



Lusenaka v County Assembly of Bungoma through the Speaker of the County Assembly & 5 others (Petition E014 of 2022) [2023] KEHC 18526 (KLR) (28 March 2023) (Judgment)

Neutral citation: [2023] KEHC 18526 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
PETITION E014 OF 2022**

REA OUGO, J

MARCH 28, 2023

IN THE MATTER OF ALLEGED VIOLATION AND PRINCIPLES OF GOVERNANCE ENSHRINED IN THE CONSTITUTION AND THE LAW

AND

IN THE MATTER OF ARTICLES 1, 2, 3 (1), 10, 19, 20, 22, 27, 165 (3) (B), 174, 258 (1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF RULES 4, 10, 11, 13 AND 20 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOM) OF THE INDIVIDUAL, HIGH COURT PRACTICE AND PROCEDURAL RULES, 2013 AND IN THE MATTER OF SECTIONS 8 AND 14 OF THE COUNTY GOVERNMENT ACT, ACT NO. 17 OF 2012 LAWS OF KENYA

AND

IN THE MATTER OF THE COUNTY ASSEMBLY OF BUNGOMA STANDING ORDERS, NO 174 (1), 176 (4), 209 (3), 212 (1), (2), (4) AND 5, 216 (1) (2) AND (3)

BETWEEN

ANTHONY LUSENAKA PETITIONER

AND

COUNTY ASSEMBLY OF BUNGOMA THROUGH THE SPEAKER OF THE COUNTY ASSEMBLY 1ST RESPONDENT

CLERK OF THE COUNTY ASSEMBLY OF BUNGOMA 2ND RESPONDENT

HON GEORGE TENDET 3RD RESPONDENT

HON JACOB PSERO 4TH RESPONDENT

BENARD KIKECHI 5TH RESPONDENT



Whether an independent member of a county assembly can occupy an office in a county assembly committee set aside for a minority party

The petition challenged the legality and constitutionality of the elections of the chairpersons and deputies of the Public Accounts and Investment Committee and the Implementation Committee of the County Assembly (the subject committees). The court found that the 3rd and 4th respondents who were elected as chairpersons to the two committees were not members of any political party. They could not be categorized as members forming the minority parties/coalition and their election was contrary to the standing orders.

Reported by Kakai Toili

Devolution – county assemblies – county assembly committees - Public Accounts and Investment Committee and the Implementation Committee - whether an independent member of a county assembly could occupy an office in a county assembly committee set aside for a minority party - what was the rationale of the Public Accounts and Investment Committee and the Implementation Committee of county assemblies having the minority party comprising the majority of committee memberships and their chairpersons - whether a member of the majority party could deputize the chairpersons of the Public Accounts and Investment Committee and the Implementation Committee of county assemblies – Constitution of Kenya, 2010, articles 10 and 201; County Governments Act, Cap 265, sections 8(1)(c), (d) and (e); Bungoma County Assembly Standing Orders Nos 176(4), 209(3) and 212(2).

Brief facts

The petitioner claimed that members of the minority coalition in the Bungoma County Assembly (the County Assembly) were aggrieved by the elections that led to the appointment of the 3rd and 4th respondents as the Chairpersons of the Public Accounts and Investment Committee and the Implementation Committee of the County Assembly respectively (the subject committees). The 5th and 6th respondents were elected as vice-chairpersons of the subject committees respectively. The petitioner stated that the 3rd and 4th respondents were not members of the minority coalition of parties but were independent members of the County Assembly.

The petitioner challenged the legality and constitutionality of the elections and sought interpretation of the law as to whether an independent candidate could occupy an office that had been expressly set aside for minority party. The petitioner questioned whether a member of the majority party could deputize the chairpersons of the subject committees. According to the petitioner, the subject committees were not properly constituted in compliance with standing order number 176(4) of the Bungoma County Assembly Standing Orders which provided that majority of members in the committees shall be from the minority party. The petitioner averred that the minority party got an equal number of members of the committees with the majority party.

The petitioner claimed that the elections of the 3rd to 6th respondents were in violation of section 8(1) of the County Government Act which provided for oversight of the County Assembly through select committees that were traditionally chaired by the minority party or coalition of parties. The petitioner further claimed that the election undermined their oversight role in the County Assembly. The petitioner sought for among other orders; a declaration that the committees were not properly constituted in accordance with Bungoma County Assembly Standing Orders.

Issues

- i. Whether an independent member of a county assembly could occupy an office in a county assembly committee set aside for a minority party.
- ii. What was the rationale of the Public Accounts and Investment Committee and the Implementation Committee of county assemblies having the minority party comprising the majority of committee memberships and their chairpersons?
- iii. Whether a member of the majority party could deputize the chairpersons of the Public Accounts and Investment Committee and the Implementation Committee of county assemblies.



