TH</sup> PETITIONER  
THE SPEAKER, NAIROBI COUNTY ASSEMBLY .....47<sup>TH</sup> PETITIONER

AND

COMMISSION ON REVENUE ALLOCATION.....1<sup>ST</sup> RESPONDENT  
CONTROLLER OF BUDGET.....2<sup>ND</sup> RESPONDENT  
THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT  
COUNCIL OF GOVERNORS.....INTERESTED PARTY

### JUDGMENT

#### Introduction

1. This Petition concerns the budgetary and related processes in County Governments. All the Petitioners are State Organs established under the provisions of Article 178(1) of the Constitution with their mandate set out under Article 178(2) of the Constitution and include *inter-alia* to preside over the sittings of their respective County Assemblies. They have brought this Petition pursuant to the provisions of Articles 1,2,3,6,10,19,20,22,23(1) & (3), 27(1), 27(4), 27, 43, 47, 73, 159, 160, 165, 174, 175, 176, 179(1), 185, 186, 189, 190, 194, 201, 205, 207, 209, 210, 216, 224, 225, 228, 259 & 260 of the Constitution of Kenya and Rules 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and Sections 117, 125, 129, 131, 133 and 134 of the Public Finance Management Act, Cap.412C, Laws of Kenya on their

own behalf and on behalf of all the Forty Seven Counties created under Article 6(1) of the Constitution as read together with the First Schedule to the Constitution.

2. On or about 22<sup>nd</sup> April, 2014 vide a circular Reference No. CRA/CGM/Vol.III/99 addressed to all County Governments, the 1<sup>st</sup> Respondent recommended a ceiling on allocation for all County Assemblies and all County Executives in County budgets for the financial year 2014/2015. Thereafter, the 2<sup>nd</sup> Respondent on diverse dates vide various circulars addressed to the County Governments allegedly reinforced the 1<sup>st</sup> Respondent's circular aforesaid and demanded that the County Assemblies' budget allocations should comply with the aforesaid Circular failure to which the 2<sup>nd</sup> Respondent would not approve withdrawals from the County Revenue Fund or any other fund by County Governments. That at the date of the impugned Circulars, none of the County Governments had passed its County Finance Act for the financial year 2014/2015 to enable implementation of its budget. The Petitioners therefore therefore claim that the 2<sup>nd</sup> Respondent acted *ultra vires* its mandate in issuing the said circulars to the Counties.
3. The Petitioners have also filed this Petition claiming a violation of Articles 73, 185, 189, 207, 216 and 228 of the Constitution by the Respondents and are further seeking to enforce their fundamental rights and freedoms under Articles 27 and 47 of the Constitution. In

their Petition dated 23<sup>rd</sup> July 2014, they therefore seek the following orders;

- (a) A declaration that the Circulars that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, jointly and severally, and either by themselves, assigns or any person claiming through them, issued to any County Government in the Republic of Kenya on various dates between the 22<sup>nd</sup> day of April, 2014 to the 16<sup>th</sup> day of July 2014, or any other date, to prescribe and or put mandatory ceilings to financial allocation to any County Assembly in a County Budget for the Financial year 2014/2015 breached the Petitioners' constitutional rights under Articles 27(1), 27(4), 27(5), 43 and 47(1) of the Constitution of Kenya, and were null and void for all intents and purposes.*
- (b) Judicial Review order of Certiorari to remove into this Honourable Court and quash the Circulars that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, jointly and severally, and either by themselves, assigns or any person claiming through them, issued to any County Government in the Republic of Kenya on various dates between the 22<sup>nd</sup> day of April, 2014 to the 16<sup>th</sup> day of July 2014, or any other date, to prescribe and or put mandatory ceilings to financial allocations to any County Assembly in a County Budget for the Financial Year 2014/2015.*
- (c) Judicial Review orders of Mandamus to remove into this Honourable Court and compel the 2<sup>nd</sup> Respondent to oversee the implementation of the budgets of County Governments in Kenya for the financial year 2014/2015 in terms of Article 228(4) of the Constitution of Kenya once County Governments pass their respective budgets for the Financial Year 2014/2015.*
- (d) Judicial Review orders of Mandamus to remove into this Honourable Court and compel the Respondents, jointly*

*and severally, and either by themselves, assigns or any person claiming through them, to approve and disburse Funds as provided for in every County Government's budgetary allocations as set out in the County's Budgets estimates of Revenue and Expenditure for the Financial year 2014/2015, County's appropriation Acts for the Financial year 2014/2015 and or County's Finance Acts for the Financial year 2014/2015.*

- (e) Costs of and incidental to this Petition and;*
- (f) Any other order that this Honourable Court deems fit and just to grant in the circumstances."*

#### The Petitioners' case

4. Prof. Ojienda, Senior Counsel, presented the Petitioners' case and the gist of their case was that the impugned Circulars were issued without authority and are in breach of the legislative authority of County Assemblies under the provisions of Articles 185(1) and (2) of the Constitution. That in issuing the said Circulars the 1<sup>st</sup> and 2<sup>nd</sup> Respondents also violated Article 189 (1) of the Constitution as they failed to consult the County Assemblies on the matter while the same fell within the latter's mandate. They further claimed that in doing so, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents violated the fundamental right of County Assemblies under Article 47 of the Constitution to administrative action that is lawful, reasonable and procedurally fair.
5. It was also the Petitioners' contention that the impugned Circulars targeted only votes on account of County Assemblies and County

Executives for the financial year 2014/2015 by creating budgetary ceilings while the Respondents wholly protected budgets for the National Executive, the National Assembly, the Senate, the Judiciary and the twelve Commissions and Independent offices listed in Article 248 of the Constitution. As such they claimed that the impugned Circulars breached the fundamental rights of County Assemblies to the fundamental and inalienable right to equal protection and equal benefit of the law and not to be discriminated against, directly or indirectly, as provided for under Article 27(1), (4) and (5) of the Constitution.

6. On the latter issue, Prof Ojienda submitted that the term 'administrative action' refers to broad areas of governmental activity in which the repositories of power are exercised by statutory bodies, including the adoption of policy making and issuance of a specific direction and application of a general rule to a particular case in accordance with requirements of policy, expediency or administrative practice. He relied on the South African case of President of the Republic of South Africa and Others vs South African Rugby Football Union and Others (CCT 16/98) 2000 (1) SA 1 which discussed the normative content of the right to administrative action. It was therefore Prof. Ojienda's submission that since the 1<sup>st</sup> and 2<sup>nd</sup> Respondents purported to direct County Assemblies on how to legislate, their actions amounted to unlawful and unfair administrative action and thus violated Article 47 of the Constitution on three fronts;

7. Firstly, that the notices are *ultra vires* the mandate of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as set out under Articles 216(2) and 228 (4) of the Constitution.
8. Secondly, that the legislative authority of Counties vests in County Assemblies by dint of the provisions of Article 185(1) and(2) of the Constitution. In that regard, that County budgets are estimates of revenue and expenditure by Counties in a given financial year and constitute plans for management of County resources and that approval of County budgets is an express constitutional mandate of County Assemblies under the provisions of Article 184(4) (a). Further, that the Constitution has not apportioned the legislative authority of County Assemblies to approve County budgets as a shared mandate between County Assemblies and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents nor does legislative authority to determine votes on accounts in County budgets vest in the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, jointly or severally. It was therefore his submission that the Circulars are unconstitutional, unlawful and a manifest of anarchy in the operationalization of the principle of devolution.
9. Thirdly, that the impugned Circulars breach the procedures, time-lines and systems of checks and balances required to be observed by County Assemblies in enacting county budgets as is envisaged under Article 201 of the Constitution and under Sections 117, 125, 129 and 131 of the Public Finance Management Act 2012. He claimed in that regard

that in their budgetary processes, each of the County Assemblies must enact and pass certain instruments before passing its County budget.

10. In addition, that each of the instruments is progressive of and dependent on the previous instruments and it would be illegal to adopt a County Budget Estimates of Revenue and Expenditure that is not consistent with the financial outlook of a County as determined by each of the aforementioned instruments. That at the time of filing this Petition, all Counties had complied with the requirements of the Constitution and the Public Finance Management Act and had enacted County budgets for the financial year 2014/2015 and had adopted their respective County Fiscal Strategy Papers, approved their County Budget Estimates of Revenue and Expenditure by the 30<sup>th</sup> June 2014 and enacted their Appropriations Acts for the financial year 2014/2015. It was therefore Prof. Ojienda's contention that for the Counties to comply with the Circulars as issued, they had to restart the entire process of reviewing and adopting the Fiscal Strategy Paper, Budget Estimates of Revenue and Expenditure, Appropriations Bills and Acts as well as Finance Bills and Acts which actions would have gone beyond the mandatory statutory timelines set out under the Public Finance Management Act and hence create the risk of invalidating the consequent budgets that they would pass.

