Mwangaza v Speaker of the Senate of Kenya; Council of Governors & 2 others (Interested Parties) (Petition E429 of 2024) [2024] KEHC 17005 (KLR) (Constitutional and Human Rights) (18 December 2024) (Ruling)

Neutral citation: [2024] KEHC 17005 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E429 OF 2024

AB MWAMUYE, J

DECEMBER 18, 2024

IN THE MATTER OF ARTICLES 1, 2, 3, 4, 10, 19, 20, 21, 22, 23, 24, 165, 174, 175,176, 195, 258 AND 259 OF THE CONSTITUTION OF KENYA 2010;

-AND-

IN THE MATTER OF VIOLATION OF ARTICLES 38, 47 & 48 OF THE CONSTITUTION OF KENYA;

-AND-

IN THE MATTER OF COUNTY GOVERNMENT ACT, NO 17 OF 2012 & SECTION 18(1) OF THE COUNTY ASSEMBLY'S POWERS AND PRIVILEGES ACT, 2017;

-AND-

IN THE MATTER OF: UNPROCEDURAL AND ILLEGAL REMOVAL FROM OFFICE OF THE GOVERNOR,

BETWEEN

HON. KAWIRA MWANGAZA ..... PETITIONER

AND

SPEAKER OF THE SENATE OF KENYA ..... RESPONDENT

AND

COUNCIL OF GOVERNORS ..... INTERESTED PARTY

FIDA KENYA ..... INTERESTED PARTY

JASON KATHURIMA RUKARI ..... INTERESTED PARTY

(On the Petitioner's Notice of Motion dated 21{{^st}} August, 2024 and the Respondent's Notice of Motion dated 3{{^rd}} September, 2024)

RULING

Background to the Matter

1. Pursuant to Article 181 of *the Constitution* and Section 33 of the County Government Act, on 8th August, 2024, the Meru County Assembly approved a Motion dated 31st July to remove the Petitioner from office as the Governor of Meru County by way of impeachment.

2. On 9th August, 2024 a letter dated 9/8/2024 was forwarded to the Respondent, informing the Respondent of the Approval of the Motion by the County Assembly of Meru impeaching the Petitioner from the office of the Governor.

3. The Respondent convened a Special Sitting of the Senate on 14th August 2024 to consider the Notice of Motion on the establishment of a Special Committee to investigate the proposed removal of the Petitioner from office by way of impeachment. The motion didn't succeed and instead the consideration of the matter was reserved for the full House sitting in plenary.

4. On 19th & 20th August 2024, the Senate convened a Plenary Session for hearing and determination of the proposed removal of the Petitioner from office where the Senate passed a resolution to remove the Petitioner from office. The Senate passed a resolution to remove the Petitioner from the State Office of Governor – Meru County by way of impeachment on the grounds of gross misconduct, abuse of office, and gross violation of *the Constitution* and other laws; affirming the decision of the County Assembly of Meru County.

5. By way of a Gazette Notice dated 20th August, 2024 and published on 21st August, 2024; the Speaker of the Senate gazetted the decision of the Senate to remove the Governor from office by way of impeachment pursuant to Article 181 of *the Constitution*, Section 33 of the County Government Act, and Standing Order 80 of the Senate Standing Orders.

6. On 21/08/2024, the Petitioner being aggrieved by the decision of the Senate approached the High Court through a Petition dated 21/08/2024 filed on 21/08/2024; which was accompanied by a Notice of Motion Application dated 21/08/2024 and filed on 21/08/2024 seeking ex parte and inter partes interim conservatory orders.

7. The Petitioner contended that the impeachment and removal process that culminated in the Senate's Resolution as carried in the impugned Gazette Notice dated 20/08/2024 and published on 21/08/2024 was unconstitutional, unlawful, and tainted with procedural impropriety, bias, and bad faith. Further, the Petitioner contended that it was an abuse of the power vested in the Senate and an abuse of the process under Article 182 of *the Constitution* and Section 33 of the County Government Act.

8. The Petitioner's Notice of Motion dated 21st August, 2024 sought the grant of the following substantive prayers, which I quote verbatim:

> " a. That pending the hearing and determination of this application inter parties there be and is hereby issued a Conservatory order staying the implementation, in any way including by gazettement, and by any person, of the resolution

passed by the Senate of the Republic of Kenya removing the Governor of Meru, Hon. Kawira Mwangaza, from office by way of impeachment.

b. That upon inter parties hearing of this application and pending the hearing and determination of the substantive petition, there be and is hereby issued a Conservatory order staying the implementation, in any way including by gazettement, and by any person, of the resolution passed by the Senate of the Republic of Kenya removing the Governor of Meru, Hon. Kawira Mwangaza, from office by way of impeachment. "

9. The Petitioner's Application was based on grounds that, inter alia;

i. The process leading to formulation and adoption of the Senate's Resolution was characterized by multiple incidents of illegality, unconstitutionality, and procedural impropriety as set out in detail in the Petition and Application of conservatory orders; and

ii. There was real and present danger that unless stayed by this Honorable Court as a matter of urgency, the said Resolution would be implemented to the irreparable detriment of the Petitioner.

