

NAIROBI CITY COUNTY

Governor's Office
Telephone: 020-344194
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City Hall,
P.O. Box 30075-00100,
Nairobi, Kenya

OFFICE OF THE GOVERNOR

REF: NCC/GOV/VOL.1/OCT.20/004
YOUR REF: SCA/BILLS.2020/005

Thursday, October 15, 2020

Hon. Benson Mutura,
Speaker of the Nairobi City County Assembly
City Hall, Assembly Wing
Nairobi.

15 OCT 2020

Dear *Mr Speaker*,

RE: THE NAIROBI CITY COUNTY APPROPRIATION BILL, 2020

I, H.E Gideon Mike Mbuvi Sonko, Governor of the Nairobi City County, pursuant to the provisions of Section 24 (2)(b) of the County Governments Act (No. 17 of 2017), do hereby **REFUSE TO ASSENT** to the Nairobi City County Appropriation Bill, 2020, for the reasons contained in the attached Memorandum, and accordingly, I do hereby REFER the Bill back to the Nairobi City County Assembly for consideration in accordance with section 24 (3)(4) & (5) of the of the County Governments Act.


H.E. Mike Mbuvi Sonko, EGH
GOVERNOR.

Copies to:

1. The Clerk,
Nairobi City County Assembly
2. The Controller of Budget,
Office of the Controller of Budget,
Bima House, 12th Floor Harambee Avenue, Nairobi



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THE CONSTITUTION OF KENYA

REFUSAL TO ASSENT TO THE NAIROBI CITY COUNTY

APPROPRIATION BILL, 2020

MEMORANDUM

By His Excellency the Honorable Mike Mbuvi Sonko, Governor of Nairobi City County.

Submitted to the Honourable Speaker of the Nairobi City County Assembly.

WHEREAS a Bill entitled "*A Bill for An Act of Nairobi City County Assembly to authorize the issue of a sum of money out of the County Revenue Fund and its application towards the service of the year ending on 30th June 2021 and to appropriate that sum and a sum voted on account by the Nairobi City County Assembly for certain public services and purposes,*" the short title of which is "*Nairobi City County Appropriation Bill, 2020*" was passed by the Nairobi City County Assembly on Thursday, October 8th, 2020;

AND WHEREAS the Nairobi City County Appropriation Bill, 2020, was presented to me for assent, in accordance with the provisions of Section 24 of the County Government Act, 2012, on the 9th October, 2020;

NOW THEREFORE, in exercise of the powers conferred on me by Section 24 (2) (b) of the County Government Act, 2012, *I refuse to assent to the Nairobi City County Appropriation Bill, 2020,* for the reasons set out hereunder:

1. DEFICIT BUDGET:

The Public Finance Management Act 2012 outlines the budget process that the County Budget process including preparation and submission of the County Fiscal Strategy Paper which informs the budget and the end result of every budget process is the Appropriation Act and Section 128 gives the County Executive Committee Member for Finance the mandate to manage the county budget process. Further, Section 129 of the Public Finance Management Act 2012 requires the County Executive member of finance to submit the budget to the Assembly on or before 30th April of each year; and while doing so the CECM-Finance should ensure that the submitted budget is in accordance with the resolutions adopted by the County Assembly on the County Fiscal Strategy Paper.

In view of the above, the CECM-Finance submitted the County Fiscal Strategy Paper 2020/2021 to the County Assembly on 28th February 2020 for consideration.

Further, and in accordance with Section 129 of the Public Finance Management Act 2012, the CECM-finance proceeded to submit the budget estimates to the County Assembly in accordance with the County Fiscal Strategy Paper 2020/2021 with a total budget of Kshs 31,433,645,196 on 30th April 2020 for consideration. The submitted budget did not make provision for any expected unutilized cash balances at the end of the financial year 2019/2020.

The County Assembly adopted the submitted budget estimates with amendments on 30th June 2020. The proposed amendments were re-allocations and did not result to an increase of the budget from the submitted budget of Kshs 31,433,645,196.

Finally, and in accordance with Section 129(7) of the Public Finance Management Act 2012, the CECM-finance prepared the Nairobi City Appropriations Bill 2020 taking into account the reconciled cash balances in the County Revenue Fund of Kshs 290,442,563.

The proposed amendments by the assembly and in order to ensure responsiveness of the bill to the realities of the day, the approved budget was realigned and the committee taken through the realigned budget for consideration in passing the bill. The total budget as per the submitted Bill amounted to Kshs 31,631,632,618.

I have reviewed the Bill as presented to me for assent and the total budget and the total projected revenues for the financial year 2020/2021 Kshs 31,631,632,618 against the total expenditure of Kshs 37,454,976,280, leaving shortfall of Kshs 5,823,343,662, which is against the Public Finance Management regulations no 31(c') which provides that the total budgeted revenue and budgeted expenditure must be balanced.

2. ADVISORY BY THE CONTROLLER OF BUDGET:

Article 201 of the Constitution of Kenya 2010 espouses that Public Finance Management, and by extension Budget Making Processes shall be guided by realities and not wishful thinking.

It is against this backdrop that the Controller of Budget issued an advisory on the 27th July, 2020 (copy attached herein), requiring the Nairobi City County Government Executive to revise downwards Own Source Revenue Projections based on the historical trend of the revenue streams.

In the Financial Year 2017/2018, our actual own source revenue capped at Kshs 10.11 billion. In the FY 2018/2019, our own source revenue rose marginally to Kshs 10.25 billion which was 66.1% of the set target (*Page 196 of the County Governments Annual Budget Implementation Report for FY 2018/19 by the OCOB*). In the just ended Financial Year 2019/2020, our own source revenue dipped to Kshs 8.41 billion, attributable to failure by the Kenya Revenue Authority (KRA) to meet the targets they set for themselves since March 2020, where they collected Kshs 4,722,465,644 against Kshs 5,197,835,397 over the same period last year.

It is against these realities that the Nairobi City County Government Executive heeded the advise of the Controller of Budget, and revised the budget downwards from Kshs 36,981,390,888 in the FY 2019/2020 to Kshs 31,631,632,618 for the FY 2020/2021.

It is therefore against the basic principles of public finance management for the Nairobi City County Assembly to abrogate unto itself the responsibility of the County Executive in budget preparation, without providing explanations or justifications for the mutilation they subjected the budget proposals to, or how the deficit of Kshs 5,823,343,662 will be financed, while ignoring the advisory of the Controller of Budget.

3. ILLEGAL AMENDMENTS TO THE BUDGETS

Section 131(3) of the Public Finance Management Act 2012 provides that an amendment to the budget may be made by the County Assembly only if it is in accordance with the County Fiscal Strategy Paper, and in making any amendments, any increase in any expenditure in a proposed appropriation is balanced out by a reduction in expenditure in another proposed appropriation. In making fundamental changes in the budget, the Assembly is duty bound under Section 131(2) of the Public Finance Management Act to consult the County Executive Member for Finance.

In addition, Regulation 37(1) of the Public Finance Management Regulations 2015, states that where the Assembly approves any changes in the annual

estimates of budget under Section 131 of the PFMA 2012, any increase or reduction of expenditure of a vote shall not exceed 1% of the votes ceiling.

In view of the above, the County Assembly exceeded the 1% threshold in making adjustments to Various votes and overall increasing the budget by 19.3% Kshs 31,631,632,618 to Kshs 37,704,976,281 against the provisions of the law.

Besides, the Bill passed by and forwarded by the County assembly contravenes Section 128 and 129 of the Public Finance Management Act, in so far as the County Assembly lacked the requisite jurisdiction to entertain the budget presented by Nairobi Metropolitan Services as such powers are vested in the County Executive Committee Member for Finance .

It cannot be justifiable for the assembly to factor in the 4.5 Billion budgeted for in the 2019-2020 financial year but remained unspent as such provisions violates section 136 (1) of the Public Finance Management Act 2012 which provides that "subject to any other legislation, an appropriation that has not been spent at the end of the financial year for which it was appropriated lapses immediately at the end of that financial year"

The budget for the 2020-2021 financial year passed by the County assembly violates article 5.2 and 5.3 of the deed of transfer which provided that "the level of funding for each transferred function shall be determined by the National Government in consultation with the County Government, but in any case, the budgetary allocation shall not be less than the amount last appropriated by the County assembly in the preceding financial year. It is not in dispute that the budgetary allocation allocated to the County Government is less than half of the amount last appropriated by the County Assembly in the preceding financial year on account of none transferred functions.

4. ALLOCATION OF FUNDS TO VOTE 5328-NAIROBI METROPLOITAN SERVICES IN RELATION TO TRANSFERRED FUNCTIONS

The bill presented for assent proposes to allocate all the funds that were appropriated to all the five Votes related to the transferred functions according to the Deed of Transfer by deleting the ENTIRE allocations hitherto appropriated to the five votes and transferring the same to Vote 5328-Nairobi Metropolitan Services . The five Votes are :

- 5315- Health
- 5316- Urban Planning and Lands
- 5317- Public Works ,Transport & Infrastructure
- 5323- Environment , Water, Energy & Natural Resources
- 5324- Urban Renewal & Housing

In doing so I wish state as follows:

- That in deleting the entire allocation to the five Votes, this leaves the Votes with no funds to finance the operations of the County Executive member responsible and the County Chief officers with no funds for operations and whereas the team is expected to coordinate the implementation of the transferred functions to the National Government.
- That in deleting the entire allocations which includes the payment of salaries for all county staff in respect of the transferred functions. The responsibility of payment of salaries remains with the Nairobi County Government for all its staff including those working in the transferred functions.
- That in deleting the entire allocations leaves the Votes with funds to finance the payment of any ongoing projects/pending bills related to the functions.
- That in deleting the entire allocations and introducing Vote 5328: Nairobi Metropolitan Services amounts to **CHANGING** the structure of the Executive without consulting the Executive.
- That Nairobi Metropolitan Services is not a delivery unit within the Nairobi City County Government and therefore does not qualify to find its way in the appropriation as a vote for appropriation of funds.

5. ALLOCATION OF FUNDS TO VOTE 5328-NAIROBI METROPOLITAN SERVICES IN RELATION TO WARD DEVELOPMENT FUND

The Ward Development Fund was established pursuant to the Ward Development Act 2014, and the Act provides for the mechanisms of the identification and implementation of the projects. The projects/programmes/activities are NOT specific to the transferred functions only and therefore the transfer of the entire allocation of the WDF is in contravention of the very Act that created the fund, in so far as ward development applies to all the functions under part 2 of the fourth schedule of the constitution.

6. ALLOCATION OF FUNDS TO VOTE 5328-NAIROBI METROPOLITAN SERVICES IN RELATION TO PUBLIC FINANCE MANAGEMENT

The presented to me also proposes to allocate Kshs 629,183,600 to Vote 5328 Nairobi Metropolitan Services in respect of salaries for revenue staff attached to Kenya Revenue Authority. Revenue function is not among the transferred

functions in accordance with the deed of transfer and therefore as stated earlier in this memorandum the responsibility of payment of salaries remains with the Nairobi City County Government.

7. ALLOCATION OF FUNDS TO VOTE 5328-NAIROBI METROPOLITAN SERVICES IN RELATION TO INSPECTORATE

The bill presented proposes to allocate Kshs 1,633,552,202 to cater for all expenses of the Inspectorate staff working under the Nairobi Metropolitan Services including salaries. While we acknowledge the importance of the enforcement staff to Nairobi Metropolitan Services in the discharge of the functions under them, I wish to state as follows:

- The payment of salaries for the Inspectorate Staff remains the responsibility of the Nairobi City County Government and not NMS.
- That, like any other support functions, the staff to be seconded ought to be negotiated between the NCCG & the Nairobi Metropolitan Services.

7. OTHER AMMENDMENTS NOT JUSTIFIED

The bill presented for assent has proposed to cut down the budgets for the programmes indicated which has the potential of paralyzing the operations of the entire programmes as shown below:

- Under vote 5312 ,Programme 0726005310: Disaster Management Coordination was reduced from Kshs 259,160,863 to Kshs 59,160,863 an amount which is not adequate to pay for the salaries of the fire department projected at Kshs 205million.
- Under vote R5314,Programme 0701005310: Public Financial Management, the allocation was reduced from Kshs 2,127,230,930 to Kshs 1,127,230,930 and this is going to affect the payment of pending bills,General Insurances and commissions for revenue collection.
- Under vote R5321,Programme 0119005310: Urban Agriculture Promotion & Regulation was reduced from 79,131,333 to Kshs 9,131,333 and this going to affect the implementation of the Agricultural Support Development Programme (DONOR FUNDED)

RECOMMENDATIONS:

In view of the above I recommend as follows:

1. That the budget be rationalized to ensure that the budget is balanced to our projected revenues of Kshs 31,631,632,618. Any5324- Urban Renewal & Housing
2. Additional revenues to be factored in a supplementary budget SUBJECT to confirmation by the source.
3. That Vote 5328 : Nairobi Metropolitan Services be deleted in its entirety.
4. That FIVE VOTES related to the transferred functions 5315- Health, 5316- Urban Planning and Lands, 5317- Public Works ,Transport & Infrastructure,5323- Environment ,Water, Energy & Natural Resources,5324- Urban Renewal & Housing be each with two Programmes namely:
 - Programme 1:General Administration & Support Services: This programme will take all the funds not transferrable to the National Government like salaries, operational expenses for the CEC member responsible and CCO and staff serving as link between the implementing agency of the functions, NCCG and County Assembly.
 - Programme 2:Transferred Services : This programe shall take the amounts determined in consultation with NMS as transferable to NMS .
5. That the Inspectorate budget allocated to Nairobi Metropolitan Services be deleted and the funds be allocated under Vote R5312: Programme 0724005310: Security and Safety Management and the amount determined for transfer to appropriated under sub-item 2640499 Other Current Transfers and 2640599 Other Capital Grants and Recurrent and Capital expenditure respectively.
6. That the in rationalizing the budget ,the ITEMS REFEREED IN ITEM NO 7 be restored as earlier proposed.

Dated at Nairobi this 15th of October, 2020.


 H.E MIKE MBUVI SONKO
 GOVERNOR, NAIROBI CITY COUNTY

Ref 001/29/07/2020

OFFICE OF THE CONTROLLER OF BUDGET



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GOVERNOR'S OFFICE
NAIROBI CITY COUNTY

29 JUL 2020

RECEIVED



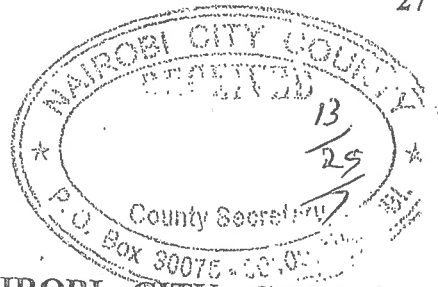
Bima House, 12th Floor
Harambee Avenue
P.O. Box 35616-00100
Nairobi Kenya

Ref: COB/NBI/002/2/3(17)

27th July, 2020

H.E. Gov. Mike M. Sonko, EGH
Nairobi City County Government
NAIROBI

Dear Gov. Sonko,



RE: COMMENTS ON THE NAIROBI CITY COUNTY BUDGET ESTIMATES FOR FY 2020/21

The Office of the Controller of Budget (OCOB) is established under Article 228 of the Constitution of Kenya, 2010 to oversee and report on implementation of the budgets of both the national and county governments to each House of Parliament every four months. Further, Article 228 (5) of the Constitution requires the Controller of Budget not to approve withdrawal from public funds unless satisfied that the withdrawal is authorized by law.

In line with the above, the OCOB has reviewed the FY 2020/21 Budget Estimates which is the basis of the Vote on Account, and other planning documents for conformity with the Public Finance Management Framework. Our review has identified the following areas which should be addressed in order to enable timely approval of funds;

1. The own source revenue target for FY 2020/21 is Kshs.14.65billion compared to Kshs.10.25 billion collected in FY 2018/19, and Kshs.8.41 billion in the FY 2019/20. The revenue streams may have been affected by the slowdown of the economy as a result of the COVID-19, nonetheless the County may not meet own source revenue target based on the historical trend of the revenue streams.

We advise that the target should be revised in line with current trends to avoid a hidden budget deficit or a justification for the projections provided.

2. The Budget Estimates of Kshs.31.43 billion allocates Kshs.25 billion (79.5 per cent) to recurrent expenditure and Kshs.6.43 billion (20.5 per cent) to development expenditure. This is in contravention the provision of Section 107 of the PFM, Act 2012 which requires a minimum allocation of 30 per cent for development activities.

We therefore advise the County to ensure allocation towards development expenditure is in line with the law.

3. Regulation 25 (1) (b) of the Public Finance Management (County Governments) Regulations, 2015 sets a ceiling on County Government expenditure on wages and benefits at 35 per cent of the County's total revenue. A review of the county's projected expenditure on personnel emoluments amounts to Kshs.14.85 billion which translates to 47.2 per cent of the total revenue target and therefore NOT within the 35 per cent ceiling set in law.

We advise the County to ensure compliance with the legal limit on expenditure on personnel emoluments.

Please address the above concerns by 14th August, 2020 to confirm adherence.

Yours

Sincerely,



Dr. Margaret Nyakang'o
CONTROLLER OF BUDGET

CC: The Speaker
Nairobi City County Assembly
NAIROBI

The CEC Finance & Economic Planning
Nairobi City County
NAIROBI

The Clerk
Nairobi City County
NAIROBI

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
(Coram: A. C. Mrima, J.)
PETITION NO. E348 OF 2020

NAIROBI CITY COUNTY GOVERNMENT.....PETITIONER

VERSUS

NAIROBI METROPOLITAN SERVICES.....1ST RESPONDENT
THE HON. THE ATTORNEY GENERAL.....2ND RESPONDENT
MAJOR GENERAL MOHAMMED A. BADI.....3RD RESPONDENT
BRIG. GEN. FREDRICK LEURIA.....4TH RESPONDENT
MAJOR J.V MBITHI.....5TH RESPONDENT
MAJOR A.N NYAKUNDI.....6TH RESPONDENT
MAJOR J.K NJOROGE.....7TH RESPONDENT
LT. COL. J.K BIOMDO.....8TH RESPONDENT
MAJOR A.L MUSOMA.....9TH RESPONDENT
WILLIAM KANGETHE THUKU.....10TH RESPONDENT
THE CS, DEPARTMENT OF NATIONAL
TREASURY & PLANNING.....11TH RESPONDENT
DEPARTMENT OF DEVOLUTION & ASALS.....12TH RESPONDENT
THE NAIROBI CITY COUNTY ASSEMBLY.....13TH RESPONDENT
THE CONTROLLER OF BUDGET.....14TH RESPONDENT

RULING NO. 1

Introduction:

1. This matter mainly focuses on, *inter alia*, the relationship between the Petitioner herein, *Nairobi City County Government*, and the *Nairobi Metropolitan Services*, the 1st Respondent herein. The relationship is anchored on the Deed of Transfer of Functions dated 25th February, 2020 between the Petitioner and the National Government. I will hereinafter refer to the Petitioner as either '**the Petitioner**' or '**the County Government**' and the First Respondent to as either '**the 1st Respondent**' or '**the NMS**'.
2. In the main, the Amended Petition seek judicial intervention on the interpretation of Article 187(2)(b) of the Constitution, the legality of the appointment, deployment and secondment of officers of the Kenya Defence Forces into the NMS, the constitutionality of the



Nairobi City County Appropriation Act, 2020, the constitutionality, further implementation and termination of the Deed of Transfer of Functions dated 25th February, 2020 and orders on return of staff files allegedly carted away by NMS from the Petitioner's custody.

3. Pending determination of the above issues, the Petitioner filed an Amended Notice of Motion dated 6th November, 2020 (hereinafter referred to as '**the application**').
4. The application is vehemently opposed by all the Respondents.

The Application:

5. The application seeks the following orders: -
 1. *This Motion be certified urgent, and be heard ex-parte owing to its demonstrated urgency, and service thereof on the Respondents be dispensed with in the first instance.*
 2. *Pending the inter-partes hearing and determination of the Motion herein, this Honourable Court be pleased to issue a Conservatory Order by way of an injunction, restraining the 1st Respondent, Nairobi Metropolitan Services, by itself, its agents and servants the 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th Respondents herein, or otherwise howsoever from executing further executing, assuming, or further assuming, or discharging any aspect of the 4(Four functions) "transferred" to the National Government from the Nairobi City County Government as contained in Article 3 of the Deed of Transfer of Functions published in the Kenya Gazette Notice No. 1609 dated 25th February 2020, and from demanding any payment, or any sums from any party in furtherance of the 4 Functions contained in the Deed of Transfer Functions set out in the Kenya Gazette Notice No. 1609 dated 25th February 2020, or otherwise howsoever receiving any funds allocated to the Nairobi City County Government under the Division of Revenue Act, 2020, until the dispute arising from, and/or relating to the Deed of Transfer of Functions between the parties as contained in Kenya Gazette Notice No. 1609 dated 25th February 2020, is subjected to, and determined through the dispute resolution procedures set out under Article 11.2 of the said Deed of Transfer of Functions, or by a Judgement of this Honourable Court.*
 3. *Pending the hearing and determination of the Petition herein, this Honourable Court be pleased to issue a Conservatory Order by way of an injunction, restraining the 1st Respondent, Nairobi Metropolitan Services, by itself, its agents and servants the 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th Respondents herein, or otherwise howsoever from executing further executing assuming, or further assuming, or discharging any aspect of the 4 (Four functions) "transferred" to the National Government from the Nairobi*



City County Government as contained in Article 3 of the Deed of Transfer of Functions published in the Kenya Gazette Notice No. 1609 dated 25th February 2020, and from demanding any payment or any sums from any party in furtherance of the 4 Functions contained in the Deed of Transfer Functions set out in the Kenya Gazette Notice No. 1609 dated 25th February, 2020, or otherwise howsoever receiving any funds allocated to the Nairobi City County Government under the Division of Revenue Act, 2020 until the dispute arising from, and/or relating to the Deed of Transfer of Functions between the parties as contained in Kenya Gazette Notice No. 1609 dated 25th February 2020, is subjected to, and determined through the dispute resolution procedures set out under Article 112 of the said Deed of Transfer of Functions, or by a Judgement of this Honourable Court.

