



**Mohamed & 6 others v County Assembly of Wajir & 9 others (Constitutional Petition E009 & E017 of 2021 (Consolidated)) [2022] KEHC 169 (KLR) (16 February 2022) (Judgment)**

*Aden Ibrahim Mohamed & 6 others v County Assembly of Wajir & 9 others [2022] eKLR*

Neutral citation: [2022] KEHC 169 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CONSTITUTIONAL PETITION E009 & E017 OF 2021 (CONSOLIDATED)  
EM MURIITHI, PJO OTIENO & TW CHERERE, JJ**

**FEBRUARY 16, 2022**

**IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 1, 2(1), (2) AND (5), 3(1) AND (2), 4(2), 10, 19,20, 21,22(1) AND 2(B) AND (C), 23(1) 24(1) 33(1) (A), .35,38 (1) 47(1) AND (2), 48,50,52,93,96,165(3) (B) AND (D) (II) 73(1), 75(1) (C) 174,175, 181,196(1) (B) 200, 258, 260**

**AND**

**IN THE MATTER OF ARTICLES 1, 2, 3, 47, 50 (B) AND (C), 181 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS PRACTICE AND PROCEDURES RULES 2013**

**AND**

**IN THE MATTER OF ARTICLES 1, 3, AND ART. 25(A) OF THE INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL RIGHTS OF 1966**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENT ACT 2012, SECTION 8, 30, 31 33(1) AND (2) AND 87**

**AND**

**IN THE MATTER OF THE STANDING ORDER NO. 67 OF THE WAJIR COUNTY ASSEMBLY STANDING ORDERS**

**AND**

**IN THE MATTER OF THE INTENDED REMOVAL FROM OFFICE OF THE GOVERNOR OF WAJIR COUNTY BY WAY OF IMPEACHMENT**



BETWEEN

ADEN IBRAHIM MOHAMED ..... 1<sup>ST</sup> PETITIONER  
OMAR JELE ABDI ..... 2<sup>ND</sup> PETITIONER  
BISHAR AHMED HUSSEIN ..... 3<sup>RD</sup> PETITIONER  
SAFIYA MAHAMED ABDI ..... 4<sup>TH</sup> PETITIONER  
YUSSUF IBRAHIM DIMBIL ..... 5<sup>TH</sup> PETITIONER  
COUNCIL OF GOVERNORS ..... 6<sup>TH</sup> PETITIONER  
H.E THE GOVERNOR OF WAJIR COUNTY AMB. MOHAMMED ABDI  
MOHAMMUD ..... 7<sup>TH</sup> PETITIONER

AND

COUNTY ASSEMBLY OF WAJIR ..... 1<sup>ST</sup> RESPONDENT  
CLERK OF THE COUNTY ASSEMBLY OF WAJIR ..... 2<sup>ND</sup> RESPONDENT  
SPEAKER OF THE WAJIR COUNTY ASSEMBLY ..... 3<sup>RD</sup> RESPONDENT  
ABDULLAHI ISSACK ..... 4<sup>TH</sup> RESPONDENT  
SPEAKER OF THE SENATE ..... 5<sup>TH</sup> RESPONDENT  
THE SENATE ..... 6<sup>TH</sup> RESPONDENT  
THE ATTORNEY GENERAL ..... 7<sup>TH</sup> RESPONDENT  
THE DEPUTY GOVERNOR AHMED ALI MUKHTAR ..... 8<sup>TH</sup> RESPONDENT  
THE CHIEF REGISTRAR OF THE HIGH COURT ..... 9<sup>TH</sup> RESPONDENT  
THE ASSUMPTION OF OFFICE COMMITTEE ..... 10<sup>TH</sup> RESPONDENT

**Failure of a mover of an impeachment motion of a Governor to affirm the motion rendered the motion void.**

Reported by Ribia John

**Civil Practice and Procedure** – pleadings - constitutional petitions – contents – affidavit - whether failure to include an affidavit in a constitutional petition was a fatal error that hindered the court in considering the petition – Constitution of Kenya, 2010 article 22(3)(d); Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, rule 11(1)

**Constitutional Law** – national values and principles - public participation – public participation in the impeachment process - whether there was public participation in the process leading to the impeachment of the County Governor of Wajir – Constitution of Kenya, 2010, article 10(2).