Held

1. It was essential to establish a connection between the petitioner, the constitutional provisions that were purported to have been breached, and the demonstration of such contravention or violation. The petition was structured into four sections:
 1. The first part identified the parties involved in the suit.
 2. The second part outlined the provisions of the Constitution that had been violated, articles 10, 27, 174 and 201 as well as other relevant legal laws that were purported to have been contravened.
 3. The third part provided a summary of the facts.
 4. The fourth part illustrated how the alleged violations occurred. The petitioner proceeded to seek reliefs in the form of prayers (a) to (h).
2. Article 165(3)(d)(ii) of the Constitution provided that the High Court had jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or of any law was inconsistent with, or in contravention of, the Constitution. The petition was appropriately presented.
3. The court was alive to the doctrine of separation of powers and the principle that courts should avoid unjustified interference in the internal workings of county assemblies, unless they acted in breach of the Constitution.
4. The petitioner had alleged that the appointment of the 3rd to 4th respondents were done in total disregard of standing orders 176(4), 209(3), 212(2) and 216 of the County Assembly of Bungoma. Standing order 176(4) provided that majority of the members of the Public Accounts and Investments Committee and Committee on Implementation were drawn from parties other than county assembly or coalition of parties forming the County Government. Standing order 209(3) provided that the chairperson of the County Public Accounts and Investments Committee shall be a member of the party or coalition of parties other than county assembly parties forming the County Government and shall have a majority of one. The functions of the Public Accounts and Investments Committee were listed under standing order 209(5).
5. The chairperson of the Committee on Implementation created by standing order 212(2) of the County Assembly of Bungoma shall be a member of the party or coalition of parties other than county assembly party or parties forming the county government. It was mandated under standing order 212(4) to scrutinize the resolutions of the House, petitions and the undertakings given by the county executive committee. Additionally, it should examine whether or not such decisions and undertakings had been implemented and where implemented, the extent to which they had been implemented; and whether or not legislation passed by the House had been operationalized and where operationalized, the extent to which such operationalization had taken place within the minimum time necessary.
6. The subject committees were essential to fostering accountability in the administration of public funds. Their oversight and scrutiny ensured that public funds were spent effectively, efficiently, and in accordance with the Constitution and any other applicable laws and regulations. That aided in fostering good government, reducing corruption, and ensuring that public monies were used to advance developmental objectives. As a result, the committee's structure had been established to guarantee that the minority party/coalition of parties held the majority of committee members (standing order 209(3) and 212(2)).
7. The petitioner had led evidence to show that the minority party/coalition of parties had 5 members out of the 11 members of the committee. Both the subject committees had one member who was not aligned with any political party, having been elected as an independent member to the county assembly. The subject committees were therefore constituted in such a way that eliminated the guarantee provided by the standing orders that required the minority party to hold the majority of seats in the



- committees. Therefore, there was sufficient evidence that standing orders 209(3) and 212(2) were violated during the selection process.
8. Standing orders 209(3) and 212(2) of the Bungoma County Assembly Standing Orders provided that the chairpersons of the committees were mandated to come from the minority party/coalition of parties. The 3rd and 4th respondents who were elected as chairpersons to the two committees were not members of any political party. They could not be categorized as members forming the minority parties/coalition and their election was contrary to the standing orders.
 9. The 1st and 2nd respondents were required to provide the necessary guidance and ensure that the elections of chairpersons to the subject committees were done in accordance with the provisions of the Bungoma County Assembly Standing Orders. As a result of their failure to give the appropriate guidance, there was a clear violation of standing orders 209(3) and 212(2) of the Bungoma County Assembly Standing Orders. As a consequence of not complying with standing orders 209(3) and 212(2), the minority parties or coalition of parties were unable to make any nominations to the Liaison Committee.
 10. The Constitution under article 185(3) provided that the county assembly may exercise an oversight role over the county executive committee and other executive organs while respecting the principle of the separation of powers. The 1st respondent carried out its oversight role through various means, one of which included use of its committees such as the subject committees.
 11. The motivation behind structuring the composition of the two committees in a manner that ensured the minority party/coalition of parties had the majority of committee memberships and their chairpersons were selected from the minority parties was to foster accountability, transparency and good governance. Article 201 of the Constitution provided for the principles and framework of public finance.
 12. To ensure openness and accountability in accordance with article 201(a) of the Constitution, the 1st and 2nd respondents were obligated to adhere to the Standing Orders by ensuring that the majority of committee members in both committees were from the minority party/coalition of parties. They were also required to observe that the chairpersons of the two committees were from the minority party/coalition of parties. The committees had the oversight role of ensuring that public money shall be used in a prudent way and responsible way as per provisions of article 201(d) of the Constitution.
 13. The petitioner lodged a complaint before the 1st respondent on the composition of the two committees but did not receive any direction from the 1st and 2nd respondent in regards to his complaint. Despite the respondents' contention that the petitioner could reintroduce the motion after six months had elapsed, the timeframe was excessively lengthy, particularly since the selection and elections were conducted in blatant disregard of the Standing Orders aimed at diluting the principles of public finance and good governance enshrined in the Constitution. The denial of the minority party/coalition of parties from having the majority seats and the subject committees did not in any way promote good governance under article 10(2) (c) of the Constitution.
 14. The 1st and 2nd respondents violated article 210(a) and (d) as well as article 10(2)(c) of the Constitution. The 3rd to 6th respondent were therefore irregularly elected. The selection and election process in regards to the subject committees were done in blatant disregard of standing orders 176 (4), 209 (3) and 212(2) of the County Assembly of Bungoma. The appointment of the 3rd to 6th respondents was inconsistent with the provisions of article 10 and 201 of the Constitution.