4. Pending the **inter-partes** hearing and determination of the Motion herein, this Honourable Court be pleased to issue a Conservatory Order by way of an injunction, restraining the 13th Respondent, Nairobi City County Assembly from allocating any funds to the 1st Respondent, Nairobi Metropolitan Services from such of the funds allocated to the Nairobi City County Government under the Division of Revenue Act, 2020, or generated by the Nairobi City County Government as part of its revenue, or under the ~~Nairobi City County Appropriation Bill, 2020 and/or any subsequent Nairobi City County Appropriation Act~~, until the dispute arising from, and/or relating to the Deed of Transfer of Functions between the parties as contained in Kenya Gazette Notice No. 1609 dated 25th February 2020, and its Addendum, is determined through the dispute resolution procedures set out under Article 11.2 of the said Deed of Transfer of Functions, or as may otherwise be Ordered herein, or by a Judgement of this Honourable Court.
5. Pending the hearing and determination of the Petition herein, this Honourable Court be pleased to issue a Conservatory Order by way of an injunction, restraining the 13th Respondent, Nairobi City County Assembly from allocating any funds to the 1st Respondent, Nairobi Metropolitan Services from such of the funds allocated to the Nairobi City County Government under the Division of Revenue Act, 2020, or generated by the Nairobi City County Government as part of its revenue, or under the ~~Nairobi City County Appropriation Bill, 2020 and/or any subsequent Nairobi City County Appropriation Act~~, until the dispute arising from, and/or relating to the Deed of Transfer of Functions between the parties as contained in Kenya Gazette Notice No. 1609 dated 25th February 2020, and its Addendum is determined through the dispute resolution procedures set out under Article 11.2 of the said Deed of Transfer of Functions, or as may otherwise be Ordered herein, or by a Judgement of this Honourable Court.
6. Pending the inter-partes hearing and determination of the Motion herein, this Honourable Court be pleased to issue a Conservatory Order by way of an injunction, restraining the 11th and 14th Respondent, from disbursing any funds to the 1st Respondent Nairobi Metropolitan Service, (NMS) as contained in the ~~Nairobi City County Appropriation Bill, 2020 and/or any~~



~~subsequent Nairobi City County Appropriation Act, or otherwise howsoever, in purported execution of the Nairobi City County Government Functions.~~

7. Pending the hearing and determination of the Petition herein, this Honourable Court be pleased to issue a Conservatory Order by way of an injunction, restraining the 11th and 14th Respondent, from disbursing any funds to the 1st Respondent Nairobi Metropolitan Service, (NMS) as contained in the ~~Nairobi City County Appropriation Bill, 2020 and/or any subsequent City County Appropriation Act, or otherwise howsoever, in purported execution of the Nairobi City County Government Functions.~~
8. Pending the inter-partes hearing and determination of the Motion herein, this Honourable Court be pleased to issue a Conservatory Order directing the 11th Respondent to release to the Petitioner such of the funds allocated, budgeted for, and set aside to pay hitherto contracted work, and so contractually completed by contractors hitherto lawfully engaged by the Petitioner to execute works and render services under the four Functions set out in paragraph 3 of the "Deed of Transfer of Functions" in Kenya Gazette Notice No. 1609 dated 25th February 2020.
9. Pending the inter-partes hearing and determination of the Petition herein, this Honourable Court be pleased to issue a Conservatory Order directing the 11th Respondent to release to the Petitioner such of the funds allocated, budgeted for, and set aside to pay hitherto contracted work, and so contractually completed by contractors hitherto lawfully engaged by the Petitioner to execute works and render services under the four Functions set out in paragraph 3 of the "Deed of Transfer of Functions" in Kenya Gazette Notice No. 1609 dated 25th February 2020.
10. This Honourable Court be pleased to refer the dispute between the Petitioner and the 2nd and 12th Respondents, implicating the 1st Respondent, for resolution pursuant to the dispute resolution mechanisms set out under Article 11.2 of instrument between the said parties dated 25th February 2020 as contained in Gazette Notice No. 1609 dated 25th February 2020, and its undated Addendum.
11. This Honourable Court be pleased to place in abeyance such of the Questions for the exclusive determination by this Honourable Court under Article 165(4) of the Constitution, raised in the Petition herein pursuant to Section 31(b) as read with Section 33(2) of the Intergovernmental Relations Act, 2012, upon the reference of the dispute between the Petitioner and the 1st and 2nd Respondents for resolution of such issues raised by the Petitioner in its Notice of Declaration of Dispute pursuant to the dispute resolution mechanisms set out under Article 11.2 of the Agreement between the said parties.
12. Leave be granted to the Petitioner (in saving Judicial Time and Costs), to rely on the Deposition tendered in support of this Motion mutatis mutandis for the trial of the Petition herein.

13. *This Honourable Court be pleased to issue a Certificate under Article 165(4) of the Constitution for the determination of the Questions raised in the Petition herein by a 3 Judge Bench, and upon issuance of the same, the Petition be referred to His Lordship the Chief Justice for the constitution of the relevant Bench.*

14. *The costs of this Motion be to the Petitioner in any event.*

6. In support of the application are 3 dispositions. They were all sworn by the Governor of the Petitioner County one, *Mike Sonko Mbuvi Gidion Kioko*, on 22nd October, 2020, 5th November, 2020 and 20th November, 2020 respectively.

7. The Petitioner further filed written submissions.

Responses:

8. The 1st to 12th Respondents were represented by the Honourable Attorney General. They relied on a Notice of Preliminary Objection dated 17th November, 2020, a Replying Affidavit sworn by one *Kang'ethe Thuku* and written submissions.

9. The Notice of objection is tailored as follows: -

1. ***THAT*** *the Honourable Court lacks the jurisdiction to hear and determine the application and the Petition herein.*
2. ***THAT*** *the Petition and interlocutory application are premature having been instituted contrary to the provisions of **Article 189 (3) and (4) of the Constitution, Sections 31 (a) & (b), 32, 33 and 34 of the Intergovernmental Relations Act.***
3. ***THAT Article 11.2 of the Deed of Transfer*** *specifically provides that in the event of a dispute between the Parties arising from a matter **provided for**, governed by or **arising out of this Agreement**, the Parties shall at the first instance endeavor to resolve the dispute amicably through negotiations, but if the dispute is not resolved amicably within 30 days from the date one party notifies the other of the dispute in writing, the Parties shall refer the dispute to the **National and County Governments Co-ordinating Summit** which has not been done in the present case.*



4. **THAT** the question of the establishment and legality of Nairobi Metropolitan Services is **Res Judicata** having been an issue that was determined by a court of competent jurisdiction in Nairobi **ELRC 52 of 2020: Okiya Omtatah Okoiti -versus- Nairobi Metropolitan Service & Others** in which the Petitioner herein was a party as admitted in paragraphs 21, 22, 23, 24 and 25 of the supporting affidavit of Hon. Mike Sonko Mbuvi Gidion Kioko the Governor of Nairobi City County.
 5. **THAT** the issue of secondment of officers to the Nairobi Metropolitan Services is **Res Judicata** as it was determined in the case of **Okiya Omtatah Okoiti -versus- Nairobi Metropolitan Service & Others (supra)** where the Petitioner herein was an interested party and is also pending determination in Nairobi High Court Constitutional **Petition No. 164 of 2020: Kiogora George & another -versus- Nairobi Metropolitan Services & others**
 6. **THAT** the Honourable court lacks the jurisdiction to hear and determine matters that deal with deployment, secondment and transfer of public officers being matters reserved for the exclusive jurisdiction of the Employment and Labour Relations Court by dint of the provisions of **Articles 165 (5) (b)** of the Constitution.
 7. **THAT** some of the matters raised by the Petitioner herein are sub judice being matters that are substantively in issue there are several pending suits before the High Court between the parties arising from and in relation to the operationalization of the Deed of Transfer; Nairobi Constitutional **Petition No. 64 of 2020** between Okiya Omtatah & Another vs. The National Executive and 2 others, Nairobi Constitutional **Petition No. 66 of 2020**, Katiba Institute & Another vs. Cabinet Secretary & 3 others, Nairobi Constitution **Petition No. 164 of 2020** Kiogora George & Another vs. Nairobi City County Government & 4 others.
10. The 13th Respondent filed and relied on a List of Authorities dated 1st December, 2020. The 14th Respondent did not file any document to the application but was, nevertheless, allowed to address the Court.



Issues for Determination:

11. I have carefully read and understood the contents of the application, the responses, the submissions and the judicial decisions on record. The following issues arise: -

- (i) *Whether this Court has jurisdiction to deal with the Petition and the application by dint of the provisions of Article 165(5)(b) and Article 189(3) and (4) of the Constitution as read with Sections 31 (a) & (b), 32, 33 and 34 of the Intergovernmental Relations Act.*
- (ii) *Whether the question of the establishment and legality of Nairobi Metropolitan Services and the issue of deployment and secondment of officers of the Kenya Defence Forces to serve in the Nairobi Metropolitan Services are res judicata having been issues that were determined by a Court of competent jurisdiction in Nairobi ELRC 52 of 2020: Okiya Omtatah Okoiti -versus- Nairobi Metropolitan Service & Others.*
- (iii) *Whether there is any dispute for referral to arbitration; and whether there is any residual question(s) to be determined by this Court under Article 165(3) of the Constitution;*
- (iv) *Whether a certification should issue for empanelment of an expanded bench.*
- (v) *Whether conservatory orders ought to issue.*

Analysis and Determinations:

12. I will now address each of the identified issues *in seriatim*.

Whether this Court has jurisdiction to deal with the Petition and the application by dint of the provisions of Article 165(5)(b) and Article 189(3) and (4) of the Constitution as read with Sections 31 (a) & (b), 32, 33 and 34 of the Intergovernmental Relations Act.



13. This issue raises two sub-issues. The first sub-issue is based on Article 189(3) and (4) of the Constitution and Sections 31(a) & (b), 32, 33 and 34 of the Intergovernmental Relations Act (hereinafter referred to as '**the Relations Act**'). The other sub-issue focusses on Article 165(5)(b) of the Constitution.
14. On the first sub-issue, the 1st to 12th Respondents posit that the dispute before Court relates on how the two levels of Government are conducting themselves on the basis of a Deed of Transfer of Functions dated 25th February, 2020. Therefore, and, in the first instance, the dispute must be resolved through the alternative dispute resolution mechanism contemplated under Article 11.2 of the Deed of Transfer, Articles 159(2)(c) and 189(3) & (4) of the Constitution and Part IV of the Relations Act.
15. According to the Respondents, Article 11.2 of the Deed of Transfer expressly provide that: -

...that in the event of a dispute between the Parties arising from a matter provided for, governed by or arising out of this Agreement, the Parties shall at the first instance endeavor to resolve the dispute amicably through negotiations, but if the dispute is not resolved amicably within 30 days from the date one party notifies the other of the dispute in writing, the Parties shall refer the dispute to the National and County Governments Co-ordinating Summit.

16. The Respondents urge this Court to find that the Petitioner did not comply with the Deed of Transfer, the Constitution and the law by failing to refer the dispute to the Summit. Consequently, this Court lacks the jurisdiction over the matter.
17. The Respondents relied on *Council of County Governors v Lake Basin Development Authority & 6 others* [2017] eKLR, *Republic v Benjamin Jomo Washiali, Majority Chief Whip, National Assembly & 4 others Ex-parte Alfred Kiptoo Keter & 3 others* [2018] eKLR, *Daniel N. Mugendi vs. Kenyatta University & 3 Others* (2013) eKLR and *County Public Service Board & Another vs. Hulbhai Gedi Abdille* (2017) eKLR in

urging the Court to strike out the Petition and application with costs to the Respondents.

18. On the second sub-issue, the Respondents submit that Article 165(5)(b) the Constitution divests the High Court of jurisdiction over matters reserved for the Courts established under Article 162(2). It is the Attorney-General's submission that the High Court does not have jurisdiction to determine matters that are a preserve of the Employment and Labour Relations Court and *vice versa*.
19. The Respondents contend that the Petitioner has raised issues on the secondment of staff to NMS, the deployment of officers of the Kenya Defence Forces to serve in civilian affairs and the issue of the transfer of employees' information to NMS. On that, the Respondents submit that such issues fall exclusively within the jurisdiction of the Employment and Labour Relations Court and not the High Court.
20. The decisions in *Malindi Law Society vs. Attorney General & 4 Others* [2016] eKLR and *Republic vs. Karisa Chengo & 2 Others* [2017] eKLR were referred to in support of the submission.
21. The Petitioner opposed the Respondents' position. According to the Petitioner, the dispute is not premature before Court as the Petitioner fully complied with the Constitution and the law. That, it forwarded the dispute to the Summit as required and since there was no resolution, the Petitioner exercised its other right under the law.
22. The Petitioner further submits that the preliminary objection did not attain the legal threshold for such an objection as it is intertwined between factual issues and legal points. It referred to *Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors* (1969) EA 696, *Mariam Mueni Musembi & Another vs. Commissioner of Lands & 5 Others* (2009) eKLR, *Oraro -vs- Mbaja* (2005) KLR 141, *John Njuguna Kimunya vs. Tersiah Wachuka Kimunya & Another* (2016) eKLR and *Kenya Council of Employment Migration Agencies vs. Nyamira County Government & 10 Others* (2015) eKLR in affirming that the Notice of Preliminary Objection cannot stand.



23. I would have taken the liberty to consider if the Notice of Preliminary Objection attain the legal threshold of a properly pleaded preliminary objection. However, I will not do so. The reason is that the contents of the Notice of Preliminary Objection were replicated in the Replying Affidavit of Kang'ethe Thuku. Those issues were responded to by the Petitioner and were, to a large extent, controverted. As a result, such issues cannot be a basis of a preliminary objection. That is the legal position flowing through the various decisions referred to by the Petitioners.
24. I will, nevertheless, consider the two sub-issues.
25. I recently dealt with the subject of jurisdiction in **Nairobi High Court Constitutional Petition No. E282 of 2020 David Ndi & Others vs. The Attorney General & Others** (unreported). This is what I stated: -

24. *Jurisdiction* is defined in **Halsbury's Laws of England** (4th Ed.) Vol. 9 as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.". **Black's Law Dictionary**, 9th Edition, defines *jurisdiction* as the Court's power to entertain, hear and determine a dispute before it.

25. In **Words and Phrases Legally Defined** Vol. 3, John Beecroft Saunders defines *jurisdiction* as follows:

By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.



26. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. *Nyarangi, JA, in Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1* expressed himself as follows on the issue of jurisdiction: -

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...

27. Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in *Jamal Salim v Yusuf Abdulahi Abdi & another* Civil Appeal No. 103 of 2016 [2018] eKLR stated as follows: -

Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows;

- 1)
- 2) *The jurisdiction either exists or does not ab initio...*
- 3) *Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.*
- 4) *Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.*

28. On the centrality of jurisdiction, the Court of Appeal in *Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR* stated that: -

So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency

and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.

29. On the source of a Court's jurisdiction, the **Supreme Court of Kenya** in **Constitutional Application No. 2 of 2011 In the Matter of Interim Independent Electoral Commission (2011) eKLR** held that: -

Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid down in judicial precedent

30. Later, in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & Others (2012) eKLR** Supreme Court stated as follows: -

A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

31. And, in **Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] eKLR**, the Court of Appeal further stated: -

[44] a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into

a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...

32. *From the foregoing, it is sufficiently settled that a Court's jurisdiction is derived from the Constitution, an Act of Parliament or a settled judicial precedent.*
26. I still hold the above position. As to whether this Court's jurisdiction is ousted under Article 189(3) and (4) of the Constitution and Sections 31(a) & (b), 32, 33 and 34 of the Relations Act, the starting point is to ascertain if the said provisions apply to this case. I will, hence, reproduce the said provisions.
27. **Article 189(3) and (4)** of the Constitution provides as follows: -
- (3) *In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.*
 - (4) *National legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration*
28. **Sections 30(2), 31(a) & (b), 32, 33 and 34** of the Relations Act states as follows: -
30. (2) *This Part shall apply to the resolution of disputes arising—*
- (a) *between the national government and a county government; or*
 - (b) *amongst county governments.*
31. *The national and county governments shall take all reasonable measures to—*
- (a) *resolve disputes amicably; and*
 - (b) *apply and exhaust the mechanisms for alternative dispute resolution provided under this Act or any other*



legislation before resorting to judicial proceedings as contemplated by Article 189(3) and (4) of the Constitution.

- 32.(1) Any agreement between the national government and a county government or amongst county governments shall— (a) include a dispute resolution mechanism that is appropriate to the nature of the agreement; and (b) provide for an alternative dispute resolution mechanism with judicial proceedings as the last resort.
- (2) Where an agreement does not provide for a dispute resolution mechanism or provides for one that does not accord with subsection (1), any dispute arising shall be dealt with within the framework provided under this Part.
- 33.(1) Before formally declaring the existence of a dispute, parties to a dispute shall, in good faith, make every reasonable effort and take all necessary steps to amicably resolve the matter by initiating direct negotiations with each other or through an intermediary.
- (2) Where the negotiations under subsection (1) fail, a party to the dispute may formally declare a dispute by referring the matter to the Summit, the Council or any other intergovernmental structure established under this Act, as may be appropriate.
- 34.(1) Within twenty-one days of the formal declaration of a dispute, the Summit, the Council or any other intergovernmental structure established under this Act shall convene a meeting inviting the parties or their designated representatives—
- (a) to determine the nature of the dispute, including—
- (i) the precise issues in dispute; and
- (ii) any material issues which are not in dispute; and
- (b) to—
- (i) identify the mechanisms or procedures, other than judicial proceedings, that are available to the parties to assist in settling the dispute, including a mechanism or procedure provided for in this Act, other legislation or in an agreement, if any, between the parties; or



(ii) *subject to Article 189 of the Constitution, agree on an appropriate mechanism or procedure for resolving the dispute, including mediation or arbitration, as contemplated by Articles 159 and 189 of the Constitution.*

(2) *Where a mechanism or procedure is specifically provided for in legislation or in an agreement between the parties, the parties shall make every reasonable effort to resolve the dispute in terms of that mechanism or procedure.*

(3) *Where a dispute referred to the Council or any other intergovernmental structure established under this Act, fails to be resolved in accordance with section 33(2), the Summit shall convene a meeting between the parties in an effort to resolve the dispute and may recommend an appropriate course of action for the resolution of the dispute.*

29. The parties to the Deed of Transfer of Functions are the Petitioner and the National Government. The Petitioner is a County Government; a creation of the Constitution and the County Government Act. The dispute stems from the Deed of Transfer of Functions. It is, therefore, a dispute between the National Government and a County Government. It is one of the disputes contemplated under Article 189(3) of the Constitution and Section 30(2)(a) of the Relations Act.

30. Such a dispute must be dealt with in accordance with the provisions of the Relations Act. The applicable procedure has been reproduced above. The history of the dispute has been deponed to at length by the Petitioner. According to a letter dated 19th October, 2020 the Petitioner referred the dispute to the National and County Governments Co-ordinating Summit (hereinafter referred to as '**the Summit**').

31. The Petitioner contend that the Summit failed to resolve the dispute and as such the Petitioner exercised its right to refer the dispute to arbitration and to institute appropriate judicial proceedings.

32. Having gone through the record, I find the position taken up by the Respondents that the dispute was yet to be referred to the Summit a



bit disturbing. I say so because on one hand the Respondents hold that the Petitioner did not refer the dispute to the Summit and on the other hand, it is the Respondents through paragraph 38 of the Affidavit of Kang'ethe Thuku, who introduced the Petitioner's letter dated 19th October, 2020. To me, the fact that the Petitioner decided to refer the dispute to the Summit is a clear signal that it was not contented with the discussions between itself and the National Government's representative. Whether the referral of the dispute to the Summit was premature and/or whether the Summit's jurisdiction was properly invoked are matters to be addressed elsewhere.

33. I would have readily agreed with the Respondents had the Petitioner failed to adhere to the laid down procedures in the law. However, in this case, I find and hold that, the Petitioner duly complied with the provisions of the Relations Act upto and including referring the dispute to the Summit. The objection, therefore, fails.
34. On whether the Petitioner has raised issues on the secondment of officers to NMS, the deployment of officers of the Kenya Defence Forces to serve in civilian affairs and the issue of the transfer of employees' information to NMS, I find it prudent to reproduce the prayers sought by the Petitioner in the Amended Petition.

35. The prayers are as follows: -

a. *A declaration be made on the scope and meaning of the expression contained in Article 187(2)(b) of the Constitution of Kenya that "the Constitutional responsibility for the performance of the function or exercise of the power [over such of the transferred functions between the National and County Governments] shall remain with the government to which it is assigned by the Fourth Schedule, in light of the Deed of the Transfer of Functions dated 25th February 2020 between the Petitioner and the National Government of Kenya means that the National Government has no unbounded power to exercise over the Petitioner, and the Petitioner remains vested with the statutory and constitutional duty to do only what is both necessary and proper in furtherance of the constitutional Principles and Objectives of Devolution.*

ALTERNATIVELY, to "a". above

b. *A declaration do issue that by operation of Article 187(2)(b) of the Constitution of Kenya, the application of the doctrine of "Constitutional responsibility for the performance of the function or exercise of the power [over the Four transferred functions]" under the Deed of Transfer of Functions dated 25th*



February 2020 remaining with the Petitioner government to which it is assigned by the Fourth Schedule means, and implies that the entity assuming the 4 Transferred Functions cannot override the Petitioners Constitutional and Statutory provisions circumscribing the exercise of the Four Functions subject of the Deed of Transfer of Functions dated 25th February 2020.

