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COLLEGE OF HUMANITIES AND SOCIAL SCIENCES

**THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR PUBLIC
PARTICIPATION IN KENYA'S SYSTEM OF DEVOLVED GOVERNMENT**

BY

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REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTERS OF LAWS
(L.L.M) OF THE UNIVERSITY OF NAIROBI.***

DECLARATION

I, **KIRICHO JUDY MWIHAKI**, hereby declare that:

This research paper is my original work and has not been submitted elsewhere for examination, award of a degree or publication. Where other people’s work or my own work has been used, this has been properly acknowledged and referenced in accordance with the University’s requirements.

I have not sought or used the services of any professional agencies to produce this work.

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Prof. Albert Mumma

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Abstract

The Constitution of Kenya, 2010 brought a new dawn with the change from the centralised system of governance to a devolved system of governance. The Constitution went on to provide for the principle of public participation. At the national and county government levels of government and for both the Executive and the Legislature, the Constitution has made public participation in decision making compulsory.

The Constitution does not spell out how this principle should be applied. This study seeks to establish what this principle entails and what various legislations provide in regard to public participation in devolved governments. This principle provides for an open, accountable and a process that is well structured process where citizens exchange opinions, interact and have an influence in decision making by the government. Articles 196 and 201 of the Constitution are some of the provisions that stipulate this principle.

This study will also seek to highlight some of the challenges that are encountered by both the citizens and the government as this principle is applied.

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Kiambu County Citizen Petition and Participation Act, 2016

Public Finance Management Act, 2012

The Kiambu County Alcoholics Drinks Act, 2018

Transition to Devolved Government act, 2012

Urban Areas and Cities Act, 2012

Table of International Conventions

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List of Abbreviation

BCE	Before Common Era
CBEF	County Budget and Economic Forum
CDF	Constituency Development Fund
CDFC	Constituency Development Fund Committee
CGA	County Government Act, 2012
CIC	The Commission of the Implementation Constitution
CIDP	County Integrated Development Plans
CRA	Commission for Revenue Allocation
CSO	Community Service Organizations
DFRD	District Focus for Rural Development
ICCPR	International Covenant on Civil and Political Rights
IEBC	Independent Electoral & Boundaries Commission
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KSG	Kenya School of Government
LASDAP	Local Authority Service Delivery Action Plans
LATF	Local Authority Transfer Fund
MCA	Member of County Assembly
MODP	Ministry of Development and Planning
MP	Member of Parliament
NCBF	National Capacity Building Framework
PFMA	Public Finance Management Act, 2012
SID	Society for International Development
TA	Transitional Authority
TFDG	Task Force on Devolved Government

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CHAPTER 1

1.0 BACKGROUND TO DEVOLUTION AND PUBLIC PARTICIPATION

1.0.1 Devolution

Devolution is surrender or assignment of power to an entity that is lower, especially by the national government to a regional or local authority¹. It is also considered as a form of decentralization which involves several steps that are taken in transferring decision making and execution of powers, roles and responsibilities as well as associated resources to legally established and democratically voted local authorities². Some of the characteristics of devolution are:

- i. There are two tiers of government which are established equally by the Constitution and they constitute the national and county governments. County governments are forty seven in number but Kenya remains a unitary state³
- ii. The forty seven county governments are geographically defined in accordance with Article 6 (1) and the Fourth Schedule of the Constitution⁴
- iii. These two tiers are distinct, however they are required to work in support and harmony with each other according to Article 6 (2) of the Constitution. As a result, their relationship has to be co-operative⁵
- iv. The national and county governments also have institutions that are established under them as required by the Constitution such as the parliament and the county assemblies respectively, which have authority to ensure that there is citizen participation in the running of their affairs⁶
- v. Each has democratically elected representatives and have distinct political authority. These representatives include the President, the Deputy President, Members of

¹Prof. Ben Sihanya, JSD (Stanford) ‘The role of the Judiciary in the accountability and governance of the devolved Government Structure’ (24th February, 2012), 1

²Ibid

³Patrick O. Onyango – Paddy ‘Devolution Made Simple’ (October, 2013), 7

⁴Ibid

⁵Ibid, 8

⁶Ibid

Parliament, for the national government and the Governors, Deputy Governors and County Assemblies for each of the forty-seven counties⁷

- vi. They also have a mandate that is clearly set out in the Constitution. Majorly, the national government creates policies whereas the counties actualize policies by delivering services to the citizens⁸.

The push for devolution in Kenya goes back to the period when Kenya was under the colonial rule⁹. As Kenya was preparing to gain independence different political parties took different ideological views¹⁰. Smaller communities formed political parties that were meant to actively encourage, preserve and pursue their interest against adjudged control by the big tribes¹¹. KADU fought for devolution and independent governments in the respective regions whereas KANU gravitated towards a unitary system of government¹². After independence, KANU formed the Government and pursued a unitary system while persuading KADU to join it and abandon agitation for a devolved system¹³. This was achieved in 1965 when KADU finally joined KANU.¹⁴

Kenya's fight for reforms of the Constitution is rooted in the deep aspiration to move away from shortcomings in its governance structure post-independence, which was founded on a unitary system (where power was centred in a single entity)¹⁵. This system was begun in the colonial days¹⁶. The primary goal of this struggle was to regain people's power to handle their problems, particularly, local development matters¹⁷. The system of governance that Kenya had after independence can be categorized as one that was marred by poor governance as evidenced by corruption, ethnicity, lack of security, political uncertainty and deprivation¹⁸. Some of the implications of poor governance include the alienation from the traditional economy of a huge population of the society, extravagant investment of public funds, abject

⁷Ibid

⁸Ibid, 9

⁹Burugu J. N 'The County, Understanding Devolution and Governance in Kenya, 2010' Nairobi: CLEAD International (2014), 15

¹⁰Ibid

¹¹Ibid

¹²Ibid

¹³Ibid

¹⁴ Ibid, 16

¹⁵Ibid

¹⁶ Ibid

¹⁷Ibid

¹⁸Ibid, 17

poverty, ethnicity, and unfair political rivalry and lack of tolerance with each other.¹⁹ Since then, there has been a consistent push for devolved government through political parties²⁰.

Attempts at decentralization through the provincial administration, which was centered in the Office of the President, were not effective as the existing structures finally led back to the executive²¹. Therefore, when the occasion came to change the formation of governance, Kenyans chose a constitutionally entrenched devolution that established a two-tier government which includes a central and the county governments that are clearly defined and connected to each other.²²

Arguably, what makes the 2010 Constitution unique is the aspect of devolution. If the Constitution did not provide the chapter on devolution, it would not be any different from the previous constitutions. Embodied in the aspect of devolution is the idea of public participation. What does this entail? Other than just having services brought closer to the communities, the communities have a say in the way matters pertaining to their lives are rolled out in their respective counties.

The devolved system was therefore established in Chapter Eleven of the Constitution. The Chapter outlines the various aspects of the devolved government which include objects and principles of devolved government, county governments, functions and powers of county governments, relationship between the respective governments among others.

The first elections under the Constitution were held on 4th March, 2013 where Kenyans voted for two hundred and ninety MP's, forty seven elected women representatives from each of the forty seven counties and twelve persons nominated by political parties representing special interests. They also voted for sixty seven Senators, forty seven elected in the Counties, sixteen seats for women nominated by political parties and two persons of either gender representing the youth and two persons also of either gender representing persons with disabilities. Further, Governors were elected on the same day. This was done pursuant to Chapter Eight, Nine and Eleven of the Constitution.

¹⁹ 'Final Report of the Taskforce on Devolved Government Volume I: A Report on the Implementation of Devolved Government in Kenya' 27

²⁰ Ibid, 3

²¹ Wambui Kimathi & Rose Kimotho 'Nguzoza Haki; Enhancing the Realisation of your rights' Issue 11, (April 2012), 3

²² Ibid

1.0.2 The Concept of Public Participation

Public Participation can be described as a transparent and explicable process through which concerned persons or a society with similar characteristics can exchange views and influence decision-making on matters affecting them²³. It is a process that is democratic where there is interaction with citizens in making decisions, organizing, and exercising an active role in the coming up with agenda and delivery of services that impact directly on their lives²⁴. The basic principle underlying participation is a foundational right of every person and that decisions made by people themselves will often be better than those made for them by their representatives²⁵. This is because of the obvious reason that people know better what they need the most in their lives²⁶.

It is mandatory to incorporate public participation in the decision-making process under the Constitution for the national and county governments and for both the executive and parliament²⁷. The need for this engagement is specifically relevant to budget planning, which is now organized over a period of time as an ongoing conversation between the government, parliament and the public²⁸. The government is obligated to make the process of these engagements easy by creating forums for participation, easing access of information by members of the public and make available all tools and other resources available for the public to engage effectively.²⁹ Under Article 201 of the Constitution, the guiding principles of public finances require transparency and responsibility and public involvement in financial matters.

Assumption of the Constitution resulted in a devolved system of governance consisting of the national government and the forty-seven county governments³⁰. This renewed the hope for worthwhile public engagements with the government³¹. Public participation has been enshrined in the Constitution for the first time in the history of Kenya and has been integrated

²³Linda Shaffer, Alberto Ninio et al 'Promoting Active Citizenry- Advocacy and Participation in Decision Making', (February, 2016), 2

²⁴ Gina GilberthHoldar, Ohla Zakharchenko, 'A hand book for public participation in local governance' World Bank (August, 2002), 5

²⁵Ibid

²⁶ Ibid

²⁷Ibid

²⁸Ibid

²⁹Ibid

³⁰Ibid

³¹Ibid

into all aspects of public administration³². For example, Article 201 of the Constitution requires openness and answerability, including citizen participation in budgetary matters. Article 196 requires that county assemblies should make possible public participation and involvement of the citizens in the legislative and in any other business of the assembly and the committees thereof.

For effective participation, the Constitution also entrenched the right for the public to access all information held by the government (Article 35) in order to ensure effective participation. This further requires that the ability of the citizens to comprehend information be enhanced, through civic education and other means.³³

1.1 Statement of the problem

The principle of public participation as contemplated in the Constitution has been addressed by various counties differently. Some counties have a specific Acts on public participation for example Kiambu County Publicity and Public Participation Act, 2016. Other counties prefer to insert a public participation clause in every bill that they pass.

The Constitution having provided for the principle of public participation, has not addressed the specific ways on how this principle will be implemented. In my view, more legislation is required from the Parliament or from the County Assemblies to assist in the full realization of public participation. This paper will consider the aspect of devolution and give a profound analysis on the principle of citizen participation from a legislative framework perspective.

1.2 Research questions

Despite the existence of the principle of public participation in the Constitution and other implementing laws:

1. What does the Constitution and other written law provide on devolved government and public participation? Is the framework on how it should be implemented clear?
2. How is this principle of public participation being implemented in Kiambu County?

These are the questions I will be seeking to answer in this study.

³²Ibid

³³Ibid

1.3 Justification of the Study

Devolution means allocating public functions, so as to promote stability to local authorities, as well as systems and necessary structures needed to support particular objectives³⁴. The Constitution has provided for structures upon which devolution will be based which will be the county governments.³⁵

Having reviewed the literature on devolved government and citizen participation, it is evident that the debate and conversations in regard to the principle of public participation has not crystalized. There is a lot of literature on this principle, a concept which is newly enshrined in the Constitution. It is necessary to determine how the devolved government applies this principle.

1.4 Generic objective

The main aim of this study is to identify the strength and weaknesses of citizen participation in Kenya's devolved government as provided for under the Constitution and identify best practices to address the weakness in order to achieve accountability and openness.

1.5 Specific objectives

The specific objectives of this study are;

- i. To examine devolution in the Constitution.
- ii. To examine the concept of citizen participation in the Constitution and the implementing legislation.
- iii. To examine the implementing laws on the concept of citizen participation by the county governments
- iv. To make recommendations on the best practices to address the weaknesses in public participation in our devolved governments legislative framework.

1.6 Hypothesis

Even though the principle of citizen participation exists in our Constitution, its implementation in our devolved governments is weak due to lack of sufficient implementation framework, lack of provision of sufficient funds to fund public participation activities and lack of willingness by the leaders to involve citizens in governance issues.

³⁴Smoke Paul,Gundula Loffler and Giuliano Bosi, 'The Role of Decentralisation/Devolution in Improving Development Outcomes at the Local Level: Review of the Literature and Selected Cases' (November, 2013),

4

³⁵ Ibid

1.7 Theoretical Framework

There is a legal theorist who has a very sharp contrast to the democracy and more so the principle of public participation. Max Weber is of the view that one of the aspects that define a state is the ability of a state to use legal violence as one of the ways of governing a given territory³⁶. He defines the state as a community of people struggling with one another so as to achieve a bigger share of power so as to apply legitimate force³⁷.

Weber argues that state's legitimacy is based on the opportunity for citizens to follow its commands as it is their source of power³⁸. He claims that the state can accomplish this due to factors such as simple habits and desires for advantage by the citizens³⁹. He goes on to state that persons with hidden motives for personal advantage have a motivation to obey the state as it is their source of what they want⁴⁰. One can therefore do what they consider as a merit, by simply obeying the state⁴¹. In simpler words, Weber affirms that the same way an employee gives up some of his freedoms so as to earn a salary, the same way a citizen gives up some of his freedoms so as to benefit from living others in a community⁴².

In conclusion, he defines a state as rule of one individual over another or by one body in given jurisdiction over another⁴³.

Michel Foucault on the other hand claims that by using knowledge, and not just use of brute force, a state can assert power by positioning itself to continue indefinitely and have more and more control over its citizens through normalization⁴⁴. He goes on to argue that the reasoning of the state, is thing that can be examined in order to learn what only a state can legally do⁴⁵. He claims that one should observe and look through the patterns that were popular in the history of a state, so that they may get a clear perception and logic of the modern state⁴⁶. To the extent that one should look at the history of a state to understand its

³⁶Rocco A. Astore, 'Defining the Legitimacy and Power of the State Through Weber and Foucault' Vol. 8 no. 05, (2016), 1

³⁷Ibid

³⁸Weber, Max. Gerth & Mills eds. 'Politics as a Vocation' in From Max Weber: Essays in Sociology' New York: Routledge, (2013), 2

³⁹Ibid

⁴⁰Ibid

⁴¹Ibid, 3

⁴²Ibid

⁴³Supra note 36

⁴⁴Ibid, 2

⁴⁵Ibid

⁴⁶Ibid

current status, Kenya may be considered as an example of such a state where our history of centralized government was not tenable to the citizens and the country shifted to devolved system of government.

Max Weber's definition of a state seems universally binding but does not meet the present real life of a state and power struggle that subjects face⁴⁷.

These theorists are a sharp contrast to modern day democracy, which provides for governance made by the people and answerable to the people. The aspects of devolution and citizen participation are clearly stipulated in the law and as it is, they should not be inferred or guessed as propagated by Michel Foucault. The Constitution and other written laws have defined what devolution is and provided for the principle of public participation.

Several theories are applicable to devolution and citizen participation. However, only the theory of democracy is of concern to the advancement of this paper.

There are several theories of democracy. Democracy or rule by the people, is a democratic form of government in which every citizen of a country decides how they are to be governed, the legislation and decisions of their state together, requiring that there is no discrimination against anybody to express their opinion⁴⁸.

The system that is commonly deemed "democratic" currently is parliamentary democracy, in which the citizens take part in a voting process and vote for leaders to act on their behalf in the legislature or the executive⁴⁹. It may also be considered as one of the most common form of democracy however it is not certain whether this kind of democracy really represents the true picture of the wishes of the electorates⁵⁰.

There is also what is known as deliberative democracy which means that democracy is government by discussion⁵¹. The other type of democracy is radical democracy which

⁴⁷Ibid

⁴⁸Cherif Bassiouni, David Beetham et al, 'Democracy: Its Principles and Achievement' Inter-parliamentary Union, Geneva (1998), 17

⁴⁹Ibid

⁵⁰Ibid

⁵¹ Ibid, 25

is founded on the idea that there are arranged in order of rank and repressive power relations that subsist in the community⁵².

The other type of theory in democracy is direct democracy where citizens make laws and policies but not through their representatives⁵³. The citizens vote on serious issues that touch on their lives directly, as opposed to a representative democracy in which people vote for leaders who then vote on issues touching on their lives⁵⁴. It may be argued that this may have been the reason why 'Wanjiku' voted for a Constitution where she will have an opportunity to directly articulate her needs to the government.

Some philosophers have articulated issues of democracy in governance such as John Locke in the principle of social contract⁵⁵. He propagates an argument that citizens surrender their freedom to the government and agree to obey the law and in exchange, the government offers them security and enhance their prosperity that comes from living in an organized community⁵⁶. However, this does not amount to total surrender of their rights⁵⁷. He says that if the government fails to protect them, they have the freedom to choose another form of governance⁵⁸. Together with Jean Jacques Rousseau, they share an important assumption that government can only be legitimate when its authority comes from the consent of the citizen⁵⁹.

John Locke pushed for representative democracy and he believed that the reason why democracy existed is to allow the citizens to check on their governments⁶⁰. However, the right to recall is entrenched in his philosophy in that the citizens have a right to recall their representatives if they breach their trust placed on them⁶¹. The citizens can put in place another government instead which paves way for government accountability⁶². The right to recall is similarly entrenched in the Constitution (Article 104), which is one ways of citizen's direct democracy.

⁵² Ibid

⁵³ Ibid

⁵⁴ Ibid

⁵⁵ Harald Sack 'John Locke and the Importance of the Social Contract' (29th August, 2015), 4

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Ibid, 5

⁵⁹ Ibid

⁶⁰ Macey, Jonathan R., 'Representative Democracy'. Faculty Scholarship Series. 1651, (1993), 6

⁶¹ Ibid

⁶² Ibid

This paper will be based on the theory of direct democracy as a variation of a democracy which is commonly known as the representative democracy. Jean Jacques Rousseau is considered to be the creator of this theory⁶³. His ideal society was where people or citizens participated in creation of laws that would govern their day to day lives⁶⁴. He maintained the position that a community should come together and make decisions and laws that best suit them and that any law that was not created in this manner, was not valid and should not be imposed on the people⁶⁵. If such laws would be imposed on the people, this would be equated to being enslaved⁶⁶.

Rousseau rejects the argument that the legislative will of citizens can be left to a few individuals⁶⁷. He argues that if an individual hands over his right to ruling to someone else or to another body amounts to being enslaved⁶⁸. He takes the position that laws passed by such representatives would bind the citizens to conditions which the citizens have not agreed upon⁶⁹.