**Devolution** – impeachment – impeachment of a county Governor – threshold – duty of the county assembly and the senate in impeachment - what was the threshold to be met for the impeachment of a county governor - whether the county assembly and the senate properly exercised their constitutional mandate on the facts of the case - Constitution of Kenya, 2010, article 181.



**Devolution** – *impeachment – impeachment of a county governor – impeachment motion – procedures and formalities guiding the tabling of an impeachment motion – duty of a mover of a motion to impeach a county governor to affirm the motion – incubation period of a motion to impeach a governor - whether the failure of a mover of an impeachment motion against a governor to affirm the motion rendered the motion void - whether tabling a motion to impeach a county governor before the legal period to incubate the notice of motion was yet to expire would render the motion void – Constitution of Kenya, 2010 article 259(5); Civil Procedure Rules, order 50, rule 8; County Assembly of Wajir Standing Orders, standing order No 67(4).*

**Civil Practice and Procedure** – *conservatory orders – nature – principles - what factors did the court consider before issuing conservatory orders – scope of the power of the High Court to issue conservatory orders - whether the court could issue conservatory orders to a deputy governor, who was sworn into the post of governor due to the impeachment of the governor, to step down and to revert the office to the former occupant of the office of the governor.*

**Constitutional Law** – *fundamental rights and freedoms – right to fair administrative action – right to a fair trial – whether a former Governor’s right to fair administrative action and fair hearing was breached by the respondents by not according to the former Governor a chance to be heard and for conducting the impeachment process in gross violation of the county and national legislation - Constitution of Kenya, 2010, articles 10, 47(1) and 50(1).*

### **Brief facts**

The petition was filed to oppose the impeachment of the 7<sup>th</sup> petitioner as the Governor of Wajir County. Shortly thereafter the 8<sup>th</sup> respondent, the deputy Governor, was sworn in as Governor. The petitioners filed the petition on grounds that the impeachment process was unlawful and unconstitutional on grounds that the impeachment motion was not affirmed, the incubation period of the impeachment motion had not been observed and the impeachment was conducted without any public participation and in breach of the rights of the 7<sup>th</sup> petitioner to fair administrative action and a fair hearing.

### **Issues**

- i. Whether failure to include an affidavit in a constitutional petition was a fatal error that hindered the court in considering the petition.
- ii. What was the threshold to be met for the impeachment of a county governor?
- iii. Whether there was public participation in the process leading to the impeachment of the County Governor of Wajir.
- iv. Whether an affirmation issued by the mover of a motion to impeach a county governor was the legal equivalent to an oath or a statutory declaration.
- v. Whether the failure of a mover of an impeachment motion of a governor to affirm the motion rendered the motion void.
- vi. Whether tabling a motion to impeach a county governor before the legal period to incubate the notice of motion expired would render the motion void.
- vii. Whether the removal of the 1<sup>st</sup> petitioner from office was in compliance with the Constitution and the law.
- viii. What factors did the court consider before issuing conservatory orders?
- ix. Whether the court could issue conservatory orders to as a deputy governor, who was sworn in to the post of governor due to the impeachment of the governor, to step down and to revert the office to the former occupant of the office of the governor.
- x. Whether the County Assembly and the Senate properly exercised their constitutional mandate on the facts of the case.