- c. A declaration do issue that by operation of Article 196(1)(b) of the Constitution of Kenya the 13th Respondent, the Nairobi City County Assembly, is enjoined in mandatory terms to facilitate public participation and involvement in the legislative and other business of the Assembly and its committees, which mandate includes the business under its relevant Committees of the 1st Respondent NMS touching on the Four functions under the Deed of Transfer of Functions Gazetted on 25th February 2020.
- d. A declaration do issue that any appointments to the Nairobi Metropolitan Services, AIMS so far as it purports to execute any of the functions of the Nairobi City County must be subjected to the mandatory demands of the PUBLIC APPOINTMENTS (COUNTY ASSEMBLIES No. 5 of 2017), as read with the Public Service Commission Act, when, and if it does assume ANY functions of the Petitioner, Nairobi City County Government.
- e. A declaration do issue that the appointments to the 1st Respondent Nairobi Metropolitan Services, NMS of Major General Mohammed Abdalla Badi, BRIG. GEN. FREDRICK LEURIA, MAJOR J. V MBITHI, MAJOR A. N. NYAKUNDI, MAJOR J. K. NJOROGE, LT. COL. J. K. BIOMDO, MAJORA. L. MUSOMA, while being members of the Kenya Defence Forces, and without the written approval of the National Assembly for such deployment prior to such deployment, or anytime thereafter constitutes a contravention of Article 241(3)(b) and (c) of the Constitution of Kenya.
- f. A declaration do issue that, there being no patent situation of declared emergency or disaster in Nairobi City County, there was no justification ab initio, and there currently subsists no justification for the deployment of members of the Kenya Defence Forces, Major General Mohammed Abdalla Badi, BRIG. GEN. FREDRICK LEURIA, MAJOR J. v MBITHI, MAJOR A. N. NYAKUNDI, MAJOR J. K. NJOROGE, LT. COL. J. K. BIOMDO, and MAJOR A. L. MUSOMA to undertake civilian duties in Nairobi City County under the Nairobi Metropolitan Services (NMS) without the written approval of the National Assembly, and the said deployment constitutes a violation of Article 241(3)(b) of the Constitution of Kenya.
- g. A declaration do issue that the Nairobi City County Appropriations Bill, 2020 was published and presented to the Petitioner's Governor for assent in violation of Section 23 of the County government Act which demands that a Money Bill be subjected to public participation, by reason of which breach it is null and void and incapable of enforcement or application, absent such compliance.
- h. A declaration do issue that all appointees set out in the letter dated September 1st 2020 signed by the Respondent having not been made in compliance with the PUBLIC APPOINTMENTS (COUNTY ASSEMBLIES No. 5 of 2017), and no advertisement thereof, inviting applications for nomination for appointment to such offices having been made, and without any vetting of such nominees by



the 13th Respondent Nairobi City County Government, the said purported appointments are null and void.

- i. A declaration do issue that the foregoing failure, refusal, and/or neglect by the 1 and 2nd Respondent to abide by the Principles of good governance, transparency, co-operation is a continued threat to a violation of Articles 187(2)(b), and 189(1) of the Constitution of Kenya.
- j. By way of Judicial Review, an Order of Certiorari do issue to forthwith remove to this Honourable Court for purposes of being quashed, and to quash, the decision made on September 2020 by the 3rd Respondent Major General Abdalla Badi, purporting to make appointments to the 1st Respondent Nairobi Metropolitan Services without compliance with the Public Service Commission Act, as read with the Public Appointments (County Assemblies Approval) Act, No. 5 of 2017, and which act is ultra vires Sections 63 and 64 of the County Government Act.
- k. By way of Judicial Review an Order for Prohibition do issue, prohibiting the 1st Respondent Nairobi Metropolitan Services, MMS through its "Director General" Major General Mohammed Abdalla Badi, BRIG. GEN. FREDRICK LEURIA, MAJOR J. V MBITHI, MAJOR A. N. NYAKUNDI, MAJOR J. K. NJOROGE, LT. COL. J. K. BIOMDO, MAJOR A. L. MUSOMA, while being members of the Kenya Defence Forces, and without the written approval of the National Assembly for such deployment prior to such deployment or anytime thereafter to the Nairobi City County civilian Functions from executing any civilian duties under the Deed of Transfer of Functions dated February 25th 2020, and to forthwith cease from any such deployment, undertaking, task, or position.
- l. A declaration do issue that the Deed of Transfer of Functions dated 25th February, 2020 as contained in GAZETTE NOTICE NO. 1609 DATED 25TH FEBRUARY 2020, vol. CXXII — No. 38 OF 2020, (together with the undated Addendum thereto) is illegal, inoperative, unenforceable, null and void and unconstitutional for want of effectual and meaningful public participation; its violation of the Objects, and Principles of Devolution set out in Article 174(a), and (c); violation of the Principles and Values of Good governance, sharing and devolution of power, the rule of law, democracy, participation of the people, accountability, integrity, and transparency as espoused in Article 10(2)(a) and (c) of the Constitution of Kenya, as well as being in breach of Section 26(2)(e) of the Intergovernmental and Relations Act.
- m. An order do issue, forthwith terminating the Deed of Transfer of Functions dated 25TH February 2020 as contained in GAZETTE NOTICE NO. 1609 DATED 25 FEBRUARY 2020, vol. CXXII- No. 38 OF 2020, (together with the undated Addendum thereto) and in consequence thereof, the said GAZETTE NOTICE NO. 1609 DATED 25TH FEBRUARY 2020, vol. cxxii- No. 38 OF 2020 be, and is hereby quashed.
- n. An injunction do issue, restraining the 11TH Respondent, Cabinet Secretary, Ministry of Finance and Planning, from disbursing any funds to the 1st Respondent Nairobi Metropolitan Service, (NMS) as contained in the Nairobi City County Assembly Appropriation Bill, 2020, and/or any subsequent Nairobi City County Appropriation Act, or otherwise howsoever, in purported execution of the Nairobi City County Government Functions.

- o. An injunction do issue, restraining the 1st Respondent, Nairobi Metropolitan Services, by itself, its agents, and servants the 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th Respondents herein, or otherwise howsoever from executing, further executing, assuming, or further assuming, or discharging any aspect of the 4 (Four functions) "transferred" to the National Government from the Petitioner Nairobi City County Government as contained in Article 3 of the Deed of Transfer of Functions published in the Kenya Gazette Notice No. 1609 dated 25th February 2020, and from demanding any payment, or any sums from any party in furtherance of the 4 Functions contained in the Deed of Transfer Functions set out in the Kenya Gazette Notice No. 1609 dated 25th February 2020, or otherwise howsoever receiving any funds allocated to the Nairobi City County Government under the Division of Revenue Act, 2020, or by any instrument on behalf of the Petitioner in furtherance of any aspect of the terms of the Deed of Transfer Functions set out in the Kenya Gazette Notice No. 1609 dated 25th February 2020.
- oo. An Order directing the 11th Respondent to release to the Petitioner such of the funds allocated, budgeted for, and set aside to pay hitherto contracted work, and so contractually completed by contractors hitherto lawfully engaged by the Petitioner to execute works and render services under the four Functions set out in paragraph 3 of the "Deed of Transfer of Functions" in Kenya Gazette Notice No. 1609 dated 25th February 2020.
- p. By way of Judicial Review an Order of mandamus do issue, compelling the 3rd Respondent, Major General Mohammed Abdalla Badi to, within 24 hours of the making of this order and service thereof on the Respondent at its offices, or by email, to deliver up, and hand over to the Petitioner at the Petitioner's City Hall offices of the Petitioner's County Secretary the 2,000 the Petitioner's personnel files which the 1st Respondent (NMS) by its servant, one Ms. Rachel Njeri unlawfully carted away on 13th October 2020.
- pp An Order of injunction do issue restraining the 14th Respondent Controller o Bud et rom authorizing the release of any funds from the Petitioner's Nairobi City County Government's Count Revenue Fund Account under votes within the Nairobi City County Appropriation Act, 2020 that do not comply with the necessary and relevant provisions of the law particularized in the Petition herein in so far as such disbursement of finances to the 1st Respondent Nairobi Metropolitan Services, NMS are concerned, and which votes constitute a violation of the law and the Petitioner's Constitutional rights herein pleaded.
- q. Any other relief as this Honourable Court may deem expedient
- r. Costs of these proceedings.
36. Prayers (d), (e), (f), (h), (j), (k) and (p) are the relevant ones in this discussion. There is no doubt that the said prayers variously relate to issues of appointments, deployment and employment of officers to the NMS.
37. Article 165(5) of the Constitution states as follows: -

The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

38. Article 162(2) of the Constitution provides that: -

Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

*(a) **employment and labour relations;** and*

(b) the environment and the use and occupation of, and title to, land.

39. The Supreme Court in *Republic vs. Karisa Chengo & 2 Others [2017] eKLR* exhaustively dealt with the jurisdiction of the High Court and the Courts of equal status contemplated under Article 162(2) of the Constitution. The Court was categorical that the High Court has no jurisdiction over matters falling within the specialised Courts and *vice versa*. Infact, the position is that the specialised Courts have jurisdiction to even determine any constitutional issues in respect of the matters they have jurisdiction over. That is the law.

40. By applying the obtaining legal position to this matter, I find and hold that, this Court has no jurisdiction to deal with prayers (d), (e), (f), (h), (j), (k) and (p) of the Amended Petition. To that extent, the Respondents' objection succeeds.

41. In sum, the objection under Article 189(3) and (4) of the Constitution and Sections 31(a) & (b), 32, 33 and 34 of the Relations Act fails whereas the objection under Article 165(2) of the Constitution partly succeeds.

Whether the question of the establishment and legality of Nairobi Metropolitan Services and the issue of secondment of officers of the Kenya Defence Force to the



Nairobi Metropolitan Services are res judicata having been issues that were determined by a Court of competent jurisdiction in Nairobi ELRC 52 of 2020: Okiya Omtatah Okoiti -versus- Nairobi Metropolitan Service & Others.

42. The Respondents vehemently oppose assumption of jurisdiction by this Court over the issues on the legality and establishment of the NMS, the secondment of officers of the Kenya Defence Force to serve in the MNS and all other staff issues relating to the NMS. They contend that those issues were finally settled in *Nairobi ELRC No. 52 of 2020: Okiya Omtatah Okoiti -versus- Nairobi Metropolitan Service & Others*.
43. The Petitioner is of the position that the legality and constitutionality of the officers of the Kenya Defence Force to serve in the NMS was not an issue in ELRC No. 52 of 2020 since the said suit only dealt with Executive Order 3.
44. The doctrine of *res judicata* is not novel. It is a subject which Superior Courts have sufficiently expressed themselves on. The Supreme Court in ***Petition 14, 14A, 14B & 14C of 2014 (Consolidated) Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR*** delimited the operation of the doctrine of *res-judicata* in the following terms;

[317] *The concept of res judicata operates to prevent causes of action, or issues from being relitigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings. In this case, the High Court relied on "issue estoppel", to bar the 1st, 2nd and 3rd respondents' claims. Issue estoppel prevents a party who previously litigated a claim (and lost), from taking a second bite at the cherry. This is a long-standing common law doctrine for bringing finality to the process of litigation; for avoiding multiplicities of proceedings; and for the protection of the integrity of the administration of justice? all in the cause of fairness in the settlement of disputes.*

[318] *This concept is incorporated in Section 7 of the Civil Procedure Act (Cap. 21, Laws of Kenya) which prohibits a Court from*



trying any issue which has been substantially in issue in an earlier suit. It thus provides:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

[319] *There are conditions to the application of the doctrine of res judicata: (i) the issue in the first suit must have been decided by a competent Court; (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title Karia and Another v. The Attorney General and Others, [2005] 1 EA 83, 89.*

[320] *So, in the instant case, the argument concerning res judicata can only succeed when it is established that the issue brought before a Court is essentially the same as another one already satisfactorily decided, before a competent court.*

[333] *We find that the petition at the High Court had sought to relitigate an issue already determined by the Public Procurement Administrative Review Tribunal. Instead of contesting the Tribunal's decision through the prescribed route of judicial review at the High Court, the 1st, 2nd and 3rd respondents instituted fresh proceedings, two years later, to challenge a decision on facts and issues finally determined. This strategy, we would observe, constitutes the very mischief that the common law doctrine of "issue estoppel" is meant to forestall. **Issue estoppel "prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route"** (Workers' Compensation Board v. Figliola [2011] 3 S.C.R. 422, 438 (paragraph 28)).*

[334] *Whatever mode the 1st, 2nd and 3rd respondents adopted in couching their prayers, it is plain to us, they were challenging the decision of the Tribunal, in the High Court. It is a typical case that puts the Courts on guard, against litigants attempting to sidestep the doctrine of "issue estoppel", by appending new causes of action to their grievance, while pursuing the very*



same case they lost previously. In *Omondi v. National Bank of Kenya Ltd. & Others*, [2001] EA 177 the Court held that "parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit."

[352] *The Judicial Committee of the Privy Council, in Thomas v. The Attorney-General of Trinidad and Tobago*, [1991] LRC (Const.) 1001 held that "when a plaintiff seeks to litigate the same issue a second time relying on fresh propositions in law he can only do so if he can demonstrate that special circumstances exist for displacing the normal rules." That court relied on a case decided by the Supreme Court of India, *Daryao & Others v. The State of UP & Others*, (1961) 1 SCR 574 to find that the existence of a constitutional remedy does not affect the application of the principle of *res judicata*. The Indian Court also rejected the notion that *res judicata* could not apply to petitions seeking redress with respect to an infringement of fundamental rights. *Gajendragadkar J* stated:

But is the rule of *res judicata* merely a technical rule or is it based on high public policy? If the rule of *res judicata* itself embodies a principle of public policy which in turn is an essential part of the rule of law, then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now the rule of *res judicata*...has no doubt some technical aspects...but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of *res judicata* they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Article 32.

[353] Kenya's High Court recently pronounced itself on the issue of the applicability of *res judicata* in constitutional claims. In *Okiya Omtatah Okoiti & Another v. Attorney General & 6 Others*, High Court Const. and Human Rights Division, Petition No. 593 of 2013 [2014] eKLR, *Lenaola J.* (at paragraph 64) thus stated:

Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of *res judicata* can and should

only be invoked in constitutional matters in the clearest of cases and where a party is relitigating the same matter before the Constitutional Court and where the Court is called upon to redetermine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious.

[354] *On the basis of such principles evolved in case law, it is plain to us that the 1st, 2nd and 3rd respondents were relitigating the denial to them of a BSD licence, and were asking the High Court to redetermine this issue.*

[355] *However, notwithstanding our findings based on the common law principles of estoppel and res-judicata, we remain keenly aware that the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law. By clothing their grievance as a constitutional question, the 1st, 2nd and 3rd respondents were seeking the intervention of the High Court in the firm belief that, their fundamental right had been violated by a state organ. Indeed, this is what must have informed the Court of Appeal's view to the effect that the appellants (respondents herein) were entitled to approach the Court and have their grievance resolved on the basis of Articles 22 and 23 of the Constitution.*

45. The Court of Appeal in **John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR** also discussed the doctrine of *res judicata* at length. The Court stated in part as follows:

The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in



nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.

We also resist the invitation by the appellants to hold that all constitutional petitions must be heard and disposed of on merit and that parties should not be barred from the citadel of justice on the basis of technicalities and rules of procedure which have no place in the new constitutional dispensation. The doctrine is not a technicality. It goes to the root of the jurisdiction of the court to entertain a dispute. If it is successfully ventilated, the doctrine will deny the court entertaining the dispute jurisdiction to take any further steps in the matter with the consequence that the suit will be struck out for being res judicata. That will close the chapter on the dispute. If the doctrine has such end result, how can it be said that it is a mere technicality" If a constitutional petition is bad in law from the onset, nothing stops the court from dealing with it peremptorily and having it immediately disposed of. There is no legal requirement that such litigation must be heard and determined on merit.

From our expose of the doctrine above, we are now able to formally answer the issues isolated for determination in this appeal earlier as follows: -

- i) The doctrine of res judicata is applicable to constitutional litigation just as in other civil litigation as it is a doctrine of general application with a rider, however, that it should be invoked in constitutional litigation in rarest and in the clearest of cases.*
- ii) There is no legal requirement or factual basis for the submission that the doctrine must only be invoked and or ventilated through a formal application. It can be raised through pleadings as well as by way of preliminary objection.*



iii) *The ingredients of res judicata must be given a wider interpretation; the issue in dispute in the two cases must be the same or substantially the same as in the previous case, parties to the two suits should be the same or parties under whom they or any of them is claiming or litigating under the same title and lastly, the earlier claim must have been determined by a competent court.*

46. I have already made a jurisdictional finding on the deployment or secondment of officers and staff to NMS in the preceding issue. I must add that even the issue of the legality and constitutionality of the officers of the Kenya Defence Force to serve in the NMS is an issue which is caught up by Article 165(5)(b) of the Constitution. The issue falls squarely within the ambit of the Employment and Labour Relations Court. I will, therefore, not endeavour to discuss whether the same issue is also *res judicata*. I will only deal with whether the legality and establishment of the NMS is, indeed, caught up by the doctrine of *res judicata*.
47. The Nairobi ELRC No. 52 of 2020 was instituted by way of a Constitutional Petition. The Governor of Nairobi County, H.E. Governor Mike Mbuvi Sonko was the 10th Interested Party.
48. The Petition prayed for the following orders in respect of the creation of NMS: -
- (i) *A DECLARATION THAT the purported creation of the Nairobi Metropolitan Services was unlawful and unconstitutional and, therefore, invalid, null and void ab initio.*
 - (vi) *AN ORDER:*
 - a. *QUASHING the creation of the Nairobi Metropolitan Services.*
49. The Court in Nairobi ELRC No. 52 of 2020 rendered itself on the above issue in a judgment delivered on 18th June, 2020, and, as follows:
- A declaration that the creation of the Nairobi Metropolitan Services was done in violation of the Law and the Constitution.***



50. On 17th September, 2020 the Court in Nairobi ELRC No. 52 of 2020 delivered a ruling. The Court held as follows: -

84. Having found as above, I therefore find that the declaration of illegality of the Nairobi Metropolitan Services as created is now lifted.

51. At the hearing of the application, Counsel for the Petitioner indicated that the above ruling is subject of an appeal before the Court of Appeal.

52. Looking at the prayers sought in Nairobi ELRC No. 52 of 2020 and the ruling delivered on 17th September, 2020, it is clear that the issue of legality and establishment of the NMS was the paramount one, that the issue was addressed by the Court and the Court finally rendered itself on it. The issue cannot be relitigated except on appeal or review. However, in the current Petition the issue is not on the legality and establishment of the NMS. One of the issues raised in the current Petition is the constitutionality and legality of the Deed of Transfer of Functions. The issue, of course, has all bearing on the life of the NMS. That issue is substantially different from the former.

53. I now find and hold that whereas the issue of legality and establishment of the NMS is caught up by the doctrine of *res judicata*, the issue of the constitutionality and legality of the Deed of Transfer of Functions is not. This Court has jurisdiction to deal with the issue of the constitutionality and legality of the Deed of Transfer of Functions.

Whether there is any dispute for referral to arbitration; and whether there is any residual question(s) to be determined by this Court under Article 165(3) of the Constitution:

54. The Petitioner contend that the dispute it referred to the Summit was never dealt with. As a result, it exercised its right to arbitration. The Petitioner now seeks the intervention of this Court under the



Arbitration Act for the institution of the arbitral proceedings and the issuance of interim reliefs in the nature of conservatory orders.

55. The Petitioner also contend that even after referring the dispute to arbitration there are still several issues which fall squarely within the mandate of this Court and that the Court ought to determine them as well. The issues are as follows: -
- (i) *The constitutionality of the Nairobi City County Appropriation Act, 2020;*
 - (ii) *The constitutionality of deployment of members of the Kenya Defence Forces into civilian duties;*
 - (iii) *The constitutional interpretation of Article 187(2)(b) of the Constitution.*
 - (iv) *The legality, constitutionality and termination of the Deed of Transfer of Functions dated 25th February, 2020.*
56. The Respondents are of the contrary position. They first contend that the Deed of Transfer did not make any provision for reference of any dispute to arbitration. They further contend that there are other modes of alternative dispute resolution provided for in the Constitution and the law and that the Respondents had not acceded to any reference to arbitration since the matter must first be dealt with by the Summit.
57. I have above dealt with the legal foundation governing dispute resolution between the two levels of Government. I wish not to rehash the same. What I need to deal with here is whether, in view of Nairobi ELRC No. 52 of 2020 and all the other Petitions including Nairobi Petition Nos. 64, 65, 66 and 164 all of 2020, there are still issues to be referred for arbitration.
58. **Section 35** of the Relations Act provide as follows: -

Where all efforts of resolving a dispute under this Act fail, a party to the dispute may submit the matter for arbitration or institute judicial proceedings.

