

# SUMMARY OF CDF RULING



## About CEDGG

The Centre for Enhancing Democracy and Good Governance (CEDGG) is a grassroots civil society organization that works to empower vulnerable and marginalized citizens to claim their rights in local development and governance processes. CEDGG legally exists as a Non-Governmental Organization and has been in operation since the year 2001. Our programme work extends to the counties of Nakuru, Baringo, Laikipia, Kericho, Elgeyo Marakwet, West Pokot and Turkana.

On 14th January 2013, the CDF Act 2013 was enacted and in doing so, instituted a structurally defective law into place and therefore violating the constitutional principle of separation of powers within the context of devolved system of governance. Aggrieved by the enactment of the CDF Act 2013, Centre for Enhancing Democracy and Good Governance (CEDGG) filed constitutional petition in the High court at Nakuru under petition No. 71 of 2013 challenging the constitutionality of CDF Act 2013. In a strategic move, CEDGG joined forces with partner organization, Institute for Social Accountability (TISA), consequently the petition was consolidated and transferred to Nairobi High Court on 22nd May 2013.

At the High Court, FOUR key issues were identified for determination: as follows;

Whether the process leading to the enactment of the CDF Act 2013 was constitutional

Whether the CDF Act 2013 offended the constitutional principles of public finance and division of revenue provided for under the constitution

Whether the CDF Act 2013 violated the division of functions between the levels of government

Whether the CDF Act 2013 offended the principles of separation of powers



**The High Court vide a judgement delivered on 20th February 2015 determined that the CDF ACT 2013 was unconstitutional and as a result, granted the following orders;**

A declaration that the CDF Act 2013 was unconstitutional and therefore invalid.

The order of invalidity above was suspended for a period of twelve (12) months from the date of judgement.

The national government could remedy the defect within the period of suspension and the CDF Act 2013 would stand invalidated at the expiry of twelve (12) months



Aggrieved with the judgment of the High Court, the 1st respondent filed Civil Appeal No. 92 of 2015 dated 16th April 2015 while the 4th respondent filed Civil Appeal No. 97 of 2015 before the Court of Appeal. The two appeals were consolidated and heard together.



**MEMBERS OF CEDGG SITTED WITH THE NATIONAL ASSEMBLY'S COMMITTEE ON CONSTITUENCY DEVELOPMENT FUND ON 19/11/2015 DURING SUBMISSION OF MEMORANDUM ON THE NATIONAL GOVERNMENT C.D.F BILL 2015.**

Having considered the issues, the Court of Appeal delivered a judgment on 24th November 2017, partially allowing the appeal, by declaring Sections 24(3)(c), 24(3)(f), and 37(1)(a) of the CDF Act 2013 unconstitutional and invalid for violating the principle of separation of powers. The court also overturned the declaration, that the CDF Act 2013 was unconstitutional in its entirety and held that the rest of the orders made by the trial court had been overtaken by events.

On the issue of division of functions between the two levels of government

The Court of Appeal held that the appellants did not prove that the functions performed by the national government through CDF are exclusively within the jurisdiction of the county government. It observed that it was not unconstitutional for the national government to perform CDF services inside the administrative structures of county governments.

# Public Finance



## ON WHETHER SECTION 4 OF THE CDF (AMENDMENT) ACT, 2013 OFFENDS THE PRINCIPLES OF PUBLIC FINANCE AND DIVISION OF REVENUE

The appellate judges determined that this contention was hypothetical as it was not empirically demonstrated that the constitutional formula for division of revenue was jettisoned in favour of the provisions of Section 4 (1) (a) of the CDF Act 2013 or that the county governments received less than their rightful constitutional share of budgetary allocation in the financial year 2013/2014 or any other subsequent year.

## ON THE CONSTITUTIONALITY OF THE CDF ACT 2013 FOR FAILURE TO INVOLVE THE SENATE IN ITS ENACTMENT

The Court of Appeal found that the Senate had no legislative role in the enactment of the CDF Act 2013 as it was passed before the Senate came into existence.