### **Held**

1. The amended petition was not accompanied by any affidavit. Prior to the amendment, the initial petition was supported by an affidavit which affidavit exhibited the documents sought to be relied upon to prove the alleged violations. That affidavit remained part of the file unless expunged by an order of



the court. Subsequent to the filing of the initial petition, parties had filed other affidavits all confirming that there were constant developments and changes of circumstances that necessitated amendments. Whereas in ordinary litigation an amendment of pleadings was the only pleading to be considered by the court, constitutional litigation was governed by the provisions of the constitution itself and the procedural rules made thereunder. According to article 22(3)(d) of the Constitution, formalities were to be kept at a bare minimum and the court was entitled to entertain a matter lodged by way of informal documentation. The obligation to file an affidavit in support of the petition was a requirement under rule 11(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The rules had to remain handmaids and not masters of justice, designed to aid the administration of substantial justice and not to defeat it.

2. A court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing justice to the parties. That principle of merit, however, bore no meaning cast in stone and suited all situations of dispute resolution. The court as an agency of the processes of justice was called upon to appreciate all the relevant circumstances and the requirements of a particular case and conscientiously determine the best course.
3. The court would not be technical and abdicate the duty to interrogate whether the impeachment process admitted by all sides to have taken place, took place in compliance with the law. The court disregarded technicalities that would have shielded the court from determining the dispute on the merits by striking out the amended petition. The failure to file an affidavit to support the amended petition was not fatal but a mere lapse in the procedural requirements.
4. In any litigation, pleadings played a very important role in informing parties as well as the court on what the dispute was. The clarity in pleadings also helped the court in its obligation and mandate to deal with disputes in a proportionate and expedient manner. A constitutional petition had to be set out with reasonable precision the rights alleged to have been violated or threatened with a violation and the manner of violation.
5. The petition had to clearly, precisely, and specifically plead that the law under the Constitution on grounds of impeachment, the right to be heard fairly, those under the County Government Act, and the Assembly Standing Orders on the process and steps to be taken were not complied with.
6. The dictate upon state organs, state officers, public officers, and all persons to ensure public participation, whenever any of them interpreted the Constitution, made or implemented public policy, was no longer debatable. It wasn't a suggestion but an obligation and a command. The concept was consistent with the principle of sovereignty of the people that permeated the Constitution and in accordance with article 1(4) of the Constitution was exercised at both national and county levels.
7. The duty to conduct and ensure participation by the people was an obligation of the Assembly as a state organ, its leadership and members as public officers. Therefore, where there was an allegation that the duty had not been discharged, it was not for the petitioners to prove failure to conduct public participation, but it was for the duty of the respondents to avail evidence showing compliance, as a way of discharge of duty under article 10(2) of the Constitution. In the context of the instant matter and with the assertion that a newspaper advert was made, the easiest thing would have been to exhibit at least a copy of the advert or such other document showing an invitation for the public to give views. In the absence of such evidence, no invitation was made to the public. No public participation was conducted or afforded in violation of the constitutional duty imposed upon the respondents, being the County Assembly, its Clerk, and the Speaker.
8. Public participation should always be real and not treated as a mere formality but one of substance. The test on whether there had been due public participation rested with the court, on case to case basis, upon consideration of many a factor including the goodwill or *bona fides* of the public actor(s), the nature of the matter, the length and quality of engagement and the mechanisms or media used to reach the people.



