



Koluwa & 5 others v County Assembly of Vihiga (Being sued through its Honourable Speaker) & another (Constitutional Petition E006 of 2021 & Petition E005 & E007 of 2021 (Consolidated)) [2023] KEHC 26025 (KLR) (28 November 2023) (Judgment)

Neutral citation: [2023] KEHC 26025 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CONSTITUTIONAL PETITION E006 OF 2021 &
PETITION E005 & E007 OF 2021 (CONSOLIDATED)**

PJO OTIENO, J

NOVEMBER 28, 2023

**IN THE MATTER OF ARTICLES 1(3); 22(1); 23(1) & 3; 165 (3)(B),(D)
(I) & (II), (6) & (7); AND 258(1) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES
25(C); 47(1) AND 236(B) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF
SECTION 40 OF THE COUNTY GOVERNMENTS ACT**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF
SECTION 4(3) OF THE FAIR ADMINISTRATIVE ACTIONS ACT**

BETWEEN

**DR AMOS KUTWA KOLUWA 1ST PETITIONER
PAMELA MBAGAYA KIMWELE 2ND PETITIONER
ENG KENNETH ELVUNA KESEKO 3RD PETITIONER
PAUL JISEVE MBUNI 4TH PETITIONER
STEPHEN CHAHASI 5TH PETITIONER
JULIUS OBUGA MASIVA 6TH PETITIONER**

AND

**COUNTY ASSEMBLY OF VIHIGA (BEING SUED THROUGH ITS
HONOURABLE SPEAKER) 1ST RESPONDENT**



JUDGMENT

The Petitioners Case

1. In the amended petition dated 7th June, 2021, the 1st to the 4th Petitioner are described as former County Executive Committee Members for the County Government of Vihiga. The 1st petitioner was in the Health Services docket and appointed on the 2nd day of January, 2018, the 2nd petitioner was in the Public Service, Administration and Co-ordination of County Affairs docket, having been appointed on 8/11/2017, the 3rd petitioner was in charge of Trade, Industry, Tourism and Entrepreneurship docket having been appointed on 18th June 2021 while the 4th petitioner was in charge of Land, Housing and Urban Planning having been appointed on 8th November, 2017.
2. The 1st to the 4th petitioner were impeached and removed from office on 18th June, 2021 and they term their removal unlawful hence orders sought in this petition.
3. The sequence of events leading up to this petition goes that one Hon. Vincent Atsiaya prophetically, but arrogantly, told members of a WhatsApp group, dubbed “Governor’s Diary’ on the 23rd and 24th day of March, 2021 that the petitioners would be impeached. On 24/3/2021, the very next day, the Vihiga County Assembly established an Ad Hoc Committee to address governance issues. The work of the committee culminated in the petitioners receiving invitation letters to provide information required in the said letters. The petitioners honoured the letters and appeared before the committee save for the 3rd petitioner who informed the committee that the documents they sought could be obtained from the office of the Vihiga County Secretary and the Head of Public Service, who was the custodian of the documents.
4. In a report dated 11/5/2021 to the Assembly, the committee directed the assembly to commence impeachment proceedings against the 1st to the 4th petitioner. Aggrieved by this action, the petitioners moved the court on the 9.6.2021, sought and obtained orders that the assembly through its select committee furnishes the petitioners with the charges and documentation to enable them respond, prepare and appear before the select committee of the Assembly. Despite the said order having been duly served upon the 1st respondent, the committee is said to have proceeded in disregard and recommended impeachment of the four petitioners.
5. On 17/6/2021, the petitioner were back in court and obtained another order suspending the implementation and/or execution of the Ad Hoc Committee’s report. The order was once again duly served but once again it was ignored, the process went on and the first four petitioners were impeached on 18/6/2021. Not relenting, the petitioners once again, for the third time moved the court and obtained orders on 21/6/2021 staying the effect of the impeachment and another directive on 10/12/2021 requiring the 2nd respondent to withdraw the advertisement inviting other persons to fill the 1st to 4th petitioners’ positions. As before, all the orders were served upon the assembly and the office of the 2nd respondent, but, both respondents chose never complied therewith.
6. The petitioners now contend in this petition that the actions of the 1st respondent violated their right to fair trial as envisaged under articles 47(1) and 236(b) of *the Constitution* as read with section 4(3) of the Fair Administrative Act. They also contend that their right to human dignity was violated as they were hounded out of office and that they were also discriminated against since their salaries, benefits and allowances were stopped unilaterally by the 2nd respondent while their



counterparts continued to receive the same. The first four petitioners' case is that the respondents violated the petitioners' constitutional rights as enshrined, and respondents failed to execute their obligations imposed under the various provisions of *the constitution*. They enumerate Articles 2,3,10,20,21,22,23,25,27,28,35,47,50,73,174,175,179,183,185,197,232,235,258,259 and 165 of *the Constitution* of Kenya, 2010 as having been violated and thus seek reliefs that: -

- “ a) That an order of certiorari do issue bringing before this honourable court the report of the Ad Hoc Committee dated the 11th day of May 2021 for the purposes of being quashed.
- b) That an order of certiorari do issue bringing before this honourable court and quashing the proceedings of 18th June, 2021 for having been conducted absent(sic) of a fair process and while court orders of 9th June, 2021 and 17th June, 2021 subsisted.
 - a. That an order of certiorari do issue bringing before this honourable court quashing the subsequent action and consequential orders of the 2nd respondent following the impugned impeachment of the petitioners on 18th June, 2021 for having been conducted absent of a fair process and while court orders of 21/6/2021 subsisted.
 - b. Damages for violation of the petitioners right to access information, right to a fair hearing and administrative action, the petitioner's human dignity and the right against discrimination.
 - c. Exemplary damages to be incurred jointly or severally by the 1st and 2nd respondent.
 - d. Loss of the petitioners' earnings
 - e. General damages
 - f. That costs of this petition be awarded to the petitioners.”