He distinguishes direct democracy from other forms of governance due to the aspect of agreement which is achieved through discussions between the government and the citizens⁷⁰. Representative democracy only allows the elected persons to make decisions to their best interests, which may not necessary be for the interests of the citizens⁷¹.

Based on the theory of direct democracy as articulated by Jean Jacques Rousseau, it may be argued that public participation is also anchored on this theory.

The root of direct democracy is as a result of shortcomings of representatives system of governance⁷². Many authors have applied a wide approach and put direct democracy in a

⁶³ Sarah James ‘Direct Democracy and Representative Democracy’ (vol. 3),(13thMay, 1996), 1

⁶⁴Ibid

⁶⁵Ibid

⁶⁶Ibid

⁶⁷Betram, Christopher, ‘Jean Jacques Rousseau’ The Stanford Encyclopedia of Philosophy (Fall 2018 Edition), 4

⁶⁸Ibid

⁶⁹Ibid

⁷⁰Ibid

⁷¹Ibid

⁷²Palliner Z.T., Kaufmann B., Marxer W, Schiller T. (eds) ‘Direct Democracy in Europe: Direct Democracy and Theories of Participatory Democracy – Some Observations’ (2007), 52

perspective of modification of the society, from the norm⁷³. Participatory or direct democracy has been regarded as a classic position of Jean Jacques Rousseau, Karl Max and other radical theorists who wanted to change all kinds of states into the self-governing administration of a liberated working-class citizens (proletarian)⁷⁴.

The most important principle of direct democracy is political equality and the theory is based on the assumption that every citizen has the capability to have participation that is meaningful⁷⁵. They also have the ability to develop and express their preferences also have the ability to make political decisions⁷⁶. The process of forming citizens' preferences is of importance because the processes are not usually articulated as personal interests but are usually formed during the process of public participation⁷⁷. The assumption is that during the process of citizen participation, common citizens interests can be discovered as opposed to during the process of direct representation⁷⁸.

Direct democracy is also viewed as a variation of a democratic form of regime as it contrasts what is commonly known as representative democracy⁷⁹. It may also be considered as the essential form of democracy⁸⁰. It describes a system where citizens literally rule themselves directly⁸¹. Generally, there is a great extent of participation by the citizens with a certain degree of consent which is granted either through the Constitution or regular popular elections⁸². In this case, there is a great degree of self-governing activities by the citizens⁸³. In view of this, participatory democracy can be described as democracy itself⁸⁴.

There are two types of direct democracy; referendums and citizen initiatives⁸⁵. A referendum usually gives citizens an opportunity to vote directly⁸⁶. This is usually done on either a constitutional, legislative or political, issue that has been referred to them by the bodies

⁷³Ibid

⁷⁴Ibid

⁷⁵Ibid

⁷⁶Ibid

⁷⁷Ibid

⁷⁸Ibid

⁷⁹Linda Maduz 'Direct Democracy' University of Zurich (March, 2010, 1

⁸⁰Ibid

⁸¹Ibid

⁸²Ibid

⁸³Ibid

⁸⁴Ibid, 2

⁸⁵Qvortrup, Matt, 'A Comparative Study of Referendums: Government by the People' Manchester University Press, 2nd edition, (2005) 2

⁸⁶Ibid

governing them, such as Parliament⁸⁷. In this case, the citizens' role is usually either endorse or overrule a decision that has already passed, for example by Parliament⁸⁸.

Citizen initiatives is a situation where the citizens are granted a direct vote on a legislative, political or constitutional issue that has been initiated by the people⁸⁹. Usually, this happens before decisions are made by the governing body, and in some jurisdictions, this may lead to a creation of new laws or lead to amendments to the constitution which are meant to be adopted without authority of the legislative arm of government⁹⁰. This is done by way of petitions with a given number of signatures by the electorate⁹¹.

Another mode of direct democracy is the right to recall⁹². This gives a given number of constituents to sign a petition to vote on the removal from office of an elected official or representative⁹³. Article 104 of the Constitution provides that the electorate has the right, before the end of his/her term, to recall a Member of Parliament. Parliament enacted the Elections Act and sections 45, 46 and 47 of the Act provides that voters within a county or constituency may call back their MP or MCA and the Act goes on to outline the grounds for such removal, timeline within which a recall may be done and the validity of a recall election.

However, the High Court in *Katiba Institute & Another –vs- Attorney General & Another* nullified sections of the law that had introduced too much formalities for the constituents to recall their MP or MCA. It declared some Sections of the Elections Act and CGA as discriminatory and unconstitutional as they fall short of the vital importance of Article 104 of the Constitution.

The Constitution lays down, in accordance with Article 255 (1) that a proposed amendment shall become law if passed in accordance with Article 256 and 257 on matters such as its supremacy, the Kenyan territory, supremacy of the authority of the people, national values and principles of governance, the fundamental rights that have been set out Bill of rights, and the term of office of the President among others. Article 256 provides for changes to the

⁸⁷Ibid

⁸⁸Ibid

⁸⁹Ibid, 3

⁹⁰Ibid

⁹¹ Ibid

⁹²Ibid

⁹³Ibid, 4

Constitution through an initiative by the parliament. A Bill seeking to amend the Constitution maybe introduced either in the National Assembly or the Senate. Article 257 also provides for revision of the Constitution by way of signing a petition by a required number of registered voters. A popular initiative is usually signed by a minimum of one million registered voters. Direct democracy is therefore deeply entrenched in our Constitution.

The oldest example of direct democracy is seen in Ancient Athens⁹⁴. Each adult male resident voted in the assembly and there was no difference between the two branches of government, which is the executive or judicial branches⁹⁵. In the 4th to 5th century BCE Athens had a remarkable system of governance, where all male citizens had equal rights that protected their individual rights from interference by the State, right to share their feelings, thoughts and views fearlessly or restraint, and the chance to engage directly in an atmosphere where they could discuss issues affecting the society⁹⁶. This system is known as democracy⁹⁷. Further, the citizens participated in a democratic space where they made the resolutions by which they lived⁹⁸. They also actively worked for the institutions that governed them, and so they directly in control of every part of the public affairs⁹⁹. The assembly met not less than monthly, often two or three times, in a designated place which could put up about 6000 citizens¹⁰⁰. All men had an equal chance to give their views in the assembly and vote on the decision being made by simply putting up their hands¹⁰¹. Decisions were made by the majority and once made; the decision was final¹⁰². Some of the issues discussed in these assemblies were those touching on service men and management of collective funding, making arrangements for food supplies, creating legislation and trials that touch on government affairs, decisions to post envoys, decisions on whether or not to be bound by a treaty, voting on the budgets among others¹⁰³. The assembly also supervised enforcement of decisions and that officials were carrying out their duties in the proper manner¹⁰⁴. However, the restriction of women from participating of women in decision making of the Athenian Democracy as this amounts to unfair discrimination against women.

⁹⁴P.J Rhodes ‘Ancient Athens: Democracy and Empire, European Review History’ (2009)

⁹⁵ Mark Cartwright ‘Athenian Democracy’ (13th October, 2014), 1

⁹⁶Ibid

⁹⁷Ibid

⁹⁸Ibid

⁹⁹ Ibid

¹⁰⁰Ibid

¹⁰¹Ibid

¹⁰²Ibid

¹⁰³Ibid

¹⁰⁴Ibid

It can be argued that direct democracy is a positive policy for citizens as it places the participatory power in the hands of the citizens. It helps in promoting transparency between the government and the citizens, in that before the decisions touching on their lives are made, there is consultation¹⁰⁵. It also promotes co-operation between the government and the citizens as it promotes a harmonious participation¹⁰⁶.

However, direct democracy has its disadvantages as it can slow down progress due to the amount of time taken to consult between the citizens and the government¹⁰⁷. As a result of these lengthy consultations, making decisions may become very difficult¹⁰⁸. It may also require some level of expertise and understanding of issues which may not be possible for all citizens, especially the uneducated in the society¹⁰⁹.

It is prudent to note that direct democracy has implementation challenges in the 21st Century¹¹⁰. The major question though is whether ordinary citizens make good public policy decisions as many lack education and expertise and may not even be interested in politics¹¹¹. An ordinary citizen may also not be aware of what goes on in the governance issues and may therefore not be able to engage in a conversation in the affairs that touch on their everyday life, for instance the construction of his village bridge. Even without necessarily having these individual shortcomings, debate by a multitude may by its very nature lead to whimsical or outright bad decisions¹¹². The population may also be too large to allow every individual to have an opinion on governance matters affecting them¹¹³.

Direct democracy may also be very capital intensive such as hiring of a venue to invite the citizens to give their opinions, transport charges to ferry them to the venue of the discussions¹¹⁴. It also has the potential to hurt the minority groups as the decision by the

¹⁰⁵Gerardo L. Munck, 'Measures of Democracy, Governance and the Rule of Law: An Overview of Cross-National Data Sets' (15th July, 2003), 3

¹⁰⁶Ibid

¹⁰⁷Timothy D. Sisk 'Democracy at the Local Level' International IDEA Handbook on Participation, Representation, Conflict Management and Governance' Series 4 (2001), 46

¹⁰⁸Ibid

¹⁰⁹Ibid

¹¹⁰Micheal Noah Mautner 'A Constitution of Direct Democracy: Pure Democracy and the Governance of the Future, Locally and Globally' (January, 2000)

¹¹¹Ian Budge 'The New Challenge of Direct Democracy' Polity' 1 edition (9th December, 1996),3

¹¹²Ibid

¹¹³Ibid

¹¹⁴Ibid

majority will always carry the day¹¹⁵. It may be very difficult to make decisions as the opinion of the citizens must be listened to and analyzed before any decision is made¹¹⁶. In a situation where each and every citizen is given an opportunity to air their views, reaching consensus becomes very difficult¹¹⁷. Making a decision on whose views to take into consideration and whose views are not important is not an easy decision to make and this may lead people to lack faith in direct democracy¹¹⁸.

It requires the coming together of citizens so as to agree on issues of great importance, however, this way of living can be very difficult, especially when citizens are not in agreement on critical issues and only some people are able to strongly and successfully vouch for what they want, this tends to lead to far greater anxiety on a daily basis for the unsuccessful citizens¹¹⁹. Notwithstanding these challenges, public participation mandatory under the Constitution. Arguably, representative democracy, as it was under the 1969 Constitution, was found to have been weak and impractical hence the departure from wholly representative democracy.

Public participation helps to promote transparency between the government and the citizens by ensuring that consultation takes place before decisions are taken on their lives¹²⁰. This principle illustrates the need for greater participation and engagement of the people in the process of making decisions within the administrative/ governance structures¹²¹. If public participation is properly utilized, it has the capacity to have a huge impact when decisions are being made and it eventually improves the process of governance¹²². At the time when the Constitution was being made, consideration was given to the fact that public participation emphasizes that when more people are seeking to solve a problem is better than one and this eventually leads to fruitful and well-grounded change¹²³. The inclusion of a majority of the citizens in decision making, avoids a situation where there is a singular decision-making authority¹²⁴.

¹¹⁵Ibid

¹¹⁶Ibid

¹¹⁷Ibid

¹¹⁸Ibid

¹¹⁹Supra note 24

¹²⁰Ibid

¹²¹Ibid

¹²²Ibid

¹²³Ibid

¹²⁴Francis Kairu and Mary Maneno 'Public participation: Kenya's best weapon against graft and poor governance' ADILI VOL.135 (August, 2012)

From this discussion, it is clear that direct democracy is a critical ingredient for successful public participation by citizens. The primary objective of devolution is bringing services closer to the citizens, which include the opportunity to participate in decision making on matters that touch on their lives. As a result, forums for civil society groups, minorities and citizens in general should be availed by the county and national governments.

1.8 Literature Review

Mugambi Laibuta argues that that devolution is hailed as the great compromise of the Constitution¹²⁵. He argues that it was one of the most outstanding aspect of the transition from a system that was concentrated under a singular authority, which was largely responsible for the great extent of imbalance, barring and deep separation amongst the Kenyan society¹²⁶. Major strides were undertaken as part of a roll-out program for three years plan for devolution as set out in the Constitution¹²⁷. Such instances include the passing in 2012 key legislation related to devolution, and thereafter by the March 2013 elections that were carried out throughout the country, creating a new governance structure¹²⁸

Paul Smoke held the view that Kenya's strong Constitutional basis is stronger than the more popular route of decentralization by Acts of parliament and this is even made stronger by the validation granted by a referendum supported by the majority¹²⁹. Kenya's devolved system is anchored in the Constitution and its mandate is remarkably transformational, creating county governments rather than making stronger or giving more authority or re-generate the already existing administrative units¹³⁰. This suggests that the positive, progressive and revolutionizing provisions in the Constitution is devolution, which is provided for in Chapter Eleven¹³¹. It provides for forty seven Counties with the elected governors and county governments exercising executive power.¹³²

¹²⁵Laibuta Mugambi, 'Implementing Devolution Kenya-Challenges and Opportunities Two Months' (11th June, 2013), 2

¹²⁶ Ibid

¹²⁷ Ibid

¹²⁸ Ibid

¹²⁹ Smoke Paul 'Devolution under Kenya's 2010 Constitution: Balancing Opportunities and Challenges' Vol. 1 (2013), 4

¹³⁰ Ibid

¹³¹ Ibid

¹³² Supra note 1

Nonetheless, there has been a myriad of challenges¹³³. Failure to understand the important issues touching on devolution initially created a lot of mistrust amongst interested persons with a number of them, mainly the parties with lesser representation in Parliament, creating the impression that the national government was trying to exasperate devolution¹³⁴. A number of counties, for instance, contested the gradual handover of duties/roles that had occurred, arguing that all powers set out in the Fourth Schedule of the Constitution should be passed on to the counties all at once¹³⁵. The demand was partly steered by the belief that by the counties that officers working under the national government were dis-gruntled by the invasion their previous extent of jurisdiction which included the previous local governments¹³⁶. This could have been case, however the real situation was that majority of county governments, if not all, did not have the capacity to exercise their powers in such a short period of time.¹³⁷

Paul Smoke goes on to say that not all public functions were decentralised by the Constitution to the county governments, therefore, how the central government would run its affairs at the local level to meet its ongoing responsibilities was also important¹³⁸. As at that time, it was unclear how far the former provinces and districts would remain in existence and in what nature.¹³⁹

Jason Lakin, in his opinion dated 16th March 2013 (The EastAfrican), noted that many analysts have stated that devolution in Kenya is the astronomical. Majorly, it refers to the reality that Kenya had created a system of government with administrative, financial and political independence all at once¹⁴⁰. He alludes to the fact that in many countries, devolution has often been gradual¹⁴¹. For instance, when such new levels of governance are created, their leaders may not necessarily be elected immediately and they have restricted authority over their money matters¹⁴².

¹³³ Supra note 125

¹³⁴ Ibid

¹³⁵ Ibid

¹³⁶ Ibid

¹³⁷ Ibid

¹³⁸ Supra note 129

¹³⁹ Ibid

¹⁴⁰ Jason Lakin 'It's here! The Challenge of Devolution' The EastAfrican, (16th March, 2013)

¹⁴¹ Ibid

¹⁴² Ibid

The World Bank made an observation that Kenya's devolution is phenomenally progressive, and hence equally perilous¹⁴³. It is a huge undertaking from a logistical perspective¹⁴⁴. Kenya has already embarked on an ambitious devolution process that can pose a lot of challenges along the way and the way forward is to sustain it and make sure that it realizes what the citizens intended it to achieve¹⁴⁵. The politics surrounding devolution justifies the high degree of hopes and expectations that have been attached to it¹⁴⁶.

Citizen participation is a dual process in which the government makes it possible for the citizens to participate; and the citizens make a choice on whether to make use such opportunities to participate¹⁴⁷. It is upon the government to encourage active involvement and make sure that there is civic education to the citizens to enable them participate on affairs that touch on their everyday lives so that they are able to make meaningful contributions when government is making these decisions¹⁴⁸.

Section 87 of CGA stipulates the principles for citizen participation. These include timely access to and implementation of information, data, documents, and other relevant information related to policies that are to be formulated and implemented; secondly, fair access to the processes of formulation and implementation of the budget, development plans approvals, projects and budget processes, the issuance of permits and the setting up of clearly defined performance standards. Thirdly, the defense and promotion of the interests and rights of minorities, disadvantaged groups as well as their freedom to access all the relevant information; fourthly, legal status for interested or affected persons, organizations, and where appropriate, groups, to appeal from or, review decisions, or resolve grievances, with special focus on persons and historically oppressed communities, including women, the youth, and vulnerable communities. Fifth, in decision making processes to foster mutual accountability and cooperation, and to provide complementarity authority oversight, a fair balance in the responsibilities and obligations of county governments and non-state actors; sixth, promoting public-private partnerships, such as joint committees, technical teams, and public commissions, to facilitate dialogue and collective action on sustainable growth; and lastly

¹⁴³ World Bank: 'Devolution without disruption: pathways to a successful new Kenya' Vol. 2 (2012), 2

¹⁴⁴ Ibid

¹⁴⁵ Ibid

¹⁴⁶ Ibid

¹⁴⁷ Nizam, Rabya; Muriu, Abraham Rugo; 'Basic Requirements for Public Participation in Kenya's Legal Framework, Woldbank Group, International Budget Partnership (2015), 5

¹⁴⁸ Ibid

recognition and promotion of mutual functions of involvement by non-state actors' participation and governmental facilitation and oversight.¹⁴⁹

According to Yang and Callahan, there exists two aspects of citizen participation, direct and indirect participation¹⁵⁰. Direct participation states that the public or citizens are the own the government and should ultimately be an integral part in the decision making the government. Indirect participation takes cognizance of the fact that elections officers and managers should act for the citizens in a representative democracy¹⁵¹. Direct participation puts its focus on the part played by the citizens during administrative decision-making process or their participation in process of making decisions related to service delivery to them¹⁵². This therefore implies that government makes efforts for the citizens to participate in decision-making on administrative matters and processes of management¹⁵³. This primarily happens at the government administrative-public interface; therefore, this kind of direct participation is different from participation on political matters¹⁵⁴. Political participation involves voting during elections, being in contact with elected officials and being involved in campaigning for political candidates.¹⁵⁵

In *Robert N. Gakuru & Others v Governor Kiambu County & 3 others*, the Judge extensively discussed the principle of public participation in the Kiambu Finance Act of 2013. One of the basis upon which these matters were grounded upon was that there was no consultation and that the public was not involved or consulted by the County Government before the Finance Act was passed. The Respondents failed to conduct adequate or acceptable public participation hence the Act was found to be unconstitutional. He made an observation that there were no efforts to encourage the public to give their views during the processing of the Bill and that there lacked proper facilitation for the citizens to participate in the exercise. The Judge also observed that the importance of the Finance Bill could not be ignored and its overall effect on the citizens as it was very critical in giving directions in their way of life which would definitely touch on their daily lives and its effect would ran deep. It would have

¹⁴⁹ Abraham Rugo Muriu, and Gladys Mbai with JalsonLakin and Ryan Flynn 'County Government Act, 2012 Section 87 County Budget and Economic Forums (CBEFs) and Public Participation in Kenya' (November, 2014), iii

¹⁵⁰ Yang, Kaifeng, and Kathe Callahan. "Assessing Citizen Involvement Efforts by Local Governments." *Public Performance & Management Review*, vol. 29, no. 2, (2005), 191–216

¹⁵¹ Ibid

¹⁵² Ibid

¹⁵³ Ibid

¹⁵⁴ Ibid

¹⁵⁵ Ibid

been very important that the information that was going out to the citizens to participate in the process of making the Bill be clearly understood. The Judge ruled that there lacked proper citizen participation as envisaged under the Constitution and the CGA.

