REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

HCCHRPET OF 2024

KENYA HUMAN RIGHTS COMMISSION……………………………………………PETITIONER

VERSUS

COUNTY GOVERNMENT OF MAKUENI……………………………………1ST RESPONDENT
COUNTY GOVERNMENT OF MACHAKOS…………………………………2ND RESPONDENT
COUNTY GOVERNMENT OF KISII……………………………………………3RD RESPONDENT
COUNTY GOVERNMENT OF NAIROBI………………………………………4TH RESPONDENT
COUNTY GOVERNMENT OF WEST POKOT…………………………………5TH RESPONDENT
COUNTY GOVERNMENT OF NYANDARUA…………………………………6TH RESPONDENT
COUNTY GOVERNMENT OF NYERI……………………………………………7TH RESPONDENT
COUNTY GOVERNMENT OF SAMBURU………………………………………8TH RESPONDENT
COUNTY GOVERNMENT OF TAITA TAVETA…………………………………9TH RESPONDENT
COUNTY GOVERNMENT OF NAROK…………………………………………10TH RESPONDENT
COUNTY GOVERNMENT OF MERU……………………………………………11TH RESPONDENT
COUNTY GOVERNMENT OF KERICHO………………………………………12TH RESPONDENT
COUNTY GOVERNMENT OF BARINGO………………………………………13TH RESPONDENT
COUNTY GOVERNMENT OF LAMU……………………………………………14TH RESPONDENT
COUNTY GOVERNMENT OF ISIOLO…………………………………………15TH RESPONDENT
COUNTY GOVERNMENT OF KAJIADO………………………………………16TH RESPONDENT
COUNTY GOVERNMENT OF UASIN GISHU…………………………………17TH RESPONDENT
COUNTY GOVERNMENT OF BOMET…………………………………………18TH RESPONDENT
COUNTY GOVERNMENT OF LAIKIPIA………………………………………19TH RESPONDENT
COUNTY GOVERNMENT OF MARSABIT……………………………………20TH RESPONDENT
ATTORNEY GENERAL……………………………………………………………21ST RESPONDENT
NATIONAL TREASURY AND PLANNING……………………………………22ND RESPONDENT
COUNCIL OF GOVERNORS…………………………………………………1ST INTERESTED PARTY
CONTROLLER OF BUDGET…………………………………………………2ND INTERESTED PARTY
LAW SOCIETY OF KENYA……………………………………………………3RD INTERESTED PARTY
AFRICA CENTRE FOR OPEN GOVERNANCE………………………………4TH INTERESTED PARTY

PETITION

A. INTRODUCTION

1. Sections 15(2)(a) and 107(2)(b) of the Public Finance Management Act, 2012 directs the national and county governments to allocate or spend at least 30% of their budget on development expenditure in the medium term. Both sections are normative derivatives of Article 225(2) of the Constitution contemplating a law on expenditure control and transparency in government.
2. This petition contests Respondents' habitual violation of sections 15 and 107 and by extension Article 225(2) of the Constitution. The petitioner contends that the skewed budgetary allocation is a retrogressive measure which threatens the rights to development besides the Article 43 rights to food, health, education, water, and social security.

B. DESCRIPTION OF PARTIES

(a) Petitioner

3. KHRC is a non-governmental organization that advocates for civil, political, and socio-economic rights, and ventures in defence against human right violations.

(b) Respondents

4. The 1st to 20th Respondents are county governments as established under Article 176(1) of the Constitution.
5. The 21st Respondent is the Attorney General of the Republic of Kenya and a public and constitutional officer established under Article 156 of the Constitution with well-defined functions, including representing the national government in court or in any legal proceedings to which the national government is a party.
6. The 22nd Respondent is created by Article 225(1) of the Constitution and section 15 of the Public Finance Management Act. The National Treasury of

the Republic of Kenya is tasked, under the Public Finance Management Act, with management of the national government's public finances.

(c) Interested Parties

7. The 1st Interested Party, Council of Governors, is an organisation established under section 19 of the Intergovernmental Relations Act, 2012. The Council of Governors consists of the governors of the 47 counties. Under Section 20 of the Act, the Council of Governors has a mandate of initiating preventive or corrective action on the performance of counties.
8. The, 2nd Interested Party, Controller of Budget is an independent office established by Article 228 to oversee the implementation of the budgets of the national and county governments.
9. LSK, the 3rd Interested Party, is mandated to assist the court, the public, and the government in legal matters.
10. The Law Society of Kenya, the 3rd Interested Party, is founded by section 4 of the Law Society of Kenya (LSK) and mandated to assist the court and the public in legal matters while advancing constitutionalism and the rule of law
11. Africa Center for Open Governance (AFRICOG), the 4th Interested Party, is an independent, non-profit organisation. AFRICOG provides cutting-edge research and monitors governance and public ethics issues in both the public and private sectors. AFRICOG's goal is to address the structural causes of the governance crisis in East Africa.