11. The Petitioners further contended that the mandate of the 1<sup>st</sup> Respondent is circumscribed in Article 216 of the Constitution that

mandate is to recommend on matters concerning financing and financial management by the Counties. That the Constitution does not allow it to decide on matters concerning financial management by the Counties and while relying on the Canadian cases of *R vs Mac Farlane (1923) HCA 36* and *Thomson vs Canada (Deputy Minister of Agriculture) (1992) 1 SCR 385*, the Petitioners distinguished a “recommendation” from a “decision” and stated that a recommendation does not have any binding force and does not impose obligations and therefore a “recommendation” connotes advice which the recipient may be at liberty to accept or disregard.

12. It was also the Petitioners' submission that the mandate of the 2<sup>nd</sup> Respondent under Article 228 of the Constitution is to oversee the implementation of the budgets of the National and County Governments through its authorization to withdraw from the Equalization, Consolidated and Revenue Funds and Prof. Ojienda further submitted that the said mandate in relation to Counties is limited to ascertaining that withdrawals from Revenue Funds under Article 207 of the Constitution is done only in accordance with the legislation enacted by County Assemblies or an Act of Parliament.
13. It was Prof. Ojienda's further submission that there is no law in Kenya that mandates any of the Respondents to approve budgets or determine votes on account of budgets and to do so would amount to usurpation of powers of the County Assemblies. While relying on the case of *Okiya Omtatah Okoiti & 3 Others vs Attorney General & 5 Others Petition*

No.227 of 2013 (2014) e KLR and the Supreme Court decision in Re Matter of the Interim Independent Electoral Commission, Constitutional Application No.2 of 2011 (2011) eKLR, he submitted that all constitutional organs are obliged to stick to their mandates as stipulated in the Constitution and do no more.

14. It was also the Petitioners' contention that the impugned Circulars violated their right not to be discriminated against as provided for under Article 27(1), (2) (4) and (5) because they only targeted votes on account of County Assemblies in County budgets for 2014/2015 and that they were therefore a premeditated and decided target. That while the 2<sup>nd</sup> Respondent oversees the implementation of the budgetary allocations to other State Organs such as the County Executive, National Executive, the National Assembly, the Senate, the Judiciary and the twelve Commissions and Independent Offices, they have not seen a single circular to these other organs faulting their votes for the financial year 2014/2015. In fact they claimed that the Respondents are all deliberately protecting those budgetary allocations in a conspiratorial manner.
15. It was the Petitioners' further contention that the Division of Revenue Act 2014 and the County Allocation of Revenue Act, 2014 contains block figures of revenue that goes to each County Government and that none of these statutes have any provision for the budgetary ceilings set by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents vide the impugned circulars.

16. Further, that Parliament did not set a law sanctioning the impugned budgetary ceilings and the Senate in its oversight role dismissed the intended ceilings as is evident in the Hansard of 5<sup>th</sup> August 2014 and 2<sup>nd</sup> September 2014. It was therefore Prof. Ojienda's submission that the Respondent breached Article 73(1)(a) and (2) (b) and (c) of the Constitution which enjoins all State Officers, including the Respondents, to exercise public authority as a public trust in a manner that brings honour to the office and promotes public confidence in the integrity of the office. He claimed in that regard that the acts of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in colluding with, obtaining and acting upon directions of the National Executive and purporting to set votes on account of County Assemblies offends Article 249(2) of the Constitution.
17. Lastly, Prof Ojienda urged the Court to find that the impugned Circulars violate the Constitution and grant the Prayers in the Petition as set out above.

#### The 1<sup>st</sup> Respondent's case

18. The 1<sup>st</sup> Respondent, the Commission on Revenue Allocation, is a constitutional commission established under Article 215 of the Constitution and whose functions are set out under Article 216 of the Constitution, the Commission for Revenue Allocation Act and the Public Finance Management Act. Those functions include making recommendations concerning the basis for the equitable sharing of

revenue raised by the National Government between the National and County Governments and among County Governments. The Commission is also mandated to make recommendations on other matters concerning the financing of, and financial management by County Governments and fiscal prudence as required by the Constitution and national legislation.

19. It opposed the Petition through the affidavit of George Ooko, the Commission Secretary, sworn on 28<sup>th</sup> August 2014. In his Affidavit, he deponed that the 1<sup>st</sup> Respondent had not violated the Constitution in any way or as alleged by the Petitioners.
20. In the said Affidavit, Mr. Ooko stated that County Governments and Assemblies must comply with the law in their budgetary processes and any County budget that does not do so is illegal and unconstitutional.
21. He claimed that the 1<sup>st</sup> Respondent's Circular Reference No. CRA/CGM/VOL. III/99 dated 22<sup>nd</sup> April 2014 did not recommend new budget ceilings for County Assemblies and County Executives. It merely restated the advice that the 1<sup>st</sup> Respondent had rendered to Parliament as provided by Article 205 of the Constitution and Parliament, while taking into consideration the recommendation, made by the 1<sup>st</sup> Respondent as provided for by Article 218(1)(a) and (b) of the Constitution, enacted the Division of Revenue Act and the County Allocation of Revenue Bill. That therefore the budgetary ceilings are as a result of existing legislation and not the 1<sup>st</sup> Respondent's Circular as

alleged. Further, that the 1<sup>st</sup> Respondent did not seek to micro-manage the County budgetary process in issuing the Circular neither did it seek to legislate on allocations to the County Assemblies and County Executives as alleged by the Petitioners because the legislative role in the County budgetary process is purely a function of Parliament and County Assemblies and that the total amount of revenue available to each County Government was done by Parliament through the Division of Revenue Act pursuant to Article 218(1)(a) of the Constitution.

22. It was his further deposition that no County had submitted copies of the County development plans, debt management strategies or any other information to the 1<sup>st</sup> Respondent as required by law. Further, that no County Treasury had sought the recommendation of the 1<sup>st</sup> Respondent, as mandatorily required by Section 117(5) of the Public Finance Management Act, in preparing the County Fiscal Strategy Paper.
23. It was also his contention that there was no discrimination meted out to County Assemblies because budget ceilings are lawfully set by Parliament for all arms of Government, all levels of Government and independent bodies and Commissions and that all the other Government agencies had complied with their set budget ceilings except County Assemblies which deliberately made budgets over and above those ceilings.
24. Mr. Oraro, appearing for the 1<sup>st</sup> Respondent, also submitted that the provisions of the Division of Revenue Act, 2014 and the County

Allocation of Revenue Act, 2014 are in conformity with the Constitution and that Parliament sets ceilings for County budgets via these two legislations as required by Article 218 of the Constitution while under Article 216, thereof, the 1<sup>st</sup> Respondent is granted the constitutional mandate of ensuring that County budgets are in compliance with the Division of Revenue Act and the County Allocation of Revenue Act.

25. It was his position therefore that the impugned Circulars are constitutional and lawful and the 1<sup>st</sup> Respondent acted within its mandate under the Constitution and the Public Finance Management Act, and related legislation.

26. He went on to submit that the various County Appropriation Acts were unconstitutional as they are in conflict with the Division of Revenue Act, 2014 and County Allocation of Revenue Act, 2014 and as such, under Article 191(2) of the Constitution, these two legislations prevail over the County Appropriations Acts. He thus urged the Court to find the County Appropriations Acts as unconstitutional and on the reliefs sought by the Petitioners, Mr. Oraro submitted that they are moot as the recommendations made by the 1<sup>st</sup> Respondent to County Governments have already been taken into account by Parliament while passing the Division of Revenue Act, 2014 and County Allocation of Revenue Act, 2014.

27. Lastly, it was Mr. Oraro's submission that the Petitioners are State Organs as created under Article 178(1) of the Constitution and the Counties are also State Organs and further that the Petitioners in their official capacity and the forty seven Counties are not persons within the meaning of the Constitution and therefore they are incapable of enjoying/enforcing any right under the Bill of Rights. In that regard, he relied on the case of County Government of County Government Meru vs Ethics-and Anti-Corruption Commission (2014) e KLR where it was held that a County Government was not a person capable of enforcing fundamental rights and freedoms and for the above reasons, he urged the Court to find that the Petition lacked merit and ought to be dismissed in its entirety.