- 7. The amended petition is supported by the affidavit of Pamela Mbagaya Kimwele which essentially reiterates the claims in the petition and substantiates same with exhibits which include; the invitations before the select ad hoc committee, the report of the committee, the motions for removal, letters requesting for information on behalf of the first four petitioners and other correspondence between counsel and the respondents.
- 8. The petition was opposed by the two respondents who separately filed, Grounds of opposition, Replying affidavit, Notice of preliminary objection and Answer to the Amended Petition.

1st Respondent's Opposition in Responses To The Amended Petition

- 9. By the Grounds of Opposition dated the 11th April, 2023, the 1st respondent opposes the amended petition on grounds that it is misconceived, bad in law, an abuse of the court process, frivolous, scandalous, vexatious and that the orders sought therein are vague and draconian in nature.
- 10. In his Replying affidavit sworn on 11th April, 2023, Hon. Ambaka Kilinga, identifies himself as the clerk of the 1st respondent and avers that the removal from office of the 1st to the 4th petitioner was in line with the provisions of section 40 of County Government Act as read together with Standing



Orders Number 69 of the Vihiga County Assembly Standing Orders in that it was commenced by way of a notice of motion presented to the office of the clerk and that the motion was supported by at least two thirds of the members of the house.

11. It is his deposition that upon receipt of the motion, the same was forwarded to the speaker for approval and after the approval it was tabled in the house for debate which debate culminated in the approval of the motion and the directive for the formation of an ad hoc committee to interrogate on behalf of the house and give recommendations. He asserts that during the ad hoc committee proceedings the petitioners were provided with documents relating to the charges and that they were given the opportunity to appear before the ad hoc to defend themselves. In a report of the ad hoc committee dated 18/6/2021 they recommended the removal of the 1st to 4th petitioners from office which report was approved by the house and the speaker then communicated the resolution to the governor who in turn relieved the petitioners of their duties. He asserts that the petitioners are challenging the ad hoc report dated 11/5/2021 titled, “AD HOC committee report on health workers, coordination of county public service, pending bills and implementation of the county assembly resolutions by the county executive” which report he says only recommended for the commencement of the proves of removal from office.
12. He swears that this court in a ruling dated 20/1/2023 pronounced itself on the issue of contempt to which no appeal was preferred hence raising the question of contempt in the amended petition becomes res judicata and that the claim for damages and loss of earnings does not arise since the petitioners are no longer serving as County Executive Members following their impeachment.
13. He further claims that Hon. Atsiaya only took part in the ad hoc committee report of 11/5/2021 and not that of 18/6/2021.

The 2nd Respondent Responses to The Amended Petition

14. The 2nd respondent file both Preliminary Objection and Answer to the Amended Petition. The Preliminary objection questions and challenges the jurisdiction of this court based on the following grounds;
 - a. The honourable court lacks jurisdiction to entertain the petition seeking reliefs of certiorari pleaded in paragraphs 2, 3 and 4 of the reliefs sought in the petition the same being in the nature of judicial review and having been statutorily barred by the application of order 53 rule 2 of the Civil Procedure Rules.
 - b. The honourable court lacks the requisite jurisdiction to entertain the petition seeking relief of loss of earnings from employment as pleaded in paragraph 7 of the reliefs since this claim falls within the exclusive jurisdiction of the Employment and Labour Relations Court by application of article 165(5)(b) of *the Constitution*.
 - c. That the entire petition is incompetent for violating rule 10(2)(g) of the Mutunga Rules.
 - d. That the petition is an abuse of the process of the honourable court.

Answer to the Petition by County Solicitor Mr. James Oyundi Mukabi

15. It is the assertion by the county solicitor that the 2nd respondent’s action in removing the 1st to 4th petitioners from office after they were impeached by the county assembly was procedurally and substantively lawful as it was mandatory by the application of section 40 of the *county Governments Act* for him to do so.



16. He contends that the allegations of the petitioners that the 2nd respondent defied the orders of this court is false since the 2nd respondent was not a party to these proceedings and neither was he served with any orders. He avers that to date the 2nd respondent is yet to be served with any order requiring him to reinstate the petitioners or pay their salaries, allowances and gratuity. He claims that the petitioners have failed to prove violation of the rights they cite and state that it was upon them to request for any materials they needed for their defence during the impeachment proceedings, an action they failed to take.
17. He concludes by stating that this court is bereft of jurisdiction to handle this petition for the reason that it cannot grant remedies of certiorari and for the reason that to grant the relief of loss of earnings is a mandate of Employment and Labour Relations Court.

