

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI LAW COURTS)
JUDICIAL REVIEW DIVISION
CIVIL APPLICATION NO. E060 OF 2021
IN THE MATTER OF LAW REFORM ACT SECTION 7&8 CHAPTER 26 LAWS OF
KENYA
AND
IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES
AND
IN THE MATTER OF APPLICATION UNDER ARTICLE 1(3), 2(2), 3, 6(2),10, 11,
94,95,96, 163(3)(d)(I) & (3)174(1), 175,179(1)&(4), 183(1), 185(3) & 189(1), 200 201(d),
212,225,226(2),229 (7)&(8) AND 259 OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF CONTRAVENTION OF COUNTY GOVERNMENTS ACT
AND
IN THE MATTER OF CONTRAVENTION OF THE PUBLIC FINANCE
MANAGEMENT ACT 2012
AND
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
BETWEEN

REPUBLICAPPLICANT

VERSUS

THE SENATE OF THE REPUBLIC OF KENYA.....	1 ST RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF MOMBASA	2 ND RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF KWALE.....	3 RD RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF KILIFI.....	4 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF TANA RIVER	5 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF LAMU.....	6 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF TAITA/TAVETA.....	7 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF GARISSA	8 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF WAJIR.....	9 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF MANDERA.....	10 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF MARSABIT.....	11 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF ISIOLO.....	12 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF MERU.....	13 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF THARAKA NITHI	14 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF EMBU.....	15 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF KITUI.....	16 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF MACHAKOS.....	17 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF MAKUENI.....	18 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF NYANDARUA.....	19 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF NYERI	20 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF KIRINYAGA.....	21 ST RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF MURANG'A.....	22 ND RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF KIAMBU	23 RD RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF TURKANA.....	24 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF WEST POKOT.....	25 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF SAMBURU.....	26 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF TRANS NZOIA.....	27 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF UASIN GISHU.....	28 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF ELGEYO/MARAKWET...	29 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF NANDI.....	30 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF BARINGO.....	31 ST RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF LAIKIPIA	32 ND RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF NAKURU.....	33 RD RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF NAROK.....	34 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF KAJIANDO.....	35 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF KERICHO.....	36 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF BOMET.....	37 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF KAKAMEGA.....	38 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF VIHIGA.....	39 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF BUNGOMA.....	40 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF BUSIA	41 ST RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF SIAYA.....	42 ND RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF KISUMU.....	43 RD RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF HOMA BAY.....	44 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF MIGORI.....	45 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF KISII.....	46 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF NYAMIRA.....	47 TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF NAIROBI.....	48 TH RESPONDENT
COUNTY ASSEMBLY OF MOMBASA	49 TH RESPONDENT
COUNTY ASSEMBLY OF KWALE.....	50 TH RESPONDENT
COUNTY ASSEMBLY OF KILIFI.....	51 ST RESPONDENT
COUNTY ASSEMBLY OF TANA RIVER	52 ND RESPONDENT
COUNTY ASSEMBLY OF LAMU.....	53 RD RESPONDENT
COUNTY ASSEMBLY OF TAITA/TAVETA.....	54 TH RESPONDENT
COUNTY ASSEMBLY OF GARISSA	55 TH RESPONDENT
COUNTY ASSEMBLY OF WAJIR.....	56 TH RESPONDENT
COUNTY ASSEMBLY OF MANDERA.....	57 TH RESPONDENT
COUNTY ASSEMBLY OF MARSABIT.....	58 TH RESPONDENT
COUNTY ASSEMBLY OF ISIOLO.....	59 TH RESPONDENT
COUNTY ASSEMBLY OF MERU.....	60 TH RESPONDENT
COUNTY ASSEMBLY OF THARAKA NITHI	61 ST RESPONDENT
COUNTY ASSEMBLY OF EMBU.....	62 ND RESPONDENT
COUNTY ASSEMBLY OF KITUI.....	63 RD RESPONDENT
COUNTY ASSEMBLY OF MACHAKOS.....	64 TH RESPONDENT
COUNTY ASSEMBLY OF MAKUENI.....	65 TH RESPONDENT