9. Failure to uphold the requirement for public participation as the very heartbeat of devolution and principle of governance ran affront the supremacy of the Constitution and any act that was undertaken pursuant to such derogation was null and void and incapable of bestowing any right or obligation on a citizen. The process of impeachment violated the requirement for public participation and was thus null and void.
10. The County Assembly of Wajir (the Assembly) Standing Orders regulated the County Assembly of Wajir's procedures, in particular, the proper conduct of its proceedings. The Standing orders exhibited to court did provide for procedures of removal of a governor at Part XIV, section 67, a member of the Assembly could, before giving a notice of motion under section 33, of the County Government Act, deliver to the speaker of the Assembly, a copy of the proposed motion for removal of the governor on the grounds of gross violation of the Constitution or other law. The notice of motion was decreed to be affirmed by the member and verified by the member and at least one-third of all the members of the assembly, on a verification form provided by the clerk, that the particulars of the allegations contained in the motion were true to the best of their own knowledge and belief. The notice was designed to be received by the clerk who would submit it to the speaker for approval and upon approval, the mover of the motion was to give a notice of at least seven days calling for the impeachment of the governor. It was only after the expiry of the seven days notice that the motion was put on the order paper for debate and disposal within three days. When all those conditions had been complied with, the mover had to garner the support of at least two-thirds of all the members of the Assembly, which evidence could be availed by the clerk preparing a list entitled signatures in support of a motion for removal of governor by impeachment and presented to the speaker at least one hour before the assembly sat.
11. The allegations had to be cogent and affirmed by the member moving the motion and also be verified by at least one-third of all the members of the assembly in writing. The need for affirmation and verification underscored the gravity of the matter. The office of a Governor was a public office acquired through an election by the majority of the voters in an election. In that regard, an impeachment occurred when one was impeached for abuse or misuse of a state office or breaching chapter six of the Constitution.
12. In legal parlance, an affirmation was the substitute or equivalent of an oath where one objected to taking an oath on account of the fact that he had no religious belief or that the taking of an oath was contrary to his religion. When standing orders imposed the duty upon the mover of a motion of impeachment to give an affirmation, such affirmation had to take the form that a statutory declaration would take. In the absence of an appropriate template, the form provided under section 15 of the Oaths and Statutory Declarations Act would suffice with befitting modifications. The mover of the notice of motion was obligated to give an affirmation to the facts and allegations in the notice of motion.
13. The court was unable to find a document that would pass as or by the name affirmation. Even in the filed papers, none of the parties had made any allusion to the existence of an affirmation of the truth of the allegations made. Without evidence that the affirmation was given, the notice of motion was defective for failure to meet the demands of the law and was thus invalid for purposes of founding the impeachment process and proceedings.
14. The law in the standing orders also set timelines for moving the motion of impeachment and limited such time to not less than seven days between the date of approval and the date of being tabled before the Assembly. The rationale was to secure for the person sought to be impeached an opportunity to prepare a defence and be ready to defend himself or herself.
15. The notice to the Speaker and a notice of motion were lodged with the Clerk who submitted the same to the Speaker on April 20, 2021, and the approval was made the same day. There was evidence that the document was served upon the office of the Governor on April 21, 2021, in terms of Standing Order No 67(4), seven days from the said date of service had to expire for the notice of motion to be placed on the order paper for disposal.