59. A look at the Petitioner's letter dated 19th October, 2020 referring the dispute to the Summit is imperative. The Petitioner was clear in the letter that it intended to terminate the Deed of Transfer of Functions between itself and the National Government. The Petitioner gave three main reasons for such intention. They are: -

- (i) That the Petitioner retained constitutional responsibility under Article 187(2)(b) of the Constitution;*
- (ii) That 'NMS is not synonymous with the 'institutional framework' envisaged within Article 7 of the said Deed; at least the formation of a competing, parallel entity was never within the contemplation of the Nairobi City County Government at any time', and*
- (iii) That the Deed of Transfer of Functions is unconstitutional and illegal.*

60. It cannot be gainsaid that the mandate to interpret the Constitution, to issue appropriate resultant orders and the determination of constitutionality of statutes and actions rests with the Superior Courts. In the High Court, Article 165 (3) and (4) of the Constitution comes to play. The Article states that: -

(3) Subject to clause (5), the High Court shall have—

- (a) unlimited original jurisdiction in criminal and civil matters;*
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;*
- (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;*
- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—*



- (i) *the question whether any law is inconsistent with or in contravention of this Constitution;*
- (ii) *the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;*
- (iii) *any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and*
- (iv) *a question relating to conflict of laws under Article 191; and*
- (e) *any other jurisdiction, original or appellate, conferred on it by legislation.*

(4) *Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.*

61. The Petitioner gave three reasons for the termination of the Deed of Transfer of Functions in the letter to the Summit. I have already outlined the reasons above. The issue of the constitutionality of the Deed of Transfer of Functions and the constitutional interpretation of Article 187(2)(b) of the Constitution are not issue capable of determination by the Summit. Those are pure constitutional issues which can only be addressed by a Superior Court. The Summit has no jurisdiction to express itself on such issues. The other reason related to the legality and constitutionality of the NMS. As said, the issue is now *res judicata*.

62. It, therefore, follows that the issues identified by the Petitioner to be addressed by the Summit are not available for such consideration. As said, the Summit has no jurisdiction to, *inter alia*, deal with the interpretation of the Constitution. That being the legal position, there is hence no issue in the Petitioner's letter dated 19th October, 2020 for referral to arbitration.

63. Conversely, there are three main issues for consideration by this Court. The issues are: -



- (i) The constitutionality and legality of the Nairobi City County Appropriation Act, 2020;
- (ii) The interpretation of Article 187(2)(b) of the Constitution.
- (iii) The constitutionality and legality of the Deed of Transfer of Functions dated 25th February, 2020.

64. This issue is now determined in that whereas there are no issues for reference to arbitration, there are serious constitutional issues which this Court has jurisdiction to deal with.

Whether a certification should issue for empanelment of an expanded bench:

65. Although the Petitioner prayed for an order on empanelment of this Bench in the application, it did not pursue it at the hearing. None of the Respondents also dealt with the prayer.

66. Notwithstanding the above, I will, nevertheless, deal with the issue. In the **David Ndi & Others case (supra)** I handled an issue of certification as follows: -

65. *Applications for certification have a constitutional underpinning. The Constitution provides for certification in the superior Courts under **Article 163(4)(b)** and **Article 165 (3) and (4)**.*

66.

67.

68.

69. *The manner in which a single Judge of the High Court certifies that a matter raises a substantial question(s) of law so as to warrant the empanelment of an expanded bench has, on several instances, been dealt with by the Superior Courts.*

70. *The Supreme Court of Kenya in **Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscione [2013] eKLR** established the principles for certification under Article 163(4)(b) of the Constitution. However, those principles were adopted, with modification, by the Court of Appeal in **Okiya Omtatah Okiiti & another v Anne Waiguru - Cabinet Secretary**,*

Devolution and Planning & 3 others [2017] eKLR when the Court of Appeal dealt with an appeal against a refusal by the High Court to certify a matter as raising substantial questions of law under Article 165(4) of the Constitution.

71.
72.

73. As said, the Court of Appeal applied the above principles in **Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR** and expressed itself thus: -

42. In *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscione [2013] eKLR* the Supreme Court of Kenya pronounced governing principles for purposes of certification under Article 163(4)(b) some of which are relevant in the context of certification under Article 165(4). Drawing therefrom, we adopt, with modification, the following principles:

- (i) For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;
- (ii) The applicant must show that there is a state of uncertainty in the law;
- (iii) The matter to be certified must fall within the terms of Article 165 (3)(b) or (d) of the Constitution;
- (vi) The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.

43. It is our judgment therefore, that whether a matter raises a substantial point of law for purposes of Article 165(4) of the Constitution is a matter for determination on a case-by-case basis. The categories of factors that should be taken into account in arriving at that decision cannot be closed.



74. The High Court has as well severally dealt with the matter. In **Republic v Public Service Commission & Keriako Tobiko Ex parte Nelson Havi [2017] eKLR** the Court stated that: -

42. Whereas this Court appreciates that the decision of an enlarged bench may well be of the same jurisprudential value in terms of precedent or stare decisis principles as a decision arrived at by a single High Court judge, the Constitution itself does recognise that in certain circumstances it may be prudent to have a matter which satisfies the constitutional criteria determined by a bench composed of numerically superior judges...

46. In the circumstances, I hereby certify that this matter raises a substantial question of law to warrant reference of the same to the Chief Justice as required under Article 165(4) of the Constitution.

75. In **Philomena Mbete Mwilu v Director of Public Prosecution & 4 others [2018] eKLR** the High Court had the following to say: -

29. I fully agree with the above views on the jurisprudential value of decisions by a bench or a single judge of this court. Although the present petition can be heard by a single judge of this court and also being fully aware that a bench would sometimes require resources both personnel and financial as well as more time to resolve a petition than if it were heard by a single Judge, the present petition is the kind of petition that this court should exercise its discretion in favour of an expanded bench due to its public importance and significance in our constitutional democracy. The issues sought to be decided are not mere questions of law, they are substantial questions of law and their resolution will have a material bearing on the 1st respondent's decision to arrest and prosecute the petitioner and the independence of the judiciary.

67. Drawing from the above, I will now apply the criterion laid by the Court of Appeal in **Okiya Omtatah Okoiti & another v Anne Waiguru case** (supra) in this case. I do not find any difficulty in



arriving at the finding that the prayer fails the test for certification under Article 165(4) of the Constitution so as to call for an expanded bench of this Court.

68. Whereas on one hand the issues raised in the Petition are weighty and of immense public interest, on the other hand, the issues are not complex. In fact, if anything, the Petition ought to be urgently heard and determined given that one of the issues is on the constitutionality of the Nairobi City County Appropriation Act, 2020 which Act determine budgetary expenditures within the County of Nairobi. Reference of this matter for empanelment will work counter the urgency.
69. This matter, therefore, does not call for an expanded bench at the moment.

Whether conservatory orders ought to issue:

70. The Petitioner has asked for the grant of conservatory orders pending the determination of the matter by this Court or under the arbitration. The application has 14 prayers for such orders. On the basis of ***Nancy Makokha Baraza vs. Judicial Service Commission & 9 Others (2012) eKLR*** the Petitioner urge this Court to allow the plea.
71. The Petitioner submit that the orders ought to issue even only on the basis of the unconstitutional and unlawful manner in which the Nairobi City County Appropriation Act, 2020 was dealt with by the 13th Respondent. The Petitioner referred to several such instances.
72. The Respondents are opposed to the grant of any conservatory orders. They contend that the basis of the orders is the reference to arbitration and since there is nothing to refer as such, then the orders sought have no basis or at all. It is also argued that any conservatory orders will adversely affect the war against Covid-19 pandemic since the NMS will not be able to deal with any of the transferred functions which includes health functions.



73. The Respondents further argue that since the Petition is not hinged on allegation of breach of any of the rights and fundamental freedoms in the Bill of Rights then the Constitution makes no provision for conservatory orders.
74. It is also pointed out that prior to the enactment of the Nairobi City County Appropriation Act, 2020 the County used to operate on Vote-On-Account until such enactment. Given that the Act is now in place the former arrangement does not apply and the Controller of Budget awaits the Governor's Warrant and approved budget to deal further.
75. I will begin with a consideration on whether conservatory orders are only available when a party alleges infringement of rights and fundamental freedoms under the Bill of Rights. I have dealt with this issue before. That was in ***Nairobi Constitutional Petition No. E364 of 2020 Okiya Omtatah Okoiti vs. Attorney General & 5 Others*** (unreported). This is what I recently stated: -

21. *Article 165(3)(d)(i) and (ii) of the Constitution empowers the High Court to hear and determine questions on the interpretation of the Constitution including the determination of whether any law is inconsistent with or in contravention of the Constitution and whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution. Article 23(3) enumerates the reliefs available in proceedings brought under Article 22 which provision permits any person who claims that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened to institute Court proceedings. The reliefs under Article 23(3) include a conservatory order.*
22. *Article 258 of the Constitution creates an avenue to any person who claims that the Constitution has been contravened, or is threatened with contravention to institute Court proceedings. Unlike Article 23(3), no reliefs are provided for under Article 258.*
23. *Article 259 of the Constitution deals with the interpretation of the Constitution. It obligates anyone interpreting the Constitution to do so in a manner that 'promotes its purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; permits*



the development of the law and contributes to good governance'. The approach is often described as '**a mandatory constitutional canon of statutory and constitutional interpretation**'.

24. There are other settled principles of interpretation of the Constitution. They include that constitutional provisions must be construed purposively and in a contextual manner; that the Constitution must be construed as whole, among others. It therefore behooves a Court interpreting the Constitution to be guided by the language used in the Constitution. A Court should not unduly strain to impose a meaning that the text is not reasonably capable of bearing. It should also avoid what was described as 'excessive peering at the language to be interpreted'. (See **Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others vs. Smit NO and Others** [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 24 and **Johannesburg Municipality vs. Gauteng Development Tribunal and Others** [2009] ZASCA 106; 2010 (2) SA 554 (SCA) at para 39, which quoted **Jaga v Dönges, N.O. and Another; Bhana v Dönges, N.O. and Another** 1950 (4) SA 653 (A) at 664G-H).
25. A Court must also adopt a holistic approach of interpretation. Provisions of a Constitution ought to be taken collectively rather than in isolation.
26. I have carefully considered the 1st Respondent's argument. I have, as well, reflected on the Petitioner's response thereto. Whereas the Constitution is silent on the remedies under Article 258, this Court is duty bound to interpret the Constitution in a manner as ordered under Article 259.
27. In a bid to settle the issue, I will consider a hypothetical scenario. The Senate, as part of the Parliament of Kenya, passes an omnibus bill that principally provides for establishment of a government otherwise than in compliance with the Constitution. The Bill also provides for torture, cruel and inhuman treatment, slavery, servitude and takes away the rights to fair trial and an order to habeas corpus. The Bill is assented into law and is ready for operationalization. A Kenyan rushes to the High Court and files a Petition under Article 258 challenging the constitutionality of the new law. The Petitioner pleads with the Court to stop the implementation of the law by initially granting an interim relief in form of a conservatory order. Faced with such a case, should the High



Court fold its legal hands and claim that a conservatory order, as an interlocutory relief, is not provided for under Article 258 of the Constitution or that the Petition is not premised on the Bill of Rights? I do not think so, since, such an approach will be tantamount to the Court failing to uphold and defend the Constitution as commanded in Article 3. Further, the Court will be taking such a narrow avenue on interpretation. The Court will, on all four corners, fail the test in Article 259.

28. A Court is always possessed of residual inherent powers. Such powers allow the Court to make any orders in the wider interest of justice. It is for the Court to fashion an appropriate remedy even in instances where the Constitution and the law are silent. A Court cannot just, helplessly so, stare at a Petitioner whose rights and fundamental freedoms are trampled upon or when it is ostensibly demonstrated that the Constitution is either contravened or so threatened. Unless a Court raises to, and asserts its authority, high are chances that it may fail the calling in Article 3 of the Constitution. The result will, undoubtedly, be anarchy and lawlessness in the society.
29. The Court of Appeal in **Total Kenya Limited vs Kenya Revenue Authority (2013) eKLR** held that even in instances where there are express provisions on specific reliefs a Court is not precluded from making any other orders under its inherent jurisdiction for ends of justice to be met to the parties. The High Court in **Simeon Kioko Kitheka & 18 Others vs. County Government of Machakos & 2 Others (2018) eKLR** held that Article 23 of the Constitution does not expressly bar the Court from granting conservatory orders where a challenge is taken on the constitutionality of legislation.
30. In **Republic Ex Parte Chudasama vs. The Chief Magistrate's Court, Nairobi and Another Nairobi HCCC No. 473 of 2006, [2008] 2 EA 311, Rawal, J** (as she then was) stated that:

*While protecting fundamental rights, the Court has power to fashion new remedies as there is no limitation on what the Court can do. Any limitation of its powers can only derive from the Constitution itself. **Not only can the court enlarge old remedies, it can invent new ones as well if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the Court itself, instead of being the protector, defender, and guarantor of the constitutional rights would be guilty of the most serious betrayal.** See Gaily vs.*



Attorney-General [2001] 2 RC 671; Ramanoop vs. Attorney General [2004] Law Reports of Commonwealth (From High Court of Trinidad and Tobago); Wanjuguna vs. Republic [2004] KLR 520...The Court is always faced with variety of facts and circumstances and to place it into a straight jacket of a procedure, especially in the field of very important, sensitive and special jurisdiction touching on liberties and rights of subjects shall be a blot on independence and many faceted jurisdiction and discretionary powers of the High Court. See **The Judicial Review Handbook** (3rd Edn) by Michael Fordham at 361.

31. *The Constitutional Court of South Africa in **Fose vs. Minister of Safety & Security** [1977] ZACC 6 emphasized the foregoing as follows: -*

Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.

32. *In this case, it is important to note that the Petitioner pleaded the likelihood of infringement of his political rights under Article 38 of the Constitution as a result of the possible implementation of the IEBC Amendment Act.*

33. *This Court, therefore, find and hold, that the High Court has the requisite jurisdiction to grant any appropriate relief, including a conservatory order, in Petitions challenging the constitutionality of any legislation. It all depends on the circumstances of each case and whether the principles for grant of such a conservatory order are satisfied. The 1st Respondent's opposition hence fails.*

76. I am still of that position.

77. In the said **Okiya Omtatah Okiiti vs. Attorney General case** (*supra*) I also dealt with other aspects of conservatory orders. I will reproduce the ones relevant to this matter. This is what I said: -



1. The principles for consideration by a Court in exercising its discretion on whether to grant conservatory orders have been developed by Courts over time. They are now settled.
2. The locus classicus is the Supreme Court in **Civil Application No. 5 of 2014 Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others (2014) eKLR** where at paragraph 86 stated the Court stated as follows: -

[86] Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant courses.

3. In **Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR** after going through several decisions, the Court rightly so, summarized three main principles for consideration on whether to grant conservatory orders as follows: -

(a) An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.

(b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and

(c) The public interest must be considered before grant of a conservatory order.

4. There is also the need to ascertain whether the conservatory order sought will delay the early determination of the dispute. (See **Nairobi High Court Constitutional Petition No. E243 of 2020 Kenya Tea Development Agency Holdings Limited & 55 Others vs. The Cabinet Secretary Ministry of Agriculture, Livestock, Fisheries & Co-operatives & 2 Others and Kenya Small Tea Holders Growers Association (Kestega) (Interested Party)** (unreported).

78. I will now consider the applicability of the principles to the application. A prima facie case was defined in **Mrao vs. First**

American Bank of Kenya Limited & 2 Others (2003) KLR 125 to mean: -

.... In a civil application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.

79. The Court of Appeal in **Nairobi Civil Appeal No. 44 of 2014 Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & Another (2015) eKLR** while dealing with what a *prima facie* case is made reference to Lord Diplock in *American Cyanamid vs. Ethicon Limited (1975) AC 396* where the Judge stated thus: -

If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities, that is the end of any claim to interlocutory relief.

80. What constitutes a *prima-facie* case was further dealt with by the Court of Appeal in **Mirugi Kariuki -vs- Attorney General Civil Appeal No. 70 of 1991 (1990-1994) EA 156, (1992) KLR 8**. The Court in allowing an appeal against refusal to grant leave to institute judicial review proceedings by the High Court, stated as follows: -

It is wrong in law for the court to attempt an assessment of the sufficiency of an applicant's interests without regard to the nature of his complaint..... In this appeal, the issue is whether the applicant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of this Act was brought into question. Without a rebuttal to these allegations, this appellant certainly disclosed a prima-facie case. For that, he should have been granted leave to apply for the orders sought.

81. In sum, in determining whether a *prima-facie* case is demonstrated a Court must look at the case as a whole. It must weigh, albeit preliminarily, the pleadings, the factual basis, the respective parties' positions, the remedies sought and the law.



82. There are three issues for determination by this Court in this Petition. They are the constitutionality of the Nairobi City County Appropriation Act, 2020, the constitutionality and legality of the Deed of Transfer of Functions dated 25th February, 2020 and an interpretation of Article 187(2)(b) of the Constitution. I will only deal with the aspect of unconstitutionality of a statute herein below.
83. Courts have discussed the manner in which the issue of conservatory orders based on an allegation of unconstitutionality of a statute ought to be handled. In **Attorney General & another v Coalition for Reform and Democracy & 7 others [2015] eKLR** the Court of Appeal stated as under: -

While the Court appreciates the contextual backdrop leading to the enactment of the SLAA, it must also be appreciated that it is not in the interest of justice to enact or implement a law that may violate the Constitution and in particular the Bill of Rights. Constitutional supremacy as articulated by Article 2 of the Constitution has a higher place than public interest. When weighty challenges against a statute have been raised and placed before the High Court, if, upon exercise of its discretion, the Court is of the view that implementation of various sections of the impugned statute ought to be suspended pending final determination as to their constitutionality, a very strong case has to be made out before this Court can lift the conservatory order. The State would have to demonstrate, for example, that suspension of the statute or any part thereof has occasioned a lacuna in its operations or governance structure which, if left unfilled, even for a short while, is likely to cause very grave consequences to the general populace.

84. It has, as well, been submitted that a statute is always presumed constitutional and that such a statute can only be suspended where its demonstrated that it is a danger to life and limb at the very moment. That is the doctrine of presumption of constitutionality. (See **Republic vs. National Assembly & 6 Others exparte George Wang'ung'u (2018) eKLR**).
85. I have carefully read and understood the contents of the material before me. The allegations made by the Petitioner against the enactment of the Nairobi City County Appropriation Act, 2020 (hereinafter referred to as '**the Appropriation Act**') are weighty and enormous. They include lack of public participation, irregular



allocation of funds statutorily managed under the Nairobi County Ward Development Fund Act to the NMS, making appropriations above the legal budgetary limits, introduction and failure to deal with an uncushioned deficit of Kshs. 5 Billion, allegations through sworn dispositions by Members of the County Assembly of Nairobi County that the voting on the Governor's Memorandum on the then Nairobi City County Appropriation Bill, 2020 was seriously and fraudulently flawed and that the result was not the expression of the will of the members, among many other serious allegations.

86. At the very least, impugment of the political rights of the Members of the County Assembly of Nairobi County under Article 38 of the Constitution and inequality and discrimination under Article 27 of the Constitution, are greatly demonstrated. There is also the serious contention that funds to be statutorily managed by an entity have, instead, been appropriated to a third party.
87. If the Appropriation Act is to be implemented as it is and upon hearing and determination of the Petition it comes out that indeed the red-flag raised by the Petitioner is merited, the situation will be irreversible since NMS or any other recipient will have long committed any funds allocated to them. The result will be a budget not subjected to public participation would have been implemented, funds meant for the benefit of the citizens in the County Wards would be otherwise dealt with to the detriment of the lives of the citizenry, the County will be in serious financial deficit among others. All these matters are not effectively controverted at the moment.
88. This Court is hence convinced that the Petitioner has demonstrated a *prima-facie* case in the circumstances of this matter.
89. Will the Petitioners suffer prejudice and the Petition rendered nugatory unless the conservatory orders are granted? The *Black's Law Dictionary 10th Edition Thomson Reuters* at page 1370 defines 'prejudice' as follows: -

Damage or detriment to one's legal rights or claims.



90. The Petitioner having demonstrated a *prima-facie* case in the foregoing manner, the Petition will be definitely be rendered nugatory if the substratum thereof is not sustained.

91. On public interest, the *Black's Law Dictionary 10th Edition* at page 1425 defines it as: -

The general welfare of a populace considered as warranting recognition and protection. Something in which the public as a whole has stake especially in something that justifies government regulation.

92. 'Public interest litigation' was described by the Court of Appeal in ***Nairobi Civil Appeal No. 364 of 2017 Tom Mboya Odege vs. Edick Peter Omondi Anyanga & 2 Others (2018) eKLR*** as follows:

A legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.

93. The Court further held that: -

.... The best examples are in Articles 22(2)(a) and 258 of the Constitution which grant every person the right to move to court in 'public interest' where there is a claim or alleged contravention or infringement of a right or fundamental freedom, or threat thereto, or a contravention or threat to violate the Constitution.

94. The Supreme Court of India in *Ashok Kumar Pandey vs. State of West Bengal AIR 2004 SC 280* stated as follows about public interest litigation that: -

.... Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal

Further, there is every good reason for all matters touching on the Deed of Transfer of Functions dated 25th February, 2020 which this Court has jurisdiction over to be considered together. To that end, I will make appropriate orders.

99. In sum, I am satisfied and convinced that the Petitioner has made an appropriate case for the grant of some conservatory orders.

Disposition:

100. Flowing from the above findings and conclusions, the disposition of the Amended Notice of Motion dated 16th November, 2020 is as follows: -

- (a) **There are no issues for reference to arbitration on the basis of the Petitioner's letter dated 19th October, 2020 addressed to the Summit.**
- (b) **The High Court is ONLY seized of jurisdiction to deal with the Amended Petition dated 16th November, 2020 on the constitutionality and legality of the Nairobi City County Appropriation Act, 2020, the constitutionality and legality of the Deed of Transfer of Functions dated 25th February, 2020 and the interpretation of Article 187(2)(b) of the Constitution.**
- (c) **No order for certification on empanelment of an expanded bench of the High Court under Article 165(4) of the Constitution shall issue. Instead this Court shall expedite the determination of the matter.**
- (d) **A conservatory order suspending the implementation of the Nairobi City County Appropriation Act, 2020 be and is hereby issued. For clarity, the 11th and 14th Respondents are restrained from disbursing any funds on the basis of the Nairobi City County Appropriation Act, 2020. The order shall be in force for 10 (Ten) days. The parties in this matter shall**



Mr. Bitta, Learned Deputy Chief State Counsel instructed by the Hon. Attorney General for the 1st to 12th Respondents.

