

## **DEVOLUTION AT 10 IN KENYA**

### **AN ANALYSIS OF TRENDS AND DYNAMICS IN IMPLEMENTATION**

Javas Bigambo &  
Kelvin Keya







# **Devolution at 10 In Kenya:**

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The glorious battles fought by Kenyans in pursuit of inclusivity, good governance and equal distribution of resources have largely succeeded, and are on-going, still. That is what the quest for seamless devolved governance in Kenya is all about.

Honoured by KAS Kenya to undertake a critical research study on Devolution at 10 in Kenya, we threw ourselves upon the task with unmatched keenness and enthusiasm, to ensure a unique and professional compendium which will serve as a vital reference book on devolution over the last one decade.

Resources and the cooperation of stakeholders permitted us the urgency to pierce the veil of time and peel the layers of literature across themes, engage key actors whose thoughts and opinions afforded us much clarity, and ultimately enabled us to weave the strands and develop the fabric that this compendium on devolution is.

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With the above acknowledgements, we dedicate this research to you, and to generations yet unborn, that the appetite for the written word, and quest for good governance may remain the righteous winds in our sails.

## EXECUTIVE SUMMARY

This study was a review of the state of devolved governance in Kenya over the last 10 years, to establish the trends, dynamics and possible insights into the future. Forty-seven (47) new counties were established by the new constitution through which governance has been implemented in the country for a period of 10 years now. The objective of the study was to develop a data-driven comprehensive book that mirrors the actual state of devolution in Kenya, over the last 10 years in. KAS sought to have this book as solid reference document aimed at strengthening understanding of Kenya's devolved system of governance, and what the future portends for devolution in Kenya. This is an in-depth analysis of the legislative and policy frameworks that enable implementation of devolution, as well as the capacities and status of institutions and the various actors within Kenya's devolution cosmos.

The researchers scoured through lots of secondary literature including journals, books, court decisions, Senate Public Accounts Committee reports, County Assembly Public Accounts and Investment Committee reports, Controller of Budget reports, Commission on revenue Allocation reports, Inter-governmental Relations Technical Committee reports, Auditor General reports, Ministry of Devolution and ASALs reports, Council of Governors and County Assemblies Forum,

County Integrated Development Plans, County and national government MDAs reports, reports by think tanks, civil society, SDG Forum, development partners, private sector, academia, research works and media publications. They purposively selected key informants for their depth and wealth of knowledge, experience and office positions.

Moreover, the researchers employed cluster and purposive sampling techniques in the study; used questionnaire instruments in the collection of data, and conducted qualitative data analysis with MS Excel, MS Word and Dedoose for coding, sorting and reviewing data as content analysis. They also utilized rapid evidence mapping, and systematic review techniques to synthesize key information. The documentation of status of devolution, lessons learned and good practices were backed up by case studies, stories and testimonies of change, a synthesis of which is also affirmed by the analysed field data. These helped to capture and share practices and experiences in order to build collective knowledge and inform learning from the counties' perspectives. These case studies were picked in a manner that was responsive to the ToR.

## ACRONYMS

AADPs	Annual Development Plans
CIDPs	County Integrated Development Plans
CKRC	Constitution of Kenya Review Commission
CBEF	County Budget and Economic Forum
CoG	Council of Governors
CoK	Constitution of Kenya
CPMF	County Performance Management Framework
CRA	Commission on Revenue Allocation (CRA)
ECDE	Early Childhood Development Education
GCP	Gross County Product
GDP	Gross Domestic Product
IGR	Inter-Governmental Relations
KIIs	Key Informant Interviews
KNUT	Kenya National Union of Teachers
LREB	Lake Region Economic Bloc
MCA	Member of County Assembly
M&E	Monitoring and Evaluation
MTP	Medium Term Plan
NAKAEB	Narok Kajiado Economic Bloc
OCoB	Office of the Controller of Budget
OSR	Own Source Revenue
PFMA	Public Finance Management Act
PWDs	People With Disabilities
SDGs	Sustainable Development Goals
SRC	Salaries and Remuneration Commission
ToR	Terms of Reference
TSC	Teachers Service Commission
UHC	Universal Health Care
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
WB	World Bank

# CHAPTER ONE

## INTRODUCTION

The Constitution of Kenya, 2010 created two levels of governments, which are distinct and inter-dependent. This system provides for sharing out of National resources equitably across all the 47 Counties and the National Government.

The Constitution of Kenya, 2010 created a decentralized system of government where two of the three arms of government, the Legislature and the Executive are devolved to the 47 Political and Administrative Counties as provided for under Article 6. Article 1(4) of the Constitution establishes government at two levels: National and County. Article 6(1) divides the territory of Kenya into 47 counties which are specified in the First Schedule. Article 6(2) states that governments at both levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation.

At the county level, both the Executive Committee and the Governor are from outside the County Assembly, indicating full separation of powers between the legislature and executive exists, just as there is at the national level. The County Governments have an executive or administrative arm of government and a legislative arm, which mirrors the executive and legislature at the national level.

The executive arm of County Governments is the Governor and the County Executive Committee, which are responsible for the running and management of counties. They develop and implement county policies through further institutions created under the county government. Each county government

has a County Assembly consisting of Assembly Members elected from the wards. The number of wards vary from one county to the other depending on population size and geographic vastness. The County Assemblies develop county legislation; undertake oversight and approval of plans for development and resource management in the county.

The County Assembly conducts its business in an open manner, and hold sittings and those of its committees, in public; and facilitates public participation and involvement in its legislative and other business, including its committees. It may not exclude the public, or any media, from any sitting unless in exceptional circumstances.

After decades of centralised governance (dating back to the colonial era), Kenyans resolved to transition to a system where powers and governance are shared between the centre and the devolved units. As such, devolution was introduced in Kenya through a new constitutional dispensation, by way of the promulgation of the Constitution of Kenya, 2010 which divided Kenya into 47 counties. Kenya's devolved system is provided for in Article 1 (3) and (4); Article 6 (1) and (2); Chapter Eleven and in the First, Fourth and Section 15 of the Sixth Schedules of the CoK, 2010.

The Constitution of Kenya, 2010 specifically through Article 174 and Article 175 that set out the objects and principles of devolution respectively, there are key statutes that guide the National and County Governments in enabling devolved governance.

These include the County Government Act 2012 , The Transition to Devolved Government Act 2012, Public Finance Management Act 2012, Assumption of Office of Governor Act 2019, the Inter-governmental Relations Act 2012 , as well as the Urban Areas and Cities Act.

The operationalisation of the County Governments commenced following the March 2013 general elections, during which, and for the first time, there was the election of county governors, deputy governors, senators and county women representatives. These 47 new county governments preside over devolved functions such as the provision of health care, pre-primary education, and maintenance of local roads, which were previously the responsibility of the national government.

The county governments receive a share of national revenues computed from the last audited national revenue accounts. The county governments are also expected to mobilize revenue from other sources within their counties, such as taxes on property and entertainment.

Devolution is construed as a “system of multi-level government under which the Constitution creates two distinct and interdependent levels of government (the National and the County) – that are required to carry out their mutual relation in a consultative and cooperative manner.” County governments have been argued as being “relatively autonomous and coordinate” rather than subordinate to the central government.

Further, given their distinct and inter-dependent nature, a system of inter-governmental relations including dispute resolution mechanisms among the two levels of government is elaborated by the Constitution and enabling statutes. The primary objective of decentralization is to devolve power, resources and representation down to the local level. To this end, various laws have been

enacted by Parliament to create strategies for the implementation framework and the adoption on which objectives of devolution can be achieved.

Decentralization enabled counties to identify problems, make policies, plan, collect revenue, execute budget, accounting, auditing, monitoring and evaluation, and citizen participation in decision-making . The Commission on Revenue Allocation (CRA) is mandated to recommend the basis for equitable sharing of revenues raised nationally between the National and the County Governments.

Transition to county governance and implementation of devolution required the building of new institutions, abandonment or restructuring of some of the old institutions, and shifting of roles, responsibilities, and accompanying resources between the two levels of Government. Furthermore, implementation of devolution required not only a change in structures and systems but also a change in governance culture by a culture that is compatible with the Constitution . To achieve this, the Constitution provided for a three-year transition period (after the March 2013 general election) to put in place the appropriate legal, policy, and institutional measures to facilitate the implementation of devolved governance.

## **The Concept and Theory of Devolution**

According to Mutakha Kangu , there are two approaches to the organization of governance and management of state power. First, the single-dimensional approach which follows a single horizontal dimension in its organization of governance and state power. This produces a unitary system and structure of government. It's based on centralization and concentration of power. Second, the multi-dimensional approach which organizes and manages governance and state power along multiple lines. It defines, distributes and

constrains the use of state power along multiple lines. It combines vertical and horizontal dimensions, and therefore forms foundation of federal systems and structures of government. The multi-dimensional approach is founded upon the concept of decentralization and devolution of power.

### **Decentralization in Kenya**

Decentralization of power in the most general terms may be defined as the transfer of authority from a central government to a subnational entity. This transfer of power may be political, administrative, fiscal or economic. It is a complex undertaking, and takes on different meanings in different contexts and in accordance with the desires of the national government in its design and implementation. Some of the ways of decentralization of power include deconcentrating, delegation, and devolution or devolved government.

Decentralization has a long history in Kenya. Following independence in 1963, the British colonial government proposed a system of regional governments based on ethnic and tribal considerations (Institute of Economic Affairs, 2011). This plan was quickly dropped by the Kenya National African Union, the dominant political party at the time. Instead, the party created a unitary state with eight provinces and 175 local authorities (Republic of Kenya, 1977). This structure effectively centralized power with the government in Nairobi, minimizing the control of resources exercised at lower levels (Norad, 2009). Under this act, the Ministry of Local Government provided strong central oversight of local governments, and government policy was enacted throughout the provinces. Although local authorities were responsible for service provision, they had little decision-making authority under the system (Kunnat, 2009).

Kenya attempted to decentralize decision-making numerous times under this

original framework. In the 1970s and 1980s, the government created six Regional Development Authorities to plan and coordinate activities (KHRC, 2010). In 1983, the District Focus for Rural Development Strategy put the district at the center of priority setting (Barkan and Chege, 1989). These strategies deconcentrated central ministry administrative staff, while also disempowering local authorities, creating few clear responsibilities or mandates between the two alternatives.

Kenya's journey towards present-day devolution of power can be traced to a decentralized arrangement in the form of deconcentration of decision-making powers to lower, provincial or local levels of the central government. Kenya has operated under a decentralized system through a local government system which had a majority of the structures of a devolved system, save for the lack of autonomy of the local levels and their immense subordination of the central government, that had a strong footing in the colonial government.

The principle of devolution involves shared governance at the national level and self-governance at the devolved level. The degree of devolution varies from one system to another, so that functions are distributed between the national and county governments. The enactment of the 2010 Constitution, which is central to the organization of government in Kenya, addresses the principle of devolved government. The division between national and county governments plays a pivotal role in the determination and implementation of public policy and management of public finances.

Devolution is central to the Constitution of Kenya by how it redefines Kenya's governance framework by bringing governance closer to the people, with county governments being at the centre of dispersing political power and economic resources to Kenyans at the lowest

possible units of development.

## **Objectives of the Study and Methodological Approach.**

### **Objectives of the Study**

The main objective for this book is “to examine the implementation of the devolved system of government over the last ten years. The contours of this study cover the understanding of the concept of devolution; policy, legal and institutional frameworks enabling implementation of the objects of devolution; real and perceived challenges; emerging issues and lastly provides concise recommendations on the way forward”.

### **Methodology and Process**

This study adopted both primary and secondary methods of data collection. For

the primary data collection, the researchers conducted Key Informant Interviews (KIIs) with selected but highly relevant persons who have continued to play critical roles in the implementation of devolution in Kenya. The KII was conducted through purposive sampling technique and involved a few of the elected leaders, among them Governors, MPs/MCAs, officials at the County Assemblies, Ministry of Devolution and Planning, Council of Governors, the Senate, the National Assembly among other relevant actors. The researchers also interviewed representatives of civil society organizations to generate useful knowledge for the study.

The researchers also utilized secondary method of data collection. They examined hundreds of books, journals, newspapers, other research study findings, and court decisions on devolution in Kenya.

## CHAPTER TWO

### DEVOLUTION IN KENYA

#### Objects and Functions of Devolved Governance in Kenya

Devolution is a form of decentralization and is simply defined as the process of transferring decision-making, implementation powers, functions, responsibilities and resources to legally-constituted and popularly elected local governments. Devolution, unlike de-concentration, entails the transfer of both political and administrative decision-making powers and authority to the sub-national entities. It is important to note that in many developing countries, there is little evidence of full devolution (UNDP, 1998).

Devolution is the statutory delegation of powers from the central government of a sovereign state to govern at a sub-national level, such as a regional or local level. Devolution transfers responsibilities for services to local governments that elect their own officials, raise their own revenue and have independent authority to make investment decisions.

To correctly perceive the opportunities, present in county governance, one should view them through the lens of Article 174, to examine whether they help to achieve the objectives of devolution.

Ghai asserts that the Constitution of Kenya Review Commission (CKRC) while going round the country noted a widespread feeling of alienation from central government among the people because of the over centralization of power on the national executive.

The essence of asking for a devolved government was for the people to have a greater control of the affairs that affected their livelihoods, freedom and interest. They needed greater participation in the governance of the state. Eventually, there had to be real transfer of substantive powers and functions to local levels. To ensure inclusivity in representation, the Constitution provides special County Assembly and Senate seats to represent the marginalised including women, youth and Persons With Disabilities (PWD) representatives.

#### **The objects of the devolution of government are;**

a) To promote democratic and accountable exercise of power.

This can be achieved by making sure that everything the county government does is made public, and that the public has a say in the final decision through representation and public participation. Each member of county assembly is elected from a ward by registered voters on the same day as a general election of members of parliament, being the second Tuesday of August, in every fifth year. This promotes democracy by making sure the voice of the citizens is heard even at the lowest level of government.

The county executive committee consists of the county governor, the deputy governor, and members appointed by the county governor, with the approval of the assembly – from among persons who are

not members of the assembly. The county executive committee provides the county assembly with full and regular reports on matters relating to the county. A county assembly, while respecting the principle of separation of powers, may exercise oversight over the county executive committee and any other county executive organs. This provides the opportunity to ensure democratic and accountable use of power within the county government.

b) To foster national unity by recognizing diversity.

Article 175(c) of the Constitution provides that no more than two-thirds of the members of representative bodies in each county government shall be of the same gender. This provides an opportunity for a more inclusive form of governance at the county level. Most positions are filled by men thus depriving counties and the country in general of the woman's wisdom. – we may need to delete this as it's not justified/does not justify the preceding sentence.

Article 177 (1) (b) states that a county assembly consists of a number of special seat members necessary to ensure that no more than two thirds of the membership of the assembly is of the same gender. In a broader view, most counties are made up of several ethnic communities with youth accounting for more than half of the population , and vulnerable people like the elderly and the physically and mentally disadvantaged.

Article 177(1) (c) provides that membership of a county assembly shall consist of the number of marginalized groups, including persons with disabilities and the youth, prescribed by an act of parliament. A marginalized group means, "a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on

one or more of the accounts mentioned in article 27(4)." Persons with disabilities and the youth are also to be represented in the county assembly membership. In total, the number of marginalized groups in the assembly has been set at six.

The counties must ensure equal or fair representation of all the ethnic communities present within its boundaries. This presents an opportunity to have county governments that reflect the face of the nation.

c) To give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them.

County governments provided people at the county level with the opportunity for self-rule and self-determination. Through electing their county governors and members of county assemblies, they have an avenue to exert their will over the use of county resources and to choose a different path of governance if the existing one is ineffective.

The Constitution outlines, in Article 1(2) that all sovereign power belongs to the people of Kenya. The people may exercise it directly or through their elected representatives.

Article 196(1) states that a county assembly shall;

i. Conduct its business in an open manner, and hold its sittings and those of its committees, in public;

ii. Facilitate public participation and involvement in the legislative and other business of the assembly and its committees.

Article 196(2) states that a county assembly may not exclude the public, or any media, from any sitting, unless in exceptional circumstances the speaker has determined

that there are justifiable reasons for doing so. Section 113 of the County Governments Act makes public participation in county planning processes compulsory.

Section 87 provides for the principles of public participation. They include timely access to information and reasonable access to planning and policy making processes. Citizens should be involved in making decisions affecting them. This can be done by allowing the public to have a say and participate in budget making for instance, Kiambu County Finance Bill . The County Governments Act states that citizens have a right to petition the county government on any matter under the responsibility of the county government. County government authorities, agencies, and agents have a duty to respond expeditiously to petitions and challenges from citizens.

Section 90 further provides that, a county government may conduct a local referendum on among other local issues – county laws and petitions, or planning and investment decisions affecting the county for which a petition has been raised and duly signed by at least twenty five percent of the registered voters where the referendum is to take place. The county government shall facilitate the modalities and platforms for citizen participation and establishment of citizen fora at county and decentralized units. Finally, the county governments should create an institutional framework for civic education.

d) To recognize the right of communities to manage their own affairs and to further their development.

This can be achieved by making sure that people at the county level are able to take part in development decisions that is meant to achieve their interest and objectives. This will create room for diversity, dynamic and unique projects that suit each county.

e) To protect and promote the interests and rights of minority and marginalized communities.

This can be achieved by giving priority to minority and marginalized communities in employment and service delivery. (SAPS v Solidarity on behalf of Banard 2014 SA) The court argued that the process in which she was eliminated was not fair and that it was discriminatory but still fair based on the history of discrimination in South Africa. Thus, equality is a restitution to bring a balance.

f) To promote social and economic development and the provision of proximate, easily accessible services throughout Kenya.

This can be achieved by making sure that all necessary services such as health, sports, education etc. are provided at the county level. This uplifts the standard of living and social justice activities.

g) To ensure equitable sharing of national and local resources throughout Kenya

County governments provide the opportunity for equitable sharing of national and local resources through Kenya. Through the Kenya commission on revenue allocation, the national cake is able to be divided in order to benefit the county governments. In addition, through county governments, members of the county are able to enjoy the benefits of the resources that are available within their boundaries.

h) To facilitate the decentralization of state organs, their functions and services, from the capital of Kenya.

i) To enhance checks and balances and the separation of powers.

Separation of powers is defined by the Supreme Court of United States as, “all powers

entrusted to the government, whether state or national, and are divided into three grand departments, the executive, the legislative and the judicial.”

### **Core County Functions**

An analysis of the functions of county governments as stipulated in Schedule IV of the Constitution of Kenya.

### **County Functions – 14 Devolved Functions Under Schedule IV**

1. Agriculture
2. County health services
3. Control of air pollution, noise pollution, other public nuisances
4. Cultural activities, public entertainment and public amenities
5. County Transport
6. Animal control and welfare
7. Trade development and regulation
8. County planning and development
9. Pre-primary education, village polytechnics, home-craft centres and childcare facilities
10. Implementation of specific national government policies on natural resources and environmental conservation
11. County public works and services
12. Fire fighting services and disaster management
13. Control of drugs and pornography
14. Ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.

### **National Government Functions**

1. Foreign affairs, foreign policy and international trade.
2. The use of international waters and water resources.
3. Immigration and citizenship.

4. The relationship between religion and state.
5. Language policy and the promotion of official and local languages.
6. National defense and the use of the national defense services.
7. Police services
8. Courts.
9. National economic policy and planning.
10. Monetary policy, currency, banking (including central banking), the incorporation and regulation of banking, insurance and financial corporations.
11. National statistics and data on population, the economy and society generally.
12. Intellectual property rights.
13. Labour standards.
14. Consumer protection, including standards for social security and professional pension plans.
15. Education policy, standards, curricula, examinations and the granting of university charters.
16. Universities, tertiary educational institutions and other institutions of research and higher learning and primary schools, special education, secondary schools and special education institutions.
17. Promotion of sports and sports education.
18. Transport and communications.
19. National public works.
20. Housing policy.
21. General principles of land planning and the co-ordination of planning by the counties.
22. Protection of the environment and natural resources with a view to establishing a durable and sustainable system of development.
23. National referral health facilities.
24. Disaster management.
25. Ancient and historical monuments of national importance.
26. National elections.
28. Health policy.
29. Agricultural policy.
30. Veterinary policy.
31. Energy policy including electricity and gas reticulation and energy regulation.
32. Capacity building and technical assistance

to the counties.

33. Public investment.

34. National betting, casinos and other forms of gambling.

35. Tourism policy and development.

From the clearly enumerated functions of county governments, and national government, it demonstrates that the primary focus of counties is service provision, and not policy formulation.

### **Implementation of County Governments' Functions**

The County Governments are mandated to facilitate citizen engagement by creating mechanisms for consultations, ensuring that the necessary information is available to the public while building the capacity of the people to engage effectively with the County planning and budgeting processes.

The Constitution of Kenya 2010, provides for the effective public finance management framework in Kenya. The Constitution sets institutions with varying powers and responsibilities over the public finances management, at the national and county levels of government. Article 215 establishes the Commission on Revenue Allocation (CRA), with the responsibility to make recommendations on the criteria for equitable sharing of national revenue and other matters relating to financial management by county governments.

Article 228 establishes the Office of the Controller of Budget to oversee the implementation of the national and county budgets by authorizing withdrawals from public funds under Articles 204, 206 and 207. Every four months, the Controller of Budget is required to submit to each House of Parliament a report on the implementation of the budgets of the national and county governments.

The Constitution splits the Controller and

Auditor General's Office by establishing two separate independent offices: the Auditor General's Office and the Office of the Controller of Budget. The Controller of Budget exercises control over expenditure of the national and county governments. The Office is also required to prepare, publish and publicize statutory reports, conduct investigations and conduct alternative dispute resolution mechanisms to resolve disputes.

The Constitution further gives parliament budgetary oversight powers. For instance, the Senate (at Article 217) is mandated to determine the basis for allocating the share of national revenue that is annually allocated to the County level of government. Revenue Bill and County Allocation of Revenue Bill must be introduced in Parliament at least two months before the end of each financial year.

According to the 2019 State of Devolution Address, in the period between 2018 and 2019, County Governments made significant strides in sustaining devolution gains across various functions.

Among the key highlights are:

- a) A sustained track record of smooth leadership transition by the Council of Governors.
- b) Improved Inter-governmental relations between both levels of government.
- c) A successful 6th Annual Devolution Conference which continues to set the agenda for delivering on the Big Four and the devolution promise to all Kenyans. The components of the Big 4 Agenda implements various SDG projects.

### **Agriculture Function**

In the agriculture sector, for instance, county governments can support agricultural production and local economic growth by strengthening extension service to farmers and by providing basic transport infrastructure and markets to promote good exchange in local

food chains. Counties have made remarkable achievements towards the realization of 100 per cent food and nutrition security. To achieve this, county governments have focused on improving both crop and animal productivity. Some of the key interventions are:

(i) Empowerment of farmers through mechanization of production systems evidenced by the purchase of 366 tractors and equipping of 26 agriculture mechanization stations offering lease services to rural farmers.

(ii) Distribution of over 2 million 50-kgs bags of subsidized fertilizer.

(iii) Under the county subsidies arrangements, 1400 greenhouses have also been purchased and distributed to farmers in the year under review.

(iv) Enhanced uptake of commercialized agriculture through construction of over 140 markets that provided direct access to markets for farmers.

(v) Vaccination of 46 million Livestock and construction of over 500 cattle dips that has improved disease control and surveillance.

(vi) Provision of over 1 million recorded Artificial Insemination Services to livestock farmers and purchase of over 300 Milk coolers distributed as input subsidies to farmer's co-operatives. In return this has enhanced animal productivity and value addition on raw products.

Overall, county governments have generally allocated on average, 6.7 % of their total budgets to the agriculture sector.

This could be construed by the extent that county governments have gone in investing in agriculture. For instance, Narok County rolled out high breed livestock farming by distributing high breeds of dairy and beef cattle to each ward across the county, to boost high breeds for better yields across the county .

In Murang'a County, Governor Mwangi Wa Iria officially launched the Murang'a Avocado Farmer's Co-operative Union Limited at the Matenjagwo Stadium – Kandara Sub-county in February 2020. The union is now the umbrella body for the 8 avocado farmers' cooperative societies in Murang'a County will ensure stability in the sector by safeguarding the interests of the avocado farmers, enhancing proper business practices and also increasing productivity in the sector for profitability.

### **Health Function**

Health function is devolved and the county governments have a huge responsibility of ensuring the local communities have access to good quality health care and live a healthy life, such as to ensure universal access to sexual and reproductive health care services, including for family planning, information and education, and the integration of reproductive health into national strategies and programmes.

In the health sector, county governments have remained committed to strengthening health systems towards the implementation of Universal Health Coverage (UHC) which was launched by His Excellency President Uhuru Kenyatta on January 8th, 2019 in Kisumu County. It has been piloted in Nyeri, Machakos, Kisumu and Isiolo Counties. Key highlights this year are:

(i) Sustained an average allocation of 20-30% to the sector in the year.

(ii) Currently we have 7,894 doctors, 26,561 nurses, 160 dental officers, 418 pharmacists and 19,000 clinical officers across the Counties. However, a total of 834 doctors are on study leave, thereby unavailable to offer services. This remains a challenge Counties have to balance between training and workforce availability.

(iii) Functional health facilities grew from 9,858 to 10,820 in 2018.

(iv) Sustained this trend with health allocations averaging between 20-30% in the current year.

(v) Increased expenditure is attributed to hiring health workers.

The Kenya Health Policy 2012-2030 provides an institutional framework that specifies the institutional and management frameworks required under the devolved system. The policy sets out the objectives of the new governance structure as:

a) delivery of efficient, cost effective and equitable health services;

b) devolution of health service delivery, administration and management to the community level;

c) stakeholder participation and accountability in health service delivery, administration and management;

d) operational autonomy;

e) efficient and cost-effective monitoring, evaluation, reviewing and reporting systems.

#### **CASE STUDY OF HEALTH SERVICES IN NAROK COUNTY**

The rapid pace of change in health care delivery in Narok County has touched all parts of every sub-county. The health care systems of semi-urban areas of the county have expanded at a pace reflected in the percentage of the economy dedicated to medical care. We have more health facilities now in the county than ever before. We have more healthcare professionals than it has ever been at any time of the county's history.

In the period preceding devolution in Narok, essential medicines did not reach people who needed them, due to problems in financing, procurement, poor management, and

delivery. Health centers and hospitals often lacked adequate supplies of basic medicines, including antibiotics, anti-malarias, and the devastation of HIV/AIDS and cancer treatment were a constant menace.

The county health development programme has cut these challenges nearly completely. Building this new referral hospital will be a major boost to healthcare delivery in Narok County.