C. STANDING AND JURISDICTION

12. KHRC brings these proceedings in the public interest under Article 22(2)(c) and 258(2)(c) of the Constitution. The Articles states that a person acting in the public interest may institute court proceedings claiming a violation or infringement of a right or fundamental freedom or of the Constitution.
13. This Court's has jurisdiction to hear and determine this matter under Article 23(1) and 165(3)(b) of the Constitution.

D. LEGAL FOUNDATION

(a) Constitutional Background

14. The Preamble to the Constitution of Kenya 2010 proclaims the aspiration of Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice, and the rule of law.

15. The concept of popular sovereignty expressed in Article 1(1) of the Constitution places all sovereign power in the people of Kenya to be exercised only under the Constitution, including directly by the people

16. Under Article 2, the Constitution is the supreme law, binding all persons and all State organs at both levels of government. No person may claim or exercise State authority unless authorised under the Constitution. As a result, any law that has an unconstitutional purpose or effect is unconstitutional. A law is also unconstitutional for procedural flaws during the legislative process.

17. Article 3 of the Constitution requires the Respondents, like all Kenyans and State organs, to respect, uphold and defend the Constitution.

18. Article 4 establishes Kenya as a sovereign Republic and a multi-party democratic State founded on the national values and principles of governance in Article 10. The national values and governance bind all state organs and everyone who applies or interprets the Constitution or any law or performs any public duty. The national values and principles of governance pertinent to this Petition include: the rule of law, human rights, human dignity, good governance, transparency, and accountability; and **sustainable development**.

19. Article 19(1) explains that the Bill of Rights is central to Kenya's democratic state and is the framework for social, economic, and cultural policies. Further, under Article 19(2), the purpose of recognising and protecting

human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.

20. Article 20(1) states that the Bill of Rights applies to all law and binds all State organs and all persons. Article 20(2) entitles every person to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. Under Article 20(3), in applying a provision of the Bill of Rights, a court must—

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom

21. In interpreting the Bill of Rights, under Article 20(4), the court must promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and the spirit, purport and objects of the Bill of Rights.

22. Under Article 20(5), in applying any right under Article 43, **where the State claims that it does not have the resources to implement the right**, a court, tribunal or other authority shall be guided by the following principles:

a) the State must show **that the resources are unavailable;**

b) in allocating resources, the **State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances**, including the vulnerability of particular groups or individuals; and

c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources,eit would have reached a different conclusion.

23. On implementation of rights and fundamental freedoms, Article 21 states:

(1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote

and fulfil the rights and fundamental freedoms in the Bill of Rights.

(2) The State must take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.

(3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.

24. Article 27 forbids discrimination on any grounds both directly and indirectly while requiring affirmative action to redress historical injustices.

25. Article 28 accords every person the right to inherent dignity and the right to have that dignity respected and protected.

26. Article 43 entitles every person to socio economic rights including—

(a) highest attainable standard of health, which includes the right to health care services, including reproductive health care;

(b) accessible and adequate housing, and to reasonable standards of sanitation;

(c) freedom from hunger, and to have adequate food of acceptable quality;

(d) clean and safe water in adequate quantities;

(e) social security; and

(f) education.

(2) … emergency medical treatment.

(3) … appropriate social security to persons who cannot support themselves and their dependants.

27. Article 175 outlines the objects of the devolution of government to include to recognise the right of communities to manage their own affairs and to further their development; to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;

and to ensure equitable sharing of national and local resources throughout Kenya.

28. Under Article 201(b)(iii) expenditure of public finances must promote the equitable development of the country. Equally, under Article 201(d) public money must be used prudently and responsibly.

29. Article 225(2) of the Constitution, on financial control, contemplates legislation to ensure both expenditure control and transparency in all governments and establish mechanisms to ensure their implementation, Parliament enacted the Public Finance Management Act.

(b) International Law

(i) African Charter on Peoples and Human Rights (Banjul Charter)

30. Under Article 1 of the Charter, States recognise the rights, duties, and freedoms in the Charter, undertaking to take 'legislative or other measures' to give effect to the rights. This obligates States parties, like Kenya, to use all resources, existing, and potential, including natural, human, technological, institutional, and informational resources.