Supplementary Affidavit by the Petitioner

18. On being served with the responses, Pamela Mbagaya Kimwele swore the Affidavit of 6th June, 2023 on her behalf and that of the 1st, 3rd and 4th petitioners, and averred that on 21st December, 2022 this court dismissed a preliminary objection by the interested party, now the 2nd respondent, challenging its jurisdiction and upheld its jurisdiction to determine the instant dispute. She further avers that leave is not required for a petitioner to apply for an order of certiorari in a constitutional petition.
19. On Section 40 of the [County Governments Act](#) on impeachment of County Executive Committee Members, she asserts the same cannot be read in isolation but has to be read conjunctively with articles 47 and 50 of [the constitution](#) and the Fair Administrative Act. To the deponent, the existence of orders of this court barring the impeachment of the 1st to 4th petitioner particularly the orders of 17th and 18th June, 2021 are not negated by the 2nd respondent feigning ignorance of their existence or claiming 'lack of service' when all along his legal representatives appeared in court including on 18th June, 2021 and were present when the orders were issued.
20. After the court determined the myriad applications by both sides, during which a considerable amount of time was lost and the decision of the petition equally delayed, it was directed that the petition, as amended, be canvassed by way of written submissions. In compliance with such directions, the petitioners and the 2nd Respondent filed submissions, which the court has had the opportunity to read and appreciates the industry exhibited by counsel. The 1st Respondent did not file any submissions and counsel told the court that he was unable because he had also been hounded out of the office during the time the submissions were to be filed. The court equally appreciates the petitioners' side in choosing to file one set of submissions.

Petitioner's Submissions

21. They identify four issues for determination namely; i) whether the preliminary objection by the 2nd respondent is merited; ii) whether the 1st respondent processes and procedures resulting to the Ad-Hoc Committee report of 11th may 2021 and subsequent processes including and up to the impeachment of the 1st to 4th petitioners was conducted in accordance with section 40 of the [County Governments Act](#); iii) whether the 1st to 4th petitioners right to access to information, human dignity, fair administrative action and fair hearing were violated and iv) whether the respondents should be liable to damages and costs.
22. On the merits of the preliminary objection by the 2nd respondent, it is their submission that this court on 21/12/2022 dismissed a preliminary objection by the interested party, now the second respondent, challenging the jurisdiction of this court in which application the court ruled that the dispute at hand



was not between an employee and an employer but rather a dispute questioning if the conduct of the assembly and its committees had been consistent and in adherence to the constitution.

23. On the second issue of the Ad-Hoc Committee report and subsequent impeachment, process vis a vis the right to fair hearing and a fair administrative action they submit that section 40 of the County Governments Act has to be read conjunctively with the provisions of articles 47 and 50 of the Constitution and the Fair Administrative Act. They take the position that it is the provision of section 40(4) of the County Governments Act that a county executive member has the right to appear and be represented before a select committee during investigations which right is echoed under section 4(3) of the Fair Administrative Act by stipulating that any person likely to facing an administrative action that is likely to be adversely affected by a decision arising therefrom is entitled to among other rights the right to be heard and the right to information, materials and evidence to be relied upon in making the decision or the administrative action.
24. They argue that the Ad-Hoc Committee whose establishment is not envisaged under section 40 of the County Governments Act violated their right to fair administrative action in that; a)they were not informed that they would be facing any adverse allegations and that they thought they were summoned to provide information; b)no charges were framed and served upon them; c)their request for documents from the 1st and 2nd respondents was declined and lastly that Hon. Vincent Atsiaya, being the chair of the ad hoc committee was not an impartial arbiter since he had commented before the formation of the committee in a WhatsApp group dubbed “Governors Diary” that the 1st to 4th petitioners would be impeached. They further claim that their impeachment was in violation of the orders of this court.
25. On the violation of the 1st to 4th petitioner’s rights, the petitioners contend that their right to access information as envisaged under article 35(1)(b) of the constitution was violated since they were not provided with information, materials and evidence to be relied upon by the respondents in taking the administrative action despite the orders of this court issued on 9/6/2021 directing the respondents to provide them with documents to be used by the respective select committee and that they be given adequate time to scrutinize the documents and consult. They contend that to date they have never been furnished by the said documents.
26. On the violation of their right to human dignity as espoused under article 28 of the Constitution, the 1st to 4th petitioners submit that they were locked out of their offices, their salaries, allowances and gratuity stopped and their medical covers including NHIF withdrawn. They argue that the withdrawal of these benefits exposed them to financial embarrassment which included having to pay for treatment from their pockets.
27. On whether the petitioners are entitled to the reliefs sought, the petitioners submit that once a court has established a violation, it must proceed and give a remedy/relief and they cite the case of Judicial Service Commission v Daniel Ochenja [2020] eKLR where the court of appeal held as follows;

“As we have seen, there was a consistent breach of various laws in the way the appellant handled the respondent’s disciplinary hearing. The respondent prayed in the petition that he be awarded Kshs.10,000,000 for breach of constitutional rights. The Judge found that the law had been breached but made no mention on what remedy the respondent was entitled to in that regard. Having found breaches the Judge was duty bound to make a finding that damages were or were not available. We are thus, in this first appeal, entitled to make a finding on the issue of compensation.



In the Peter Kariuki (supra) case the appellant was a former Commander of Kenya Air Force. He was charged of various offences; sentenced to imprisonment which he served in full. He filed a case many years later claiming breach of fundamental rights. The High Court awarded him compensation Kshs.7,000,000. He appealed to this Court and compensation was enhanced to Kshs.15,000,000 in addition to other reliefs. This did not include reinstatement to office.”

28. They thus urge that each be entitled to an award of Kshs. 2,000,000/- for the violated rights which include right to access information, right to fair hearing and administrative action, human dignity and the right against discrimination. In addition, petitioners pray that each should be awarded exemplary damages of kshs. 10,000,000/- to punish the respondent for engaging in a lengthy litigation in which they filed more than 10 applications and four notice of appeals to the court of appeal which were all dismissed and a multiplicity of objections.