16. On the computation of time under order 50 rule 8 of the Civil Procedure Rules and article 259(5) of the Constitution, provided that the first day was excluded from the computation of time while the last day was included. The court excluded April 21, 2021, from the seven days and determined that the seven days period was due to expire on April 28, 2021. It was after that date that the motion could be placed on the order paper for deliberation. Accordingly, therefore, when the same was tabled on April 27, 2021, the legal period to incubate the notice of motion was yet to expire and therefore the notice of motion was prematurely tabled. Such tabling was done contrary to the standing orders adopted by the assembly to help regulate orderly proceedings. A party should not be allowed to benefit from a violation of the law. The proceedings of the 1<sup>st</sup> respondent of April 27, 2021, were done in violation of express requirements of its own standing orders were void.
17. Standing order 67 of the County Assembly of Wajir Standing Orders guided the County Assembly when deliberating on an impeachment motion. Standing order 67 provided that an impeachment motion was to only be placed on the order paper upon expiry of 7 days after notice of the motion of impeachment was given. Standing order 67 was not complied with and the non-compliance had the effect of denying the 7<sup>th</sup> petitioner adequate time to prepare his defence in contravention of article 50(2)(c) of the Constitution and standing order 67 (3) and (4).
18. Where an inquiry showed that the county assembly had been operating within the constitutional scheme of devolution, separation and running its legislative processes within the ordinary safeguards of the separation of powers, there would hardly be any scope for the deployment of the court's conservatory orders more particularly without first hearing the petitioners.
19. All state organs were bound by the Constitution and the law and courts retained the power to interpret, protect and promote the Constitution. A careful and thorough consideration of the impeachment process of the 1<sup>st</sup> petitioner demonstrated that the county assembly was not operating properly, within its constitutional mandate to impeach the governor. The court was quite legitimately within its constitutional duty to issue conservatory orders as it did on April 26, 2021, to protect the rights of the 1<sup>st</sup> petitioner which were threatened by the non-compliance, by the respondents, with the Constitution and the County Assembly of Wajir Standing Orders.
20. The assumption of the Office of Governor Committee published in the Kenya Gazette and the County Gazette that the 8<sup>th</sup> respondent was to be sworn in as Governor of the County Government of Wajir on Tuesday, May 18, 2021, at the Wajir County Headquarters starting at 10.00 am. The 8<sup>th</sup> respondent was sworn in as Governor of the County Government of Wajir by a High Court Judge. Section 11(2) as read with Section 16(1)(a) of the County Governments Act provided that a deputy governor who assumed the office of the County Governor was to be sworn in on the first Thursday after the tenth day following the declaration of the final results and in the instant case, following the publication of a notice notifying the public of the removal from office by the impeachment of the Governor. The notice notifying the public of the removal from office by the impeachment of the Governor was published on May 17, 2021. The first Thursday after the tenth day following the publication of a notice notifying the public of the removal from office by the impeachment of the Governor was on May 27, 2021. the swearing-in of the 8<sup>th</sup> respondent that took place on May 18, 2021, which was only a day after the publication of a notice notifying the public of the removal from office by the impeachment of the Governor contravened the mandatory provisions of section 11(2) as read with section 16(1)(a) of the County Governments Act.
21. The court was within its constitutional duty to issue conservatory orders as it did on May 18, 2021, staying and/or suspending the implementation of the gazette notice issued on May 17, 2021, notifying the 6<sup>th</sup> respondent's resolution passed on May 17, 2021, purporting to remove the 7<sup>th</sup> petitioner herein from the office of the Governor of Wajir by way of impeachment and restraining the Speaker of the County Assembly of Wajir County or anybody, organ or authority from implementing the 6<sup>th</sup>



- respondent's resolution from conducting and/or presiding over the taking the oath of office of the 8<sup>th</sup> respondent as Governor of the County Government of Wajir.
22. Judicial authority of the court under the constitutional Bill of Rights imported both anticipatory and *post facto* power to respectively restrain or remedy breach or violation of rights. The judicial authority existed where rights and fundamental freedoms were violated or threatened with the violation, in the textual provisions of article 22 of the Constitution.
  23. A party could not be required to suffer illegality, breach of his rights, and resultant injustice on the solace that his grievance would be remedied upon appeal or other review after the damage had been done. It was the singular authority of the court to deal with such threatened violations before they happen and to give appropriate relief, including conservatory orders, in terms of article 23(3) of the Constitution.
  24. An application to set aside conservatory orders filed after refusal to comply with court orders was mischievous and incompetent. It was the unqualified obligation of every person against, or in respect of whom, an order had been made by a court of competent jurisdiction, to obey it unless and until that order was discharged.
  25. To entertain and determine the cross-petition would be to affirm the decision of the Senate without a valid appeal before the court. On the other hand, the court could not determine that there was no merit in the complaint against the governor by the 4<sup>th</sup> respondent who moved the motion of removal of the governor from office. The court was not exercising an appellate review of the Senate determination.
  26. The court could not sit, and was not sitting, on appeal from the determination of the county assembly or the Senate, and it could not, therefore, make a finding on the merits of the notice of motion for removal of the governor. For the same reason, the court could not make a determination of the matters raised in the cross-petition by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent that the 1<sup>st</sup> petitioner had violated the specified articles of the Constitution, the County Governments Act and the Finance Act as that merit determination was within the province of County Assembly and the Senate.
  27. What the court was required to consider was whether there was relevant material and vital aspects having nexus to the constitutional and legislative purpose or whether the process had a clear nexus with the determination. Had the process of initiating and prosecution of the motion for removal been conducted in accordance with the constitutional safeguards on fair administrative action and the statutory provisions of the County Governments Act and the Standing Orders of the County Assembly, giving the 7<sup>th</sup> petitioner a fair trial and opportunity to defend himself on the allegations, the merit determination by the County Assembly and the Senate could have been valid as decisions of the organs constitutionally mandated to deal with the question of removal of the Governor from office.
  28. The impeachment proceedings were conducted in breach of the constitutional and statutory provisions and in disobedience of the orders of the court made by the High Court, as the constitutional court, prior to the commencement of the impeachment trial proceedings. The proceedings of the county assembly were null and void, as were the subsequent confirmation at the Senate flowing from the county assembly's determination.