Petition allowed.

Orders

- i. *A declaration was made that the Public Accounts and Investment committee and the Implementation Committee were not properly constituted in accordance with Bungoma County Standing Order No 176(4), 209(3), 212(2).*



- ii. *A declaration was made that the election of the 3rd to 6th respondents as chairperson and vice chairpersons of the Public Accounts and Investment Committees and Implementation Committees of Bungoma County Assembly was in violation of articles 10 and 201 of the Constitution as read together with section 8(1)(c), (d) and (e) of the County Governments Act No 17 of 2012 and the Bungoma Standing Orders Nos 176(4), 209(3), 212(2) and was to that extent, illegal, unconstitutional, null and void ab initio.*
- iii. *The Public Accounts and Investments Committee an Implementation Committee was to be re-constituted in accordance with the provisions of Bungoma County Order No 176(4), 209(3) and 212(2).*
- iv. *An order was issued to the 1st respondent to conduct the elections of the chairperson and vice chairpersons of the Public Accounts and Investment Committee and Implementation Committee in accordance with the provisions of Bungoma County Assembly Standing Orders Nos 176(4), 209(3) and 212(2).*
- v. *Parties to bear their own respective costs.*

Citations

Cases

Kenya

1. *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* Petitions 628, 630 of 2014 & 12 of 2015 (Consolidated); [2015] eKLR - (Explained)
2. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014; [2015] KESC 13 (KLR) - (Explained)
3. *County Assembly of Kisumu and 2 others v Kisumu County Assembly service board and 6 others* Civil Appeal 17 & 18 of 2015; [2015] KECA 397 (KLR) - (Explained)
4. *Mahamud, Mohamed Abdi v Ahmed Abdullabi Mohamad & 3 others* Election Appeal 2 of 2018; [2018] KECA 677 (KLR) - (Explained)
5. *Matiba v Attorney General* Miscellaneous Application 666 of 1990; [1990] eKLR - (Explained)
6. *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Explained)
7. *Ruto, William SK & another v Attorney General* Civil Suit 1192 of 2005; [2010] KEHC 1431 (KLR) - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 10, 20, 22(1); 22(2); 27; 165(3); 174; 185; 201 - (Interpreted)
2. County Governments Act (cap 265) section 8(1)(c)(d)(e) - (Interpreted)

Advocates

Miss Ashbioya for the petitioner

Mr. Makokha for the respondents

JUDGMENT

1. The petitioner is a member of county assembly for Bukembe Ward and the leader of the Minority coalition of the parties of the county assembly of Bungoma. On October 26, 2022 the Committee on Selection of the County Assembly Bungoma tabled a report before the County Assembly of Bungoma on the nomination of members of county assembly select committees. The elections of the Chairpersons of the Public Accounts and Investment committee and the Implementation committee were conducted on October 28, 2022. Their deputies were also elected on the same day.