#### **Devolution Trajectory: Key Milestones in the Health Sector in Seven Years**

a) More than 423 new health staff of different cadres have been employed.

b) A fully equipped and functional County Referral Hospital, which has Managed Equipment Services (MES) in collaboration with the national government. The fact sheet of success so far is that;

a) Narok County Referral Hospital

- 22 patients managed in ICU to the best standards.
- 407 dialysis sessions done so far.
- 1,221 surgical operations done so far.
- 1,662 radiological investigations done so far.

b) Transmara West Sub-County Hospital

- 855 surgical operations done already.
- 1,912 x-rays done
- 950 ultrasound scans done

c) Emergency evacuation and referral services

- A total of 20,517 life-saving emergency evacuation and referrals done from the inception in 2014 to date.
- Out of these, 10,610 were internal (between county health facilities) while the remaining 9,907 were external (to other health facilities outside the County).

d) Community Led Total Sanitation (CLTS)

- 254 villages triggered
- 152 villages certified Open Defaecation Free.
- Reduction in number of diarrhoea cases in link health facilities.

e) Community Based Distributors (CBDs) of Short Acting Family Planning methods.

- 90 CBDs trained
- Uptake of family planning services improved in the county from 29.2% to 33.9%

f) Training of staff - Long courses (e.g. Masters/ specialization courses within Kenya & abroad), senior management courses at the Kenya School of Government and short courses for skills improvement.

g) Promotion of health staff that were due for promotion before devolution.  
(reported above).

h) Immunization coverage – from 47% in 2014 to 60%

i) Skilled deliveries – from 18% in 2014 to 33%.

New Narok County Referral Hospital and Medical School: New Dawn for Improved Health Infrastructure for Accessible Healthcare Services

Narok County government recently commissioned a new, fully fledged state-of-the-art 400-bed capacity referral hospital (within the Narok County Referral compound), which will be twined by a modern medical school. Under the 2018-2022 County Integrated Development Plan for health, improvement of health infrastructure is crucial.

Public health infrastructure constitutes several different components, which the new facility will ably handle. The three key components of a strong and effective public health infrastructure which the new Narok Referral Hospital will manage include:

1. Managing all healthcare needs including emergency, surgery, MRI, x-ray and cancer screening.

2. Sufficiency in health workforce.

3. Client data information systems.

4. Healthcare research, teaching and disease prevention.



**Inside view of Narok County Referral Hospital New ICU Wing.**

**Source: Key Informant Interview Information**

### **Education: Vocational Training and Early Childhood Education**

County Governments are responsible for early childhood development (ECD) that form the basic foundation for education. As such, they are well placed to identify and tackle the barriers to school attendance in our communities. County Governments can integrate technical and vocational training programmes into local economic development strategies, making sure training is valuable to labour market opportunities into account. County Governments are particularly well placed to reach out to vulnerable and marginalized individuals and communities and to ensure they have access to education and training that meet their needs.

### **Water and Sanitation**

Under Water and Sanitation, County Governments have been working towards the realization of universal access to water. Both levels of government (National and County) in 2019 committed to develop a policy to guide water resource sharing across counties and increase investment in water infrastructure.

Notably;

- i. Water coverage has now increased to 57%.
- ii. Sanitation coverage is now at 16%.
- iii. Non-revenue water is now at 41%.
- iv. Six (6) Counties now have water Masterplans from the previous two (2).
- v. Fourteen (14) Counties have water policies.

vi. Six (6) Counties have operational Water Laws.

vii. However, in the coming year County Governments have committed in their plans to put greater effort on improving sanitation since so far only one (1) County has a County strategic plan on sanitation.

viii. Whereas there is a lot of investment in the water sector by development partners little or no money trickle down directly to the County Governments for investment in this sector.

County Performance Management Framework  
The Council of Governors (CoG) developed the County Performance Management

Framework (CPMF) for County Governments. The CPMF seeks to provide strategic alignment to key National and County plans and their implementation to ensure that the entire country is pulling in the same cohesive strategic direction. In the financial year (FY) 2018/19, the “Big Four” agenda was incorporated into the MTP III and the CIDPs.

The CPMF also seeks to ensure that the logical hierarchy and linkage of targets and policy outcomes are aligned to resources for achievement of the intended results.

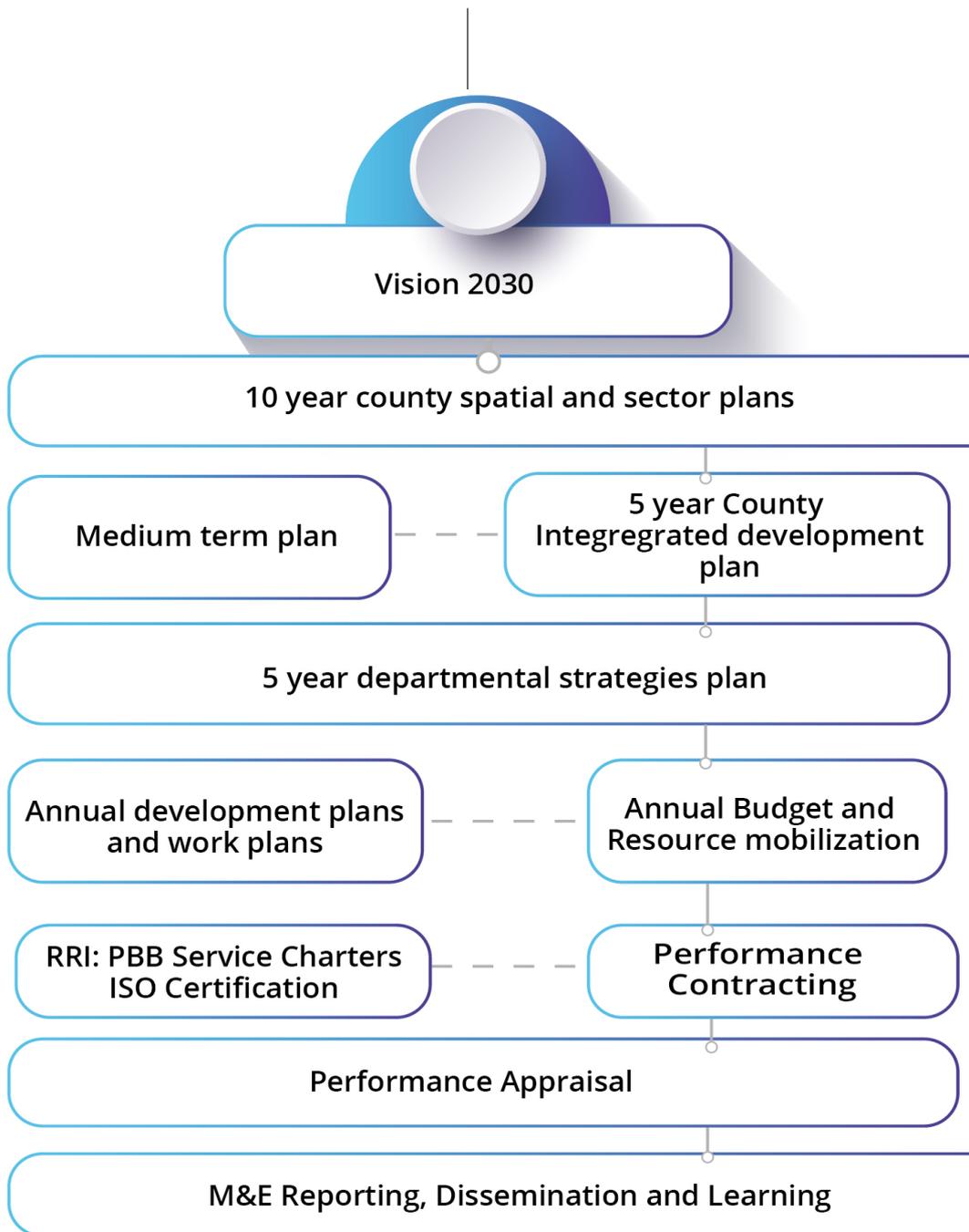


Chart showing the County Performance Management Framework  
Source: County Performance Management Framework 2017.

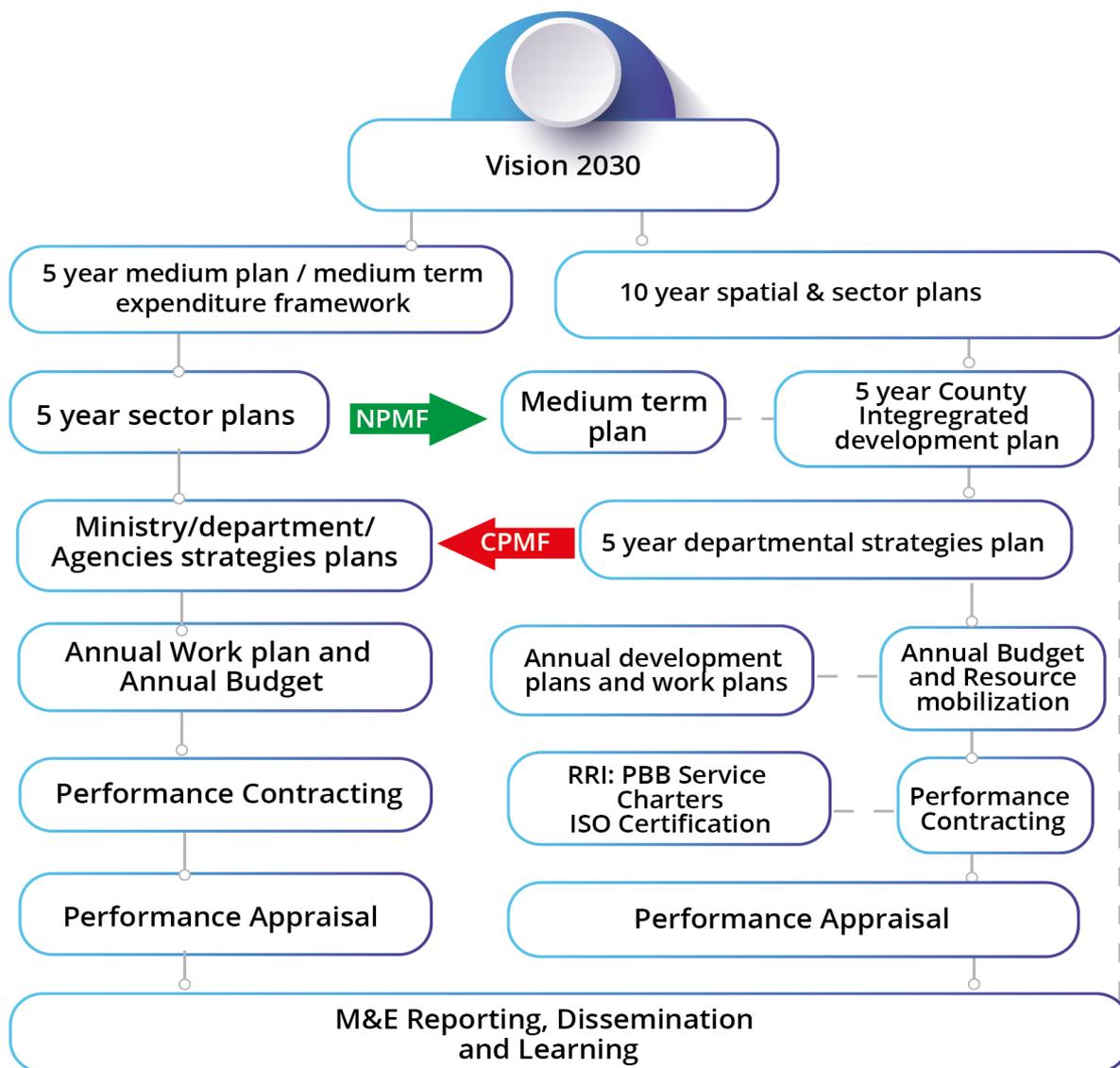


Chart showing Harmonized National and County Performance Management Framework

Source: County Performance Management Framework 2017

The Council of Governors resolved that all County Governments should sign performance contracts as a way of enhancing service delivery and accountability to counties. Guidelines have been developed to guide County Governments in operationalization of performance contracts. In 2018/2019 financial year, a total of 24 Counties signed performance contracts. Progressively, more Counties are embracing performance contracting as a management tool.

### KENYA DEVOLUTION POLICY

Policies provide guidance in administrative procedures, and further details that cannot be covered in ordinary legislation. Policies are thus important guides to day-to-day activities that are carried out by officers at the national and county levels .

The approval of the Devolution Policy by the Cabinet in October 2016 was particularly significant. The policy is founded on the Sovereignty of the People of Kenya, Supremacy of the Constitution, National Values

and Principles of Governance, the Bill of Rights, the Objects of Devolution and the Principles of Devolved Governments.

It intends that devolution will attain its stated objects under Article 174 of the Constitution, which are to: Promote democratic and accountable exercise of power; foster national unity by recognizing diversity; give powers of self- governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them; recognize the right of communities to manage their own affairs and to further their development; protect and promote the interests and rights of minorities and marginalized communities; promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; ensure equitable sharing of national and local resources throughout Kenya; facilitate the decentralization of State organs, their functions and services, from the capital of Kenya; and enhance checks and balances and the separation of powers.

#### The Values of the Devolution Policy

- D** Development First.
- E** Equitable Sharing of National Resources.
- V** Vigor and Vitality in the pursuit of the Objects of Devolution.
- O** Open and Accountable Governments
- L** Leveraging on the strength of each County.
- U** Unity of Purpose.
- T** Tapping into local resources
- I** Involvement of all Kenyans in their Diversity.
- O** Organised and Effective Governance
- N** No turning back on Devolution.

#### The Policy is anchored on 11 Inter-linked Pillars

1. Capacity Building for Devolved Governance.
2. Leadership and Governance.
3. Decentralized (Devolved) Units.
4. Public Service Transformation.
5. Public Finance Management
6. Inter-Governmental Relations.
7. Public Participation in Governance
8. Civic Education.
9. Public Communication.
10. Equity and Inclusivity.
11. Management of Transfer of Responsibilities, Powers, and Functions between the National and the County Governments.

The Devolution Policy is an exceptionally vital enabler that serves to facilitate smooth implementation of functions by the National and County Governments toward meeting the objects of devolution, and as enabled by statutes.

The policy, therefore, creates and sustains a clear enabling environment for county governments in execution of functions. The County

Governments have great responsibility in the provision of key services most of which are essential in realisation of socio-economic rights by Kenyans .

## CHAPTER THREE

### EXCLUSIVE AND RESIDUAL POWERS IN DEVOLVED GOVERNANCE

#### Introduction

#### Residual Powers and Functions of County Governments

The Constitution states that there are two levels of government, the national government and the county government. It goes further to state that both levels derive their powers from the Constitution of Kenya only. Further, the Constitution requires 'each level of government to perform its functions and powers in a manner that respects the functional and institutional integrity of the government at the other level'. The territory of Kenya is also divided into 47 counties which are listed in the First Schedule.

Explicitly from the Constitution of Kenya, the counties are conferred with both legislative powers/functions and executive powers/functions. The legislative powers/functions which include passing laws and overseeing the county executive are bestowed on the county assemblies while the executive powers/functions including, inter alia, implementing county legislation and national legislation within the county are bestowed on the county executive committee.

Article 186 succinctly states that the county governments shall exercise the functions outlined in the Fourth Schedule. Reading through the breadth of article 186, there are various concepts of the powers and functions therein, including exclusive powers/functions enumerated in one list, each for the national and county governments, concurrent

powers/functions and residual powers/functions.

The County Governments Act also expounds on the functions of the county governments. The devolved system of governance which was proposed during the constitution making process is aimed at achieving two things. First, is the participation and involvement of the people, and secondly is the better supervision and implementation of the policies at the grass-root level.

#### Exclusive Powers

##### Concept

The concept of exclusive powers and functions is one where the powers and functions assigned to one level of government are not assigned to any other level of government. For example, a function that is only performed by the county government and not by the national government is an exclusive power. For example, health as a function has been designated to the county governments only. Judicial function is exclusively assigned to the national government. The list of functions in the Fourth Schedule do not state what exclusive powers or functions are but the meaning can be inferred. The rationale for having exclusive powers or functions is to allow article 6(2) of the Constitution on distinct levels of government to be effective.

## **The Exclusive Powers/Functions**

Article 186(2) of the Constitution implies that there are exclusive powers/functions not conferred on more than one level of government, and secondly, those assigned to only one level of government. In essence, these are powers that are available at both the national and county governments level. Article 191 also covertly provides for the idea that all functions and powers in the Fourth Schedule are not concurrent but some are exclusive.

Article 186(4) in its entirety gives us the gist of the extent to which there is a distinction between exclusive and concurrent powers. Part 2 of the Fourth Schedule outlines the functions of county governments. Gleaning through the list quickly, some functions stand out as being exclusive. They include, firefighting services and disaster management, control of drugs and pornography, pre-primary education, county transport such as street lighting, traffic and planning. The Fourth Schedule assigns 14 functions to county governments.

Additionally, county health services particularly control of county health facilities and pharmacies, ambulance services, veterinary services, cemeteries and funeral parlors among others are exclusive functions. Other services that fall under the purview of counties are ferries and harbors excluding regulation of international and national shipping. Furthermore, animal control and welfare and county public works and services such as storm water management systems in built-up areas and water and sanitation services are also exclusive functions of county governments.

A more succinct example of an exclusive function enumerated in the Constitution is on trade development and regulation, including markets, trade licenses, fair trading practices, local tourism and cooperative societies. County planning and

development, including statistics, land survey and mapping, boundaries and fencing, housing and electricity and gas reticulation and energy, cultural activities, public entertainment and public amenities such as betting casinos are under the county government. Additionally, there is the implementation of specific national government policies on natural resources and environmental conservation is an exclusive power.

## **The state of management and governance**

### **Parking Services**

Just recently, the County Government of Mombasa rolled out an electronic system of parking services. E-parking was a way in which the County Government of Mombasa exercised innovation in undertaking the parking function exclusively designated to counties. Many counties had earlier rolled out e-parking services to ensure efficiency and smooth functioning.

### **Pre-primary Education**

In 2018, Mandera County Government rolled out the implementation of their new Basic Education Curriculum Framework. This was followed by a two-day training for the ECDE teachers by the Department of Early Childhood Development in the Mandera County Government. This was in line with the need to fully implement the Early Childhood Education which is a devolved function under the Fourth Schedule of the Constitution.

Other counties such as Marsabit County, through the Marsabit County Assembly have enacted legislations to provide a framework for Early Childhood Development and Education within the county. This is the Marsabit County Early Childhood Development and Education Act, 2016.

Judge Edward Muriithi in a case between KNUT and Cabinet Secretary for Education, Attorney General and TSC opined that all aspects of pre-primary education fall under the purview of the county governments as is stated in the Constitution. However, registration of teachers recruited by the county governments falls under the TSC. The court then ordered TSC to register all the teachers employed by county governments across the country.

### **Cultural Activities and Public Amenities**

#### **Lamu Cultural Festival**

This is an annual event and a UNESCO World Heritage Site carried out by the Lamu County Government together with other developmental partners. Together they fund and organize the entire event. The festival offers an opportunity for tourists and the locals to enjoy and experience the Swahili culture. In return this boosts the domestic tourism sector and helps grow the economy of Lamu County.

#### **Lake Turkana Festival - "Tobong'u Lore"**

Tobong'u Lore, known in English as the Lake Turkana Cultural Festival, is a celebration of indigenous culture held every spring in Turkana, northern Kenya. The lake Turkana Festival takes place annually in Loiyangalani, a small town located on the south-eastern coast of Lake Turkana. The name means "a place of many trees" in the native Samburu tongue and is home to the El Molo, an almost extinct community, amongst other communities. Its main industries include fishing, tourism and gold panning. It is fast becoming a popular tourist destination in Northern Kenya, as the surrounding El Molo and Turkana villages, amongst others, offer unique cultural experiences.

#### **Marsabit Cultural Festival**

The three-day festival celebrates the cultures of the Gabbra, Rendille, Watta, Dasanach, El Molo and the Turkana who are among the 14 tribes living in the County of Marsabit. The festival held by the County Government of Marsabit is aimed at fostering cohesion and peaceful co-existence between the pastoral communities living in Marsabit.

#### **Public Amenities**

**The Fourth Schedule lists County Parks, recreational facilities and beaches.**

#### **Uhuru Park, Jeevanjee, Central Park, Kamukunji**

The management of these public amenities falls under the County Government of Nairobi. The Nairobi County Finance Act, 2013 clearly outlines the rates for the use of these public parks for any purpose. This indicates that the county governments have an exclusive function to manage these parks. The revenue collected is used for the maintenance of these parks by county government employees. The County Government of Nairobi has embarked on a beautification programme which is an exclusive function with the recent one being the erection of the lion statute at the roundabout near University Way and Uhuru Highway.

#### **Fire Station Services and Disaster Management**

##### **Nairobi County**

The county enacted the Nairobi City County Disaster and Emergency Management Act, 2015. The aim of the Act was among others to establish an effective structure for the management of disasters and to establish an institutional framework for disaster management within the County. The

Act was to come up with The Disaster and Emergency Management Council whose role was to formulate policies and strategies as well as oversee their implementation. The Act also came up with the County Disaster Management Fund. The Fund will be financed by the County government and will be used to meet the expenses associated with preparedness, response, mitigation, relief and county reconstruction.

The County government has also undertaken to construct two fire stations in Nairobi at a cost 1.131 Billion being financed by the Belgian Government. The proposed sites are the Industrial Area and Ruaraka. The County government is also expanding the only existing fire station along Tom Mboya Street. This has been the case throughout the 47 counties. All counties have purchased firefighting equipment as well as employment and training of personnel.

Another exclusive power is that the county governments should aid in capacity development in their communities or locations so as to ensure public participation at the grass roots level. Notably, only county governments may impose property rates and entertainment taxes.

### **Concurrent or Shared Powers (Between National and County Governments)**

#### **Concept**

The concept of concurrent/shared power or function refers to a situation where a power or function is exercisable by both the national and county levels of government. Article 186(2) expressly provides for concurrent powers and functions. In essence, these are powers that are available at both the national and county governments level. Concurrency occurs especially where the functions overlap. The essence of concurrent functions is to ensure and enhance complementarity.

In the spirit of the Constitution, the two governments are perceived to be equal and no level of government has supervisory powers over another. In fact, the Constitution stipulates that both levels of government are 'distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and co-operation'. It is a power delegated by the constitution and shared by the National and County governments. Concurrent powers may be exercised by the two levels of government simultaneously within the territory and in relation to the body of citizens.

As noted earlier, the Constitution clearly stipulates distinctive roles of each government. However, an inherent overlap in exercising such roles persists. The overlapping powers are what are referred to as concurrent or shared powers of the government. Nonetheless, paragraph 2 of article 189 states that, a function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government.

### **The Concurrent/Shared Powers or Functions**

Gleaning through the Fourth Schedule, many functions are shared at both levels of government. They include inter alia, housing planning function where the national government can come up with housing policy and counties can also carry out housing function in furtherance of their development.

Protection of the environment of natural resources with a view to establishing a durable and sustainable system of development, including water protection and protection of animals and wildlife among others are concurrent to the function of county governments to implement specific national government policies on natural resources and environmental conservation. Other shared powers are in health, agriculture and veterinary services, where the national

government makes policies on these and the county governments are charged with overseeing their implementation under the list of functions/powers for county governments. Disaster management and transport are also examples of concurrent functions.

The essence of sharing powers and functions is to ensure that the hoi polloi at the grass root levels receive services. This is because of increased synergy that will be created if and when functions are shared. Furthermore, is so as to allow complementarity because the constitution provides that the county and national governments are interdependent. However, when national law or policy on a concurrent power/function conflict, the national law or policy prevails.

### **Role of Concurrent Powers/Functions in County Governance**

Despite the clear demarcations of specific roles of each government under fourth schedule, sharing of some roles or power between the two governments is inevitable. Perhaps these results from the need to increase citizens' participation on governance issues as well as effective service delivery for the people. The former denotes that, by devolving the powers of the national government to the county level, the public shall be in close contact with the county governments thus will be able to directly contribute to the development needs necessary for them. For instance, sharing of power ensures that the majority of the population is reached under the devolved units rather than leaving the national government to control everything. The latter on the other hand signifies that, by sharing of powers between the two levels of government, the state shall deliver quality services to its citizens. This is because the individual needs of the population shall have been taken into account through participation at county levels.

### **Examples**

Some of the functions listed in the Fourth Schedule are concurrent legislative powers because the national government can also legislate in that area. A number of the shared powers are embedded in the following areas.

#### **The Legislations**

The enactment of legislations is both a national and county government function. The national parliament cannot prevent the constituents' unit legislatures from enacting legislations on any of the provided areas. Accordingly, a clear analysis of article, 186 (2) as read together with fourth schedule shows concurrent powers exercisable independently by the national as well as county governments. These includes legislations in the agricultural sector. Part one of the schedule provides that the national government may legislate on agriculture policy. Equally, part 2 empowers counties to legislate on Agriculture hence concurrence.

#### **Housing Policy**

The Jubilee Government has come up with housing fund and policy to build housing units and roll them out across Kenya. Similarly, most counties have instituted such a plan to build houses in their counties. Examples of such counties include Mombasa, Nairobi and Kakamega.

#### **Transport systems**

Both national and county governments have the powers to legislate on areas in respect to roads, traffic ferries and harbours. For instance, the national governments through the Administrative Police officers controls the traffic within the state while the Nairobi County Government through traffic marshals, Kanjo, to control traffic within the city.

## **Residual Powers/Functions**

### **Concept**

Residual is the power that is retained by the government after other powers were distributed to other authorities in the course of elections or by the process of delegation. With respect to devolution in Kenya, residual power is that which was retained by the national government after decentralization to the counties. These powers remained because in their nature and form, cannot be delegated or should not be delegated. It is imperative that such powers be only exercised by the national government. Residual powers in county governance are therefore those powers exercised by the national government over county governments. These powers are not only meant to facilitate proper coordination and cooperation between the two levels of government but also to prevent interference between them. Many times, nations with devolved units struggle with issues of cessation and the conflict of control of resources and such had to be dealt with here in Kenya.

### **The Residual Powers or Functions**

These functions include; foreign affairs and policy with the inclusion of international trade, the use of international waters and water resources, immigration and citizenship, matters or religion in relation to the state, the promotion of both local and official languages and policy to the same, The use of national defence services, police services, courts, national economic policy and planning, monetary policy, currency and banking, national statistic and data on population, the economy, and society.

Others include: Intellectual Property (IP) rights; labour standards; consumer protection; education policy formulation; setting standards for the curriculum and examination; granting of university charters;

promotion of sports; managing of educational institutions at secondary and tertiary levels as well as in special institutions; national public works; transport and communication; housing policy; national health and national referral facilities; protection of the environment and natural resources; planning of land and its coordination at the county level; disaster management; protection of national and historical sites; formulation of agricultural and veterinary policy; energy regulation and reticulation policy; capacity building and technical assistance to counties; public investment; national betting regulation and tourism policy and development.

### **Role of Residual Powers and Functions in County Governance**

The National Government effects its functions at the national level with the aim of effective and transparent service delivery at the county level of government. In Kenya, the National Government Coordination Act provides the meaning of national government function as, "any function assigned by the Constitution or any other law to the executive arm of government". The National executive comprises of the President, Deputy President and the cabinet.