10. This Court, sitting in Chambers during the August Recess, preliminarily considered the Certificate of Urgency, the Notice of Motion, and the Supporting Affidavit all dated 21st August, 2024 and found that the Application raised constitutional, legal, and factual issues that met the threshold to warrant the immediate issuance of ex parte interim orders. Consequently, this Court issued interim conservatory orders dated 21st August, 2024 whose most significant orders were that:

a. The Application dated 21/08/2024 be and hereby certified urgent and shall be heard on a priority basis.;

b. Pending the inter partes hearing and determination of the Application dated 21/08/2024, a conservatory order be and is hereby issued staying the furtherance or the implementation of the Resolution of the Senate removing the Governor of Meru County, Hon. Kawira Mwangaza, from Office by way of impeachment.

c. Pending the inter partes hearing and determination of the Application dated 21/08/2024, a conservatory order be and is hereby issued restraining the Speaker of the Senate, or any other person or authority, from publishing or causing to be published in the Kenya Gazette a notification or declaration of a vacancy in the Office of the Governor of Meru County.

11. The Respondent filed a response dated 28/08/2024 to the Petitioner's Application dated 21/08/2024 opposing the same. The Respondent also filed a Notice of Motion Application dated 03/09/2024 seeking that this Court be pleased to review, vary, set aside and or discharge the conservatory orders given on 21/08/2024 on grounds that, and I quote verbatim:

"a. That on 21st August 2024, this Honourable Court issued ex-parte conservatory Orders whereby it stayed the furtherance or the implementation of the Resolution of the Senate removing the Governor of Meru County, Hon. Kawira Mwangaza from office by way of impeachment.

b. That this Honorable Court further issued an order restraining the Speaker of the Senate, or any other person or authority, from publishing or causing to be published in the Kenya Gazette a notification or declaration of a vacancy in the office of the Governor of Meru County.

c. That it is the Senate of the Republic of Kenya that voted to uphold impeachment charges against the Respondent and it therefore follows that only the Senate can answer to issues raised regarding the propriety of the proceedings before the House.

d. That in the case of Sonko -vs- Clerk, County Assembly of Nairobi City & 10 others (Petition 11 (E008) of 2022) [2022] KESC 38 (KLR) the Supreme Court held as follows;

> "[109] We start with the observation that the removal proceedings for a county Governor are textually committed by *the Constitution* to the legislative branch of government, that is, the County Assembly and the Senate. The constitutional mandate and the process to impeach a Governor commences in the County Assembly and terminates in the Senate. The County Assembly and Senate are the only organs involved because of their special roles in devolved governments...
>
> [110] *The Constitution* commits to both institutions the exclusive power to remove the Governor subject only to procedural requirements set out in the *County Governments Act* and the respective Standing Orders of the County Assemblies and the Senate: and proof of the charges. From this, it seems fair to state that both institutions through their Standing Orders are at liberty to determine the procedures for receipt and consideration of evidence necessary to satisfy the duty to conduct an impeachment hearing..."

e. That under Article 122(2) (a) of *the Constitution*, the Respondent being the Speaker of the Senate has no vote in the matters before the House. Consequently, the omission of the Senate of the Republic of Kenya from these proceedings renders the Petition incurably defective.

f. That the conservatory orders issued by this Honorable Court have the effect of staying the decision by the Senate to impeach the Respondent. In Constitutional Petition No. 4 of 2024 (Nyamira) - Purity Moraa Kirera - vs- Senate and Speaker of The Senate and 2 Others the court considered an application to set aside conservatory orders staying the impeachment of the Deputy Governor of Kisii County. The court while discharging the conservatory orders held as follows;

> "The question which arises is if this court can issue orders whose effect will be to stay the decision, by the Senate, to impeach the 9th Respondent pending the hearing and determination of the Petition. My finding is that, since the Senate has already made a resolution, the court must exercise restraint and limit its intervention in the impeachment to hearing the merits of the petition. I further find that issuing conservatory orders to stay the Senate's decision will be akin to directing or interfering with another organ/arm of government in the exercise of its mandate."

g. That the Orders issued on 21st August, 2024 violate the principles of natural justice which provides that parties have the right to be heard before adverse orders are made against them. The Senate was not given an opportunity to be heard which violated the rules of natural justice.

12. The Court directed that the two Applications would be heard and determined together, as they related to the same subject matter; the question of whether or not interim conservatory orders that would retain the Petitioner as the Governor of Meru County should be granted pending the hearing and determination of the Petition. Further, the Court considered various applications for joinder and by consent of the Parties the 1st, 2nd, and 3rd Interested Parties were joined in these proceedings.