2. The petitioner avers that members of the minority coalition were aggrieved by the elections that led to the appointment of the 3rd and 4th respondents as the Chairpersons of the Public Accounts and Investment committee and the Implementation committee respectively. The 5th and 6th respondents were elected as vice-chairpersons of the Public Accounts and Investment committee and the Implementation committee respectively. The petitioner claims that the elections were in violation of the standing orders No 176(4), 209(3) and 212(2) of Bungoma County Assembly. The standing orders have been enacted pursuant to the Constitution and County Government Act. The 3rd and 4th respondents are not members of the minority coalition of parties of the county assembly of Bungoma but are independent members of the county assembly.
3. The petitioner in his petition is challenging the legality and constitutionality of the elections and seeking interpretation of the law as to whether an independent candidate can occupy an office that has been expressly set aside for minority party. He also questions whether a member of the majority party can deputize the chairperson of the Public Accounts and Investment committee and the Implementation committee which are oversight committees of the assembly. According to the petitioner, the of the Public Accounts and Investment committee and the Implementation committee are also not properly constituted in compliance with standing order number 176 (4) which provides that majority of members in the said committees shall be from the minority party in the assembly. The petitioner avers that the minority party in this case got an equal number of members of the committees with the majority party.
4. Additionally, it was pleaded that the elections of the 3rd to 6th respondents are in violation of section 8(1) of the County Government Act which provides for oversight of the County assembly through select committees that are traditionally chaired by the minority party or coalition of parties. The provisions of article 10 as read with articles 174 & 201 of the Constitution have therefore been violated since the minority party has been denied their oversight role as envisioned in then Constitution.
5. The petitioner in his supporting affidavit averred that it is the responsibility of the minority coalition of parties in the county assembly to oversee and monitor the conduct and implementation of the assembly's work. The election in question undermined their oversight role, resulting in a lack of accountability and transparency in the governance of the county assembly of Bungoma, contrary to what the Constitution of Kenya intended. He explained that major operational decisions and budgetary allocations of the county assembly are conducted by the liaison committee, which comprises the deputy speaker as chairperson, and all the chairpersons of all the other committees except ad hoc committees. The minority coalition of parties can only chair the Public Accounts and Investment Committees and implementation committees which are oversight committees of the assembly. The election of the 3rd and 4th respondents as chairpersons of the said committees have completely locked out the minority party from participating in the liaison committee, therefore, violating their fundamental right to oversight the decision made in the liaison committee and to be represented in the said committee which is very critical decision making committee of the county assembly.
6. Despite lodging a complaint with the 1st respondent through the speaker of the assembly on October 28, 2022, he received no response. The petitioner is therefore seeking the following orders:
 - a. A declaration be and is hereby made that the Public Accounts and Investment committee and the implementation committee are not properly constituted in accordance with Bungoma County Standing Order No 176(4), 209(3), 212(2).



- b. An order that the Public Accounts and Investments Committee and Implementation Committee be re-constituted in accordance with the provisions of Bungoma County Order No 176(4), 209(3), 212(2).
 - c. A declaration be and is hereby made that the election of the 3rd to 6th respondents as chairperson and deputy chairpersons of the Public Accounts and Investment Committees and implementation committees of Bungoma County Assembly was in violation of articles 10, 27(1), 38(2), 174, 201 of the Constitution of Kenya as read together with section 8(1)(c)(d) and (e) of the County Governments Act No 17 of 2012 and the Bungoma Standing Orders Nos 176(4), 209(3), 212(2) and is to that extent, illegal, unconstitutional, null and void *ab initio*.
 - d. An order of certiorari be and is hereby issued by this honourable court for purposes of being quashed and quashing the decision of the 1st respondent in electing the 3rd and 4th respondents on the October 28, 2022 as chairpersons of the Public Accounts and Investment Committee and Implementation Committee of Bungoma County Assembly.
 - e. An order be and is hereby issued directing the 1st respondent to conduct the elections of the chairperson and vice chairperson of the Public Accounts and Investment Committee and Implementation Committee in accordance with the law and standing orders of the Bungoma County Assembly.
 - f. An order be and is hereby issued to the 1st respondent to conduct the elections of the chairperson of the Public Accounts and Investment Committee and Implementation Committee in accordance with the provisions of Bungoma County Assembly Standing orders Nos 176(4), 209(3), 212(2).
 - g. A declaration be and is hereby made that the Vice chairperson of the Public Accounts and Investment Committee and Implementation Committee should not be members of the majority party or coalition of parties in the county assembly of Bungoma.
 - h. The costs of this Petition be borne by the respondents.
7. The petition was strongly opposed by the respondents. The 1st respondent filed its replying affidavit dated November 14, 2022 deposed by the Speaker of the 1st respondent, Emmanuel Mukhebi Situma. It was averred that the petitioner had not established a prima facie case with a likelihood of success and hence is not deserving of the conservatory orders. On 28th he called for a special meeting of the house for the purposes of constituting the house business and selection appointments committees as provided by standing order 173(2), 174(3) and 209(3) of the County Assembly of Bungoma. On October 26, 2022, the Committee of Selection on the nomination of members to serve in County Assemblies Committee tabled its report in the house which report was proposed by the majority leader and seconded by the minority leader who is the petitioner herein. On adoption of the said report by the full house, Emmanuel Mukhebi Situma in his capacity as speaker directed the clerk to the Assembly to communicate to the various committees to sit and elect committee leadership on October 28, 2022 to enable the house start working. He further directed that any member of the Budget and Appropriations Committee or Public Accounts Committee and Investment cannot vie for chairmanship in any other committee. The clerk to the Assembly, on October 26, 2022 issued a memo requesting for the conduct of election of chairpersons and vice chairpersons. The