31. Article 22 of the **African Charter on Human and Peoples Rights**, on the right to development, guarantees all peoples the **right to economic, social and cultural development** in the equal enjoyment of the common heritage of humanity. States have the duty, individually, and collectively, to ensure the exercise of the **right to development**.

(ii) General Comment 7: State obligations under the African Charter on Human and Peoples' Rights in the context of private provision of social services

32. Para 37 of this General Comment explains that the **State's obligation** to provide public social services cannot be realised without **sufficient resources being mobilised, allocated and spent in an accountable, effective, efficient, equitable, participatory, transparent and sustainable manner**. Prioritising social services in budgetary policy

contributes not only to realising the rights in the Charter, but also has a strong correlation with **economic growth and sustainable development**. So all structures in government with a role in **devising public budgets** should exercise their functions in a way that realises the rights guaranteed in the Charter.

33. At para 38(c) and (d) General Comment also explains that the obligation in Article 1 of the Charter, requires States to take '**legislative or other measures**' to give effect to economic, social, and cultural rights, to their **maximum available resources**. This requires States to **use all resources,** existing and potential. To do this, States must ensure that **budgets are systematically planned**, **enacted**, **implemented**, and accounted for at the national and subnational levels of the State.

34. On expenditure control, alike the ones here, the General Comment explains at para 40 that states: "should ensure that **spending does not fall below the level required**" and "**must also allocate sufficient funds to deliver social services** during emergencies, including the outbreak of war, natural disasters or public health crises".

35. On that score, under para 41, "**public resources dedicated to social service provision should be managed efficiently**" and "**approved expenditures should be executed in line with the enacted budget**" to realise the States obligation to respect, protect. promote, and fulfil human rights.

(iii) Maputo Protocol

36. Under Article 26(2) of the Maputo Protocol, states parties agree to adopt all necessary measures and provide **budgetary and other resources** for the full and effective implementation of the rights in the Protocol. This obligation requires states to allocate **adequate financial resources for the strengthening of public health services** so that they can provide comprehensive care in family planning/contraception and safe abortion. This includes making specific budget allocations under the health budget at

national and local levels, as well as tracking expenditures on these budget lines. Information on health expenditures should be available to facilitate monitoring, control and accountability. (***African Commission General Comment 1 on art 14(d) & (e) of the Protocol to African Charter on Human and Peoples' Rights on the Rights of Women in Africa***).

(iii) ***African Commission General Comment*** **General Comment No 5 On "State Party Obligations Under the African Charter on the Rights And Welfare of the Child (Article 1) and Systems Strengthening for Child Protection**

37. This General Comments states that legislation, policies, and programmes cannot be implemented without sufficient financial resources being mobilised, allocated, and spent in an accountable, effective, equitable, transparent and sustainable manner. The adoption of national public budgets is essential to the fulfilment of both legislative measures (see above at 6.3) and "other measures".

38. Allocation and spending of resources for implementing African Child's Charter rights remains a matter of serious concern about a great number of State Parties (if not all), and has identified **budgeting, efficient resource use and domestic revenue mobilisation as key aspects** of the implementation obligation envisioned in Article 1(1) of the Charter.

(iv) International Covenant on Civil and Political Rights

39. Under Article 2(2) of the ICCPR, Kenya undertakes to **"take necessary steps** to adopt laws or **other measures** necessary to give effect to the rights in the Covenant".

(v) International Covenant on Economic Social and Cultural Rights

40. Under Article 2(1) of the ICESCR state parties, like Kenya, "undertake to take steps…to the **maximum of its available resources**, with a view to achieving progressively the full realization of the rights" in the Covenant.

(vi) CESCR General Comment No 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)

41. Article 2(1) obligates each State party **to "take the necessary steps" and to the" maximum of its available resources"**. In order for a State party to attribute its **failure to meet at least its minimum core obligations** to a lack of available resources it must demonstrate that **every effort has been made to use all resources** that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

(vii) CESCR, General Comment No. 7 (1997) on the Right to Adequate Housing: Forced Evictions

42. CESCR, General Comment No. 7 (1997) on the Right to Adequate Housing: Forced Evictions, at para 16 explains that where persons "affected (by evictions) are unable to provide for themselves, the State party must take all appropriate measures, to the **maximum of its available resources,** to ensure that **adequate alternative housing, resettlement or access to productive land**, as the case may be, is available".

(viii) Declaration on the Right to Development

43. Article 2 of the **Declaration on Right to Development** provides that:

> 1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development.
> 2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfillment of the human being, and they should therefore **promote and protect an appropriate political, social and economic order for development.**
> 3. States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful

participation in development and in the **fair distribution of the benefits** resulting therefrom.