The 2<sup>nd</sup> Respondent's case

28. The 2<sup>nd</sup> Respondent, the Controller of Budget, is an office established under Article 228 of the Constitution and its mandate is to oversee the implementation of the budgets of the National and County Governments by authorizing withdrawals from public funds and also to bar any withdrawal from a public fund unless he is satisfied that the withdrawal is authorized by law.
29. It opposed the Petition through the Affidavit of Mr. Waweru Tuti, its Legal Officer, sworn on 12<sup>th</sup> September 2014. Mr. Arwa appeared for the 2<sup>nd</sup> Respondent and argued its case.

30. In his affidavit Mr. Waweru deponed that for any withdrawals to be authorized by law, the budgetary process as envisaged by the Constitution and the Public Finance Management Act, must be adhered to.
31. That the 2<sup>nd</sup> Respondent, before approving any withdrawal from the County Revenue Fund, interrogates the budgetary process to establish whether the requirements of the law have been met and that in the financial year 2013/2014, County Assemblies approved flawed budgets and thereafter their Appropriation Acts were based on the said flawed budgets and consequently, requests for withdrawals from the County Revenue Fund was not approved and the same were referred back to the County Assemblies for rectification and/or incorporation of details and or information that had been omitted thus resulting in the delay of withdrawals of any money from the Fund which in turn stalled the operations of County Governments. That to avoid similar situations, the 2<sup>nd</sup> Respondent advised County Assemblies to present their proposed budgets ahead of time for advise on what additional information ought to have been incorporated in them before presentation of the budget estimates to the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent upon being presented with the proposed budgets by each of the County Assemblies for comments prior to enactment of the Appropriation Act, wrote letters to the 47 Counties on diverse dates between 5<sup>th</sup> June 2014 and 16<sup>th</sup> June 2014 briefly indicating what requirements of law their budgets had to satisfy before any withdrawal from the County Revenue Fund would be allowed. That the County Assemblies disregarded the recommendations

and circulars sent to them and prepared budgets without due consideration to the recommendations made and therefore the Budgets presented to the 2<sup>nd</sup> Respondent were not prepared in line with the Programme Based Budget Approach as required by the Public Finance Management Act, and the Transition Authority Circular dated 12<sup>th</sup>, March 2014 which required all County Governments to implement Programme Based Budgets with effect from the financial year 2014/2015.

32. Further, that the Budget prioritization documents presented by each of the Petitioners were inconsistent with the devolved functions as stipulated under the Fourth Schedule to the Constitution and that the budgets presented did not show the allocation of development projects in the County. In particular, that the geographical distribution of the projects could not be ascertained by examining the particular budget estimates and that the budgets presented did not disclose the comparative data for the development expenditure of the prior year, thus limiting the ability to assess whether enough money had been allocated to complete those projects. Further, that the sub-items in the budget had no codes according to the Government Financial Statistics coding that provides that every item must have a code and lastly, that the Counties had allocated monies that exceeded the monies in the County Revenue Fund and the County Assemblies ignored the recommendations of the 2<sup>nd</sup> Respondent in the whole budget process.

33. Mr. Waweru thus concluded that there was need to observe the principles of Public Finance as enshrined in Article 201 of the Constitution and ensure prudent and responsible use of money and avoid wastage as was clear in the financial year 2013/2014 where members of County Assemblies made several foreign trips which were unnecessary and a waste of public funds. That the reason why the Petitioner's budgets were therefore not approved was because they had not satisfied the requirements of law in their enactment and that is why they could not be approved as submitted and not because they had exceeded the ceilings set by the 1<sup>st</sup> Respondent as contended by the Petitioners.

34. Mr. Arwa added that the Petitioners had not been discriminated against as alleged and that the ceilings were made based on an existing legal framework which had to be followed by all agencies including the Petitioners. He thus urged the Court to dismiss the Petition with costs.

#### The 3<sup>rd</sup> Respondent's case

35. The 3<sup>rd</sup> Respondent, the Attorney General, is established under the provisions of Article 156(1) of the Constitution with its mandate set out under Article 156(4)(b) of the Constitution including to represent the National Government in Court or in any other legal proceedings to which the National Government is a party.

36. The Attorney General opposed the Petition and Mr. Moimbo presented his case and while associating himself with the submissions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, he added as follows;
37. That the generation of budgets at the National and County levels is a process that is strictly guided by both the Constitution and the Public Finance Management Act and as such, any budget based on budget estimates outside the provisions of the Constitution and Public Finance Management Act is unconstitutional and untenable in law.
38. On the issue of the alleged recommendations by the 1<sup>st</sup> Respondent, he submitted that under Sections 25(5)(a) and 117(5) of the Public Finance Management Act, the National Treasury and the County Treasuries are enjoined to seek and take into account the views of the 1<sup>st</sup> Respondent while preparing the Budget Policy Statement and the County Fiscal Strategy Paper. He thus submitted that the recommendations made by the 1<sup>st</sup> Respondent are binding on the Petitioners and that they have the force of law because Article 216(3)(a) of the Constitution removes the basis of such recommendations from the wisdom of the 1<sup>st</sup> Respondent and places it on the mandatory criteria of equity under Article 203 of the Constitution. That a finding by this Court that the recommendations made by the 1<sup>st</sup> Respondent are not binding would render the 1<sup>st</sup> Respondent functionally ineffective and would render Article 203(1) and 216(3) (a) inoperative and useless.

39. As regards the 2<sup>nd</sup> Respondent, Mr. Moimbo submitted that it can only oversee the implementation of budgets of the National and County Governments, by authorizing withdrawals from public funds under Articles 204, 206 and 207 and that under Article 228(5) such withdrawals can only be made within the law and it is within the mandate of 2<sup>nd</sup> Respondent to stop a withdrawal that is not legal.

40. Mr. Moimbo thus urged the Court to dismiss the Petition.

#### The Interested Party's Case

41. The Interested Party, the Council of Governors, opposed the Petition. Mr. Wanyama presented its case and his submissions were that County Assemblies were not persons capable of enjoying rights under the Bill of Rights. That while the provisions of Article 20(1) of the Constitution recognize both horizontal and vertical application of the Bill of Rights, the Constitution has not given State Organs, such as the Petitioners, the power to petition this Court over a violation enshrined in the Bill of Rights. He relied on the case of *Kenya Bus Service Ltd and Anor vs Minister for Transport and 2 Others (2012) eKLR* where it was held that state organs are not entitled to the protection of the Bill of Rights and cannot therefore claim a violation of fundamental rights and freedoms.

42. It was his further submission that the impugned Circulars are binding on the Petitioners and that under the provisions of Section 2 of the Interpretation and General Provisions Act (Cap 2) Laws of Kenya,

the Circular is a form of subsidiary legislation since the 1<sup>st</sup> Respondent was acting within its powers under Article 216 of the Constitution and Section 10(c) of the Commission on Revenue Allocation Act.

43. He submitted further that in any event, if there was conflict between County legislation and National legislation, National legislation prevails as provided for under Article 191(2) of the Constitution. That because the Commission on Revenue Allocation Act is also a National legislation that has donated powers to the 1<sup>st</sup> Respondent to make recommendations on how funds should be spent at the County Government, the recommendations made thereunder amount to subsidiary legislation and therefore prevails over County legislation. He claimed further that the fact that County Appropriation Bills as passed exceeded the ceilings imposed by the recommendations of the 1<sup>st</sup> Respondent shows that they are contrary to the law and in any event, under Article 191(2)(b) of the Constitution, the suspended County Assemblies budgets prejudice the National economic policy and as such are void.
44. He therefore urged the Court to find that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent have not violated the Constitution in any way and have instead acted in accordance with the law by issuing the impugned Circulars to the Petitioners. He urged the Court to dismiss the Petition for the above reasons.

### Determination

45. Having set out the Parties' submissions as above and looking at the pleadings and submissions before me, I am of the view that there are two main issues for determination in this Petition. Firstly, whether the impugned Circulars were issued in breach of the law and the legislative authority of County Assemblies. To answer that issue I must also consider the budgetary making process and the mandates of County Assemblies as well as that of the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent in the said budgetary making process. Secondly, whether the Petitioners' fundamental rights under Article 27 and 47 of the Constitution have been violated by the Respondents, jointly or severally. Lastly, I will consider what remedies are available to the Petitioners, if any.