The Relative Positions of the Parties and Documents Filed

13. Broadly, the Petitioner and the 1st and 2nd Interested Parties are in support of the Petitioner/Applicant's Notice of Motion Application dated 21/08/2024 and the grounds therein; while the Respondent and the 3rd Interested Party oppose that Application and support the Respondent's counter- application dated 03/09/2024 and the grounds therein.

14. In furtherance of their relative positions, the following documents and pleadings were filed by the parties and were considered for the purposes of this Ruling:

A. Petitioner

i. Petitioner's Certificate of Urgency dated 21/08/2024;

ii. Petitioner's Notice of Motion Application dated 21/08/2024;

iii. Petitioner's Supporting Affidavit dated 21/08/2024;

iv. The Petition dated 21/08/2024;

v. Petitioner's Supplementary Affidavit dated 04/09/2024;

vi. Petitioner's Written Submissions dated 04/09/2024;

vii. Petitioner's Replying Affidavit dated 11/09/2024 in opposition of the Respondent's Notice of Motion Application dated 03/09/2024;

viii. Petitioner's List and Bundle of Authorities dated 04/10/2024; and

ix. Petitioner's Various Bundles of Evidence and Documents.

B. Respondent

i. Respondent's Replying Affidavit dated 28/08/2024 opposing both the Petition and the Petitioner's Notice of Motion Application both dated 21/08/2024;

ii. Respondent's Notice of Motion Application dated 03/09/2024

iii. Respondent's Written Submissions dated 11/09/2024 canvassing both the Petitioner's Application dated 21/08/2024 as well as the Respondent's Application dated 03/09/2024; and

iv. Respondent's List and Bundle of Authorities dated 11/09/2024.

C. 1st Interested Party

i. 1st Interested Party's Written Submissions dated 02/10/2024; and

ii. 1st Interested Party's List of Authorities dated 02/10/2024, with annexed authorities.

D. 2nd Interested Party

i. 2nd Interested Party's Written Submissions dated 02/10/2024; and

ii. 2nd Interested Party's List and Bundle of Authorities dated 02/10/2024.

E. 3rd Interested Party

i. 3rd Interested Party's Written Submissions dated 30/09/2024 with annexed authorities.

15. The Court wishes to underscore that for the purposes of this Ruling the consideration of pleadings, documents, and materials either meant for the main matter or which applied to both the interlocutory stage as well as the final stage was only a preliminary assessment of the same limited to an appraisal as to whether the party advancing a particular position had raised triable issues that merited a response and rebuttal from the other parties.

Issues for determination

16. The parties are in agreement on the issues for determination in this Ruling; and they have largely cited the same authorities or authorities articulating the same or similar points of law in support of their relative positions and in opposition of the positions being taken by the parties on the opposite side of the matter.

17. From the Applications, the Affidavits, and the Written Submissions it emerges that the issues for determination are as follows:

A. Whether the Petitioner has demonstrated a prima facie case with a likelihood of success;

B. Whether the Petitioner has approached the Court with clean hands;

C. Whether the Petition would be rendered nugatory if the conservatory orders sought were denied and were not extended to cover the hearing and determination of the Petition;

D. Whether the respective Applicants would suffer an irreversible and irreparable prejudice if their respective Application did not succeed;

E. Where does the Public Interest lie; and

F. Costs.

18. On the first issue for determination, whether the Petition discloses a prima facie case, the applicable legal standard for considering whether a prima facie case has been established in a constitutional petition is whether or not the petition in question raises arguable or triable issues of a nature that calls for response or rebuttal from the party or parties on the opposite side of the dispute; and which arguable or triable issues have a likelihood of success. Put another way, the arguable or triable issues raised in the petition must be of a nature that, if the party or parties on the opposite side of the dispute failed to respond and rebut the position advanced in the petition, the petition in question would have a likelihood of succeeding.

19. I must make clear from the outset that in determining the question of prima facie case at the interlocutory stage the Court must ensure that it does not delve into the relative merits or demerits of the contested legal and factual positions at issue in the Petition. The role of the Judge is to weigh

those contested legal and factual positions to determine if on the face of it the petition raises issues that should be canvassed at full hearing of the petition rather than being dismissed at the preliminary stages, and the petition has a likelihood of success if the matter were to proceed to finality.

20. It is clear that the Petition herein raises arguable and triable issues that require hearing and determination post the interlocutory stage. This is not to say that those arguable and triable issues, such as the questions of fair hearing, public participation, sub judice, and others shall necessarily succeed; but they most certainly are of a nature and a weight that make them fit and proper for full hearing and determination.

21. This is not to say that the Court has at this stage formed an opinion on the counter arguments by the Respondent, and to a lesser extent by the 3rd Interested Party, that the Petition is essentially incapable of determination in favour of the Petitioner for the reason that the position of Governor is a public office position with respect to which there can be no private need or expectation to hold office; a position adopted by the Supreme Court of Kenya in the case of County Assemblies Forum -vs- Attorney General & 3 Others [Supreme Court Petition No. 22 of 2017, KESC 58 KLR]. That assertion is one best suited for articulation and determination at the main stage rather than at this interlocutory stage.