44. In terms of Article 2(5) and 2(6) of the Constitution, treaties, and conventions that Kenya has ratified and the general rules of international law are part of the laws of Kenya.

(ix) UN Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation No. 24 (1999) on Women and Health

45. UN Committee on the Elimination of Discrimination against Women (CEDAW), general recommendation No. 24 (1999) on women and health, para. 30, says: "States parties should **allocate adequate budgetary,** human and administrative **resources** to ensure that women's health receives a share of the overall health budget comparable with that for men's health, taking into account their different health needs.

(c) Statutory Background

(i) Public Finance Management Act, 2012

46. Section 15 of the PFM directs the National Treasury to enforce fiscal responsibility principles:

> (1) The National Treasury shall manage the national government's public finances in accordance with the Constitution, and the principles of fiscal responsibility set out in subsection (2).
>
> (2) In managing the national government's public finances, the National Treasury shall enforce the following fiscal responsibility principles—
>
> (a) **over the medium term a minimum of thirty percent of the national and county governments budget shall be allocated to the development expenditure**.
>
> (b) the national government's expenditure on wages and benefits for its public officers shall not exceed a percentage of the national government revenue as prescribed by regulations;
>
> (c) over the medium term, the national government's borrowings shall be used only for the purpose of

financing development expenditure and not for recurrent expenditure;

(d) public debt and obligations shall be maintained at a sustainable level as approved by Parliament for the national government and the county assembly for county government;

(e) fiscal risks shall be managed prudently; and

(f) a reasonable degree of predictability with respect to the level of tax rates and tax bases shall be maintained, taking into account any tax reforms that may be made in the future.

47. Section 107 of the Public Finance Management Act, 2012 directing the county governments to allocate at least 30% of their budgets to development expenditure states:

(1) A County Treasury shall manage its public finances in accordance with the principles of fiscal responsibility set out in subsection (2), and shall not exceed the limits stated in the regulations.

(2) In managing the county government's public finances, the County Treasury shall enforce the following fiscal responsibility principles—

(a) the county government's recurrent expenditure shall not exceed the county government's total revenue;

(b) over the medium term a minimum of thirty percent of the county government's budget shall be allocated to the development expenditure;

(c) the country government's expenditure on wages and benefits for its public officers shall not exceed a percentage of the county government's total revenue as prescribed by the County Executive member for finance in regulations and approved by the County Assembly;

(d) over the medium term, the government's borrowings shall be used only for the purpose of financing development expenditure and not for recurrent expenditure;

(e) the county debt shall be maintained at a sustainable level as approved by county assembly;

(f) the fiscal risks shall be managed prudently; and

(g) a reasonable degree of predictability with respect to the level of tax rates and tax bases shall be maintained, taking into account any tax reforms that may be made in the future.

(d) Statutory Instruments

(i) Public Finance Management (County Government) Regulations, 2015

48. Regulation 25(1)(g) of the County Government Regulations establishes a fiscal strategy for county governments and echoes the provisions of the Public Finance Management Act by stating that the county government actual expenditure on development shall be at least thirty percent in conformity with the requirement under section 107(2)(a) of the Act.

F. FACTS OF THE CASE

49. Acting under Article 228(6) of the Constitution, the Controller of Budget recently reported that the **national government only allocated 17%** of the revised gross budget to development expenditure in the first six months of the Financial Year (FY) 2023/24.

50. Likewise, the 21 county governments sued in this petition spent less than 10% of their budget on development expenditure. Kisii County spent 2.9%, Nairobi County spent 3.3%, Machakos County spent 3.5%, West Pokot spent 8.7%, Nyandarua spent 7.0%, Nyeri spent 6.4%, Samburu spent 5.2%, Taita Taveta 4.4%, **Makueni 7.1%**, Meru 9.8%, Kericho 7.6%, Baringo 5.8%, Lamu 7.5%, Isiolo 9.7%, Kajiado 8.7%, Narok 52.4%, Bomet 27.1%, Uasin Gishu 27%, Laikipia 22.5% and Marsabit 21.7%

A growing trend

51. In the same period, from 1 July 2023 to 31 December 2023, some county governments spent much less than the required 30% of the budgetary allocation on development.

52. Comparatively, in the 2022/23 financial year, 16 counties failed to adhere to the 30% allocation requirement for development expenditure.