### Whether the impugned circulars were issued in breach of the law and the legislative authority of County Assemblies

46. As already stated, in order to determine the dispute before me, it is important to analyse and confirm the budget making process as outlined in the Constitution and in the Public Finance Management Act *vis-a-vis* the mandate of the County Assemblies as well as the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in that process. If I understood Prof. Ojienda well, his submission was that the Constitution does not allow the 1<sup>st</sup> Respondent to decide on matters concerning financing and fiscal management by Counties and that its mandate is limited to making recommendations on the basis of equitable sharing of finances while that of the 2<sup>nd</sup> Respondent is to ascertain the lawfulness of withdrawals from

Revenue Funds created under Article 207 of the Constitution. It was therefore his submission that there is no known law presently that mandates any of the Respondents to approve budgets or determine votes on account of budgets of County Assemblies and to do so would amount to usurping the powers of the County Assemblies and therefore the ceilings recommended by the 1<sup>st</sup> Respondent through Reference No. CRA/CGM/Vol. III/99 are illegal.

47. It is important to state from the outset that the budgetary process in Kenya is undertaken both at the National Level and at the County level. At the National level, the process is managed by the National Treasury while at the County level it is managed by the County Treasury. That being so, the first principle in the budgetary process is to be found in Articles 201(b)(ii) and 202(1) of the Constitution which provide that revenue collected nationally shall be shared equitably between the National and County Governments. As to how and the manner in which that revenue is to be shared, Article 218 (1)(a) of the Constitution is important as it directs that at least two months before the end of each financial year, there shall be introduced into Parliament, a Division of Revenue Bill which shall divide revenue raised by the National Government among the two levels of Government.
48. The National budgetary process proper then starts with the preparation of a Budget Policy Statement by the National Treasury as is provided for in Section 25(1) of the Public Finance Management Act. Section

25(4)(c) of the same Act requires that the Budget Policy Statement must include the amount of indicative transfers of funds from the National Government to the County Governments. Section 25(5)(a) of the same Act enjoins the National Treasury in its preparation of the Budget Policy Statement to seek and take into account the views of the 1<sup>st</sup> Respondent, County Governments, Controller of Budget, the Parliamentary Service Commission, the Judicial Service Commission, the public and any other interested persons or groups. Section 25(7) of the Act then provides that Parliament, within fourteen days of submission to it of the Budget Policy Statement, shall table and discuss its recommendations and pass a resolution to adopt it with or without amendments. Thereafter, under the provision of Section 25(8) of the Act, the Cabinet Secretary for Finance shall take into account the resolutions passed by Parliament and finalize the budget for that financial year. Lastly, under Section 25(9) of the Act, the National Treasury shall publish and publicize the Budget Policy Statement not later than fifteen days after submission of the said Statement to Parliament.

49. Of importance in this Petition is that the National Treasury indeed prepared the 2014 Budget Policy Statement and presented the same to Parliament and that it was adopted by Parliament on 20<sup>th</sup> March 2014. In accordance with Article 218(1)(a) of the Constitution which directs that at least two months before the end of each financial year there shall be introduced in Parliament a Division of Revenue Bill which shall

divide revenue raised by the National Government among the National and County levels of Government, Parliament enacted the Division of Revenue Act, 2014 which was assented to by the President on 30<sup>th</sup> July, 2014 and which came into effect on 4<sup>th</sup> August 2014. Section 3 of that Act provides as follows;

*“The object and purpose of this Act is to provide for the equitable division of revenue raised nationally between the national and county levels of government for the financial year 2014/2015 in accordance with Article 203(2) of the Constitution”.*

Further and in the above context, Article 218(1)(b) provides for the enactment of the County Allocation of Revenue Act which provides for the equitable allocation of revenue raised by the National Government among the 47 Counties. In that regard, the County Allocation of Revenue Act, 2014 in Section 3 states it objects as follows;

*“(a) provide, pursuant to Article 218(1)(b) of the Constitution, for the allocation of the equitable share of revenue raised by the National Government among the County Governments in accordance with the resolution approved by Parliament under Article 217 of the Constitution for the financial year 2014/2015;*

*(b) provide, pursuant to Articles 187(2) and 201(2) of the Constitution, for conditional additional allocations for the financial year 2014/2015; and*

(c) *facilitate the transfer of allocations made to the County Governments under this Act from the Consolidated Fund to the respective County Revenue Funds."*

50. The National Budgetary process effectively ends when transfers are made to the respective County Revenue Funds and before I start on the budgetary process at the County Level, I am aware that the Petitioners' case is pegged on the import to be attached to Circular Reference as CRA/CGM/VOL.III/99 issued by the 1<sup>st</sup> Respondent to all the Governors and County Executive Committee Members of Finance in all the 47 Counties. In that regard, it was Prof. Ojienda's submission that the said Circular is void on two fronts. Firstly, that it was issued without authority and in breach of the legislative authority of County Assemblies under the provisions of Articles 185(1) and (2) of the Constitution. Secondly, that in issuing and acting on the said Circular, the 1<sup>st</sup> Respondent violated Article 189 (1) of the Constitution as it failed to consult County Assemblies on a matter that fell within their mandate and would in effect affect them.

51. For avoidance of doubt that impugned Circular reads as follows;

"COMMISSION ON REVENUE ALLOCATION

Our Ref: CRA/CGM/VOL.III/99

22<sup>nd</sup> April, 2014

- All governors
- County Executive Committee members – Finance

RE: RECOMMENDED BUDGET CEILINGS FOR COUNTY ASSEMBLY AND COUNTY EXECUTIVE BASED ON RECOMMENDED BUDGET ON COSTS OF NEW COUNTY STRUCTURES OF KSHS.30,232 MILLION

*Attached please find CRA recommended ceilings for County Assembly and County Executive with accompanying notes.*

*Please note that where budget exceeds the recommended ceilings, it would be at the expense of the costed devolved services which will consequently affect service delivery.*

*Yours sincerely,*

*SIGNED*

*George Ooko*  
*COMMISSION SECRETARY*

*cc - Controller of Budget*  
*- Clerk of the Senate*  
*- Ag. CEO, Council Of Governors." (Emphasis added)*

Three facts can be clearly discerned from a plain reading of the Circular. Firstly, it was issued by the 1<sup>st</sup> Respondent. Secondly, it was directed at Governors and County Executive Committee members in all the 47 Counties and lastly, it recommended budget ceilings for County Assemblies and County Executives and in that regard a question arises whether the 1<sup>st</sup> Respondent had powers to issue the Circular and lastly, if so, whether the recommended ceilings were within the law.

52. The 1<sup>st</sup> Respondent is an Independent Commission established under Article 248(2) of the Constitution. Its functions are stipulated under Article 216(1) and (2) of the Constitution as follows;

“(1) The principal function of the Commission on Revenue Allocation is to make recommendations concerning the basis for the equitable sharing of revenue raised by the National Government-

(a) between the National and County Governments’ and

(b) among the County Governments’.

(2) The Commission shall also make recommendations on other matters concerning the financing of, and financial management by, County Governments’ as required by this Constitution and National legislation.” (Emphasis added)

In addition to the above provisions, Section 10(1) of the Commission on Revenue Allocation Act, Cap. 5 provides as follows;

“(1) In addition to its principal function under Article 216(1) of the Constitution, the commission shall, in accordance with clause (2) of that Article -

(a) Make recommendations for consideration by Parliament prior to any Bill appropriating money out of the Equalization fund is passed in parliament.

(b) Upon request from the Senate, make recommendations on the basis for allocating

*among the counties the share of National revenue that is annually allocated to the County levels of Government.*

- (c) Submit recommendations to the Senate, National Assembly, National Executive, County Assembly and County executive on the proposals made for equitable distribution of revenue between the National and County Governments and amongst the County Governments taking into account the criteria set out in Article 203 of the Constitution, including recommendations on the amounts earmarked for specific purposes such as the constituency development fund, among others; and*
- (d) Perform such other functions as are provided for by the Constitution or any other written law.”  
(Emphasis added)*

53. Looking at the above provisions and all of them read together, the 1<sup>st</sup> Respondent is the body charged with the responsibility of making recommendations *inter-alia* to the Senate, the National Assembly, the National Executive, County Assemblies and County Executives on the basis upon which revenue would be shared equitably between the National and County Governments. It also recommends how the revenue allocated to the County Government level would be shared among the County Governments. It also makes recommendations on matters concerning the financing and financial management by the County Governments. None of the Parties disputed these facts but the point of disagreement is whether those recommendations are binding on all the organs to which they are made. Mr. Moimbo for example warned this Court against any interpretation that would mean that the

recommendations aforesaid are not binding. What is the law on the subject?