22. Similarly, the position taken by the Respondent and the 3rd Interested Party that the failure to join the Senate and the County Assembly of Meru is fatal to the Petition, a position which was strenuously opposed by the Petitioner and the 1st Interested Party in their respective written submissions, is one best left for the Petition stage of this matter for the reason that the modalities and confines of the interlocutory stage do not lend themselves to an adequate articulation and consideration of matters that go to the heart of whether the Petition is merited or not or if the Petition is fatally defective or not. To hold otherwise would be blur, if not completely eliminate, the distinction between the interlocutory and main stages of the hearing and determination of a petition.

23. The second issue for determination is whether the Petitioner approached this Court with clean hands. The Respondent, in advancing this argument, has at Paragraph 40 of its Written Submissions contended that the Petitioner mislead this Court into granting ex parte interim conservatory orders by not disclosing to this Court that the Ruling by the Hon. Mr. Justice L. Kassan in Meru HC Constitutional Petition No. E013 of 2024 related to a motion of impeachment by the County Assembly dated 17th July, 2024 and not the subject motion of impeachment by the County Assembly dated 31st July, 2024 upon which the Senate acted.

24. The question of approaching the Court with clean hands is a fundamental one. The issuance of interim conservatory orders ex parte is at the discretion of the Court, and should it be subsequently be shown to the Court that the interim conservatory orders issued by the Court ex parte were obtained by the Applicant through willful misrepresentation, non-disclosure of material facts, or any other similar conduct then those orders would be at peril of being discharged, set aside, or vacated; with the further consequence that the Applicant would also likely not be in a position to obtain those orders at the conclusion of the hearing and determination of the Application that was tainted by the Applicant's initial bad faith and misconduct.

25. The Respondent in support of its proposition that the Petitioner approached this Court and subsequently obtained interim relief based on unclean hands cited Caliph Properties Limited -vs- Barbel Sharma & Anor [2015] eKLR which was cited with approval in the High Court Succession Cause of Mongare -vs- Kerubo [Succession Cause No. E016 of 2023 (2024) KEHC 4980 (KLR)] where the High Court restated the age old principle that equitable reliefs cannot be issued in favour of a party who has approached the Court with unclean hands, and that party's application for injunctive orders must necessarily fail on that ground alone.

26. The Petitioner indeed relied extensively in her depositions on what she saw as the sub judice conduct of both the County Assembly of Meru as well as the Senate with respect to the Ruling and Orders of the Hon. Mr. Justice L. Kassan. However, and similarly to the position taken by this Court earlier on the question of a prima facie case, I find that a determination of the merits or otherwise of this issue is best reserved for the main stage rather due to the nature of the contested facts advanced by the Petitioner on one hand versus the Respondent on the other. Were it a clear cut case of unclean hands which this Court could identify and determine at the interlocutory stage, then this Court would have no hesitation in determining that question even at the interlocutory stage.

27. In the present case, the allegation being articulated by the Respondent is far more nuanced than the stark instances that were demonstrated in the cases cited by the Respondent; and as such, that limb is best reserved for the main stage.

28. All five parties before the Court in this matter have submitted extensively on the question of whether the Petition would be rendered nugatory if the conservatory orders sought were denied and were not extended to cover the hearing and determination of the Petition; the third issue for determination in this Ruling. The Petitioner, the 1st Interested Party, and the 2nd Interested Party have taken the position that without the interim conservatory orders in place at the moment being confirmed and extended to the full hearing and determination of the Petition, then the Petition would be reduced to an academic exercise.

29. Paragraph 11 of the Petitioner's Written Submissions dated 04/09/2024 succinctly articulates the position of the Petitioner and the 1st and 2nd Interested Parties on this question. It reads as follows:

> " 11. It is our humble submission that the Petition should be heard without disrupting the status quo as failure to grant conservatory orders would render the Petition a mere academic exercise of no effect. Indeed, disallowing the Application would have the indirect effect of denying the prayers in the petition given the irreversible nature of the series of political actions that would follow. We invite the court to take judicial notice of the operations of any government, where a change of the Governor or President comes with far reaching ramifications, that would not be desired in the pendency of the Petition to be determined."

30. The 2nd Interested Party added its voice to this question in support of the confirmation of the conservatory orders in force by stating, at Paragraph 27 of its Written Submissions dated 02/10/2024 that:

> " 27. 27. The conservatory orders sought are to maintain the status quo until the issues of violation of the Petitioner's constitutional rights are heard and determined to finality. Your Lordship, the process of the impeaching the Petitioner ought to be interrogated in order for this Honourable Court to reach a fair and just determination in the circumstances. Unless the conservatory orders sought are issued, the petition herein shall be rendered otiose."