53. In the previous four fiscal years (FY 2018/19 – FY 2021/22), only eight counties failed to meet the threshold of not less than 30 percent allocation for development expenditure. In the 2021/22 financial year, two counties, Kiambu (27.82%) and Nairobi (26.08%), disregarded the fiscal responsibility of allocating no less than 30 percent of their budgets to development.

54. And in the 2020/21 financial year, only Nairobi (22.38%) was non-compliant.

55. In 2019/20 financial year, four counties, including Kirinyaga (29.94%), Nyamira (27.94%), Meru (29.76%), and Nairobi (21.86%), were below the 30% threshold.

56. Again, in 2018/19 financial year, only Nairobi (22.40%) did not allocate at least 30 percent of its budget to development.

57. KHRC is concerned by the deteriorating trend of the national and county governments failing to allocate 30% of their budget to development expenditure over the medium term.

G. CONSTITUTIONAL VIOLATIONS

58. First, the skewed allocations flout the rule of law in Article 10 of the Constitution by violating section 107(2)(b) of the PFM and Regulation 15(2)(a) requiring the national and county governments to allocate at least 30% of their budgets for development expenditure. By extension, the skewed allocations and expenditure violate Article 225(2) of the Constitution contemplating legislation ensuring that both expenditure control and transparency in all governments and mechanisms for implementation. Failure to allocate 30% of the budget to development violates Article 201 (b) and (d) demanding that expenditure of public finances must promote the equitable development of the country and the prudent and responsible use of public money.

59. Second, the skewed budgetary allocations violate Kenya's obligation under the **UN Declaration on the Right to Development** and Article 22 of the

Banjul Charter guaranteeing all peoples the **right to economic, social, and cultural development.** The omission further violates Kenya's duty to ensure the exercise of the **right to development** under Article 22 of the Banjul Charter. The omission also violates Kenya's obligation under Article 2(3) of the **UN Declaration on the Right to Development** to formulate national development policies that equitably improve 'the well-being of the entire population and of all individuals'. And further to create 'national and international conditions favourable to the **realisation of the right to development**'.

60. Although the right to development is not expressly contained in the Bill of Rights, Article 19(3)(b) states that the Bill of Rights includes other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, unless inconsistent with the Constitution.

61. The failure to allocate or spend 30% of budgets on development violates the objects of devolution under Article 175 to recognise the right of communities to manage their own affairs and to further their development besides promoting social and economic development and the provision of proximate, easily accessible services throughout Kenya and equitable sharing of national and local resources throughout Kenya.

62. Third, the skewed allocations violate the State's positive obligation under Article 21(1) of the Constitution, Article 1 of the Banjul Charter, Article 2 of the ICCPR, and Article 2 of the ICESCR to *respect*, *observe, protect*, *fulfil*, and *promote* the rights and fundamental freedoms in the Bill of Rights.

63. The skewed allocations further violate the state's obligation under Article 21(1) to take legislative, policy, and **other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43:** food, health, education, water, social security, and housing. By these skewed allocations the Respondents also violate their

obligations to **"take the necessary steps"** or to allocate **"maximum of its available resources"** to realise the Bill of Rights.

64. Fourth spending less than 30% of the budget on development expenditure violates the Respondents' obligations to comply with their human rights obligations. Even when allocations show no discriminatory intent, under expenditure may, whether deliberately or not, be discriminatory in impact despite Article 27. For example, allocations may be underspent while underserved areas need additional investment and could benefit a great deal from the funding that is left over. Last, under expenditure funds allocated for socio economic rights should be fully spent. A failure to do so amounts to a failure to comply with the States's obligation to use the most available resources.

H. RELIEFS

65. Invoking Article 23, therefore, KHRC seeks the following or other appropriate reliefs:

a) A declaration be issued that the failure by national and county governments to allocate or spend at least 30% of their budgets on development expenditure over the medium term is unconstitutional and unlawful. That the omission infringes the rights of citizens to development and violates the Respondents' obligation to allocate the maximum of available resources to realise the Bill of Rights.

b) A declaration that corruption, inefficiency, and underexpenditure is a failure to "make maximum use of available resources" violating Article 20 and 21 of the Constitution and Kenya's international law obligations.

a) An order compelling the Respondents to allocate and spend at least 30% of their budgets on development expenditure over the medium term under sections 15(2)(a) and 107(2)(b) of the Public Finance Management Act, 2012, in the financial year 2024/25, going forward.

b) A structural interdict directing the Respondents to each file a report before court, within 6 and 12 months, respectively, of the judgment stating the steps they have taken to comply with this court's order in (b) above.

c) There be no costs order considering the public interest in this matter.

Dated at Nairobi on 28 April 2024

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