2nd Respondent's Submissions

29. The submissions are largely in support of the preliminary objection dated 26/4/2023 and raises three issues for determination namely; a) whether the honourable court can entertain the petition seeking reliefs of certiorari in the amended petition; b) whether the honourable court can entertain the petition seeking relief of loss of earnings and c) whether the amended petition is competent.
30. On whether the honourable court can entertain the petition seeking reliefs of certiorari in the amended petition, the 2nd respondent submits that the amended petition seeks a judicial review relief of certiorari without seeking leave of this court as envisaged under order 52 rule 2 and which leave ought to have been granted not later than 6 months after the date of proceeding.
31. On whether the honourable court can entertain the petition seeking relief of loss of earnings they submit that the relief falls within the purview of the Employment and Labour Relations Court under article 165(5)(b) of *the Constitution*.
32. On whether the amended petition is competent, they contend that the petition is in violation of rule 10(2)(g) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 since the petitioners have not stated with precision the constitutional provisions the 2nd respondent has violated and cite the case of World Explorers Safaris Limited v Cosmopolitan Travel Limited & another [2021] eKLR where the court held as follows;

“ ... Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary.”

“A useful discussion on the importance of pleadings is to be found in Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the



interlocutory proceedings before the trial and which the court will have to determine at the trial.”

33. For the reasons and arguments advanced in the submissions, the 2nd Respondent prays that the Petition be dismissed.
34. Even though the 1st respondent did not file written submissions, counsel attended court on the date set for highlighting and made oral submissions. In those submissions, counsel shared what other Kenyans have observed that governance remains a challenge and did not doubt the demand that removal from office should be in strict observance of the law.
35. Counsel tacitly admitted that the composition of the ad hoc committee may not have observed the two thirds gender rule but justified the same composition by reminding the court that Parliament has never been compliant but the same has not invalidated the legislations from that house.
36. He the gave the background to the dispute to be that there was at the time, a challenge in recruiting health workers and the mandate of the committee was wider than the impeachment

Issues, Analysis and Determination

37. Having looked at the amended petition, the responses thereto and the submissions by the parties herein, as highlighted, the court discerns the following issues for determination: -
 - a. Whether a court, sitting as a constitutional court, has the jurisdiction to grant orders of certiorari without leave first sought and obtained?
 - b. Whether the respondents violated the petitioners’ constitutional rights as espoused under Articles 27, 28, 35 and 47 of *the Constitution* of Kenya, 2010?
 - c. Whether the petitioner is entitled to the reliefs sought?
38. Whether or not the court is clothed with the requisite jurisdiction to deal with the was raised by the respondents earlier, the court heard the parties on the same and by a ruling delivered on 21st December 2022 the court said: -

“22. How about Petition No. E006 clearly brought by persons who have pleaded being employees of the County Government of Vihiga and whose employment was threatened with and subsequent termination by way of impeachment? The court finds that the Petitioners were indeed employees of the Government of Vihiga County and that the positions to which four (4) were removed are indeed constitutional offices and the removal was done by the 1st Respondent, state organ, acting pursuant to a constitutional mandate.

23. It is to this court not a dispute between the employee, (Petitioners) and the employer, the county executive, Vihiga County Government but a dispute questioning if the conduct of the assembly and its committees had been consistent and in adherence with *the Constitution*. It is a matter that can be narrowed down to whether the assembly complied with *the Constitution* in executing its mandate. To this court, it is a matter that falls for determination by only the High Court in that even though there is an employment relationship pleaded, the employer is not pleaded as a party and thus the



dispute falls outside the boundaries set by the statute for Employment and Labour Relations Court to entertain.”

39. With that decision standing on the file, the court cannot revisit the same issued unless it sets on mission to sit on appeal of its own decision.
40. On the issue of the respondents’ defiance of the orders of this court which the petitioners have continued to raise, this court vide a ruling dated 20th January, 2023 ruled on the issue of contempt by stating;
- “ 37. In the absence of proof of knowledge by the two of the court orders brought to their knowledge and notice before the action of 18/6/2021, the court finds that contempt has not been proved.”
41. It is the position of the court that it is not entitled to revisit and tinker with its previous decisions in the same file unless moved appropriately under the law

Whether a court, sitting as a constitutional court, can issue orders of certiorari outside the procedure under Civil Procedure Rules?

42. By the notice of Preliminary Objection dated 25th April, 2023, the 2nd respondent contends that the court lacks jurisdiction to entertain this petition seeking reliefs of certiorari, the same being in the nature of judicial review unless with full compliance with order 53 rule 2 of the Civil Procedure Rules.
43. The court views the argument to fly in the face of clear stipulations of *the constitution* and elevates the Rules above *the constitution*. It is totally unnecessary for this court to remind counsel that Rules of procedure remains rules subservient to the law under which they are made and way so inferior to the Grundnorm.
44. Article 22 of *the constitution* stipulates is no ambiguous terms that the court sitting as a constitutional court on alleged or threatened violation of constitutional rights has the power to grant any appropriate relief, including; declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; an order for compensation; and an order of judicial review.
45. It being basic that an order of certiorari is one of the three order available by way of judicial review, it follows that the court, sitting as a constitutional court, is vested with very clear mandate and powers to issue an order of certiorari. There thus cannot be any merit in any of the Grounds of preliminary objection raised by the 2nd respondent.