31. Unsurprisingly, the Respondent and the 3rd Interested Party are of a diametrically opposite view, but for different reasons. The 3rd Interested Party, at Paragraphs 12 and 13 of his Written Submissions dated 30/09/2024 states that in principle the 3rd Respondent was not opposed per se to the grant of the interim order ex parte as was done by this Court on 21/08/2024 but the 3rd Interested Party wondered

why they subsisted for more than 14 days contrary to the provisions of Order 40 Rule 4(2) of the Civil Procedure Rules. Paragraphs 12 and 13 of the 3rd Interested Party's Written Submissions read as follows:

> " 12. 12. Your Lordship, a Conservatory order in the nature of an injunction is a Judicial remedy sought or issued by a court to preserve a subject matter until the Suit/Petition is heard and determined. It is in other words an order of status quo so that the substratum of the suit/petition is preserved, or so that the same is not rendered an academic exercise. Whereas we have no problem with the jurisdiction of the court and the power to issue such orders, we have a challenge in appreciating why the court would issue such an order for more than 14 days.
>
> 13. Order 40 rule 4(2) states "An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of parties or by the order of the court for a period not exceeding fourteen days."

32. While constitutional petitions are undoubtedly civil in nature, the Civil Procedure Rules cannot be solely and directly be applied to petitions such as the present one in all instances. The Civil Procedure Rules, and in this instance Order 40 Rule 4(2) must be read together with *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013; commonly referred to as the Mutunga Rules, and the latter, being specific to this arena, should take primacy. Rule 23 of the Mutunga Rules, and whose marginal note is "conservatory or interim orders" does not make any mention of a time limitation on the pendency of interim orders issued ex parte, nor is there any mention of any other requirement such as the consent of the parties either in that Rule or elsewhere in the Rules.

33. The Supreme Court has also on several occasions, such as in Gatirau Peter Munya -vs- Dickson Mwenda Kithinji [2014] eKLR, made clear that there is a significant distinction between interlocutory injunctions in private law on one hand and conservatory orders in public law on the other. Therefore, the principles and procedures for interlocutory injunctions in private law cannot be seamlessly applied to conservatory orders in public law.

34. The Respondent on its part has taken a different route, albeit to the same destination. The Respondent, at Paragraphs 29 and 30 of its Written Submissions argues that the Petition herein cannot be rendered nugatory on account of a failure to confirm and extend the interim orders in place since the High Court has the requisite power to undo any actions that would have taken place subsequent to a refusal to confirm and extend the interim conservatory orders in place.

35. In determining this limb, it must be said that each Petition is unique and must be considered based on the specific facts, allegations, and circumstances at issue in that particular case. The failure to grant or confirm and extend interim conservatory orders may render one petition concerning impeachment likely nugatory but not another; based on the unique facts, allegations, and circumstances of each. A uniform, robotic, or formulistic approach to the question of a petition potentially being rendered nugatory does not take into account differential backgrounds and scenarios.

36. In the present case, the Petitioner has satisfied this Court that the Petition would likely be rendered nugatory and academic if the interim orders already in place were not confirmed and extended to the full hearing and determination of the Petition herein. If the interim orders in force were not confirmed and extended as prayed by the Petitioner, there would be a succession in the Office of the Governor of the County; and with it the likelihood of changes in the staffing of the Executive Committee and other

key offices, a change in the policy and direction of the County, among others. Those changes would not be as easy to undo as the Respondent has suggested, even for the High Court; and arguably they may even be beyond the capability of this Court to realistically and meaningfully undo. Were those actions to occur, then a large swathe of the grievances that brought the Petitioner to Court would perhaps be determined by actions and decisions taken outside of the court process.

37. To this Court's mind the alternative of preserving the substratum of the Petition for the few more months that it would take to hear and determine the Petition and arrive at a final determination of the dispute before the Court is the more prudent and just avenue to take.

38. The fourth question, whether the respective Applicants would suffer an irreversible and irreparable prejudice if their respective Application did not succeed is one which is somewhat related to the nugatory question and is being determined separately as it was extensively canvassed as such by the Respondent. Further, whether it is an applicable limb within the grant of conservatory orders is not necessarily the question since the Respondent has submitted on this point extensively.

39. It is clear to my mind that the Respondent, and also the Senate, have no real or significant prejudice that they would suffer if the interim orders were confirmed and extended pending the hearing and determination of the Petition. The Petitioner on the other hand would stand to suffer potentially irreversible and irreparable harm and prejudice if the orders sought were not granted, confirmed, and extended. During the highlighting of written submissions in this matter, Counsel for the Respondent and Counsel for the 3rd Interested Party both submitted at length that any prejudice that would potentially be suffered by the Petitioner could be adequately compensated by way of money damages. However, while that would apply to lost remuneration, money damages cannot compensate for other harm and prejudice that would potentially arise from being removed from office and thereafter being reinstated, if the Petition were to succeed.