COUNTY ASSEMBLY OF NYANDARUA.....	66 TH RESPONDENT
COUNTY ASSEMBLY OF NYERI	67 TH RESPONDENT
COUNTY ASSEMBLY OF KIRINYAGA.....	68 TH RESPONDENT
COUNTY ASSEMBLY OF MURANG'A.....	69 TH RESPONDENT
COUNTY ASSEMBLY OF KIAMBU	70 TH RESPONDENT
COUNTY ASSEMBLY OF TURKANA.....	71 ST RESPONDENT
COUNTY ASSEMBLY OF WEST POKOT.....	72 ND RESPONDENT
COUNTY ASSEMBLY OF SAMBURU.....	73 RD RESPONDENT
COUNTY ASSEMBLY OF TRANS NZOIA.....	74 TH RESPONDENT
COUNTY ASSEMBLY OF UASIN GISHU.....	75 TH RESPONDENT
COUNTY ASSEMBLY OF ELGEYO/MARAKWET.....	76 TH RESPONDENT
COUNTY ASSEMBLY OF NANDI.....	77 TH RESPONDENT
COUNTY ASSEMBLY OF BARINGO.....	78 TH RESPONDENT
COUNTY ASSEMBLY OF LAIKIPIA	79 TH RESPONDENT
COUNTY ASSEMBLY OF NAKURU.....	80 TH RESPONDENT
COUNTY ASSEMBLY OF NAROK.....	81 ST RESPONDENT
COUNTY ASSEMBLY OF KAJIANDO.....	82 ND RESPONDENT
COUNTY ASSEMBLY OF KERICHO.....	83 RD RESPONDENT
COUNTY ASSEMBLY OF BOMET.....	84 TH RESPONDENT
COUNTY ASSEMBLY OF KAKAMEGA.....	85 TH RESPONDENT
COUNTY ASSEMBLY OF VIHIGA.....	86 TH RESPONDENT
COUNTY ASSEMBLY OF BUNGOMA.....	87 TH RESPONDENT
COUNTY ASSEMBLY OF BUSIA	88 TH RESPONDENT
COUNTY ASSEMBLY OF SIAYA.....	89 TH RESPONDENT
COUNTY ASSEMBLY OF KISUMU.....	90 TH RESPONDENT
COUNTY ASSEMBLY OF HOMA BAY.....	91 ST RESPONDENT
COUNTY ASSEMBLY OF MIGORI.....	92 ND RESPONDENT
COUNTY ASSEMBLY OF KISII.....	93 RD RESPONDENT
COUNTY ASSEMBLY OF NYAMIRA.....	94 TH RESPONDENT
COUNTY ASSEMBLY OF NAIROBI.....	95 TH RESPONDENT

AND

COUNCIL OF GOVERNORS	1 ST INTERESTED PARTY
ATTORNEY GENERAL	2 ND INTERESTED PARTY

EXPARTE:

CHARLES ONGARO KIAGE	1 ST APPLICANT
CPA BENSON ORINA BOSIRE.....	2 ND APPLICANT
RICHARD OSEKO OGETO.....	3 RD APPLICANT
WILLIAM ANDREW KINANGA OBAGA.....	4 TH APPLICANT
JARED MOMANYI.....	5 TH APPLICANT

NOTICE OF MOTION

[Section 1A,1B & 3A of the Civil Procedure Act , Order 53 rules 1 (1), (2) and (4) of the Civil Procedure Rules, the Law Reform Act Cap 26 and all other enabling provisions of law & leave granted on 7th May, 2021]

TAKE NOTICE that this Honourable Court will be moved on the.....day of2021 at 9.00 O'clock in the forenoon or so soon thereafter by counsel for the Applicant **FOR ORDERS THAT;**

1. This honourable Court do make a declaration that the decision of the Senate of the Republic of Kenya by a Notice to appear, published in the Standard Newspaper on 23rd April 2021 to summon for questioning the Chief Executive Officers of the 47 County Government Executive on the Reports of the Auditor General on Financial Statements for the financial year 2018/2019 by the Senate County Public Accounts and Investment (CPA&I) Committee and is ultra vires its Constitutional mandate hence invalid, void and of no effect.
2. This honourable court do issue an order of Prohibition directed at the Senate of the Republic of Kenya Committee of the County Public Accounts and Investment(CPA&I) or full plenary from summoning for questioning the Chief Executive Officers of the 47 County Government Executive for consideration of Reports of the Auditor General on the Financial Statements for the financial year 2018/2019
3. This Honourable Court do issue an order of Mandamus directed to the Respective County Assemblies (the 49th to 95th Respondents) to debate and consider the Reports of the Auditor General on the Financial Statements and take appropriate action and recommendations as required by article 229(7) & (8) of the constitution of Kenya.
4. This honourable court be pleased to make a declaration that the Speakers of the respective County Assemblies (the 2nd to 48th Respondents) who have not periodically complied with the provisions of Article 229(8) of the constitution of

Kenya by ensuring that all the reports of the Auditor General on the Financial Statements are debated and recommendations made within the constitutional timelines are in breach of their constitutional and statutory duty and are therefore unfit to continue holding public office.