The President exercises his executive powers by establishing committees for the effective coordination of the national government function and decentralizes the same through the Cabinet Secretaries who have the necessary powers for the performance of their functions within the aforementioned statute. These committees thus play the key role of carrying out national government functions through the powers given to them to enable the smooth running of county governance. There have been a number of committees set up by the current national government with this aim in mind to deal with individual national government functions.

## Examples

Practically, control of national resources is entirely left to the national government. The national government is exclusively left with matters of defense and security because if counties were allowed to have their own military, tension and conflict would be an imminent threat. Further, the counties have no international legal standing to represent themselves i.e. in borrowing of funds. They must go through the national treasury.

## Other Concepts

### Transfer of powers between the two levels of government

As the powers are enumerated in the Fourth Schedule, it does not mean that they are fixed. The functions are transferrable between one level of government to the other. In essence, the Constitution outlines the two conditions that must be met before a function is transferred from one level of government to the other. These are if one, the receiving government would be effective in performance of that function or power and secondly, if the legislation under which that power or function will be performed does not prohibit the transfer of that power or function.

The necessary resources to facilitate the exercise of the function must be transferred from the transferring government to the receiving government. Additionally, a function or power will be performed at the level of government it has been constitutionally assigned unless there is a transfer. This means that the level of government that has been assigned a particular function is constitutionally obligated to exercise that power or function. There is clamour by the county governments for the functions of security and education to be transferred to the county level and for the health function to be transferred to the national government. This is however not feasible.

## Cooperation

The Constitution envisages a situation of cooperation between or among various county governments in exercise of their powers or functions. This may be made possible by setting up of joint committees or joint authorities. An instance where cooperation may be required at county level is in funding or management of regional resources such as level five hospitals and game reserves.

### Powers of county governments

A county government being a body corporate with perpetual succession on top of exercising constitutional authority is endowed with powers necessary for the performance of its functions. The powers include: entering into a contract which will be valid and binding; acquiring, purchasing or leasing any land; delegating functions to its officers; and entering into public-private partnerships in accordance with the Public-Private Partnerships Act of 2005. Formation of a firm or company or body corporate by a county government is another power that is bestowed on the counties so as to ensure efficient service delivery and effective functioning of the county governments.

### Conflict of functions

In early 2016, the Teachers Service Commission was involved in a vicious battle with county governments over the hiring of Early-Childhood Development Education (ECDE). TSC claimed that the role of employing nursery school teachers was on them while the counties accused TSC of misinterpreting the Constitution and reading its provisions in isolation. Moreover, counties argued that they were exercising their constitutional mandates even as TSC averred that the counties were overlapping their mandates. The court ruled in favour of the county governments and stated that hiring ECDE teachers was a power conferred to the counties, hence counties were

given the greenlight to continue recruiting teachers.

**Conclusion**

The powers and functions discussed in this section are meant to be exercised by county governments to ensure some principles are adhered to. These principles include efficiency, effectiveness, inclusivity and participation of the people. In extrapolation therefore, the functions and powers are meant to ensure that the objectives enumerated in article 174 of the Constitution are realized.

**DEVELOPMENT PLANNING AND REVIEW OF SELECTED CIDPs**

**Review of Kwale’s County Integrated Development Plan (CIDP) and the Annual Development Plan (ADP 2019/20)**

**Kwale County Annual Development Plan**

Devolved Function/Institution	Transformation/Development Agenda	Strategies
<p><b>Agriculture, Livestock and Fisheries</b></p>	<p>End poverty in all its forms everywhere.</p> <p>End hunger, achieve food security and improved nutrition, and promote sustainable agriculture.</p>	<p>Promotion of high value crops.</p> <p>Livestock breed improvement.</p> <p>Development of livestock and fish markets.</p> <p>Establishment of dairy processing centres.</p> <p>Promotion of bee keeping.</p> <p>Promote drought tolerant crops.</p> <p>Upscale dissemination of appropriate technologies.</p> <p>Provision of appropriate fishing gears.</p> <p>Promotion of sea weed farming.</p>

Devolved Function/Institution	Transformation/Development Agenda	Strategies
<b>Environment and Natural Resources</b>	<p>Ensure access to affordable, reliable, sustainable and modern energy for all.</p> <p>Make cities and human settlements inclusive safe resilient and sustainable.</p> <p>Take urgent action to combat climate change and its impacts.</p> <p>Protect, restore and promote sustainable use of terrestrial ecosystems sustainably.</p> <p>Manage forests, combat desertification, and halt and reverse land degradation, and halt biodiversity loss.</p>	<p>Facilitate renewable energy generation and use such as solar, wind, hydropower and biogas. Encourage the use alternative energy saving solutions such as energy saving jikos and stoves.</p> <p>Establish a spatial plan, and appropriate land use plans.</p> <p>Develop climate change financing schemes such as carbon credit schemes in forest and payment for ecosystems service schemes to enhance environmental protection and mitigate impacts of climate change.</p> <p>Protect and conserve the environment and land management through adequate policies to regulate charcoal burning, conserve forests, planting of trees, environmental assessments and audits on infrastructure development, and waste management.</p>
<b>Water Services</b>	<p>Ensure availability and sustainable management of water and sanitation for all.</p>	<p>Improve the availability and supply of clean and treated water by constructing of large water dams and pans, drilling of boreholes, pipe reticulation, water testing and treatment facility.</p>
<b>Education</b>	<p>Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all.</p>	<p>Promote early childhood education, youth training and sponsorship/bursary programmes.</p>
<b>Social Services and Talent Development</b>	<p>Ensure gender equality and empower all women and girls.</p>	<p>Empowering women, youth and People with Disabilities through strengthened table banking, enhancing on loan issuance program (YOWEPEF) and capacity building on governance and socio – economic programs.</p>

Devolved Function/ Institution	Transformation/Development Agenda	Strategies
	Reduce inequality within and among countries.	Enhance civic education on mainstreaming of youth, PWDs and gender issues through sensitization to county departments to incorporate gender issues in planning, budgeting and implementation of their programmes.
<b>Roads and Public works</b>	Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.	Enhance socio cultural heritage and social integration by organizing county/inter county cultural activities/programs, community cultural centres and documentation of tangible and intangible assets.
<b>Health Care Services</b>	Take urgent action to compact climate change and its impacts.	Make expanded road network more resilient to weather patters
<b>Finance and Economic Planning</b>	Ensure healthy lives and promote well-being for all ages.	Promotion of preventive and curative health care services.
<b>County Executive Services</b>	Strengthen the means of implementation and revitalize the global partnership for sustainable development.	Deepening stakeholder participation and partnerships in county service delivery.
<b>Public Service and Administration</b>	Strengthen the means of implementation and revitalize the global partnership for sustainable development.	Strengthen governance structures and inter-governmental relations.
<b>County Public Service Board</b>	Strengthen the means of implementation and revitalize the global partnership for sustainable development.	Empower the public through coordination and public participation and civic education in County laws, regulations and policies and programmes.
<b>County Assembly</b>	Promote sustainable economic growth, full and productive employment and decent work for all.	Operationalize equal opportunity employment.
<b>County Assembly</b>	Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.	Facilitate inclusivity, accountability and the rule of law.

Table: County thematic areas and proposed programs and projects

Source: County Department of Finance and Economic Planning.

### **Review of Makueni County's CIDP and ADP 2019/20**

Makueni County's 2019/20 ADP adopted a holistic and cross-sectoral government approach to development planning and projects prioritization.

It focused on improving livelihoods through increased agricultural production, empowering youths to participate in economic activities, enhancing quality health care for all and the contribution of communities to development. This is aimed at improving coordination and cooperation among the various stakeholders in the delivery of the intended objectives.

The ADP took into consideration, the challenges and issues identified through consultative forums and pillar working groups/technical officers. This participatory process also incorporated the inputs of the County Budget and Economic Forum (CBEF).

The CIDP is specific on synchronization of planning, and budgeting is important as it ensures that projects are not under-budgeted or over-budgeted for. There are projects in the County that stalled awaiting reallocation through the supplementary budget. This resulted in delayed development and also an indication of poor planning and implementation by the County Government.

The Makueni County CIDP 2018-22 focuses on actualizing socio-economic transformation as envisaged under the Makueni Vision 2025 based on the background laid out under CIDP 2013- 17. The rallying theme of the 2018-22 CIDP is "Increased Household Income for

Sustainable Livelihoods". This will be delivered through interventions in five thematic areas, namely:

- 1) Community economic empowerment.
- 2) Water resource management.
- 3) Lands, urban planning and development.
- 4) Socio-economic development.
- 5) Enablers (infrastructure, cooperatives, financial infrastructure, energy, ICT, institutional capacity, market infrastructure).

### **The County's 2019/20 ADP Objectives cover five key aspects:**

#### **1. Community Economic Empowerment:**

Increasing agricultural productivity through adoption of appropriate and modern technologies; promoting value addition and agriculture commercialization and improving food security; reducing post-harvest losses; enhancing industrialization (agro processing, cottage industries); ensuring inclusive participation in economic activities; enhancing land security and utilization, and ensuring sustainable natural resource management.

#### **2. Water Resource Management:**

Increasing availability and access to safe water within 2 Kms; improving water governance mechanism and improving water catchment management.

#### **3. Lands, Urban Planning and Development:**

Improving urban planning and infrastructure development; improving land information management (GIS, digitization of land registry); and increasing HHs with secure land tenure system.

#### **4. Socio-Economic Development:**

Transforming health standards of the health system to achieve quality health care for

all; reducing morbidity and mortality through enhanced health emergency response; upgrading and equipping health, education and sporting facilities; attracting and retaining qualified medical staff; reducing dependency rates; and enhancing a cohesive society through sports, culture and provision of quality education and training.

#### 5. CIDP Enablers 2018 – 2022:

Improve access to markets through efficient road network and communication; enhance access to reliable energy; improve institutional development and knowledge management; effective citizen engagement; improve access to ICT; enhance fiscal responsibility and accountability and improve urban and market infrastructure.

Makueni CIDP 2018-2022 identifies key enablers that will contribute in delivering the programmes in the plan for enhanced socio economic development in the County.

These include:

- a. Improved access to ICT, infrastructure and energy.
- b. Governance, institutional capacity, citizen engagement, enhanced fiscal responsibility and accountability.

#### **Revenue Performance 2013-2017 CIDP and Analysis of the 2018-2022 CIDP Fiscal Matters for Makueni County**

The County funded its budget through transfers of equitable shares and conditional grants from the national government and own source revenue. In the period under review the County received a total of Ksh. 28,796,038,697.00 as equitable share and mobilized its own source revenue amounting to Ksh. 1,162,389,753.55. The equitable share increased by 56 per cent from Ksh. 4.366 bil-

lion in 2013/14 financial year to Ksh. 6.825 billion in 2017/2018 financial year. Further analyses show that the increase has been increasing at a decreasing trend where the increase between financial years 2013/2014 and 2014/2015 was 18.9 per cent compared to 5.95 per cent between financial years 2016/2017 and 2017/2018.

Therefore, to implement the development projects in the 2018-2022 CIDP, County's resource mobilization strategy will have to revolve around internal and external mobilization to fill up the fiscal basket. The internal strategy should focus on enhancing the County's own-source revenue while the external strategy shifts the attention towards engaging external partners to finance implementation of the 2018-2022 CIDP. The external strategy has to involve deepening engagement with bilateral and multilateral agencies, public private partnerships, private foundations and diaspora engagement (fundraising).

## CHAPTER FOUR

### FINANCIAL MANAGEMENT AND FISCAL CONCERNS BY COUNTY GOVERNMENTS

The Constitution of Kenya 2010 identifies various sources of revenue for County Governments: transfers from nationally raised revenues; raising their own revenue; and borrowing subject to Article 212. County

Governments are empowered to generate revenue from their own sources which consist of property rates, entertainment taxes, and any other tax that they are authorized to impose through an Act of Parliament. Further, Counties are also permitted to levy charges for services provided (Article 209 (3), Constitution of Kenya).

In particular, revenue performance in County Governments is analyzed by stream: equitable shareable revenue; conditional grants from the National Government; conditional grants from Development Partners; and County Governments' own-source revenue collection.

Specific focus is given on budget financing, budget allocation, exchequer issues, and expenditure performance by votes and by programmes. Expenditure is analysed by the major economic classifications of compensation to employees, operations and maintenance and development expenditure.

The necessity of Own-Source Revenue (OSR) by County Governments is a fundamental principle of devolution. In fact, it's embedded in the three principles stated in Article 175 of the Constitution. By dint of the said Article, County Governments established under the Constitution are required to reflect the

following principles of devolved government :

- a) County Governments shall be based on democratic principles and the separation of powers;
- b) County Governments shall have reliable sources of revenue to enable them to govern and deliver services effectively; and,
- c) Not more than two-thirds of the members of representative bodies in each County Government shall be of the same gender.

Kenya's County Governments are highly dependent on vertical equitable share transfers received from the National Government. County Governments receive a minimum of 15 percent of nationally raised revenues as an equitable share, which accounts on average for 81 percent of County Government total revenues.

#### **Own-Source Revenue by County Governments**

A sound revenue system for subnational governments is a critical prerequisite for the success of fiscal decentralisation in Kenya. Government budgets are at the core of sustainable development. The budget is the government's most powerful economic tool to meet the needs of its people, especially those of poor and marginalized communities. Budgets enable fiscal responsibility and accountability. Each of the 47 County Governments has executive and legislative authority to budget for and perform devolved functions.

The need for County Governments to have reliable revenue is a key principle of Kenya's devolution. This is contained in Article 175(b) of the Constitution of Kenya, 2010. The devolution arrangements also feature political and administrative devolution, as well as fiscal decentralization. Counties are allowed to impose:

- a) Property rates;
- b) Entertainment taxes;
- c) Charges for services they provide;
- d) Any other tax or licensing fee authorized by an Act of Parliament.

Counties can gradually fund an increasing share of local service delivery from own source revenue if they are able to realize more of the available potential over time (while Inter-governmental fiscal transfers will continue to play an important role for local goods and services, particularly in health, education and infrastructure).

The Public Finance Management Act provides guidelines for management of County revenues including banking arrangements and appointment of revenue receivers and collectors. To give effect to Article 209(3) of the CoK, Counties enact specific laws such as the annual county finance acts that authorise tax collection and receipt of other revenues. Counties also enact sector or source specific legislation such as trade licensing, liquor control and property rating/valuation laws that allow them to regulate various sectors through licensing and permits that are acquired at a fee.

Adequate mobilisation of OSR is the key to Counties' improved ability to provide various public goods and services to eradicate poverty and achieve sustainable development goals.

Currently, most Counties levy cess not only on agricultural products but also on non-agricultural commodities including

natural resources such as sand and timber. Most Counties treat cess as a revenue stream that can be used for any expenditure rather than revenue earmarked for improvement of agricultural production as was envisaged under the repealed Agriculture Act. However, in Busia cess is earmarked for road maintenance, whereas in Nyeri it is earmarked for maintenance of infrastructure in tea growing areas.

In a bid to increase their OSR, County Governments have created several regulations to enable them to collect more revenue through multiple licenses and permits. For instance, transporters of agricultural produce are often required to pay multiple cess charges as they cross County boundaries to reach various markets.

This remains a challenge because it leads to high distribution costs that are often passed to consumers and undermine the efforts by the National Government to create an environment that is conducive for business and investment. In addition, double taxation resulting from weak coordination of tax measures that affect cross County trade discourage private investment.

### **OSR Volume and as a Percentage of the Gross Domestic Product**

All counties are raising less than 40 per cent of their estimated revenue potential except counties with game parks. Management of game parks appears to advantage counties in terms of OSR collection. Narok County collects more than a 1 billion shillings annually similar to city counties. Notable is Samburu County that has surpassed its estimated potential while Isiolo, Laikipia and Baringo are among the counties that collect more than 40 per cent of their estimated revenue potential.

Own Source Revenue across Counties is still little in volume and as a percentage of the

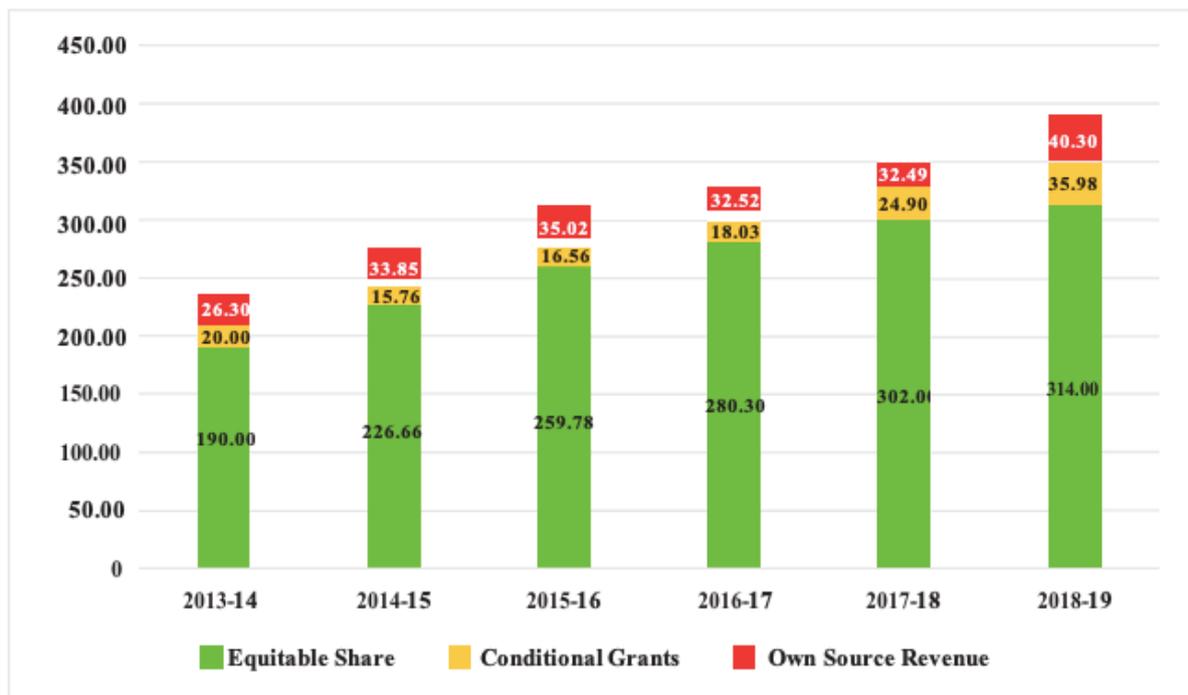
national gross domestic product (GDP). OSR volume has been decreasing since 2016/17. In the first five years of fiscal decentralisation (2013/14 to 2017/18), OSR was less than 1% of national GDP.

Counties that have a larger economic size have higher revenue collections than small economic sized counties. Similarly, counties collecting more than Ksh.1 billion OSR annually collect it as a percent of Gross County Product (GCP) that is above the average of all counties.

Conversely, the majority of counties collecting less than Ksh. 400 million are below average using the same parameters.

In 2014/15, the amount of OSR collected by the 47 Counties increased by 29.1%. However, it increased by only 3.5% in 2015/16. In 2016/17 and 2017/18, OSR reduced by 7.1% and 0.1% respectively. The limited available literature attributes the decrease in OSR mobilisation to poor revenue collection practices and significant revenue leakages.

### Annual Revenue for County Governments from Financial Year 2013-14 and 2018-19 in Ksh. Billions



Source: CRA County Own-Source Revenue Report, 2019.

Adequate mobilization of OSR is key to counties' improved ability to provide various public goods and services, eradicate poverty and achieve development goals. In the face of rising public debt and increasing expenditure needs, enhancing OSR mobilization is expected to enable counties bridge funding gaps occasioned by inadequate disbursements from the national government. Moreover, strengthening OSR mobilization can improve fiscal autonomy through more predictable access to revenue, thereby allowing counties to have greater ownership and control over their development agenda .

National Government allocates to County Governments equitable share and conditional grants. In the six years between financial years 2013-14 and 2018-19, the share of revenue counties raised to fund their budget constitute between 9 % and 12 %, making transfers from National Government to be between 88% and 91 % of total revenue received by County Governments.

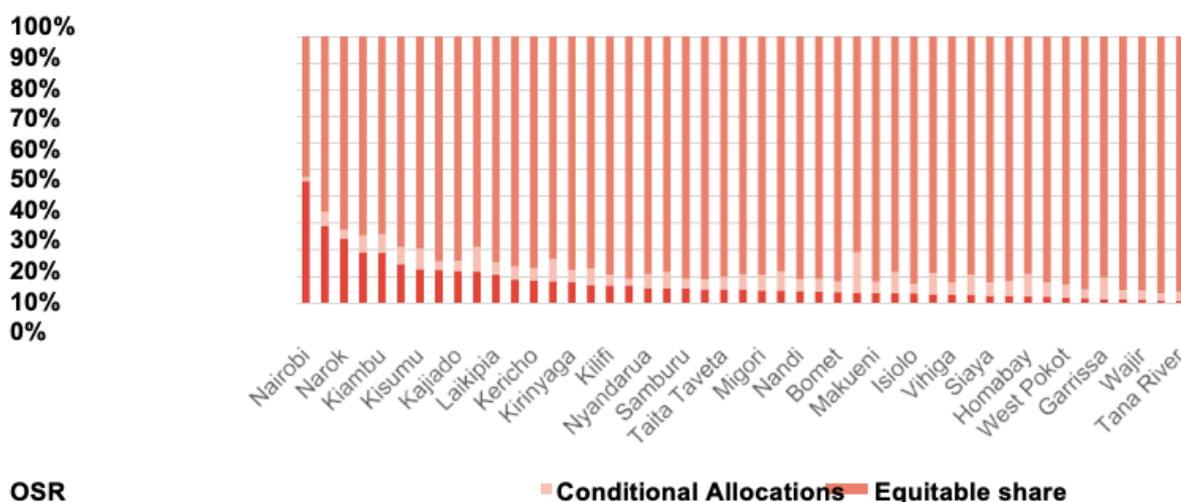
Available data indicates that OSR is concentrated in ten counties that have high levels of urbanisation and diverse economic activities. Specifically, Nairobi, Mombasa, Nakuru, Kiambu, Narok, Machakos, Kisumu, Uasin

Gishu, Nyeri and Kajiado accounted for 72.8% of the total OSR raised by the 47 Counties between 2013/14 and 2017/18.

Tharaka Nithi, Elgeyo Marakwet, Nyamira, Marsabit, Garissa, West Pokot, Wajir, Mandera, Lamu and Tana River had the lowest OSR, with a combined share of 2.8% in total County OSR raised over the five years. Six of these Counties i.e. Marsabit, Garissa, West Pokot, Wajir, Mandera and Tana River also have high incidence of poverty, with over 50% of their populations living below the national poverty line.

Looking at individual counties, Nairobi has the lowest level of fiscal dependence given that 45.3% of its total revenue for the period 2013/14 and 2017/18 came from own sources (Figure 2). Among the top five Counties - Nairobi, Mombasa, Narok, Nakuru and Kiambu - OSR accounted for at least 18% of total revenue for the five years reviewed.

By contrast, OSR accounted for less than 1.5% of total revenue in the bottom five counties: Garissa, Turkana, Wajir, Mandera and Tana River. Overall, in the period of focus, only 11 counties were able raise at least 10% of their total revenues from own sources.



Source: DI based on Controller of Budget data for various years

Overall, only five Counties – Kericho, Homa Bay, Baringo, Bomet and Nyandarua – achieved at least 70% of their annual OSR targets for the last seven years.

### **Analysis**

From the information above, County Governments that meet their annual targets of OSR have more fiscal capacity to finance projects that fall within SDGs than those that face periodic fluctuations or fail to meet more than 50% of OSR targets.

Investing in full automation of revenue collection and management is an opportunity to increase OSR by improving transparency, minimizing leakages and ensuring efficiency. However, some counties have reported reduced revenue after automation.

Kiambu, Kisumu, Bungoma, Mombasa and Taita Taveta are good examples of counties that have automated their revenue collection systems. In Kiambu, OSR collection doubled between 2013/14 and 2015/16 in part due to automation of revenue collection and management. Similarly, automation contributed to increased OSR collection in Bungoma, Mombasa and Kisumu Counties.

County Governments need to do more to ensure sustained increase in OSR and ensuring they meet the annual OSR target or at least be above the 80% mark, for adequacy of fiscal resources locally to supplement the revenue allocation from National Treasury, so as to meet their development goals.

Counties need to fully and effectively embrace technology for revenue collection mechanisms. Nonetheless, other prevailing challenges could be a result of inadequacy of functional policies that serve the interests of County Governments.

There are concerns that most of the national draft policy documents in most sectors were developed by the ministries concerned at the national level without effective consultation and the involvement of counties .

### **Own-Source Revenue Analysis for 2020/2021**

According to the Controller of Budget, during the reporting period , county governments generated Ksh.25.52 billion, which was 45.6 per cent of the annual target of Ksh.56.02 billion. This was a decrease compared to Ksh.28.04 billion generated in a similar period of FY 2019/20.

The table below shows an analysis of quarterly OSR collection for the period July 2020 to March 2021.

**Table : Own-Source Revenue Collection in the First Nine Months of FY 2020/21**

<b>County</b>	<b>Annual OSR Target for FY 2020/21 (Ksh.)</b>	<b>First Nine Months of FY 2020/21 OSR Collection (Ksh.)</b>	<b>% of Collection of OSR Against Annual Target</b>
<b>Baringo</b>	346,088,720	147,634,909	42.7
<b>Bomet</b>	275,922,277	127,722,724	46.3
<b>Bungoma</b>	700,000,000	286,566,412	40.9
<b>Busia</b>	1,119,555,802	231,234,728	20.7
<b>Elgeyo Marakwet</b>	71,477,570	52,946,854	74.1
<b>Embu</b>	909,000,000	283,208,447	31.2
<b>Garissa</b>	150,000,000	71,555,792	47.7
<b>Homa Bay</b>	170,818,374	73,817,542	43.2
<b>Isiolo</b>	113,686,337	26,836,921	23.6
<b>Kajiado</b>	1,687,000,000	697,944,570	41.4
<b>Kakamega</b>	2,113,000,000	725,318,746	34.3
<b>Kericho</b>	644,058,870	272,572,753	42.3
<b>Kiambu</b>	3,988,390,833	1,695,568,966	42.5
<b>Kilifi</b>	1,150,000,000	663,738,709	57.7
<b>Kirinyaga</b>	405,000,000	307,737,805	76.0
<b>Kisii</b>	650,000,000	234,325,860	36.1
<b>Kisumu</b>	1,579,172,106	369,377,149	23.4
<b>Kitui</b>	600,000,000	220,979,557	36.8
<b>Kwale</b>	365,641,316	171,139,550	46.8
<b>Laikipia</b>	1,006,875,000	575,871,508	57.2
<b>Lamu</b>	150,000,000	66,293,021	44.2
<b>Machakos</b>	1,729,798,232	735,542,916	42.5
<b>Makueni</b>	1,093,000,000	391,011,277	35.8
<b>Mandera</b>	200,037,792	109,108,870	54.5
<b>Marsabit</b>	150,000,000	84,729,538	56.5

<b>Meru</b>	600,000,000	316,124,165	52.7
<b>Migori</b>	285,000,000	221,751,429	77.8
<b>Mombasa</b>	5,252,448,363	2,478,670,237	47.2
<b>Murang'a</b>	900,000,000	442,468,954	49.2
<b>Nairobi City</b>	16,209,511,170	7,988,810,107	49.3
<b>Nakuru</b>	1,800,000,000	1,247,530,155	69.3
<b>Nandi</b>	405,408,260	174,091,347	42.9
<b>Narok</b>	3,133,923,503	453,294,737	14.5
<b>Nyamira</b>	250,000,000	121,714,967	48.7
<b>Nyandarua</b>	830,000,000	274,813,477	33.1
<b>Nyeri</b>	1,000,000,000	645,810,014	64.6
<b>Samburu</b>	180,312,319	49,683,593	27.6
<b>Siaya</b>	351,000,000	238,910,584	68.1
<b>Taita Taveta</b>	363,000,000	201,703,500	55.6
<b>Tana River</b>	72,600,000	67,211,547	92.6
<b>Tharaka Nithi</b>	350,000,000	168,311,841	48.1
<b>Trans Nzoia</b>	991,000,000	734,577,793	74.1
<b>Turkana</b>	150,000,000	126,675,575	84.5
<b>Uasin Gishu</b>	991,000,000	734,577,793	74.1
<b>Vihiga</b>	216,096,587	98,198,179	45.4
<b>Wajir</b>	150,000,000	26,955,722	18.0
<b>West Pokot</b>	168,352,202	82,477,078	49.0
<b>Total</b>	<b>56,018,175,633</b>	<b>25,517,147,916</b>	<b>45.6</b>

Source: County Treasuries as captured by the County Governments Budget Implementation Review Report of the Controller of Budget for the First Nine Months of FY 2020/21.