## ON THE DOCTRINE OF SEPARATION OF POWERS

The Court of Appeal found that it was not unconstitutional for the National Assembly under Section 28 of the CDF Act 2013 to require the National Assembly to appoint a National Assembly Select Committee to perform an oversight role over the Fund, which oversight role it could have delegated to one of its own Committees.



# DISSATISFIED WITH THE COURT OF APPEAL'S DECISION, THE APPELLANTS (CEDGG & TISA) FILED AN APPEAL BEFORE THE SUPREME COURT ON DECEMBER 2019 SEEKING, INTER ALIA, THE FOLLOWING ORDERS:



## A declaration be issued that failure to involve senate in the passage of CDF Act 2013 was unconstitutional.

On 10th May 2015, the Centre for Enhancing Democracy and Good Governance (hereinafter referred to as CEDGG) filed a constitutional Petition No. 16 of 2013 in the High Court at Nakuru, alleging that the CDFA was unconstitutional and sought reliefs, inter alia, for striking down of the Act for being unconstitutional. The Nakuru petition was later transferred to Nairobi and consolidated with the Nairobi Petition. On 2nd August 2013, the Chairperson of Constituency Development Fund Committee – Mr. Moses Lessonet caused to be published the Constituency Development Fund (Amendment) Act – No. 36 of 2013 which commenced on 1st October, 2013. Thereafter the petitioners filed an amended petition in the consolidated petitions.

The High Court – Constitution and Human Rights Division (Lenaola, Mumbi Ngugi & Majanja, JJ.) issued a judgment that led to the filing of the appeal, which judgment was in the following terms:

- (a) A declaration is hereby issued that the Constituencies Development Fund Act, 2013 is unconstitutional and therefore invalid.
- (b) The order of invalidity above is suspended for a period of twelve (12) months from the date of judgment.
- (c) The National Government may remedy the defect within that period and the Constituencies Development Fund Act shall stand Judgment-CA 92.015 3 invalidated at the expiry of the twelve (12) months or may be earlier repealed whichever comes first.
- (d) Each party shall bear its own costs.

The Court of Appeal decision was by Justices Githinji, Okwengu and G.B.M Kariuki and you can [click on this link to read the judgment of the Court of Appeal](#)

A declaration be issued that numerous provisions of the CDF Act 2013 are unconstitutional and cumulatively render the entirety of the Act untenable and therefore unconstitutionally invalid ab initio;

A declaration be issued that any organ or body purportedly established by the CDF Act 2013 is illegal as it was created without the authority of the law;

An order do issue striking down the CDF Act 2013 for being unconstitutional; and The 1st to 4th respondents to bear the costs in this court and the courts below.

IN THE COURT OF APPEAL  
AT NAIROBI  
**(CORAM: GITHINJI, OKWENGU & G.B.M. KARIUKI, JJA)**  
**CIVIL APPEAL NO. 92 OF 2015**  
BETWEEN  
THE NATIONAL ASSEMBLY OF KENYA.....APPELLANT  
AND  
THE INSTITUTE FOR SOCIAL  
ACCOUNTABILITY.....1<sup>ST</sup> RESPONDENT  
CENTRE FOR ENHANCING DEMOCRACY  
AND GOOD GOVERNANCE.....2<sup>ND</sup> RESPONDENT  
THE SENATE.....3<sup>RD</sup> RESPONDENT  
THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT  
THE CONSTITUENCY DEVELOPMENT  
FUND BOARD.....5<sup>TH</sup> RESPONDENT  
COMMISSION FOR THE IMPLEMENTATION  
OF THE CONSTITUTION.....6<sup>TH</sup> RESPONDENT

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Lenaola, Mumbi & Majanja, JJ.) delivered on 20<sup>th</sup> February, 2013)*

in

H.C. Petition No. 71 of 2013  
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**CONSOLIDATED WITH  
CIVIL APPEAL NO. 97 OF 2015**  
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REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA AT NAIROBI  
*(Coram: Maraga, CJ & P; Mwilu, DCJ & V-P; Ibrahim; Wanjala & Njoki, SCJJ)*  
PETITION NO. 1 OF 2018