***Petition allowed; cross petitions dismissed.***

***Orders***

- i. *Declaration issued that the impeachment process initiated by the 4<sup>th</sup> respondent through the notice of motion dated April 19, 2021, was conducted in violation of the right to public participation and the 7<sup>th</sup> petitioner's right to fair administrative action and fair hearing, under articles 10, 47(1) and 50(1) of the Constitution of Kenya and in breach of statutory procedures of the County Governments Act 2012 and the Standing Orders of the County Assembly of Wajir.*
- ii. *Declaration issued that the proceedings for removal of the 7<sup>th</sup> petitioner before the 1<sup>st</sup> respondent (County Assembly of Wajir) held on April 27, 2021 was in violation and disregard of court orders and therefore null and void.*



- iii. *Declaration issued that the 7<sup>th</sup> petitioner was not validly removed from the office of the Governor of the County of Wajir by the impeachment process which was held in contravention of articles 10, 47, 50 and 196 of the Constitution.*
- iv. *Declaration issued that the appointment of the 8<sup>th</sup> respondent as Governor of Wajir County and his subsequent nomination and appointment of a Deputy Governor was null and void.*
- v. *The Cross-petition by the 1<sup>st</sup> and 3<sup>rd</sup> respondents, respectively the County Assembly of Wajir and the Speaker of the County Assembly, dated December 14, 2021 was declined.*
- vi. *The application for setting aside dated August 10, 2021 filed by the 8<sup>th</sup> respondent was dismissed.*
- vii. *An order of certiorari was issued to bring into the instant court to quash the decision made by the 3<sup>rd</sup> respondent on April 20, 2021 in relation to the removal of the 1<sup>st</sup> petitioner (7<sup>th</sup> petitioner) from office based on the notice of motion dated 19/4/2021.*
- viii. *An order of certiorari was issued to quash any resolution made by the 1<sup>st</sup> and 3<sup>rd</sup> respondents in relation to the removal of the 1<sup>st</sup> petitioner (7<sup>th</sup> petitioner) from office based on the notice of motion tabled in the County Assembly of Wajir on April 27, 2021 or thereabout.*
- ix. *An order of certiorari was issued to quash the special issue of the Kenya Gazette No. 4702 dated 17/5/2021 issued by the 5<sup>th</sup> respondent pursuant to the purported impeachment of the 7<sup>th</sup> petitioner.*
- x. *An order of certiorari was issued to quash the special issue of the Kenya Gazette No. 4703 dated May 17, 2021 issued by the 10<sup>th</sup> respondent's chairman.*
- xi. *An order of mandatory injunction was granted against the 8<sup>th</sup> respondent compelling him to handover and restore the Office of the Governor of the County of Wajir to the 7<sup>th</sup> petitioner.*
- xii. *A declaration that the 8<sup>th</sup> respondent remained the Deputy Governor for the remainder of the current term of the Office of Governor of County of Wajir.*
- xiii. *In the interests of a smooth hand-over of the affairs of the Office of Governor of Wajir County, the resumption of Office by the 7<sup>th</sup> petitioner was to be stayed for twelve (12) days to take effect on March 1, 2022 to allow the preparation of full inventory of hand-over reports, as may be necessary.*
- xiv. *As the instant case was a matter of public interest, the parties were to each bear their own costs of the petition.*