This literature review does not address the question whether or how Kiambu County applies the principle of public participation in the governance of its citizens. This is the gap that this research is going to fill.

1.9 Research Methodology

There are many publications that include papers, journals among others on the legislative framework of devolved government and public participation in Kenya. The method used in this thesis is analytical because as it seeks to establish what the law on public participation provides. The choice of the study of Kiambu County was based on the need to study the county as an example of how public participation is undertaken in Kenya. This research is conducted using secondary data which includes online journals and articles, Sessional papers, World Bank reports among others. The sources used in this thesis are obtained from the internet, University of Nairobi library, perusal of files and data from Kiambu County offices, Kiambu County Assembly website and conducting of oral interviews. The conduct of interviews was undertaken with the officers within the County who directly are involved in the conduct of public participation exercise within the County. These officers were considered as the suitable persons that would give a better insight into how both the County Executive and the Assembly undertake public participation due to the nature of their job descriptions and their day to day experiences.

By conducting oral interviews, this gave me a chance to have a one on one conversation with my interviewees and which also gave me a chance to have as much details as I required. I was also seeking to understand if the County has undertaken any measures to address public participation as the Kiambu Finance Bill, 2014 had been nullified as a result of failure to conduct proper public participation.

1.10 Scope and Limitations

This research assesses both the Constitutional and legislative structure for public participation in Kenya. How does the principle of public participation apply to the county or national

governments as enshrined in the respective legislative frameworks? The paper explores this larger question in order to assess Kenya's legislative framework on public participation.

The research will be limited to public participation in Kenya under the devolved government after the 4th March, 2013 elections. It will also be limited by time as it will not be possible to conduct interviews. I will also limit the research to legislation and case law dealing with public participation.

1.11 Chapter Outline

The study comprises five chapters. Chapter One outlines the Introduction and Background of the devolution and the principle of public participation. This chapter gives the theoretical framework underlying this research, justification for the research, research objectives, research questions, research methodology, literature review and statement of the problem. Chapter Two describes the History of Devolution and Public Participation in Kenya's Constitution. The chapter will discuss the history of devolution in Kenya and scrutinize the principle of public participation under the Constitution of Kenya, 2010. Chapter Three contains the analysis of the law on public participation in Kenya. This chapter discusses the constitutional provisions, the regulatory framework dealing with public participation in Kenya. This chapter will also discuss the relevant case law on public participation. It will also look at the advantages of public participation and the current challenges to this principle in Kenya. Chapter Four examines how Kiambu County is implementing the principle of public participation, post 2014 after nullification of the Finance Act, 2013 by the High Court for lack of public participation. Chapter Five stipulates the Conclusion and Recommendations. This chapter contains the conclusion deduced from the study and the recommendations proposed by the research on public participation in devolution. It will also analyse the hypothesis in line with findings of the study.

CHAPTER 2

2.0 DEVOLUTION IN KENYA

2.0.1 Introduction

On 4th March 2013, Kenyans elected the first Members of County Assemblies, Governors and Senators under the Constitution. Soon thereafter, majority of the county governments made appointments of their Executive Committees, passed their initial budgets, adopted their first integrated development plans, and recruited their own staff¹⁵⁶.

In February 2013, there was a shift of roles to the devolved governments as it was required by Section 23 of the TDGA. The functions transferred were closely connected with the functions assumed by the previous Local Authorities, which were replaced by the county governments¹⁵⁷. Under the Sixth Schedule, the Constitution provides that the county roles would be relayed moderately over a three-year period, as the devolved governments enhanced the ability to shoulder them. Majority of the devolved functions were formally transferred to all county governments in August 2013¹⁵⁸. However, on 9th August, 2013 after a period of lobbying by county governors, the TA gazetted the transfer of nearly all the remaining functions¹⁵⁹.

Kenya undertook a decentralization system that will require a lot of hard work and a lot of resources in order to be successful as it seeks to radically reorganize the relationship between the government and its citizens¹⁶⁰. The Constitution seeks to move the country from a government where power is concentrated on a single unit, to a government where power is transferred to the local governments¹⁶¹. It also seeks to change the mode of interaction between the government and the citizens from “top-down” to “bottom-up”¹⁶². Among major departures from the independence Constitution, devolution could be said to be the most significant change in the 2010 Constitution¹⁶³.

¹⁵⁶ A Background Brief on Kenya’s Devolution’ World Bank, (November, 2013), 1

¹⁵⁷ Ibid

¹⁵⁸ Ibid

¹⁵⁹ Ibid

¹⁶⁰ Ibid

¹⁶¹ Ibid

¹⁶² Ibid

¹⁶³ Building Public Participation in Kenya’s Devolved Government, Kenya School of Government, Working Paper 1, (February, 2015), 1

The Constitutional and new legal framework on devolution puts a strong and special focus on making the public more involved in the governance structure which is a key component in Kenya's plan to speed up growth¹⁶⁴. It also seeks to address well-established economic opportunities, investment, and service delivery imbalances across different parts of the country¹⁶⁵. A study has been conducted to prove the connection between poverty/imbalances and government shortcomings that lessen the working in a well-organized and competent manner; fairness in distribution of public resources and services; impeding of financial and economic conditions and undermining job creation¹⁶⁶.

The universally acceptable experience with decentralization confirms that Constitutions stress on governance, transparency and public participation¹⁶⁷. This experience also points out that effective decentralized government is dependent on balancing enlarged preference of local authorities with increased answerability, both upwards and downwards¹⁶⁸.

As they concurrently deliver services to the citizens and establish new institutions, county governments are also seeking to establish results-oriented ways to engage with the public¹⁶⁹.

2.1 What is devolution?

Devolution is one among the several types of decentralization, which is a common feature of majority of the governments worldwide¹⁷⁰. Subsidiarity principle is the basis of decentralization, which assigns particular functions which are usually undertaken by the center (of an organization) to the bottom-most possible sub-centers on the periphery¹⁷¹. The logical way of looking at decentralization is that it enlarges local participation in making of decisions over material issues, and eventually increases their connectedness locally and participation by citizens in their implementation¹⁷².

¹⁶⁴Ibid

¹⁶⁵Ibid

¹⁶⁶ Ibid

¹⁶⁷Ibid

¹⁶⁸ Ibid

¹⁶⁹Ibid

¹⁷⁰Supra note 111

¹⁷¹Ibid

¹⁷² Ibid

There are four major aspects of decentralization which include organizational, political, financial and economic¹⁷³. Organizational decentralization alludes to the moving of the authority for the organizing, funding and managing of some functions for the citizens¹⁷⁴. Reduction in the authority of the national government in making policies (political decentralization) is the sharing of power among the arms of government in addition to the different levels of government which include the national and local governments¹⁷⁵. Financial decentralization includes transferring of fiscal resources from national government to the local authorities¹⁷⁶. This also takes into account transferring of authority directly from the national government to the local government or delegating power to tax the citizens in their local jurisdictions¹⁷⁷.

Devolution is commonly defined as the steps taken in transferring of power between the national and local government, which primarily operate at the citizens level¹⁷⁸. It is not a process that operates on a straight line, but a great extent of cooperation between the two levels of government is required for it to be successful¹⁷⁹. Local governments have an obligation to make the necessary local level plans and execute them as necessary¹⁸⁰. This recently developed system has made significant gains as a key measure of decentralization of governance¹⁸¹.

The basic goal of devolution is delegating authority, transferring resources, and providing for comprehensive local representation¹⁸². Hence, the huge expectation of a majority of the Kenyan citizens is to constantly participate in their own governance matters so as to fulfil the guarantee of speedy growth locally and easy access to primary services and amenities¹⁸³.

Devolution particularly promises a policy of favouring individuals belonging to the groups known to have been discriminated against in the past; justifiable levels of representation; a

¹⁷³ Abraham Rugo Muriu 'Why Kenya chose devolved system?' Sunday Nation(13th November,2011)

¹⁷⁴ Ibid

¹⁷⁵ Ibid

¹⁷⁶ Ibid

¹⁷⁷ Ibid

¹⁷⁸ Supra note 107

¹⁷⁹ Institute of Economic Affairs 'Devolution in Kenya Prospects, Challenges and Future' Research Paper Series no. 24, (2010), 9

¹⁸⁰ Ibid

¹⁸¹ Ibid

¹⁸² Ibid

¹⁸³ Supra note 107

system where minorities and other marginalized groups rule themselves and control their own affairs¹⁸⁴. In other words, to take cognizant of heterogeneity wherever it exists¹⁸⁵. The letter and intention of devolution is intended to expand the sociopolitical space for the people to identify, own and engage in the affairs of matters that affect them directly¹⁸⁶. It was also encouraged by the belief that financial decentralization promotes and closely links the citizens' needs with policies and programs¹⁸⁷.

Devolution has also been accepted as a route to deepening democracy within a sovereign state which has constitutional boundaries resulting to diminished friction between the national government and citizens which would be as a result of undermining their sovereignty¹⁸⁸. In addition to being concerned with efficiency in delivering of services, devolution can also be the solution to too much centralized mis-governance or diffuse schism tendencies, steering towards harmony in decision making¹⁸⁹.

Article 174 of the Constitution clearly outlines the objects and principles of devolved government which comprise of promotion of democratic and responsible use of power; fostering national cohesion by acknowledging heterogeneity; giving powers to the people to rule themselves and have control over their affairs and promote citizen participation in the exercise of the authority of the State while it is making decisions that touch on their lives. This type of decentralization aims to remedy past social inequalities that have resulted in deep regional inequality, systemic favouritism and bribery, the increasing gap between the rich and the poor and the turbulent general dissatisfaction of the previous years which boiled around the 2007 General Elections¹⁹⁰.

¹⁸⁴Ibid

¹⁸⁵Ibid

¹⁸⁶Ibid

¹⁸⁷Ibid

¹⁸⁸Ibid

¹⁸⁹Okoth-Ogendo, H.W.O. *'The Politics of Constitutional change in Kenya since Independence, 1963-69'*. African Affairs Vol. 71 (282): (1972) 9-34

¹⁹⁰Supra note 24

2.2 The History of Devolution in Kenya

2.2.1 1962-1967: The Independence Constitution

The 1962 Lancaster Constitution established a democratic parliamentary system which created a bicameral system of government¹⁹¹. The Senate was introduced to protect minority groups¹⁹². However, this was not a decision that was made unanimously by all the political actors¹⁹³. Bicameralism was championed mostly by KADU members, who were led by Ronald Ngala and Daniel arap Moi¹⁹⁴. Their argument was that a second chamber was of vital importance to take care of the interests of the minority tribes in Kenya¹⁹⁵. They were also concerned about the presence of the major tribes, the Agikuyu and the Luo who were the majority members of KANU¹⁹⁶.

Each district had one representative in the Senate¹⁹⁷. This meant that if population was the only factor to be considered, the minority groups had a considerable representation than would have been the case¹⁹⁸. Secondly, the Senate was set up to protect the region's autonomy and protect the peoples' interests in the different regions¹⁹⁹. The Senate generally served as a medium within the legislative body for the representation of local political interests, over and above the ordinary electoral process²⁰⁰. As the proponents of dual chambers, KADU understood that besides taking care of the interests of the various districts, the Senate was also mandated to safeguard the interests of the regional governments widely known as *Majimbo*²⁰¹.

The third function of the Senate was to formulate legislation²⁰². The 1962 Constitution donated to the Senate the mandate to formulate any bill except financial related bills and to examine bills which originated from the House of Representatives²⁰³. The money bills could

¹⁹¹ Supra note 9, 6

¹⁹² Supra note 179, 27

¹⁹³ Ibid

¹⁹⁴ Ibid

¹⁹⁵ Ibid

¹⁹⁶ Iqbal, Z. Kenya's new Constitution: Erasing the Imperial Presidency. IIJD Newsletter (August 2010), 1

¹⁹⁷ Ojwang' J. B. 'Constitutional development in Kenya: Institutional adaptation and social change' Nairobi: ACTS Press (1990), 114

¹⁹⁸ Ibid

¹⁹⁹ Ibid

²⁰⁰ Proctor Jr., J.H. The Role of the Senate in the Kenyan Political System. Parliamentary Affairs Vol. XVIII (4), (1964) 389-415

²⁰¹ Supra note 197

²⁰² Ibid

²⁰³ Ibid

only be formulated by the House of Representatives²⁰⁴. All such finance bills would only be presented to the Senate just for discussion, but it could not be modified to reflect any changes²⁰⁵.

The Senate's fourth role was to make sure that the government was accountable²⁰⁶. This would be done through question time in the Senate and at the respective Senate committees²⁰⁷. The Senate was also set up to protect the Constitution of 1962²⁰⁸. There would be no constitutional amendments without the Senate's involvement²⁰⁹. The 1962 Constitution had firmly established clauses on citizenship, fundamental human rights, and structure of the respective regions, the judiciary, and land²¹⁰. These could not be modified without being unanimously agreed upon by at least ninety per cent of the Senators²¹¹. All other modifications required a minimum of seventy-five per cent of members of the Senate²¹². These safeguards were requisite so as to make sure that the major parties did not infringe on the rights of the minor ones and to safeguard the interests of all the citizens²¹³.

In December 1963, the government intended to impose a state of emergency in North-Eastern province, so as to solve with the "*shifita*" problem²¹⁴. Despite receiving majority votes in the House of Representatives, they required sixty-five per cent Senate approval²¹⁵. The executive made a threat to declare a state of emergency without due regard to the Constitution as it had failed to get a majority vote in the Senate²¹⁶. However, through the Minister of Justice, it reached out to KADU so as to build consensus, after which a majority vote was attained²¹⁷.

The House of Representatives was used by KANU to bring bicameralism to an end²¹⁸. The Senate on the other hand was unsuccessful in working together to protect its interests, and the Senators who were representing KANU were the channel through which Senate was

²⁰⁴ Ibid

²⁰⁵ Ibid

²⁰⁶ Ibid

²⁰⁷ Ibid

²⁰⁸ Ibid

²⁰⁹ Supra note 179

²¹⁰ Ibid

²¹¹ Ibid

²¹² Ibid

²¹³ Ibid

²¹⁴ Supra note 197

²¹⁵ Ibid

²¹⁶ Ibid

²¹⁷ Ibid

²¹⁸ Ibid

exasperated and finally torn down²¹⁹. Between 1963 and 1964, Kenya had a two-fold executive system which was founded on the Westminster structure where Governor-General exercised decision making authority while the Prime Minister run the government on a day to day basis²²⁰. Kenya's new prime minister was the leader with the parliamentary majority also appointed his ministers from among National Assembly members²²¹. As a result, there was no proper distinction between parliament and the executive²²².

Shortly after independence, KANU elites begun to mutilate the 1963 Constitution by perpetuating the theory of supreme executive authority which was backed up by then Prime Minister Jomo Kenyatta and Thomas Joseph Mboya, tossing the basic principles of constitutionalism to the wind²²³. These basic principles were meant to underscore a restrained government²²⁴. KANU argued that the Constitution published on 19th April, 1963 was intended to lead Kenya to self-governance rather than to independence²²⁵. This Constitution had been promulgated to fasten the process of attaining self-rule and prevent prolonged disputes between KANU and KADU²²⁶. KANU persuaded KADU to join KANU in November, 1964 and in December of the same year, the first constitutional amendment was introduced, the Constitution of Kenya (Amendment) Act No. 28 of 1964²²⁷.

This was the amendment that transformed Kenya into a republic and created a powerful President who became both the head of state and head of government²²⁸. This amendment to the Constitution created an authoritarian President to the detriment of the other branches of government and the people²²⁹. The second amendment passed the same month as the first one, through the Constitution of Kenya (Amendment) (No. 2) Act No. 38 of 1964²³⁰. This amendment abolished the power to change regional boundaries by the regional assemblies

²¹⁹ Ibid

²²⁰ Ghai, Y.P. and J.W.P.B. McAuslan (1970) '*Public Law and political change in Kenya*' Oxford University Press: Nairobi, (1970), 58

²²¹ Ibid

²²² Ibid

²²³ Supra note 9, 33

²²⁴ Stultz, N.M. Parliaments in former British Black Africa. *Journal of Developing Areas*, Vol. 2 (4), (July 1968)479-494

²²⁵ Ibid

²²⁶ Ibid

²²⁷ Ibid

²²⁸ Ibid

²²⁹ Ibid

²³⁰ Ibid

and transferred it to parliament²³¹. It also abolished the titles of the respective regional presidents and replaced them with ‘less powerful’ title chairmen²³². The power to collect revenue was taken away from them thus making them to entirely dependent on the national government²³³. Finally, this amendment gave power to the President to solely appoint all judges including the Chief Justice without consultation with any other organ or branch of government²³⁴.

The third amendment no. 14 of 1965 lowered the Senate’s requirement for constitutional amendments for the entrenched clauses, from 90 per cent to 65 per cent, and from 75 per cent to 65 per cent for other clauses²³⁵. The fourth amendment no. 16 of 1966 permitted the indefinite incarceration of persons without trial on 3rd March, 1966 and conserved the harsh and severe Public Security Act of 1966 which provided for a framework for carrying out of detention without trial²³⁶. The aim of this Act was to ensure all critics were severely dealt with by the imperial President²³⁷. On 28th April 1966, Parliament passed the amendment no. 17 of 1966, popularly known as the ‘turn coat rule’ to practically compel the opposition parliamentarians to stand down and go back to the electorates for re-election²³⁸.