—BETWEEN—

INSTITUTE FOR SOCIAL  
ACCOUNTABILITY.....1<sup>ST</sup> APPELLANT  
CENTRE FOR ENHANCING DEMOCRACY  
AND GOOD GOVERNANCE.....2<sup>ND</sup> APPELLANT

—AND—

NATIONAL ASSEMBLY OF KENYA.....1<sup>ST</sup> RESPONDENT  
THE SENATE .....2<sup>ND</sup> RESPONDENT  
THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT  
CONSTITUENCY DEVELOPMENT FUND BOARD.....4<sup>TH</sup> RESPONDENT

COMMISSION FOR THE IMPLEMENTATION OF THE  
CONSTITUTION.....5<sup>TH</sup> RESPONDENT

*(Appeal from the Judgment of the Court of Appeal of Kenya at Nairobi (Githinji, Okwengu & G.B.M Kariuki, JJ. A) in Civil Appeal No.92 of 2015 dated 24<sup>th</sup> November, 2017)*

### **RULING OF THE COURT**

#### **INTRODUCTION**

[1] On 8<sup>th</sup> November 2019, we delivered a ruling on the appellants' Notice of Motion application dated 30<sup>th</sup> January, 2018 and lodged in the Supreme Court Registry on 31<sup>st</sup> January, 2018 allowing the application in the following terms:

- a) The Application dated 30<sup>th</sup> January, 2018 is hereby allowed;



Having considered the respective parties' pleadings and submissions in the appeal and cross-appeal, the following issues emerge for determination at the supreme court;

**Whether the CDF Act 2013, as amended by the CDF (Amendment) Act, 2013 is unconstitutional on account of procedural lapses in the law-making process?**

**Whether the CDF Act 2013 offends the constitutional Design?**

**Whether the CDF Act 2013 offends the division of functions between the national and county governments?**

**Whether the CDF Act 2013 offends constitutional principles on the division of revenue?**

**Whether the CDF Act 2013 offends constitutional principles on public finance?**

**Whether the CDF(Amendment) Act, 2013 offends the principles of separation of powers?**



# Having fully considered all the issues: The supreme court vide a judgement delivered on 8th August 2022 determined that the CDF ACT 2013 was unconstitutional and as a result, granted the following orders;

Does the CDF Act 2013 offend the constitutional principle on public finance?

Members of Parliament cannot oversee the implementation or coordination of the projects and at the same time offer oversight over the same projects. To this end, we find that the CDF as structured under the CDF Act 2013 violates the constitutional principles on public finance, particularly the principle of prudent and responsible management of public funds as enshrined in Article 201(d) of the Constitution.

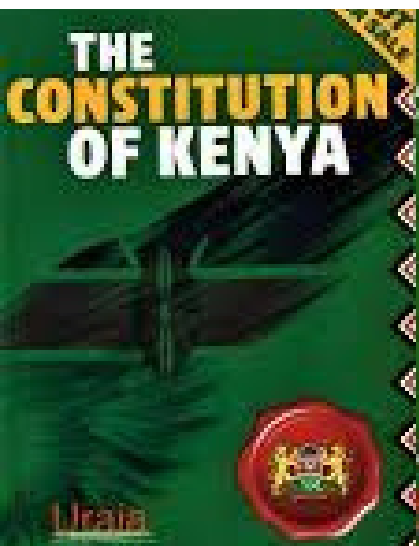
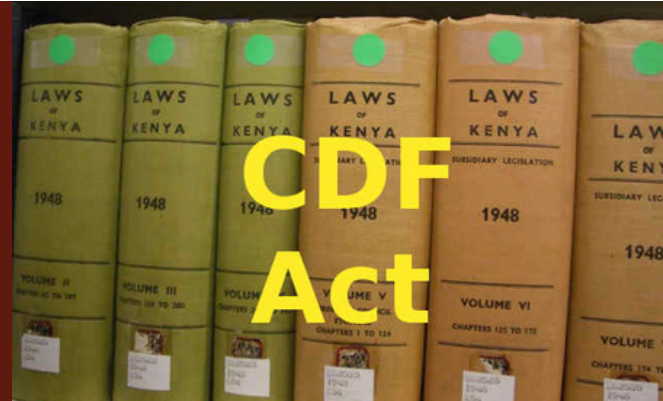
The CDF Act 2013 offends constitutional principles on the division of revenue.

