



KATIBA INSTITUTE AND WANJIRU GIKONYO v CS DEVOLUTION AND GOVERNOR NAIROBI COUNTY

PETITION 66 OF 2020

UNCONSTITUTIONALITY OF TRANSFER OF FUNCTIONS FROM NAIROBI COUNTY TO NATIONAL GOVERNMENT

Today, February 27th, 2020 Katiba Institute and Ms Wanjiru Gikonyo, the National Coordinator of The Institute for Social Accountability (TISA) filed a Petition at the High Court challenging the unlawful transfer of County Health, Transport, Planning and Development, Public Works, Utilities and Ancillary Services functions from Nairobi County to the National Government. The transfer was announced on 25th February 2020 through Gazette Notice 1609 of 2020 where the CS Ministry of Devolution, Attorney General, Nairobi County Governor and the Acting Nairobi County Secretary Justus Kathenge unlawfully agreed to transfer the said functions from Nairobi County to the National Government. The agreement takes effect on 17th March 2020. The Petitioners have requested the Court to suspend the enforcement of the agreement pending hearing and determination of the case.

The overall concern that triggered this litigation is that the agreement recentralizes and transfers Nairobi County Government functions to the National Government, and violates the Constitutional principles of intergovernmental consultations, negotiations, agreements, and public participation which are a condition precedent to the transfer of functions. The petitioners claim that the transfer of functions from Nairobi County to the National Government is unconstitutional because:

1. The Governor of Nairobi County has been charged with multiple counts of corruption and is presently barred by court order from accessing or performing the functions of the office. Therefore, he has no authority to sign away county government functions.
2. The agreement was not submitted to the County Assembly for approval and undermines the legislative authority of the Nairobi County Assembly.
3. The agreement undermines Nairobi County Government's fiscal autonomy and revenue-raising powers at the benefit of the national government because it requires the transferred functions to be funded from the County Revenue Fund while allowing the national government to collect and remit revenue accruing from the transferred functions. The functions transferred, however, are the primary revenue generators for the county. This lopsided agreement in which the county is required to pay for services but has no control of the incoming revenue ensures that the revenue stream is unreliable.
4. The agreement purports to appoint Kenya Revenue Authority to collect revenue from the transferred functions even though revenue collection is not one of the 4 functions transferred under Paragraph 3 of the agreement.
5. The transfer violates the constitution in that it affects both the functions and powers of Nairobi County Executive and Assembly and citizens in a manner that would require a constitutional amendment. The wholesale transfer of such significant functions and powers amounts to recentralization of functions and contravenes the basic doctrine of the constitution of Kenya.
6. The execution of the agreement was not the outcome of consultation or public participation.

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