The Constitution was further amended and it stripped powers to elect national members from Parliament, and these powers were bestowed to the President²³⁹. The Constitution provided for the election of twelve ‘specially elected members’ by Parliament while sitting as an electoral college, until 1966 when these powers were again stripped off²⁴⁰.

The Constitution also provided for a seven-region system of devolution to protect minority interests by granting autonomous authority to the regions²⁴¹. The colonialists had passionately recommended to the political class to give great consideration to devolution²⁴². They had said

²³¹ Ibid

²³² Ibid

²³³ Ibid

²³⁴ Ibid

²³⁵ Irungu, K. E. *The Machiavellian art of political manipulation: The Kenyan experience.*; Thika: House of Hedges, (1999) 63-66

²³⁶ Ibid 21-29.

²³⁷ Ibid

²³⁸ Gertzel, C. ‘*The politics of Independent Kenya, 1963-8*’ London: Heinemann, (1979),67

²³⁹ Ibid

²⁴⁰ Chapter IV, Part 1, Section 39, Republic of Kenya (ROK) The Constitution of Kenya (1963)

²⁴¹ Sihanya, B. Reconstructing the Kenyan Constitution and State, 1963-2010: Lessons from German and American constitutionalism. Law Society of Kenya Journal Vol. 6 (1),(2010) 1-35

²⁴² Ibid

that a strong and competent central government must be in place if the rights of individuals were to be properly safeguarded²⁴³. Further, if there was to be a governance system that the citizens would have confidence in, Kenya would require additionally to other governing authorities, their own defined rights which would not necessarily come from the central government²⁴⁴. Such freedoms would have to be enshrined in the Constitution, and the Constitution should be one that cannot be amended in such a way as to frustrate what was agreed at the Lancaster conference²⁴⁵.

The regions had their respective legislative assemblies to make laws relevant for the citizens within their jurisdictions²⁴⁶. Thus, the assemblies were given the role of protecting the interests of the local citizens who feared being dominated by the larger tribes in matters of national interest²⁴⁷. By the time the Lancaster Conference began, the stage for the provision of devolution had been set and at its opening ceremony in February 1962, the Secretary of State stressed the importance of safeguarding the interests of the minorities²⁴⁸. In this regard, the Secretary of State had prepared the way for the forthcoming negotiations²⁴⁹. He insisted that the existence and structure of the central government, the nature, function and powers of other governing bodies must be determined²⁵⁰. Devolution was subsequently enshrined in the Constitution²⁵¹.

The powers of the regional assemblies included to enact laws for the peace, order and good governance of the regions or of any part thereof and on matters stipulated in part I or II of the First Schedule of the Constitution²⁵². Each region had its executive authority bestowed in the finance and establishment committee of the respective regional assembly²⁵³. This authority was limited and was subject to central government's authority²⁵⁴. This enabled both of them to work in tranquility, separately and naturally subject to the national law²⁵⁵. The regions' executive authority was to be exercised in such a way as not to hinder or compromise the

²⁴³Ibid

²⁴⁴Ibid

²⁴⁵ Ibid

²⁴⁶Steve Nguru '46 Districts of 1963' (25th September, 2012)

²⁴⁷Ibid

²⁴⁸Ibid

²⁴⁹Ibid

²⁵⁰Ibid

²⁵¹ Ibid

²⁵²Ibid

²⁵³Ibid

²⁵⁴ Ibid

²⁵⁵Ibid

exercise of the executive authority of the national government and to make sure that there was full adherence to any laws created by Parliament and applying to the respective region²⁵⁶.

In addition to making laws, the regions were also required to create fully developed public service administrative bureaucracies in order to exercise the executive authority in implementing policies at the local level, and to deal with internal staffing related issues²⁵⁷. The execution of policies was done by different committees, the major one among them was the finance and establishment committee and the devolved responsibilities were also clearly spelt out²⁵⁸. Each regional assembly was required to set up a committee to deal with finance and staff issues and would establish other committees, as it would consider necessary, to deal with issues such as trade, education land, agriculture and forests; regional government and administration among others²⁵⁹.

In accordance with the principles of devolution and equal representation, the respective regional assemblies could make a determination of the number of constituencies represented within the assembly and thus determine its own composition²⁶⁰. There was a President, a Vice-President and a Clerk in each assembly²⁶¹. The President led the various committees that constituted the executive of each regional government²⁶².

The regional assembly committee consisted the President as well as other persons nominated from among regional assembly members²⁶³. Therefore, the members of the committees would perform functions of both legislative and executive²⁶⁴. The rest of the committees except the finance and establishments committee were led by a Chairman and a given number of ordinary members of the assembly²⁶⁵.

Members of the committee were elected from among members of the assembly²⁶⁶. In general, the committees were inclusive in accordance with devolution had indistinguishable

²⁵⁶ Ibid

²⁵⁷ Ibid

²⁵⁸ Ibid

²⁵⁹ Ibid

²⁶⁰ Ibid

²⁶¹ Ibid

²⁶² Ibid

²⁶³ Ibid

²⁶⁴ Ibid

²⁶⁵ Ibid

²⁶⁶ Ibid

representation of the different tribes within the respective region²⁶⁷. Except the President, no other member of the committee would be elected to sit in more than two committees at any one time²⁶⁸.

The respective assemblies had representatives who would be recommended by the elected members to represent special interests groups whose numbers were decided by a simple formula²⁶⁹. Section 94 (1) of the Constitution provided that the number of the special groups in the respective regional assembly would be determined by the number resulting from dividing the number of seats of elected members of that regional assembly by eight or the next whole number greater than that result.

Unfortunately, devolution did not last very long, the split of the opposition KADU in 1964, being the party that championed for devolution, contributed to making devolution moribund and consequently integrating itself into KANU, which had sought a unified government during the Lancaster constitutional talks²⁷⁰. The KANU government had barely undertaken any significant devolution of the administrative function, the related expenditure and staffing resources to the local governments by the time KADU was dissolved, but it had usurped devolved functions such as delivery of social services²⁷¹. In the 1960s and 1970s, the national government boasted about its superior capacity to deliver services to its citizens and this was embodied in the ambition of achieving the economic blueprint, Sessional paper number 10 of 1965 on African Socialism and its Application to Planning in Kenya²⁷². This inevitably led to numerous reforms to the Constitution that eventually established an imperial president²⁷³.

Within the third decade of independence, the declining delivery of service by the government raised the need to interrogate the effectiveness of the overly centralized government, resulting in limited wide-ranging decentralizing steps, such as the DFRD planning and budgeting process which were implemented weakly²⁷⁴. There was constant demand from an extremely subdued political opposition and a vibrant civil society who fought for a return to multiparty

²⁶⁷ Ibid

²⁶⁸ Section 113 (7) 1963 Constitution

²⁶⁹ Supra note 238

²⁷⁰ Othieno Nyanjom 'Devolution in Kenya's new Constitution' Constitution Working Paper No. 4 Society for International Development (2011), 2

²⁷¹ Ibid

²⁷² Ibid

²⁷³ Ibid

²⁷⁴ Ibid

democracy as a way of promoting appreciable accountability by the government²⁷⁵. This together with global pressure for liberalization, was fruitful in 1991 when Kenya went back to multi-party politics²⁷⁶. The insistence for radical constitutional changes, in particular integrating the devolved system of government to the local level, came into fruition when the 2010 Constitution was passed²⁷⁷. Following a two-decade gestation, Kenya adopted a new Constitution in August 2010 which has far-reaching democratization clauses, which include the forty-seven devolved governments²⁷⁸.

2.2.2 Devolution in Kenya under the 2010 Constitution

2.2.2.1 What is the form of devolution in Kenya?

Devolution in Kenya is characterized by three key principles;

- a) The principle of distinctiveness which means that both levels of government have clearly defined borders, revenue sources and functions²⁷⁹.
- b) The interdependence principle, meaning that the two levels of government are dependent on each other, serve a common population and some of their functions may overlap²⁸⁰. In most instances, the national government formulates policy while the county governments implement them²⁸¹.
- c) There is oversight which is done by intergovernmental bodies such as the independent offices and commissions²⁸².

Article 174 of the Constitution sets out the objectives of devolved governments in Kenya. These include promoting democracy and answerability in the exercise of power; promotion of national unity by acknowledging heterogeneity of citizens; giving capacity to the citizens to control their own affairs and increase the participation of the citizens as the state exercises its powers in making decisions that touch on their day to day lives; giving due regard to the rights of the citizens to take charge their own issues and to promote betterment of their lives; preserving and fostering the interests and rights of minority and disadvantaged citizens;

²⁷⁵Ibid, 3

²⁷⁶Ibid

²⁷⁷Ibid

²⁷⁸ Ibid

²⁷⁹Onesimus Kipchumba Murkomen 'Devolution and the Health System in Kenya' (12thNovember, 2012), 1

²⁸⁰Ibid

²⁸¹Ibid

²⁸² Ibid

championing of social and economic growth and the providing services that are easy to access throughout the country; ensuring a fair share of national and local wealth across the country; making possible the movement of administrative state power, their operations and amenities from Nairobi city and strengthening of the counterbalancing of power so as to ensure that political power is not in control of a few individuals and respect for the separation of powers.

The Constitution has made Kenya undertake an aggressive and quick reorganization of its governance framework after independence²⁸³. As noted, the independence Constitution and the Constitution amendment act no. 28 of 1964 abolished the provisions that allowed the respective regions to collect their own revenue²⁸⁴. This resulted into making regions fully dependent on revenue allocated by the central government, as a result, this led to centralization of power and weakening the regions (*majimbo*)²⁸⁵. Kenya shifted from decentralization, to centralization of power in a singular office²⁸⁶. Elias Wakhisi, argues that devolution was designed in the direction of bringing amenities, wealth and capacity closer to the people²⁸⁷. And this therefore means that the people will be able to make decisions about issues that directly affect them²⁸⁸.

Since the colonial times, Kenya has had power centralized, with notably huge executive authority centralized in Nairobi²⁸⁹. The President's office was the pinnacle of a centralized governance system which was known as the provincial administration and comprised of a large group of officials, who included thousands of chiefs at the locational level and the eight provincial commissioners who were found at the provincial level²⁹⁰. It was a system that left many people unable to participate in anything touching on problems of local significance²⁹¹. Although there were city and district councils across Kenya, their significance in terms power and material wealth was insignificant²⁹².

²⁸³ Supra note 241

²⁸⁴ Prof. H.W.O Okoth-Ogendo, 'Politics of Constitutional Change in Kenya Since Independence, 1963-1969,' St. Anthony College, Oxford United Kingdom, Africa Affairs, (January, 1961) 9-34

²⁸⁵ Ibid

²⁸⁶ Ibid

²⁸⁷ Ibid

²⁸⁸ Lisa Akinyi Mary; 'Devolution to transform Kenya' IRIN, (25th March 2013), 1

²⁸⁹ Ibid

²⁹⁰ Supra note 241

²⁹¹ Ibid

²⁹² Supra note 197

Only a few financial resources were flowing to the eight provinces for the improvement of the standard of living, therefore many citizens moved to Nairobi looking for job opportunities as the capital hosted a wide array of flourishing businesses while at the country side, they were mainly deteriorating²⁹³. According to a report by Society for International Development, Kenya was found to be in the category of the countries with the greatest inequalities in the world²⁹⁴. It was found that the remote northeastern Mandera County was the poorest in accessing amenities²⁹⁵. For example, the central highlands were found to have public hospital beds which if compared with those in Mandera, they would be ten times more²⁹⁶.

In Wajir which is also in the northeast, seventy nine percent of children were found to be at a higher risk of persistent malnourishment, compared to sixteen percent in Mombasa County²⁹⁷. Furthermore, power and wealth inequalities have on numerous occasions been found to fall along ethnic lines²⁹⁸. Although there are forty-two ethnic groups, only a few of have had power and influence on the political landscape²⁹⁹.

Devolution which is a major cornerstone of the Constitution, split the country into forty-seven counties which have their own executive and legislative arms of government³⁰⁰. The Fourth Schedule sets out how roles are divided between the national and county governments providing that the counties shall be responsible for functions such as agriculture, issuance of trade licenses, sanitation, early childhood education, youth polytechnics and majority of the health facilities³⁰¹.

A minimum of fifteen percent of the national budget is assigned to the county governments, giving room for budgetary increments under some circumstances³⁰². The national government retains the function for provision of security, international relations, national treasury and planning, as well as education³⁰³.

²⁹³ Ibid

²⁹⁴ 'Exploring Kenya's Inequality: Pulling Apart or Pooling Together?' Kenya National Bureau of Statistics and Society for International Development (2013)

²⁹⁵ Ibid

²⁹⁶ Ibid

²⁹⁷ Ibid

²⁹⁸ Ibid

²⁹⁹ Ibid

³⁰⁰ Ibid

³⁰¹ Ibid

³⁰² Ibid

³⁰³ Supra note 24

The elections that were held on 4th March, 2013 filled the positions set out in the Constitution which include the forty-seven governors, who are the heads of the executive branch of county governments and one thousand four hundred and fifty ward representatives, who are the members of county assemblies. Ward representatives were sworn also in on 22nd March 2013, when they also elected speakers of their respective assemblies.

Several institutions were established so as to oversee the process of devolution. These include:

- The TA (whose term has expired), which was intended to supervise the handover of power from the national government to the county level;
- The CRA, which manages budgetary resources allocation between the national government and the counties and among the forty-seven counties;
- The government appointed the TFDG, which put in place six major bills to ensure the creation of administrative frameworks to direct the process of devolution;
- The CIC (whose term has also expired), whose mandate extended far beyond, ensuring compliance with constitutional provisions regarding devolution

Devolution in Kenya is one of the most zealous in the world, as it involves extensive political, financial, and administrative decentralization³⁰⁴. Since the elections held on March 2013, the forty-seven county governors who were elected together with the county assemblies, they are in charge of a remarkable portion of public funds and delivery of services³⁰⁵.

Devolution was clearly demonstrated in Kenya after March 2013 general elections³⁰⁶. It's most outstanding intimation is reducing poverty, bringing delivery of services close to the citizens and growth of the economy³⁰⁷. The reforms of devolution seek to address multiple issues that include tackling of ingrained disparities that have existed for a long time between regions; increasing public participation by citizens; enabling greater independence to the

³⁰⁴Christopher Finch, Annette Omollo and Rabya Nizam 'Building Public Participation in Kenya's Devolved Government' Working Paper Series No. 1, World Bank (February, 2015), 1

³⁰⁵ Supra note 1, 2

³⁰⁶Supra note 173

³⁰⁷Ibid

various counties, and the re-organization of power by taking it away from the central government where it has been historically entrenched³⁰⁸.

The county governments quickly assumed responsibilities as stipulated in the Fourth Schedule of the Constitution which comprise local infrastructure, agriculture, urban basic services and health³⁰⁹. Transferring of functions and finances to counties was faster than how it was contemplated by the Constitution³¹⁰. The Constitution and the legal framework for devolution places strong emphasis on openness, accountability and citizen participation as means of improving the effectiveness, equity and inclusiveness in the governance structure and delivery of services³¹¹. The comprehensive principles and values contained in the Constitution and the ensuing legal framework steadily impress upon the government to commit to openness, answerability and civic engagement in the devolved system of governance³¹².

Citizens value devolution very highly as it is believed that it will improve delivery of services and improve accountability³¹³. Devolution has created enormous optimism and high anticipation of how rapidly devolution will impact the lives of ordinary citizens, enhance delivery of quality services, and lessen corruption³¹⁴. This anticipation reflect high degree of dissatisfaction with delivery of services to the citizens at the local level before devolution³¹⁵. Nonetheless, the public is in the process of learning about new responsibilities and expectations under devolution³¹⁶. Before the coming of devolution, studies indicate that only about one-third of the Kenyan population (twenty nine percent) had a clear comprehension of devolution, while majority (seventy one percent) could not coherently articulate the correct positions or the duties of the various office holders³¹⁷.

Kenya's devolution so far has been comparatively smooth but implementing a devolution process that involves a substantial overhaul of governing structures at both the local and national level, can be an extremely complex process and the risks attached to it are

³⁰⁸ Ibid

³⁰⁹ Ibid

³¹⁰ Ibid

³¹¹ Ibid

³¹² Ibid

³¹³ Ibid

³¹⁴ Ibid

³¹⁵ Ibid

³¹⁶ Ibid

³¹⁷ Ibid

significant³¹⁸. As has been seen in devolution experiences elsewhere, such as Nigeria and Indonesia, the potential for graft and corruption through the creation of new bureaucratic systems is increased, and funding streams may prove erratic at the beginning³¹⁹.

Countries around the world that are implementing devolution have consistently faced increased bribery, bias of public resources to benefit a few individuals, and worsening service delivery to the citizens³²⁰.

The Constitution provides for the legal and institutional framework of devolution³²¹. It creates devolution whereby two out of the three branches of government; the legislature and the executive are decentralised to the forty-seven political and administrative counties as provided for under Article 6 and particularized in the First Schedule³²².

The main aim of devolution is to decentralize power, finances and having representatives down to the local level³²³. To achieve his, Parliament has passed several laws which laid the master-plan for the framework for implementation through which the goals of devolution would be achieved;

1. Section 17 of the Basic Education Act provides for the County Education Board in every county which among other things, should supervise the administration and management of community polytechnics, nursery and early childhood education programmes in the respective counties. It is also mandated to bring different elements of education together into a harmonious relationship and systematically review the quality of education and training in the county on behalf of the national government.
2. Section 36 of the Constituencies Development Fund Act also set up the County Projects Committee which is created, for every county a committee whose main function is to coordinate the execution of projects funded through CDF.
3. CGA was enacted to give life to Chapter Eleven of the Constitution and to provide for powers, roles and responsibilities of the county governments so as to deliver services to the citizens

³¹⁸Christine Alberto 'Kenya's Devolution still Evolving' Oxford Business Group,(July 2014), 17

³¹⁹Ibid

³²⁰Ibid

³²¹Ibid

³²²Ibid

³²³ Ibid

4. Division of Revenue Act which is enacted at the commencement of every financial year to lay out for the fair sharing of revenue raised nationally between the national and county governments.
5. Intergovernmental Relations Act was passed to create a structure for collaboration and cooperation between the national and county governments and among the county governments; to create an intergovernmental dispute resolution mechanism pursuant to Articles 6 and 189 of the Constitution.