40. Once more, I take the position that it would be more prudent and just to avoid the question of potentially irreversible and irreparable harm and prejudice by confirming and extending the interim orders in force for the few more months that it would take the High Court, as the first court seized with the questions raised in the Petition and thus as the trial court, to hear and determine the dispute herein substantively.

41. The next issue for determination is where does the Public Interest lie. The parties have taken strong positions on the same, particularly the Respondent. The Respondent has canvassed the question of whether the public interest tilts in favour of the confirmation and extension of the orders sought or their lifting at Paragraphs 32 to 37 of its Written Submissions. The Respondent submits that the public interest militates against the confirmation and extension of the interim conservatory orders in force as the confirmation and extension of the same would amount to a stay of the implementation of the Resolution passed by the Senate removing the Petitioner from Office by way of impeachment.

42. The Respondent has cited the High Court's decision concerning the impeachment of the Deputy Governor of Kisii County, which was Nyamira High Court Constitutional Petition No. 4 of 2024. The High Court in that matter discharged the conservatory orders that were in force vide a Ruling dated and delivered on 13th June, 2024. The Court observed:

> "The question which arises is if this court can issue orders whose effect will be to stay the decision, by the Senate, to impeach the 9th Respondent pending the hearing and determination of the petition. My finding is that, since the Senate has already made a resolution, the court must exercise restraint and limit its intervention in the impeachment to hearing the merits of the petition. I further find that issuing conservatory orders to stay

the Senate's decision will be akin to directing or interfering with another organ/arm of government in the exercise of its mandate."

43. Article 165(6) and (7) set out the supervisory jurisdiction of the High Court in the following terms:

> "(6). The High Court has supervisory jurisdiction over the subordinate courts and over any person, body, or authority exercising a judicial or quasi-judicial function, but not over a superior court.
>
> (7). For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice." [Emphasis Mine]

44. Impeachment and removal proceedings by the Senate are undoubtedly quasi-judicial in nature. Given that the Senate is not a superior court, a plain reading of Article 165(6) leads to the inescapable conclusion that the Senate while exercising a quasi-judicial function fits into the persons, bodies, or authorities subject to the constitutionally established supervisory jurisdiction of the High Court.

45. Had the framers of *the Constitution* intended otherwise, nothing would have been simpler than to add the phrase " or a House of Parliament" to the exclusion contained in Clause 6.

46. Furthermore, Article 165(7) empowers the High Court, in exercise of its supervisory jurisdiction, to make any order or to give any direction as it considers appropriate towards ensuring the fair administration of justice, including staying a resolution of the Senate. The Senate is not insulated from that provision of our apex law by any Article or Clause of *the Constitution*.

47. The doctrine of separation of powers and the principle of independence of branches of government should not be extended to run contrary to the plain reading of *the Constitution*. We should not lose sight of the fact that *the Constitution* of Kenya 2010 was the culmination of a decades' long effort by the People of Kenya to promulgate a new constitution that would be better able to check against excesses and violations of their fundamental rights and freedoms. The supervisory power of the High Court in that regard, and even over Parliament, is a critical aspect of those checks and balances, and the protections in built into our supreme law.

48. This is not to say that the supervisory jurisdiction of the High Court over Parliament should not be exercised without restraint and introspection. Simply put, the mere fact that the High Court is empowered to and can supervise Parliament when one or both of the August Houses performs a judicial or quasi-judicial function does not mean that it should exercise that jurisdiction in every instance and/or issue interlocutory conservatory orders whose effect would be to stay the action or decision of Parliament pending the hearing and determination of the petition before the court.

49. What should guide the High Court is whether the Public Interest favours the grant or the refusal to grant the orders sought. Both the Respondent and the 3rd Interested Party have once more relied on the Kisii Deputy Governor Case to advance their proposition that the Public Interest lies in this Court lifting the conservatory orders in force, just as our counterpart in Nyamira did.

50. Paragraphs 79 and 80 of that Ruling extensively considered the question of the public interest in the petition that was before that Court. While the Respondent and the 3rd Interested Party sought to

paraphrase those two paragraphs, they did not do that analysis justice, and thus I quote those two paragraphs verbatim:

> " 79. Turning to the third parameter for the granting of conservatory orders which requires the court to consider public interest before granting a conservatory order, I find that the public interest in this matter tilts against the granting of the conservatory orders. I say so because it is the electorate or the people of Kisii County, through their elected duly elected [SIC] representatives both at County Assembly and the Senate, that considered the impeachment motion in accordance with the law and arrived at the majority decision to impeach the 9th Respondent. As I have already stated in this ruling, the decision of the Senate can only be challenged during the substantive hearing of the Petition and not through the granting of conservatory orders. I further find that since the office of a Deputy Governor is a public office that does not belong to a specific individual, it follows that once the officer is impeached, he has to give room to the next office holder unless and until such [an] impeachment is overturned or nullified by an order of the Court.
>
> 80. I find that in the circumstances of this case, the rights/interests of the people of Kisii County, to be represented and served by a duly appointed Deputy Governor following the 9th Respondent's impeachment far outweigh any prejudice, if any, that the Applicant herein will suffer if the orders sought in the application are not granted." [Emphasis Mine]

51. The High Court in that matter took the position that the moment the Senate passes a resolution impeaching an office holder, that office immediately falls vacant; thus, setting the stage for the filling of that vacancy within the applicable timelines.

