

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, 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..... 1ST RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF MOMBASA2ND RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF KWALE.....3RD RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF KILIFI.....4TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF TANA RIVER5TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF LAMU.....6TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF TAITA/TAVETA.....7TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF GARISSA8TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF WAJIR.....9TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF MANDERA.....10TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF MARSABIT.....11TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF ISIOLO.....12TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF MERU.....13TH RESPONDENT
SPEAKER, COUNTY ASSEMBLY OF THARAKA NITHI14THRESPONDENT
SPEAKER, COUNTY ASSEMBLY OF EMBU.....15THRESPONDENT

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

RICHARD OSEKO OGETO
CPA BENSON ORINA BOSIRE
WILLIAM ANDREW KINANGA OBAGA
JARED MOMANYI

SUPPORTING AFFIDAVIT

I, **CHARLES ONGARO KIAGE** a male adult of sound mind holder of national identity card number 0946526 a resident of South C Estate in Nairobi County in the Republic of Kenya make oath and state as follows:-

1. **THAT** I am the first applicant, herein with full knowledge of the facts and with authority of my co- applicants who are all Kenyan citizens of repute and training with whom I share aspirations and governance ideals. *(annexed and marked COK 1& 2 is a copy of my National Identity Card and Authority)*
2. **THAT** the co applicants and myself seek the grant of the Judicial Review remedies on the grounds set forth on the face of this application.
3. **THAT** the facts and matters stated in the grounds in the said notice of application are true to my knowledge.
4. **THAT** in the premises, I respectfully ask for orders of Judicial Review for an order of Prohibition, Mandamus and declaration as set out in the said Notice of Motion.
5. **THAT** it has come to the attention of the applicants that the Senate of the Republic of Kenya through the Clerk of the Senate has by a Notice published in the Standard Newspaper of 23rd April, 2021 issued a notice of sittings of 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 by way of summons to appear before the said committee on various dates starting 5th May, 2021 to end of September, 2021.

Whereby they are to consider the Reports of the Auditor General on financial statements for the year 2018/2019 (*annexed and marked COK 3 is a copy of the Notice as Published*)

6. **THAT** I know from my experience as an Auditor & Policy Development Expert, in consultation with my co -applicants who are financial experts and having previously worked with the government in various capacities in mainstream Ministries, Semi -Autonomous Government Agencies (SAGAs) and Local Authorities and County Governments that there was never any intention to have the Senate supervise, evaluate and or interrogate the audit reports of the County units and this was crafted and encompassed in the Constitution hence the Senate is acting without the requisite Constitutional authority as envisaged in Article 2(2) and 226(2) of the constitution.
7. **THAT** I know of my own knowledge from my reading of the constitution and on advice from my legal team which information I verily believe to be true is that by dint of Article 2(2) of the constitution no person or body shall exercise state powers unless as authorized by the constitution and further that Article 189(1) that function needs to be exercised by the rightful authority and there is need to have respect of functional and institutional integrity of County Government.
8. **THAT** I am aware by the virtue of my work, experience, training and reading of the Constitution that the Constitution has clearly defined the role of the Senate at Article 96 of the Constitution, the same does not include the function of interrogating the Final Audit report as is sought to be done by the CPA&I Committee of the Senate. The function of questioning the Chief Executive Officer to the County Government Executive is expressly vested in the County Assembly hence the Senate is overstepping its powers as donated by the Constitution.
9. **THAT** I know of my own knowledge and understanding and advise from my legal team and our Advocate on record that the persons sought to be questioned by the

Senate CPA&I Committee are governors who are the Chief Executive Officers of the County Government Executive who are also the Accounting Officers and by virtue of Article 226(2) and 179(4) are only accountable to the County Assemblies.

10. **THAT** I know of my own knowledge and on advice from my legal team that the Audit Reports 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 contradistinguished with Article 93 of the Constitution.
11. **THAT** it is clear from the foregoing that the execution of the decision and actions we seek to prohibit 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.
12. **THAT** I am apprehensive that if this honourable Court does not stay the said Senate's CPA&I Committee's decision, its actions it will lead to wastage and or imprudent use of public resources. There will be duplication of roles by firstly the County Assembly which is constitutionally supposed to execute the mandate and the Senate which is an imposter.
13. **THAT** the a fore stated loss of public funds will be by way of travel to Nairobi, accommodation and out of pocket expenses for the Governors, the entire County Executive Committees for all the Counties and their handlers, the time taken to travel to, prepare for the meeting and travel back, could have otherwise used to serve the citizenry contrary to the provisions of Article 201(d) of the Constitution.
14. **THAT** were the reverse to happen, whereby the Senate CPA&I Committee to travel to the county, then it would involve the travel, upkeep and accommodation for all the members of the Senate Committee and the secretariat and handlers travel to all the Counties or regional stations.