These Acts among many others have laid the framework upon which devolution will occur.

2.3 Does devolved system of Government improve public participation?

The prominence that Kenya has given to citizen participation reverberates with the universal trends, which demonstrates that boosting bottom-up mechanisms for participation is a key component to effective decentralization³²⁴.

While there is a strong momentum towards carrying out citizen participation, there is disparity between the legal framework and the real implementation on the ground³²⁵. There are also distinct perspectives of what entails successful participation³²⁶. It has been said that the solutions must be realistic for implementation that specific policies and guidelines for public participation are required to enable county governments to adopt them³²⁷. Despite the fact that counties have the authority to facilitate citizen participation, they face some difficulties such as how to bring on board underprivileged societies especially in the peripherals including arid and semi-arid areas³²⁸. The reality of public participation is in the capacity to have an impact in the decisions made by the government and it's both advantageous to the county governments and to its citizens as it is the foundation of success of a society³²⁹.

³²⁴Jackline Kiramana 'Public Participation Key to Kenya's Devolution' The Institute for Social Accountability, World Bank Group, Nairobi (30th April, 2015),2

³²⁵Ibid

³²⁶Ibid

³²⁷Ibid

³²⁸Ibid

³²⁹Supra note 196

The Constitution and legal structure provide for a strong foundation for citizen participation³³⁰. They provide for openness which means that there are clear financial reporting mechanisms; people access to accurate information that touches on budget making process timeously and results of the respective citizen consultations³³¹. Financial accountability and independent commissions are critical in overseeing implementation of constitutional provisions and the handling of complaints by citizens³³². They also ensure accountability which also means amenability and responsiveness³³³. Participation means that the public should be engaged in development of budgets and strategies, preparation and delivery of social services and setting of community priorities³³⁴. Such foundational aspects of citizen participation are obligatory to both the national and county governments³³⁵.

Engaging of citizens in the planning, service delivery, budget making process and surveillance is well set out across the legislation³³⁶. The Constitution makes reference to these concepts in Articles 10 and 174 which directly refer to citizen engagement in public finance matters (Art. 201), policy-making mechanism (Art. 232) and, the organization and managing of urban areas and cities (Art. 184). The CGA (Sections 3 and 6), the PFMA, (Section 10); the TDGA (Section 14) and the Urban Areas and Cities Act (Section 3) are all guided by the fundamentals of openness, answerability and citizen participation.

In *Robert N. Gakuru & Others v Governor Kiambu County & 3 others*, the Judge held that citizen participation should be genuine and not delusional and should not be viewed merely as a rigid observance for the purposes of fulfilling of the Constitutional requirements. He also held that the county assemblies shall pass legislation that will guarantee that the spirit of citizen participation is achieved both in terms of quality and efficiency. County assemblies should do whatever is necessary to ensure that majority of their constituents specifically and the Kenyans generally are aware that legislation is being processed and where such legislation touches on such critical aspects such as payment of taxes and levies, the obligation is even more burdensome. He further said that it is the obligation of the County Assembly in such situations is to urge its citizens to get involved in processing such legislation by using as

³³⁰ Ibid

³³¹ Ibid

³³² Ibid

³³³ Ibid

³³⁴ Ibid

³³⁵ Ibid

³³⁶ Ibid

many gatherings as possible such as *barazas*, houses of worship, national and local radio stations and such other forums where the public can easily access information of the planned actions.

In conclusion, it is expected that devolution ought to make public participation easier for the citizens as this is the nearest a citizen is closest to the government and this is the core of devolution.

CHAPTER 3

3.0 WHERE DOES PUBLIC PARTICIPATION FIT IN DEVOLUTION?

3.0.1 Definition of public participation

This paper uses the terms “public participation” and “citizen participation” inter-changeably. Public participation does not have a universal definition³³⁷ but the Aarhus Convention³³⁸ sets out the basic conditions for public participation³³⁹. These include prompt and practical notification among the relevant parties; reasonable deadlines for participation and at the onset of the decision-making process; the relevant documents should be availed free of charge; due regard should be paid to the public participation exercise and publication of the decision that are made at the end of the consultation exercise³⁴⁰.

Citizen participation activities include participating in elections; taking part in meetings; engaging in discussions that are either public or political; signing of petitions on a desired government action; participating in activities within the community and donating funds to a political party or a favourite candidate and other such like activities are some of the examples of public participation³⁴¹. So is involving people in a process of solving a problem or making a decision that may be of interest or may affect them³⁴². Public participation includes a set of procedures for consulting, involving and informing the public to enable those affected by a decision to contribute to that decision-making process³⁴³.

³³⁷Supra note 23, 2

³³⁸This was adopted at the United Nations Economic Commission for Europe (UNECE) through the Convention on Access to Information and Public Participation in Decision Making & Access to Justice in Environmental

Matters in the Danish city of Aarhus (25th June, 1998)

³³⁹Supra note 23, 2

³⁴⁰Ibid

³⁴¹Ibid

³⁴²Ibid

³⁴³Prof. Ben Sihanya et al ‘Overview and Objects of the Constitution’ Rapid Results Initiative Presentation to the University of Nairobi, CCU, (6th September, 2013)

The World Bank defines participation as a mechanism in which the power and control of stakeholders has influence over development programs, decisions and finances that affect them³⁴⁴.

Citizen participation has two extensive dimensions which are indirect and direct involvement³⁴⁵. Indirect involvement recognizes that officials who conduct elections and professional staff should act on behalf of the citizens in a representative democracy³⁴⁶. Direct participation means that the government is owned by the citizens and must therefore be consulted as the state makes decisions³⁴⁷. The critical importance for public participation is also derived from their legal obligation to pay taxes so that the state can deliver services to the citizens³⁴⁸. It therefore means that they do not just consume services rendered but they are critical contributors of funds that run the government³⁴⁹. The engagement of citizens in public decision making is therefore inclusive of identifying priorities, creating strategies, policies, and keeping track of and assessing of services that are rendered by the government³⁵⁰.

There are key elements of public participation which include;

- a) Social accountability which refers to processes which empower citizens to hold government institutions responsible and make them respond to their needs³⁵¹.
- b) Transparency in public finance matters and in performance of duties is made certain through regulations, processes, and ability for information sharing on programs that are being run by the government, budgeting processes, and sharing of the outcomes with people³⁵².
- c) Through the participation processes, citizens are enabled to participate in identifying the budgetary priorities, monitoring of expenditure, and evaluate delivery of services; there is also feedback mechanism which gives citizens the chance to make their comments and complaints³⁵³.

³⁴⁴World Bank 'The World Bank Participation Sourcebook' Washington: (1996), xi

³⁴⁵Ibid

³⁴⁶Ibid

³⁴⁷Ibid

³⁴⁸Ibid

³⁴⁹Ibid

³⁵⁰ Annette Omolo, The Institute for Social Accountability (TISA) 'Policy proposals on citizen participation in Devolved Governance in Kenya', (2011) 8

³⁵¹ Jason Lakin, 'Public Participation in Kenya: County Budget & Economic Forums – Principles & Options' International Budget Partnership, Budget Brief, Number 21, (December, 2012), 1

³⁵²Ibid

³⁵³Ibid

- d) Accountable mechanisms which include both direct and indirect relationships, where those who provide services are penalized if they fail to meet the set standards³⁵⁴

3.0.2 History of public participation in Kenya

Despite the minimal participation in decision making regarding the great extent of expenditure by government, Kenya has had a remarkable history with direct participation in government finances, as there has been funds such as the CDF and LASDAP where there has been some level of citizen participation³⁵⁵.

The key tools for participation at the local level were the LASDAP and CDF³⁵⁶. The LASDAP was introduced by a circular issued by the ministry in 2001 while CDF was established by the CDF Act in 2003³⁵⁷. The LASDAP had a roll out plan of about three years that required focus on poverty with the most important consideration being areas of health, education and infrastructure³⁵⁸. LASDAP gave local authorities the opportunity to engage constructively with the local communities on planning, budget processes and developmental issues³⁵⁹. The CDF Act picked the development projects at the constituency and more specifically those focused to fighting poverty at the basic level in the community³⁶⁰. The CDF Act provided that the local communities should play a role in development of their constituency through the various committees established under the Act³⁶¹. The CDF Committee (CDFC) members are appointed by respective Member of Parliament, although the Act also provides for a structure detailing the categories of representation³⁶².

To enable local authorities' access transfer of funds from national government under the LATF, they were mandated to give citizens a chance to directly take part in planning and budgetary process for a given amount of the resources available, with the major focal point being on the infrastructural projects³⁶³. Consequently, access to funds for the local authorities

³⁵⁴ Ibid

³⁵⁵ Rose, Jonathan; Omolo, Annette 'Six Case Studies of Local Participation in Kenya. Lessons from LASDAP, CDF & Water Action Group World Bank' Washington, DC (2013), 2

³⁵⁶ Ibid

³⁵⁷ Ibid

³⁵⁸ Ibid

³⁵⁹ Ibid

³⁶⁰ Ibid

³⁶¹ Ibid

³⁶² Ibid

³⁶³ Supra note 351

to pay the bills for crucial services and debts was pegged on their preparedness to carry out budgeting process that is participatory³⁶⁴.

In the legislation establishing CDF and the infrastructure for LASDAP programmes, the requirements for public was established although these funds were just a small fraction of total government disbursement³⁶⁵. LATF was allocated just about five percent of government income, which was shared among the local authorities, but only a small percentage was channeled through the LASDAP process practically³⁶⁶. The CDF program was allocated approximately two and a half percent of the income collected by the government³⁶⁷.

Public participation was mandatory as part of the devolved LATF³⁶⁸. Despite having the best aspirations, citizens were subjected to countless obstacles to participate and more so, the poor ones in the society³⁶⁹. They had little personal drive to attend the public participation fora, the reason being that they were not compensated for the time spent at the meetings or the working time that was lost³⁷⁰. Participation in these situations meant bringing together of the citizens by other players, such as village chiefs and elders, which was a typical strategy to make sure that the citizens attended the meetings³⁷¹. A comparable strategy was taking other planned meetings, such as the chief's *sbaraza*, and to make public participation as part of the agenda³⁷². Some other times, the civil society would assist in bringing citizens together as well, but the ability to sustain such resourcefulness was not always certain³⁷³. Due attention could not be given to the means of accessing the venue; the availability of the citizens at the time of the meeting; successful mobilization that required simultaneous effort; using several modes of communication and information avenues to get the information around; sufficient notice for the meeting was also an important factor, as well as the time of holding such meetings³⁷⁴. There were many frameworks and ways of holding community meetings and the

³⁶⁴ Abraham RugoMuriu and Gladys Mbai with Jason Lakin and Ryan Flynn 'County Budget and Economic Forums (CBEFs) and Public Participation in Kenya A Synthesis of Case Studies from Five Counties' (November, 2014), 2

³⁶⁵ Supra note 351

³⁶⁶ Ibid

³⁶⁷ Ibid

³⁶⁸ Ibid

³⁶⁹ Ibid

³⁷⁰ Ibid

³⁷¹ Ibid

³⁷² Ibid

³⁷³ Ibid

³⁷⁴ Ibid

basic attributes of successful meetings included punctuality by all participants and leaders who would not have personal interests in the proposed programs³⁷⁵.

Although the LASDAP process has in the past been found to be founded on equitable and rational principles of successful participation in the allocation of local resources, it eventually failed as a result of poor execution³⁷⁶. LASDAP did actually promote citizen participation in the process of giving priorities to projects but participation was majorly limited to dialogues³⁷⁷. It was easier to conduct participation in the local authorities with smaller populace like in the county or town councils, as a result participation was found to be higher³⁷⁸. Citizen participation seemed to have been restricted to negotiations on which projects should be undertaken but the results thereof were not always binding³⁷⁹. Even as public became more aware about LASDAP, vigorous participation remained difficult to achieve³⁸⁰. Participation seemed to decline as the process of picking out the priority needs progressed to execution and assessing of the progress of the ongoing projects, and substantive indications of participation in the evaluation stage were just not in existence³⁸¹.

For the longest time, participatory development was restricted projects that were to community development oriented³⁸². Kenya also endeavoured to establish as a norm the transferring to the local governments, the planning and execution of its programmes in the early 1960s through sessional papers³⁸³. DFRD strategy was the most intricate and it became functional in 1983.³⁸⁴ DFRD majorly emphasized on the participation of the national government field officers in executing the programmes³⁸⁵. This contradicted the origin of the public participation³⁸⁶. In public participation, development officers such as civil servants should ideally make the process easy by giving assistance to the members of the community to pick out and find solutions for their problems³⁸⁷. The DFRD strategy faced execution challenges as it was not anchored on a legislative framework that would establish the

³⁷⁵ Ibid, ii-v

³⁷⁶ Supra note 351

³⁷⁷ Ibid

³⁷⁸ Ibid

³⁷⁹ Ibid

³⁸⁰ Ibid

³⁸¹ Ibid

³⁸² Ibid

³⁸³ Ibid

³⁸⁴ Supra note 351, 9

³⁸⁵ Ibid

³⁸⁶ Ibid

³⁸⁷ Ibid

committees that were coordinating it in the law³⁸⁸. For that reason, it operated in an administrative way rather than being anchored in law³⁸⁹. This is one of the attributes of devolution policies in Kenya, whereby a fund has been established through an Act of Parliament and therefore giving it a legal backing³⁹⁰. There are others that were established through policy proclamations and subsequently had no assurance of progression³⁹¹.

The lack of clear procedure for the citizens to take part in the process of making decisions is a major flaw in the CDF Act³⁹². While these existed under the very intricate LASDAP structure that was reviewed in 2009, actual data confirmed that there was a breach between what the policy provided and its implementation³⁹³. The poor implementation of engagement mechanisms remarkably influenced the accomplishment of the LASDAP and CDF³⁹⁴. Specific structures for engaging and articulating public priorities are required to promote citizen participation as devolution is executed at county governments' level³⁹⁵.

The adoption of the Physical Planning Act in 1996 was a critical event in the advancement of participatory development³⁹⁶. The law provided for community involvement in the development and execution of physical and development plans³⁹⁷. Nevertheless, its main shortcoming is the absence of the crucial component of sensitizing the members of community on their roles³⁹⁸. Physical planning is also concentrated in the big urban areas and therefore communities living in far way areas continue to be treated as insignificant in the participatory planning process³⁹⁹.

3.0.3 Public Participation under the 2010 Constitution.

Adherence to citizen participation in the execution, service delivery, budgetary process and assessment of the same is well set out across several legislations. The Constitution makes reference to this principle in Articles 10 and 174 where direct reference is made particularly to citizen engagement in matters touching on public finance (Art. 201), mechanisms of

³⁸⁸ Ibid

³⁸⁹ Ibid

³⁹⁰ Ibid

³⁹¹ Ibid

³⁹² Ibid

³⁹³ Ibid

³⁹⁴ Ibid

³⁹⁵ Supra note 21

³⁹⁶ Supra note 351, 9

³⁹⁷ Ibid

³⁹⁸ Ibid

³⁹⁹ Ibid

policy-making (Art. 232) and, the organization and managing of urban areas and cities (Art. 184).

Article 94 gives Parliament the authority to ensure that the heterogeneity of the Kenyan citizen is manifested, that the will of the people is properly represented and make use of the supreme power of the citizens. Article 118 provides that both houses have to make sure that there is participation by the public and its involvement during the preparation of legislation and any other affairs of the Parliament and the committees thereof. Article 196 mandates County Assemblies to undertake their affairs in a transparent way, and conduct its sessions and committees' sessions, in an open public area, to ease the processes for the public to take part and their views be taken into account in the legislation making and any other affairs of the assembly and the committees.

The CGA (Sections 3 and 6), the PFMA, (Section 10); the TDGA (Section 14) and the Urban Areas and Cities Act (Section 3) are all guided by the fundamentals of openness, answerability and citizen participation⁴⁰⁰. These principles are aimed at ensuring that citizens are continually having access to prior access to information on matters that touch on their lives and in a mode of communication that they can interpret⁴⁰¹. There's also a coordinated and integrated building of capacity that is geared towards empowerment of citizens and enhanced effective participation by the minority groups at all levels of government⁴⁰². These principals also guarantee adequate budgetary provision for public participation⁴⁰³. They also promote an effective monitoring and evaluation by the citizens through public participation which results in timely feedback mechanisms that build confidence in the government by the citizens⁴⁰⁴.

Counties are required by the Constitution and the PFMA, Section 207 to establish structures for citizen to participate in the budget making process across the counties. Equally all counties are mandated establish CBEF that will ease dialogue on the budget and the county plans⁴⁰⁵.

⁴⁰⁰ Ibid

⁴⁰¹ Ibid

⁴⁰² Ibid

⁴⁰³ Ibid

⁴⁰⁴ Ibid

⁴⁰⁵ Ibid

The CGA, PFMA and Urban Areas and Cities, Act 2011 stipulate steps on citizen participation that the county governments should commit themselves to. They mandate that citizen participation should be undertaken in many facets of national and county government which include enactment of new legislation, planning by the national and county governments on priorities in the budget making process, assessing performance by the public service and spending, and making their complaints known⁴⁰⁶. Citizen participation is mandatory in all steps of the budget process⁴⁰⁷. County governments should create framework, apparatus and the general rules for citizen participation, enhance opportunities for the minorities and the disadvantaged persons, create structures for broad communication to the public and opportunities to gain access to information, and submit yearly reports on participation by the members of the public to the county assembly⁴⁰⁸. Other non-state actors are also acknowledged as playing a critical part in implementing and playing an oversight role (CGA Section 87), and in making sure that citizen participation is undertaken in the planning processes that are undertaken by the county governments (CGA Section 104)⁴⁰⁹.

In *Robert N. Gakuru & Others v Governor Kiambu County & 3 others*, the Petitioners persuaded the court to declare that the Kiambu Finance Act, 2013 contravened the Constitution on the basis that there was no citizen participation that was undertaken and they were not invited for any consultations before the Act was promulgated. The Petitioners primarily complained that there was no genuine public participation, and therefore, the County Government enacted a law that was not guided by good reason with unwarranted clauses that were harsh, as the net effect was to have the citizens pay taxes twice based on the same source of income. The court upheld that citizen participation is a principle that is based on the Constitution which should guarantee that, in addition to the citizens voting for their leaders, they should also have a chance to participate in the process of making decisions that are undertaken by the leaders. In the interpretation of the concept of public participation, the judge avered that public participation is a mandatory requirement under the Constitution and statute.