54. The Concise Oxford English Dictionary defines "recommend" as;
- "(i) put forward with approval as being suitable for a purpose or role*
  - (ii) Advise as a course of action".*

Taken in its ordinary English meaning, it would therefore mean that 'recommendations' do not have a binding effect on the person or body to whom they are made. Recommendation are not the same as 'directives' or 'directions' which are certainly binding on those to whom they are addressed, - See Re Thomson (supra). However, in the context of the Petition before me and in order to interpret 'recommendations', the Constitution must be read as a whole in order to ascertain its aim and object so as to establish the aim of the drafters of the Constitution - See Kigula and Others vs The Attorney General (2005) AHGRLR 197 (Ug CC 2005). Heed must therefore be paid to the language used and the context of the specific provision under consideration.

55. In that regard and further to what I have stated above, Article 217 of the Constitution states that;

*"(1) Once every five years, the Senate shall, by resolution,*

*determine the basis for allocating among the Counties the share of National revenue that is annually allocated to the County level of Government.*

- (2) In determining the basis of revenue sharing under clause (1), the Senate shall—*
  - (a) take the criteria in Article 203 (1) into account;*
  - (b) request and consider recommendations from the Commission on Revenue Allocation;*
  - (c) consult the County Governors, the Cabinet Secretary responsible for finance and any organisation of County Governments; and*
  - (d) invite the public, including professional bodies, to make submissions to it on the matter.*
- (3) Within ten days after the Senate adopts a resolution under clause (1), the Speaker of the Senate shall refer the resolution to the Speaker of the National Assembly.*
- (4) Within sixty days after the Senate's resolution is referred under clause (3), the National Assembly may consider the resolution, and vote to approve it, with or without amendments, or to reject it.*
- (5) If the National Assembly--*
  - (a) does not vote on the resolution within sixty days, the resolution shall be regarded as having been approved by the National Assembly without amendment; or*
  - (b) votes on the resolution, the resolution shall have been--*

- (i) amended only if at least two-thirds of the members of the Assembly vote in support of an amendment;
  - (ii) rejected only if at least two-thirds of the members of the Assembly vote against it, irrespective whether it has first been amended by the Assembly; or
  - (iii) approved, in any other case.
- (6) If the National Assembly approves an amended version of the resolution, or rejects the resolution, the Senate, at its option, may either--
- (a) adopt a new resolution under clause (1), in which case the provisions of this clause and clause (4) and (5) apply afresh; or
  - (b) request that the matter be referred to a joint committee of the two Houses of Parliament for mediation under Article 113, applied with the necessary modifications.
- (7) A resolution under this Article that is approved under clause (5) shall be binding until a subsequent resolution has been approved.
- (8) Despite clause (1), the Senate may, by resolution supported by at least two-thirds of its members, amend a resolution at any time after it has been approved.
- (9) Clauses (2) to (8), with the necessary modifications, apply to a resolution under clause (8)." (Emphasis added)

57. The bonding of nature of a resolution above is quite different, obviously, from a mere recommendation. Important is also Article 218 (2) of the Constitution which provides as follows;

*"(1) ...*

*(2) Each Bill required by clause (1) shall be accompanied by a memorandum setting out--*

*(a) an explanation of revenue allocation as proposed by the Bill;*

*(b) an evaluation of the Bill in relation to the criteria mentioned in Article 203 (1); and*

*(c) a summary of any significant deviation from the Commission on Revenue Allocation's recommendations, with an explanation for each such deviation." (Emphasis added)*

The import of the above provisions is that a recommendation made by the 1<sup>st</sup> Respondent to the Senate is not binding but for good order, reasons for a deviation must be given.

58. As to who the recommendations are generally made to, Article 218(5) proves as follows;

216 *"(1) ...*

*(2) ...*

*(3) ...*

*(4) ...*

*(5) The Commission shall submit its recommendations to the Senate, the National Assembly, the National*

*Executive, County Assemblies and County Executives.”*

Reading Articles 216, 217 and 218 of the Constitution as well as Section 10(1) of the Commission on Revenue Allocation Act, Cap.5E, a number of facts can be distilled a viz;

- (i) The principle function of the 1<sup>st</sup> Respondent is to make recommendations to the Senate, the National Assembly, the National Executive, County Assemblies and County Executives.
- (ii) By the very nature of recommendations, they are persuasive but not binding on the person or body to which they are directed.
- (iii) Its principal functions in Article 216(1) and (2) of the Constitution are to be supplemented by legislation and hence Section 10(1) of the Commission on Revenue Allocation Act, which has been reproduced elsewhere above.
- (iv) The impugned Circular if looked at in the context of Article 216(1) (2) and (5) of the Constitution and Section 10(1) aforesaid cannot be said to be unlawful or unconstitutional

as argued by the Petitioners because it was made well within the mandate of the 1<sup>st</sup> Respondent.

But that is not the end of the matter because it has been argued that the Circular has breached the legislative authority of the County Assemblies. How has that been done? The Petitioners have stated that the Circular had the effect of invalidating their County Fiscal Strategy Papers, County Budget Estimates of Revenue and Expenditure, Appropriation Bills and Finance Acts but I am at pains to understand that argument because while the circular was issued on 22<sup>nd</sup> April 2014, the law providing for budgetary ceilings, being Section 12 of the County Allocation of Revenue Act, 2014 came into force on 5<sup>th</sup> September 2014 while this Petition was filed on 23<sup>rd</sup> July 2014.

Section 12 aforesaid provides as follows;

*“Section 107 of the Public Finance Management Act is amended by inserting the following new Subsection immediately after subsection (2) -*

*(2A) pursuant to Articles 201 and 216 of the Constitution and notwithstanding Subsection (2), the Commission on Revenue Allocation shall recommend to the Senate the budgetary ceilings on the recurrent expenditures of each County Government.” (Emphasis mine)*

Prof. Ojienda in the above context, submitted that neither the Division of Revenue Act, 2014 nor the County Allocation of Revenue Act, 2014 contained block figures of revenue that goes to each County

government as budgetary ceilings set by the 1<sup>st</sup> Respondent vide the impugned Circulars. I have again looked at the impugned Circular and the accompanying notes which provide for budget ceilings in block figures to each County. Where then is the dispute? Whether the Petitioners acted on the circular is a non-issue because in fact it was not binding on them or Parliament. That issue is moot because once I have found that the recommendations made are not binding, then it follows that any complaint by the Petitioners ought to be directed at the State Organs with the final say on the budgets i.e. Parliament. There is no argument before me that the County Allocation of Revenue Act, 2014 is unconstitutional or that Section 12 which introduced budgetary ceilings is unconstitutional. I have also not seen any argument that Section 107 of the Public Finance Management Act, Cap.142 is unconstitutional. That Section for avoidance of doubt proves as follows;

*“(1) A County Treasury shall manage its public finances in accordance with the principles of fiscal responsibility set out in subsection (2) and shall not exceed the limits stated in the regulations.*

*(2) In managing the county Government’s public finances, the County Treasury shall enforce the following fiscal responsibility principles-*

*(a) the county Government’s recurrent expenditure shall not exceed the County Government’s total revenue;*

- (b) over the medium term a minimum of thirty percent of the County Government's budget shall be allocated to the development expenditures;
- (c) the County Government's expenditure on wages and benefits for its public officers shall not exceed a percentage of the County Government's total revenue as prescribed by the County Executive member for finance in regulations and approved by the County Assembly;
- (d) over the medium term, the Government's borrowings shall be used only for the purpose of financing development expenditure and not for recurrent expenditure;
- (e) the County debt shall be maintained at a sustainable level as approved by County Assembly;
- (f) the fiscal risks shall be managed prudently; and
- (g) a reasonable degree of predictability with respect to the level of tax rates and tax bases shall be maintained, taking into account any tax reforms that may be made in the future.
- (3) For the purposes of subsection (2) (d), short term borrowing shall be restricted to management of cash flows and shall not exceed five percent of the most recent audited County Government revenue.
- (4) Every County Government shall ensure that its level of debt at any particular time does not exceed a percentage of its annual revenue specified in respect of each financial year by a resolution of the County Assembly.

(5) *The regulations may add to the list of fiscal responsibility principles set out in subsection (2)."*

Read together with Section 12 aforesaid, the above principles are crucial in the management of funds allocated to County Governments and I see no reason in the circumstances to delve into them in the circumstances of the Petition before me because there is no issue raised with regard to them.

Without Section 12 or Section 107 above being declared unlawful, I do not see the value of any case made out of a non-binding Circular while the law that came subsequent to it remains intact.

59. Notwithstanding my findings above, I also understood one of the Petitioners' complaints to be that the 1<sup>st</sup> Respondent issued the impugned Circular without having involved and consulted them. I shall now turn to consider this submission.