Analysis of own-source revenue as a proportion of the annual revenue target indicates that Tana River, Turkana, and Migori achieved the highest ratios at 92.6 per cent, 84.5 per cent, and 77.8 per cent, respectively. Conversely, counties that recorded the lowest proportion of own-source revenue against annual targets were Narok at 14.5 per cent, Wajir at 18 per cent, and Busia at 20.7 per cent.

County Governments have continued to perform dismally in meeting their revenue targets. County Budget Implementation Review Reports by the Controller of Budget since financial year 2013/14 have shown consistent underperformance in actual revenue collection and below the target figures. As per the report, Embu County came first collecting 78.6 per cent of the target revenue for the nine month period followed by Narok at 68.3 per cent and Bungoma at 67.2 per cent.

Wajir was the worst performing county having collected only 31.9 per cent of its own source revenue target for the nine months, followed by Kisii and Kakamega at 33 per cent and 41.3 per cent respectively. In terms of amounts, however, Nairobi leads at Sh7.07 billion followed by Mombasa and Narok at Sh2.44 and Sh2.18 billion respectively.

While Narok, Isiolo, West Pokot, Taita Taveta, and Kiambu surpassed their targets in financial year 2018/19, Kisii, Meru, Wajir, Bungoma, and Garissa failed to meet theirs. During the 2019/20 financial year, county governments generated Ksh35.7 billion, which represents 65.2 per cent of their set annual target of Ksh54.9 billion.

Despite the persistent failure to meet revenue targets over the years, the total own-source revenue generated by the counties has been rising to stand at Ksh40.3 billion in financial year 2018/19 up from a paltry Ksh9.1 billion in financial year 2002/2003. According to ICPAK, low revenue collection in the counties was caused by ineffective revenue monitoring and control systems, lack of updated revenue databases, lack of enumeration and classification of revenue source and low capacity support in the revenue function.

Table shows that over years the primary revenue streams consistently constitute less than 1 per cent of the county GCP while the other revenue streams contribution is negligible.

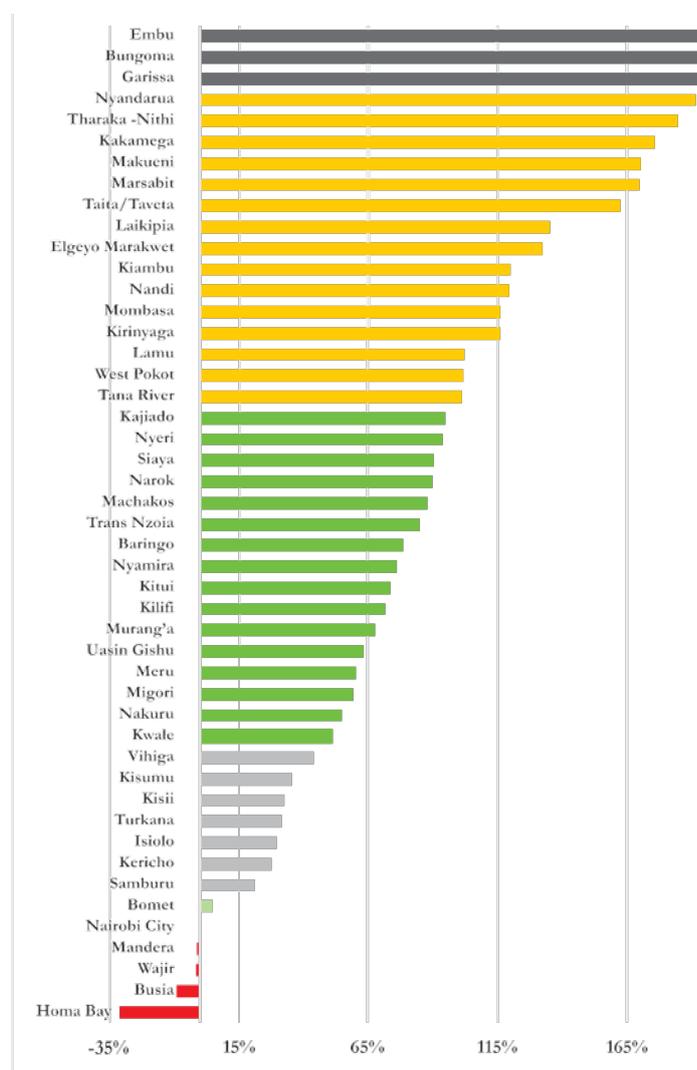
**Table 1: Proportion of OSR to GDP of total counties collection**

OSR CATEGORY	2013/14 OSR to GCP	2014/15 OSR to GCP	2015/16 OSR to GCP	2016/17 OSR to GCP
Business Permits	0.01%	0.07%	0.08%	0.08%
Property-related revenue	0.09%	0.11%	0.11%	0.07%
Vehicle parking fees	0.01%	0.06%	0.07%	0.06%
Health facility operations/ serv.	0.00%	0.05%	0.04%	0.06%
Natural resource revenue	0.04%	0.04%	0.03%	0.03%

Cesses	0.00%	0.02%	0.02%	0.02%
Market/trade centre fee	0.02%	0.02%	0.02%	0.02%
Housing	0.00%	0.02%	0.03%	0.01%
Other unclassified receipts	0.00%	0.04%	0.05%	0.01%
External services fees	0.00%	0.00%	0.00%	0.01%
All other OSR sources	0.54%	0.32%	0.18%	0.15%
<b>Grand Total</b>	<b>0.72%</b>	<b>0.75%</b>	<b>0.62%</b>	<b>0.52%</b>

Source: Commission on Revenue Allocation, (2019); Own-Source Revenue Report.

### County Governments' Compound Revenue Growth from 2013-14 to 2018-1



Source: Commission on Revenue Allocation, (2019); Own-Source Revenue Report.

## COUNTY CATEGORISATION BY OSR COLLECTION

Counties revenue collection from 2013/14 to 2018/19 averaged and categorised into five major clusters.

First category counties – are counties that collected OSR of more than Ksh. 1 billion on average annually. They are Nairobi, Mombasa, Machakos, Nakuru, Kiambu, and Narok.

Second category counties – are counties that collected OSR of between Ksh. 601 and 900 million on average annually. They are Nyeri, Uasin-Gishu, and Kisumu.

Third category counties – are counties that collected OSR of between Ksh. 401 and 600 million on average annually. They include Kilifi, Kajiado, Murang'a, Meru, Laikipia, Kakamega and Bungoma.

Fourth category counties – are counties that collected OSR of between Ksh. 201 and 400 million on average annually. They include Kwale, Kitui, Makueni, Embu, Kirinyaga, Nyandarua, Baringo, Kericho, Nandi, Migori, Trans nzoia and Busia.

Fifth category counties – are counties that collected OSR of less than Ksh. 200 million on average annually. These include Siaya, Homabay, Bomet, Kisii, Nyamira, Elgeyo-Marakwet, West Pokot, Turkana, Marsabit, Samburu, Isiolo, Wajir, Mandera, Garissa, Tana-River, Lamu, Taita-Taveta and Tharaka-Nithi.

**Source: Commission on Revenue Allocation, (2019); Own-Source Revenue Report**

## CHAPTER FIVE

### SUSPENSION OF COUNTY GOVERNMENTS OR TRANSFER OF FUNCTIONS

#### 1. The Council of Governors (CoG)

As framed by the Constitution under Kenya's devolved system of government, the national government seems to retain a supervisory role. For instance, Article 192 as read together with the County Government Act which elucidates on matters regarding dissolution of a county, provides that the President (who is the head of state and National Government according to Article 131) may suspend a county.

This study interrogates the circumstances and processes under which a county may be suspended by the President of the Republic of Kenya. Towards this end, this study discusses a case study of attempted dissolution using the case of Makueni County and whether circumstances and process surrounding such attempt met the threshold in law or not. From this case study, the study highlights the challenges to the process as provided for in law, and ultimately makes recommendations on how to improve on the said process.

#### **Circumstances under which a County Government can be Suspended**

A county government can only be suspended by the President in the occurrence of an emergency arising out of internal conflict or under any other exceptional circumstance. In the first scenario, it has been argued that due to the grave consequences resulting from the suspension of a county government, it is prudent and imperative that suspension

would only be justified if the specific county is alleged to have done something in relation to the internal conflict or war resulting in a state of emergency.

However, suspension under any other exceptional circumstance provides a challenge. The President is empowered to suspend a county government if satisfied that sufficient grounds amounting to exceptional circumstances exist after examining the receipt of the report of the commission investigating the matter.

Neither the Constitution of Kenya 2010 nor the County Government Act outlines what exceptional circumstances are and only the County Government Act elaborates further by exemplifying that in a petition to suspend a county government on the basis of exceptional circumstances, it would be required of the petitioner to show that the county government has engaged in actions inimical to the needs and interests of the citizens in the county. This effectively means that the answer to the question, "What levels of actions of a county government are deemed to be so inimical to the needs and interests of the citizens of a country to justify suspension of a county government?" remains unanswered. However, the matter concerning the dissolution of Makueni County Government provided important jurisprudence on the matter.

The commission of inquiry investigating the petition to dissolve Makueni County Government recommended, on a 5-1 vote for

the dissolution. The President on examination of the report determined that due to the weighty nature and far reaching consequences of decision to dissolve a county government, the bar to determine what exceptional circumstances were was extraordinarily high. The President therefore emphasized that the circumstances must be out of the norm to extinguish a county government validly in place manifesting the will of the people.

The President noted, though, the shocking and disgraceful occurrences such as the failure to pass the 2013/2014 county budget by almost five months. This was occasioned by the standoff pitting the executive on one hand and assembly on the other hand over a ward kitty. The discord was further aggravated by the governor's displeasure of the MCAs foreign adventures numbering fourteen, catered for by re-allocated funds. The serious standoff led to a breakout of a gunfight in which the governor's chief of staff was injured. Regardless of all these circumstances, the President noted, that put together, still they did not meet the threshold required for him to exercise his power to suspend the County Government and referred the decision to the Senate. This matter illustrates the extraordinary threshold which has to be met to suspend a county government on the grounds of exceptional circumstances. What we can draw from this therefore, is that the inability by the county government officials to perform their functions is not an exceptional circumstance unless interventions by the national government through the relevant cabinet secretary have also failed. This is aimed at promoting independence of the county government and devolution as a whole by allowing the President to use his powers of suspension only sparingly.

### **The Process of Suspension of a County Government**

The process of suspending a county government is stipulated in Article 192(2) of

the Constitution of Kenya. It provides a three step process that involves three institutions: the President, an independent commission of inquiry and the Senate. These three institutions must work hand in hand in the process of suspending a county government. Even with the powers conferred upon the President to suspend a county government, his decision to suspend cannot be taken unless an independent commission of inquiry investigates the allegations made against the county government. After the President is satisfied that the allegations are justified, the Senate must then authorize the suspension.

The County Government Act envisages how the process commences. It states that a person (citizen) may petition the President to suspend a county government in accordance with Article 192(1)(b) of the Constitution where a county government engages in actions that are deemed to be against the common needs and interests of the citizens of a county. The petition must then be supported by signatures of not less than 10% of the registered voters in the county.

After receiving the petition, the President is required to submit a report on the allegations made and the grounds giving rise to the petition for a suspension to the summit. The Summit is established as the body for approval and appointing the members of the commission to inquire the allegations. The President is required to submit the report within fourteen days.

### **The Independent Commission of Inquiry**

Suspending a county government can lead to grave consequences. This explains the importance of an independent commission to look into the allegations against a county government and report back to the President before it is suspended. The decision should be considered very carefully and that's why an independent body stands in a better position

to carry the investigations as opposed to, say, a parliamentary committee. When the work is left to a parliamentary committee, there is a high possibility of the process being politicized. Once the commission is formed to investigate the allegations, the county government stands as the accused party and should therefore be notified and given a reasonable opportunity to try and defend itself.

### **The President's Decision**

Once it completes the investigation, the commission is required to report its findings to the President. There can only be two findings, either the allegations made against the county government are justified or not justified. If they are not justified, then the matter ends there and no institution with power of suspending a county government can suspend it. However, if the allegations are found to be true, the matter proceeds to the next step where the President upon satisfactorily going through the findings, refers the it to the Senate for authorization of a suspension.

### **Authorization by the Senate**

It is important that the Senate gives authorization before a county government is suspended because the Constitution it the role of representing and protecting the interests of the counties and their governments. "The provision puts the Senate in a position of wielding a veto power over the President." The Senate can either authorize suspension or terminate it. When the suspension is authorized, elections for a new county government are done on the expiration of ninety days.

Note that, even after the Senate has authorized suspension, it can terminate it later, before expiry of the ninety days. Termination of a suspension can arise where it's found that the decision to suspend was a mistake or emergency of exceptional circumstances that cease to exist. If there were internal conflicts

or war within the county government that led to the suspension, and they come to an end, then the suspension can be terminated by the Senate. Once the suspension is terminated, the county government resumes its position and responsibilities. Consequently, there would no need of elections for a new county government.

The decision of authorizing suspension or termination is a matter that concerns counties and the votes are not of individual senators but the county delegations. TOPENKenya to suspend the Makueni County in what they viewed as grave differences between the legislative and executive arms of the county government that led to stalling of projects.

The biggest factor according to the petitioners was the apparent wrangles between the county assembly and the county executive, as well as the county speaker and Governor Kivutha Kibwana. They cited hostilities between the groups that resulted in the executive being unable to carry out its functions under the Constitution. The petitioners also provided that some of the laws passed by the assembly were grossly unconstitutional.

The petitioners also brought to light the fact that the assembly attempted to receive funding for various ward development projects without adhering to the county budgeting process set out in the Public Finance Management Act, hence carrying out illegal lobbying.

The county assembly further went ahead to allocate a large portion of the county's budget to personal needs such as salaries and travel, instead of development projects. The ensuing stalemate between the two groups compromised the realization of devolution goals and objectives, characterized by incomplete projects.

The petitioners collected a total of 50,800 signatures from the citizens and cited extreme harm to resources and lack of development as their grounds for requesting the suspension of the county by the President.

They backed up their claim using the Constitution as their main authority, and further relied on statutes.

### **The Constitution of Kenya, 2010**

The petitioners cited the Preamble of the Constitution, which provides the themes of equality, dignity, social justice and rule of law, among others, as the essential values behind governance. Article 10 provides for the key national principles which include rule of law, transparency and accountability.

Article 20 provides for the bill of rights. The bill of rights sets out the fundamental rights and obligations that bind all state organs and persons.

Article 37 provides for the freedom of assembly that includes peaceful demonstrations, picketing and presenting petitions to public authorities. Article 73(2) provides for the guiding principles of leadership and integrity which include objectivity, impartiality, selflessness, discipline and commitment to service.

Article 192(1) (b) allows the President to suspend a county government in the face of exceptional circumstances.

### **Other Legal Foundations**

#### **The County Government Act**

Sec 123(1) of the county government Act allows for any person to petition to the President to suspend a county government, as read with Article 192 of the Constitution.

### **The Leadership and Integrity Act**

Section 3(1) provides that state officers are required to respect the values, principles and requirements of the Constitution of Kenya, as read with Articles 10, 73 and 99 of the Constitution.

Section 52(1) provides that as read with chapter 6 and Article 80 of the Constitution, part two of this act applies to all public officers.

### **President's decision**

In accordance to the Makueni case the President declined to suspend the county government because the case lacked justifiable grounds for suspension in line with article 192 of the Constitution of Kenya. He further acknowledged that the Makueni County Government did indeed need a better management scheme for the intra-county conflicts to prevent them from escalating and disrupting service delivery.

The County Government Act does not necessarily define the exceptional circumstances under which the President can suspend a county government. The President further relies on the fact that first the intervention of the case under the Constitution should have been the cabinet secretary in charge of the inter-governmental relations.

If the county government ought to be suspended, the governor and his deputies are to manage the county for ninety days after which the President will appoint an interim county management board. The members of the county stated that both entities were working parallel to each other which led to the embezzlement of funds and thus there was no financial control as stated in the county government act and under the constitution.

He further stated that the National Government may intervene in a county government if it is unable to perform its

functions or if it does not operate a financial management system that complies with the requirements of the law.

### **Analysis of the Petition for Suspension of Makueni County Government**

The petition for the suspension of Makueni County Government, being one of its kind from the start of devolution in Kenya, offers a practical view of the law on suspension of county governments. This law, as discussed in earlier sections of this paper, dictates the persons who have the right to present such a petition, governs the circumstances under which such a petition can be made, the process to be followed and the parties to hear the petition. This section seeks to compare the letter of the law with the practical actions taken during the petition to suspend the Makueni County.

Under Section 123(1) of the County Governments Act, any person may petition the President to suspend a county government in accordance with Article 192(1) (b) of the Constitution. This allows any person to make a petition. However, according to Section 123(2), the petition must be supported by the signatures of not less than 10% of the registered voters in the county. In this Petition, the petitioners automatically had capacity to make the petition by virtue of Section 123(1). They were able to collect 50,826 signatures of registered voters out of approximately 423,310 registered voters in Makueni County making that around 12%, and thereby meeting the requisite threshold.

As further provided for under Section 123(1) of the County Governments Act, a petition for the suspension of a county can be made only where the county government engages in actions that are deemed to be against the common needs and interests of the citizens of a county. Through their petition, the members

of Makueni County cited numerous violations of the law such as the county assembly passing unconstitutional laws in a bid to fatten their pockets; the county assembly failing to pass the county budget; the stalemate between the county executive and county assembly leading to a dysfunctional government among others. These actions, even per the findings of Mohammed Nyaoga's commission amounted to actions that compromised the needs and interests of the citizens of Makueni County Government.

The procedure, under Section 123(3), (4), (7) and (8), dictates that once the President receives the petition, he should, within fourteen days, submit a report on the averments made and grounds giving rise to suspension of a county government before the apex inter-governmental body. Upon approval by the apex body, the President is required to nominate members of a Commission and with approval by Senate, appoint the members of the Commission by a Gazette notice.

The Commission is set up to investigate the situation in the county and make recommendations on the suspension of the county government. On receipt of the report, if the President is satisfied that justifiable grounds exist for suspension of a county government, he/she shall within seven days forward the report, the recommendations and the petition for suspension of the county government to the speaker of the Senate.

In the Makueni County case, the procedure was followed since the President forwarded the petition to the inter-governmental body, he appointed the Commission lead by Mohammed Nyaoga which investigated the matter and made recommendation that the Makueni County Government ought to be dissolved. However, after considering the petition and the report by the Commission, the President was of the opinion that "...due to the gravity of the import

of such a decision (suspension of a county government) the Law sets an extraordinarily high standard to be met” and decided that such a threshold was not met.

Notably, the law is effective procedurally and substantively when making the petition, but it may be argued that the process of deciding the outcome of the petition is only effective procedurally and not substantively. The President’s decision and the process of arriving to this decision is critiqued under the shortfalls of the law on suspension of county governments.

### **Shortfalls of the Law on the Suspension of a County Government**

#### **Overlooking the Sovereignty of the People**

Article 192 provides that the starting point of suspension of the county is from the President who makes the decision either during an emergency arising out of internal conflict or war or in any other exceptional circumstances. The county government is composed of both the county assembly and the county executive. The county assembly is made up of members elected by duly registered voters of the wards, among others. County executive members are appointed by the county Governor and approved by the county assembly in exercise of delegated power.

From this, it can be seen that the county government is a government for the people and by the people who exercise their sovereign power to elect their leaders at the lowest level. Therefore, it should be the people of that county who make the decision as to whether or not to suspend the county government.

The electorate has the sovereign power; it gives this power to the county government and should be able to take it away. Furthermore, it is the people who are best placed to tell if their government is working, following the principles and objects of devolution or if there

is existence of an internal conflict. In light of this, a system including popular initiative should be adopted in determining whether a county government should be suspended.

#### **Wide Discretion of the President’s Power**

Under Section 123 of the County Governments Act, the President has the discretion to decide whether or not to suspend a county government if satisfied that justifiable grounds exist for suspension of a county government. By failing to provide the parameters for what “justifiable grounds” are, the law accords to the President wide discretion in making the decision on whether or not to suspend a county government. For instance, in the Makueni County case, in giving reasons as to why he chose not to suspend the government, the President stated that “...due to the gravity of the import of such a decision (suspension of a county government) the Law sets an extraordinarily high standard to be met” . The threshold alluded to by the President is not founded in law and yet, due to the President’s wide discretion, it was used to invalidate the aspirations of citizens of Makueni County.

Notably, the Constitution provides some form of limitation on using any other exceptional circumstance. As per Article 192(2), it provides that a commission of inquiry must be set up to investigate the allegations against the county government. This commission, as under Section 123(5) of the County Governments Act, is to be comprised of various professionals are likely to ensure proper investigations are carried out and citizens of the county involved thus ensuring the affected people are heard. Despite these robust checks and balances in place, the law gives the President the discretion to disregard in its entirety the recommendations of the Commission thereby watering down its significance and the process.

## Recommendations

### Owing to the challenges established beforehand, we recommend the following:

1. It would be instrumental to have the recommendations of the Commission on suspension of a county not to be executed at the pleasure of the President. For instance, in the Makueni case, the Commission recommended that the county be suspended. Nonetheless, given the President's prerogative, he chose not to suspend it. It therefore amounts to wastage of taxpayers' money and time.

2. When a county is suspended, as would have been the case with Makueni County, the Senator representing the county would have remained in office unsuspended. Given that a Senator is elected to represent the interest of his/her county, it is proper that if a county is suspended, then the respective senator should stand suspended too.

3. After the Commission's findings/recommendations, the place of public participation should be further entrenched by having the residents of a county ratify the decision through a vote of preferably 50%.

4. A county stands suspended following due process, due to major internal/external conflicts. The leadership of the county at the said time should be barred from contesting elective positions for one election cycle.

#### Transfer of Functions from Nairobi County Government to the National Government

The transfer of functions from Nairobi County Government to the National Government was announced on 25th February 2020 through Gazette notice number 1609 of 2020, where the Cabinet Secretary for the Ministry of Devolution, the Attorney General, Nairobi County Governor and the Acting

Nairobi County Secretary agreed to transfer selected key functions from Nairobi County to the National Government. The agreement took effect on 17th March 2020.

Through Petition 66 of 2020, the petitioners challenged the constitutionality of the transfer of functions, on grounds that;

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 undermined the legislative authority of the Nairobi County Assembly.

3. The agreement undermined Nairobi County Government's fiscal autonomy and revenue-raising powers at the benefit of the national government because it required 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, were the primary revenue generators for the county. This lopsided agreement in which the county was required to pay for services but had no control of the incoming revenue ensured that the revenue stream was unreliable.

4. The agreement purported to appoint Kenya Revenue Authority to collect revenue from the transferred functions even though revenue collection was not one of the 4 functions transferred under Paragraph 3 of the agreement.

5. The transfer violated the constitution in that it affected both the functions and powers of Nairobi County Executive and Assembly and citizens in a manner that required 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 .

On December 9th 2019, the Nairobi City County Governor Mike Mbuvi Sonko, was charged in court with several counts of corruption. He was released on Ksh 15 Million bail and barred from accessing his office during the pendency of the prosecution.

On 25th February 2020, the Office of the State House Spokesperson issued a Press Statement informing the nation that an Agreement had been signed between the National Government and the Nairobi City County Government; transferring certain functions of the Nairobi City County Government to the National Government pursuant to Article 187 of the Constitution .

Article 187 (1) states that the function of the government at one level may be transferred to a government at the other level by agreement between the government if:

a) The functions or power would be more effectively performed or exercised by the receiving government; and

b) The transfer of the function or power is not prohibited by the legislation under which it is to be performed or exercised.

Article 187(2) states that if a function is transferred from the government at one level to a government at the other level:

a) Arrangements shall be put in place to ensure that the resources necessary for the performance of the function or exercise of the power are transferred; and

b) Constitutional responsibility for the performance of the function or exercise of the power shall remain with the government to which it is assigned by the Fourth Schedule.

The Press Statement indicated that the National Government would take over the following functions of the Nairobi City County Government:

- (i) County health services;
- (ii) County transport services;
- (iii) County public works, utilities and ancillary services; and
- (iv) County Government planning and development.

This means that the county still had budgetary responsibilities to run other ten functions that remained under its management.

Subsequently, Gazette notice No. 1609 dated 25th February 2020 was published seeking to give effect to the transfer of the functions of the Nairobi City County Government to the National Government. The Gazette notice also stipulates that Article 187 as read together with Section 26 of the Inter-governmental Relations Act, 2012, the Nairobi City County Government had transferred certain functions to the National Government vide the Deed of Transfer of Functions (The Agreement ) set out in the Schedule to the Gazette notice.

The Schedule set out the Deed of Transfer of Functions from the Nairobi City County Government to National Government. The transferred functions were then later to be managed under a new entity called the Nairobi Metropolitan Services (NMS).

This was followed by the Kenya Revenue Authority Gazette notice to collect all Nairobi County revenues, which left many pending questions, such as whether the KRA would be remitting the funds collected into the CFA; and further, regarding the role of the

County Executive and the County Assembly in overseeing the revenues collected, and decisions on the application of such funds be made, the reporting mandates of the KRA, and the implications of the County Finance Bill.