⁴⁰⁶ 'Budget Transparency & Citizen Participation in Counties in Kenya, A guide by National Taxpayers Association' (April, 2013), 1

⁴⁰⁷ Ibid

⁴⁰⁸ Ibid

⁴⁰⁹ Ibid

In Kenya's devolution reforms, the position of the local governments has been taken by counties and therefore LASDAP has been abolished⁴¹⁰. It has been argued that a very comprehensive set of standards and strategy for the citizens to participate in the budget making process has been set aside⁴¹¹. As counties strategize on how to execute the requirements for citizen participation, it has been argued that LASDAP guiding principles were very helpful in citizen participation of the budget making process, but their implementation was poor⁴¹². There are arguments that counties should borrow from the guiding principles that originated locally, and make use of them⁴¹³. Some of the core principles that LASDAP was based are;

1. Public participation and negotiations had be given sufficient time⁴¹⁴. The procedure of consulting with citizens occurred for a period of approximately two months, starting from September each year, to November⁴¹⁵. Public participation was required to begin at the ward level before proceeding to the local authority level⁴¹⁶. Therefore, a reasonable period of time was used each year to ensure that there was a proper participatory process⁴¹⁷.
2. Participation in the budget making process always started with planning⁴¹⁸. LASDAP guiding principles mandated the local government to create a draft proposal to guide the process of budgeting⁴¹⁹. This was known as information gathering stage⁴²⁰. It was the responsibility of the Community Development Officers to collect data on status of projects undertaken the previous year; the experiences learnt from the previous year; reference point of the social economic data of a community; LASDAP processes of the previous year and an analysis by the relevant stakeholders⁴²¹.
3. Appropriate dialogue begun with notifying the public in advance about the available funds, the condition of the previous projects, and the key decisions to be made⁴²². This stage required that the notice given to members of the public should provide information on the funding available, an inventory of projects that were picked out

⁴¹⁰Ibid

⁴¹¹Supra note 9

⁴¹²Supra note 355

⁴¹³Ibid

⁴¹⁴Supra note 351

⁴¹⁵Ibid

⁴¹⁶Ibid, 1

⁴¹⁷Ibid, 2

⁴¹⁸Ibid

⁴¹⁹Ibid

⁴²⁰Ibid

⁴²¹Ibid

⁴²²Ibid, 3

and executed in the past years, citizen participation timetable and the places where the meetings would be held⁴²³. It also sought for the views of the citizens on their requirements so that they would be considered⁴²⁴. The notice had to be posted in public places for a minimum period of two weeks before holding the first consultation meeting⁴²⁵. It was of great importance to pass around the information about the meetings over as large geographical areas as possible to exhort citizen participation⁴²⁶. Public areas included the markets, bus stops, hospitals, mosques and churches, schools and chief's offices⁴²⁷. The detailed schedule under LASDAP set how information would be gathered and at what stage, it also provided for keeping track and assessing the progress of the projects⁴²⁸. The schedule was meant to give people sufficient details that would help their acceptable participation in every step⁴²⁹.

4. These consultations would start at a level that was closest to the community and moved upwards⁴³⁰. There used to be what was known as ward level consultation meetings which would be escalated to the local authority level for consensus meetings, this gave a chance to the local community to select projects at a level close to them⁴³¹. The views of each ward were presented at the local authority level by the ward representatives who included one male and one female who had been nominated by every ward⁴³².
5. Citizen participation would also have to be linked to the feasibility of the project⁴³³. As these projects progressed from the consultation to consensus stage, they would be evaluated by technical persons who would assess their practicality as proposed by the communities⁴³⁴.
6. Participatory mechanisms had to be harmonized with other parallel propositions to funding so as to avoid duplication of projects⁴³⁵. This required officers from other sources of funding such as CDF to avail their projects list for implementation so that

⁴²³Ibid

⁴²⁴Ibid

⁴²⁵Ibid

⁴²⁶Ibid

⁴²⁷Ibid

⁴²⁸Supra note 351, 11

⁴²⁹Ibid

⁴³⁰Ibid

⁴³¹Ibid, 12

⁴³²Ibid

⁴³³Ibid

⁴³⁴Ibid

⁴³⁵Ibid

they could be compared with the rest⁴³⁶. In a situation where there were more than one approach towards identifying and funding of projects in a particular jurisdiction, LASDAP proposed the need to co-ordinate the efforts so as to avoid duplication⁴³⁷. Through sharing of such information, it assisted efforts to harmonize various roles and development projects funded by various actors in a given geographical area and to make sure that there was maximum collaboration and synchronization between LASDAP and other financing actors such as CDF so as to avoid duplication and wastage of funds⁴³⁸.

7. In the same token, what the citizens preferred had to form an integral part of the official budget making process⁴³⁹. Resolutions of LASDAP meetings were factored in the comprehensive budgeting process⁴⁴⁰. If the council had a different view and desired to make amendments to the resolutions arrived at through LASDAP, such proposed amendments had to be taken back to the consensus meeting so that a decision would be made from that level⁴⁴¹. Preferences that had been made by the citizens would not be disregarded by the council⁴⁴².
8. Citizen participation did not stop at the proposal stage but it continued into execution of the projects⁴⁴³. There was a requirement to form a monitoring group which was responsible for the implementation of the LASDAP projects that had already been agreed upon for that particular year⁴⁴⁴. The monitoring group comprised of seven people who included councilors and non-state actors⁴⁴⁵. This group was required to meet three times per year and were also required to oversee the procurement and all other processes of implementation of projects⁴⁴⁶.

LASDAP was aimed at empowering local communities to come up with capital investment plans to meet the needs that touch on their daily lives and their most immediate needs through a bottom-up consultative process⁴⁴⁷. To enable local governments be given LATF, they were

⁴³⁶Ibid

⁴³⁷Ibid

⁴³⁸Ibid

⁴³⁹Ibid

⁴⁴⁰Ibid

⁴⁴¹Ibid

⁴⁴²Ibid

⁴⁴³Ibid

⁴⁴⁴Ibid

⁴⁴⁵Ibid

⁴⁴⁶Ibid

⁴⁴⁷Supra 351, 7

mandated to give a report on the processes undertaken and final decisions of LASDAP⁴⁴⁸. Such reports included copies of public notices for LASDAP meetings, minutes of the consensus meetings and LASDAP meetings⁴⁴⁹. Local authorities were motivated to conduct LASDAP decision making meetings and respect of the outcome of those meetings⁴⁵⁰.

The Constitution and the ensuing legislation, such as the CGA and the PFMA, provides that public participation shall be held in all matters touching on public funds⁴⁵¹. There are a great number of references to citizen participation in these laws, most are uncertain as they do not provide further guidance on how public participation should be undertaken⁴⁵². However, there is one departure from this, which is the particular requirement that every county must establish a CBEF⁴⁵³. The CBEF is mandatory under the PFMA, Section 137(2) provides that counties must establish these convocations so as to provide for a medium of dialogue by the county government on:

- i. Putting together of county plans, the county's financial strategy paper, the budget plan and outlook paper for the county and
- ii. All matters associated to the budget process, the economy and management of finances at the county level.

Emphasis is that public participation is very critical in making of decisions that are administrative in nature, it is important in setting goals, determining blueprints, programmes and in improving performance so as to achieve results by the government while offering services⁴⁵⁴. Public participation activities therefore relate to the way this is carried out so as to arrive at these decisions⁴⁵⁵. The ways of conducting it includes holding official meetings and sittings, public advisory councils and public panels, neighbourhood or resident association meetings and public surveys⁴⁵⁶. The useful or pragmatic aspects for public participation are wealth development, education matters, protection of the environment, matters touching on

⁴⁴⁸Ibid

⁴⁴⁹Ibid, 8

⁴⁵⁰Ibid

⁴⁵¹Ibid

⁴⁵²Ibid

⁴⁵³ Supra note 351

⁴⁵⁴ Supra note 197, 64

⁴⁵⁵Ibid

⁴⁵⁶Ibid

the health of the public and preservation of law and order, safety of the public among other things⁴⁵⁷

3.0.4 Who participates in Public Participation and how?

Public participation may be carried out through a number of public forums that are open and have been extensively publicized around the county⁴⁵⁸. Through these gatherings, citizens put forward their representatives from the villages or sub location level to act on their behalf at the wards or county level⁴⁵⁹. The number of citizens is randomly chosen, sometimes it is known as a mini-public, which comes together intentionally and these people are usually picked out based on certain attributes, such as coming from a particular region, organization or class so as to act on behalf of the rest of the citizens⁴⁶⁰.

Kenyans have been deeply concerned for a long time about how resources were distributed across the country⁴⁶¹. Majority of the regions and communities felt that they had been marginalized by a powerful centralized regime⁴⁶². Devolved government and citizen participation contemplated in the Constitution is an endeavour to unlock institutions at the local levels and enlarge the chances for citizen participation, as well as having greater checks and balances by offices, such as the Controller of Budget⁴⁶³. As a result, it follows that public participation is partly concerned about giving support to the requirements and the peremptory requests of the citizens together with the choices made by the government⁴⁶⁴. Public participation must therefore take place during the budget formulation processes, when the very important considerations are being made⁴⁶⁵. At this point, public participation will bolster decision making by providing decision makers with information about needs of the citizens as they evaluate their priorities in spending⁴⁶⁶. This could end up in equitable distribution of resources⁴⁶⁷.

⁴⁵⁷ Ibid

⁴⁵⁸ Ibid

⁴⁵⁹ Ibid

⁴⁶⁰ Supra note 351

⁴⁶¹ Supra note 9, 2

⁴⁶² Ibid

⁴⁶³ Ibid

⁴⁶⁴ Ibid

⁴⁶⁵ Ibid

⁴⁶⁶ Ibid

⁴⁶⁷ Ibid, 3.

Similarly, apprehension about unscrupulous dealings and failure to be accountable about resources that are allocated during budget implementation, indicate that citizen participation is also significant in the course of budget execution and when budget performance is being assessed⁴⁶⁸. The citizens have a supervisory role to play that blends the county assembly and other oversight bodies⁴⁶⁹. The information that the citizens holds about the success of public expenditure on the ground will help inform the monitoring process and enhance the execution of the budget⁴⁷⁰.

Giving an opportunity to the citizens to participate is also about building official legitimacy and reputation of the government⁴⁷¹. By having a robust engagement with citizens, the government employees can guarantee reinforcement for their programs and build credence in the expertise of the administration⁴⁷². This in turn could give confidence to the citizens to meet their tax obligations, encourage foreign direct investment, and encourage donors to help meet the deficit of the existing sources of revenue⁴⁷³. If we value citizen participation as a tool for building undisputed credibility, it should be understood that effective citizen participation will necessitate openness and successful feedback mechanism in which citizen requirements are acknowledged and reasons are given for either accepting or rejecting them⁴⁷⁴.

After the March 2013 elections, county governments have been pushing towards delivering palpable developments in delivery of services at the same time that they are establishing new institutions⁴⁷⁵. Among other things, they recruited their executive teams and members of staff, established county public service boards, prepared CIDPs, developed county strategies on wide array of issues⁴⁷⁶. They also seek to entice investors and control revenues⁴⁷⁷. Counties now play a foundational role on-the-ground in providing health facilities, agricultural services that in the past used to be managed by the national government⁴⁷⁸. In the middle of all these challenges, the policy makers, national and county government

⁴⁶⁸Ibid, 4

⁴⁶⁹Ibid

⁴⁷⁰Ibid

⁴⁷¹Ibid

⁴⁷²Ibid

⁴⁷³Ibid

⁴⁷⁴Ibid

⁴⁷⁵Supra note 344

⁴⁷⁶Ibid

⁴⁷⁷Ibid

⁴⁷⁸Ibid

authorities, and civil society organizations have pushed to promote citizen engagement in many ways⁴⁷⁹. At the national government level, MODP set in motion the National Capacity Building Forums which seeks to make the citizens stronger so as to hold national and county governments responsible by making them more aware on the well-structured policy instruments that buttress devolution⁴⁸⁰. The ministry has instigated a civic education curriculum, and has commenced the launch of a nationwide civic education program⁴⁸¹. The Ministry has also developed very desirable practical guiding principles on citizen participation⁴⁸².

The National Treasury with assistance of the World Bank created the public financial management component on preparation of the budget, implementation and financial accounting and reporting mechanisms that blend the crucial concepts of participation and answerability⁴⁸³. The CIC put in place apparatus to keep track on the progression by counties in the execution of what the Constitution stipulates including those that correlate to citizen participation⁴⁸⁴.

At the counties, the fundamental focus has been to put into operation the policy and legal framework on openness and citizen participation⁴⁸⁵. There seems to be a notable political interest from the governors and the members of staff of the county governments, as well as central government, to notify the citizens on the development initiatives and to make them part of these processes⁴⁸⁶.

Article 174 of the Constitution has transferred authority to the citizens to control their own affairs and intensify citizen participation as the State exercises its authority and in making decisions that affect them. Citizen participation is an obligation created by the Constitution and the county governments must adhere to it⁴⁸⁷. However, it must be distinctly set out by the county governments that they are in concurrence with the citizens to achieve fulfilling

⁴⁷⁹ Ibid

⁴⁸⁰ Ibid

⁴⁸¹ Ibid

⁴⁸² Supra note 85

⁴⁸³ Patrick Mariru ‘What about public participation? Where are we?’ (16th October, 2015)

⁴⁸⁴ Ibid

⁴⁸⁵ Supra note 344

⁴⁸⁶ Ibid

⁴⁸⁷ Ibid

results⁴⁸⁸. The county government is mandated to concur with the citizens on the procedures, levels of entry, safeguards given to citizens' needs and the assurance that their necessities and primary needs will come first⁴⁸⁹.

Article 35(1) of the Constitution stipulates that every citizen has the right to access data that is in the hands of the State. Article 35(3) provides that the State should make public any key data affecting the people. Successful citizen participation can be made easy by providing proper information to citizens⁴⁹⁰. Government bodies that have charge over public data and are financed by taxpayers, owe a duty to supply this information to the public⁴⁹¹. There is a chance to give assurance of access to information through the Access to information Act, 2016.⁴⁹² In depth civic education to ensure that citizens are familiar with what the Constitution stipulate on devolution and PFMA must be undertaken by CSOs, independent commissions and the government⁴⁹³. This right of public participation is further stressed throughout the Constitution and specifically in Article 10.

The Constitution and subsequent laws are at the center of openness, engagement and accountability⁴⁹⁴. The Constitution places comprehensive conditions one national and devolved governments for citizen participation, as enshrined in Article 1⁴⁹⁵. The devolution laws in turn have many requirements that county governments are expected to follow including timely access to data, public inclusion in planning, budget processes, implementation of performance criteria and participation in county decision making processes⁴⁹⁶. The big task ahead is to convert legislative provisions into functional guiding principles, working systems and capacities⁴⁹⁷.

Section 115 of the CGA provides that county governments must undertake their affairs in an open and accessible to the public and make it easy for citizen to be involved in their activities and the relevant committees in accordance with Art. 196 of the Constitution. Sections 9 provides that members of the county assemblies must maintain a relationship that is within

⁴⁸⁸ Ibid

⁴⁸⁹ Ibid

⁴⁹⁰ Ibid

⁴⁹¹ Ibid

⁴⁹² Ibid

⁴⁹³ Ibid

⁴⁹⁴ Supra note 406, 2

⁴⁹⁵ Ibid

⁴⁹⁶ Ibid

⁴⁹⁷ Ibid

close proximity with the electorate and keep engaging with them on matters that are under discussion in the county assemblies. County governments are also required to establish frameworks, apparatus and guiding principles for citizen to participate to guarantee that citizen participation is open to all without prejudice and have protection against control of the negotiations by a particular group⁴⁹⁸.

In several Articles in the Constitution that include Article 10 and 118, the Constitution has made it mandatory that citizens must participate in the process of administration of the Constitution including participation in the law-making process. In *Mercy Munene & Another -V- Safaricom Limited & Another* (2016) eKLR the court held that introduction of an amendment to an Act of Parliament through Statute Miscellaneous Amendment Act without subjecting it to public participation and its effect is to be applied retrospectively without regard to existing arrangements between artists and their contracted Premium Rate Service Providers is unconstitutional.

3.0.5 How should public participation be done?

Both the Constitution and legislation require that both the national and county governments to have legitimate, regulatory and institutional structures for citizen participation.

Section 207 of the PFMA requires that county governments should create frameworks, apparatus and guiding principles for citizen participation. This is meant to ensure that public participation is open to all without prejudice and have safeguard against being dominated by the elite such as the politicians⁴⁹⁹. Section 47 and 115 of the CGA also has made it mandatory that each county assembly should enact laws and guidelines giving effect to the prerequisite for successful citizen participation in establishment of planning and discharge of mandate within the county and such laws and guiding principles shall stick to the lowest national demands.

Under Article 35 of the Constitution and Section 96 of the CGA, county governments and their agencies are required to mandate an office or officer who will ensure that there is access to information and shall pass laws that will ensure that there is access to information for which rational fees may be imposed. Further, they are required to champion access to information for the minority, disempowered groups and communities.

⁴⁹⁸Ibid, 4

⁴⁹⁹Supra note 344

Sections 94 and 95 of the CGA mandated the county governments to establish apparatus to make easy public communication and access to data through the medium with the broad public outreach, which include televisions, websites, radio stations and public gatherings.

Article 232 and Section 115 of the CGA provides that County Governments are in charge of guaranteeing citizen participation in service delivery. Section 102 of the CGA also requires that planning of the county should aid as the foundation for interaction between county governments, citizens, all concerned persons and interested parties. The County Planning Unit as provided for under Section 105 of the CGA is in charge of making sure that there is worthwhile citizen participation in planning procedures through a five-year CIDP, a ten-year county sectoral plan, a ten-year county spatial plan and a Cities and urban Areas Plan Act⁵⁰⁰.

Sections 48, 123 (3), 139 and 166 (4c) of the PFMA require that various budget documents for example the estimates of the budgets and the respective approvals, papers on financial strategy, audited accounts, yearly and quarterly reports, be communicated and made public within set out timelines and in formats that are user friendly so the people can make consequential inputs. Section 48 of the Urban Areas and Cities Act, provides that municipal and city boards must publicize their yearly audited fiscal statements that shall also be published in two major public dailies, as well as website of the Board, and in a position that is clearly visible at the offices of the Board.