60. The 1<sup>st</sup> Respondent is an Independent Constitution Commission and as such under, Article 249(2), it is not subject to the direction or control of any person or authority. The Supreme Court in Re Matter of the Interim Independent Electoral Commission (supra) expressed itself in the following terms as regards independent commissions;

*"While bearing in mind that the various commissions and independent offices are required to function free of subjection to "direction or control by any person or authority", we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the Commissions and independent*

*offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit. These Commissions or independent offices must, however, operate within the terms of the Constitution and the law; the "independence clause" does not accord them carte blanche to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law."*

The Court went further to state that;

*For due operation in the matrix, "independence" does not mean "detachment", "isolation" or "disengagement" from other players in public governance. Indeed, for practical purposes, an independent commission will often find it necessary to co-ordinate and harmonise its activities with those of other institutions of Government, or other Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of Government, or other commissions, so as to maximize results, in the public interest. Constant consultation and co-ordination with other organs of Government, and with civil society as may be necessary, will ensure a seamless, and an efficient and effective rendering of service to the people in whose name the Constitution has instituted the safeguards in question.*

It then concluded as follows;

*The moral of this recognition is that commissions and independent offices are not to plead "independence" as an end in itself; for public-governance tasks are apt to be severely strained by possible "clashes of independences."*

61. I am duly guided on the interpretation of the law as above and it is clear to me that the 1<sup>st</sup> Respondent ought to perform its functions as provided

for under the four corners of the Constitution and the law. Further, in meeting its objectives it is bound by the provisions of Article 249 (1) which are as follows,

*“(1) The objects of the commissions and the independent offices are to—*

- (a) protect the sovereignty of the people;*
- (b) secure the observance by all State organs of democratic values and principles; and*
- (c) promote constitutionalism”.*

Some of the democratic values and principles which also bind the 1<sup>st</sup> Respondent are those stated at Article 10 of the Constitution are as follows;

*“(1) ...*

*(2) The National values and principles of governance include--*

- (a) patriotism, national unity, sharing and devolution of power ,the rule of law, democracy and participation of the people;*
- (a) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;*
- (c) good governance, integrity, transparency and accountability; and State and religion. National symbols and national days. National values and principles of governance.*

*(d) sustainable development."*

62. Further, under Article 216(3) of the Constitution;

*"(3) In formulating recommendations, the Commission shall seek--*

*(b) to promote and give effect to the criteria mentioned in Article 203 (1);*

*(c) when appropriate, to define and enhance the revenue sources of the national and county governments; and*

*(c) to encourage fiscal responsibility."*

63. In addition to the above, Section 10(2) of the Commission on Revenue Allocation Act provides that;

*"In making recommendations under this Section, the Commission shall take into consideration such facts or information as may be given to it by a County Government".*

64. Having rendered the law as I have done above, did the 1<sup>st</sup> Respondent seek any information from County Governments before making the recommendation for budgetary ceilings and was it obligated to do so? I do not think so and I say so because I have no evidence to the contrary. Section 10(2) above creates no obligation in the manner suggested by the Petitioner although the information required may be useful to the 1<sup>st</sup> Respondent. It is a matter wholly of discretion on its part.

65. I reiterate that the 1<sup>st</sup> Respondent was not bound by the Constitution and the Act to seek information and representations from the County Government before making its recommendations on budget ceilings. I say so well aware that the principles in Article 189 of the Constitution encourage consultation between the two levels of Government and I dare add that the same principles would apply to relations between the levels of Government and Independent Commissions and Offices. That Article provides as follows;

*“(1) Government at either level shall—*

*(a) perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level;*

*(b) assist, support and consult and, as appropriate, implement the legislation of the other level of government; and*

*(c) liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.*

*(2) Government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities.*

- (3) *In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by mean of procedures provided under national legislation.*
- (4) *National legislation shall provide procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration."*

66. In addition to the above, I am aware of the provisions of Section 25 (5) of the Public Finance Management Act which provides that;

*"(1) ...*

*(2) ...*

*(3) ...*

*(4) ...*

*(5) In preparing the Budget Policy Statement, the National Treasury shall seek and take into account the views of -*

*(a) the Commission on Revenue Allocation;*

*(b) County Governments;*

*(c) Controller of Budget;*

*(d) The Parliamentary Service Commission;*

*(e) The judicial Service Commission;*

*(f) The public; and*

*(g) Any other interested persons or groups;"*

67. All the above provisions read together would point to the fact that in the entire budgetary process, the views of County Governments and

Assemblies are important and ought to be considered and taken seriously in making the Budget Policy Statement which would be used in preparing the National Annual Budget but I am not prepared to hold that it is a mandatory obligation to do so on the part of the 1<sup>st</sup> Respondent. I say so because while it is a good practice to consult and in terms set out in Article 189 above, failure to do so cannot amount to a violation of any law or the Constitution itself. The point is that out of respect for each other's roles and expertise, each organ should not off-handedly dismiss any suggestions or information obtained from the other but failure to do so cannot attract this Court's sanctions.

68. Having found as I have, I must now consider the other interrelated issue on whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents usurped the legislative mandate of the County Government in the County budgetary process. Prof. Ojienda strenuously submitted on this point and argued that the Circular is unconstitutional, unlawful and manifests anarchy because approval of County budgets is within the mandate of County Assemblies and it is not within the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' mandate to determine particular votes on County Budgets.
69. In that regard, under the provisions of Section 104(1)(a)(b) of the Public Finance Management Act, it is the responsibility of the County Treasury to prepare the Annual Budget for a County and co-ordinate the preparation of Estimates of Revenue and Expenditure of a County Government. The procedure for the budgetary process under

Section 117 of the Public Finance Management Act therefore starts with the preparation of a County Fiscal Strategy Paper which is then submitted for approval by the County Assembly by 28<sup>th</sup> February of each financial year. In preparing the County Fiscal Strategy Paper, the County Treasury is obligated to specify the broad strategic priorities and policy goals that will guide the County Government in preparing its budget for the coming financial year. Thereafter, under Section 118 of the Act, the County Treasury prepares a County Budget Review and Outlook Paper in respect of the County for each financial year and submits the paper to the County Executive Committee by 30<sup>th</sup> September of that year. The County Executive Committee then is obligated to discuss that Outlook Paper and after approval it is laid before the County Assembly before it is published and publicised.

70. The County Government budget process therefore consists of the following stages as stipulated under Section 125(1) of the Public Finance Management Act;

*“(1) ...*

- (a) Integrated development planning process which shall include both long term and medium term planning;*
- (b) Planning and establishing financial and economic priorities for the County over the medium term;*
- (c) Making an overall estimation of the County Government's revenues and expenditures;*

- (d) *Adoption of County Fiscal Strategy Paper;*
  - (e) *Preparing budget estimates for the County Government and submitting estimates to the County Assembly;*
  - (f) *Approving of the estimates by the County Assembly;*
  - (g) *Enacting an appropriation law and any other laws required to implement the County Government's budget;*
  - (h) *Implementing the County Government's budget; and*
  - (i) *Accounting for, and evaluating, the County Government's budget revenues and expenditures.*
- (2) *The County Executive Committee member for Finance shall ensure that there is public participation in the budget process."*

71. As can be seen and above, one can only but agree with Prof. Ojienda for the Petitioners that it is within the mandate of the Treasury, County Executive and County Assembly to prepare and approve budgets for a County. However, that process cannot be read in isolation of other processes because I have already found that it is within the mandate of the 1<sup>st</sup> Respondent to recommend to the Senate, the National Assembly, the County Assembly and the County Government on equitable sharing of revenue between the two levels of Government and as between County Governments. By so recommending, the 1<sup>st</sup> Respondent would in essence be performing its obligations under Article 216 of the **Constitution** and I therefore reiterate that even if the 1<sup>st</sup> Respondent had recommended budgetary ceilings in the County Budgets for

2014/2015 financial year, that action does not violate the Constitution. I further reiterate that it is actually the core responsibility of the 1<sup>st</sup> Respondent to recommend the manner in which the National Revenue is to be shared between the two levels of Government and among the Counties and such recommendation may include prescribing ceilings. However it must do so in the framework and in accordance with the Constitution and the law as I have found elsewhere above.