- 3rd and 4th respondents were elected as chairpersons and the 5th and 6th respondents were elected as vice chairpersons. This was communicated to the full house on November 1, 2022. The 3rd and 4th respondents elected as chairpersons were not from the majority party or coalition of parties forming the government as they were elected as independent members from their respective wards. The 1st respondent contends that the petition has been filed in an attempt to circumvent the standing orders of the County assembly of Bungoma especially standing order No 60 which provides that once a motion has been passed and or declined by the house, the same cannot be re-visited after the lapse of 6 months.
8. The 3rd respondent in his replying affidavit dated November 14, 2022 averred that he was elected as the chairperson of the Public Accounts and Investment committee after he was nominated on October 26, 2022 to serve in the committee. He deposed that he was elected as a member of the county assembly on an independent ticket and he is neither a member of the majority party nor a member of the coalition party forming the government. He is therefore eligible to vie as the chairperson of the Public Accounts and Investment committee. The petitioner participated in the elections and his candidate lost and cannot therefore fault the elections for being unconstitutional.
 9. The 4th respondent also filed his replying affidavit on November 15, 2022. He deposed that he was elected as a member of of the county assembly on independent ticket representing Chesikaki ward. He was nominated to serve on the Implementation Committee, offered himself for elections and was elected as Chairperson defeating Job Mukoyandali by getting 6 votes while his opponent got 5 votes. He avers that the petitioner's case is misplaced as he is not a member of the majority part in the County Assembly.
 10. Respondents all together filed their response to the petition on November 16, 2021. They maintain that the 3rd and 4th respondents were validly, legally and constitutionally elected as Chairpersons of the Public Accounts and investments, and Implementation committee. There is no legal requirement barring the 5th and 6th respondents who are in the majority party to act as vice chairpersons. The respondents pleaded that they ascribe to the national values and principles of governance including public participation, democracy, good governance, integrity and accountability. They denied being in contravention of any law or the *Constitution of Kenya* . The respondent therefore is of the view that the petition is bad in law incompetent and an abuse of the court process.
 11. The petitioner in a rejoinder filed a supplementary affidavit. He averred that the petition is premised on the directions given by the 2nd respondent to the clerk of the assembly. He failed to give directions to the clerk to conduct the elections according to the standing orders. The 2nd respondent's failure to provide guidelines for the election of the Public Accounts and Investment Committee and Implementation Committee's leadership was a deliberate scheme to prevent the minority coalition of parties from joining the Liaison Committee. Although the petitioner lodged a complaint in regards to his elections on October 28, 2022 the 2nd respondent did not address the complaint and made no substantive finding on it.

Petitioner's Submissions

12. The petitioner in his submissions argue that he is challenging the legality and constitutionality of the election of the 3rd to 6th respondent as chairpersons and vice chairpersons of the Public Accounts and Investment committee; and the Implementation Committee. He argues that the 3rd to 6th respondents are not members of the minority coalition of parties of the county assembly of Bungoma. He identified 2 issues for consideration by then court:
 1. Whether the court has jurisdiction to hear the case.



2. Whether the election of the 3rd to 6th respondents as chairpersons of the Public Accounts and Investment Committee was in contravention of the law.
13. On the first issue, the petitioner submits that the petition is before the court pursuant to article 20, 22(1), 22(2) and 165(3) of the *Constitution*. Article 185(3) of the *Constitution* provides that the county assembly, while respecting the principle of the separation of powers, may exercise oversight over the county executive committee and any other county executive organs. The petitioner lodged his complaint through the speaker vide a letter dated October 28, 2022. The matter was not determined by the speaker of the assembly based on the substantive issues.
14. On whether the election of the 3rd to 6th respondents as chairpersons of the Public Accounts and Investment Committee was in contravention of the law, the petitioner submitted that the leadership of the committees vests with the minority party. The reason behind it is to create checks and balances, transparency and accountability as envisaged in article 10 of the *Constitution of Kenya*. They argue that an ‘independent candidate’ means a candidate for county elections who is not a member of a political party. Due to their lack of membership in any political party, an independent candidate is ineligible to hold the position of chairperson of the Public Accounts and Investment Committee; and/or the Implementation Committee. Additionally, Standing Orders 209(3) and 212(2) requires the minority party to have majority of the members by one. The purpose of this is to guarantee that the minority party holds the majority of votes, which helps prevent the committee from being dominated by the majority party. The current composition of the committees which includes 5 members from both the minority and majority parties, as well as one independent member, has resulted in the neutralization of the minority party’s voting strength.
15. They submitted that even though the Standing Orders don’t outline the responsibilities of the vice chairperson, they are expected to assume the duties of the chairperson when the latter is unavailable. Therefore a member of the majority party cannot be from the majority party.
16. They also submit that due to the absence of a chairperson from the minority party, they have been excluded from being members of the Liaison Committee established by Standing Order 216 in contravention of the Constitutional and Statutory provisions that provide that there shall be oversight of the operations of the County government. Section 8 of the County Government Act provides:
 8. Role of the county assembly
 - (1) The county assembly shall—
 - a. ...
 - b. perform the roles set out under article 185 of the *constitution*;
 - c. approve the budget and expenditure of the county government in accordance with Article 207 of the *constitution*, and the legislation contemplated in article 220(2) of the *constitution*, guided by articles 201 and 203 of the *constitution*;
 - d. approve the borrowing by the county government in accordance with Article 212 of the *constitution*;
 - e. approve county development planning; and