15. **THAT** my research has revealed that this practice and conduct of the Senate CPA&I Committee of trespassing on the functions of the County Assemblies has led the Speakers County Assemblies to abdicate their roles as mandated by the Constitution.
16. **THAT** Further the process has allowed political whitewashing of professionally prepared Audit Reports to go un actioned. (see the final recommendations of senate reports)
17. **THAT** I know of my own knowledge and hold a firm view that, if the 49th to 95th Respondents (the County Assemblies) under the leadership of the Speakers (the 2nd to 48th) Respondents were executing their mandate and of interrogating the reports of the Auditor General on financial statements of the County Entities and presenting reports and recommendations to the relevant bodies, the Financial Reports of Counties would be closely evaluated and recommendations made by the County Assemblies who (initially approved the budget) and are direct beneficiaries of the prudent financial management.
18. **THAT** I know from my experience as an Auditor that if interrogation, evaluation and analysis is done at the County level, the same will be done at minimal cost and while continuing to serve the citizenry as there is no unnecessary travel time;
19. **THAT** I know of my own knowledge and understanding that the failure to attempt and or undertake the evaluation and making of recommendation by the 49th -95th Respondents/County Assemblies has curtailed the development and enhancement of capacity to interrogate Financial statements, budgets and audit reports in the County Assemblies which is part and parcel of their mandate for which they are elected and draw a salary in contravention of Article 73 of the constitution.

20. **THAT** I have keenly looked at the schedule containing the notice to appear and the same has been crafted in a way that seems to give a systematic rotation of the members of the 1st Respondent's Committee on CPAC&I a round tour of the country at the taxpayer's cost. There is a clear demonstration that the national values and principles as envisaged at Article 10 of the constitution **have not been** applied by the Senate's CPA&I committee as they are calculated at self-enrichment at the expense of the taxpayer
21. **THAT** I know from my knowledge and my study of law that separation of powers is paramount and the constitution has given the National Assembly powers to evaluate and recommend on audit reports for National Government Agencies and the County Assembly, County Agencies. The appetite of the senate to interrogate a devolved unit before the County Assembly gives its recommendation is failure to appreciate the separation of powers and recognition of devolution.
22. **THAT** I know from my own knowledge and on information received in the cause of my work as a financial consultant that, notwithstanding the erroneous override by the Senate through its committees has in the past Eight years there has been one report done with respect to this function and no recommendation to ride home about emanating therefrom hence the inquiry has been to a large extent a public embarrassment process, extortion opportunity and muscle flexing opportunities which is not a worth investment of public money. *(annexed and marked COK 5 a,b and c is a copy of the 3 volumes of the report of the CPA&I committee for 2015-2018)*
23. **THAT** on consultation with my legal team it is apparent that a number of applications, petitions and references have been made to Court to give meaning to the respective roles of various entities of government and that various interpretations have been given some of which tend to enlarge the mandate of the

Senate to oversight the use of County resources but the same does not extend to interrogating the County Government Executive 's audited reports.

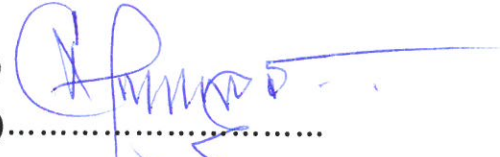
24. **THAT** I know of my own knowledge and from research that during the same period the CPA&I Committee interrogated and evaluated County Assemblies but no report has been forthcoming. *(annexed and marked COK 5 is a screenshot from the committee's website on the reports)*
25. **THAT** in the unlikely event that this honourable Court finds that the senate has the mandate to evaluate the reports (which is least likely)I am aware that the financial reports sought to be evaluated by the 1st Respondents CPA&I Committee were released on 18th February 2021 and as such as required by the Constitution the same ought to have been discussed and recommendations made within 3 months. The pushing of the evaluation of the reports outside the given Constitutional timelines is also irregular and out of time. *(annexed and marked COK 6 a, b, c, d, e, f, g, h, i, and j are pages of the report of the Auditor general for a few County Government Executive and County Assemblies)*
26. **THAT** I know of my own knowledge that for effective policy development and evaluation for allocation and oversight responsibilities, the Senate needs the Auditor General to issue it with a Consolidated Report /Blue Book giving overall Audit issues for resource allocation/distribution and legislation. The consolidated report with respect to the year under Review has not been issued and without the consolidated report any attempt at considering the same is futile.
27. **THAT** I am informed by my legal team which information I verily believe to be true that, the law on separation of powers and functions is now well settled, and where there is express Authority, **implied authority cannot** override.

28. **THAT** it is my position that the Senate has usurped the powers of the 47 County Assemblies the 49th to 95th Respondents and purports to take up a function of the devolved units. I am advised by my legal team that, there is **no room** for a delegation of functions, co-sharing of devolved functions or transfer to a national government entity without undertaking a referendum under Article 225 and the speakers (the 2nd to 48th respondents) have willingly allowed the same to happen.
29. **THAT** I am know of my own knowledge and I am aware that the interrogation of the reports of the Auditor General on financial statement of County entities is not the only oversight role, there is special Audits, value for money, performance Audit and evidence of execution of works which have overreaching value than Reports of financial statements which has Been assigned to a specific body.
30. **THAT** I am aware that the circumstances under which the Senate may have oversight Authority are in situations where the National Government has made Conditional grants or Donor Funded Projects to the County entity to undertake a specific task outside the normal budgetary allocation that results in periodic, annual routine Audit as was in the case of the COVID-19 fund audit and other special grants given by development partners through the National Government.
31. This honourable Court is clothed with the requisite jurisdiction to hear and determine the issues herein.
32. **THAT** it is in the interest of Justice that the Orders sought be granted.
33. **THAT** the facts deponed herein are true to the best of our knowledge, information sources of which are disclosed and belief foundation upon which has been laid.

SWORN by the said

CHARLES ONGARO KIAGE

at Nairobi this 20th day of May 2021

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)
) **DEPONENT**
)
)

BEFORE ME



COMMISSIONER FOR OATHS

DRAWN AND FILED BY

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