Whether the respondents violated the petitioner’s constitutional rights as espoused under Articles 27,28,35 & 47 of *the Constitution* of Kenya, 2010.

46. It is now settled law that where a petitioner claims violation of his or her constitutional rights and seeks relief under *the constitution*, the petitioner is obligated and ought to plead with precision the right that he alleges to have been violated and how it has been violated. This was laid well before the new constitution in Annarita Karimi Njeru vs. Attorney General [1979] KLR 154; [1976-80] 1 KLR 1272 and has been followed by all superior courts including the Supreme Court. In Anarita Kirimi (supra) it was held as follows: -

“If a person is seeking redress from the High Court in a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that



he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they have been infringed.”

47. In order to evaluate the compliance by the petitioners with that trite position of the law we turn to the specific rights which the petitioner alleges to have been violated and how the same has been pleaded.

Article 27 of *the Constitution* of Kenya, 2010

48. The first set of violation is that the first four petitioners were treated differentially and were thus discriminated against because their salaries, benefits and allowances were stopped unilaterally by the 2nd respondent while their counterparts continued to receive the same.
49. Discrimination can be said to occur where persons in the same situation are treated distinctively and in this case it would apply to County Executive Committee Members who had been subjected to the impeachment proceedings. It is my view that for the allegation of discrimination to stand, the petitioners ought to have demonstrated distinctive and unfair treatment against them when compared to colleagues in the County Executive committee on matters of pay and benefits. That has not been demonstrated at all.
50. What the petitioners have shown is that their salaries and benefits were stopped after the impugned impeachment proceedings. To this court, while that they were removed as officers made then not entitled to the salaries and benefits accruing to the holders of the offices unless and until the removal was quashed. The court thus finds that as long as the removal stood, the petitioners had no right to expect to be treated as if they had not been removed. The court thus finds that the petitioners have failed to prove the violation of their rights under Article 27 of *the constitution* by the respondents.

Article 28 of *the Constitution* of Kenya, 2010

51. The provision enshrines that every person has inherent dignity and the right to have that dignity respected and protected. In this petition, the first four petitioner have been treated to public ridicule and have been maligned with the consequence of violation of the right to human dignity besides being put to financial embarrassment. The essence of the right to dignity needs no overemphasis. By it there is an acknowledgement of the intrinsic worth of human beings. Every human being is entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many other rights that are specifically entrenched in *the Constitution*. See S vs. Makwanyane & Another (CCT3/94) [1995] ZACC 3.
52. The 1st to 4th petitioners submit that their right to human dignity was violated when they were locked out of their offices, their salaries, allowances and gratuity stopped and their medical covers including NHIF withdrawn. They argue that the withdrawal of these benefits exposed them to financial embarrassment which included having to pay for treatment from their pockets.
53. While it would follow that withdrawal of salary and benefits results in financial loss and difficulties to the subject, such flow from the office one holds and not intrinsic nor perpetual on an individual. The court has held that those benefits were tied and a result of the tenure each enjoyed as members of the Executive committee. Such definitely terminate one the tenure ends. Such benefits would not be expected to continue after the petitioners were removed from office.
54. Even on the duty to prove the allegation, not much effort was put forth. The court finds that the same has not been proved to the satisfaction of the court. That has not come out clearly.



On Article 35 of *the Constitution* of Kenya, 2010, Access to information.

55. That every citizen has the right of access to the information held by the State and required for the exercise or protection of any right or fundamental freedom is not debatable in this petition. The issue is whether that right was denied and violated. Pursuant to article 35, the *Access to information Act* was enacted. Section 4(3) of the Act 2016 provides that access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost. The petitioners assert that they repeatedly requested for information held by the respondents to facilitate their appearance before the select committee were not provided with same. That denial was also without regard to the court orders issued on 9/6/2021 and explicit that the respondents provides them with documents to be used by the respective select committee and that they be given adequate time to scrutinize the documents and consult. They contend that to date they have never been furnished by the said documents.
56. In disagreement, the 1st respondent in his replying affidavit contends by asserting that during the ad hoc committee proceedings the petitioners were provided with documents relating to the charges. The only document to support that assertion is the letter dated 3.6.2021 authored by the deponent of the affidavit in his capacity as the Clerk to the 1st respondent. That letter in deed forwarded some of the document including the report of the ad hoc committee, which had in fact stayed by the court.
57. The records reads that on the 9th day of June, 2021, this court issued the directed at the 1st respondent and, among other things, directing the speaker of the 1st respondent to; provide the petitioner with legible copies of any and all documents that intended for use by the respective select committees before the scheduled meetings on 10th and 11th June 2021; afford adequate opportunity to consider the documents provided and consult with their legal advisors before any substantive meetings are held and that the applicants be provided with a succinct statement of charges and/or criticisms that they are required to answer before any substantive meetings are held.
58. In an attempt to demonstrate compliance with the said court order, Hon. Ambaka Kilinga, the clerk to the Assembly, swore an affidavit on 11th April, 2023 in which he has annexed a number of documents, including two letters dated 25/5/2021 from K.N.Wesutsa & Co. Advocates, representing the petitioners, whose subject was request for summons and documents. A follow up letter was made dated 31/5/2021. In response to the said letters, Mr. Ezekiel Ayiego, the county secretary and head of public service vide a letter dated 3rd June, 2021 wrote to the firm K.N.Wesutsa & Co. Advocates saying in part, ‘Consequently, his excellency has instructed his chief of staff, Mr. James Otari who is in charge of administration at his office to avail himself at your disposal to assist with the information you may require and if acceptable to you, testify as witness for the affected CEC members.’
59. This letter was followed by another on the same date from Ambaka Kilinga, the clerk of the county assembly, forwarding to the petitioners’ advocate the motion on removal from office of the four County Executive Committee Members as well as the report by the ad hoc committee, resolution by the Assembly requesting CECM, public service and administration to prepare draft legislation, a staff audit report by Public service Board, a motion giving rise to the formation of the ad hoc committee and the list of members of the assembly supporting the motion for removal.
60. What the respondents appear not to appreciate is that the request and the court order were explicit of the sought document and made pursuant to a statute with constitutional underpinning and that the assembly had no discretion nor choice in determining what to give and what to hold back.
61. Moreover, the replying affidavit of Hon. Ambaka Kilinga does exhibit the subject documents for the court to appreciate what the documents actually said. It is thus difficult for the court to disprove the assertion that the request for documents was never honoured.