The main objectives of citizen participation are to make the people aware, collaborate, interact and give authority to the citizens through various ways at all stages when all policies are being made⁵⁰¹. The spirit of the Constitution is not just that public participation may take place but that it should be so meaningful so as to impact the process of making policies⁵⁰². Sometimes it has been found that public participation takes place so as to attain the minimum requirements of the Constitution and as a result, it undermines the permissible public participation as envisaged by the Constitution⁵⁰³.

⁵⁰⁰ Supra note 9, 6

⁵⁰¹ Mbithi Antony, Ndambuki, Damiana&Juma Fredrick 'Determinants of Public Participation in Kenya County Governments' *Journal of Asia & African Studies*, (2018), 1

⁵⁰² Ibid, 2

⁵⁰³ Ibid

Devolution shifted the crucial powers to make decisions from the central government to the county governments giving the citizens a chance for a bottom-up engagement with the government during policy and decision-making processes; which is the spirit of public participation⁵⁰⁴. This is backed up in the Constitution and the legislative framework for the government to work closely and seek concurrence with the public and give response on a regular basis⁵⁰⁵.

3.1 Conclusion

As the counties organize CBEF's so as to attain their public participation prerequisites in the county budget process, it is an appropriate period to reflect on what we already had under LASDAP, and learn a few lessons on how to promote citizen participation in Kenya.

From this discussion, it is evident that, citizen participation, as a principle that is political in nature which has also been acknowledged as a right, (a right to public participation), must fit in devolved government. It is not an option, it is mandatory. The devolution of governance was designed to bring access to amenities closer to the people and also make sure that there is fair sharing of the resources by the people⁵⁰⁶. It was intended to bring to an end the previously existing highly centralized system of administration which was aimed towards recompense friends, alter egos and mockers of the judicial system⁵⁰⁷. Citizen participation ought to be in existence and not wrongly misinterpreted and should not to be seen as a mere fulfillment of the Constitutional dictates⁵⁰⁸. It therefore incumbent upon the county assemblies in passing laws to guarantee that the typical quality of citizen engagements is achieved both in quantity and quality⁵⁰⁹.

The draftsmen of the Constitution were fully conscious of the danger of the country being compartmentalized into small states with god fathers or mercenaries as the governors⁵¹⁰. Therefore, appropriate protection was put in place to guarantee that despite having devolved system of governance, the country continued to exist a unitary State where the central

⁵⁰⁴Supra note 324

⁵⁰⁵Ibid

⁵⁰⁶ Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR , 21

⁵⁰⁷Ibid

⁵⁰⁸Ibid

⁵⁰⁹Ibid

⁵¹⁰Ibid

government holds the authority and was not converted into a federation⁵¹¹. In this regard, the court concluded that in legislating, the county assemblies must consider the fact that the devolved governments must exist harmoniously with each other and that their undertakings do not inordinately transgress upon the entitlements of citizens of other units as envisaged by the Constitution⁵¹².

The experience globally shows that successful decentralization mainly is dependent on balancing and increased caution of local authorities with increased answerability both upwards and downwards⁵¹³. Kenya's own experiences shows that if proper accountability measures are not quickly put in place, there are major risks associated with delivery of devolved services⁵¹⁴. Building downward transparency requires tailoring county systems to be responsive to the needs of residents and tailored to the local level, such as the geographical scale of the county, degree of urbanization, capacity of the county government power, statistics of the vulnerable groups and others⁵¹⁵. Experience demonstrates that such adaptation process is improved in discussions with the county government along with civil society through a participatory process, as opposed to a top-down approach⁵¹⁶.

⁵¹¹Ibid

⁵¹²Ibid

⁵¹³ Supra note 9, 5

⁵¹⁴Supra note 324

⁵¹⁵Ibid

⁵¹⁶ World Bank 'Devolution without disruption: Pathways to a successful new Kenya' Washington, DC: (2012)

CHAPTER 4

4.0 IMPLEMENTATION OF THE PRINCIPLE OF PUBLIC PARTICIPATION IN KIAMBU COUNTY

4.0.1 Justification of the study of Kiambu County

Kiambu County is of great interest to this study. The reason for choosing to study Kiambu County, firstly was taken at the county as an example of how devolved governments are applying the principle of public participation. Secondly, as a result of the judgment in *Robert N. Gakuru & Others -v- Governor Kiambu County & 3 others* [2014] eKLR. In this matter, Judge found that public participation was not properly conducted as contemplated under the CGA. Therefore, the *Kiambu Finance Act, 2013* gazetted in the Kiambu County Gazette Supplement No. 8 (Act No. 3) violated the Constitution and was therefore found to be null and void. It would be of great interest to study how the County has since changed in terms of how public participation is undertaken in governance structure of the county. Thirdly, this County is the second most populous County⁵¹⁷. Kiambu is also one of the Counties with the highest level of education according to a 2017 survey undertaken by the Kenya National Bureau of statistics⁵¹⁸.

As noted, citizen participation is a critical decision-making procedure, however remarkable public participation outcome may not necessarily be achieved⁵¹⁹. One of the failures to achieve quality public participation is participants who do not have requisite capacity to engage with the government⁵²⁰. Participants' literacy has been found to be a key misalignment that can hinder quality public conversations leading to compromise of such conversations between the citizens and the government⁵²¹. A process that is aligned to the participants' literacy yields constructive dialogue, seeks compromise and common understanding leading to a robust and result oriented outcomes that influence subsequent policy decisions⁵²².

⁵¹⁷2019 Kenya Population & Housing Census, Kenya National Bureau of Statistics' (November 2019)

⁵¹⁸Kenya National Bureau of Statistics 'Survey on Highest Education Level by County and District' (2017)

⁵¹⁹Mathew Cohen, Armin Wiek et al 'Aligning Public Participation to Stakeholders' Sustainability, Literacy – A case study on Sustainable Urban Development in Phoenix, Arizona (July, 2015)

⁵²⁰Ibid, 2

⁵²¹Ibid

⁵²²Ibid

The fact that this County has a high populace, which is largely educated and well informed, may mean that the citizens have a proper understanding of their constitutional rights and duties. It is against this background that there is a need to understand how the principal of public participation is being applied by the County Government, the County Assembly and the ‘common *mwananchi*’.

4.0.2 Implementation of Public Participation in Kiambu County

Kiambu County has undertaken a raft of measures to address the problem that was identified by the court in above mentioned judgment. Some of the steps taken include the following;

i. Kiambu County Citizen Petition and Participation Act, 2016

This Act was enacted to set up a mode and a medium for citizen petition in the governance structure of the County⁵²³. The Act is applicable to enactment of county legislations, policy, county Integrated Development Plan and Fiscal Strategy papers as well as all matters requiring citizen participation as provided in the county and national laws⁵²⁴.

This Act further stipulates guiding principles⁵²⁵ for citizen petitions and taking part in the County Government activities. These principles⁵²⁶ include;

- a. Communities, citizens or organizations to be impacted by a decision have a right to be called upon to give their opinions and to be involved in the process of making decisions
- b. Contributions by the constituents are taken into consideration
- c. The county should be a promote a sustainable decision-making process by acknowledging and share information on the needs and interests of all participants
- d. The County Government should also take into account the needs of the society, institutions and the people who have the potential to affected by or have an interest in a decision that is going to be made
- e. There should be a mandatory engagement of the participants and input in coming up with modalities on how they participate

⁵²³‘Kiambu County Citizen Petition and Participation Act, 2016’ - Preamble

⁵²⁴Ibid Section 4 (a)-(c)

⁵²⁵Ibid, Section 5 (a)-(k)

⁵²⁶Ibid

- f. There should also be fair access to the data they need in order to facilitate participation in a consequential manner
- g. The County Government should also have a feedback mechanism to the participants on how their participation affected the decision being made.

Section 10 of the Act creates the Office of Public Participation and Citizens Petitions which is headed by a Director who is responsible for coordinating citizen participation activities of the County Executive, mobilizing and organizing citizens, interested parties and the citizens to participate in county governance and the processes of decision making. This office has been in existence since March, 2018 and currently, it comprises of three (3) members of staff and has got a deficit of about eighteen (18) staff. Further, this department does not have its own budget line of its own but works under the Department of Administration and Public Service.

An oral interview was conducted with the Director, who explained the processes that are undertaken in order to ensure that there is citizen participation in all decisions (where public participation is a requirement) made by the County Government. To begin with, the Act is clear on how public participation should be undertaken. The Act provides for Citizen Participation Forums (which should be convened by the Governor). This forum comprises of all elected leaders within the county, County Executive Members where they should discuss development matters touching on the County. Each year, MCA's are also required to convene a ward citizen participation forum to discuss on any matter touching on the County Government.

The Act further requires that any County Department shall use the most appropriate communication methods to notify the public on any matter requiring public participation. They are required to use public notices through which they should spell out the purpose and likely effect of the implementation of the issues under consideration. They should define avenues which are open to the public to participate, duration of citizen participation, the date and time for public hearings and other public participation forums. Such notices should be in English and Kiswahili and are required not to be less than seven days.

Currently, the Office of the Director is fully operational at the County level, however due to challenges of finances, at the Sub- County levels, this office is not yet fully operational and

the County Government relies on the Sub- County Administrators and MCA's to assist in conducting civic education on matters relating to citizen participation. This office also works closely with the office of the Clerk of the County Assembly, Administration and Public Service Committee in the County Assembly so as to propagate this concept of public participation.

The Office of Public Participation and Citizens Petitions works together with the twelve (12) sub- county administrators as stipulated in Section 50 (g) of the CGA. I also observed that public participation is not a day to day activity within the County Government activities. Public participation exercise is conducted during budgetary making process, while preparing legislation and during appointments of members of the County Executive Committee.

There was also an opportunity to study situations that the County Government has undertaken citizen participation. On 12th March, 2018 the Director of Public Participation sent out notices through the radio stations, notices through the churches, notices to the Chief's offices, and placed notices in strategic places within the various townships within the respective wards so that citizens could vote for the members of the Alcoholic Drinks Committee. This is pursuant to Section 16 (1) (g) of The Kiambu County Alcoholic Drinks Control Act, 2018. The Act requires that a person who is a resident within the County representing a ward to be appointed by the Governor from persons nominated in a public baraza convened by the Governor or his nominee.

The office of the Director has kept records of the persons who attended the meetings in each of the wards stipulating the details of each of the attendees such as their identification card numbers and their signatures. I also noted that there are attendees whose details had been entered on their behalf in the attendance sheets. This was pointed out that even those that are unable to read and write, therefore they were assisted in entering their details.

The attendance in each of these wards was high. On average each meeting was attended by about one hundred and fifty people. These wards include Mwhoko, Gitohua, Githurai, Kiuu, KahawaWendani, Kiganjo, Ng'enda, Ndarugu, Kiamwangi, Kalimoni, Ngoliba among many others. The Director informed me that the reason why there was such high turnout is because there are some issues where public participation is required, they attract a lot of attention unlike others. For example, the budget making process does not attract as much attention as

matters touching on alcohol and this explains the high turnout in the meetings for election of representatives of Alcoholic Drinks Committee members.

It was also evident from the attendance sheets that the meetings were held on the same day in each of the Sub- County but in the respective wards. The reason being limited availability of funds. Compared to funding allocated to foreign travel which was approximately Ksh. 38,500,000/= in the 2016/2017 financial year and Ksh 40,810,000/= in the 2017/2018 financial year and the funding allocated to public participation does not have its own budgetary allocation, but is funded through the Department of Administration and Public Service. It would therefore easy to argue that public participation is just being undertaken to fulfill the statutory requirements, but not because of its importance as stipulated in the Constitution and various legislation.

ii. Budget making process by the Executive

The County Government also undertakes County Integrated Development Plan, which is a five-year plan which defines the intended priorities in each ward. To come up with this plan, the County Government held a Public Participation forum in each of the sixty (60) wards within the County. The members are given an opportunity to state what they feel is of great importance within the ward, such as provision of water or repair of feeder roads. After these forums, citizens are given a chance to peruse through the County Integrated Development Plan, so as to confirm that their views have been considered. Where such views have not been prioritized for reasons such as insufficient budget, the County Government must get a feedback mechanism to the citizens. The County Integrated Development Plan are renewed mid-term so as to establish what has been achieved and what may not be achieved. I had a chance to peruse through the list of attendees of these meetings as well. From a cursory look at the proposals by the members of the public, it is quite obvious that that citizens do not differentiate the functions of the national government from those of the county government. For example, at Karai, Kabete and Juja wards, there was a proposal that the County Government should improve security by constructing police posts/ stations. However, the Fourth Schedule, Part 1 (7) provides that this is a function of the National Government.

This emphasis the need for civic education so that the citizens may have a clear understanding of the various functions of the different levels of government. It also brings out

the importance of public participation as citizens are able to bring out the issues affecting them.

The processing of the Kiambu County Integrated Development Plan is usually undertaken based on the principle of citizen participation, the CGA and the Medium-Term Plan under Vision 2030. In cooperation with all stakeholders, including national government agencies, community groups and the private sector, the County Executive Member for Finance and Economic Planning leads the preparation process. Citizens are also given an opportunity to submit their views through memoranda and public consultative meetings.

From the discussion above that the benefits of public participation cannot be over emphasized as it is clear that it is very key for proper governance through a democratic process. Some of its benefits include the leadership is able to meet the needs of the citizens instead of forcing ideas on them. It also assists in getting a vast array of ideas and wide experience of citizens. Local citizens have the best experience based on real understanding and first-hand experience of the issues touching on them. This greatly assists in decision making.

Public participation also makes members of the public feel part of the process and therefore get to watch over the projects, they feel like they own these projects and thus when they embrace such projects, it increases its chances of being successful. Members of the public generally are made understand what the project aims to achieve. This is usually undertaken at the initial stage of the project.

Public participation also increases answerability on the part of the leaders to the citizens and also improves trustworthiness between them. The involvement of the citizens also enables them to grasp the issues at hand, the reasons why funding has been allocated to the project, the importance and difficulties (if any) of implementing the project, among many other things which reduces conflict between the leaders and the citizens.

When the County involves its citizens in creating the County integrated Development Plans, it become easy on their part to execute on their mandate. The County Integrated Development Plans are reviewed midterm and there is usually a feedback mechanism where the County Government gets back to the citizens to review what they have been able to achieve, what has

not been achieved and why it has not been achieved. On numerous occasions, some projects are not achievable due to lack of enough finances.

iii. Public Participation by the County Assembly

When the County Assembly is preparing legislation, (majorly, the proposed legislation emanates from the Executive) the Executive works very closely with the County Assembly to prepare this legislation. However, the County Assembly has got its own mechanism of conducting its public participation, which applies to Bills emanating from the County Government as well as Private members bills.

These Bills are sent to the Clerk of the Assembly as Legislative Proposals. At this point, the Executive should have undertaken public participation and usually, they demonstrate to the relevant Committee of the Assembly how public participation was undertaken. They should be able to demonstrate if they advertised through the various channels for example the newspapers with the widest circulation, through radio stations, memoranda among others. The Executive should also submit its report on public participation to the Assembly. On 29th October, 2018, the County Government placed an advert on the *Daily Nation* Newspaper calling for written memoranda and called citizens to participate in a public participation forum so as to discuss the Kiambu County Jijenge Fund Regulations, 2018. These Regulations are meant to address the procedure for application and grant of loans to the Youth, Women and Persons with disability and vulnerable persons through the County Government and other financial institutions.

Upon receipt of the Legislative Proposal from the Executive, it is published in the Kenya Gazette and the County Gazette then it goes for First reading, then it is submitted to the relevant Sectoral Committee. This Committee invites the *wananchi* for public participation and the Executive to make its submissions on the Bill. The Clerk usually advertises through newspapers, the Assembly's website, through the offices of the MCA's, placing notices in strategic places etc. These adverts usually give a notice of the period within which memoranda should be received, stating the date, time and venue.

During the public participation forums or the written memoranda, citizens are supposed to give objections, proposals or concur with what has already been proposed by the Executive or the Assembly.

The County Assembly conducts public participation forums in each of the 12 Sub-Counties for the Finance Bill, every year. From the discussions with the Legal Counsel in the County Assembly, it was clear that due to the importance that is attached by the Kiambu citizens to the Finance Bill, the constituents of Kiambu County, holds the Assembly at very high standards when it comes to that particular bill and therefore, the Assembly must extensively consult with them before it is passed. He informed that since the inception of the County Assembly, every year, the Kiambu County Finance Act is usually highly contested and different stakeholders usually file matters in court to contest the respective Acts. In this regard, the Assembly finds it prudent to subject the Finance Bill to a more devolved (in every ward) public participation compared to the rest of the Bills. In Robert N. Gakuru & Others, the Petitioners contended that the County Government on 1st December, 2014 purported to enact *Kiambu Finance Act, 2014* without undertaking proper public participation.

For the rest of the Bills, the Assembly usually holds these public participation forums within the precincts of the Assembly. Citizens are invited to submit their memoranda to the house or send their input through email. The major reason for this is because of lack of sufficient funds to conduct public participation to the sub-county level. Further, there are also some Bills that do not attract as much interest as the Finance Bill and the Alcohol related Bills/ Regulations.

Several memoranda were found to have been submitted by various stakeholders which includes a memoranda from Kabete Sub-County Bar Owners Association, Kikuyu Bar Owners Association, Karuri Ward, Kiambaa Sub- County Self Help Group, Kidfarmaco South Self-Help Group and The Mindset Change Travelling Theatre in regard to the Kiambu County Alcoholic Control Bill, 2018. Among the issues raised by these groups included the discouraging of alcohol use by minors, eradication of illegal alcoholic drinks and abuse of drugs and substances, enforcement of operation hours and stiffer penalties for persons contravening the law.

There was also memoranda in response to the Kiambu County Water Sanitation Services (Amendment) Bill, 2018 which sought to merge Water Service Providers within the County by Kahuhu Sub-Location Water Project within Kabete Sub-County, Muguga Village Self-Help Water Project within Kabete Sub-County, Kiangune Self-Help Water Project within

Kikuyu Sub-County. Among the issues brought out is the efficient supply of water within the County even after the merger of these water suppliers, among other issues.

After the County Executive members are appointed by the Governor, their names are usually sent to the County Assembly where the citizens are given an opportunity to send their memoranda or make presentations on any matter touching on the appointees. Besides the County Executive, there are also other appointments for instance the appointment of Municipal Board Members pursuant to Section 14 of the Urban Areas and Cities Act and the CGA.