According to the CRA recommendations on shareable revenue, the criteria of sharing revenue is based on the support for all devolved functions including: Planning & Development; Agriculture, Livestock and Fisheries; Culture, Public Entertainment & Public Amenities; Youth Affairs and Sports; Trade, Cooperative Development & Regulation; Roads & Transport; Lands, Housing and Public Works; Water, Natural Resources & Environmental Conservation; Pre-Primary Education; Public Administration; New Conditional Grant; Financing of cities.

### **Lack of Public Participation**

There was no public participation regarding the transfer of functions. There was no involvement of key institutions such as the County Budget and Economic Forum which is a multi-stakeholder body established under the Public Finance Management Act, 2012 bestowed with the mandate to provide a means for consultation by the County Government on matters relating to budgeting, the economic and financial management at the County.

### **Creation and Functions of the Nairobi Metropolitan Services**

President Uhuru Kenyatta created the Nairobi Metropolitan Services (herein after referred to as "NMS") headed by Major General Mohamed Badi of the Kenya Air Force who is the Director General, deputized by Enosh Momanyi.

The NMS is in charge of some functions of the Nairobi City County which were transferred to the National Government, some of the functions are;

- a. The general was tasked to end the rampant corruption in the county and dismantle the 'cartels' that have slowed the growth of the country's capital.
- b. Streamlining urban renewal projects.
- c. Regeneration of Nairobi, with area of focus being reactivating garbage collection and implementation of solid waste management plan.
- d. To decongest the city Centre by reintroducing the use of traffic signals.
- e. Operationalize the effective garbage collection and disposal mechanism.
- f. Health services.
- g. Transport services.
- h. Planning and Development.
- i. Public works, utilities and ancillary services.

The Kenya Revenue Authority was tasked with the collection of county revenue while the public service board will oversee the affairs of the county.

Payment of the salaries of the county staff was consequently undertaken by the Public Service Commission for a period of three months, to enable the reorganization of the county's payroll in line to the transfer of functions to the NMS.

The Nairobi City County Assembly agreed that part of the activities related to legal services, procurement, audit, inspectorate, sub-county administration, ICT, public finance management and human resources be part of the ancillary services transferred to the NMS.

## CHAPTER SIX

### KEY INSTITUTIONS ENABLING DEVOLUTION IN KENYA

#### 1. The Council of Governors (CoG)

Section 19 of the Inter-governmental Relations Act 2012 establishes the Council of Governors. The mandate of the Council is to facilitate; consultations amongst County Governments, sharing of information on the performance of the Counties in the execution of their functions with the objective of learning and promotion of best practice and where necessary, initiating preventive or corrective action, considering matters of common interest to Counties, dispute resolution between Counties, Facilitating capacity building for governors, receiving reports and monitoring the implementation of inter-county agreements on inter-county projects, Considering matters referred to the Council by a member of the public, and Consideration of reports from Inter-governmental forums on issues affecting National and County interests or relating to the performance of Counties.

The CoG is composed of the Governors of the 47 Counties. It promotes a forum for consultation, leadership, and a collective voice on policy and governance issues, being the focal point for the County Governments in national affairs.

The CoG was formally constituted in March 2013 and currently has 12 sectoral committees and four support units to guide its operations which include: Education; Gender, Youth, Sports, Culture and Social Services; Human Resource Labour & Social Welfare; Trade, Investment, Manufacturing and

Cooperatives; Tourism & Natural Resources Management, Agriculture; Arid and Semi-arid Lands (ASALs); Health; Finance, Planning, Economic Affairs & ICT; Urban Development, Housing, Planning, Energy, Infrastructure and Lands; Legal Affairs, Human Rights, Inter-governmental Relations; Security and Foreign Affairs; Liaison, Management and Resource Mobilization; Sustainable Development Goals Unit; Public participation Unit; Maarifa Centre and M&E and Information Communication Technology Unit.

#### 2. The Senate

Chapter eight of the Constitution of Kenya establishes the Legislature. Article 93 states that "There is established a Parliament of Kenya," (Parliament) "which shall consist of the National Assembly and the Senate." The two Houses of Parliament shall perform their respective functions in accordance with the Constitution as stated in Article 93 (2) of the Constitution.

##### Roles of the Senate

The Senate's overall function is to protect the interests of the counties and their governments. Article 96 of the Constitution provides that the Senate has a role in:

1. Law-making;
2. Determining allocation of national revenue among counties as per Article 217 of the Constitution and overseeing national revenue allocated to county governments; and

3. Considering and determining any resolution to impeach the President and Deputy President as per the provisions of Article 145 and 150(2) of the Constitution respectively.

### A. Law-making

In exercising its legislative mandate, the Senate considers, debates and approves Bills.

Articles 110 and 256 of the Constitution provide that Bills that may originate from the Senate are:

#### (a) Bills concerning County Governments

Article 110 of the Constitution defines a Bill concerning County Governments as that which:

- (i) contains provisions affecting the functions and powers of the County Governments as set out in the Fourth schedule;
- (ii) relates to the election of members of a county assembly or a county executive; or
- (iii) affects the finances of the County governments

The process of passing Bills in this category is guided by the provisions of Articles 111 through to 113 of the Constitution.

(b) Bills that propose amendments to the Constitution through Parliament as envisaged in Article 256 of the Constitution.

#### **Other than Bills that originate from the Senate, the Senate considers Bills that:**

- (i) originate from the National Assembly but affect county governments;
- (ii) propose to amend the Constitution under Articles 256 or 257 of the Constitution;

(iii) divide the national revenue between the National and County government i.e. the Division of Revenue Bill under Article 218(a) of the Constitution.

(iv) divide the national revenue allocated to the County level of government through the Division of Revenue Bill, amongst the county governments; i.e. the County Allocation of Revenue Bill under Article 218(b) of the Constitution.

### B. Allocation of National Revenue

#### 1. Division of revenue between the National and County Governments

Article 217(1) of the Constitution mandates the Senate to determine, by resolution, the basis for allocating among the counties the share of national revenue that is annually allocated to the county level of government. In determining the basis of revenue sharing under clause (1), the Senate must:

(a) Consider the provisions of Article 203(1) of the Constitution; i.e. the national interest, the public debt and other national obligations, the needs of the national government, the need to ensure counties perform their functions, fiscal capacity and efficiency of county governments, developmental and other needs of counties, economic disparities within and among the counties, affirmative action, economic optimization of each county, the desire for stable and predictable allocations of revenues and flexibility in responding to emergencies and other temporary needs;

(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.

While considering the Division of Revenue Bill under Article 218 of the Constitution, the Senate ensures that the counties get their share of the revenues collected at the national level.

## 2. County Allocation of Revenue Bill

Immediately after the approval of the Division of Revenue Bill, the Senate is charged with considering, deliberating and voting on the County Allocation of Revenue Bill which divides revenue allocated to the county level of government amongst the counties using the formula developed by the Senate every five years as per the provisions of Article 217 of the Constitution.

## 3. Review of any Bills dealing with sharing of revenue or any financial matter concerning County Governments

The Senate also considers recommendations made by the Commission on Revenue Allocation regarding provisions of any Bill dealing with sharing of revenue or any financial matter concerning County Governments as per the provisions of Article 205 of the Constitution.

## C. Impeachment

The Senate plays a pivotal role in the process of impeaching the following State officers:

1. The President
2. The Deputy President
3. The Speaker and Deputy Speaker of the Senate
4. The Governors.

## 1. The President

The process of impeaching the President is outlined in Article 145 of the Constitution. The Senate is required to investigate allegations for impeachment of the President and resolve if they have been substantiated. The Senate may by resolution constitute a Special Committee of eleven Senators to investigate the allegations. If the Special Committee of the Senate finds that the allegations have been substantiated, then the Senate shall:

(i) accord the President an opportunity to be heard; and

(ii) vote on the impeachment charges.

If at least two-thirds of all Senators vote to uphold any impeachment charge, the President ceases to hold office.

## 2. The Deputy President

The process of impeaching the Deputy President is outlined in Article 150 of the Constitution. The Senate is required to investigate allegations for impeachment of the Deputy President and resolve if they have been substantiated. The Senate, by resolution, may appoint a Special Committee of eleven Senators to investigate the allegations. If the Special Committee of the Senate finds that the allegations have been substantiated then the Senate shall:

(i) accord the Deputy President an opportunity to be heard; and

(ii) vote on the impeachment charges.

If at least two-thirds of all Senators vote to uphold any impeachment charge, the Deputy President ceases to hold office.

### 3. The Speaker and Deputy Speaker of the Senate

Article 106(2)(c) gives the Senate the power to remove the Speaker or the Deputy Speaker of the Senate from office if it passes a resolution supported by at least two-thirds of its members.

### 4. The Governors

The process of impeaching the Governor is outlined in Article 181 of the Constitution and section 33 of the County Governments Act.

The Senate is required to investigate allegations for impeachment of the Governor and resolve if they have been substantiated. The Senate, by resolution, may appoint a Special Committee of eleven Senators to investigate the allegations. If the Special Committee of the Senate or the Senate sitting in Plenary finds that the allegations have been substantiated then the Senate shall;

- i. accord the Governor an opportunity to be heard; and
- ii. vote on the impeachment charges.

If the Majority of Senators vote to uphold the impeachment charge, the Governor ceases to hold office.

If the vote to uphold the impeachment fails, then the Speaker of the Senate shall inform the Speaker of the concerned County Assembly.

A motion for removal of the Governor on the same charges may only be re-introduced in Senate on the expiry of three months from the date of the failed vote to uphold the impeachment.

### 3. The National Assembly

The Constitution of Kenya 2010 establishes a legislature that is bicameral, constituting of the Senate and the National Assembly. The National Assembly has a total of 349 seats: 290 elected from the constituencies, 47 women elected from the counties and 12 nominated representatives. The Speaker of the National Assembly of Kenya serves as an ex-officio member. Article 95 of the Constitution of Kenya enumerates the roles of Parliament, to include:

- The National Assembly represents the people of the constituencies and special interests in the National Assembly.
- The National Assembly deliberates on and resolves issues of concern to the people.
- The National Assembly enacts legislation in accordance with Part 4 of this Chapter.
- The National Assembly:
  - a) determines the allocation of national revenue between the levels of government, as provided in Part 4 of Chapter Twelve;
  - b) appropriates funds for expenditure by the national government and other national State organs; and
  - c) exercises oversight over national revenue and its expenditure.
- The National Assembly-
  - a) reviews the conduct in office of the President, the Deputy President and other State officers and initiates the process of removing them from office; and
  - b) exercises oversight of State organs.
  - 6) The National Assembly approves declarations of war and extensions of states of emergency.

#### 4. Ministry of Devolution

The State Department for Devolution (SDD) draws its mandate from Articles 6, 10 and Chapter 11 of the Constitution of Kenya; the Executive Order No. 1 of June 2018 (Revised) and the various Acts under which devolution is implemented including; Inter-governmental Relations Act, 2012; County Governments Act, 2012; Urban Areas and Cities Act 2011 and Public Finance Management Act 2012. The Executive Order 1 of June 2018 (Revised) assigned the State Department the following functions:

- a) Devolution Policy;
- b) Inter-governmental Relations;
- c) Capacity Building and Technical Assistance to County Governments; and
- d) Management, Monitoring and Evaluation for Devolution Affairs;

The State Department for Devolution is responsible for supporting county governments through policy formulation, capacity support and inter-governmental relations. Additionally, the state department manages the shared function of disaster risk management between the National and County governments.

#### 5. Commission on Revenue Allocation

The Commission on Revenue Allocation (CRA), is an independent Commission with its mandate defined in Article 216 of the Constitution of Kenya 2010. It is mandated to recommend the basis for equitable sharing of revenues raised nationally between the national and the county governments. Additionally, The Commission is mandated under Article 216(4) to determine, publish and regularly review a policy setting out the criteria to identify marginalized areas for purposes of Article 204(2) .

The Commission, established under Article 215 of the Constitution of Kenya 2010 plays a significant role of recommending on matters concerning the financing and financial management of both the national government and county governments.

Other key functions of the CRA include: recommend the basis of equitable sharing of revenue raised by national government between national and county governments; recommend the basis of equitable sharing of revenue raised by national government among county governments; make recommendations on matters concerning the financing of both the national government and county governments; make recommendations on matters concerning financial management of both national and county governments; be consulted and its recommendations considered before parliament passes any Bill appropriating money out of the Equalization Fund; be consulted on any Bill that includes provisions dealing with sharing of revenue; and, be consulted on any Bill that includes provisions dealing with any financial matter concerning county governments, among other functions.

The CRA has thus far proposed three successive revenue sharing formulae between the National and County Governments.

For instance, in accordance with the provisions of Article 217(1), the Commission made its recommendation on the third basis for revenue sharing for the next five financial years. The recommendation, summarised below takes into account the need to align revenue sharing to functional assignment and the criteria provided in Article 203(1) to ensure equity in the sharing of revenues.

Pursuant to article 216 (1) (a), the CRA is mandated to make recommendations concerning the basis for equitable sharing of revenue between national and county

government. In this regard, the commission recommended for the fiscal year 2019/2020, the equitable share for the county governments should increase from Ksh. 314B to 336B, as captured below.

Public sector function	Constitutional Functions and Powers (Schedule 4)	Indicator of expenditure need	Proposed weight
1.1 Health	County health services	Uninsured population in-patient days equivalent outpatient Visits	15%
1.2 Agriculture	Agriculture; Animal control and welfare	Rural population	10 %
1.3 Water	County public works and services – water services)	Population in need of access to clean drinking water	3 %
1.4 Urban services and environment	Control of air pollution, noise pollution, other public nuisances and outdoor advertising; fire-fighting services and disaster management; control of drugs and pornography; and county public works and services (storm water management and Sanitation)	Urban population	3 %
1.6 Public administration	County planning and development; ensuring and coordinating the participation of communities in governance at the local level	Equal share	20%
Objective 2. Promote Balanced Development			
2.1 Balanced Development	County transport; Trade development and regulation	Land area (km <sup>2</sup> ) County road network (km) Poverty	8% 3% 15%
Objective 3. Incentivize capacity to raise revenue			
3.1 Revenue collection	County revenue collection	Revenue collections	2 %
Objective 4. Incentivize prudent use of public resources			
4.1 Prudent use of public resources	Management of public resources	Fiscal Prudence	3 %

Source: CRA Third Revenue Allocation Formula

The Senate approved a revised Third Basis for revenue sharing among the counties on 17th September 2020 which was unanimously approved by the National Assembly on 24th September, 2020.

The Third Basis formula adopted by the Senate addressed two primary objectives: first, to enhance service delivery, and second, to promote balanced development.

The Third Basis relies on a total of eight allocation factors. The Third Basis uses five measures of service delivery need in line with the formula's objective to enhance services delivery, notably: a health index (17%); an agriculture index (10%); population, as an indicator of need for other county services (18%); equal shares, reflecting the need for county administration (20%); and the number of urban households, as an indicator of need for urban services (5%). In addition, Equitable Share resources as distributed in proportion to land area (8%), rural access (8%) and poverty (14%) in line with the objective to promote balanced development.

The Third Basis will be used as the basis for the equitable sharing of revenue among county governments starting with the Division of Revenue Bill for FY 2021/22.

Political disagreements had prevented several earlier attempts to approve the formula. In approving the Third Basis, Parliament recommended a phased-in implementation that is pegged on the equitable share to counties being at least Ksh. 370 billion. The phasing - in is meant to ensure that the implementation of the Third revenue sharing Basis does not destabilize the functionality of county governments and disrupt service delivery.

### **Challenges on Revenue Sharing Formula**

Supreme Court Advisory Opinion on Division

of Revenue Bill Stalemate

### **Meaning and Relevance of Advisory Opinion**

On 15th May 2020, the Supreme Court issued an advisory opinion on the Division of Revenue Bill 2019 stalemate. The Council of Governors and the 47 County Governments asked for the advisory opinion after Parliament failed to enact the Division of Revenue Bill for the 2019 financial year. Without a Division of Revenue Act, county governments could not prepare and adopt their annual budgets and appropriation laws. Advisory Opinions are not binding, but are of compelling legal value.

### **Facts in Issue**

The 47 county governments and CoG sought an advisory opinion following the lengthy disagreement between the National Assembly and the Senate over the Division of Revenue Bill 2019. The key point of contention between the two houses of parliament was on how much money should go to the counties.

The two houses took hard-line positions; the Senate agreed with the Commission on Revenue Allocation (CRA) recommendation that Ksh. 335.7 billion be given to the counties, while the National Assembly aligned with the National Treasury, which proposed that the counties receive only Ksh. 310 billion. While the Division of Revenue Bill was stuck in the disagreements between the National Assembly and Senate, the National Assembly enacted the Appropriation Act.

### **Substance of the Supreme Court Advisory Opinion**

On whether the recommendation by the Commission on Revenue Allocation is binding upon both Houses during deliberations concerning the Division of Revenue Bill and the Appropriation Bill, the Court gave an opinion that, "the recommendations by the Commission on Revenue Allocation are not

binding upon either the National Assembly or the Senate. What the two Houses cannot do however is to ignore or casually deal with such recommendations”.

On what happens when the National Assembly and the Senate fail to agree on a Division of Revenue Bill, thereby triggering an impasse, the apex court advised that, “in the event of an impasse, the percentage of the money to be withdrawn be based on the equitable allocation to Counties in the Division of Revenue Act of the preceding financial year. In keeping with the spirit of Article 222 (2) (b) of the Constitution, the money to be withdrawn shall be 50% of the total equitable share allocated to the Counties in the Division of Revenue Act.”

Whether there should be timelines within which the National Government should release the equitable share of revenue to County Governments; the Supreme Court opined that “Any delay in releasing funds to Counties, has to be justifiable and must be explained in good time at a forum convened for that purpose by the National Government.”

Whether the National Assembly can enact an Appropriation Act prior to the enactment of a Division of Revenue Act, the Supreme Court advised that, “It follows in our view that in an ideal situation, the enactment of an Appropriation Act cannot precede the enactment of a Division of Revenue Act.”

Through its advisory opinion, the Supreme Court made conscious effort to cushion county governments in unique situations where impasse ensues during the Division of Revenue process. It did so by proposing an allocation of 50% of the preceding Division of Revenue Act allocations, and denied the national government access to the same 50% provision of the expenditure estimates for that year.

This is predicated on provisions of Articles 222(1) and 222(2) that only allow for the National Government to access the 50% of its estimates if and only when the Appropriation Bill has been enacted by Parliament and awaiting assent by the President. In the absence of the Appropriation Bill having been enacted by Parliament, the National Government cannot access the 50% of its estimates. The Appropriation Bill is an essential piece of legislation that instrumentalizes the authorization of the national government to withdraw money from the Consolidated Fund for expenditure National Government.

The National Assembly should authorize counties to withdraw money from the Consolidated Fund. The percentage of the money to be withdrawn shall be 50% of the total equitable share allocated to counties in the Division of Revenue Act of the previous financial year. However, if the amount exceeds the total equitable share proposed in the Division of Revenue Bill, the withdrawal amount should not be less than 15% of all revenue collected by the National Government. The Court urged Parliament to enact a law to give effect to these recommendations.

## **6. Controller of Budget**

The Office of the Controller of Budget (OCOB) is an independent office established under Article 228 of the Constitution of Kenya with the core mandate being to oversee implementation of the budgets of the National and County Governments by authorizing withdrawal from public funds. Conceptually, it is an oversight institution established under Article 228 of the Constitution of Kenya, 2010 to oversee and report on the implementation of the budgets for both the National and County Governments. Article 228 (4) and 228 (6) of the Constitution, and Section 9 of the Controller of Budget (COB) Act, 2016, require the Controller of Budget to authorize the withdrawal of public funds and report on budget.

The legal basis of the execution of the mandate of the Office of the Controller of Budget is guided by the Constitution, the Public Finance Management Act, 2012 and the attendant Regulations, the Controller of Budget Act, 2016 and all other enabling legislations in order to ensure that all withdrawal of public funds is in accordance to the laws.

The Controller of Budget prepares, publishes and publicizes statutory reports, conducts investigations suo moto (based on their own initiative) or on a complaint made by a member of the public, and conducts alternative dispute resolution mechanisms to resolve disputes. Additionally, the OCoB also has a constitutional mandate to advise Parliament on issues related to the transfer of funds to State organs or any other public entities.

The OCoB has a major reporting function, which necessitates the preparation of quarterly, annual and special reports to the legislature and executive, on budget implementation matters of the national and county governments as provided by the Constitution .

Specifically, the various types of reports prepared by the Controller of Budget include:

- a) Quarterly Reports on Budget Implementation to the Executive and Parliament ;
- b) Annual Reports on Budget Implementation to the President and Parliament ;
- c) Special Reports to the President and Parliament ; investigation reports and reports on stoppage of funds for governments units as per Article 225 of the Constitution;
- d) Arbitration/Mediation Reports to Parliament on matters relating to Budget Implementation ;
- e) Performance reports for the activities of

Office of Controller of Budget; and

- f) And any other report on Budget implementation that may be required.

For county governments, the Controller of Budget prepares the County Governments Budget Implementation Review Report (CBIRR), which is based on the approved budgets and financial reports submitted by respective county governments to the Office of the Controller of Budget and augmented with data from the Integrated Financial Management Information System (IFMIS).

It presents information on the release of funds to county governments, own-source revenue performance by each county, and a review of actual expenditure against budget allocations.

In fact, the significance of the Controller of Budget can be seen through the prism of the utility of its reports to all stakeholders in the governance sector.

For instance, the County Budget Implementation Review Report (CBIRR) aims to provide information to Parliament and County Assemblies to aid their oversight roles. The report is also valuable for other stakeholders and the public at large as it satisfies the requirements of Section 39 (8) of the Public Finance Management (PFM) Act, 2012, which requires the Controller of Budget to ensure that members of the public are provided with information on budget implementation. This therefore plays a crucial role in public participation exercises.

## **7. County Assembly**

Article 176 (Chapter Eleven) of the Constitution of Kenya establishes County Governments consisting of a County Assembly and a County Executive. The Chapter further sets out the roles, functions and other matters relating to

the membership and operations of the County Assembly.

The major role of the Members of the County Assembly (MCAs) in Kenya is legislation, representation, and oversight. In addition, the County Governments Act stipulates the role of the MCAs under Section 9.

Section 8 of the County Governments Act provides that the County Assembly shall vet and approve nominees for appointment to county public offices, perform the roles set out under Article 185 of the Constitution, approve the budget and expenditure of the county government in accordance with Article 207 of the Constitution, and the legislation contemplated in Article 220 (2) of the Constitution, guided by Articles 201 and 203 of the Constitution, approve the borrowing by the county government in accordance with Article 212 of the Constitution, approve county development planning, and perform any other role as may be set out under the Constitution or legislation.

A member of the public, public entity or private entity may write a petition to the County Assembly requesting the County Assembly to consider any matter within its authority, including enacting, amending or repealing any legislation. The procedure to petition a County Assembly in Kenya is stipulated in the Petition to County Assemblies (Procedure) Act. The Act gives effect to Article 37 of the Constitution on the right to petition a county assembly.

The Assembly also receives and approves plans and policies for the management and exploitation of the County's resources and the development and management of its infrastructure and institutions. County Assemblies are expected to conduct oversight over the County Executive, which has been expanded greatly, with extended control over critical County processes such as the budgeting process, public appointment and County

legislation among others.

The procedure to petition a County Assembly in Kenya is stipulated in the Petition to County Assemblies (Procedure) Act. The Act gives effect to Article 37 of the Constitution on the right to petition a county assembly.

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### **Form of a Petition to the County Assembly**

A petition to a County Assembly should be in the form set out in the Schedule of the Petition to County Assemblies (Procedure) Act and should:

- a) be handwritten, printed or typed;
- b) be in English or Kiswahili;
- c) be written in respectful, decorous and temperate language;
- d) be free of alterations and interlineations in its text;
- e) be addressed to the county assembly;
- f) have its subject matter indicated on every sheet if it consists of more than one sheet;
- g) indicate whether any efforts have been made to have the matter addressed by a relevant body and whether there has been any response from that body or whether the response has been unsatisfactory;

h) indicate whether the issue in respect of which the petition is made is pending before

any court of law or other constitutional or legal body; and

i) conclude with a clear, proper and respectful prayer, reciting the definite object of the petitioner or petitioners concerning the matter to which it relates; among other conditions.

### **The Procedure to Petition a County Assembly**

The procedure for presenting a petition to the county assembly should be as follows.

A petition to a county assembly should be:

(i) submitted to the respective Clerk of the County Assembly by the petitioner; or

(ii) presented by a member of the county assembly on behalf of a petitioner, with the consent of the Speaker of the County Assembly;

(iii) A member of a county assembly is not eligible to present a petition on their behalf;

(iv) The Clerk should, within seven days of the date of receipt of the petition, review the petition to ascertain whether the petition meets the requirements in the form of a petition to the County Assembly;

(v) Where the Clerk considers that a petition does not meet the requirements, the Clerk may give such directions as are necessary to ensure that the petition is amended to comply with the requirements; and

(vi) A petition should not be rejected merely because it is not addressed to the Clerk of a county assembly.

### **Register Of Petitions**

The Clerk should keep and maintain a register with a record of all petitions and supporting documents, and the decisions of the County Assembly on the petitions. The register of petitions should be accessible to the public during working hours.

## CHAPTER SEVEN

### INTER-GOVERNMENTAL RELATIONS UNDER THE DEVOLVED SYSTEM OF GOVERNMENT IN KENYA

The relationship between the two levels of government is provided in the Constitution of Kenya 2010. Article 6(2) states that the two levels of government are distinct and inter-dependent and are expected to conduct their mutual relations on the basis of consultation and cooperation.

Article 189 makes it imperative that each level of government performs and exercises its powers in a manner that respects the functional and institutional integrity as well as the constitutional status of institutions of government at the other level. The Inter-Governmental Relations Act, 2012 establishes the legal and institutional framework for consultation, cooperation and dispute resolution between the national and county governments and amongst the county governments.

The Act establishes the following inter-governmental relations bodies: National and County Government Coordinating Summit; the Inter-Governmental Relations Technical Committee and the Council of County Governors. The Public Finance Management Act 2012 creates the Inter-governmental Budget and Economic Council as a forum for consultation and cooperation between the two levels of government on fiscal matters.

The Inter-Governmental Relation Act 2012 provides for establishment of inter-governmental sector forums on sector issues of common interest to the national and county

governments. There are however a number of challenges with regard to establishment of these forums. They include but are not limited to the following:

- i) Absence of administrative procedures for establishing and managing Inter-governmental sector forums;
- ii) The decisions of the forums are not binding; and
- iii) Absence of enforcement mechanism for forum decisions.

Section 12 of Inter-Governmental Relations Act 2012 provides for the functions of the Inter-Governmental Relations Technical Committee. However, regulations to give effect to the Act have not been developed making it difficult for the committee to effectively discharge its mandate.

#### **The Legal Framework for Inter-governmental Relations**

Inter-governmental Relations refers to the interdependent relations among the different spheres of government . It includes the coordination of policy in the government for the attainment of common goals. Ademolekun refers to Inter-governmental relations as the interactions between the different levels of government within the state and to the fiscal and administration process by which spheres of government share resources .