72. Before I conclude on this issue, I recall that by Prof. Ojienda submitted that there are strict timelines and systems of checks and balances required to be observed by County Assemblies in enacting County budgets. In that regard, under the provisions of Sections 117, 125, 129 and 133 of the Public Finance Management Act, the following instruments must be passed during the budgetary process in each financial year;

(j) A County Fiscal Strategy Paper, which, pursuant to the provisions of Sections 117(1) and (6) of the Public Finance Management Act must be submitted to a County Assembly by the County Treasury by 28<sup>th</sup> February each year, and adopted by the County Assembly by 14<sup>th</sup> March each year. It is the County Fiscal Strategy Paper that presents the financial outlook of a County with respect to County Government revenues, expenditures and borrowing for the coming financial year and over the medium term;

- (ii) A County Budget Estimates of Revenue and Expenditure, which, pursuant to the provisions of Sections 125(2) (a), 129(6) and 131(1) of the Public Finance Management Act, must be presented to a County Assembly by the County Executive Committee Member for Finance by 30<sup>th</sup> April each year and approved by the County Assembly promptly and in any event before 30<sup>th</sup> June each year;
- (iii) A County Appropriations Act which the County Assembly must consider and enact by 30<sup>th</sup> June each year; and
- (iv) A County Finance Act, which pursuant to the provisions of Section 133 of the Public Finance Management Act, a County Assembly must consider and enact by 30<sup>th</sup> September each year.

73. In the above context, I note that the impugned Circular is dated 22<sup>nd</sup> April 2014. As can be seen from the provisions of Section 117 of the Public Finance Management Act, the County Fiscal Paper ought to be prepared by 28<sup>th</sup> of February in each financial year. I must therefore agree with Prof. Ojienda that for Counties to comply with the Circular as issued by the 1<sup>st</sup> Respondent, they had to restart the budgetary process with the preparation and adoption of the Fiscal paper. But to my mind the issue is moot considering that the Allocation of Revenue Act, 2014 is in operation and it is the one that creates the offending ceilings even if it is based on non-binding recommendations from the 1<sup>st</sup> Respondent. I

will say no more on the subject because that Act is not the subject of challenge in this Petition.

74. The last issue I will deal with on this question regards the submission made by the Petitioners that it is the constitutional duty of the County Assemblies to approve budgets for County Assemblies and as such the 2<sup>nd</sup> Respondent acted *ultra vires* its mandate by purporting to approve the said County Budgets.
75. In that regard, under Article 228(4) of the Constitution, the mandate of the 2<sup>nd</sup> Respondent is to oversee the implementation of the budgets of the National and County Governments by authorizing withdrawals from public funds under Articles 204, 206 and 207 of the Constitution. Under Article 228(5), the Controller of Budget shall not approve any withdrawal from a public fund unless that withdrawal is authorized by law.
76. If I understood Mr. Arwa properly, his submission was that the 2<sup>nd</sup> Respondent had failed to authorize withdrawals from the County Revenue Fund mainly because the County Assemblies had disregarded the recommendations made in the respective Circulars issued to them on diverse dates between 5<sup>th</sup> June 2014 and 16<sup>th</sup> June 2014. The question I must therefore answer is whether the 2<sup>nd</sup> Respondent acted *ultra vires* its mandate by so doing.

77. In that context, I recall Mr. Waweru, the Legal Officer for the 2<sup>nd</sup> Respondent stated in his Affidavit that in the financial year 2013/2014, the County Assemblies approved flawed budgets and thereafter their Appropriation Acts were rendered on rendered equally flawed and as such withdrawals from the Revenue Fund were not approved. That in order to avoid a similar situation for the financial year 2014/2015, the 2<sup>nd</sup> Respondent advised County Assemblies to present budget estimates to the 2<sup>nd</sup> Respondent for comments prior to the enactment of the Appropriation Acts and that the budget estimates were thereafter submitted and the Controller of Budget wrote letters on diverse dates between 5<sup>th</sup> June and 16<sup>th</sup> July 2014 advising the County Governments on what items their budgets ought to have included before their finalization and ultimately enactment of the Appropriation Acts; Was that a lawful action on the part of the 2<sup>nd</sup> Respondent? I think not.

78. I say so because the law on the subject is very clear. Section 102 of the Public Finance Management Act sets out the principles that County Governments must adhere to in respect of public finances. They are as follows;

*“(1) Each County Government shall ensure adherence to—*

*(a) the principles of public finance set out in Chapter Twelve of the*

*(b) the fiscal responsibility principles provided in section 107 under this Act;*

*(c) national values set out in the Constitution; and*

- (d) any other requirements of this Act.
- (2) *The County Executive Committee shall observe principles of collective responsibility in exercising their functions under this Act.*
- (3) *In making decisions a county assembly shall take cognisance of Article 216(2) of the Constitution."*

79. As regards the responsibility of a County Treasury with respect to County public funds, Article 207(1) of the Constitution as well as Section 109 of the Public Finance Management Act establishes a County Revenue Fund for each County Government and the fund is to be administered by the County Treasury. Under Section 109(4) of that Act, the County Treasury shall arrange for the fund to be kept in the Central Bank or an account approved by the County Executive Committee member responsible for finance. Under Article 207(2)(3) as well as Section 109(6) of the Public Finance Management, the County Treasury shall obtain the approval of the Controller of Budget before withdrawing money from the County Revenue Fund under the authority of an Act of the County Assembly appropriating money for a public purpose, an Act of Parliament or county legislation that imposes a charge on that fund or in accordance with the provision of Section 134 and 135 of the Public Finance Management Act.

80. Prior to the above processes and as stated earlier, the budget process in a County starts with the preparation of the County Fiscal Strategy Paper by the County Treasury. Under Section 117 (2) of the Public

Finance Management Act, the County Treasury ought to align its County Fiscal Strategy Paper with the national objectives in the Budget Policy Statement. The County Treasury shall in that regard, include in its County Fiscal Strategy Paper the financial outlook with respect to county government revenues, expenditures and borrowing for the coming financial year and over the medium term. Under Section 117 (5) of that Act, in preparing the County Fiscal Strategy Paper, the County Treasury shall seek and take into account the views of the Commission on Revenue Allocation, the public, any interested persons or groups and any other forum that is established by legislation. Under Section 126 of that Act, in developing the County Fiscal Strategy paper, the County Treasury consults with and takes into account the recommendations of the 1<sup>st</sup> Respondent and not the 2<sup>nd</sup> Respondent. Similarly, in developing the County Development Plan, the County Treasury sends the approved copy by the County Assembly.

In addition, Section 131(1) of the Public Finance Management Act provides that;

*“the County Assembly shall consider the county government budget estimates with a view to approving them, with or without amendments, in time for the relevant appropriation law and any other laws required to implement the budget to be passed by the 30th June in each year.”*

81. I have deliberately reproduced the above sections of the Public Finance Management Act to demonstrate that nowhere in the law is any role created for the 2<sup>nd</sup> Respondent and specifically for it to review budgets of County Governments before they are enacted. Fiscal reporting mechanisms are clear at the National level and so are they in the County level with the County Executive, County Treasury and County Assemblies each charged with the responsibility of ensuring accountability and transparency in utilization of County resources and specifically, the mandate of approving County Budgets is the responsibility of a County Assembly. I must therefore agree with the Petitioners that the 2<sup>nd</sup> Respondent obviously encroached on their mandate when it sought to get involved in their budgetary processes. I have read the affidavits of Mr. Waweru Tuti and Mr. George Ooko and whereas I note their concerns about the alleged untidy spending habits of County Governments and alleged claims of misuse of public funds as well as the need to ensure prudent utilization of public funds, good faith and meaningful intentions are worthless if those objects and designs are constitutionally and statutorily objectionable.
82. Before I conclude on this issue, I also recall the submission made by Mr. Oraro that the various County Appropriation Acts are invalid as they are in conflict with the Constitution and as such are not enforceable.

83. It is indeed true that under Article 191(2) of the Constitution, National legislation prevails over County legislation. However, in terms of the Petition before me, and as I have found elsewhere above, I have not seen any law authorizing the 2<sup>nd</sup> Respondent to undertake the function of approving County Budgets. Article 228 is very clear that the 2<sup>nd</sup> Respondent only oversees the implementation of budgets. In that regard, the importance of the Appropriation Act is obvious and cannot be understated. The argument made by the Respondents that the 2<sup>nd</sup> Respondent would only authorize withdrawals from the County Revenue if the law and the budgetary process as envisaged by the Constitution and the Public Finance Management Act, 2012 was adhered to is a matter of interpretation of the Constitution and Statute based on a specific set of contested facts. Who should ultimately determine alleged violations of the Constitution and the Public Finance Management Act? Who determines whether the County Appropriation Acts are in line with the Constitution and Public Finance Management Act.

84. The provisions of Article 165 of the Constitution are clear in that regard. For avoidance of doubt it states thus;

165(3)(1) ...

(a) ...

(b) ...

(2) ...