62. Furthermore, in the contempt proceedings conducted by this court, the speaker of the County Assembly of Vihiga, who by the order of this court was charged with the mandate of furnishing the petitioners with documentation, denied knowledge of the court order. It begs the question whether the Clerk to the assembly could act without consultation with the speaker in what concerned the proceedings of the assembly. It also questions how genuine both the speaker and the Clerk were with the court.
63. From the foregoing there is no doubt in the mind of the court that indeed the respondents failed to furnish the petitioners with documents necessary for their preparation and presentation before the select committee. In doing so, the first respondent violated the right of the petitioners to access the information under article 35 of *the Constitution*.

Article 47 of *the Constitution* of Kenya, 2010

64. The rule that nobody shall be condemned is as old as the system of administration of justice and may be much older than dispute of dispute resolution, as the same is known today. Article 47 thus codes the age old principles of natural justice, just in case one was to deem that foreign in this modern state called Kenya, in the following language: -
- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
 - (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - (b) promote efficient administration.”
65. Article 236(b) of *the Constitution* demands that a public officer shall not be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law. In that spirit, Parliament deemed it fit to code the procedure for the removal of a County Executive Committee Member under section 40 of the *County Governments Act* No. 17 of 2012. The statute provides that a motion for removal may be initiated by a member of the county assembly, supported by at least one-third of all the members of the county assembly, requiring the governor to dismiss a county executive committee member on the grounds of gross violation of *the Constitution* or any other law; incompetence; abuse of office; gross misconduct; or if convicted of an offence punishable by imprisonment for at least six months.
66. The law further stipulates that the motion be supported by at least one-third of the members of the county assembly and that the shall appoint a select committee comprising five of its members to investigate the matter; the select committee shall report, within ten days, to the county assembly whether it finds the allegations against the county executive committee member to be substantiated or not. At the hearing before the select committee, the county executive committee member has the right to appear and be represented. Should the select committee find the allegations unsubstantiated, no further proceedings shall be taken; but if substantiated, the county assembly shall vote whether to approve the resolution requiring the county executive committee member to be dismissed. In such vote, a simple majority suffices and upon a resolution being passed, the speaker of the county assembly



- shall promptly deliver the resolution to the governor; and the governor shall, with no discretion reserved, dismiss the county executive committee member.
67. The national legislative procedure on removal of a County Executive Committee member has guided the formulation of The Vihiga County Assembly Standing Orders, 2017 which adopts, almost, verbatim the national legislation and provides, in addition, that; before giving notice of motion under section 40 of the [County Governments Act](#), the member of the assembly shall deliver to the clerk a copy of the proposed motion in writing stating the grounds and particulars upon which the proposal is made, for requiring the Governor to dismiss a Member of the County Committee. The Standing Orders appears to increase the number of the select committee to a third of the assembly members.
68. The petitioners allege a violation of their right to fair administrative action in that; they were not informed that they would be facing any adverse allegations and that they thought they were summoned to provide information; no charges were framed and served upon them; their request for documents from the 1st and 2nd respondents was declined and lastly that Hon. Vincent Atsiaya, being the chair of the ad hoc committee was not an impartial arbiter since he had commented before the formation of the committee in a WhatsApp group dubbed “Governors Diary” that the 1st to 4th petitioners would be impeached.
69. The short chronology of the events leading up to the impeachment of the 1st to 4th petitioners are that an ad hoc committee was established on 24/3/2021 to address governance issues in Vihiga County. In a letter dated 14/4/2021 the 1st to 4th petitioners are instructed to appear before the committee and come 11/5/2021 the committee issues a report addressing the governance issues in Vihiga County to which they recommend the impeachment of the 1st to 4th petitioners. Worth noting is that the establishment of an ad hoc committee is neither envisaged by section 40 of the [County Governments Act](#) nor by Order 69 of the Vihiga County Assembly Standing Orders, 2017.
70. The report of the ad hoc committee is then followed by four motions being tabled by different members of the county assembly and seeking the impeachment of the 1st to 4th petitioners. In record time, the motions are passed by at least one third of the members of the county assembly thus requiring the assembly to set up a select committee to investigate the allegations raised against the petitioners in the motions. By way of letters dated 4th June, 2021, the petitioners are invited by the clerk of the county assembly to appear before the select committee on 10th June 2021 to address allegations raised against them and further informing them that the documents they wish to rely on had been shared with them earlier. In a letter dated 3rd June, 2021 by the clerk of the county assembly addressed to the advocates of the petitioners, he indicates that the select committee shall rely on the ad hoc committee report dated 11/5/2021. On whether the report was made available to the petitioners prior to their appearance before the select committee is unknown since the respondents have not evidenced service.
71. The legality and propriety of the ad hoc committee has been questioned by the petitioners on the basis that the same it is not provided for under the [County Governments Act](#) nor in the Vihiga County Assembly Standing Orders and that it was thus unlawful for the select committee of the Assembly to use the report in dismissing the petitioners from office.
72. Any administrative action taken without legal backing or foundation is ipso fact unconstitutional in the words of the Supreme Court in *Martin Wanderi & 106 others v Engineers Registration Board & 10 others* [2018] eKLR when it held that: -