## Citations

### Cases

1. Anarita Karimi Njeru-vs- Republic ([1979] eKLR) — Mentioned
2. Anne Mumbi Waiguru v County Assembly of Kirinyaga ([2020] eKLR) — Explained
3. British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others ([2017] eKLR) — Mentioned
4. Charity Kaluki Ngilu v County Assembly of Kitui & 2 others ([2020] eKLR) — Mentioned
5. Charles Okello Mwanda v Republic [2019] eKLR (Criminal Appeal 183 of 2015) — Mentioned
6. Council of Governors v Attorney General & 7 others ([2019] eKLR) — Mentioned
7. Gedion Konchella V Julius Ole Senkuli [ (2018)eKLR)
8. Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others ([2017] eKLR) — Explained
9. In the matter of the Mui Coal Basin Local Community ([2015] eKLR) — Explained
10. Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another ([2017] eKLR) — Mentioned
11. Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017]eKLR (Petition 32 of 2014) — Explained
12. Legal Advice Centre & 2 others v County Government of Mombasa & 4 others ([2018] eKLR) — Explained
13. Martha Wangari Karua & another v Independent Electoral and Boundaries Commission & 3 others ([2017] eKLR) — Explained
14. Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others ([2014] eKLR) — Explained



15. Martin Nyaga Wambora v County Assembly of Embu & 37 others ([2015] eKLR) — Explained
16. Maureen Nyambura Ngigi Warui v Board of Directors, Kenya Power & Lighting Company Limited & 2 others [2020] eKLR (Petition 226 of 2019) — Mentioned
17. Mike Sonko Mbuvi Gedion Kioko & another v Clerk, Nairobi City County Assembly & 9 others ([2021] eKLR) — Mentioned
18. Mike Sonko Mbuvi Gidion Kioko v Clerk Nairobi City County Assembly & 5 others [2020] eKLR (Constitutional Petition 35 of 2020) — Mentioned
19. Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others ([2015] eKLR) — Explained
20. Mumo Matemau v Trusted Society of Human Rights Alliance & 5 others ([2013] eKLR) — Mentioned
21. Raila Odinga vs IEBC and 4 others (Petition No. 5 of 2013) — Explained
22. Wildlife Lodges Limited -vs- County Council of Narok and Anor ([2005] 2E.A 344 (HCK)) — Explained
23. Borbet South Africa Ply Ltd & others v Nelson Mandela Bay Municipality (3751 of 2011 [2014] ZA EA PEHC 35 [2014] 5 SA 256) — Explained
24. Doctors for Life International v The Speaker of the National Assembly & others (CCT 12 of 2005 [2006] ZACC 11) — Explained
25. King v Attorneys Fidelity Fund Board of Control & anor ([2006] 1 SA 474) — Explained
26. Hadkinson vs. Hadkinson ([1952]2 All ER 567) — Mentioned

#### **Statutes**

1. Assumption Of The Office Of Governor Act (No. 4 of 2019) — section 11(2)(3), 16(a), 16(1) — Interpreted
2. Civil Procedure Act (Cap. 21) — Order 50; Rule 8 — Interpreted
3. Constitution of Kenya, 2010 — article 10, 196(1), 181(1), 47, 50, 196, 43, 177(1), 165, 259, 185, 201(a), 183(3), 259, 28, 259, 182(2), 201(e) — Interpreted
4. County Governments Act (No. 17 of 2012) — section 33(1), 87, 3(3)(a)(b)(f), 14, 91, 115, 30(2)(j) — Interpreted
5. Fair Administrative Action (No. 4 of 2015) — section 4 — Interpreted
6. Oaths and Statutory Declaration Act (Cap. 15) — section 15 — Interpreted
7. Public Finance Management Act (No 18 of 2012) — section 149, 166, 107(2) — Interpreted
8. Public Finance Management [County Governments] Regulations — Regulation 167(1), 82(1)(b) — Interpreted
9. Public Procurement and Asset Disposal Act (No. 33 of 2015) — Interpreted