Mr. Okatch, Learned Counsel instructed by the firm of Messrs. Okatch & Partners Advocates for the 13th Respondent.

Miss. Ruto, Learned Counsel for the 14th Respondent.

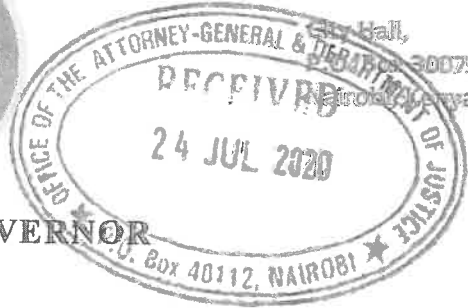
Dominic Waweru – Court Assistant.



FILE COPY

NAIROBI CITY COUNTY

Governor's Office
Telephone: 020-344194
Web: www.nairobi.go.ke

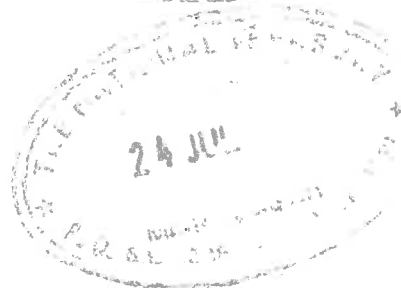
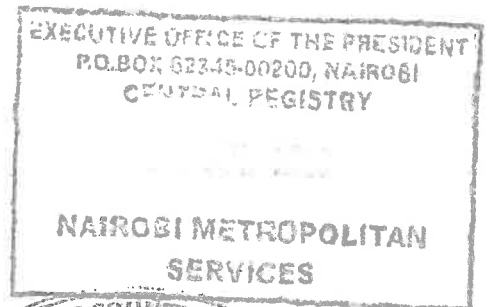


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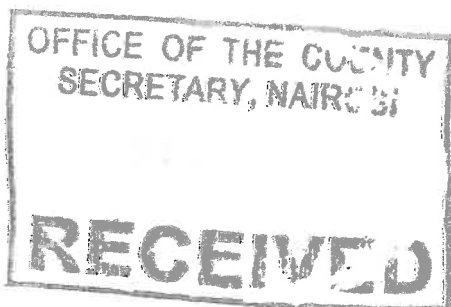
REF: NCC/GOV/VOL.1/JUL.20/002

Friday, July 24, 2020

- 1. THE CABINET SECRETARY**
MINISTRY OF DEVOLUTION AND ASALS
GOVERNMENT OF THE REPUBLIC OF KENYA
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STATE LAW OFFICE & DEPARTMENT OF JUSTICE
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- 3. THE DIRECTOR GENERAL**
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RE: NOTICE OF DECLARATION OF A DISPUTE BETWEEN THE NAIROBI CITY COUNTY GOVERNMENT AND THE NATIONAL GOVERNMENT UNDER THE DEED OF TRANSFER OF FUNCTIONS, DATED 25TH FEBRUARY 2020,



✓

GAZETTE NOTICE NO. 1609 DATED 25TH FEBRUARY 2020, Vol. CXXII – No. 38

INVOCATION OF ARTICLE 11.2 OF THE DEED OF TRANSFER OF FUNCTIONS FROM THE NAIROBI CITY COUNTY GOVERNMENT TO THE NATIONAL GOVERNMENT, GAZETTE NOTICE NO. 1609 DATED 25TH FEBRUARY 2020, Vol. CXXII – No. 38

& TERMINATION OF THE SAME BY THE NAIROBI CITY COUNTY GOVERNMENT,

& APPLICATION OF SECTION 33(2) OF THE INTERGOVERNMENTAL RELATIONS ACT, 2012

The Nairobi City County Government refers to the above subject and hereby issues a Notice of Declaration of a Dispute pursuant to Section 31(b) as read with Section 33(2) of the Intergovernmental Relations Act, 2012 with the intent of terminating forthwith the Deed of Transfer of Functions from the Nairobi City County Government to The National Government, as contained in Gazette Notice No. 1609 dated 25th February 2020 on the bases stated in the succeeding paragraphs.

AWARE of the patent illegalities attendant to the Deed of Transfer of Functions from the Nairobi City County Government to The National Government, as contained in Gazette Notice No. 1609 dated 25th February 2020, (hereinafter simply referred to as “the Deed of Transfer of Functions”) the Nairobi City County Government invokes Article 11.2 thereof as now stated.

WHEREAS Article 11.1 of the Deed of Transfer of Functions dictates that the same shall be governed by the Laws of Kenya, all legal antecedents necessary to clothe it with legality were never observed, thereby rendering the same a nullity *ab initio*.

Indeed, it is grounded on sheer bad faith, monumental breaches of the **Intergovernmental Relations Act**, and since the Nairobi City County Government is bound by the Principle of the Rule of Law under **Article 10(2)(a) of The Constitution** in the execution of any act in furtherance of its Constitutional mandate, (which is underscored in **Section 4(d) of the Intergovernmental Relations Act**), the Nairobi City County Government does not wish to abet and condone these breaches of the law.

Hereunder, the County Government addresses the breach of these legal antecedents first, and thereafter references specific breaches that contextually, and in sum warrant the invocation of Article 11.2 of the Deed of Transfer of Functions.

The Intergovernmental Relations Act, 2012 is binding on the parties to the Deed of Transfer of Functions, and it was enacted primarily to *“establish a framework for consultation and co-operation between the national and county governments...”* and it forms the primary legislative framework for the bedrock and operationalization of ANY Deed of Transfer of Functions such as under reference.

There was neither consultation of any sort regarding the 4 affected Departments, nor co-operation by the national government with the Nairobi City County Government prior to the execution of the subject Deed of Transfer of Functions.

This was in express violation of **Section 4(b), (c), and (h) of The Intergovernmental Relations Act**, there being NO form of *“inclusive and participatory governance”* in the antecedent engagement, nor any respect by the National Government for the *“functional and institutional integrity of the Nairobi City County Government.”*

The legal foundation of any such Deed of Transfer is best captured by the provisions of **Section 4(g) of the Intergovernmental Relations Act** which provides the formation of the subject Deed of Transfer of Functions on mandatory *“objectivity and impartiality in decision making.”*

Both objectivity and impartiality in decision making were lacking in the antecedents leading to the execution under duress of the subject Deed of Transfer of Functions.

Indeed, whereas the Deed of Transfer in its recitals expresses “common intent”, there was hardly NO common intent at the antecedent level.

It is of critical concern to the Nairobi City County Government that **Article 189(2) of the Constitution** of Kenya has totally been ignored by the National Government consistently - at the antecedent and subsequent points relative to the Deed of Transfer of Functions Executions. Not a single joint committee or joint authority was, or has been formed in furtherance of the envisaged co-operation between the two Governments to give effect to this Constitutional intendment.

Rather, the National Government adopted, and has continued to adopt an overbearing and superior attitude so far as the 4 affected functions are concerned, and indeed ALL other functions Constitutionally-vested on the Nairobi City County Government. The National Government has effectively adopted a scorched earth attitude and approach to the Nairobi City County Government, altogether in breach of **Article 189(1)(a) of the Constitution**.

In demonstration of this objection by the Nairobi City County Government, whereas **Article 4.4 of the Deed of Transfer of Functions** clearly maps the ground for the entry into *“sector specific service-level agreements and/or Memoranda of Understanding to guide and achieve better performance of [the] agreement.”*, not a single service-level agreement and/or Memorandum of Understanding has been forwarded by the National Government to the Nairobi City County Government for consideration on any of the 4 affected functions to date.

There is no legal basis to transfer the 4 Functions subject of the Deed of Transfer from the Nairobi City County Government to the NATIONAL METROPOLITAN SERVICE (hereinafter simply referred to as “NMS”). NMS has no legal underpinning, no legal existence, and indeed no functional existence within the Deed of Transfer of Functions yet it is seeking chunks of taxpayers’ money in budgetary allocations that will be outside the application of the law.

The NMS is NOT rooted in the Deed of Transfer of Functions, and it is incapable of carrying out the 4 Functions subject of the said Deed.

At the core of the National Government’s approach is an apparent unconstitutional, illegal TAKEOVER of the Nairobi City County Government by means of this Deed of Transfer, yet **Constitutional responsibility** over the 4 Functions are, and remain VESTED in the Nairobi City County Government. This unilateral approach by the National Government to the Transfer of the 4 Functions is in itself a breach of **Section 25(d) of the Intergovernmental Relations Act**.

This Statutory provision bars in express terms the transfer of Constitutional responsibility assigned to the Nairobi City County Government over the 4 Functions. This is non-negotiable, unless the National Government envisages a naked breach of the Constitution of Kenya.

There is NO justification offered by the National Government for the takeover of the 4 Functions at ANY stage prior to or subsequent to the Deed of Transfer of Functions, in violation of **Section 26(2)(c) of the Intergovernmental Relations Act**.

The Transfer of the 4 functions has NO reasons stipulated in the Agreement itself for the said transfer. To be clear, the scope of **these reasons** is NOT synonymous with the blanket recitals in the subject Deed of Transfer of Functions.

Not a single **sector performance contract** has been forwarded to the Nairobi City County Government in respect of ANY of the 4 Functions as envisaged by **Section 26(2)(d) of the Intergovernmental Relations Act**, and captured in Article 4.1 of the subject Deed of Transfer of Functions. We need to abide by the applicable law and seeing there is no compliance with the law, this constitutes a dispute surrounding a primary antecedent which cannot be ameliorated *post hoc*.

The Nairobi City County Government is UNWILLING to fly blind on this, and its Constitutionally-vested mandate over the 4 Functions and/or violate the applicable law in furtherance of an unlawful scheme.

Since the National Government has adopted a wholly belligerent and bullying attitude as against the Nairobi City County Government in respect of these 4 Functions, it is best that the Nairobi City County Government withdraws from the Deed of Transfer of Functions.

Again, whereas **Section 26(2)(e) of the Intergovernmental Relations Act** stipulates in mandatory terms that the Deed of Transfer of Functions stipulates within the Deed itself the “*resourcing framework for delivery of the powers, function or competency transferred or delegated*”, NONE of this is contained in the subject Deed of Transfer of Functions. The Nairobi City County Government is unwilling to proceed with these naked breaches of the law.

The Deed of Transfer is fatally flawed *ab initio*, and it cannot be paper beaten with time, where milestones are required by law; we would be turning to re-look at the Deed of Transfer of Functions to plug financial, capacity, or deliverables haemorrhage which is untenable in fact, and in law.

Section 28(d) of the Intergovernmental Relations Act envisages the existence of the level of technical and managerial expertise required to perform a transferred or delegated function or competency, yet the Nairobi City County Government knows of no such expertise or competency vested in the National Government-formed NAIROBI METROPOLITAN SERVICE entity.

The Nairobi City County Government HAD, and was possessed of the managerial and technical capacity in all the 4 Functions which probably needed a little tweaking, for optimal service delivery, yet there is no similar managerial or technical capacity in NMS. This is an amorphous entity assuming to take over Constitutionally-vested functions of the Nairobi City County Government as contained in Schedule 4 of the Constitution of Kenya.

Moreover, the NMS is engaged in unconstitutional actions that are untenable, in light of **Article 241(3)(c) of the Constitution of Kenya**.

Deployment of MILITARY OFFICERS to NMS, as it were to deliver services to the Nairobi City County IS OUTRIGHT OBJECTIONABLE, led by its Director General Mohammed Abdalla Badi, a Military Officer.

Even though the Kenya Defence Council may have “released” Director General Mohammed Abdalla Badi to NMS for 2 years, the Constitutional imperative of a National Assembly approval is integral to such an act, yet it is lacking to date.

This breach of a Constitutional imperative renders all the acts of, and directed by Director General Mohammed Abdalla Badi, via and on behalf of the NMS (whether under the Deed of Transfer of Functions or otherwise) a nullity. Nairobi City Government fully disassociates itself with such a violation of the Constitution of Kenya.

Similarly, and with all due respect to them, Brig F. Leuria, Major J.V Mbithi, Major A.N Nyakundi, Major J. K. Njoroge, Lt Col J.K.Biomdo and Major A.L. Musoma have NOT been approved and sanctioned by Parliament to be part of civilian affairs in deployment to the NMS.

They also have NO proven service delivery track records in the 4 Transferred Functions, which track record would have emerged in the envisaged National Assembly approval. The Nairobi City County Government will not proceed any further with the open militarized takeover of the Nairobi City County Government stated key functions.

Article 241(3)(c) of the Constitution of Kenya FORBIDS the deployment of members of the Defence Forces cited above to any part of Kenya absent the approval of the National Assembly. Indeed, the mandatory requirement of such approval by the National Assembly renders this entire act unconstitutional, and the Nairobi City County Government is unwilling to proceed any further with a wholly unconstitutional arrangement.

In sum, the incremental deployment of MILITARY officials of the KENYA DEFENCE FORCES in furtherance of the Deed of Transfer of Functions to the NMS is for all intents and purposes a silent coup (euphemistically put), and constitutes an act of bad faith, vitiating the entire Deed of Transfer of Functions. No Kenyan has approved such an act.

The foregoing ties with the objection that no shred of PUBLIC PARTICIPATION preceded this Deed of Transfer of Functions in whatever form or character.

The Nairobi City County Government holds government at the County level as a trustee for the People of Kenya vested in it pursuant to Article 1 of the Constitution, and they were NEVER consulted on this imperative prior to the execution of the Deed of Transfer.

Section 29 of the Intergovernmental Relations Act demands that public participation be entrenched in the entire process.

Indeed, **Section 30(3) of the County Government Act** mandates the Governor of the Nairobi City County to promote public participation in such an event. Public participation is an integral Principle of Governance set out in **Article 10(2) of the Constitution of Kenya** and which was breached in the instant issue of the Deed of Transfer of Functions.

Not a single advert was placed in any publication with national or County circulation, social media platform, or any of the Wards or locations within the Nairobi City County span of

jurisdiction for the County Government (or any convocation called) for purposes of sensitizing the Nairobi City County residents to the scope and intent of the Deed of Transfer of Functions prior to, or subsequent to its objectionable execution.

Public participation having been bypassed and altogether ignored antecedent to the execution of the Deed of Transfer of Functions renders the same a nullity. WE note that the NMS has purported to suspend Development and Planning applications in certain areas of Nairobi City County which directly implicates the rights of the affected Nairobi City County residents.

The Summit was NEVER involved in the drawing up or the terms of the Deed of Transfer of Functions yet according to **Section 8(k) the Intergovernmental Relations Act** the Summit is mandated in mandatory terms to provide a forum *“facilitating and coordinating the transfer of functions, power or competencies from and to either level of government...”*

No facilitation of the transfer of functions envisaged in the Deed of Transfer of Functions subject of this Notice of Declaration of Dispute was, or has been effected by the Summit in favor of the Nairobi City County Government. Effectively, in the entire scope of the process now subject of this Notice, the Summit has been not a mere bystander, but a distant spectator.

The role of the Summit in the antecedents envisaged under **Section 8(f); 8(h); and 8(i) of the Intergovernmental Relations Act** were totally ignored. The preparation and inception of the Deed of the Transfer of Functions was done absent the statutory input and role of the Summit, rendering the process fatally flawed.

NO Report of the Summit to the National Assembly envisaged under **Section 10(1) of the Intergovernmental Relations Act** ever recommended the transfer of the 4 Functions subject of the Deed of Transfer of Functions from the Nairobi City County Government to the National Assembly.

Indeed, NO such report of the Summit exists as would form the statutory basis for the Deed of Transfer of Functions now declared under dispute.

Although the Cabinet Secretary in charge of Devolution is mandated to convene consultative for a on sectoral issues surrounding the 4 functions as envisaged under **Section 13(2) of the Intergovernmental Relations Act**, no such for a were ever convened by the Cabinet Secretary directing his mind to the issues contained in the Deed of Transfer of Functions subject of the Declaration of Dispute herein.

In short, all the statutory avenues to ventilate pertinent issues PRIOR to the crafting of the Deed of Transfer of Functions and its final execution were NEVER availed to the Nairobi City County Government.

In the opinion of the Nairobi City County Government, the establishment of the Technical Committee under Section 11 and 12 of the Intergovernmental Relations Act is not for nought. It was, in our view, intended to forestall such an event as has now occurred.

This avenue was shut from us and the Deed of Transfer of Functions was effectively an act of ambush in violation of these procedures and provisions of the Intergovernmental Relations Act.

Consequently, the ambiguity created in Article 5.1 and 5.2 of the Deed of Transfer of Functions calls for immediate cessation of the Transfer of Functions.

The Nairobi City County Government finds it unfair, oppressive, mischievous, and in gross bad faith for the Deed of Transfer of Functions to purport to broaden the source of funding of the 4 Functions in Article 5.1 thereof between the Consolidated Fund AND the County Revenue Fund.

Yet, **Article 5.2 of the Deed of Transfer of Functions** turns inexplicably to state that *"The Nairobi City County Government shall ensure that the transferred functions are fully funded from the County Revenue Fund"*. This patent contradiction has already resulted in a dispute over the application of about Ksh. 15 billion towards the 4 Functions which the Nairobi City County Government perceives as oppressive, resulting in a protracted and baneful situation.

At any rate, even where the National Government has forcibly demanded the stated (and disputed) Ksh. 15 Billion there was NO consultation of whatever kind with the Nairobi City County Government. There is now (as of May 27th 2020) an inexplicable demand for an allocation of Ksh. 27 Billion to the NMS from the National Budget.

Section 25(c) of the Intergovernmental Relations Act prescribes that the Nairobi City County Government is to ensure that *"..the transfer is in accordance with the procedures set out under [the said] Act, or prescribed under the Regulations made under [the said] Act."*

As you will note, **Article 5.3 of the Deed of Transfer of Functions** dictates that the *"the level of funding for each transferred function shall be determined by the National Government in consultation with the County Government..."*

Not a single report was prepared of, or concerning the 4 Functions by the Ministry of Devolution and ASALS, pursuant to **Section 121 of the County Governments Act, Act No. 17 of 2012.**

As stated above, the Nairobi City County Government cannot transfer constitutional responsibility assigned to it under Schedule 4 of the Constitution of Kenya. This is expressly stated in **Section 25(d) of the Intergovernmental Relations Act.**

What has happened since the February 25th 2020 is a full throttle attempt by the NMS to have FULL transfer of the functions TOGETHER with Constitutional responsibility of the 4 functions reposed in the Nairobi City County Government. This is untenable.

In particular, **Section 121(2)(a) of the County Governments Act** predicates the transfer of functions on an objective assessment of the performance of a County Government *“with a view to determine its support requirements”*. No prior assessment was ever made at any stage of these supportive requirements.

Further, **Section 121(2)(b)** of the said Act demands that a report be prepared in furtherance thereof, in addition to conducting research under Subsection (c) of that Section, *“to determine the extent of the support requirements”*.

No such report, assessment or research exists of, or in respect of the 4 Functions, prior to or subsequent to the takeover of the 4 Functions subject of the Deed of Transfer of functions.

None of the “causes” of the perceived problems were identified yet **Section 121(2)(f) of the County Government Act** the Ministry of Devolution was supposed to identify the cause of the problems informing the “takeover” which the subject Deed of Transfer envisaged.

Whereas Article 5.4 of the Deed of Transfer of Functions stipulates that the National Government *“shall have the responsibility of collecting and remitting all revenue accruing from the transferred functions..”*, **Section 121(2)(h) of the County Government Act** stipulates that this was to be done in consultation with the CEC in charge of Nairobi City County Finance.

The Deed of Transfer of Functions cannot substitute statutory imperatives. The Nairobi City County Government cannot override statute in favor of the Deed of Transfer of Functions, thereby provoking a dispute for which notice is hereby given.

Prior to the Deed of Transfer of Functions, it was mandatory to have the report outlining such of the deficiencies that the National Government envisaged warranted the purported intervention. This is what is stated in mandatory terms in **Section 121(3) of the County Government Act**.

Moreover, **Section 121(4) of the County Government Act** demands that the said Report be tabled before Parliament PRIOR to *“assuming responsibility for the functions”* now already assumed. It cannot be done post hoc. Compliance with the Law is mandated under the Principle of Rule of Law under **Article 10(2) of the Constitution of Kenya**, and we cannot place the cart before the horse or seek retrospective validation of an expressly unlawful act.

There was NO NOTICE at all of the nature of the intended intervention that was given to the Nairobi City County Government of the intended “takeover” of the 4 functions by the National

Government via the Deed of Transfer prior to its purported execution contrary to the demands of **Section 121(5) of the County Governments Act.**

For the foregoing reasons, it is clear that the antecedents are riddled with illegalities.

Even SUBSEQUENT to the purported and unlawful Deed of Transfer of Functions, the National Government has acted unlawfully and in excess of its statutory and constitutional bounds.

The NMS purported to recall ALL the employees of the Nairobi City County Government at a time when the COVID-19 Regulations forbade gathering of more than 15 persons at a venue. It further purported to employ 6,052 employees of the Nairobi City County Government. On what Clause can this unlawful act be located? This is a point of declaration of dispute.

In spite of H. E The Governor of Nairobi City County Government Mike Sonko Mbuvi protesting at this, NMS totally ignored the objections and acted in breach of the law to purport to “redeploy” these employees. Again this has generated legal issues with the relevant Union, spilling over to the Employment and Labour Relation Court at Nairobi.