Whether the CDF Act 2013 offends the division of functions between the national and county governments?

CDF Act 2013 violates the division of functions between the national and county levels of government;

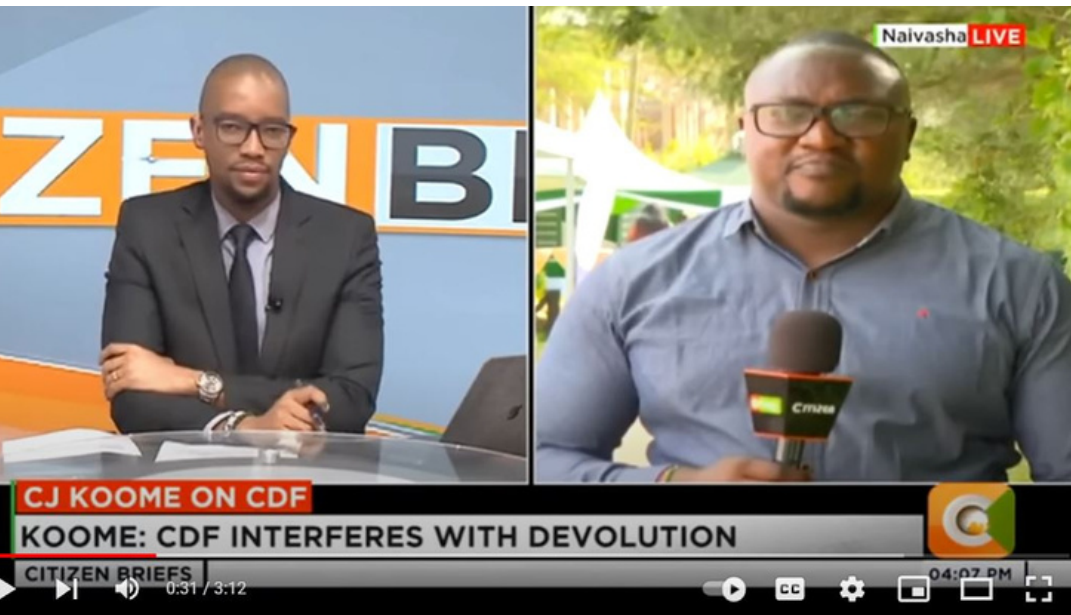
Consequently, we find that the CDF Act 2013 violates the principles of the division of revenue as stipulated in Article 202(1) of the Constitution.

The CDF Act 2013 offends constitutional principles on public finance.



## ORDERS!

A declaration is hereby made that the Constituency Development Fund Act, 2013 is unconstitutional.



### [135] Having fully considered all the issues delineated by this Court for determination as above, we find as follows:

- a. The appeal before the Court of Appeal was not moot.
- b. The CDF Act 2013, as amended by the CDF (Amendment) Act, 2013 is unconstitutional on account of procedural lapses for failing to involve the Senate in its enactment.
- c. The CDF Act 2013 does not offend the constitutional design.
- d. The CDF Act 2013 offends the division of functions between the national and county governments.
- e. The CDF Act 2013 offends constitutional principles on the division of revenue.
- f. The CDF Act 2013 offends constitutional principles on public finance.
- g. The CDF Act 2013 offends the constitutional principle of separation of powers.



## CONTACT US



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