52. I note that the High Court sitting in Nyamira was clear that it arrived at its findings based on the particular circumstances of the case before it; as expressly stated in the paragraphs of the Ruling that are quoted verbatim above.

53. This Court takes the position, as explained earlier above, that the High Court in exercise of its supervisory jurisdiction over a quasi-judicial function of the Senate can certainly stay an impeachment resolution of the Senate and restore the status quo ante that obtained before the passing of that impeachment resolution, pending the hearing and determination of the Petition.

54. The question though is, would that be in the public interest? To begin to answer that question, this Court must consider the nature of conservatory orders and thereafter proceed to situate them within the question of where the public interest lies.

55. All five parties in this matter have relied on or alluded to the Supreme Court's discussion on the nature of conservatory orders in the Ruling dated and delivered on 2nd April, 2014 in the seminal case of Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others [SC Application No. 5 of 2014]. At Paragraph 86 of the said Ruling, the Supreme Court stated:

> " 86. "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicative authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as "the prospects of irreparable harm"

> occurring during the pendency of the case; or "a high probability of success" in the Applicant's case for orders of stay. Conservatory Orders, consequently, should be granted on the inherent merits of a case, having in mind the public interest, the constitutional values, the proportionate magnitude, and the priority levels attributable to relevant causes."

56. Following on from this examination of the nature of conservatory orders, the Supreme Court in that Ruling proceeded to issue conservatory orders pending the hearing and determination of the gubernatorial appeal pending before it.

57. The public interest depends on the circumstances of each case. What may be in the public interest in one matter, may not be in the public interest in another matter on the same subject area; due to the difference in the circumstances of each matter. The Court, in determining where the public interest lies regarding conservatory orders in a case before it, can examine any number of factors or considerations, including:

    a. What impact would the grant or refusal to grant the conservatory orders sought have on the public;

    b. How long it would take to hear and determine the Petition, i.e., how long would the conservatory orders likely last;

    c. Would the grant or refusal to grant the conservatory orders sought foster constitutional principles and values; and

    d. Are there any unique or special circumstances at issue in the matter, which are undisputed, which would tilt the public interest in one way or the other?

58. To my mind, the public interest as it applies to the People of Meru County and the wider People of Kenya would be best served by the confirmation and extension of the interim conservatory orders in place pending the expedited hearing and determination of the Petition. The refusal to confirm and extend those orders would result in a gubernatorial succession in Meru County, which in the event that the Petition were to succeed in a few months' time would have to be undone by this Court and/or other courts at great public cost, if at all it could be undone.

59. That eventuality, if it were to occur would not resonate with the Supreme Court's binding guidance in the Peter Munya Ruling on the aspects of proportionate magnitude and the priority of matters. It should also be considered that in these times of austerity, prudent use of scarce resources, which is also a constitutional imperative, is all the more relevant and a greater consideration in terms of the public interest. The gubernatorial succession in the County which would result from the Petitioner's Application not succeeding would trigger events and changes that would be funded from the public purse. It is prudent to hold off on the same for a very short time, and then have them either occur or not to occur based on a Judgment rather than a Ruling.

60. Secondly, the public interest as it applies to a Deputy Office Holder in the Executive Branch at either level of Government may not be the same as it applies to the Chief Executive Officer. The Chief Executive Officer is the principal person tasked with conceptualizing a vision, strategies, and the consequent policies that would spur that particular unit of Government towards greater heights. While certainly the Deputy Chief Executive Officer has significant constitutional and statutory powers and gravitas, they are not akin to those vested in the Chief Executive Officer. The former receives instructions and directions from the latter, and consequently the public interest implications of succession in the principal office are more consequential that those in the office of the deputy.

61. Thirdly, the People of Meru County elected a Governor and it is in their overriding interest that their elected representatives at the County Assembly level as well as their national representatives in the form of the Senate only extinguish the People's choice and expression of their sovereign will for constitutionally permissible grounds that are proven to the required standard after a constitutionally compliant process. This public interest element necessarily requires that the adjudicative authority of the High Court be maintained and be seen to be maintained for the short period of time it would take to hear and determine the Petition on its merits.

62. Lastly on the public interest, none of the parties opposed to the continuation of the orders in force have elucidated any unique or special circumstances at issue in the matter, which are undisputed, and which would tilt the public interest against the Petitioner's prayers.

63. Consequently, it is my finding that the public interest favours the continuation of the subsistence of the interim conservatory orders in force, pending the hearing and determination of the Petition.