- (3) *Subject to clause (5), the High Court shall have—*
- (a) ...
  - (b) *jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;*
  - (c) ...
  - (d) *jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—*
    - (i) *the question whether any law is inconsistent with or in contravention of this Constitution;*
    - (ii) *the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;*
  - (e) ...”

The dispute before me does not concern itself with the legality or otherwise of the Counties Appropriation Acts but it regards the mandate of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in the budgetary process and in overseeing the implementation of County budgets. The allegation that Counties had not submitted copies of County developments plans, debt management strategies as required by the law was not proved and given my findings as above, that issue is moot. That being the case, this Court cannot enter into such a vague dispute. It would only intervene

had it been shown that the Appropriation Acts as enacted by the Counties violated the existing national legislation or that the Petitioners acted in contravention of the law, which is not the case before me.

85. In conclusion, the 2<sup>nd</sup> Respondent's role is limited to overseeing the implementation of budgets including withdrawals from public funds. But having said so, as will be seen shortly, in fact this issue was not one in which any specific order was sought against the 2<sup>nd</sup> Respondent.

Whether the fundamental rights and freedoms of the Petitioners were violated

86. I now turn to consider the last issue I set out to determine which is the alleged violation of the Petitioners' rights under Articles 27 and 47 of the Constitution. In this regard, Prof. Ojienda submitted that in issuing the impugned Circular, the 1<sup>st</sup> Respondent failed to consult the Petitioners thus violating their right to fair administrative action as provided for under Article 47 of the Constitution. He also claimed that the fact that the impugned Circular on budget ceilings targeted only votes on account for County Assemblies and County Executive for the financial year 2014/2015 and did not affect budgets of other State Organs such as the National Executive, National Assembly, Senate, Judiciary and the twelve Commissions and Independent offices, was discriminatory and therefore a violation of Article 27 of the Constitution.

87. The 2<sup>nd</sup> Respondent on the other hand argued that there was no discrimination as alleged because budget ceilings were set for all arms of Governments and independent bodies and that all these other Government agencies had complied with their budget ceilings requirements save the Petitioners. On his part, Mr. Oraro submitted therefore that the Petitioners are State Organs under Article 178(1) of the Constitution and as such they are not persons capable of enforcing any of the fundamental rights and freedoms under the Bill of Rights.
88. I will start by determining this preliminary issue and if I find that County Governments are not persons for purposes of enforcing fundamental rights and freedoms, the matter ends there. If not, I will proceed and determine the merits of the claims aforesaid.
89. It is not in doubt that the Petitioners have invoked the provisions of Article 22 of the Constitution to allegedly enforce their right to protection against discrimination and right to fair administrative action as provided for under the provisions of Article 27 and 47 of the Constitution respectively.
90. Article 20(2) of the Constitution is on the application of the Bill of Rights and it provides that;

*"Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedoms'.*

Under Article 260 of the Constitution a 'person' includes "a company, association or other body of persons whether incorporated or unincorporated".

The issue therefore is whether County Assemblies are persons capable of having their fundamental rights protected and enforced. In answering that question, Majanja J in County Government of Meru vs Ethics and Anti-Corruption Commission (supra) stated as follows;

*"A County Government is recognized as part of the State organs that exercise the sovereign power of the people under Articles 1(4), 6 and 176 of the Constitution. Under Article 260 of the Constitution. "State", when used as a noun, means the collectivity of offices, organs and other entities comprising the Government of the Republic under this Constitution" while the term person, "includes a company, association or other body of persons whether incorporated or unincorporated." Under Article 21 of the Constitution, the obligations, regarding the implementation of fundamental rights and freedoms are cast on the on the State and every State organ. Article 22 of the Constitution, which has been invoked by the Petitioner, grants every "persons" the right to Institute Court proceedings claiming that a right or fundamental freedom in the bill of Rights has been denied, violated or infringes or is threatened."*

The learned judge continued thus;

*"The provisions I have cited above show that there is a clear distinction between a person and a County Government which is a State organ vis-à-vis the rights and obligations under the Bill of Rights. I am doubtful, that the County Government qua County government can lodge a claim under Article 22 of the Constitution against another State organ to enforce fundamental rights and freedoms as the County Governments is not a person for purposes of the Constitution ad more particularly the Bill of Rights. I therefore find and hold that the Petitioner cannot agitate a claim for violation of fundamental rights and freedoms against the Commission. I therefore decline to grant prayer (b) of the Amended Petition."*

91. I am in agreement with the learned judge and I adopt his reasoning in the instant Petition. I do so because the Petitioners are not private individuals but officers serving in a public office as defined in Article 260 of the Constitution. The Respondents are also officers and offices in the same public office and it is inconceivable how one can violate the other's rights in the context of the Bill of rights. In any event, in the circumstances of the Petition before me, any differences regarding the fiscal and budgetary processes between affected State Organs should not be such as to attract this Court's intervention under the Bill of Rights. Those differences are to be settled in the manner envisaged by Article 189(4) of the Constitution and not by litigation predicated on the Bill of Rights. In addition, the dispute at hand concerns the powers

of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in revenue allocation, budgetary processes and budget implementation. Article 10 of the Constitution sets out the principles of rule of law, transparency, accountability and good governance as some of the national values to guide such processes. Rule of law dictates that every state organ, independent offices and Commission must apply the Constitution and the law in its affairs and it is the duty of this Court to determine the legality of their actions and that is how far the Court should go.

92. In a nutshell, I see no reason to make any finding that any rights as under Articles 27 and 47 of the Constitution have been breached as far as the Petitioners are concerned and I so hold and find. All their complaints in that regard and which have been set out elsewhere above are dismissed.

Whether the orders sought can be granted

93. From what I have stated above and noting the prayers in the Petition, once I have held that the impugned Circulars were not binding yet were lawfully issued, it follows that Prayers (a) and (b) in the Petition cannot be granted and are instead dismissed.
94. As regards prayers (c) and (d), it is the duty of the 2<sup>nd</sup> Respondent to oversee the implantation of the budget in accordance with the law subject to what I have stated above. It is also not bound to follow the respective County Budgets which are themselves subject to National

Revenue Allocation Laws to wit the Public Finance Management Act, the Division of Revenue Act and the County Allocation of Revenue Act. No challenge has been made to those laws and the powers donated to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in that regard. The prayers as crafted cannot be granted and are instead dismissed.

95. As for costs, I see no reason to award costs as this was litigation between State Organs and offices.

### Conclusion

96. This case brings to the fore the need for prudence in the use of public funds and the need to follow the lawful processes set by the Constitution and relevant Statutes. It also makes urgent the need for a clear across-the-board understanding of Chapter 12 of the Constitution. Although one of the most important Chapters in the Constitution, seldom has it been subjected to an interrogation at the practical level. The result is that each of the Organs and institutions charged with its implementation invariably find relevance in areas reserved for others. The Chapter creates distinct roles for the National Executive, Parliament, County Executives and County Assemblies, Independent Commissions and offices and in this judgment, I have attempted to demarcate those roles. Should any of them for whatever reason become rogue, and should any wrangles arise, the law has created sufficient dispute resolution mechanisms to quickly address such situations including alternative dispute resolution mechanisms as is provided for in Article 189(3) and (4) of the Constitution.

97. In the course of the hearing of this Petition, on more than one occasion, I directed parties to attempt a resolution of the issues raised but the little progress made only related to certain payments made to enable obligations towards salaries and sundries to be met. I encourage more and more attempt at meetings to resolve these issues and the Attorney-General ought to take a lead and not a backseat in such situations.
98. Lastly, it is time that County Executives and County Assemblies learnt that funds allocated to Counties are meant to serve legitimate and lawfully progressive purposes. It is distressing, as was said by one party to this Petition, to learn that Kenyans elected to serve in Counties may have been banned from travel for being a nuisance in certain foreign Countries. The funds used for such trips are said to be in their millions. Granted, no doubt devolution is working and indeed it must work but wastage will only drain an already drained populace. I digress and will now proceed to make the final orders based on all the findings I have made above.

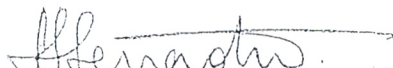
#### Final orders

99. It follows from the above findings that I see no merit in the Petition and the same is dismissed. Having so ordered, it follows that this Judgment is binding on Petitions Numbers 417 of 2014 and 242 of 2014. Both are determined in the same terms and a copy of this Judgment shall be placed in each of those files for record purposes.

100. I shall make no orders as to costs.

101. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS ..... 20<sup>th</sup> DAY  
OF ..... February ..... , 2015

  
ISAAC LENAOLA

JUDGE