Other memoranda were submitted by Kiambu County Business Organization. Our Lady of Fatima Catholic Church, Ndumberi on nomination of Mr. Thomas Kimani to the Municipal Board. This was in response to the call by the County Executive Committee for the appointment of members pursuant to Section 14 of the Urban Areas and Cities Act.

Further, the nomination of some of the members to this Board were queried. One of the memoranda is of interest. Majimbo A.G & Co. Advocates wrote a memorandum (on behalf of their clients) to the County Assembly in regard to the vetting of the members of the Board. Under the 13 and 14 Act, a total of five (5) positions is reserved for an umbrella body that represents professionals within that jurisdiction, an association that represents the members from the non-government agencies, a congregate that represents the associations that are informal in nature, are registered and are from within that jurisdiction, a congregate that represents the residents association in the area and an alliance of urban areas and cities. All the applicants were to submit their applications to the Head of Public Service Board by 14th June, 2018. The relevant bodies are required to be the ones that nominate their members, however, there was no public participation in determining who their representatives would be. In this case, the application for appointment was made through the County Secretary, without the input of the relevant bodies.

There has also been input by Town Planners Association of Kenya. They submitted a memorandum on the proposed upgrading of 6 (six) areas to municipal status, requiring that there should be proper public participation in this regard and that these municipals should be properly gazette and demarcated and that the appointment of municipal Boards and the Municipal managers should be done in accordance with the law.

During the budget making process for the 2018/2019 financial year, there was intense consultations between the County Assembly and citizens in the respective Sub- Counties. There Assembly dedicates a minimum of three (3) days to engage with members of the twelve (12) Sub-Counties. Due to the high literacy level and well-informed citizens within the County, the citizens usually have a deep understanding of budget making process, and specifically the budget itself. There was also input the Kenya Pharmaceutical Association seeking clarification on the Finance Bill. There were also proposals to factor in the budget from individuals, proposing the inclusion of emergency funds to assist in clearing drainage systems especially during the rainy season and also provision of security lights.

One of the major contentions in the 2018/2019 Finance Bill is the re-introduction of market fees which had been waived when the new Executive came into office. From my perusal of the County Assembly file on Budget Making for 2018/2019 Financial Year, proposals by the citizens that market fees should not be re-introduced as they feel shortchanged as that was one of the campaigns promises by the Governor and Members of the County Assembly, so that they could vote for them. However, it is proving to be difficult for the Executive to run the markets. Things like provision of electricity and sanitation require funding, and the market fees is where the government can obtain fees to run the markets. Unfortunately, the County Government has to go back on its campaign promises and re-introduce the market fees. This has created a lot of mistrust between the County Executive and the citizens. Therefore, the Executive should undertake civic education and persuasion so that the citizens may understand the importance of paying the fees.

There has been a proposal by the Kenya Association of Manufacturers on the Skilled Labour Database Bill, 2018 through a memorandum to the County Assembly. The Chairman of the Central Chapter and surrounding Regions Chapter also seeking an extension of time on the submission of their input into the Bill.

The Director of Coffee Tourism Project at Fairview Estate also submitted a to the County Assembly that the County Government has not listed Coffee Tourism as one of the tourism activities in Kiambu County. His proposal was that Coffee Tourism should be promoted by the County Government.

The County Assembly also enacted The Kiambu County Co-operative Societies Act, 2018 which commenced on 12th October, 2018. This Act seeks to facilitate the establishment of a framework for registration and regulation of co-operative societies and to promote freedom of association in accordance with Article 36 of the Constitution.

A report dated 4th October, 2018 by the various cooperative societies (which include Githunguri Dairy Cooperative Society) in the County on the consideration of the Kiambu County Cooperative Societies Bill, 2018. These cooperative societies had written individual memoranda and a joint memorandum and made oral submissions before Sectoral Committee on Trade, Tourism and Cooperatives. The Memoranda submitted by the Chairperson of K-Unity SACCO, raised very pertinent issues. The Chairperson indicated that the advert that was put in the newspapers was not visible and a website where to access the Bill was also given, but was not accessible. They were given three days' notice to make submissions. Further, the Bill was not available on the website as indicated in the advert. There was also a delay in acquiring a copy of the Bill from the office of the Clerk. He submitted that the Bill intended to completely overhaul Cooperative Societies, ranging from creating new governance structures and therefore, more input from the public. K-Unity SACCO indicated that the time given for public participation was not sufficient.

Several other Cooperative societies including Githunguri Dairy Farmers Cooperative Society, Kikuyu Dairy Farmers Cooperative Society, Kiambaa Division Cooperative Society among many others raised similar issues. In the same report, there is attached a list of participants from the various Cooperative Societies who attended public participation forums.

As a result of this impasse, Githunguri Dairy Farmers Cooperative Society, K-Unity Cooperative Society and Kiambu Coffee Growers association have filed Nairobi High Court Petitions number 356, 357 and 362 of 2018 respectively to contest that public participation was not sufficiently carried out when this Bill was passed. These Petitions are still pending before court for determination.

4.1 Challenges of Citizen Participation in Kiambu County

Devolution is one of the hailed achievements of the 2010 Constitution. Public participation is hinged to devolution but its implementation has been faced with several challenges. During our conversations with the Director of Public Participation in Kiambu County and the Legal Officer at the County Assembly, I gathered the following challenges that have been encountered so far;

- (i) The cost of conducting public participation is very high. There is limited resources that is allocated to conduct the exercise, in terms of finances and human resource capacity. For there to be meaningful public participation, it is critical that sufficient funding is availed for the county government to undertake meaningful public participation. Further, there is insufficient number of staff to facilitate this exercise, vis-à-vis the population in the county.
- (ii) Lack of sufficient time to undertake public participation. Citizens generally spend most of the time fending for their daily living. Thus, it becomes a difficult for them to spend time away from their workplaces and have them participate in public participation meetings.
- (iii) Accessibility to the places where the meetings will be held at times may not be easy more so by the elderly, people living with disabilities or due to long distances that may require people to incur costs for transport, either through private or public means.
- (iv) Mistrust by the citizens in those who are in leadership positions. This results to apathy that leads to lack of interest when meetings are organised.
- (v) Variance of opinions among the citizens. They sometimes may have various opinions, ulterior motives, and interpretations on the matter that is being subjected to public participation. This may lead to disagreements as the citizens may not always agree on the singular position to take.
- (vi) Capture by the high in society. A few people within the society who are of a higher stature financially, culturally, politically or in attainment of education may at times take over the process and instead force its ideas on the citizens and purport that a public participation exercise was done
- (vii) Competition among politicians. The leaders who are already elected are often not comfortable with well-known persons or professionals who interact with citizens on matters affecting the public due to political insecurities. They view such persons as political competitors.

- (viii) Citizens usually expect to be compensated for attending citizen participation forums. They expect to be paid for the time spent in such forums and demand for stipends to attend the sessions.
- (ix) There is inadequate civic education on the seriousness of participating in matters affecting the members of the public.
- (x) Insufficient funding for citizen participation activities at the county level has led to ineffective participation by the citizens.
- (xi) Control of citizen participation forums by multiple interests. During the making of the 2018/2019 Finance Bill, a public participation forum was held in Thika Sub-County where the County Government intends to raise the rent for County houses. The citizens present during the discussion declined to sign the attendance registers so that there would be no proof that public participation was ever undertaken.

4.2 Conclusion

In *Doctors for Life International vs. Speaker of the National Assembly and Others*, the constitutional court made an observation that the right to political participation is one of the fundamental human rights, which has been stipulated in a number of regional and international treaties. In these treaties, this right has two elements which include the right to be involved in the management of affairs that touch on the lives of the citizens and the right to take part in elections, either to vote or to be elected. More particularly, the ICCPR which gives a guarantee on both the right and freedom to exercise the right to public participation. Article 25 (b) of the ICCPR provides for the right to participate in the conduct of public affairs. This places a duty upon the state to take the necessary steps towards ensuring that voters have a chance to exercise their right to political participation. It is therefore generally accepted that approaches to public participation not only include indirect participation through elections but also participation directly in the affairs of government (both National and County).

Kiambu County government, like all devolved governments must engage with its citizens in all governance and legislative matters. From the above observations, we note that Kiambu County Government has undertaken a raft of measures to enhance citizen participation and to appreciate the importance of devolution, which is a substantial deviation from the highly centralized system of government. The County has enacted an act that established a framework which lays down modalities and platform for participation by citizens and of filing petitions. Further, during the budget making process, the County undertakes County

CIDPs where the County Government holds citizen participation forums in the sixty (60) wards within the County. The County Assembly as well undertakes participation during the preparation of the Finance Bills and public appointments such as those of the Members of the County Executives. One of the major highlights is the creation the office of the Director of Public Participation through which, the county government engages more with the citizens during budget making process, appointment of County Executive and other public appointments.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter gives a synopsis of the conclusions and recommendations.

5.2 Summary of findings

The main aim of this study was to examine devolution and public participation under the Constitution and the implementing legislation. The study found that the High Court found that Kiambu County had violated the Constitution on the principle of public participation leading to the nullification of Kiambu Finance Act, 2013. Subsequently, the County enacted the Kiambu County Citizen Petition and Participation Act, 2016 which establishes modalities and a platform for citizen petition in the governance issues of the County. This Act also established the Office of the Director of Public Participation who facilitates public participation during legislation and the budget making process. However, this office is not fully staffed and operational within the sub-county levels, the County has made steps in the right direction.

Kiambu County has also been preparing CIDPs and the Fiscal Strategy paper, which is also a five-year plan which defines the intended priorities for each ward. To prepare this plan, the county government holds public participation forums in each of the sixty wards within the County. The plan is also published in the County website for ease of access by the citizens. During preparation of these public participation forums, the citizens are notified beforehand of the time and place where the meetings will be held. This information is communicated through mass media, office of the ward administrators and Members of the County Assemblies.

5.3 Conclusion

The study revealed that the Constitution has given concise directions on the application of principle of public participation by both the national and county governments. Further, there is also a wide array of legislation (as discussed in this study) stipulating on how this principle should be strictly adhered to. Some of the key highlights include;

- (i) Article 10 provides that participation by the citizens is one of the values and principles of governance
- (ii) Article 174 provides that one of the objects and principles of devolution of government is giving power to the people to govern themselves and enhance public participation
- (iii) Article 201 provides that openness and accountability are mandatory, so is including public participation in the public finance framework
- (iv) Section 10 of the PFMA provides that the Parliamentary Budget Office shall take into consideration public participation in the budget matters
- (v) Section 3 of the CGA provides that public participation is mandatory in the conduct of the activities of the county assemblies

We can therefore conclude that the law is sufficient which provides for the framework within which this principle should be applied.

Kiambu County has faced several challenges towards reaching out to its citizens so as to realize the overwhelming benefits of devolution and public participation, the County is making steps in the right direction, towards bridging the gap between the citizens and the county government through public participation forums.

The County enacted the Kiambu County and Citizen Petition and Participation Act which provides for the guiding principles for citizen participation. The Act also creates the Office of the Director of Public Participation who facilitates the citizen participation activities on behalf of the County Executive within the County. The County Government has also deployed staff within the office who facilitate public participation. During the budget making process, the County Assembly holds public participation meetings within the 60 wards in the county so as to ensure that it reaches to the grass root level and give a chance to citizens to make their submissions. As the County is also preparing its five year County Integrated Development Plan, it also holds public participation forums across the County. The County assembly also gives an opportunity to the citizens by filing their memoranda in regard to any Bill that is pending before the Assembly or the appointment of the members of the County Executive.

Both the County Executive and the County Assembly work hand in hand so as to avoid wastage of funds by avoiding repetition of what has already been undertaken by the other organ,

However, there are challenges that the County experiences which include insufficient funds to facilitate the conduct of public participation. It is also necessary that the County undertakes a lot of civic education to enable the citizens appreciate their role during public participation forums and appreciate its importance.

The successful realization of the benefits of public participation will eventually transform the lives of citizens as they will be given an opportunity to participate in the decisions that touch on their day to day lives⁵²⁷. The commitment to citizen participation in delivery of services, planning and budgeting is well set out in law⁵²⁸. Global patterns suggest that increased local government discretion and upward – downward transparency are important for public participation⁵²⁹. Kiambu County should continue to adhering to both to the letter and spirit of the law so that the residents of the County can reap the benefits of public participation.

5.4 Recommendations

- 1 The County Executive for Finance should allocate more funds to facilitate public participation. This will enable the County to avail the necessary documentation free of charge as set out in the Aarhus Convention⁵³⁰. The County Executive should also be avail funds to recruit more staff who will work together with the Director of Public Participation so as to facilitate public participation. Similarly, the Clerk of the County Assembly should allocate funds to the County Assembly, to enable MCA's conduct proper public participation. Both the County Executive for Finance and the Clerk should also allocate more funds towards conducting a more vibrant civic education so that the citizens may appreciate more the importance of devolved government and public participation towards attainment of good governance which is for the benefit of everyone. Low turnout during public participation forums and the expectation of compensation by citizens to be paid for availing themselves at the public forums is a common cause of fruitless public participation. A habit of civic engagement should be

⁵²⁷Supra note 197

⁵²⁸Ibid, 1

⁵²⁹Ibid

⁵³⁰Supra note 284

supported by both levels of government through civic education. Citizen's indifference and expectancy of compensation for participation in public forums should be deterred through creation of civic duty awareness by both the County Executive and the County Assembly.

- 2 The County Secretary and the Clerk of the Assembly should also enhance a culture of issuing timely, adequate and effective notification between the County Executive or the County Assembly and the citizen during the intended public participation process. This was clearly set out in the Robert N. Gakuru & Others v Governor Kiambu County & 3 others.
- 3 The County Secretary and the Clerk of the Assembly should respectively give reasonable time frames for public participation at an early stage of the decision-making process⁵³¹. They should reach out to the citizens through local radio stations, churches or at chief's *barazas*. This should give the citizens adequate time to prepare themselves to attend public participation forums or submit memoranda. This should be done early enough at the beginning of the process but not towards its end.
- 4 The County Secretary and the Clerk of the Assembly should respectively ensure that due account is taken of the proposals made at the public participation exercise as they make their respective decisions⁵³². Public participation should not just be undertaken geared towards fulfilling the Constitutional or legislative threshold but indeed the input by the citizens should be reflected in the final decision that is made.
- 5 The County Secretary and the Clerk of the Assembly should also publicise the decision that was finally made after undertaking public participation. This assists in building confidence in the government by the citizens. They will also be able to appreciate that the government indeed considers their views on matters that touch on their daily lives.

⁵³¹Ibid
⁵³²Ibid

- 6 The County Secretary and the Clerk should work closely with each other and the respective national government agencies, especially the funding sources such as the office of the MP (CDF) so as to avoid duplication of projects and subsequent wastage of resources.

Arguably, public participation exercise may not be conducted all the time. For the reason being that public participation is only tenable in a small population. With such a huge population that the respective counties have, it is almost impossible to have meaningful engagements with the citizens. It is also an expensive exercise and therefore requires quite a huge funding and human resource capacity. It requires a certain degree of literacy and knowledge for the citizens to engage with the government. In some counties, there are high levels of illiteracy and lack of technical know-how such that it may be impossible to have fruitful discussions on technical issues. Further, the citizens may not always agree all the time, there will always be those who are dissatisfied, there will be those whose opinions will prevail and those whose opinions will not be successfully considered.

Representative democracy where democratically elected leaders make decisions on behalf of the citizens may be the practicable compromise. In this case, the citizens will have a right to recall their representatives, if such representatives do not properly represent them as the will of the majority.

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APPENDIX 1

Oral interview schedule- KIAMBU COUNTY

TOPIC: THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR PUBLIC PARTICIPATION IN KENYA'S SYSTEM OF DEVOLVED GOVERNMENT

RESEACHER: JUDY MWIHAKI KIRICHO

SUPERVISOR: PROF. ALBERT MUMMA

INTRODUCTION

I am grateful for the opportunity to conduct this interview with you. I am a student at the University of Nairobi, pursuing Masters in Law (LLM). As part of the requirement for an award of the LLM degree, I am required to write a research paper. I have undertaken to write a paper on '**The Legal and Institutional Framework for Public Participation in Kenya's System of Devolved Government**'.

The questions which I have here below are aimed at examining the question of public participation in Kiambu County. The interest in the County has been occasioned by a ruling that was rendered in Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR, where the Kiambu Finance Act, 2013 was nullified on the basis of lack of public participation during the preparation of the Act. Further, Kiambu County is one of the Counties with a majority of its population that is educated and is therefore expected to be more familiar with matters of governance within the County.

The interview will take approximately 45 minutes (as I would want to peruse some of your documents) and in case of further clarification, I will come back for a further discussion.

As we undertake this conversation, it is important to note that I have sought the permission of the Kiambu County Secretary and Head of Public Service, and permission has been granted for me to conduct this research.

A. Deputy County Secretary and Head of Public Service, Kiambu County Government

1. How does the Kiambu County Executive undertake public participation?

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2. Are you aware of a decision by the High Court that nullified the Kiambu County Finance Act, 2013?

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3. What steps has the County Government undertaken to ensure that there is compliance with the principle of public participation during as required by the Constitution and relevant legislation?

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4. How does the County Government facilitate the relevant departments to ensure that public participation?

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5. Is there sufficient allocation of funds to support activities relating to public participation?

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B. Director, Office of Public Participation and Citizens Petitions

1. Is there sufficient budgetary allocation to conduct public participation in accordance with the Constitution and relevant legislation?

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2. How does the County Government notify the public of any intended public participation meeting/exercise?

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3. How much notice is usually given for the public to submit memoranda/oral submission?

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4. Is the department sufficiently staffed? If it is not, how do you ensure that there is no compromise in terms of reaching out to majority of the citizens in a public participation exercise?

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5. What has your experience been like in terms of turn out (numbers) by the citizens? During these meetings/ submissions of memoranda, do the citizens appear to understand what exactly their role is?

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C. Director, Legal Services, Kiambu County Assembly

1. Are you aware of a decision by the High Court that nullified the Kiambu County Finance Act, 2013?

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2. In the light of the decision, how has the County Assembly been conducting public participation during legislative making process and vetting of public officers?

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D. Legal Officer, Kiambu County Assembly

1. Is there sufficient budgetary allocation of sufficient funds to conduct public participation?

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2. Does the County Assembly conduct civic education so as enlighten the members of the public on the role they should play during public participation?

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3. What are the challenges that the County Assembly has so far experienced in conducting public participation?

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Observations
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