64. Turning now to costs, noting the foregoing and the circumstances of this matter, it is fit, just, and proper that each party bear its own costs.

65. Having analyzed the issues for determination, it is my overall finding that the Petitioner/Applicant has met the requisite legal threshold for the grant of conservatory orders and for them to be confirmed and extended to the full hearing and determination of the Petition herein, and thus the Respondent has failed to satisfy the Court to the contrary. For the avoidance of doubt, and for the benefit of the members of the public who have been following this matter with great interest, the Court is not saying that the Petition will succeed or that it will fail; rather, the Court has found that in terms of the applicable law and legal considerations it is fit, just, and proper for the interim conservatory orders in force to continue to apply for a little while longer.

66. Ordinarily, a ruling such as this would end there, but there is a critical aspect that this Court must plainly state. This Court has repeatedly in the foregoing paragraphs and with respect to various limbs of the applicable legal criteria expressed its position that it would be prudent and just to confirm and extend the orders in force for the few more months that it would take to hear and determine the Petition. The Court cannot, therefore, rest its pen before expressing clearly what that short period of time would be and what the obligations on the parties, and in particular the Petitioner, would be.

67. It is regrettably the case that in some instances petitioners who are successful at the interlocutory stage in terms of receiving a grant of conservatory orders pending the hearing and determination of the petition thereafter seek to delay the progression of the petition. They do so, of course, to benefit for as long as possible from those conservatory orders without reaching the point at which those conservatory orders may cease to exist, i.e., the judgment date.

68. This phenomenon has been the subject of much discussion in judgments in this and other jurisdictions, at colloquia, at trainings, in scholarly articles, and in both traditional and new media. What is clear is that there needs to be a balance of the competing positions and interest, so that in issuing conservatory orders pending hearing and determination of the Petition there is no scope for abuse of court process or deliberate delay of the progression of the matter.

69. To my mind, a court has two approaches that it can take in addressing this concern. The first is to issue a schedule with comprehensive timelines running all the way to the date of highlighting of written submissions. The orders confirmed and extended would then have been confirmed and extended to a definite date, rather than being open ended, and the court would then extend them further to the judgment date it would issue at the conclusion of the highlighting of written submissions. Such an

approach would mean that that schedule and timelines would either be issued within the attendant ruling or in separate directions that would derive their compulsive force from the ruling.

70. The second approach would be to confirm and extend the conservatory orders for a specific period of time. The court would, in arriving at the period of time for which those orders should subsist, calculate the time needed for the various filings and milestones culminating in the delivery of the judgment; with the judgment having the ability to bring those orders to an end if the petition was unsuccessful, even if the time for the same was yet to lapse due to the court having been guided by an abundance of caution.

71. At this juncture, and before I articulate which route shall be applied in the present case, it is important for this Judge to state that nothing in the conduct of the Petitioner informed the proposed adoption of the above. The Petitioner has been diligent in meeting all applicable timelines since the filing of this matter on 21/08/2024 to date; as have the Respondent and the three Interested Parties. The Petition and the Petitioner's Notice of Motion Application dated 21/08/2024 were filed on 21/08/2024. That means that today's ruling is being delivered exactly 119 days from the date of filing of the initial Application in this matter. To arrive at this point, and having determined four other Applications within the same 119 days from inception, could only have been possible due to the exemplary cooperation and diligence of the parties herein and their able counsel. Accordingly, each of the Counsel in this matter is commended by this Court for their diligence and professionalism in that regard.

72. Turning now to which path the Court will take, this Court is minded to apply the second approach; and thus, I shall in this Ruling confirm and extend the interim orders for a defined period of time, which I shall formally pronounce under the disposition heading of this Ruling.

Disposition

73. Consequently, and for the foregoing reasons, this Court issues the following orders:

    A. The Petitioner/Applicant's Notice of Motion Application dated 21/08/2024 is hereby allowed in the specific terms to be set out at (C) below;

    B. The Respondent's Notice of Motion Application dated 03/09/2024 is dismissed;

    C. The ex parte conservatory orders issued by this Court on 21/08/2024 are confirmed and extended for a period of 120 days from the date hereof and in that time the Petitioner shall continue to serve as the governor of Meru County; with the proviso that the Judgment in this matter may be rendered before the lapse of those 120 days from the date hereof;

    D. Each party to bear its own costs for the two Applications; and

    E. Directions on the hearing and determination of the Petition within the period set out in (c) above shall be issued by this Court immediately after the delivery of this Ruling.

DATED, SIGNED, AND DELIVERED IN OPEN COURT ON THIS 18TH DAY OF DECEMBER, 2024.

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BAHATI MWAMUYE

JUDGE

In the Presence Of:

Counsel for the Petitioner –

Counsel for the Respondent –

Counsel for the 1st Interested Party –

Counsel for the 2nd Interested Party –

Counsel for the 3rd Interested Party -

Court Assistant –