The larger scope of Nairobi City County employees NOT affected in the 4 Functions CANNOT lawfully be “deployed” by the Public Service Board. The mandate to oversee the employment of the said employees falls within the ambit of the Nairobi City County Assembly Service Board and this is a point of declared dispute.

The fate of thousands of casual employees under the Nairobi City County Government has NOT been addressed to date, and it is clearly outside the scope and ambit of the NMS. The payment of these casuals has equally not been addressed by the NMS, yet the NMS purported to “redeploy” the Nairobi City County Government employees in a blanket manner. This is a point of declared dispute.

The NMS has totally ignored **Article 5.7 of the subject Deed of Transfer of Functions** which stipulates that **The Nairobi City County Public Service Board shall**, in consultation with the Public Service Commission formulate the necessary instruments “*to facilitate the secondment and/or deployment of the necessary human resources.*” This has been erroneously translated (in our view) by the NMS to be a carte blanche for a take-over of the human resources of the ENTIRE Nairobi City County Government.

Nowhere is the NMS accorded blanket powers to take-over the entire operations of the Nairobi City County Government functions. This is a declared point of dispute. It is in breach of **Section 28(b) of the Intergovernmental Relations Act.**

The purported “**comprehensive capacity assessment**” referred to in Article 6 of the Deed of Transfer of Functions in no way refers to the ENTIRE County of Nairobi.

In spite of the OBJECTIONS leveled against the Deed of Transfer of Functions by the residents of the Nairobi City County prior to its coming into effect, NONE of the Objections were included in the final Deed, in breach of **Article 10.1 and 10.2 thereof**. This was therefore imposed, and in breach of **Section 29 of the Intergovernmental Relations Act**.

Too, the NMS has encroached on the unaffected Functions of the Nairobi City County Government, going as much as demanding unconnected documents to justify its overarching intrusion into the larger Nairobi City County Government functions.

This has been communicated to the NMS and interpreted as belligerence, which it is not. This is a point of declared dispute.

One fundamental aspect of the Deed of Transfer of Functions envisaged under **Article 187(1)(b) of the Constitution of Kenya** is that such a function or functions MUST NOT be prohibited by statute.

It states:

“A function or power of government at one level may be transferred to a government at the other level by agreement between governments if,

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

The Physical Planning & Land Use Act has an express and implicit conferment of planning to be effected by the County Government in the County’s jurisdictional zoning, and by implication such a function CANNOT be transferred to the National Government.

At any rate, the NMS has proceeded to embark on projects within the Nairobi City County CBD of a public nature without any consultations with the Nairobi City County government. Where established and existing pavements that are fully functional and without any discernible defects these have been demolished and dubious contractors engaged without any consultation with the Nairobi City County Government. This is happening along Kenyatta Avenue.

The Constitutional responsibility over these functions has NOT shifted to the NMS and this is a point of declared dispute.

The complications arising in the resultant scenario are evident in the aftermath of the suspension of development approvals purported by NMS as at May 27th 2020. This is a point of declaration of dispute.

Finally, H. E. The Governor of the Nairobi City County expressed regret at the execution of the Deed of Transfer of Functions under duress and pressure.

On February 25th 2020, H. E. The Governor of Nairobi received a telephone call from State House, directing him to immediately avail himself before H. E. The President of the Republic of Kenya, Uhuru Muigai Kenyatta on an urgent issue.

This Deed of Transfer had NOT been availed prior to the stated telephone call, either in soft form or in hard copy. There was hardly a 15 minute break between the said telephone call and H. E. The Nairobi City County Governor's arrival at State House on the said date.

Upon arrival, the Nairobi City County Government Governor, H. E. Mike Sonko found the table set, H. E. The President of the Republic of Kenya and the other persons standing by him, ready with the document of the Deed of Transfer of Functions subject of this Declaration of Dispute for execution. There was NO time afforded to H. E The Governor of Nairobi City County Government to read this document or seek legal consultations thereon prior to executing it.

He was then given a pen and directed to execute the same next to his name. This was sheer duress. It is thus not binding on the Nairobi City County Government.

Moreover, the venue of the execution of the Deed of Transfer of Functions subject of this Declaration of Dispute was at State House, Nairobi. This is a document that relates to the ostensible Transfer of Functions from the Nairobi City County to the National Government, and the ostensible venue for its execution would have either been at the Nairobi City County Government's City Hall, or the Hon. Attorney General's Office at Sheria House.

To locate the execution of the said document within State house itself speaks of vitiating duress. There would be NO expected "drama" of refusal to execute the said deed (for whatever reason) by H. E. The Governor of Nairobi City County Government, since such an act would be read as disrespect, insubordination and even perhaps treasonable.

In the result, such duress works to vitiate the entire Deed of Transfer of Functions subject of the foregoing objections.

All efforts to amicably resolve the foregoing have been unsuccessful after the Director General of NMS declined to address the issues raised with him by H. H. the Governor, Nairobi City County government.

Further, all efforts by Mr. Justus Kathenge, Acting County Secretary of the Nairobi City County Government to liaise with the Director General NMS and his junior officers to resolve the matter have failed, necessitating this formal declaration of a dispute.

In the High Court decision in the case of Okiya Omtatah Okoiti vs. The Nairobi Metropolitan Service and Others (Employment and Labour Relations Court Case No. 52 of 2020) decided on 18th July 2020, the Hon. Lady Justice Wasilwa held in paragraph 113 (1). of that Judgement that

“...the creation of the Nairobi Metropolitan Services was done in violation of the law and the Constitution.”

It follows that NO legally binding ACT can be engaged with the said NMS at all, pursuant to, or in purported execution of the Deed of Transfer of Functions, and the Nairobi City County Government does NOT wish to be party to ANY illegality executed in the name of the Deed of Transfer of Functions rooted in illegality and unconstitutionality.

By reason of the matters foregoing, this document constitutes a Notice of Declaration of a Dispute pursuant to Article 11.2 of the Deed of Transfer, as read with **Section 31(b) and 33(2) of the Intergovernmental Relations Act**, and in the interim, the Nairobi City County Government demands immediate and forthwith cessation of all assumed Functions under the Deed of Transfer of Functions.

TAKE NOTICE that in default of immediate cessation of all assumed Functions under the objected-to Deed of Transfer of Functions, the Nairobi City County Government will seek legal intervention as the entire NMS is unconstitutional and based on an unconstitutional and illegal Deed, and will Not be held liable for any illegal actions executed by the NMS thereunder or purported to be in furtherance of the said Deed of Transfer of Functions.

Yours Faithfully,



H. E. HON. MIKE SONKO MBUVI-GIDION KIOKO,

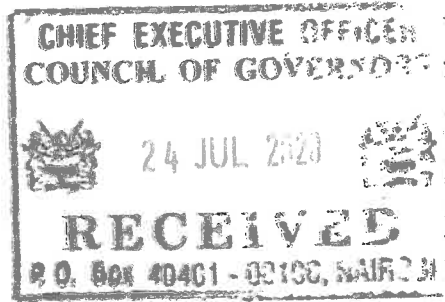
GOVERNOR,

NAIROBI CITY COUNTY GOVERNMENT

c.c.

THE SUMMIT,
Delta Corner, 2nd Floor,
Opposite PWC, Chiromo Road,
Off Waiyaki Way,
P.O. Box 40401-00100
NAIROBI
Email: info@cog.go.ke

THE COUNCIL OF GOVERNORS
Delta Corner, 2nd Floor,
Opposite PWC, Chiromo Road,
Off Waiyaki Way,
P.O. Box 40401-00100
NAIROBI
Email: info@cog.go.ke



MR. JUSTUS KATHENGE
A.G. NAIROBI CITY COUNTY SECRETARY
NAIROBI CITY COUNTY GOVERNMENT
NAIROBI

LYDIA KWAMBOKA
COUNTY ATTORNEY
NAIROBI CITY COUNTY GOVERNMENT
CITY HALL
NAIROBI

No.

2020

OFFICE OF THE SPEAKER
HON. BENSON MUTURA
15 OCT 2020
RECEIVED
P.O. Box 45844 - 00100, NAIROBI

THE NAIROBI CITY COUNTY GOVERNMENT

HIS EXCELLENCY THE GOVERNOR
HON. GIDEON MIKE MBUVI SONKO

I assent

15 OCT 2020

Governor

15th October 2020
Gideon Mike Mbuvi Sonko

An Act of Nairobi City County Assembly to authorize the issue of a sum of money out of the County Revenue Fund and its application towards the service of the year ending on the 30th June, 2021 and to appropriate that sum and a sum voted on account by the Nairobi City County Assembly for certain public services and purposes.



REPUBLIC OF KENYA
MINISTRY OF DEVOLUTION AND ASALS
OFFICE OF THE CABINET SECRETARY

Telephone: 2250646
Web: <http://www.devolutionasals.go.ke>
Email: asalscsdevolution@gmail.com

Treasury Building
Harambee Avenue
P O Box 30004-00100
NAIROBI

Ref. No. MDP/DD/ADM/3/18

12th August, 2020

Hon. Mike Sonko Mbuvi Gideon Kioko
Governor
Nairobi City County Government
NAIROBI



Dear Governor Sonko

**RE: NOTICE OF DECLARATION OF A DISPUTE BETWEEN THE
NAIROBI CITY COUNTY GOVERNMENT AND THE NATIONAL
GOVERNMENT UNDER THE DEED OF TRANSFER OF FUNCTIONS
DATED 25TH FEBRUARY, 2020**

Reference is made to your letter Ref: No. NCC/GOV/VOL1/JUL.20/002 dated 24th July 2020 and our letter Ref: MDP/DD/ADM/3/18 dated 28th July 2020.

Following your declaration of dispute arising from the implementation of the Deed of Transfer executed on 25th February 2020, and pursuant to article 11.2 of the said Deed of transfer, this is to invite you to a meeting to be held on **Monday, 17th August, 2020, Treasury Building, 10th Floor Boardroom at 10.00 a.m.**

In view of the Ministry of Health protocols for the prevention of the spread of COCIV-19, we request that you are accompanied to the meeting by not more than 4 officers.

Kindly confirm your availability at your earliest convenience.

Yours sincerely

A handwritten signature in black ink, appearing to be 'E. Wamalwa', written over a horizontal line.

HON. EUGENE L. WAMALWA, EGH
CABINET SECRETARY

Copy:

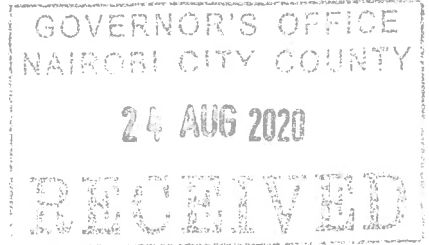
Justice (Rtd) Paul Kihara Kariuki, EGH
Attorney General
State Law Office & Department of Justice
NAIROBI

Maj. Gen. Mohammed Abdalla, EBS
Director General
Nairobi Metropolitan Services (NMS)
NAIROBI



REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE



Our Ref.: AG/CONF/21/74/21 VOL. I

20th August 2020

H.E. Mike Mbuvi Sonko EGH
County Governor
Nairobi City County
NAIROBI

RE: NOTICE OF A DECLARATION OF DISPUTE BETWEEN THE NAIROBI CITY COUNTY GOVERNMENT AND THE NATIONAL GOVERNMENT UNDER THE DEED OF TRANSFER OF FUNCTIONS DATED 25TH FEBRUARY 2020

This has reference to the above-captioned subject matter, your letter dated 24th July 2020 thereon and to the meeting held on 17th August 2020 between representatives of the National Government led by the undersigned and representatives of the Nairobi City County Government led by yourself.

Article 11.2 of the Deed of Transfer of Functions Between the National Government and the Nairobi City County Government, dated 25th February 2020, provides as follows:

"In the event of a dispute between the Parties herein arising from a matter provided for, governed by or arising out of this Agreement, the Parties shall at the first instance endeavour to resolve the dispute amicably through negotiations, but if the dispute is not resolved amicably within 30 days from the date one Party notifies the other of the dispute in writing, the Parties shall refer the dispute to the National and County Governments Co-ordinating Summit." [Emphasis supplied]

By dint of the foregoing provision, the subject dispute should be resolved amicably within 30 days from the date that the declaration of the dispute was notified to the National Government.

However, as indicated by the representatives of the National Government during the aforesaid meeting of 17th August 2020, the explication of some of the issues of dispute by the County Government's representatives substantially departed from the contents of your letter dated 24th July 2020. These issues are highlighted below:

- (a) The scope of the transferred functions in view of the claim that the NMS has assumed functions beyond those contemplated in the Deed of Transfer, through

SHERIA HOUSE, HARAMBEE AVENUE
P.O. Box 40112-00100, NAIROBI, KENYA. TEL: +254 20 2227461/2/251355/07119445555/0732529995
E-MAIL: info.state.law.office@kenya.go.ke WEBSITE: www.attorney-general.go.ke

DEPARTMENT OF JUSTICE
CO-OPERATIVE BANK HOUSE, KAILLE SELLASIE AVENUE P.O. Box 56057-00200, Nairobi-Kenya TEL: Nairobi 2224629/ 2243337
E-MAIL: legal@justice.go.ke WEBSITE: www.justice.go.ke

ISO 9001:2008 Certified

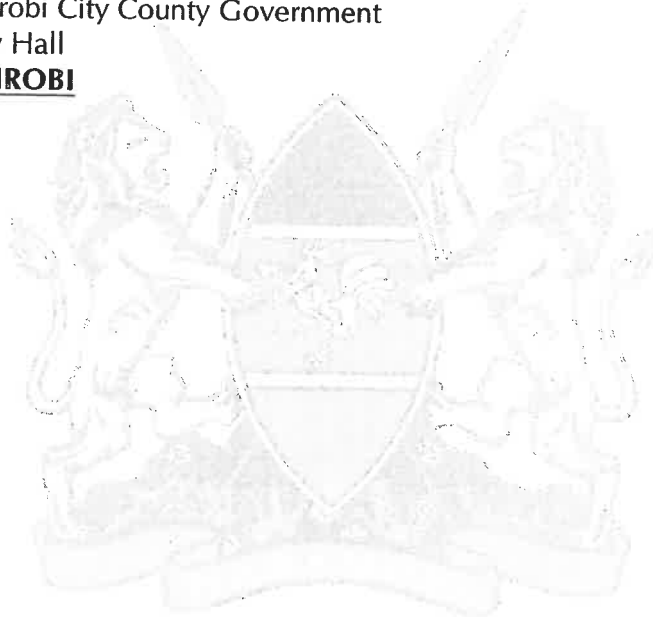


Major-General Mohamed Abdalla Badi EBS, SS
Director-General
Nairobi Metropolitan Services
NAIROBI

Mr. Kang'ethe Thuku EBS
Deputy Director General
Nairobi Metropolitan Services
NAIROBI

Mr. Charles Sunkuli CBS
Principal Secretary
State Department for Devolution
NAIROBI

Ms. Lydia Kwamboka
County Attorney
Nairobi City County Government
City Hall
NAIROBI



FILE COPY
NAIROBI CITY COUNTY

Governor's Office
Telephone: 020-344194
Web: www.nairobi.go.ke



VERY URGENT

City Hall,
P.O. Box 30075-00100,
Nairobi, Kenya



RECEIVED
24 AUG 2020
Nairobi

OFFICE OF THE GOVERNOR

REF: NCC/GOV/VOL.1/AUG.20/005

Monday, August 24, 2020

Mr. Kennedy Ogeto, CSB
The Solicitor General
Office of the Attorney General & Department of Justice
Sheria House, Nairobi



Dear *Mr. Ogeto,*

EXTENSION OF TIMELINES FOR NEGOTIATIONS FOR A FURTHER THIRTY (30) DAYS, STARTING MONDAY, AUGUST 17, 2020

Your letter Ref. No. AG/CONF/21/74/21 VOL.1 dated 20th August ,2020 refers.

Your request for the extension of timelines for the resolution of the dispute registered between the Nairobi City County Government and the National Government, for a further thirty (30) days from 17th August, 2020 is hereby agreed to. This is to facilitate discussions and negotiations between representatives of the Nairobi City County Government and the National Government as provided for in the Deed of Transfer signed on 25th February, 2020.

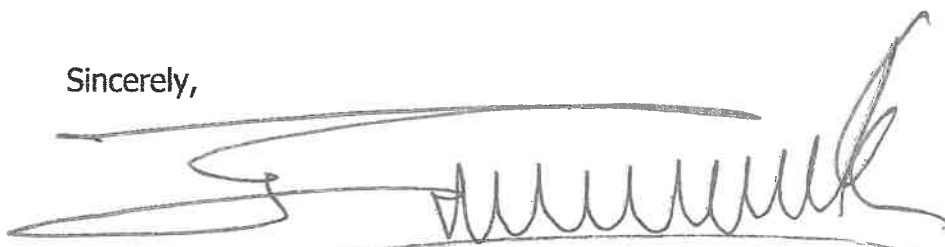
In the spirit of goodwill by either parties geared towards arriving at an amicable and sustainable solution, I request that the Departments and/or agencies tasked with the implementation of functions captured in the Notice of Dispute and during our meeting of 17th August, 2020 be advised to refrain from undertaking or initiating further actions and/or activities that may jeopardize the outcome of the process that we have commenced.

Specifically, the Kenya Revenue Authority (KRA) should shelve their current plans to introduce a new revenue management system for the Nairobi City County Government, an undertaking which would be outside their scope of work as outlined in Article 5.5 of the Deed of Transfer.

Your commitment, and that of all other representatives from the National Government to this process is much appreciated.

On the same breadth, I wish to assure you of my personal commitment, and that of the Nairobi City County Government, to the speedy conclusion of this process.

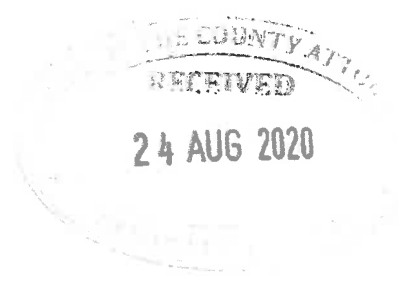
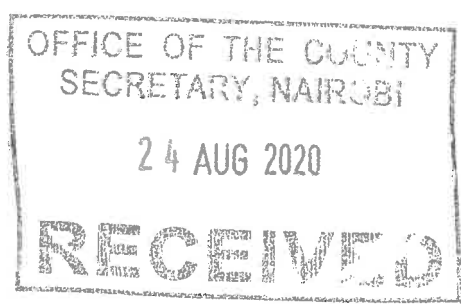
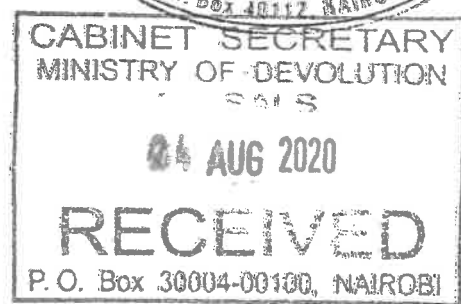
Sincerely,



H.E. Mike Mbuvi Sonko, EGH
Governor,

Copies to:

1. **Hon. Justice (Rtd) Paul Kihara Kariuki, EGH**
Attorney General
2. **Hon. Eugene L. Wamalwa, EGH**
Cabinet Secretary
Ministry of Devolution & ASALS
3. **Mr. Charles Sunkuli, CBS**
Principal Secretary
State Department of Devolution
4. **Mr. Njee Muturi, CBS**
Deputy Chief of Staff
Executive Office of the President
5. **Major-General Mohammed Abdalla Badi, EBS, SS**
Director General
Nairobi Metropolitan Services
6. **Mr. Kang'ethe Thuku, EBS**
Deputy Director General
Nairobi Metropolitan Services
7. **Mr. Justus M. Kathenge**
AG. County Secretary
Nairobi City County Government
8. **Ms. Lydia Kwamboka**
County Attorney
Nairobi City County Government





The National Treasury and Planning

**Impact of the Covid-19 Pandemic and the
Government's Intervention Measures**

**Presentation to the National and County Governments
Coordinating Summit**

**By Hon (Amb). Ukur Yatani, EGH
Cabinet Secretary/National Treasury and Planning**

Date: June 10th, 2020

1.0 Impact of the Covid-19 Pandemic

1.1 Global Growth Outlook

The FY 2020/21 budget is prepared against a backdrop of a contracting global economy with severe economic disruptions occasioned by the Covid-19 pandemic. The pandemic has devastated many countries causing interruptions to global production, supply chains, trade flows, volatility in financial markets and tightening of global financial market conditions. Consequently, global growth is projected to contract by -3.0 percent in 2020, from the earlier projected growth 3.3 percent in January 2020. This contraction is worse than the 2008-2009 global financial crisis. On the positive side, the global economy is expected to rebound strongly in 2021 to grow by 5.8 percent assuming the pandemic is fully contained in the second half of 2020.

Amidst the global turbulence, African economies have not been spared. With Africa's increased interconnectedness with the rest of the world, the Covid-19 pandemic poses a new blow to Africa's economies. Consequently, Sub-Saharan Africa's economic growth is projected to contract by -1.6 percent in 2020 from a January projection of 3.5 percent. Like the rest of the world, these economies are projected to rebound strongly to grow at 4.1 percent in 2021. According to the World Bank, the East African Community (EAC) is expected to post significantly slower growth in 2020 due to the pandemic. The combination of shocks associated with the public health measure taken to contain the spread of Covid-19 are expected to reduce growth in the region to an average of 3.1 percent in 2020, down from about 5.8 percent in 2019.