The Constitution of Kenya, 2010 created a devolved system of government with two levels of government. These are the National Government and 47 County Governments. They are to conduct their mutual relations on the basis of consultation and cooperation in the execution of their exclusive and shared functions, as assigned in accordance with the Fourth Schedule of the Constitution.

To oversee inter-governmental relations between the National and County Governments, the Inter-governmental Relations Act of 2012 provides a framework for consultation and cooperation between the National and County governments. It has institutional structures to facilitate government policies legislation as well as providing means of transferring functions of government; The National and County Government Coordination Summit, The Inter-governmental Relations Technical Committee and the Council of Governors'. The National and County Government Coordination Summit is the apex structure in the Act, which brings together the president and the 47 governors. It ensures smooth operations of the different levels of government, monitoring and implementation of joint plans and the transfer of functions.

The Inter-governmental Relations Committee deals with all matters relating to the relationship between one County Government and another County Government and the National Government and County Governments; dispute resolution between the two levels of government and amongst the County Governments; and engagements with other Inter-governmental relations bodies.

The Council of Governors on the other hand has the function of considering of common matters affecting county governments, capacity building, dispute resolution and the implementation of inter-county agreements and inter-county projects. The Council has

power to establish other Inter-governmental forums including inter-city and municipal forums . The Act provides for both formal and Alternative dispute resolution mechanisms.

According to section 33 of the Act, before a party formally declares the existence of a dispute the parties to a dispute shall in good faith ,make every reasonable effort to take all necessary steps to amicably resolve the matter by initiating direct negotiations with each other or through an intermediary .It is only if this fails that a party to a dispute may formally declare a dispute by referring the matter to the summit ,the council or any other Inter-governmental structure established under the IGR Act 2012 . The County Budget and Economic Forum

The PFM Act, 2012 establishes the County Budget and Economic Forum to provide a means for consultation by the county government on preparation of county plans, the County Fiscal Strategy Paper and the Budget Review and Outlook Paper for the County. This Forum also discusses matters related to budgeting, the economy and financial management at the county level. The membership of this important consultative body is drawn from organizations representing professionals, business, labour issues, women, persons with disabilities, the elderly and faith based groups at the county level.

### **Alternative Dispute Resolution (ADR) and Inter-Governmental Disputes**

Alternative dispute resolution is the only feasible means of settling disputes between the different levels of government under the Constitution of Kenya.

Alternative dispute resolution encompasses all legally permitted processes of dispute resolution other than litigation. It also includes a term that generally gives alternative to the court adjudication of disputes such as negotiation, mediation,

arbitration, reconciliation among others. Alternative Dispute Resolution is also seen as an appropriate dispute resolution as it is a harmonious process that many a time can be tailored to suit the needs of the parties.

The Inter-governmental Relations Act, 2012 outlines that national and county governments are supposed to take all reasonable measures to resolve disputes in a polite way and use all alternative Inter-governmental dispute resolution mechanisms before relying on judicial proceedings for redress.

In Kenya, the use of ADR is supported by articles 159(2) and (3) of the Constitution that states that in exercising judicial authority, the courts and tribunals shall be guided by the following principles:

- (a) Justice shall be done to all, irrespective of status;
- (b) Justice shall not be delayed;
- (c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
- (d) Justice shall be administered without undue regard to procedural technicalities; and
- (e) The purpose and principles of this Constitution shall be protected and promoted.

Article 3 states that traditional dispute resolution mechanisms shall not be used in a way that:

- (a) Contravenes the Bill of Rights;
- (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or

(c) is inconsistent with this Constitution or any written law.

There are some characteristic features of ADR that make it the most feasible way of settling inter-governmental disputes. Disputes are inevitable in the course of everyday interactions and the government is no exception. With the rise in inter-governmental disputes, ADR has taken strides in replacing litigation as a resolution seeking platform. This is as a result of its definite merits over litigation, that is:

- Confidentiality – as some governmental matters are of great sensitivity, ADR offers the confidentiality that litigation lacks as matters in litigation become a matter of public record upon judgment. The media also gives details of court proceedings due to public interest unlike in ADR. Practitioners using ADR mechanisms are bound by their code of ethics to preserve the privacy of their clients.
- Expeditious – parties avoid components of traditional litigation that prolong and delay the process and resolution.
- Cost effective – ADR is less costly, unlike litigation that has lots of procedures that push up the cost.
- Non-judicial – the decision-making when settling the dispute remain with the parties rather than a third party who has no stake in the outcome. (it's not imposed on them)
- The voluntary nature of ADR also makes it feasible as it thrives under the principle of self-determination to use legally accepted procedure to resolve a conflict. No party is coerced unlike in litigation where the respondents can be forced to respond to charges or evidence in court. However, it can be mandatory in the case of an arbitration clause in a contract. This doesn't mean that the parties are forced into it but are simply called

to respect prior voluntary agreement to use arbitration as an alternative dispute resolution.

- Conciliation – after the ADR process is done, the end result is intended to bring the opponents together and into harmony. ADR is therefore preferred as it aims at resolving conflicts. It aims to be an alternative way to litigation and violence. The primary goal is to help the disputants resolve their conflict through various techniques and procedures.

### **Inter-governmental Disputes Resolved Through Alternative Dispute Resolution**

Division of Revenue between National and County Governments

Article 203 (2) of The Constitution 2010, on Equitable share and other financial laws provides that:

1) For every financial year, the equitable share of the revenue raised nationally that is allocated to county governments shall be not less than fifteen per cent of all revenue collected by the national government; and

2) The amount referred to in clause (2) shall be calculated on the basis of the most recent audited accounts of revenue received, as approved by the National Assembly.

Article 218 on The Annual Division and Allocation of Revenue Bills states that; (1) At least two months before the end of each financial year, there shall be introduced in Parliament:

a) a Division of Revenue Bill, which shall divide revenue raised by the national government among the national and county levels of government in accordance with this Constitution; and

b) a County Allocation of Revenue Bill, which shall divide among the counties the revenue allocated to the county level of government on

the basis determined in accordance with the resolution in force under Article 217 .

In 2014, the Council of Governors started an initiative to amend the Constitution of Kenya through the Constitution of Kenya, 2010 Amendment Bill 2014 to guarantee an increased allocation of 45% of revenue from 15% in Article 203 of The Constitution of Kenya . They sought this as an alternative to negotiation and haggling with the national government for increased allocation. They accused the national government of not allocating counties their rightful share of national revenue and therefore derailing development in the counties. The initiative was however abandoned .

According to the Devolution Conference report of 2016, County fiscal needs could not be sustained through the 15% equitable share of national revenues. In as much as the National Government has increased the equitable shareable revenue, more needs to be done . For instance, own revenues would give counties the most fiscal flexibility.

However, it was noted that counties have not done a good job of collecting own revenues. This was attributed to political constraints, lack of political will, and limited scope for revenue collection. The report also highlighted slow disbursements of funds for the discharge of county functions. Accordingly, counties were not able to provide effective and efficient service delivery to citizens . In 2018 County Governments received 368 billion Kenya Shillings up from 326 billion Kenya Shillings the previous year.

This amount included 314 billion Kenya Shillings as equitable share of revenue and 54 billion Kenya Shillings as conditional grants. According to the office of the Deputy President, it was the first time in the last five years; it was the only time they had agreed on revenue sharing with county governments without any push and pull. This was after a meeting of

the Inter-governmental Budget and Economic Council (IBEC). The increase in allocation was a culmination of talks between the National Treasury and The Commission on Revenue Allocation. The National Treasury also assured the council of timely disbursement of funds to the counties.

### **Disputes Referred to ADR by the Judiciary**

In the case of International Legal Consultancy Group & another v Ministry of Health & 9 others [2016] eKLR. The petition concerned the division of functions between the national and county governments in relation to health. It arose out of a decision by the national government, through the Ministry of Health, to procure certain medical equipment to be used in health facilities throughout the country.

The petitioners argued that the actions of the national government are unconstitutional as they violate the division of functions between national and county governments. The court held that the petition had no merit as the county governments had accepted the medical equipment and entered into MOUs with the national government and that the second petitioner, The Council of Governors did attempt to resolve the dispute through dispute resolution mechanisms under the Inter-Governmental Relations Act.

Constitutional Petition of 511 of 2015 County Government of Isiolo and 10 others v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government and 3 others 2017, is a petition exploring conflict between Isiolo and Meru boundaries. The issue of demarcation has led to tension between the two communities. That the Cabinet Secretary of Interior and Co-ordination of National Government constituted a task force single-handedly without involving and informing the people in the two counties and that it didn't have authority on issues of touching the boundaries.

In the matter, however, respondents stated that the petition is unmerited as they haven't sought any Alternative Disputes Resolutions first under the Inter-Governmental Relations Act with regards to ADR. And that the petitioner approached the court without exhausting ADR mechanisms under 189(3) of constitution of Kenya 2010 and 31-35 of the Inter-Governmental Relations Act 2012. Court held that it is a matter between the National government and the County government so ADR must first be applied under art 189 of Constitution of Kenya 2010 which states disputes are settled through use of reasonable force and that the boundaries can be altered only by resolution.

Section 31 of the Inter-Governmental Relations Act states that issues between the National Government and the County Government must first be exhausted with ADR before resorting to judicial review. However, the petition was eventually allowed and the boundary dispute board was declared illegal and there by quashed and the dispute should be resolved by an independent commission to be set up by parliament under 188 of the Constitution of Kenya 2010.

### **Disputes Settled through Litigation Allocation of Functions**

Article 186 and the Fourth Schedule of the Constitution set out the functions of the respective levels of government. Since the 2013 elections and the operation of the new system of devolved government, there has been much contestation between the two levels of government with regard to their respective functions and mandates.

In 2014, The Council of governors petitioned the High Court to stop the Kenya National Highways Authority and The Kenya Urban Roads Authority from maintaining and rehabilitating roads that fell under the mandate of counties. In this case, Council of County

Governors v Attorney General & 4 others [2015] eKLR, the Court decided that the management of all public roads save national trunk roads are functions of county governments.

### **Shortfalls of Litigation for Inter-governmental Disputes**

Government opts not to use the courts for Inter-governmental disputes because of the following reasons.

- Lack of privacy

When dealing with government agencies or levels of government it might be considered public interest matters and hence public scrutiny and lack of trust will arise.

- Expensive

It may be expensive for the losing party and will also affect government expenditure and reflect on people's lives.

- Bars participation

Court processes do not allow for participation from the parties involved except through their advocates. This may in turn hinder access to justice and fairness.

### **Conclusion**

Alternative Dispute Resolution is the only feasible, less acrimonious means of settling disputes between the different levels of government under the Constitution of Kenya owing to its attributes of confidentiality, being expeditious, cost effectiveness, being non-judicial, voluntary, and conciliatory. The relationships between various government organs and its three arms need to be harmonious for continued functioning of government. However, disputes are bound to arise which may best be resolved through ADR.

## CHAPTER EIGHT

### PUBLIC PARTICIPATION AND DEVOLUTION IN KENYA

Public participation is the process where individuals, governmental and non-governmental groups influence decision-making in policy, legislation, service delivery, oversight, and development matters.

It is a two-way interactive process where the duty bearer communicates information in a transparent and timely manner, engages the public in decision-making and is responsive and accountable to their needs. The public gets actively involved in the process when the issue at stake relates directly to them.

The International Association for Public Participation (IAP2) defines it as a process by which agencies or institutions consult with interested and affected individuals, organisations and government agencies before making a decision.

Public participation is an integral part of governance in Kenya, as provided for by the Constitution of Kenya 2010, and other enabling statutes.

Active citizen participation underpins a democratic and inclusive society. The artery of a healthy liberal democracy is the participation of citizens in decision-making. As such, effective public participation is a pre-condition for transparent and accountable governance. It helps governments to tackle inequality by ensuring that all persons, including those from the poorest segments of society and marginalised communities, are able to participate in decisions that impact their lives. Constitutional provisions on public

participation are clearly spelt out in Articles 69 (1) (d), 118, 174, 184, 196, 201 (a), 221 (5), and 232 (1) (d) among others.

The County Governments Act, 2012 Part X, provides that there shall be established a national design and framework of civic education, including determining the content of the curriculum. The institutions that have been legally mandated to facilitate the provision of civic education include; the Ministry of Devolution and Planning, Office of the Attorney General and Department of Justice, County Governments, and Transition Authority. On the other hand, historically, non-state actors have always played a reciprocal role in spearheading provision of civic education in the country.

Active, free and meaningful participation moves beyond provision of information and consultation to authentic and empowered participatory governance. This requires creating opportunities for citizens to safely and freely influence decision-making at all stages.

The County Government Act, 2012 outlines the roles of the members of the County Assembly that include: maintaining close contact with the electorate and consulting them on issues before or under discussion in the County Assembly; presenting views, opinions and proposals of the electorate to the County Assembly; attending sessions of the County Assembly and its committees; (d) provide a linkage between the county assembly and the electorate on public service delivery; and extend professional knowledge,

experience or specialized knowledge to any issue for discussion in the County Assembly.

Further, the County Governments Act (CGA, 2012) and Public Financial Management Act (PFMA, 2012) makes it a mandatory requirement for the County Governments to ensure that they involve the citizens in the decision-making processes at the county from the development of plans to implementation and oversight . The County Government is mandated to facilitate citizen engagement by creating mechanisms for consultations, ensuring that the necessary information is available to the public notwithstanding building the capacity of the people to engage effectively with the county planning and budgeting processes.

Public participation is the highway to inclusivity and accountability in service delivery at the national level as well as county level. "Accountability is the obligation to render an account for a responsibility conferred. It presumes the existence of at least two parties: one who allocates responsibility and one who accepts it with the undertaking to report upon the manner in which it has been discharged ." A public participation exercise that does not lead in the public affecting or influencing the outcome of the process can be frustrating and futile .

For the avoidance of doubt, public participation means much more than putting a few people together to deliberate on a matter of public interest before an official decision is taken.

As held in the dictum per Odunga J in Robert N. Gakuru & Others v County Government of Kiambu & Others, (2014), "In my view to huddle a few people in a 5-star hotel on one day cannot by any stretch of imagination be termed as public participation for the purposes of meeting constitutional and legislative threshold. Whereas the magnitude

of the publicity required may depend from one action to another a one-day newspaper advertisement in a country such as ours where a majority of the populace survive on less than a dollar per day and to whom newspapers are a luxury leave alone the level of illiteracy in some parts of this country may not suffice for the purposes of seeking public views and public participation."

### **Goal of Public Participation**

The fundamental goal of public involvement is to provide a collaborative environment that gathers, processes, and applies a diversity of opinions during the development of a plan, program, policy, or project. It entails involving the public in decision-making on all legislative and developmental agenda, so as to enhance accountability and transparency in the governance processes.

The Constitution establishes the normative framework for public participation, makes it mandatory for policy and law-making processes, establishes the key institutions for public participation and directs the establishment of statutory bodies and enactment of legislation for effective participation .

### **Public Participation Spectrum**

Public participation has five key pillars, which constitute informing; consulting; involving; collaborating and empowering the people, as shown in the table below.

Inform	Consult	Involve	Collaborate	Empower
To provide members of the public with balanced information to assist them in understanding the problem, alternatives, opportunities and solutions.	To obtain public feedback on issues of public interest for analysis, inclusion, alternatives and decisions.  To meet the constitutional and statutory requirements	To work directly with the public throughout the process to ensure that public concerns are consistently understood and considered.	To partner with the public in each aspect of the decision-making, including the development agenda and the identification of preferred solutions.	To have autonomous decision-making by the public.  To give them information and power over projects and major governance decisions.

### Utility of multi-stakeholders' engagement in devolved governance in Kenya.

#### Legal Framework for Public Participation in Kenya

##### The Constitution of Kenya, 2010

- Article 1(2): All sovereign power belongs to the people of Kenya. The people may exercise their sovereignty directly or through their elected representatives.
- Article 10 (2) a, b and c: The national values and principles of governance include; democracy and participation of the people; inclusiveness; good governance, integrity, transparency and accountability.
- Article 33: Public participation should respect the freedom of expression of all participants.
- Article 35: The Constitution guarantees the right to access information by citizens.
- Article 61: Gives the public, individually or as a group, a say in matters of land including acquisition, management, transfer, disposal, or ownership of private, public and/or community land.
- Article 174(c): Objects of devolution are: to give powers of self-governance to the people and enhance their participation in the exercise of such powers in decision-making.
- Article 174(d): Communities have the right to manage their own affairs and to further their development.
- Article 196(1): A County Assembly shall — (a) conduct its business in an open manner, and hold its sittings and those of its committees, in public; and (b) facilitate public participation and involvement in the legislative and other business of the assembly and its committees.
- Article 196(2) A County Assembly may not exclude the public, or any media, from any sitting, unless in exceptional circumstances the speaker has determined that there are justifiable reasons for doing so. Article 201 (a): there shall be openness and accountability, including public participation in financial matters.
- Article 232(1) (d): The values and principles

of public service include the involvement of the people in the process of policy making and (f) transparency and provision to the public of timely and accurate information.

### **The Public Finance Management Act**

- Section 10(2): In carrying out its functions (see Section 10:1); the Parliamentary Budget Office shall observe the principle of public participation in budgetary matters.
- Section 35(2): The Cabinet Secretary (for Finance) shall ensure public participation in the budget process (provided for under Section 35:1).
- Section 125(2): The County Executive Committee member for finance shall ensure that there is public participation in the budget process (provided for under Section 125:1).
- Section 207: County Governments are to establish structures, mechanisms, and guidelines for citizen participation.

### **The County Governments Act 2012**

- Section 113: Makes public participation in county planning processes compulsory.
- Section 87: Stipulates the principles of public participation. They include timely access to information and reasonable access to planning and policy making process.
- Section 88: Citizens have a right to petition the county government on any matter under the responsibility of the county government.
- Section 89: County government authorities, agencies, and agents have a duty to respond expeditiously to petitions and challenges from citizens.
- Section 90: A county government may conduct a local referendum on among other local issues — county laws and petitions or planning

and investment decisions affecting the county for which a petition has been raised and duly signed by at least twenty-five percent of the registered voters where the referendum is to take place.

- Section 91: The county government shall facilitate the establishment of modalities, and platforms for citizen participation e.g. town hall meetings, IT-based technologies and establishment of citizen fora at county and decentralized units.

Public participation in Kenya is especially important in the budget process and the legislative processes. Remarkably;

(i) 34 Counties have enacted legislation that promote public participation while the remaining are at various stages of enactment. Additionally, there are designated and operational Public Participation offices in 45 Counties, and

(ii) 40 Counties have established County Budget Economic Forums (CBEF) which engage the public on the preparation of County budgeting and planning. Moving forward, Counties will establish a structured mechanism for feedback from the public.

### Utility of multi-stakeholders' engagement in devolved governance in Kenya

Benefits for the County Departments	Benefits for the Stakeholders
<ol style="list-style-type: none"> <li>1. Higher quality decision-making.</li> <li>2. Increased efficiency in and effectiveness of service delivery.</li> <li>3. Streamlined policy and program development processes.</li> <li>4. Greater engagement with stakeholder interests – ensuring services are delivered in collaboration with stakeholders and provide outcomes which meet community needs.</li> <li>5. Enhanced community confidence in projects undertaken.</li> <li>6. Enhanced capacity to innovate.</li> </ol>	<ol style="list-style-type: none"> <li>1. Greater opportunities to contribute directly to policy and programme development. For example, in Narok County, farmers' cooperatives contributed to decision by county to purchase and distribute high breeds of cattle.</li> <li>2. More open and transparent lines of communication.</li> <li>3. Increasing the accountability of government and driving innovation.</li> <li>4. Improved access to decision-making processes, resulting in the delivery of more efficient and responsive services.</li> <li>5. Early identification of synergies between stakeholders and government work, encouraging integrated and comprehensive solutions to complex policy issue</li> </ol>

While a lot of public participation efforts have been made in both levels of government, there is no clarity on what constitutes adequate participation, the nature of the participation that meets the constitutional threshold, or the most effective mechanisms for public participation .

The County Governments, like other state organs, are required by law to put into place regulatory frameworks, structures and mechanisms and provide for appropriate spaces for all persons to participate i.e. women and men of all ages, those with disability and in difficult to reach in marginalized areas.

Civic education has not been carried out by either level of government in any significant manner. Access to public information in a timely, inexpensive manner has not been

achieved in either level of government. There are however emerging good practices in some of the county governments such as Makueni County, which has wholeheartedly embraced public participation and established a citizen-led public participation framework going all the way to the village level .

Public participation at the county level needs to be institutionalized and funded as any other county programs and initiatives. This has to be complemented with strengthened capacity of the department to ensure public participation becomes a process rather than an event .

A cursory look at the existing legal and policy frameworks point to an impressive fabric of satisfying provisions, yet the implementation process seems to be dissatisfying with

respect to public participation for service delivery . As relates to Public Finance and Participation, Chapter 12 and Article 201(a) provides for openness and accountability, including public participation in financial matters. Under Article 196(1) (b) the County Assemblies are required to facilitate public participation in the legislative activities of the assembly. This includes peoples' participation in assembly committees and other business of the assemblies.

To strengthen accountability and public participation, the Constitution and the PFM Act, 2012 provide a distinct opportunity to enhance the role of citizens in public financial management processes in Kenya, and more clearly, the PFM Act, 2012 elaborately outline the stages in the budget process at the national and county government levels respectively in any financial year.

But enhancing participation will require sustained efforts by government and civil society to establish structured processes that are efficient and inclusive. On the government side, this will include setting guidelines and mechanisms for sharing information and soliciting feedback around county government processes like planning, budgeting, and monitoring. It will also depend on government providing guidelines and training of civil servants so that they are able to effectively facilitate participation and transparency in these processes. Civil society actors can help to define priorities of what they would like county governments to operationalize first, and they can also help government put in place and initially roll out such systems (as is happening in a number of counties) .

Civil society organizations bring rich experience on how counties can operationalize transparency, participation, and recourse mechanisms that are useful for citizens and that improve service delivery. Individual counties are enlisting civil society organizations to help them structure and carry out effective

participation processes .

### **Recommended Approaches toward Effective Public Participation by the County Executives and County Assemblies**

For effective public participation exercises, the County Executives and County Assemblies should employ multiple approaches including:

- Drawing annual work plans on public participation activities;
- Conducting stakeholder mapping and data base management on the thematic issue;
- Convene a public participation planning committee meeting;
- Disseminating the public participation programmes to the public and all stakeholders;
- Conducting public participation meetings and collecting public views;
- Report writing and evaluation;
- Making enough copies of the public participation matter.
- Availing enough writing materials (notebooks and pens);
- Updating websites and social media pages (through alerts and updates);
- Multi-level relevant WhatsApp groups to enhance the completeness, validity and reliability of relevant information;
- Design posters, flyers and graphic media posters for the websites as well as County Assembly social media platforms;
- Public announcements in religious gatherings, public barazas, market places and

other applicable local forums;

- Communications office to liaise and brief the media on the upcoming events;
  - Using bulk messaging to inform the public on the upcoming events;
  - Display adverts through posters, flyers and brochures to encourage the public to attend and have meaningful input in to the decision-making process;
  - Publishing pieces of legislations in the County gazette;
  - Receiving memoranda during deliberations;
  - Translating pieces of legislations into popular versions;
- Uploading pieces of legislations in the County website;
  - Use of digital display noticeboards in the County Executive or County Assembly lobby areas; and
  - Evaluation forms for the participants.

## CHAPTER NINE

# ACCOUNTABILITY IN GOVERNANCE AND IMPEACHMENT OF GOVERNORS

### Introduction

One of the objects of devolution was to 'promote democratic and accountable exercise of power'. Governors preside over devolved functions and the attendant resources. This informs the reason why there is constant scrutiny of the utility of executive powers at the county level, the consequence of which is impeachment initially by the respective County Assembly, and subsequently by the Senate, once charges are proved. Reasonableness is the measure of judgment in public service.

The 2010 Constitution has provided for the powers and functions of legislative and executive structures at both levels of government, the Judiciary and independent commissions. Among them is the oversight role of impeachment given to the legislature over the executive. The County Assembly is mandated with the role of commencing the impeachment proceedings by tabling a motion to the Speaker of the County Assembly by way of notice for the removal of the Governor.

Where the county governor falls short of performing their duties as required by law or in an instance where they misuse their power, they may be removed from office by the County Assembly and the senate by way of impeachment as provided for by the County Government Act.

### Impeachment, Reasons and the Intrigues in Counties

Impeachment is the formal process by which a legislative body addresses charges of serious misconduct against a public official. If the allegations facing a governor are proven, the official can be removed from office. Generally, impeachment is both a political and legal process. In Kenya, it is a quasi-judicial process.

The courts play a crucial role at the tail end of impeachment process. They cannot interfere with an on-going impeachment process, which is a substantive mandate of the legislature. For instance, in the 2014 case of *Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others* (Hereinafter *Wambora I*), Mr Wambora sought to challenge the validity and constitutionality of the impeachment process that was on-going against him as he faced charges of gross violation of the Constitution.

While the Kerugoya High Court restrained the Speaker of the Senate through grant of conservatory orders, the Senate carried on with its proceedings and ultimately impeached the governor.

In principle, Article 165(2)(b) gives the High Court the power to determine whether a fundamental right or freedom has been infringed. The High Court in *Trusted Society of Human Rights and others v Attorney General and others* highlighted its interpretative role in determining the constitutionality of all governmental actions.

The issue of impeachment also brings to the fore the essence of separation of powers. The Constitution of Kenya 2010, provides for the doctrine of separation of powers. Article 1(3) delegates sovereign power to three state organs: the legislature, executive and judiciary .

Each of these branches has distinct functions which are to be performed separately and free from interference . Generally, the executive performs administrative functions, the judiciary has the power to interpret the Constitution and the power of judicial review while the legislature has the power to make laws and oversee the role of the executive.

Article 181(2) of the 2010 Constitution codifies and provides for Parliament to enact a law highlighting the process of impeachment of a county governor. This has been realised through the County Government Act , Section 33. Section 33 recognises the County Assembly and the Senate as the bodies responsible for this process.

The County Government Act 2012 on the other hand, lays out the procedure for the impeachment of a governor. The first step is for a member of the County Assembly to notify the Speaker of the assembly, through a motion, of the removal of a governor under various grounds such as;

- (i) Gross violation the Constitution or any other law,
- (ii) Committing a crime under national or international law,
- (iii) Abuses of office, or gross misconduct, and
- (iv) Physical or mental incapacity that prohibits them from performing functions of a county governor.

## Profiles of Impeached Governors

### 1. Governor Martin Wambora – Embu County

Martin Wambora was impeached twice during his first term as Embu County Governor. Consequently, he holds record of the first Kenyan governor to be impeached, after the Senate approved his impeachment. However, Governor Wambora appealed on both occasions and the Court of Appeal nullified the Senate's decision to impeach him. Appellate Judges John Mwera, Hannah Okwengu and GBM Kariuki nullified the Senate's decision, adjudging that there was no clear evidence that the governor acted in gross violation of the Constitution. In 2017 he vied for the Embu gubernatorial seat and won. He is currently serving his second and final term as a governor.