“In examining Article 47(1) of [the Constitution](#), the starting point is a presumption that the person exercising the administrative power has the legal authority to exercise that authority. Once satisfied as to the lawfulness of the power exercised, is when the court will delve into



inquiring whether in the carrying out of that administrative action, there was violation of Article 47(1). This is the test of legality. So that the question of the unlawfulness or otherwise to act is at the onset of the inquiry. Where the act done was ultra vires the mandate of the administrative entity, the act is void ab initio and the inquiry stops there as there is an outright violation of *the Constitution*. The question of legality or the lawfulness of an act lies at the core Article 47(1).”

73. From the documents filed, it emerges that the ad hoc committee was purportedly appointed pursuant to article 185(1) and (3) of *the constitution* as read with section 8, County Government Act and the summonses issued pursuant to article 195 of *the Constitution*. The constitutional provisions cited give the general authority and mandate to the assembly to oversight the County Executive and to summon witnesses during its inquiries while section 8 of the Act provides the specific roles of the assembly. To this court, it is section 40 of the Act, which is specific to the power to impeach a member of the County Executive Committee. It does so by prescribing how to initiate the process. That prescription envisages not the role to be played by an ad hoc committee before the motion is presented to the assembly. To the extent that the initiation was by the ad hoc committee, chaired by a person who had prophesied the removal of the first four petitioners, it is the finding of the court that the ad hoc committee ventured into an arena reserved for others. In legal parlance, the ad hoc committee exceeded jurisdiction, acted ultra vires, and its actions and resolutions so reached remain null and void, incapable of bestowing any benefit on the assembly. Being void, nothing placed or purported to be erected upon it can stand when put to the test of legality. Such must be declared to what it is, null and void, and deemed as having not taken place.
74. It thus follows that the impeachment of the 1st to 4th petitioners having been founded on the report of the ad hoc committee, which was void ab initio, for lacking a legal footing, any subsequent actions by the county assembly based on that report, lacked legality and must equally stand as null and void.
75. Even if that frolic by the assembly was to be ignored, it was a constitutional obligation on the ad hoc committee and assembly once they constituted itself into administrative bodies, to strictly comply with section 4 (3) of the Fair Administrative Actions Act as read with sections 4 & 5 of *Access to Information Act*. The first four petitioner were not only denied the right to access the information that would have assisted then controvert the allegations against them but were also not given the charges they were expected to answer before the select committee. Those failures were a brazen violations rights staring on every legal mind to see and denounce.
76. Having held that the right to access the information by the petitioners was violated and denied, it follows that their right to fair hearing was equally denied with the consequence that the process followed by the Assembly and its ad hoc and select committees were in disregard to the obligation imposed by article 3(1) of *the constitution* and thus invalid pursuant to article 2(4) of *the constitution*. If invalid for violation of *the constitution*, it must be struck down and quashed. That is the only option the court must exercise.
77. The foregoing would be sufficient to dispose of the matter but it has also been argued and stressed that the ad hoc committee did not meet the 1/3 gender threshold. To that complaint, the 1st respondent responded as if it was a triviality or just an irksome vexation. To the 1st respondent, the gender threshold has never been attained even by the by the national assembly yet, it continues to pass legislation which remain uninvalidated.
78. To this courts mind and opinion, the challenges faced by parliament require intricate legislation and policy formulations unlike the mechanical duty on the assembly to appoint members to a select or ad hoc committee. In selecting the ad hoc committee without regard to its gender composition, the



assembly acted unconstitutionally and must be reminded that a violation of any provision of *the constitution* by a state organ or agency is not the justification for continued or fresh violation by other organs even where it is practically expedient to do so. The court thus finds that in constituting the ad hoc committee, the assembly did not respect the provisions of article 27 (8) of *the constitution* notwithstanding the fact that it was practical to respect that provision. That is yet another reason the process must be quashed. The court thus allows the petition and issues orders in favour of the 1st to 4th petitioner in terms of prayers 2, 3 and 4 of the petition.

79. Having quashed the entire process it follows that the removal of the four was null and void, and thus the withholding of salaries and benefits were equally untenable before the law. While the 1st respondent contends that the question of unpaid salaries, is the preserve of the Employment and Labour Relations Court, the court takes the position that as a constitutional court, it has the jurisdiction to make declarations and also craft appropriate reliefs to realize the end of such declarations. With such position, the court view that it is appropriate that a declaration be made that the four petitioners are entitled to their due salaries for the period they were to remain in office but were kept out and salaries withheld courtesy of the unlawful conduct by the 1st respondent.