1.2 Domestic Economic Growth

Kenya's economy remained strong and resilient prior to the Covid-19 pandemic, despite the challenging global environment. In 2019, the economy grew by 5.4 per cent from a growth of 6.3 per cent in 2018. The slower growth in 2019 was partly due to slow agricultural activity, following suppressed long rains in key agricultural zones. The growth of agricultural activities slowed down to 3.6 percent in 2019 compared to 6.0 percent in 2018. The manufacturing sector was equally suppressed with its performance declining to 3.2 percent in 2019 from 4.3 percent in 2018. Activity in the service sector provided significant support to growth in 2019, especially accommodation and restaurant business that expanded by 10.3 percent; information and communication that grew by 9.0 percent; transport and storage that grew by 7.8 percent; financial and insurance that grew by 6.6 percent; and, wholesale and

retail trade that grew by 6.6 percent in the twelve months to December 2019. Additionally, electricity and water supply sector recorded a growth of 7.0 percent while construction sector grew by 6.4 percent in the same period.

1.3 Impact of the Covid-19 pandemic on the Kenyan Economy

The outbreak of the Covid-19 pandemic in the world has had a significant negative impact on the Kenyan economy in 2020. This followed the closure of borders by world economies impacting on trade, tourism, agriculture, manufacturing and other related sectors. With confirmation of the first coronavirus case in Kenya on March 12th, 2020, trade (both imports and exports) and tourist arrivals fell dramatically, partly due to containment measures announced by the Government.

While the extent of the adverse effects of the pandemic is still evolving, preliminary analysis shows that most sectors of the economy will significantly suffer. The agricultural sector has further been impacted by low global demand for exports (e.g. particularly for horticultural exports, tea and coffee) and desert locust invasion, among others. In reality, demand constraints will have negative implications for manufacturing and other sectors. Further, reduction in imports of raw materials and intermediate goods from China and other countries has heavily impacted the manufacturing sector. The financial services sector has been affected through reduced remittances from the diaspora, capital flight resulting from withdrawal by foreigners of their investments in the country, and there is a likelihood of an increase in non-performing loans. In addition, the capital market has registered reduced investment flows. Revenue performance for FY 2019/20 has also been impacted negatively by the low import-related taxes. Other domestic taxes have also shrunk due to declining incomes and depressed consumption resulting in part from the Government's enhanced Covid-19 containment measures specifically movement restrictions and night time curfew.

Against this backdrop, the projected growth for 2020 has been revised downwards to 2.5 percent from an initial projection of 6.1 percent in the 2020 Budget Policy Statement. This outlook could worsen as the pandemic evolves. In tandem with the global predictions, Kenya's economy is expected to rebound subsequently to grow by 5.8 percent in 2021 and 6.5 percent by 2024.

1.4 Fiscal Impact of Covid-19 Pandemic on FY 2019/20 budget

The execution of budget for FY 2019/20 has progressed well despite the challenges of reduced revenue collection that has been below target. In the nine months to 31st March 2020, revenue collection was below target by Ksh 204.8 billion (out of which Ksh 132.3 billion was due to ordinary revenue shortfall and Ksh 72.5 billion in ministerial A-i-A shortfall). The impact of the current Covid-19 pandemic is projected to further worsen revenue collection in the remaining quarter of FY 2019/20 and the projection for FY 2020/21. In particular, import-related taxes such as import duty, VAT on imports, import declaration fees and railway development levy will be negatively affected due to lower imports and closure of trade among countries while other domestic taxes will be affected due to declines in incomes and depressed consumption. In general, these revenue shortfalls will also have an impact on future division of revenue between the two levels of Government, through a shrinkage in the shareable revenue pool.

To cushion Kenyans against the Covid-19 pandemic and increase liquidity in the economy, the Government reduced various tax rates especially corporate income tax rate and personal income (PAYE) top tax rates from 30 percent to 25 percent, 100 percent tax relief to those earning below Ksh 24,000 per month, VAT rate from 16 percent to 14 percent and turnover tax rate from 3 percent to 1 percent among others. These measures will reduce income tax and VAT collections. Overall, it is projected that in the FY 2019/20 the pandemic will directly lead to a revenue loss of about Ksh 79.4 billion and indirectly through the incentives by Ksh 55.7 billion and this will widen the fiscal deficit in FY 2019/20 and in the Medium Term.

Impact of Covid-19 on jobs and employment

According to the World Bank, Covid-19 has led to negative impacts on otherwise healthy firms through four channels: **i)** falling demand and revenues; **ii)** reduced input supply; **iii)** tightening of credit conditions; and, **iv)** increased uncertainty. The Covid-19 containment measures are also costly to incomes and jobs by reducing social interaction, production and demand. This cost is aggravated by presence of a large informal sector in Kenya (accounting for at least 70% of employment), relatively high poverty rate, and significant unemployment rate among the youth. Against this backdrop, the Government's top priority is to protect jobs and firms to enable them cope with the pandemic. Section 2.0 contains the Government's intervention measures, including those designed to shield existing jobs and create new ones.

1.5 Fiscal Outlook: FY 2020/21 Budget

The fiscal framework for FY 2020/21 budget and the medium term has been revised to take into account the existing shortfalls in revenues as at end March 2020 as well as the negative impact on revenue due to the pandemic and the impact of the reduced tax rates. In order to boost revenue mobilization, the Government will continue to strengthen tax administration so as to seal loopholes and safeguard revenue base. Save for Covid-19 pandemic, these measures are expected to yield positive results and therefore reverse the trend. The measures will also broaden the tax base and further improve revenue administration into the medium term.

On the other hand, expenditure priorities in the budget for FY 2020/21 and the medium term are aligned to programmes under the “Big Four” Agenda. Specifically, the planned expenditures prioritized employment creation; youth empowerment; enhancing manufacturing activities; rolling out of Universal Health Coverage (UHC); improving food security and nutrition; and easing availability and affordability of houses through construction of affordable houses and spending through the enablers. The outbreak of Covid-19 has necessitated inclusion of changes in the revenue, spending and borrowing measures in the FY 2020/21 budget. As a result of these measures, the FY 2020/21 budget targets revenue collection including Appropriation-in-Aid (AIA) of Ksh 1,892.6 billion (16.8 percent of GDP) with ordinary revenues projected at Ksh 1,633.8 billion (14.5 percent of GDP). On the other hand, total expenditure and net lending are projected at Ksh 2,789.1 billion (24.7 percent of GDP) while recurrent expenditures will amount to Ksh 1,825.4 billion (16.2 percent of GDP). The fiscal deficit in FY 2020/21 is projected at Ksh 839.4 billion (or 7.4 percent of GDP) and will be financed by net external financing of Ksh 347 billion (3.1 percent of GDP), net domestic borrowing of Ksh 492 billion (4.4 percent of GDP) and other net domestic repayments of Ksh 0.6 billion.

The Government remains committed to gradually reduce the fiscal deficit from 7.7 percent of GDP in FY 2018/19 to 7.4 percent of GDP in FY 2020/21 and 4.2 percent of GDP over the medium term in line with the fiscal consolidation plan. This will in turn reduce the stock of public debt and create enough fiscal space to fund priority expenditures under the “Big Four” Agenda over the medium term.

2.0 The Government's Intervention Measures on the Covid-19 Pandemic

The Government has made significant efforts to contain the spread of the virus as recommended by the World Health Organization (WHO) by advising people to stay at home, social distancing, introduction of curfew and lockdown of four Counties among others. Below is a summary of specific measures:

<p>Fiscal measures</p>	<ul style="list-style-type: none"> • 100 % tax relief for persons earning gross monthly income of up to Ksh. 24,000 • Reduction of personal income tax top rate (PAYE) from 30% to 25% • Reduction of resident corporation income tax (CIT) rates from 30% to 25% • Reduction of the turnover tax rate from 3% to 1% for all MSMEs • Reduction of the VAT rate from 16% to 14%, effective 1st April, 2020 • Reduction of tax exemptions/expenditures in tax laws to cover for the revenue lost through the reductions in the tax rates above.
<p>Budget allocations</p>	<ul style="list-style-type: none"> • Provision of an additional Ksh.10 billion for cash-transfers to the elderly, orphans and other vulnerable groups by the Ministry of Labour & Social Protection, to cushion them from adverse economic effects of the pandemic • Expanding the <i>Inua Jamii</i> Cash Transfer Programmes to include workers in precarious employment including those in the informal sector and unemployed persons • Provision of Ksh 13.1 billion for paying verified pending bills by relevant Ministries and Departments • Provision of Ksh 10 billion to KRA to expedite payment of all verified VAT refund claims or allow for offsetting of Withholding VAT • Provision of Ksh.1.0 billion from the Universal Health Coverage kitty for recruitment of additional health workers. • Funding amounting to Ksh.10 billion for stocking of the Strategic Food Reserve to be able to respond to emergency food requirements • Allocation of Ksh.400 million to provide food relief and non-food commodities for insecure communities
<p>Monetary policy measures</p>	<ul style="list-style-type: none"> • The CBK lowered the Central Bank Rate (CBR) to 7.25% from 8.25% and further to 7.0% in April 2020 to prompt commercial banks to lower the interest rates to their borrowers • The CBK lowered the Cash Reserve Ratio (CRR) to 4.25 per cent from 5.25 per cent providing additional liquidity of Ksh.35 billion to commercial banks • Providing flexibility to banks with regard to requirements for loan classification and provisioning for loans that were performing as at March 2nd, 2020 and whose repayment period was extended or were restructured • Temporary suspension of the listing with Credit Reference Bureaus (CRB) of any person, MSMEs and corporate entities whose loan account fall overdue or is in arrears
<p>Other measures</p>	<ul style="list-style-type: none"> • Establishment of the Covid-19 Emergency Response Fund to receive voluntary pay donations and contributions from well-wishers towards the pandemic • State Agencies were instructed to establish and implement frameworks for staff to work from home • Roll out the National Hygiene Programme as from April 29, 2020 which seeks to create jobs for the youth while making our environment cleaner and healthier.

In addition, the National Treasury has submitted to Parliament proposed amendments to the FY 2020/21 Budget mainly to take care of critical expenditures under the Post Covid-19 Economic Stimulus Programme (PC-ESP). This programme seeks to cushion citizens and businesses from adverse effects of the Covid-19 pandemic as well as the slowdown in the economy. **The proposed allocation for the stimulus programme is Ksh. 55.7 billion**, which is funded largely through re-alignment of the FY 2020/21 and the Medium-Term Budget. Moreover, the programme specifically targets the new vulnerable citizens and businesses affected by job losses, increased operating costs, and reduced demand for their products and services. It should be noted that the programme focuses on interventions targeted at keeping food supply chains functioning; facilitating access to locally-produced goods and services; and, securing livelihoods of daily wage-earners, particularly those affected by interventions that were implemented as part of corona virus disease spread mitigation. The stimulus programme will be implemented through the following (selected) measures across eight (8) thematic areas:

Thematic area	Post Covid-19 Economic Stimulus Programme Measures
Youth empowerment & employment creation	<ul style="list-style-type: none"> Rolling out youth empowerment and employment creation programme “<i>Kazi Mtaani Programme</i>” to cushion the youth against job losses. This will be achieved by using local labour in rehabilitation of access roads and foot bridges.
Improving education outcomes	<ul style="list-style-type: none"> Support infrastructure improvement in secondary schools Recruitment of 10,000 contract teachers to support the 100 percent transition and employment creation Recruitment of 1,000 ICT interns in order to support digital learning in public schools and employment creation
Improving health outcomes	<ul style="list-style-type: none"> Recruitment of additional 5,000 Diploma and Certificate-level health interns for one year at an estimated cost of Ksh. 20,000/month Supply locally-sourced 20,000 units of beds and beddings to public hospitals at an estimated cost of Ksh. 25,000 Establish 50 modern walk-through sanitizers (at border points and hospitals) at an estimated cost of Ksh. 500,000
Improving environment, water & sanitation facilities	<ul style="list-style-type: none"> Undertake flood control mitigation measures, expand rainwater harvesting program as well as rehabilitation of wells, underground tanks and water pans using local labour
Agriculture & food security	<ul style="list-style-type: none"> Subsidizing supply of farm inputs through the e-voucher system to reach small scale farmers in order to ensure adequate food supply Providing temporary support to enable horticultural farmer’s access international markets
Tourism	<ul style="list-style-type: none"> Boosting the tourism sector by providing support for hotel renovations through soft loans to be channeled through the Tourism Finance Corporation Promoting aggressive post Covid-19 tourism marketing Providing financial support to 160 community conservancies
Enhancing liquidity to businesses	<ul style="list-style-type: none"> Providing seed capital to operationalize the Credit Guarantee Scheme in order to support MSMEs access credit

Thematic area	Post Covid-19 Economic Stimulus Programme Measures
	<ul style="list-style-type: none"> • Fast track payment of VAT tax refunds and pending bills owed to local businesses to enhance liquidity to MSMEs • Promote purchase of locally assembled cars for use by MDAs in order to support manufacturing sector
Social protection	<ul style="list-style-type: none"> • Enhance cash transfers

Note: This is not the exhaustive list of interventions.

It should be noted that proposed amendments to the FY 2020/21 Budget to cater for the above critical expenditures have been approved by the Cabinet. Ministries, Departments and Agencies (MDAs) are expected to formulate strategies for effective implementation of the indicated measures.

2.1 Additional funding for County Governments

In FY 2019/20, County Governments were allocated a total of Ksh 378.3 billion, of which 83.7 percent comprised their equitable share of revenue raised nationally, with the rest being conditional allocations from the Government as well as proceeds of external loans and grants. This is apart from County Governments' own-source revenue, which as per reports from the Controller of Budget, is projected at Ksh. 54 billion, assuming 100 percent collection. It should be noted that unlike the National Government, Counties' equitable revenue share allocation has not been reduced owing either to shortfalls in ordinary revenue or in response to the Covid-19 pandemic.

In addition to the above resources, Ksh. 5 billion for Covid-19 interventions within County Governments was approved under Article 223 of the Constitution. This has been transferred to the Ministry of Health (MoH), and has been released to the Counties.

To supplement these resources, the Government approached Kenya's development partners, some of who responded positively and have committed to extend financial support to the country, some of which is intended for channelling to County Governments. In this context, following discussions with the World Bank, it has been agreed that some funds under existing conditional grants to the Counties can be redirected to support interventions aimed at mitigating the negative impact of the Covid-19 pandemic. For example, the World Bank has indicated willingness to redirect funds earmarked for the Kenya Devolution Support Program (KDSP) towards the fight against the Covid-19 pandemic by supporting sensitization of communities on the pandemic. The redirected funds could also be applied towards purchase

of personal protective equipment (PPE), sanitizers and other related accessories required by County Governments to help in their response to this pandemic.

The Government through the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works will also consult with the World Bank on another existing conditional grant i.e. the Urban Development Grant of the Kenya Urban Support Program (KUSP). This grant is meant to provide support to urban boards and administrations through their respective County Governments for financing infrastructure investments in urban areas. The consultations with World Bank will determine whether scope exists within the existing KUSP framework to address some immediate issues within the informal settlements, in particular the possibility for County Governments with congested informal settlements to alter their current work plans to focus on dealing with direct effects of the pandemic.

In April 2020, the Government of Denmark committed the equivalent of Ksh 350 million in support of gazetted level II and III public health facilities within County Governments for operations and maintenance costs during the financial year 2019/20. This commitment comprises additional support to the existing DANIDA-funded Universal Healthcare in Devolved System Program. As per the grant agreement, the additional resources are being disbursed to the Counties under the same conditions, and with the same formula, as the existing grant.

Considering that this additional funding to County Governments both from the Government and from development partners is happening after the County Allocation of Revenue Bill, 2020 (CARB), had been submitted to Parliament, the National Treasury is in consultations with other stakeholders to determine alternative ways of channelling these funds to the Counties.

3.0 Status of disbursements to County Governments

As at June 8th, 2020, the County Governments had received payments totalling Ksh. 284.2 billion in the form of their equitable share of revenue raised nationally. (*Annex I*). This translates to 78.4 percent of the allocation for FY 2019/20, which is Ksh. 316.5 billion. The National Treasury undertakes to disburse the outstanding amount before the end of the financial year, as has happened in all previous years. In addition to the equitable share, the Counties have also received transfers totalling Ksh 24.4 in the form of conditional grants as follows:

- a) Ksh 4.3 billion from the level-5 hospital grant;
- b) Ksh 900 million from the compensation for the abolition of user-fees;
- c) Ksh 2 billion for the rehabilitation of youth polytechnics; and,
- d) Ksh 17.2 billion from loans and grants from development partners

4.0 Status of Pending Bills by County Governments

As at June 8th, 2020, County Governments had settled eligible pending bills amounting to Kshs. 37.1 billion, which is equivalent to 72.3 percent of total eligible pending bills (Ksh 51.3 billion) as per the Auditor-General. (*Annex 2*). Accordingly, the outstanding eligible balance of pending bills is Kshs. 14.2 billion. This is based on updated reports from the Controller of Budget (CoB).

Annexes

Annex 1: Status of Disbursements to County Governments as at June 8th, 2020 (Figures in Ksh unless indicated otherwise)

County	Equitable Share Allocation	Equitable Share released	Level 5 Hospitals	User fee	Grants for polytechnics Rehabilitation	Transforming Health Systems For Universal Care Project	Kenya Climate Smart Agriculture Project	Universal Healthcare For Devoled System Programme	NACGRIP	IDA-WSDP	Total Loans And Grants	Grand Total Disbursements	Equitable Share Balance	% Release on Equitable share
Baringo	5,095,630,000	4,198,815,600	-	13,191,000	24,873,298	23,252,236	54,084,479	-	-	-	115,401,014	4,314,216,614	896,834,400	82%
Bomet	5,507,100,000	3,939,604,900	-	16,713,356	47,388,298	14,125,815	69,033,478	17,718,750	-	-	164,979,697	4,124,584,597	1,547,495,100	72%
Bungoma	8,893,650,000	7,328,367,600	-	32,837,307	53,928,298	14,024,526	-	13,359,375	233,309,572	-	474,459,078	7,802,826,678	1,565,282,400	82%
Busia	6,013,500,000	4,323,706,500	-	16,934,085	63,333,298	78,863,352	44,822,152	17,812,500	-	-	221,765,387	4,545,471,887	1,689,793,500	72%
Eld. Marakwet	3,861,300,000	3,181,711,200	-	8,788,919	30,228,298	33,891,972	45,371,285	11,250,000	-	-	129,530,474	3,311,241,674	679,588,800	82%
Embu	4,304,400,000	3,546,825,600	301,040,463	10,724,225	33,603,298	44,663,425	-	13,312,500	209,940,412	-	613,284,323	4,160,109,923	757,574,400	82%
Garissa	7,026,300,000	5,789,671,199	344,739,886	12,964,636	20,628,298	44,643,379	60,357,821	10,359,375	-	135,046,320	628,739,715	6,418,410,914	1,236,628,801	82%
Homa Bay	6,741,450,000	5,534,954,800	-	22,185,346	35,163,298	40,518,189	-	19,968,750	200,965,854	-	318,801,437	5,873,756,237	1,186,495,200	82%
Isiolo	4,241,100,000	3,049,330,900	-	3,472,461	10,833,298	53,033,354	65,496,042	11,718,750	-	-	144,533,905	3,193,904,805	1,191,749,100	72%
Kajiado	6,424,930,000	5,294,158,800	-	16,955,365	35,493,298	135,621,176	55,019,659	17,906,250	-	-	260,995,748	5,555,154,548	1,130,791,200	82%
Kakamega	10,412,850,000	8,580,188,400	427,283,234	37,789,290	76,923,298	61,794,598	44,824,648	30,843,750	-	-	679,458,818	9,259,647,218	1,832,661,600	82%
Kericho	5,380,300,000	4,433,532,000	-	18,048,789	29,433,298	60,339,870	76,511,087	17,065,500	-	-	201,395,549	4,634,927,549	946,968,000	82%
Kisumu	9,431,700,000	7,771,720,801	538,716,763	34,671,542	55,113,298	80,079,440	-	27,937,500	230,751,500	-	967,270,043	8,738,990,844	1,659,979,199	82%
Kisumu	8,830,350,000	7,276,208,400	-	22,499,906	72,588,298	103,785,962	-	20,625,000	268,608,366	-	480,513,782	7,756,722,182	1,554,141,600	82%
Kisumu	7,785,900,000	6,415,581,600	-	15,209,593	59,793,298	147,037,619	-	22,500,000	241,448,671	45,015,440	531,004,621	6,946,586,221	1,370,318,400	82%
Kisumu	4,177,800,000	3,442,507,200	-	9,968,208	41,298,298	25,549,880	50,214,821	12,281,250	-	-	129,922,457	3,272,429,657	735,292,800	82%
Kisumu	2,959,300,000	2,138,527,200	-	2,451,034	41,298,298	34,402,667	60,390,161	10,593,750	-	-	149,135,910	2,287,663,110	456,772,800	82%
Lamu	7,754,250,000	5,575,305,750	383,583,813	24,129,039	51,093,298	129,838,778	57,565,560	24,843,750	-	-	671,074,237	6,246,379,987	2,178,944,250	72%
Machakos	7,406,100,000	6,102,626,400	-	19,435,760	60,333,298	84,293,539	-	21,281,250	243,315,576	-	428,659,423	6,531,285,823	1,303,473,600	82%
Makueni	10,222,950,000	7,350,301,050	-	25,474,920	22,113,298	65,351,998	76,718,822	20,906,250	-	-	160,203,170	5,741,237,570	1,920,065,600	82%
Marsabit	8,039,100,000	6,624,218,400	373,872,834	31,648,428	56,568,298	19,737,878	-	11,953,125	184,436,399	-	678,216,961	7,302,435,361	1,414,881,600	82%
Mombasa	6,773,100,000	4,869,858,900	388,439,308	21,655,884	30,033,298	76,811,165	-	18,656,250	209,160,983	247,584,920	742,629,998	6,538,380,798	1,242,199,200	82%
Muranga	6,298,350,000	5,189,840,400	-	23,383,934	83,268,298	77,074,190	-	24,562,500	208,695,938	-	407,833,366	5,597,673,766	1,108,509,600	82%
Nairobi City	15,919,950,000	10,172,848,050	-	79,423,251	22,998,292	96,359,510	-	47,156,250	-	-	245,937,303	10,418,785,353	5,747,101,950	64%
Nakuru	10,476,150,000	7,532,351,850	373,872,832	38,722,265	63,063,298	36,621,116	-	28,218,750	169,848,002	-	710,347,263	8,242,699,113	2,943,798,150	72%
Nandi	5,348,850,000	4,407,452,400	-	18,008,363	32,793,298	44,928,998	-	16,031,250	242,399,539	-	354,239,448	4,761,691,848	941,397,600	82%
Narok	8,039,100,000	5,780,112,900	-	20,595,297	19,488,298	27,200,699	-	19,031,250	255,036,254	-	341,351,798	6,121,464,698	2,258,987,100	72%
Nyandarua	4,874,100,000	3,964,099,200	-	13,175,221	67,068,298	14,054,627	-	7,125,000	161,791,811	-	263,714,956	4,227,314,156	846,700,800	82%
Nyandarua	5,412,150,000	4,459,611,600	407,861,272	13,701,379	55,143,298	24,814,801	44,927,897	14,718,750	-	-	145,365,867	4,161,624,267	857,841,600	82%
Nyandarua	4,620,900,000	3,807,621,600	-	5,235,578	15,483,298	35,000,000	-	18,000,000	204,998,690	-	273,936,316	4,081,557,916	813,278,400	82%
Siaya	5,791,950,000	4,164,412,050	-	18,194,808	40,278,298	42,427,178	54,479,856	13,218,750	-	-	173,380,139	4,337,792,189	1,627,537,950	72%
Taita/Taveta	4,241,100,000	3,494,666,400	-	5,296,305	55,638,298	56,942,903	44,833,870	6,046,875	-	45,015,440	213,773,691	3,708,440,091	746,433,600	82%
Tana River	3,924,600,000	3,233,870,400	-	5,682,357	21,228,298	50,849,353	76,718,822	16,593,750	-	-	171,072,760	4,995,798,760	1,030,524,000	82%
Trans Nzoia	5,760,300,000	4,746,487,200	-	21,304,915	61,188,298	36,686,728	-	10,875,000	222,439,095	-	173,289,479	3,407,159,879	690,729,600	82%
Turkana	10,539,450,000	7,377,864,550	-	25,634,941	13,893,298	67,802,286	-	17,718,750	257,569,739	-	358,400,286	5,104,867,486	1,013,812,800	82%
Uasin Gishu	6,330,000,000	5,215,920,000	-	20,813,065	57,588,298	34,836,257	76,718,822	6,656,250	-	-	207,675,191	4,285,179,765	1,114,080,000	82%
Vihiga	4,652,550,000	3,833,701,200	-	12,637,201	67,743,298	30,207,560	58,724,486	25,312,500	-	-	193,948,281	7,235,440,281	1,504,008,000	82%
West Pokot	5,000,700,000	3,595,503,300	-	12,128,484	17,313,298	35,000,000	44,936,627	7,359,375	-	-	116,737,784	3,712,241,084	1,405,196,700	72%
Total	316,500,000,000	248,249,940,000	4,326,000,000	900,000,000	2,000,000,000	2,655,779,588	1,396,769,390	770,437,000	4,562,651,325	562,693,000	17,174,330,803	265,424,270,803	68,250,060,000	78%