His survival of impeachment can be understood from the perspective that the Judiciary has the power to review and check whether the actions of the Senate and the County Assembly are in compliance with the Constitution and whether they have the power to quash an impeachment proceeding if it occurs contrary to the Constitution . This is done through judicial review.

In *Humphrey Makokha Nyongesa & another v Communications Authority of Kenya & 2 others*, judicial review was defined as 'the means through which the courts supervise the actions or decisions of administrative bodies or tribunals' . Scholar PLO Lumumba defines judicial review as the power by which judges analyse public law functions and through which they intervene as a matter of discretion to quash or prevent unlawful, unreasonable or unfair decisions .

### 2. Prof. Paul Chepkwony – Kericho County

On May 14, 2014, Governor Chepkwony was the second governor to be impeached. Prof. Paul Chepkwony was impeached after

Members of the Kericho County Assembly accused him of financial mismanagement. He was also accused of violating the Constitution and the Public-Private Partnership Act, specifically for recruiting personnel and failing to follow due process regarding public and private partnerships.

Thirty-two MCAs approved the motion to oust the governor on accounts of abuse of office, flouting procurement rules, unlawfully procurement of goods and services. However, survived the impeachment after the Senate committee investigating him cleared him of all three charges.

### **3. Governor Ferdinand Waititu – Kiambu County**

Ferdinand Waititu, who is the former Kiambu County Governor was impeached due to gross misconduct while in office. The Members of the County Assembly passed a motion on his impeachment after finding him guilty of mismanaging county resources.

### **4. Governor Mike Sonko – Nairobi City County**

Former Nairobi Governor Mike Mbuvi Sonko was impeached after 88 out of 122 Members of Nairobi County Assembly passed a vote of no confidence on him. Mike Sonko had been accused of four charges among them being violation of the constitution, inability to run the governor's office and mismanagement of county funds.

### **5. Mohammed Abdi – Wajir County**

Wajir County Governor, Mohammed Abdi was impeached after 25 senators voted for the motion, two voted against the motion, and four abstaining from voting. He was impeached after being found guilty of gross violation of the constitution. Abdi stands as the latest governor to be impeached.

## **Unsuccessful Attempts to Impeach Governors**

### **1. Governor Mwangi Wa Iria**

In October 2015, Murang'a Governor Mwangi Wa Iria became the third casualty of impeachment when 35 MCAs voted to send him home. The MCAs accused him of misusing county cash, failing to manage the county's debt, gross misconduct and abuse of office.

However, after Senate hearings, on November 11, 2015 the Senate ruled that the charges did not meet the constitutional threshold for impeachment and threw out the impeachment motion.

### **2. Governor Nderitu Gachagua – Nyeri County**

The late Nyeri County Governor, Nderitu Gachagua became the fourth county boss to be ousted when MCAs voted in September 2016 to impeach him. He survived the impeachment after senators rejected all the charges brought against him, saying the charges did not meet the threshold for impeachment.

### **3. Governor Granton Samboja – Taita-Taveta County**

The Taita-Taveta Governor, Granton Samboja was impeached on October 9 but senators voted to reject all the allegations of misconduct levelled against him.

### **4. Governor Anne Waiguru – Kirinyaga County**

At the crux of the impeachment trial are charges against Kirinyaga Governor, Anne Waiguru by the County Assembly of Kirinyaga. The Governor was impeached on grounds of gross violation of the Constitution & abuse of office and gross misconduct. Specifically, she was accused of: failing to deliver the annual

state of the County address to the County Assembly; undermining the authority of the County Assembly; violation of the Public Procurement and Asset Disposal Act, 2015 and the Public Finance Management Act, 2012; violation of section 46 of the Public Procurement and Asset Disposal Act; improperly conferring a benefit to a Public Officer; disregard of the recommendation of the County Public Service Board regarding remuneration of the Board of Kirinyaga Investment Development Authority (KIDA) Board members outside the IFMIS and County Government Payroll, and payment of imprests amounting to more than fourteen million to Mr. Francis Muriithi Kariuki; and violation of the right to health of the people of Kirinyaga County.

The Senate, on 16th June, 2020, pursuant to Section 33 (3) (b) of the County Governments Act, 2012 and Standing Order No. 75 (1) (b) (i), by resolution, established a Special Committee comprising 11 of its members to investigate the matter of the proposed removal from office, by impeachment, of the Governor of Kirinyaga County, and to report to the Senate within 10 days of its appointment, on whether it finds the particulars of the allegations to have been substantiated.

The Senate Committee found that all the allegations were unsubstantiated, not proved and therefore did not warrant impeachment .

## CHAPTER TEN

### DEVOLUTION, SUSTAINABLE DEVELOPMENT GOALS AND REGIONAL ECONOMIC BLOCS

Kenya, being a member of the United Nations participated in the Sustainable Development Goals (SDGs) processes at national, regional and global levels including during the adoption of the SDGs agenda. The 2030 Agenda for Sustainable Development encourages member states like Kenya to “conduct regular and inclusive reviews of progress at the national and local levels, which are country-led and country-driven” . The Ministry of Devolution and Planning is responsible for the overall management and coordination of the implementation, monitoring and reporting of SDGs process in Kenya.

The Council of Governors has been facilitating the localisation of the global agenda on SDGs. The CoG is composed of the Governors of the 47 Counties. It promotes a forum for consultation, leadership, and a collective voice on policy and governance issues.

The Council of Governors established the SDGs unit to support County Governments in mainstreaming SDGs in their strategies, plans, projects and programmes. The Unit also supports County Governments to develop an institutional framework for the implementation of SDGs.

Further, the Unit is working with County Governments to develop Sustainable Development Goals’ indicator handbook on tracking and reporting on the progress and process of SDGs implementation. The Unit has facilitated the coordination of SDGs between the

National Government and the 47 County Governments .

The SDGs provide clear guidelines and targets for all countries to end all forms of poverty, fight inequalities and tackle climate change while ensuring no one is left behind. Mainstreaming SDGs at the sub-national level is done through the 5-year CIDPs, which domesticates the National Government MTPs at the sub-national level. The CIDPs form the basis for planning and budgeting for the period 2018-2022. The plans ensure that the SDGs are localized and mainstreamed into the development processes at the sub-national levels. The creation of County SDGs Coordination Units across all the 47 Counties is instrumental in facilitating the mainstreaming of SDGs in the CIDPs.

Kenya’s devolved system of governance provides an easy platform and framework for mainstreaming and localization of SDGs through development planning by County Governments through CIDPs and budgeting processes. Once SDGs are mainstreamed in these planning and budgeting processes, especially through the CIDPs, action plans for tracking, monitoring and accelerating implementation, through the involvement of relevant stakeholders are also developed. Five (5) Counties (Kwale, Busia, Kisumu, Marsabit and Taita-Taveta) developed Local Voluntary Reports (VLRs) on SDGs implementation . They were shared during the High-Level Political Forum (HLPF) held in New York in July 2019. VLR is intended to demonstrate County Governments’ con-

tribution towards the realization of the SDGs. This initiative is planned to be replicated in other Counties.

Ensuring that the SDGs are mainstreamed in MTPs and CIDPs ensures implementing projects and programmes geared towards the achievement of the SDGs. This also helps in ensuring allocation of adequate funds to the SDGs, by focusing on the Annual Development Plans, and ensuring that annual county budgets factor in those development targets. This is what the 47 County Governments are presently implementing.

The Council of Governors developed the County Performance Management Framework (CPMF) for County Governments. SDGs have been mainstreamed in the CPMF components including in planning, performance contracting, and M&E.

The CPMF seeks to provide strategic alignment to key National and County plans and their implementation to ensure that the entire country is pulling in the same cohesive strategic direction. In the Financial Year 2018/19, the “Big Four” agenda was incorporated into the MTP III and the CIDPs.

County Governments are required to integrate the governor’s manifesto and global sustainable development goals (SDGs) in their second generation CIDPs. The CPMF seeks to eliminate the ‘silo approach’ in the management of public affairs and create harmony in planning and utilization of public resources.

### **Regional Economic Blocs as Enablers of Objects of Devolution**

In the course of these last 10 years since the textual and practical roll-out of devolved governance, there have been conscious and deliberate strides toward the realization of the objects of devolution by individual county governments as single economic units.

Over time, these single units have also established that there are benefits in building united regional blocs for socio-economic benefits. There is evident optimism for more productivity when economic relations and partnerships between proximate counties are enhancing utility of their resources, to boost trade relations and facilitate easy transactions.

The necessity of integration among counties has emerged due to socio-economic realities that cannot be ignored. That is why counties have formed blocs largely due to their historical, political and economic similarities and realities, with a view to create symbiotic relationships. Counties have realised that it is important to overcome divisions that impede the flow of goods, services, capital, people and ideas between people, farmers, traders and investors.

The Constitution, county and inter-governmental laws, private investment opportunities with supportive Vision 2030 Medium Term Plans (MTPs) and sectoral policies form the basis for the anchors for operationalisation of the county regional blocs. The establishment of the county blocs is consistent with the spirit of Article 189 (2) of the Constitution which allows for “Government at each level, and different governments at the county level, to co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities” to improve performance and delivery.

The objective of the existing regional economic blocs such as Lake Region Economic Bloc (LREB), the Jumuiya ya Kaunti za Pwani Economic Bloc, and last but not least, the Narok Kajiado Economic Bloc (NAKAEB) is to co-ordinate and unify socio-economic and political interests, in order to secure fair, stable and progressive commercial, cultural and developmental interests, for the residents and traders in Narok and Kajiado Counties. The establishment of regional blocs is an acknowl-

edgement by the counties that investment will play a key role in the realization of Vision 2030, which is the development blueprint which seeks to transform Kenya into an industrialized middle-income country, providing a high-quality life to all its citizens by the year 2030.

Historically, the idea of economic integration and the establishment of regional blocs were more responsive to the aspirations of economies with geographical identities. The Blocs, if properly managed, will unlock regional economic development in productive sectors such as agriculture, tourism, trade and industrialization in the Counties that form them. The Manufacturing sector will also benefit from these blocs as revenue-raising policies will be coordinated within these Blocs hence harmonious revenue-raising policies .

For County Governments to realize growth in social and economic, the principle of cooperation and consultation both horizontally and vertically is inevitable. The counties must liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.

The principle of cooperation and consultation require that counties co-operate in the performance of functions and exercise of powers, which is unfettered in Article 189 of the Constitution of Kenya. This principle of cooperation also implies that cooperation should include other stakeholders, for example, the manufacturing sector .

Counties have formed blocs largely due to their historical, political and economic similarities. The following seven (7) blocs have already been established though mutual understanding between the various counties;

1. Frontier Counties Development Council (FCDC) comprising of seven (7) counties namely; Garissa, Wajir, Mandera, Isiolo, Marsabit,

Tana River and Lamu.

2. Narok-Kajiado Economic Bloc (NAKAEB) Comprising Narok and Kajiado Counties.

3. North Rift Economic Bloc (NOREB) comprising of eight (8) counties namely Uasin Gishu, Trans-Nzoia, Nandi, Elgeyo Marakwet, West Pokot, Baringo, Samburu and Turkana.

4. Lake Region Economic Bloc (LREB) comprising of thirteen (14) counties namely Migori, Nyamira, Siaya, Vihiga, Bomet, Bungoma, Busia, Homa Bay, Kakamega, Kisii, Kisumu, Nandi, Trans Nzoia and Kericho.

5. Jumuia ya Kaunti za Pwani comprising of six (6) counties namely, Tana River, Taita-Taveta, Lamu, Kilifi, Kwale and Mombasa.

6. South Eastern Kenya Economic Bloc comprising of three (3) counties namely Kitui, Machakos and Makueni.

7. Mt. Kenya and Aberdares Region Economic Bloc Comprising of ten (10) counties namely Nyeri, Nyandarua, Meru, Tharaka Nithi, Embu, Kirinyaga, Murang'a, Laikipia, Nakuru and Kiambu.

County Economic Blocs were established as one of the innovative strategies for delivering the objects of devolution in counties. They were formed to facilitate efficient delivery of some of the functions given under the Fourth Schedule of the Constitution of Kenya 2010, greater inter-county cooperation and consultation. The Blocs also serve as platforms to facilitate joint planning for those programs and projects that would be more efficiently carried out through joint effort .

Sadly, there is no legal framework for the operationalization of the regional economic blocs. In the absence of an over-arching policy and legislative framework for their establishment, the county governments have ad-

opted, with variations, the EU, EAC and Lehigh Valley Economic Development Region models to guide the set up and operationalization of the regional economic blocs . The Inter-Governmental Relations Act (2012) provides the constitutional basis for the establishment of frameworks that facilitate consultation and cooperation among counties. However, specific legislation and policies to guide the establishment and operations of the regional county economic blocs are lacking.

Nonetheless, the overall objective is to design a framework to guide county regional economic blocs to optimise economic potentials while leveraging national, regional and international resources and commitments as it delivers on its obligations. This is expected to be done within the devolution and intra-government engagement and cooperation mechanisms .

It is essential to re-orient the territorial economic policy to enhance local competitiveness and attract new investments. To exploit fully locational comparative advantages and generate robust growth in local employment and income; several changes in the policy, legal and institutional arrangements are proposed.

These include a review of the national and county legal and policy instruments. This anchors the county economic blocs and the harmonization of the business facilitation mechanisms . It also allows benchmarking of international best practices to open up meaningful access to the national, regional and international markets for both exports and sourcing of investors. This can be achieved through institutionalizing the participation of the county governments and county blocs in the national frameworks linking into the regional and international frameworks .

## CHAPTER ELEVEN

### MEDIA COVERAGE AND ITS IMPLICATION ON DEVOLUTION

#### Media and Devolution in Kenya

Access to information is core to transparency and accountability in government, both at national and sub-national levels such as county levels. On the role of the media in enabling devolved governance, this study examined and analysed soft news (features), TV programmes, opinion pieces, editorial pieces, and supplements related to the devolution theme.

Media's informational role is majorly achieved in the news stories (hard news). This is because the news stories are brief to the point of what has happened and not as detailed as feature stories or opinion pieces (BBC News, 2018). It is through information flow that public oversight is facilitated – thus improving good governance.

The Constitution of Kenya makes comprehensive provisions for the media freedom, and through it, together with enabling legislation, provides for the nexus between media, governance and development. The three sources of press law in Kenya are: the Constitution of Kenya; the Statutory Law; and the Common Law.

Media plays crucial roles as enablers of governance. Media shapes public opinion; communicates and informs the public of various plans of government such as plans for public participation forums; informs government officials of what is happening in various spaces.

The mass media, especially the newspaper has become the most effective tool to distribute information to the public. Studies show that 69.77% of urban residents, and Nairobi City dwellers for example, rely on newspapers and TV for educational purposes on the functions and development issues across county governments.

Communication, through whichever media, is key in promoting interactions among people and therefore, if well established in the devolved governments in Kenya would not only improve the physical development, but also social capital among the local residents (Ajayi et al, 2020).

The Media is expected to play a key role in the manner in which devolution is implemented by:

- a) keeping citizens informed about its implementation and activities;
- b) providing the requisite information to enable their participation; and
- c) reporting on the successes and best practices emanating from different counties.

#### **Article 34 of the Constitution of Kenya provides for freedom of the media;**

- 1) Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33 (2).

2) The State shall not;

a) exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or

b) penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.

3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that;

a) are necessary to regulate the airwaves and other forms of signal distribution; and

b) are independent of control by government, political interests or commercial interests.

4) All State-owned media shall;

a) be free to determine independently the editorial content of their broadcasts or other communications;

b) be impartial; and

c) afford fair opportunity for the presentation of divergent views and dissenting opinions.

Media provides information to a larger group of the society to know what is happening, to participate in decision-making processes such as discussion of parliamentary Bills or public participation in budget making processes or for discussions concerning development projects such as creation or expansion of roads, and, in the process, facilitate development.

The passing of the Kenya Information and Communications (Amendment) Act, 2013 and the Media Council Act, 2013 in December 2013 ushers in a new legal and regulatory

framework in media, information and communication environment in Kenya.

Under the enabling statutes, journalists or the media should ensure that the freedom and independence of media is exercised in a manner that respects the rights and reputations of others. Further, The Media Council Act, 2013 under Section 27 establishes a Complaints Commission independent from the Council to enforce media standards set the by the Council, and whose mandate is to arbitrate in disputes between;

- a. Public and the Media.
- b. Government and media.
- c. Within the media (Intra-media).

The County Government Act No. 17 of 2012 necessitates the county governments to use any form of mass media they are predisposed to create awareness on devolution and governance.

Lots of happenings in county governments, including development reports, public participation exercises, cases of misappropriation of funds, excerpts or Auditor General's reports, impeachment motions, and even impeachment proceedings of governors have been brought to the public attention by media.

For instance, there are occasions when audit queries have been raised by the Auditor General concerning county governments. Almost all the counties have had the concerns raised but depended on the opinion given by the Auditor General. The case for Nairobi City County Executive got a Disclaimer of Opinion for the year ended June 30, 2018 while the Nairobi City County Assembly got an adverse opinion . For the case of Kakamega County, the County Executive and County Assembly both had a Qualified Opinion .

What is required especially for the Nairobi City County, is the need to overhaul the staff in the finance department and ensure strict compliance with the public finance management legislations and regulatory frameworks. In addition, there is need for activation of critical institutions such as EACC to investigate further some of the concerns raised by Auditor General.

The Kakamega County is doing well but needs to aspire to have unqualified opinion to give room for stricter compliance to the legislations and regulations and enhanced capacity of the finance department staff. There are still many good transformative stories of change that are not being well captured by the media.

Through the media, the gains of devolution continue to be revealed, in a clear indication that its impact has the potential to truly transform and develop communities especially those historically marginalized. Selected media coverage on the gains of devolution include;

a) A first caesarean section delivery at a hospital in remote Turkana where Maternal Mortality was high due to lack of access to efficient health provision.

b) Caesarean Section conducted in Mandera County.

c) Between 2013 and 2016, some 379km of road have been tarmacked, 35,934km 'murammed', 19,148km of new road built and 9,572km rehabilitated.

d) By rehabilitating and building dams, water pans and boreholes, counties have put more than 70,000 hectares (172,973 acres) under irrigation, apart from subsidizing mechanized means of farming. (The Standard Newspaper 12th April 2017).

#### **More that is expected from the media;**

(i) Specialised as opposed to sensational reporting. For instance, media reporting of the Auditor General's report should be professionally done to highlight issues, and not alarmist sensational reporting.

(ii) Since devolution is a statutory delegation of powers, the media must be on the forefront to ensure that there is transparency and that power, resources and representation at grass-root level is adhered to.

(iii) Media should increase and have in-depth coverage of county governments and County Assemblies' affairs in order to keep citizens updated on developing agendas and news.

(iv) Media must remain vigilant by monitoring implementation of devolution projects and development expenditures.

(v) County governments should consider media as unavoidable partners in development planning and communication.

## CHAPTER TWELVE

### CHALLENGES OF DEVOLUTION FACED BY COUNTY GOVERNMENTS

Since the promulgation of the 2010 Constitution, the county governments have experienced innumerable challenges that have ultimately inhibited the attainment of the objectives of devolution. Such challenges include:

#### 1. The rough transitional process

The poor transition process to devolution was primarily caused by the lack of training or capacity building of the new decision-making actors at the county level who found themselves burdened with uncharted roles and responsibilities.

The Council of Governors also blamed the state of derailing the transition process to devolution by failing to prioritize the agenda of devolution and the weak relations between the two levels of government. This poor transition process greatly affected the delivery of services at the county levels.

#### 2. Corruption

One of the objectives of devolution was to promote the accountable exercise of power which would ultimately fix the endemic corruption that, for a long time, had been a salient feature of central government. This was however never realized as, regrettably, decentralization also brought about the devolution of corruption to the very basic county levels. Corruption was classified as the biggest threat to devolution since it eats into funds that would have been utilized to greatly

improve the counties and avail services at the very basic levels. County leaders have since been charged to watch against any form of corruption at the county levels.

#### 3. Inherited debts

County Governments have grappled with the challenge of inheriting debts amounting to billions that were incurred by the local authorities in operation before the county governments came into play. For instance, the Nairobi City County government was especially burdened with repaying loans that were incurred in developing, not just the Nairobi region, but the entire country. The debts have been estimated to take years to clear by which time the county governments would have otherwise made such exceptional steps in improving the services offered in the county.

#### 4. Inadequate and delay in disbursement of funds

This is one of the few challenges that is experienced across the board by all the 47 counties. The shortage of funds in counties has primarily been caused by insufficient allocation of money from the national government. Additionally, the allocation of funds is more often delayed and irregular which greatly cripples the ability of the county governments to run and provide essential services.

The same way the National Treasury is working with the national government

ministries and parastatals, is the same way it should be dealing with the county governments. The National Treasury should be realising funds to counties on quarterly basis rather than on monthly to facilitate proper internal planning by county governments, and to avoid unnecessary monthly delays, which affect implementation of programmes and projects .

Shortage of funds has also been caused by the prioritization of non-core activities by the decision makers at the county levels in contravention of the Public Finance Management Act.

Counties too are not generating the various tax collection projects they have set themselves. This has grounded the various projects that are to be carried out in the various counties.

## **5. Duplication of roles and a bloated workforce**

This has been caused by a failure by the National Government to fully devolve certain functions which has in turn acted as one of the major impediments of devolution. Pre-primary education is, for example, managed by the County Governments whereas all other levels of education are managed by the National Government. The National Government has not fully organized the various ministries in line with the devolved structure. This has created barriers in implementation of duties and accountability issues, while consequently causing conflicts between the National and County Governments in the performance of roles since both governments employ workers who end up performing similar roles. Such overlaps are solely responsible for the inflated wage bill. There is a thin line between some of the offices at the national level. This poses a challenge in maintaining checks and balances of the County Executive by the County Assembly.

The Senate has the oversight role of funds that come from the national government and the County Assembly has the general oversight role. There is no clear indication of the use of funds that have come from the national government and those that have been generated by the county government. There is a thin line as it seems the County Assembly roles have been usurped by the Senate.

## **6. Unnecessary interference by the National Government**

In the case of International Legal Consultancy Group & another v Ministry of Health, the National Government procured medical equipment for use in county health facilities. A conflict arose when the National Government demanded that the County Governments ought to pay for the equipment which had been procured at very exorbitant prices.

This is a clear illustration of the National Government meddling in the County Governments' affairs and further illustrates a situation where the county governments do not act independently, as they were designed to, but rather as puppets of the National Government.

## **7. Lack of public participation**

The public has not been involved fully in public participation at the counties. Makueni County for instance, was almost dissolved. The public was not involved in the budgetary allocation process. The county assembly passed unconstitutional bills.

The MCAs had passed the Makueni County wards development funds that allowed the leader of the majority to be the determinant of the amount that is going to be awarded to each ward. The county majority leader acted ultra vires. The County Assembly is a watchdog. The majority leader cannot then play the role

of the County Executive Committee member of finance.

The court in some instances has been forced to nullify some of these laws due to unconstitutionality and inconsistency in the processes. The Kiambu County Finance Act was nullified as a result of lack of public participation.

### **8. Procurement irregularities**

Bribery, favouritism, procurement irregularities, bid rigging, embezzlement of public funds, shoddy implementations of projects, abuse of office, conflict of interest, misuse of public resources, delay in service delivery and discrimination are the most prevalent forms of corruptions in the counties .

### **9. Gaps in law and absence of relevant policies**

Currently the county government of Nairobi is led by a governor without a deputy following the resignation of the deputy governor. The law is not clear on what should happen in such situation thus becoming a challenge.

### **10. Low revenue collection**

Counties are increasingly becoming reliant on the state for failing to meet local revenue targets, thus continuously putting a strain on the treasury to provide development top-up funds. According to the Fourth Schedule of the Constitution, counties get their revenue from market and trade licensing, county parks, beaches and public cemeteries. They also control licensing of domestic animals, ferries, tourism and casinos. County Governments should therefore develop and implement strategies aimed at enhancing local revenue collection.

### **11. Delayed disbursement of funds by the National Treasury**

The Council of Governors has continually lamented the delayed irregular or delayed disbursement of devolved funds from the National Exchequer.

For instance, in a press statement released on 8th September, 2020, H.E. Wycliffe Ambetsa Oparanya, Chairman, Council of Governors, as he then was, stated that "Firstly, we note that devolution is under attack. The stifling approach by the National Government is intended to diminish finances of the Counties to undermine devolution. In the recent past, we have indulged the Senate and the National Treasury on available options of unlocking funds to County Governments for the current Financial Year 2020/21.

This has been occasioned by the delay in approval of the County Allocation of Revenue Act, 2020. Despite our efforts to provide solutions to the existing stalemate, our proposals have been disregarded. Further, Parliament and the National Treasury have failed to operationalize the principles laid out in the Supreme Court Advisory Reference No. 3 of 2019. To effectively provide the services, County Governments will require total release of the allocated funds for both development and recurrent expenditure. It is not logical to disburse funds meant to pay salaries together with operations and maintenance and fail to undertake development to citizens."

Other fundamental challenges continue to bedevil county governments since the advent of devolution. The challenges are vast and specific, and a real threat to the full maturity of devolution in Kenya as the desirable form of governance. They include:

- 1) Weak and uncoordinated planning and execution;

- 2) Stalled projects;
- 3) Inadequate financial resources;
- 4) Mis-allocation of the available financial resources;
- 5) Over-indebtedness including bank overdrafts negotiated to off-set wages and salaries;
- 6) Huge pending bills;
- 7) Tribalism, Nepotism and Clannism in the employment and deployment of workers;
- 8) Persistent political wrangling and infighting;
- 9) Inadequate capacity at the county level to effectively and efficiently perform the devolved functions;
- 10) Duplicity of efforts at both the national and county levels;
- 11) Utilization of budgetary allocations on non-core activities in contravention of the Public Finance Management Act.