- f. perform any other role as may be set out under the *constitution* or legislation.
17. The petitioner submitted that the fact that the 3rd to 6th respondents have already been elected does not prevent the court from granting the orders sought. They relied on the case of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others* [2018] eKLR where the court held that:
- “A person who is not qualified to vie for a particular seat cannot hold onto his false victory by pointing to the margin of his vote vis-à-vis his competitors. He ought not to have been in the race in the first place and the alleged victory is a distortion of reality and a subversion of the electoral process.”
18. The mere fact that the petitioner was a member of the select committees and that he participated in the elections held on the October 28, 2022 does not invalidate the express provisions of the law.

Respondents' Submissions

19. The respondents in their submissions raised 2 concerns:
- a. Whether the election of the 3rd to 4th respondents was in contravention of the law.
 - b. Whether the Petition qualifies to be granted any conservatory orders of stay.
20. They submitted that the petitioner has failed to demonstrate to the court which particular right has been violated and to what extent. They relied on the case of *Matiba v AG* (1990) eKLR and *William SK Ruto & Another v AG* (Civil Suit No 1192 of 2005) where the court stated that where one is alleging a violation of a constitutional right one must plead with precision the section or paragraph which he alleges the violation and most importantly spell out the nature of the infringement.
21. They argue that the independent members, the 3rd and 4th respondents are not members of the majority party and there is no standing order prohibiting their election as chairpersons of the Public Accounts and Investment Committee and Implementation Committee. Similarly there is no provision prohibiting the election of the 5th and 6th respondents as the vice chairpersons. There is no evidence tabled to indicate that the leadership of the 3rd to 6th respondents is likely to compromise the committee's role of oversight.

Analysis and Determination

22. After considering the pleadings, affidavits on record and the written submissions the court considers that the issues that arise for determination are five. These are as follows:
- a. Whether the petition meets the threshold of a constitutional petition;
 - b. Whether the court has jurisdiction to examine if Bungoma County Assembly contravened its own standing orders;
 - c. If (a) and (b) are in the affirmative, the court should consider whether there was a violation of the standing orders;
 - d. Whether the breach of the standing order undermines the committee's oversight function and contravenes articles 10 and 201 of the *Constitution of Kenya*; and



- e. Whether the petitioner is entitled to the orders sought.

a. Whether the petition meets the threshold of a constitutional petition?

23. On the first issue, the respondents in their submission argued that the petitioner had failed to demonstrate before the court the particular right that has been infringed. Courts have maintained that it is essential to establish a connection between the petitioner, the constitutional provisions that are purported to have been breached, and the demonstration of such contravention or violation. The Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR as follows: -

“Although article 22(1) of the *Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

24. The Petition is structured into four sections. The first part identifies the parties involved in the suit. The second part outlines the provisions of the *Constitution* that have been violated, articles 10, 27, 174 and 201 as well as other relevant legal laws that are purported to have been contravened. The third part provides a summary of the facts. The fourth part illustrates how the alleged violations occurred. The petitioner proceeds to seek reliefs in the form of prayers (a) to (h). Article 165(3)(d) (ii) of the *Constitution of Kenya* provides that the High Court has jurisdiction to hear any question respecting the interpretation of the *Constitution* including the determination of the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, the *Constitution*. The court in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR found that:

“The High Court had jurisdiction to review and set aside the appointment of the appellant on grounds of constitutionality or legality. We make this conclusion based on article 165(3) (d)(ii) of the *Constitution* which grants the High Court jurisdiction to hear any question respecting the interpretation of the Constitution, including the determination of a question regarding whether an appointment by any organ of the Government is inconsistent with, or in contravention of the Constitution.”

25. It is on this basis that I find that the petition was appropriately presented.

b. Whether the court has jurisdiction to examine if Bungoma County Assembly contravened its own standing orders?

26. I am alive to the doctrine of separation of powers and the principle that courts should avoid unjustified interference in the internal workings of County Assemblies, unless they act in breach of



the Constitution. The Court of Appeal in County Assembly of Kisumu and 2 others v Kisumu County Assembly service board and 6 others [2015] eKLR observed that:-

“Understanding of, and respect for, the principle of separation of powers is the sine qua non of a democratic state. The essence of the doctrine of separation of powers is that the Executive, the legislative and the judiciary constitute three separate and independent arms of government with different and exclusive responsibilities. The legislative function, that is the enactment of laws, belongs to the legislature; the implementation of law and government policies is the role of the Executive; and interpretation and enforcement of the rule of law is the mandate of the Judiciary. By virtue of this separation, it is not permissible for any branch to interfere with the other’s spheres. With regard to the issue before us, under the doctrine of separation of powers, the court should not interfere with the freedom of speech and debate of legislative bodies. The court must resist unwarranted intrusion into internal procedures of parliament and the County Assemblies unless they act unconstitutionally. As this court stated in *Martin Nyaga Wambora and other v Speaker of the Senate and others*, where it is shown that in conducting its proceedings, a legislative authority has acted within the confines of the Constitution, courts have no jurisdiction and ought not to interfere simply because anybody is aggrieved by a decision passed by the legislative authority. However, where they have not, the court can interfere. This is because the legislative assemblies, like all other organs of state and indeed every person, must act in accordance with the Constitution.”