Whether the petitioner is entitled to the reliefs sought

80. The petition prays for declarations of violations, orders of judicial review as well as general and exemplary damages. The court has set out its determinations on the alleged violations and now hold that for each right established to have been violated an appropriate declaration issues and that anything done contra *the constitution* cannot be left to stand but must be quashed.
81. The next task is to establish if there should be awards made in damages for the proved violations. The principles for the award of damages in respect to violation of constitutional rights was well laid by the Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR to be intended go some distance towards vindicating the infringed constitutional right and not necessarily to warn the state against misbehavior. How much the quantum the court awards depends on the circumstances of the case. The fact that the right violated was a constitutional right adds an extra dimension to the wrong.
82. In this matter, the circumstances reveal a desire to remove the four petitioners from their public positions at all cost even if that meant disregard by the assembly of its constitutional obligation on access to information and observing the duty to afford to them fair administrative action. The court finds that this case depicts high handedness and desire act oppressively. That calls for not only general damages but also exemplary/aggravated damages. The court holds that the four are entitled to both heads of damages so that there be vindication and an expression that the removal of a state officer or public officer is not trivialized, and grounded on hate or vendetta for personal gratification but done for the public good for proficient delivery of public duty and service.
83. The petitioners urge and submit that each be entitled and awarded Kshs. 2,000,000/- for the proved violated rights including right to access information, right to fair hearing and fair administrative action. They further urge that they be awarded exemplary damages of Kshs. 10,000,000/- to punish the respondent for engaging in a lengthy litigation in which they filed more than 10 applications and four notice of appeals to the court of appeal which were all dismissed and a multiplicity of objections. To this court, the conduct of a party in a litigation, after pleadings close should never be the measure or consideration in assessing the measure of damages rather it may be a consideration in awarding higher costs in appropriate cases.



84. In opposition, the 1st respondent that the claim for damages and loss of earnings does not arise since the petitioners are no longer serving as County Executive Members following their impeachment. That is the only comment made by the respondent. Both opted never to make suggestions on the commensurate sum in the event the petition succeeded.
85. Having established a violation of the 1st to 4th petitioners' right to access information, fair administrative action and fair hearing, in the context of the fact that the 1st respondent is a creature of the constitution an award of damages is an appropriate remedy appropriate to vindicate the violated rights. In coming to that conclusion, the court draws from the leaning that it behooves it to make an award that serves the purpose of vindicating the violation in a commensurate manner. The court finds that an award of monetary compensation is appropriate and has posed to itself the crucial question as to what is a reasonable amount in the peculiar circumstances of the case. The court views the infringement in its true perspective as an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the supreme law of the land by the state itself. That, however, does not mean that the infringement should be blown out of all proportion to reality by making a disproportionately high award as to appear as a windfall to the petitioners nor does it mean that the violation be trivialized. Having considered the stated factors and the fact that there is a declaration that the petitioner be paid for the unexpired duration of their tenure, and having reviewed comparable awards in decided cases, it awards to each of the 1st to 4th petitioners General damages in the sum of Kshs. 1,800,000/-.
86. As for the claim of exemplary damages, the court follows the learning that such damages are only due for award where there exists proof of oppressive arbitrary or unconstitutional actions by the servants of the Government; and where the Defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the Plaintiff. See *Obongo vs. Kisumu Municipal Council* (1971) EA 91, where the Court of Appeal referred to the English case of *Rookes vs. Barnard & Others* (1964) AC 1129
87. Exemplary damages are due as additional damages and in a constitutional litigation like this the emphasis remains on protection of rights and its vindication and not to enrich the claimant. In many cases, a nominal award suffices. Taking into the awards already made to the petitioners, and as an expression of disapproval on how they were treated, the court award to each of them a sum of Kshs 250,000 being exemplary damages
88. It is of interest to court that the 5th and 6th petitioner were made parties to the cause but no pleadings nor prayers were made on their behalf. In fact, not even how they relate to the matter was made out. It give the view that they were joined if not by mistake then as convenient companion. They deserve no orders at all from the court.
89. While there was evidence against the 1st respondent in the impugned process, there was never an inkling of any material against the 2nd respondent. I get the impression that he was joined merely because of the duty the law places in his office to implement the decision of the 1st respondent. I find that no evidence was laid against it for any wrongdoing and therefore no remedy was can issue against it. The claim against the 2nd respondent is thus dismissed.
90. Flowing from the reasons set out above, this court issues the following orders:
- a. A declaration is hereby issued that the 1st to 4th petitioners fundamental rights and freedoms as enshrined under Articles 35 47 and 50 of the Constitution of Kenya, 2010, have been contravened and infringed upon by the 1st respondent.



- b. That an Order of Certiorari is hereby issued calling into this Honourable Court the report of the Ad Hoc Committee dated 11th day of May 2021 the proceedings of 18th June 2021 and the resolution of the 1st respondent approving the recommendation of its select committee together with the all subsequent actions and decisions emanating and flowing therefrom, including the letter by the 2nd respondent dated the 18th June 2021, for the purposes of being quashed.
- c. A declaration that the 1st-4th petitioners be paid their withheld salaries for the unexpired period of their contract
- d. Each of the 1st to 4th petitioner is awarded general damages in the sum of Kshs. 1,800,000/- and Kshs 250, exemplary damages.
- e. Being a public interest matter and where no remedies have been sought against individuals personally, each party shall bear own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 28TH DAY OF NOVEMBER, 2023

PATRICK J. O. OTIENO

JUDGE

