



THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
NAIROBI PETITION NO. 71 OF 2013

THE INSTITUTE OF SOCIAL ACCOUNTABILITY & ANOTHER v THE NATIONAL ASSEMBLY & 3 OTHERS
JUDGMENT DELIVERED ON 20TH FEBRUARY 2015 BY
JUSTICES LENAOLA, MUMBI NGUGI AND MAJANJA
PRESS AND PUBLIC SUMMARY

The following summary is provided to assist the public and the media in reporting this case and is not binding on the Court.

The consolidated petition was filed by the Institute of Social Accountability and the Centre for Enhancing Democracy and Good Governance. The petitioners sought declarations that the **Constituencies Development Fund Act, Act No. 30 of 2013 ('CDF Act')**, which replaced the **CDF Act, 2003** violates the Constitution. The Act establishes a fund known as the Constituencies Development Fund (CDF) which has for the past decade disbursed money to the constituencies to finance and implement development projects. The petitioners challenge the constitutionality of the **CDF Act** on two fronts; the process leading to its enactment and the substance of the legislation including the nature, administration and management of the CDF. The petitioners contended that the **CDF Act** contravened the constitutional principles of the rule of law, good governance, transparency, accountability, separation of powers and the division of powers between the national and county government and the public finance management and administration.

After considering the parties arguments, the Court identified the following four issues for determination and summarised its findings as follows:

- a) **Whether the process leading to the enactment of the CDF was constitutional.**
 - (i) That the **CDF (Amendment) Bill** concerned county government in terms of **Article 110** and consequently the Amendment Act was unconstitutional on the ground that the Senate was not involved in its enactment.
 - (ii) That there was sufficient public participation in the process leading up to the enactment of the **CDF (Amendment) Act**.
 - (iii) With regard to consultation of the CIC and the Commission on Revenue Allocation, there was no violation of **section 14** of the **Sixth Schedule** to the Constitution.
- b) **The nature of the CDF and whether it violates principles of public finance and division of revenue.**
 - (i) That CDF is not a conditional grant to the county governments within the meaning of **Article 202(2)** of the Constitution.
 - (ii) That **Article 202** envisages equitable sharing of the national government revenue between the national and county governments. Nevertheless, if national government so desired, it could at its discretion grant additional revenue, whether conditionally or unconditionally to the county governments.

(iii) That such grants by national government must respect the governance structures established under the Constitution. In other words, the national government must tap into the existing structures of the county government.

c) Whether the CDF Act violates the division of powers and functions

(i) That power and functions of the State are distributed at only two levels of government, the national and county levels.

(ii) That the purpose and design of the **CDF Act** is constitutionally flawed in a number of aspects: First, the Act establishes CDF as a mechanism that runs parallel the constitutionally recognised governance structures. By charging it with community based projects under **section 22** of the **CDF Act**, it threatens to upset the division of functions between the national and county levels of governments and interfere with the county government autonomy.

d) Whether the CDF Act 2003 offends the principle of separation of powers

That separation of powers and checks and balances are principles well ingrained in the Constitution. By involving Members of Parliament in the planning, approval, coordination and implementation of the CDF projects, the **CDF Act** violates the doctrine of separation of powers between the executive and legislative functions. It also undermines some key national values and principles of governance including devolution of power, accountability and good governance.

While recognising the developmental role that CDF has played over the years and the noble objective that the **CDF Act** sought to achieve, the learned Justices nevertheless found that good faith and well-meaning intentions could not override the Constitution as the supreme law.

Following the above findings, the Court concluded that the **CDF Act** was unconstitutional and therefore invalid in its entirety. The Court noted that in light of the powers it had under the Constitution to make a declaration of invalidity, it could also suspend the declaration in dealing with the consequences of such invalidity. The Court observed that suspension of the declaration of invalidity would be appropriate in the present circumstances in order to allow the Legislature time to correct the defective legislation while avoiding chaos and disarray in a system that has been established for over a decade. In considering the period of suspension, the court considered that the CDF had been running for a decade and that the funds for the financial year 2014/2015 have been disbursed and the budgetary process for the next financial year was in progress. As the Fund had entered into legal obligations that needed to be dealt with, it was in public interest to suspend the period of invalidity of the impugned Act for a year to give room for corrective and transitional measures. This was in line with the national value of good governance.

The Court then made the following final orders;

(a) A declaration is hereby issued that the Constituencies Development Funds Act, 2013 is unconstitutional and therefore invalid.

(b) The order of invalidity above is suspended for a period of twelve (12) months from the date of judgment.

(c) The national government may remedy the defect within that period and the Constituencies Development Fund Act shall stand invalidated at the expiry of the twelve (12) months or may be earlier repealed whichever comes first.

(d) Each party shall bear its own costs.