27. A 5 judge bench, in the case of Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others [2015] eKLR was faced with a similar question of whether it had jurisdiction to examine whether the National Assembly contravened its own Standing Orders. In Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya case (*supra*) the petitioner contested the process that led to the enactment of Security Laws (Amendment) Act, No 19 of 2014, alleging that it was tainted by violations of the National Assembly’s Standing Orders. The decision of the court was as follows:

“172. In our view, the principle that emerges from the above decisions read together with article 124(1) of the Constitution is that in a jurisdiction such as ours in which the Constitution is supreme, the court has jurisdiction to intervene where there has been a failure to abide by Standing Orders which have been given constitutional underpinning under the said article. However, the court must exercise restraint and only intervene in appropriate instances, bearing in mind the specific circumstances of each case.

...

177. The case of *Oloka – Onyango & others v AG* (*supra*) was specifically cited in support of the proposition that where Standing Orders are blatantly disregarded, then a court can properly declare all proceedings arising from such an action, unconstitutional. We agree with that general principle. However, that case can be distinguished from the matter before us in that it involved a lack of quorum in the Parliament of Uganda; and the Hansard showed that although the Speaker was alerted, thrice, that there was no quorum, “the respondent [Attorney General] in his pleadings and submissions did not attempt to suggest that the Rt Hon Speaker in any way reacted to the objection



raised that there was no coram.” In that case there was therefore clear evidence of breach of Standing Orders.”

28. In this case, the petitioner has alleged that the appointment of the 3rd to 4th respondents were done in total disregard of Standing Orders 176(4), 209(3), 212(2) and 216. Standing Order 176(4) of the County Assembly of Bungoma provides that majority of the Members of the Public Accounts and Investments Committee and Committee on Implementation are drawn from Parties other than County Assembly or Coalition of Parties forming the County Government. Standing Order 209(3) of the County Assembly of Bungoma provides that the Chairperson of the County Public Accounts and Investments Committee shall be a Member of the Party or Coalition of Parties other than County Assembly Parties forming the County Government and shall have a majority of one. The functions of the Public Accounts and Investments Committee are listed under Standing Order 209(5) as:
- a. pursuant to article 185(3) of the *Constitution*, to exercise oversight over County Executive Committee and any other County Executive Organ;
 - b. pursuant to article 229(7) and (8), of the *Constitution*, to examine the reports of the Auditor-General on the annual accounts of the County Government;
 - c. to examine special reports, if any, of the Auditor-General on County Government Funds;
 - d. to examine the reports, if any, of the Auditor General on the County Public Investments; and
 - e. to exercise oversight over County Public Accounts and Investments.
29. Similarly the Chairperson of the Committee on Implementation created by Standing Order 212(2) of the County Assembly of Bungoma shall be a Member of the Party or Coalition of Parties other than County Assembly Party or Parties forming the County Government. It is mandated under Standing Order 212(4) is to scrutinize the resolutions of the house, Petitions and the undertakings given by the County Executive Committee. Additionally it should examine whether or not such decisions and undertakings have been implemented and where implemented, the extent to which they have been implemented; and whether or not legislation passed by the House has been operationalized and where operationalized, the extent to which such operationalization has taken place within the minimum time necessary (see Standing Order 212(4)(a) & (b)).
30. These two committees are therefore essential to fostering accountability in the administration of public funds. Their oversight and scrutiny ensure that public funds are spent effectively, efficiently, and in accordance with the *Constitution of Kenya* and any other applicable laws and regulations. This aids in fostering good government, reducing corruption, and ensuring that public monies are used to advance developmental objectives. As a result, the committee's structure has been established to guarantee that the minority party/coalition of parties holds the majority of committee members (see Standing Order 209(3) and 212(2)).
31. The petitioner has led evidence to show that the minority party/coalition of parties has 5 members out of the 11 members of the committee. It is not in dispute that both the Public Accounts and Investment Committee and the Implementation Committee have one member who is not aligned with any political party, having been elected as an independent member to the county assembly. The two committees were therefore constituted in such a way that eliminated the guarantee provided by the standing orders that requires the minority party to hold the majority of seats in the Committees. Therefore there is sufficient evidence that Standing Orders 209 (3) and 212(2) were violated during the selection process.