Annex 2: Status of Payment of Eligible Pending Bills by County Governments (Ksh)

County	Eligible Pending Bills	Eligible Pending Bills Paid	Outstanding Eligible Pending Bills
Baringo	24,046,826	24,046,826	0
Bomet	1,190,167,877	968,259,233	221,908,644
Bungoma	376,038,793	362,774,197	13,264,596
Busia	972,895,883	971,644,606	1,251,277
Elgeyo/Marakwet	225,216,395	225,216,395	0
Embu	435,114,432	435,114,432	0
Garissa	2,307,530,407	1,827,402,126	480,128,281
Homa Bay	40,447,020	40,447,020	0
Isiolo	1,258,372,703	509,806,817	748,565,886
Kajiado	88,191,609	88,191,609	0
Kakamega	583,093,452	583,093,452	0
Kericho	490,184,743	490,184,743	0
Kiambu	1,831,618,030	1,565,606,208	266,011,822
Kilifi	1,116,043,558	1,116,043,558	0
Kirinyaga	741,080,963	276,202,932	464,878,031
Kisii	1,200,573,919	1,184,810,134	15,763,785
Kisumu	1,792,200,077	1,489,710,075	302,490,002
Kitui	572,033,419	572,033,419	0
Kwale	809,734,393	809,734,393	0
Laikipia	77,539,708	77,539,708	0
Lamu	85,050,899	85,050,899	0
Machakos	942,363,607	926,436,565	15,927,042
Makueni	33,018,202	33,018,202	0
Mandera	349,433,313	338,950,000	10,483,313
Marsabit	728,259,831	517,744,517	210,515,314
Meru	1,845,545,178	1,647,527,361	198,017,817
Migori	1,007,373,410	731,321,456	276,051,954
Mombasa	3,545,800,427	1,862,722,116	1,683,078,311
Murang'a	1,531,778,008	1,531,778,008	0
Nairobi City	11,783,829,072	4,631,491,266	7,152,337,806
Nakuru	420,164,604	383,376,514	36,788,090
Nandi	942,307,841	942,307,841	0
Narok	1,980,736,070	1,137,896,245	842,839,825
Nyamira	275,698,127	275,698,127	0
Nyandarua	297,078,779	297,078,779	0
Nyeri	152,196,769	152,196,769	0
Samburu	762,579,174	714,377,693	48,201,481
Siaya	637,310,697	511,069,825	126,240,872
Taita/Taveta	390,269,112	390,269,112	0

County	Eligible Pending Bills	Eligible Pending Bills Paid	Outstanding Eligible Pending Bills
Tana River	507,082,631	474,747,325	32,335,306
Tharaka -Nithi	701,871,919	640,453,202	61,418,717
Trans Nzoia	666,047,614	659,157,124	6,890,490
Turkana	1,816,400,453	1,431,839,661	384,560,792
Uasin Gishu	76,566,231	60,435,232	16,130,999
Vihiga	1,151,148,522	654,041,979	497,106,543
Wajir	2,039,742,167	2,039,742,167	0
West Pokot	483,053,261	384,982,834	98,070,427
Total	51,284,830,125	37,073,572,702	14,211,257,423

Source of data: Controller of Budget



REPUBLIC OF KENYA
THE NATIONAL TREASURY AND PLANNING

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Date: 30th November, 2020

REF: IGFR/NCCG/01/WTY (11)

Hon. Mike Mbuvi Sonko, EGH
Governor
Nairobi City County Government
NAIROBI

Maj. Gen. Mohammed Badi, EBS, SS, ndc(K)
Director General
Nairobi Metropolitan Services
NAIROBI

Dear *Governor,*

RE: **FRAMEWORK FOR FINANCING TRANSFERRED FUNCTIONS**

As you are aware, pursuant to Article 187 of the Constitution as read with section 26 of the Intergovernmental Relations Act, 2012, the Nairobi City County Government (NCCG) on 25th February, 2020, transferred some of its functions to the National Government. The transfer was legally effected through a mutual Deed Agreement vide Gazette Notice No. 1609.

Article 6.1 of the Addendum to the Deed of Transfer of Functions stipulates that "Further to Article 187(2) (a) of the Constitution and Article 5.1 and 5.2 of the Deed, the National Treasury shall put in place arrangements and an appropriate framework to ensure that the resources necessary for the performance of the transferred functions are transferred from the NCCG to the National Government.

The National Treasury has developed the required framework in line with the requirement of the Deed of Transfer of Functions (see attached). The framework takes into account the provisions as outlined in CARA 2020 as well as



THE NATIONAL TREASURY AND PLANNING

FRAMEWORK FOR FINANCING TRANSFERRED FUNCTIONS

Introduction

1. Pursuant to Article 187 of the Constitution as read with section 26 of the Intergovernmental Relations Act, 2012, Nairobi City County Government (NCCG) on 25th February, 2020, transferred some of its functions to the National Government. The transfer was legally effected through a mutual Deed Agreement vide Gazette Notice No. 1609. According to the Agreement, the scope of the functions unequivocally transferred to the National Government included, County Health Services; County Transport Services; County Planning and Development Services and County Public Works, Utilities and Ancillary Services.

Constitutional and other Legal Provisions on Transfer of Functions

2. Article 187 of the Constitution requires that, "if a function or power is transferred from a Government at one level to a Government at the other level, **arrangements shall be put in place to ensure that the resources necessary for performance of the function or exercise of the power are transferred and constitutional responsibility for the function or exercise of the power shall remain with the Government to which is it assigned by the Fourth Schedule**".
3. Section 4 (1) of County Allocation of Revenue Act (CARA), 2020 provides that, "Each county government's equitable share of revenue raised nationally, on the basis of the revenue sharing formula approved by Parliament in accordance with Article 217 of the Constitution in respect of the financial year 2020/21 shall be as set out in Column D of the First Schedule". First Schedule of CARA 2020 column D provides for allocation of each County Government's Equitable share of revenue raised Nationally in Financial Year 2020/21. Further Section 4 (2) of CARA, 2020 provides that, "Each county government's allocation under subsection (1) shall be transferred to the respective County Revenue Fund (CRF), in accordance with a payment schedule approved by the Senate and published in the gazette by the Cabinet Secretary in accordance with section 17 of the Public Finance Management Act (PFMA), 2012".

4. Section 5 (3) and 5(5) of CARA 2020 requires that conditional allocations are transferred to the respective CRF(except conditional grants for leasing of medical equipment), in accordance with a payment schedule published in the Gazette by the Cabinet Secretary in accordance with section 17 of the PFM Act, 2012, if the Cabinet Secretary and the responsible development partner, have agreed in writing that the funds shall be transferred to the County Governments (for Conditional allocations financed by proceeds of loans or grants from development partners). Further section 5(3) (c) and 5 (5) (b) requires that these transfers shall be included in the budget estimates of the County Government and submitted to the County Assembly for approval.
5. Section 7 (1), (2) and (3) of CARA 2020 states that:

Section (1) "where a County Government has transferred functions to the National Government pursuant to Article 187 of the Constitution, the County Executive in consultation with the National Government shall determine the cost of the transferred functions.

Section 7 (2) The respective County Assembly shall appropriate such monies as may be required for the transferred functions in accordance with the determination made under subsection (1) and the allocation shall not be less than the amount appropriated by the County Assembly in the preceding financial year;

Section 7 (3) The monies appropriated under subsection (1), shall be transferred to the National Government."

Provisions of the Deed of Transfer in Relation to Financing of Transferred Functions

6. Articles 5 of the Deed of Transfer of Functions provide for financing the delivery of the transferred functions.
7. Specifically, articles 5.1, 5.2 and 5.3 of the Deed provide that:

Article 5.1 'Financing for the functions herein shall be drawn from either or both the **Consolidated Fund and the County Revenue Fund**';

Article 5.2 'The NCCG shall ensure that the transferred functions are fully funded from the **County Revenue Fund**';

Article 5.3 'The level of funding for each transferred function shall be determined by the National Government in consultation with the County Government, but in any case the budgetary allocation shall not be less than the amount last appropriated by the County Assembly in the preceding financial year.'

8. The above sections of CARA 2020 and Article 5.2 of the Deed of Transfer of Functions therefore imply that equitable share allocation and all conditional allocations due to NCCG (except conditional grants for leasing of medical equipment), shall be transferred to NCCG Revenue Fund Account.

Proposed Framework for Financing Transferred Functions

9. Article 6.1 of the Addendum to the Deed of Transfer of Functions stipulates that "Further to Article 187(2) (a) of the Constitution and Article 5.1 and 5.2 of the Deed, the National Treasury shall put in place arrangements and an appropriate framework to ensure that the resources necessary for the performance of the transferred functions are transferred from Nairobi City County Government to the National Government".
10. The proposed framework takes into account the above stated Constitutional and legal provisions as contained in CARA 2020 as well as the provisions of the Deed of Transfer of Functions.

(a) Budget Formulation

11. Section 7 (1) of CARA 2020 require that the County Executive in consultation with the National Government shall determine the cost of transferred functions.
12. The cost of transferred functions as determined in paragraph 11 above shall form the basis for the allocation of the transferred functions.
13. Allocations under paragraph 12 shall be included in the budget estimates of NCCG and of the National Government. The budget for NCCG shall include a transfer item to National Government entity(NMS) to facilitate transfer of funds for the transferred functions from NCCG to the National Government, while budget estimates for the expenditures for purposes of budget execution, will include detailed items of as provided in PFM Act 2012.

14 The allocations under paragraph 12 above shall be included in NCCG Appropriation Bill and National Government Appropriation Bill and shall be submitted to Nairobi City County Assembly and National Assembly respectively for approval

(b) Budget Execution

- 15 National Government Budget relating to the transferred functions shall be implemented in line with the National Treasury Circular providing guidelines for implementation of 2020/21 Budget
- 16 The National Government and NCCG, shall prepare joint cash flow projection based on revenue projections from NCCG's equitable share and own source revenue
- 17 The joint cash flow projections shall be shared with the Controller of Budget and the National Treasury, and shall form basis for any requisition of funds from the CRF besides any other prescribed documentations by OCOB.
- 18 The allocations appropriated under paragraph 14 above shall be transferred to a Special Purpose Account (SPA) for the National Government Entity responsible for implementing the transferred functions. The Special Purpose Account shall be opened and operated at the Central Bank of Kenya.
19. **Withdrawals from the CRF to the SPA shall be through a requisition raised by the Accounting Officer of the National Government entity responsible for implementing the transferred functions to County Executive Committee Member responsible for Finance (CECMF) of NCCG with a copy to the National Treasury and Controller of Budget (COB).**
20. **CECMF shall raise a requisition to COB for the amounts requested in paragraph 19 above within 48 hours (2 working days) upon receipt of the request.**
21. The Controller of Budget shall require that any requisition by the CECM-Finance shall be in line with the joint cash flow projections, and that for every requisition made, it will include a transfer to both NCCG and the SPA, otherwise such a requisition will be deemed not complete and maybe declined, if no satisfactory explanation is given.
22. When satisfied that the requested funds are authorized by the relevant laws, COB shall authorize withdrawal of the requested funds to the SPA referred in para 18 above.
- 23 Financing of transferred functions will be drawn from NCCG allocation from equitable

(c) Reporting and Oversight

24. Accounting, reporting and oversight on expenditures in respect to transferred functions shall be as spelt out in Public Finance Management Act 2012, CARA 2020, the Deed of Transfer of Functions and the Addendum to Deed of Transfer.
25. The Accounting Officer of the entity responsible for implementing transferred functions, shall prepare quarterly and annual financial and non-financial reports and submit to the Cabinet Secretary to the National Treasury and Planning with a copy to the Controller of Budget, NCCG CECM for Finance and the Executive Committee members responsible for the transferred functions.
26. The Cabinet Secretary to the National Treasury shall prepare financial and non-financial quarterly reports in respect of the expenditure of funds on transferred functions Pursuant to Section 7 (4) & (5) of CARA,2020.
27. The reports prepared under paragraph 26 above shall be submitted to the Senate, the National assembly, the Controller of Budget, the Auditor General and the Nairobi City County Assembly, pursuant to Section 7 (6) of CARA, 2020.
28. Nairobi City County Assembly shall exercise its constitutional and statutory oversight mandate over the performance of transferred functions as provided for in Article 7 of the Addendum to the Deed of Transfer and may summon the County Executive Committee Members or Chief Officers responsible for any of the transferred functions to appear before it for the purpose of giving evidence or providing information.



08 MAR 2018 6.1

THE PRESIDENCY
EXECUTIVE OFFICE OF THE PRESIDENT
HEAD OF THE PUBLIC SERVICE

Telegraphic Address
Telephone: 020-2225435
When replying, please quote
OP.CAB/304/018

STATE HOUSE
P.O. Box 30550 NAIROBI
7th March 2018

Ref. No. _____
and date _____

Prof. Margaret Kobla, MGH
Cabinet Secretary
Ministry of Public Service, Youth and General Affairs
NAIROBI

Dear Prof Kobla,

REF: GOVERNMENT DELEGATION TO THE 62ND SESSION OF THE
COMMISSION ON THE STATUES ON THE STATUS OF WOMEN (CSW)
2018

Reference is made to your letter ref. No. MPYG.CS/15 dated 6th
2018.

There is no objection for Mrs. Primrose Mwelu Nyamu and Ms Saumi
Agnes Mbuvi to be included as part of the Kenyan delegation to
travel to New York, USA, to attend the 62nd Session of the Commission
on the Status of Women (CSW) 2018, scheduled to take place from
12th to 23rd March, 2018.

The resultant expenditure will be met by their respective institutions.

Inform them accordingly.

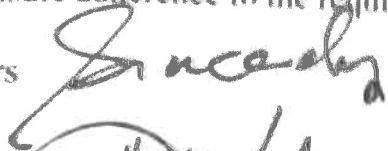
Yours Sincerely
Joseph K. Kinyua

JOSEPH K. KINYUA, EGH
HEAD OF THE PUBLIC SERVICE

'MMS-16'

The purpose of this letter therefore is to forward to you the framework and request you to ensure adherence to the requirements stated herein

Yours




HON. (AMB) UKUR YATANI, EGH
CABINET SECRETARY/THE NATIONAL TREASURY AND PLANNING

Encl:

Copy to: Hon. P. Kihara Kariuki EGH
ATTORNEY GENERAL

Dr. Margaret Nyakang'o
Controller of Budget
Bima House, 12th Floor
Harambee Avenue
NAIROBI

Mr. Kange'the Thuku, EBS
Deputy Director General
Nairobi Metropolitan Services
NAIROBI



REPUBLIC OF KENYA
THE NATIONAL TREASURY AND PLANNING

Telegraphic Address: 22921
FINANCE-NAIROBI
Fax No.: 330426
Telephone: 2259922

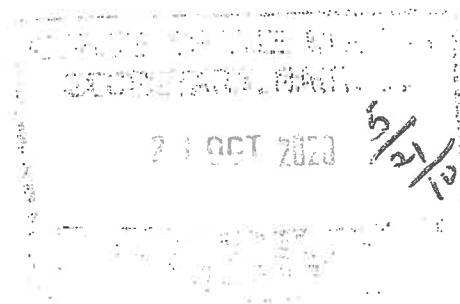
THE NATIONAL TREASURY
P.O. Box 30007
NAIROBI
KENYA

When replying please quote

15th October, 2020

REF: IGFR/NCG/01/B/TY (85)

Maj. Gen. Mohamed Abdalla Badi, EBS, SS, NDC(K)
Director General
Nairobi Metropolitan Services
Kenyatta International Convention Centre
23rd Floor
NAIROBI



Dear

**RE: PAYMENT OF SALARIES FOR STAFF SECONDED TO NAIROBI
METROPOLITAN SERVICES**

Reference is made to your letter Ref. No. EOP/NMS/ADM/1/VOL.II/7 dated 3rd September, 2020 on the above subject matter.

As you are aware, Section 4 (1) of the County Allocation of Revenue Act (CARA), 2020 provides that, "Each county governments' equitable share of revenue raised nationally, on the basis of the revenue sharing formula approved by Parliament in accordance with Article 217 of the Constitution in respect of the financial year 2020/21 shall be as set out in Column D of the First Schedule. First Schedule of CARA column D provides for allocation of each County Governments' Equitable share of revenue raised Nationally in Financial Year 2020/21." Further Section 4 (2) of CARA, 2020 provides that, "Each county governments' allocation under subsection (1) shall be transferred to the respective County Revenue Fund, in accordance with a payment schedule approved by the Senate and published in the gazette by the Cabinet Secretary in accordance with section 17 of the Public Finance Management Act, 2012.

The above legal provisions therefore imply that equitable share allocation due to Nairobi City County Government (NCCG), including monies for personnel emoluments, shall be transferred to NCCG Revenue Fund Account.

As you may recall by a letter dated 24th July 2020, the Nairobi City County Government issued notice of a Declaration of Dispute pursuant to Article 11.2 of the Deed of Transfer which provides that Parties shall, in the first instance, endeavor to resolve disputes governed by, or arising from, the Deed of Transfer amicably through negotiations.

Consequently, Parties to the Deed of Transfer of functions from the Nairobi City County Government (NCCG) to the National Government entered into an Interim Settlement Agreement as an expression of good faith and commitment to an amicable resolution of the matters in dispute among them Budgeting, Provision and Oversight of Nairobi Metropolitan Services (NMS) Funds and secondment of staff to NMS.

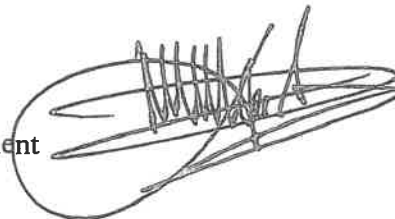
The Interim Settlement Agreement provided for formation of Committees to advise on issues contained in the notice of a declaration of dispute which includes provision of NMS funds and secondment of staff to NMS.

Given the above legal provisions and the ongoing negotiations, the National Treasury awaits further guidance from the Office of the Attorney General on the way forward on the above issues.

Yours

HON. (AMB.) UKUR YATANI, EGH
CABINET SECRETARY/THE NATIONAL TREASURY AND PLANNING

Copy to: Mr. Justus Kathenge
Ag. County Secretary
Nairobi City County Government
NAIROBI

A handwritten signature in black ink, appearing to be 'Justus Kathenge', is written over a circular stamp or seal. The signature is somewhat stylized and overlaps the stamp.