## CHAPTER THIRTEEN

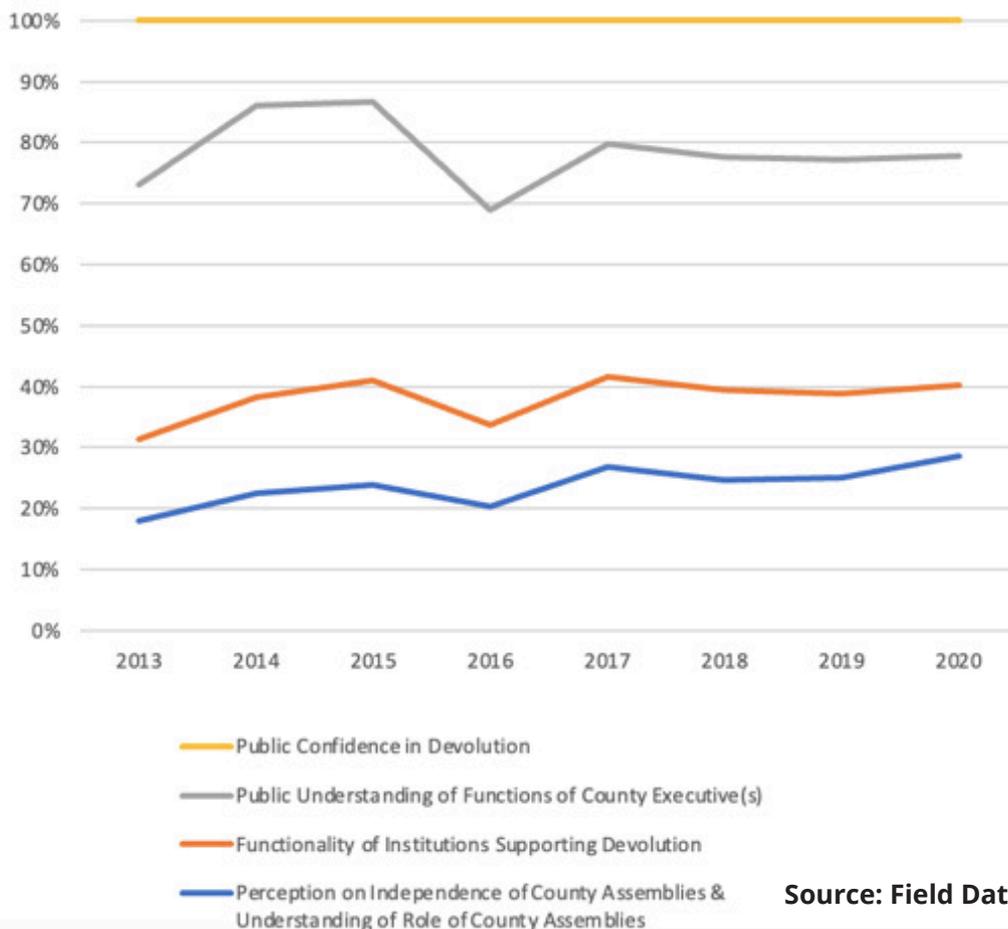
### ANALYSIS OF STUDY FINDINGS

A comprehensive analysis of the data collected, and a comparative review of the secondary and primary data provides divergent answers to important questions about the state of devolution in Kenya, impact so far, stakeholders' perceptions and the status of devolution of policy-making from the national government to subnational levels of government. The findings further provide

competing yet vital hypotheses implied by the interpretations of the responses by Key Informants, which responses have been critically evaluated.

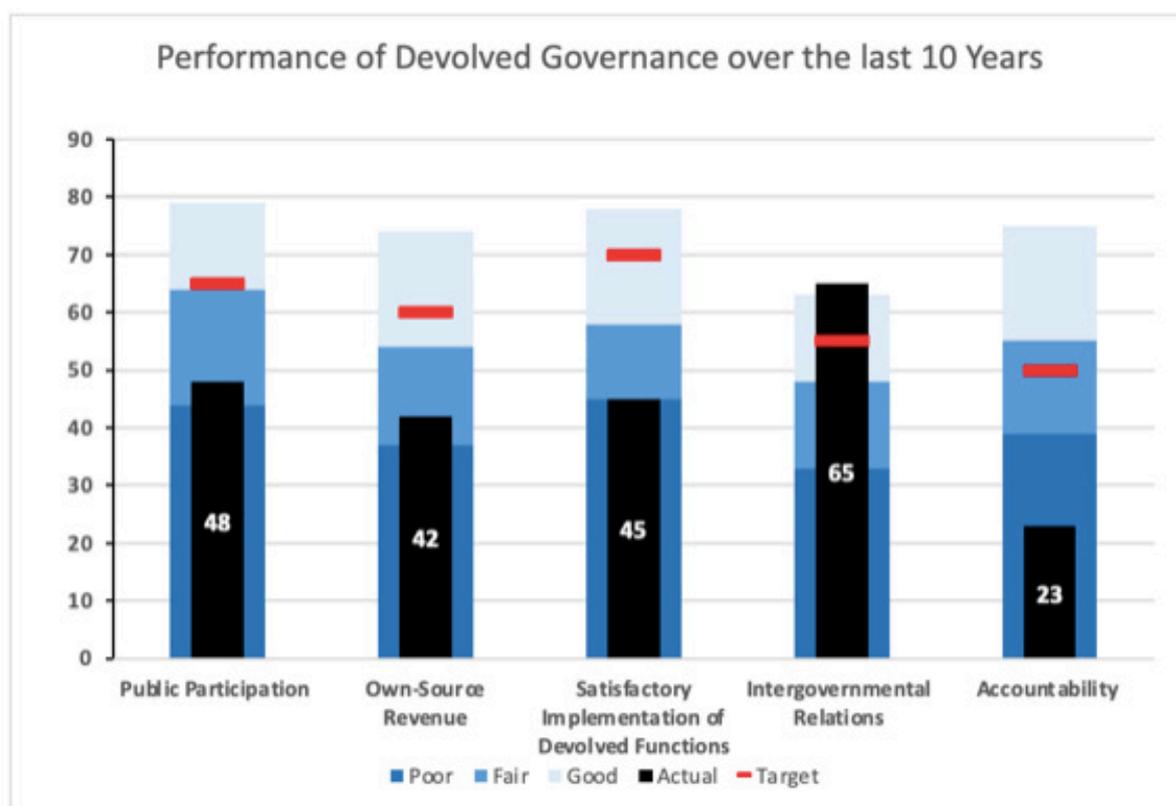
An analysis of the trends also shows that institutions, such as the County Governments, intended to support the devolved governance framework are not appreciated as doing optimal work to make devolution a success.

#### 10 Years of Devolution in Kenya



This signals a crisis of public confidence or growing dissatisfaction with the overall direction of public policy, and service delivery in devolved governance. The Constitution provides clarity on the varying or relative roles of the different levels of government, and on the assignment of expenditure and revenue, as well as the functions of entities and institutions within each level of government.

However, many citizens, especially in rural settings have no proper and right understanding of the different functions of each level of government as provided for in the Fourth Schedule of the Constitution.



Source: Field Data

There seems to be an enduring concern among stakeholders on the state of devolved governance in Kenya. As graphically presented above, public confidence ratings in devolution have not passed the 50% mark, and public perception on accountability of county governments is trailing at 23%.

The successful impeachment of governors, pending debts, and curious queries raised by the Auditor General's reports paint a picture of the state of accountability. Accountability is predicated on governance

under the rule of law. This therefore means that public confidence on devolved governance that is accountable, based on the rule of law is as minimal as 23%.

The success of devolution framework in Kenya will over the years increasingly depend on the smooth functioning of fiscal decentralization framework, which stipulates how the counties spend; how counties raise revenue from their own sources, how county governments settle payments to service providers, and also the extent to which

development projects initiated are completed within the stipulated times. Incessant delays in budget resource flows from the National Treasury to County Governments induces the need for greater localized fund raising through creative Own-Source Revenue scale up by individual county governments or through the Regional Economic Blocs.

Further, several mechanisms through which the citizens participate in service delivery or related development initiatives contributes to their perceptions of inclusivity. Public participation is one of the cardinal principles

of good governance secured and demanded of every public institution by the Constitution of Kenya, 2010.

Additionally, in spite of its elaborate devolution frameworks, subnational units still exhibit some National Government constraints on local decision-making especially in areas of local taxation, including the capping of local tax levels, thus affecting the resources available to support local development initiatives these constraints have not extinguished the desire to development new ways of involving people in the decisions that shape their lives at local levels.



In essence, one of the intents of devolution is to distribute authority over public goods and revenues devolution, and resources, in a manner that demonstrates equality, inclusivity and accountability. Nonetheless, there seems to be sustained public perception that devolution is not achieving exactly what was intended by the framers of the Constitution of Kenya 2010.

Incessant cases of corruption evidenced by the charging in court of some governors and various county officials, and lack of accountability on expenditures for various goods and services make the public a little more than fairly satisfied with service delivery by County Governments.

In this breadth, empirical evidence on the impact of devolution depicts mixed results. One of the perennial fears is that devolution

may lead to the capture of County Governments by the political elites, especially if devolution rules and systems are not well designed, and hence allow the local politicians to use the

local resources to consolidate their hold on to political power through patronage. This rests on the views that most county projects are awarded to cronies of those in power.

## Footprints of Devolved Governance over the last 10 Years

### Strong Institutions

Building strong Institutions remains paramount e.g senate, County assemblies, auditor generals office, civil society organizations, communities, county executive

### clear development planning

county integrated plans & annual development plans are instrumental for service delivery



### Passing of Enabling Legislation

From 2003, wheels of devolution have been enabled by key & progressive legislation on devolved governance.

### Support to government institutions

Technical & financial support to county governments for effective service delivery

### Human resource

Effective service delivery will continually be enabled by the capacity of human resources at all levels i.e County Assembly, County Executive, county public service boards, controller of budgets office, Auditor Generals office, National treasury etc

**Prioritized legislative & policy agenda**

County Governments should prioritize functional laws and policies specific to the needs of each county. e.g for urban planning, agribusiness or local revenue collection

**Transformative Devolved Governance**

Accelerated Beneficial Intergovernmental relations

**Accountability & integrity**

Responsive leadership based on the rule of law

**Documentation & evidence based delivery**

Result driven, verifiable and impactful development service delivery at all times, based on devolved/shared functions

**Access to information**

public participation and inclusive citizen engagement can only be meaningful when there is ease of access to information which is a constitutional guarantee

**Partnerships**

Multi-stakeholders partnerships for transformative and innovative models, support and peer learning

**From time based development programmes**

Timely Disbursement of sharable revenue from treasury

**Balanced expenditure**

public participation and inclusive citizen engagement can only be meaningful when there is ease of access to information which is a constitutional guarantee

**Conclusion**

From detailed and structured discussions, there is great appreciation for devolved governance, and affirmation that it is a great development model for Kenya. While the last ten years have presented various challenges to County Governments, they have also presented immense and unique opportunities for socio-economic growth of the subnational units.

Vital legal, policy and institutional

structures have been established, and are operational. What is necessary is functional political good will by the leadership of the National Government, and the leadership of the County Governments, to ensure adherence to the rule of law, accountable governance, and seamless cooperation.

Support for County Governments is very necessary, especially from the National Government, and the National Treasury ensuring that disbursements of funds do not perpetually delay, because it affects service

delivery. There is great optimism and support for devolution by stakeholders.

On their part, County Governments should have their priorities right, follow the development plans as laid out in respective

County Integrated Development Plans, pay service providers on time, and pay fidelity to the constitutional principles of good governance. The bright future for devolution increasingly depends on the high regard for constitutional edicts.

## CHAPTER FOURTEEN

### POLICY AND LEGAL PROPOSALS TOWARD STRENGTHENING DEVOLUTION IN KENYA

#### 1. Accountability as per Article 174 (a)

The vice of corruption has been reported in several County Governments and it thrives in a setting where there is no sense of accountability on those officers charged with the management of public funds. Sensitization through workshops and conferences can be used to awaken the levels of accountability of county officers. If the measures don't work then individual cases should be prosecuted and serious sanctions imposed to curb the vice.

Impose jail term for county officials who are at pains to account for how they have used the county's funds. We should demand for budgets to be made so that we can see the estimates made by each county. Implement policies that prevent the county officials from over spending. In matters procurement, the counties should go for the cheaper quotations to save on money.

#### 2. Awareness creation hence realizing provisions of Article 174 (c)

The general members of the society especially in rural areas need to be sensitized that the effect of devolution can only be felt directly over a period of time within which any voted-in County Government should be able to set-house and deliver on its manifesto according to the expectations of its electorate. These calls for patience and support from the society rather can complaints and a nagging attitude.

Civic Education – people at grass roots levels as well as those in urban areas should be offered instance, public participation is something that has been expressly provided for in the Constitution of Kenya 2010. It basically means participation of the citizens in making important decisions on matters that affect them. However, this principle cannot be successful if those participating in such matters know nothing to do with devolved governance and can be easily manipulated. The County Governments should allocate funds for such a useful project (civic education) rather than use the funds in ghost projects.

#### 3. Public participation be enhanced as per Article 174 (c)

The counties should make it a priority to always involve its population on any issue before taking a stand. It matters not whether the matter is trivial. The gatherings should also be made in open common ground and not segregated hotels as was the case with Kiambu County . Enhancement of people participation in affairs and determination of their own destiny in county governments will facilitate openness hence curbing corruption.

#### 4. Inclusivity as stipulated in Article 174 (e)

Within a given county are marginalized groups, be it women or children and marginalized communities i.e. minorities within minorities. To ensure that a county sojourns in one boat, the it should incorporate representatives from

all communities in governance.

### **5. To address inadequate budget hence promote social and economic development as per Article 174 (f)**

The County Governments should create more innovative ideas that generate revenue in order to enable them raise funds to boost their annual allocations. The County Assemblies should also enact laws that promote mobilization of local resources and revenue collection to boost its income so as to meet the expectation of the people.

Counties should embrace Public-Private Partnerships, sustainable borrowing as options to assist them implement county development plans. They can for instance borrow from Machakos County where social amenities such as the People's Park charges entry fees.

### **6. Coordination between the two levels of government**

The conflict arising time to time pitting the National and some County Governments should be alleviated through proper collaboration between the two levels of government in order to achieve smooth operational existence. The mutual understanding between the two levels of government goes towards improving service delivery and also attaining the requirements set by the Constitution of Kenya 2010.

Counties should be encouraged to take arbitration to solve their differences. In Central Kenya, Nyandarua and Laikipia are feuding over taxation in the commercial hub of Nyahururu town, they should be encouraged to arbitrate.

### **7. Equitable sharing of resources as per Article 174 (g)**

County governments should work closely with the national government to ensure they complement each other and not compete. Resources from the national government should trickle down to counties irrespective of their political affiliations.

### **8. Efficient checks and balances as incorporated under Article 174 (i)**

It is no secret that governors appoint their sycophants and or cronies into the county executive positions who at times have no pre-requisite qualifications. To ensure these appointees perform, the county Assemblies should genuinely ensure that they work and impeach those who don't produce results. The county executive should also put Members of County Assembly to the task of delivering their parties manifestos.

### **9. Need to define the role of deputy governor and appointment in case of vacancy**

Article 180 of the CoK 2010 and the County Government Act, 2012 should be amended to provide for clear roles for the Deputy Governor.

### **10. Approval of audited accounts**

Article 203 (3) provides that audited accounts be approved by National Assembly, shall, in not more than one year be amended to ensure timely approval of audited accounts.

### **11. Separation of powers**

There is need to enhance separation of powers between county executives and county assemblies by ensuring direct allocation of funds to County Assemblies through National Assemblies.

## 12. Regional Economic Block Policy

County governments should fast track the finalization of the policy and legal framework on regional economic bloc policy.

## 13. Inter-governmental Relations Act.

Amend the IGRA, 2012 to strengthen Inter-governmental structures and provide for resolution of both inter and intra governmental disputes through ADR.

## 14. Develop partnership programmes

Both levels of government should forge a strong partnership with the private sector and institutions of higher learning carry out research to inform strategic planning.

## 15. Abolishment of foreign benchmarking trips

Eliminate wastage of public resources through irrelevant benchmarking trips and promote transparency and prudent utilization of public resources.

## 16. Harmonization of revenue collection

Both levels of government should develop a policy and legal framework for harmonization of revenue collection by both levels.

## 17. Revenue allocation

Increase revenue allocation to county and ensure prompt and consistent disbursement.

## 18. Public Financial Management

Constitutional Commissions and Independent Offices should ensure provisions in PFM Act and other Statutes on prudent financial management procedures are enforced promptly. Implement section 65(1) (e) of the County Government Act 2012 on tribal balance

(30%).

## 19. Health sector

Revert the Human resource function in the health sector to the public service commission (National Government) to ensure uniformity in promotion and remuneration.

20. Need to develop policy and legislative instruments to institutionalize performance management in the counties to boost commitment to effective and efficient public service delivery.

## 21. Regular statistics collection and analysis

Need to develop policy and legislative instruments to boost collection of quality data. Adequate resources, both financial, infrastructure and personnel, should be allocated to regular statistics collection and analysis both at national and county levels. Quality data should be both timely and disaggregated to the lowest level and ensure inclusion of marginalized areas.

## 22. Monitoring and evaluation of development projects

Need to develop policy and legislative instruments to strengthen the capacity of both levels of government in terms of monitoring and evaluation of development projects.

## REFERENCES

### Legal References

#### The Constitution of Kenya 2010

#### Statutes

- a) The Leadership and Integrity Act 2012
- b) County Governments Act, 2012
- c) Appropriation Act 2018
- d) Division of Revenue Act, No. 1 of 2018
- e) Inter-governmental Relations Act 2012
- f) Law of Succession Act Revised Edition 2017

#### List of Cases

1. Amina Rashid Masoud v Governor Lamu County & 3 others 2016 eKLR, Malindi High Court Petition No. 10 of 2016.
2. Borbet South Africa (Pty) Ltd & Others v Nelson Mandela Bay Municipality
3. County Government of Isiolo and 10 others v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government and 3 others 2017.
4. Council of County Governors v Attorney General & 4 others [2015] eKLR.
5. Etim A. Akpan & Others V. Peter John Umah & Others
6. Institute of Social Accountability & another v National Assembly & 4 others [2015] eKLR.
7. International Legal Consultancy Group v Senate & Clerk of the Senate, Constitutional Petition No. 8 of 2014 eKLR.
8. International Legal Consultancy Group & another v Ministry of Health & 9 others [2016] eKLR.
9. Johnson Muthama v Minister for Justice and Constitutional Affairs and Another Petition No. 198 of 2011 [2012] eKLR.
10. Justus Kariuki Mate & another v Martin Nyaga Wambora & another 2017 eKLR.
11. Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR
12. Martin Nyaga Wambora v Speaker County Assembly of Embu & 5 others 2014 eKLR.
13. Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others 2014 eKLR, Nyeri High Court Civil Appeal No. 21 of 2014.
14. Michael Manthi Kisoi v Commission of Inquiry into the Petition to Suspend Makueni County Government & 8 Others 2015 eKLR, Nairobi High Court Constitutional Petition No. 158 of 2015.
15. Murang'a County Public Service Board v Grace N Makori & 178 others [2015] eKLR
16. National Assembly of Kenya & another v Institute for Social Accountability & 6 others [2017] eKLR
17. Okiiya Omtatah Okoiti v County Government of Kiambu [2018] eKLR
18. Phillip Munyw'oki Kilonzo and 8 others v The County Government of Makueni [2014].
19. Republic v County Government of Kiambu Ex parte Robert Gakuru & another [2016] eKLR.
20. Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR
21. Speaker, County Assembly of Embu 2018 eKLR, Supreme Court Reference No. 1 of 2015.
22. Speakers of the 47 County Assemblies v Commission on the Implementation of the Constitution & 2 Others, Supreme Court Ad-

visory Opinion Reference No. 3 of 2014 2016 eKLR.

### 23. The Le Sueur Case.

#### Books & Reports

Ademolekun, L. (2002). *Public Administration in Africa*. Lagos: Spectrum Books.

Andrew Marney Khakula. 'Realizing the Right to Development through Devolution in Kenya'.

Bigambo Javas (2019). *Public Participation as an Enabler of Effective Service Delivery at County Level: The Case of Kajiado County Assembly*. Unpublished LLB Dissertation.

CKRC (2009). *The preliminary Report of the Committee of Experts on Constitutional Review*

Derman B., Ferguson, G. Gonese F., Chikozho C., Mapedza E. and Vombo S., 'Decentralization, Devolution and Development: Reflections on the Water Reform Process in Zimbabwe' Centre for applied Social Sciences, University of Zimbabwe, Draft #3 August 9, 200, Available at <http://pdf.usaid.gov/pdf-docs/PNACL415.pdf>.

Ghai Y.P. and Ghai J.C (2007) *Kenya Constitution: AN Instrument for Change*, Cottrell (2011) Greer S.L. & Jarman H., 'Policy Styles and Devolution' Presented at the "Britain after Blair" conference of the British politics Group, Chicago, 29 August 2007, Available at <http://www.rose-hulman.edu/~casey1/BAB-Greer-Jarmon.pdf>.

Institute of Economic Affairs (2010). *Devolution in Kenya: Prospects Challenges and the Future*. Institute of Economic Affairs Research Paper, Series No.24.

Institute of Economic Affairs. (2011). *A Guide for Understanding Decentralization in Kenya*. Available at [http://www.ncck.org/largedocs/Decentralization%20Manual%20-%20Re-](http://www.ncck.org/largedocs/Decentralization%20Manual%20-%20Revised%20Feb%202011.pdf)

[vised%20 Feb%202011.pdf](http://www.ncck.org/largedocs/Decentralization%20Manual%20-%20Revised%20Feb%202011.pdf).

Kangu M. (2011). 'Operationalization of Devolution in the Constitution of Kenya,' a Presentation at a Workshop held at Strathmore Business School.

Kenya Human Rights Commission (KHRC) and Social and Public Accountability Network (SPAN). (2010). *Harmonization of Decentralization and Development in Kenya: Towards Alignment, Citizen Engagement, and Enhanced Accountability*. Nairobi, Kenya: KHRC and SPAN.

Kunnat. (2009). *The Local Government System in Kenya*. Available at <http://www.kunnat.net/fi/palvelualueet/pohjoinen-etela/kuntatieto/kenia/Documents/Local%20Government%20System%20in%20Kenya.doc>.

Loveridge S. (1999) 'The Origin of Devolution: A Speculative Note' Paper presented at the Southern Regional Science Association Meeting, Richmond, Virginia, April 17, 1999, Available at <http://www/rri.wvu.edu/pdffiles/Devolution.PDF>

Oloo A. (2006) *Devolution and Democratic Governance: Options for Kenya*, IPAR Discussion Paper Series, Discussion Paper No. 077/2006.

PLO Lumumba, M.K Mbondenyei, S.O Ode-ro., *The Constitution of Kenya, Contemporary readings*.

Sihanya, B. (2011). *Constitutional Implementation in Kenya, 2010–2015: Challenges and Prospects*. Friedrich Ebert Stiftung (FES) Kenya Occasional Paper, No. 5. Available at <http://library.fes.de/pdf-files/bueros/kenia/09857.pdf>.

Simiyu, F. N. (2015). *Recasting Kenya's Devolved Framework for Inter-governmental Relations: Lessons from South Africa*.

World Bank Group. n.d. "What, Why, Where." *Decentralization & Subnational Regional Eco-*

nomics. Available at <http://www1.worldbank.org/publicsector/decentralization/what.htm>.

### Government Legal Reports

Manoah Esipisu. (2015) 'Statement by State House in the Matter of the Petition to Suspend Makueni County Government' (6th September 2015) [www.president.go.ke/2015/09/06/statement-by-state-house-spokesperson-in-the-matter-of-the-petition-to-suspend-makueni-county-government/](http://www.president.go.ke/2015/09/06/statement-by-state-house-spokesperson-in-the-matter-of-the-petition-to-suspend-makueni-county-government/).

Petition for Suspension of the Government of Makueni County 29th April 2015.  
IEBC 2017 Register of Voters available at <https://www.iebc.or.ke/iebcreports/index.php/2017-register/> accessed 4th September 2021.

### Online Articles

Admin, 'The County's Early Childhood Development Department Embarks on Capacity Building of ECDE Teachers.' <<http://www.mandera.go.ke/index.php/component/k2/item/508-the-county-s-early-childhood-development-department-embarks-on-capacity-building-of-ecde-teachers>> accessed 2 September 2021.

'Counties to Hire TSC Pre-Unit Teachers' (Education News, 23 March 2017) <<http://educationnews.co.ke/2017/03/23/counties-to-hire-tsc-pre-unit-teachers/>> accessed 5 September 2021.

'Functions of County Government' <<https://www.crakenya.org/functions-of-county-government/>> accessed 5 September 2021.

Gavin Williams, 'Democracy as Idea and Democracy as a Process in Africa' (2003) 88(4) *The Journal of African American History* <https://www.jstor.org/stable/3559085> last accessed 1st September 2021.

Githinji G, 'The Role and Functions of County Governments in Kenya' (26 October 2018) <<https://www.epickenyan.com/role-and-functions-of-county-governments-in-kenya/>> accessed 4 September 2021.

Jack Kropansky, "Element of a Social Contract" <https://medium.com>.

*Journal of Global Affairs and Public Policy* Volume 1, November, 2011

Kabau T, *Constitutional Law of Kenya on Devolution* by John Mutakha Kangu (HeinOnline 2021).

'Marsabit Lake Turkana Cultural Festival 2019 in Kenya - Dates & Map' <<https://rove.me/to/kenya/the-lake-turkana-festival>> accessed 1st September 2021.

NDUNG'U W, 'Counties and TSC Battle over Hiring Nursery School Teachers' (The Standard) <<https://www.standardmedia.co.ke/article/2000201138/counties-and-tsc-battle-over-hiring-nursery-school-teachers>> accessed 4 September 2021.

Mitullah, W. V., & Nguri, J. (2012). *Inter-governmental Relations Act 2012: Reflection and Proposals on Principles, Opportunities and Gaps*. (The University of Nairobi Repository) <[http://erepository.uonbi.ac.ke/bitstream/handle/11295/61285/Mitullah\\_intergovernmental%20relations%20act%202012:reflection%20and%20proposal?sequence=1](http://erepository.uonbi.ac.ke/bitstream/handle/11295/61285/Mitullah_intergovernmental%20relations%20act%202012:reflection%20and%20proposal?sequence=1)> Accessed September 10th 2021.

Stanford Encyclopedia of Philosophy 'Constitutionalism (September, 2021) <http://plato.stanford.edu/entries/constitutionalism/>.

Steytler N, *Concurrent Powers in Federal Systems: Meaning, Making, Managing* (BRILL 2017.)

The Council of Governors, 'Devolution Conference Report 2016' (The Council of Governors, 22 April 2016) <<http://cog.go.ke/reportss/category/59-devolution-conference-report-2016>>.

Thursday, November 7 and 2013 21:51, 'Nairobi Set to Build Two New Fire Stations' (Business Daily) <<https://www.businessdailyafrica.com/news/Nairobi-set-to-build-two-new-fire-stations-/539546-2064586-o29jbqz/index.html>> accessed 1st September 2021.

'TSC Ordered to Register All ECDE Teachers Recruited by Counties' <<https://www.advance-africa.com/tsc-ordered-to-register-all-ecde-teachers-recruited-by-counties.html>> accessed 5th September 2021.

'WAJIR: Habaswein Hospital Conducts First CS Delivery - Daily Nation' <<https://www.nation.co.ke/counties/WAJIR--Habaswein-hospital-conducts-first-CS-delivery/1107872-3297206-sdhiv7z/index.html>> accessed 4th September 2021.

#### Newspaper Articles

Peter Leftie, 'Most Kenyans Back Referendum Campaign' Daily Nation (Nairobi, 15 October 2014).

Roselyne Obala, 'Governors Vow to Push Further with Pesa Mashinani' Standard (Nairobi, 13 February 2015).



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