32. Additionally, Standing Orders 209(3) and 212(2) provide that the Chairpersons of the committees are mandated to come from the minority party/coalition of parties. The 3rd and 4th respondents who were elected as chairpersons to the two committees are not members of any political party. They cannot be categorized as members forming the minority parties/coalition and their election was contrary to the standing orders.
33. The 1st and 2nd respondents were required to provide the necessary guidance and ensure that the election of chairpersons to the Public Accounts and Investment Committee and the Implementation Committee were done in accordance with the provisions of the standing orders. As a result of their failure to give the appropriate guidance, there was a clear violation of the standing Orders 209(3) and 212(2). As a consequence of not complying with Standing Orders 209(3) and 212(2), the minority parties or coalition of parties were unable to make any nominations to the Liaison Committee.

c. Whether the breach of the standing order undermines the committee's oversight function and contravenes Articles 10 and 201 of the Constitution of Kenya?

34. The *Constitution of Kenya* under article 185 (3) provides that the county assembly may exercise an oversight role over the county executive committee and other executive organs while respecting the principle of the separation of powers. The 1st respondent carries out its oversight role through various means, one of which includes use of its committees such as the Public Accounts and Investment Committee and the Implementation Committee.
35. The motivation behind structuring the composition of the two committees in a manner that ensures the minority party/coalition of parties has the majority of committee memberships and their chairpersons are selected from the minority parties is to foster accountability, transparency and good governance. Article 201 of the *Constitution* provide for the principles and framework of public finance. It provides as follows:

201. Principles of public finance

The following principles shall guide all aspects of public finance in the Republic—

- a. there shall be openness and accountability, including public participation in financial matters;
 - b.
 - c.
 - d. public money shall be used in a prudent and responsible way;
36. To ensure openness and accountability in accordance with article 201 (a) of the *Constitution of Kenya*, the 1st and 2nd respondents were obligated to adhere to the standing order by ensuring that the majority of committee members in both committees were from the minority party/coalition of parties. They were also required to observe that the chairpersons of the two committees were from the minority party/coalition of parties. The committees have the oversight role of ensuring that public money shall be used in a prudent way and responsible way as per provisions of article 201(d) of the *Constitution of Kenya*. The petitioner lodged a complaint before the 1st respondent on the composition of the two committees but did not receive any direction from the 1st and 2nd respondent in regards to his complaint. Despite the respondents' contention that the petitioner can reintroduce the motion after six months have elapsed, I believe that the timeframe is excessively lengthy, particularly since the selection and elections were conducted in blatant disregard of the Standing Orders aimed at diluting



the principles of public finance and good governance enshrined in the Constitution. I am constrained to agree with the petitioner that the denial of the minority party/coalition of parties from having the majority seats and the 2 committees does not in any way promote good governance under article 10(2) (c) of the Constitution.

37. The petitioner has therefore demonstrated that the 1st and 2nd respondent violated article 210(a) & (d) as well as article 10(2) (c) of the Constitution of Kenya. The 3rd to the 6th respondent were therefore irregularly elected.

d. Is the petitioner is entitled to the orders sought?

38. The petitioner has proved that the selection and election process in regards to the Public Accounts and Investment Committee and Implementation Committee were done in blatant disregard of standing orders 176(4), 209(3) and 212(2) of the County Assembly of Bungoma. The appointment of the 3rd to 6th respondents was inconsistent with the provisions of article 10 and 201 of the Constitution of Kenya.

39. In the end, having given due consideration to the petition, the response thereto, submissions by the parties, precedent and the law, and applied my mind to the Constitution as well as the circumstances of this case, I make the following Orders:

1. A declaration be and is hereby made that the Public Accounts and Investment committee and the implementation committee are not properly constituted in accordance with Bungoma County Standing Order No 176(4), 209(3), 212(2).
2. A declaration be and is hereby made that the election of the 3rd to 6th respondents as chairperson and vice chairpersons of the Public Accounts and Investment Committees and implementation committees of Bungoma County Assembly was in violation of articles 10 and 201 of the *constitution* of Kenya as read together with section 8(1)(c)(d) and (e) of the *County Governments Act* No 17 of 2012 and the Bungoma Standing Orders Nos 176(4), 209(3), 212(2) and is to that extent, illegal, unconstitutional, null and void ab initio.
3. The Public Accounts and Investments Committee an Implementation Committee be re-constituted in accordance with the provisions of Bungoma County Order No 176(4), 209(3), 212(2).
4. An order be and is hereby issued to the 1st Respondent to conduct the elections of the chairperson and vice chairpersons of the Public Accounts and Investment Committee and Implementation Committee in accordance with the provisions of Bungoma County Assembly Standing orders Nos 176 (4), 209(3), 212 (2).
5. Parties shall bear their own respective costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF MARCH 2023

R.E. OUGO

JUDGE

In the presence of:

Miss Ashioya for the Petitioner

Mr. Makokha for the Respondents

Wilkister Court Assistant