5. [Further or in the alternative] damages arising from the matters herein and interest thereon.
6. An order for costs.

WHICH APPLICATION is founded upon the following grounds and the annexed affidavit of the 1st Applicant **CHARLES ONGARO KIAGE** filed herein and on such further grounds to be adduced at the hearing hereof.

- (i) The Senate of the Republic of Kenya through the Clerk has by a notice published in the Standard Newspaper of 23rd April 2021 issued a Notice to Appear before the County Public Accounts and Investment (CPA&I) Committee of the Senate in the months of May, June, July, August and September directed to the Chief executive Officers of the 47 County Government Executive to appear before the said committee but does not have the requisite constitutional authority as envisaged in Article 2(2) and 226(2) of the Constitution.
- (ii) The Constitution has clearly defined the role of the Senate at Article 96 and the function of questioning or considering the Reports of the Auditor General on the financial statement of the county entities is not among them
- (iii) The constitution provides that the Chief Executive Officer to the County Government Executive/unit is expressly answerable to the County Assembly on issues financial resource management and therefore by dint of Article 6(2) and Article 189(1), that function needs to be exercised by the rightful authority.
- (iv) The persons sought to be questioned by the 1st Respondent are the Chief Executive Officers of the County Government Executive who are also the

accounting officers and by virtue of Article 226(2) are accountable to the County Assemblies

- (v) The Report sought to be evaluated and or discussed is foreign to the senate as the same is prepared by the Auditor General and submitted to the County Assembly as per the provisions of Article 229(7) as read with Article **226(2)** as contra-distinguished with Article 93 of the Constitution.
- (vi) The execution of the subject decision will contravene the express provisions of article 1(3), 2, 6, 10, 11, 94, 96, 174, 175, 179, 183, 185, 189(1), 190, 201 and 259 of the Constitution.
- (vii) The continued execution of the subject decision has led to wastage and or imprudent use of public resources whereby there is duplication of roles leading to loss of public funds by way of travel, accommodation to and from Nairobi for the Governor together with the Executive Committee and their handlers, and the Committee of the Senate in the event the Senate conducts the sittings at the County level. Wastage of time which could have otherwise used to serve the citizenry contrary to the provisions of Article 201(d) of the Constitution.
- (viii) The practice and conduct of the Senate has led to the Speakers of the various County Assemblies to abdicate their roles as mandated by the constitution which would have led to closer assessment and inquiry while serving the citizenry, development and enhancement of capacity to interrogate financial statements, budgets and audit reports in contravention of Article 73 of the constitution.
- (ix) There is a clear demonstration that the all the National Values and Principles as envisaged at Article 10 of the Constitution have not been applied by the Senate (the 1st Respondent) with regard to separation of powers and recognition of devolution.
- (x) Notwithstanding the erroneous acts of the various committees of the Senate in the past eight years there has been no recommendations to ride home

about emanating therefrom hence the exercise can only be said to be a public embarrassment process, potential extortion and muscle flexing opportunities which is not a worth investment of public money.

- (xi) The law on separation of powers and functions is now well settled, and where there is express Authority, implied authority cannot override.
- (xii) The Senate has usurped the powers of the County Assembly and purports to take up a function of devolved units without undertaking a referendum under Article 225 and the speakers (the 2nd to 48th Respondents) have willingly allowed the same to happen.
- (xiii) This honourable Court is clothed with the requisite jurisdiction to hear and determine the issues herein.
- (xiv) It is in the best interest of justice that the prayers sought are granted.

DATED at NAIROBI this 20th day of May 2021



Gekonde Omariba

Advocate

LSK/2021/2530 P.105/4394/01

OMARIBA & COMPANY

ADVOCATES FOR THE APPLICANTS

DRAWN AND FILED BY

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TO BE SERVED UPON: -

The Senate of the Republic of Kenya
Parliament
Nairobi.

Speakers of the 47 Counties (through their respective offices)

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County Assembly of Kakamega

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NB; If any party served does not appear at the time and place fixed the court will proceed to hear and determine the application and any further orders your presence notwithstanding.