#### **Advocates**

*Mr. Wanyama* for the 1st - 6th Petitioners

*Prof Ojienda SC with Mr. Kamwaro and Mr. Kere* for the 7th Petitioner

*Mr Ahmed Nassir SC with Ms Hannan and Ms Wangui* for the 1st - 4th Respondents

*Ms Thanji* for the 5th & 6th Respondents

*Mr. Issa Mansur* for the 8th Respondent

## **JUDGMENT**

1. This is a judgment on two consolidated petitions, petition No E009 of 2021 and petition No E017 of 2021. Upon consolidation, parties in the two petitions will be referred to as petitioners and respondents as shown in the title hereinabove.



2. Petition No E017 of 2021 was initially filed in Nairobi as Constitutional petition No E146 of 2021 and was transferred to Garissa and registered as petition No 1 of 2021 subsequent to which it was transferred to Meru and registered as petition No E017 of 2021.
3. By a further further amended petition dated 7<sup>th</sup> June 2021 in petition No E009 of 2021 the 1- 6 petitioners approached the court seeking some fourteen reliefs set out as follows:
  - a. A declaration that the notice of impeachment dated 19/4/2021 against the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner in consolidated petition) is defective and unlawful for want of compliance with section 33(1) of the County Government Act 2012 as read with order 67(1) of the standing orders of the County Assembly of Wajir.
  - b. A declaration that the notification of the Notice of impeachment dated 20/4/2021 from the Speaker County Assembly of Wajir to the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) Governor of Wajir County, is defective and unlawful for want of compliance with article 50(1) of *the Constitution*.
  - c. A declaration that within the intendment of section 87 of the County Government Act as read with article 10, and 196(1) of *the Constitution*, a County Assembly, must conduct meaningful and qualitative public participation in all the wards of the county on any decision that leads to a motion to impeach a County Governor.
  - d. A declaration that in considering the motion for impeachment for the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) dated 19/4/2021, the County Assembly of Wajir did not conduct meaningful and qualitative public participation as required by section 87 of the County Government Act as read with article 10 and 196(1) of *the Constitution*.
  - e. A declaration that the resolution passed by the County Assembly of Wajir on 27/4/2021 on the impeachment of the Governor of Wajir, the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) herein, was made in contravention of a court order and is consequently a nullity.
  - f. A declaration that the resolution passed by the Senate of the Republic of Kenya on 17/5/2021 on the impeachment of the Governor of Wajir, the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) herein, was made in contravention of a court order and is consequently a nullity.
  - g. A declaration that the decision of the Senate of the Republic of Kenya on 17/5/2021 to remove from office the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) as Governor of Wajir County based on a singular charge of violation of the right to health of the people of Wajir County does not meet the threshold requirements in article 181(1) of *the Constitution*.
  - h. A declaration that given the provisions of section 11(3) and section 16(a) of the *Assumption of the Office of Governor Act* 2019; a Deputy Governor who assumes office of Governor in the event of a vacancy in the office of Governor, shall be sworn in on the first Thursday after the tenth day following the declaration of the vacancy in the Office of Governor and not otherwise.
  - i. A declaration that the swearing into office of the 2<sup>nd</sup> interested party (8<sup>th</sup> respondent) herein as Governor of Wajir County based on the impeachment resolution of the County Assembly of Wajir of 27/4/2021 and the resolution of the senate of the Republic of Kenya of 17/5/2021 regarding the removal from office of the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) by way of impeachment is a nullity.



- j. A declaration that the constitutional rights of the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) have been violated by the respondents and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> interested parties (8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> respondents) herein and the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) is entitled to damages.
  - k. An order of *certiorari* be issued to remove to this honorable court and quash the notice of impeachment dated 19/4/2021 by the County Assembly of Wajir on the removal of the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) as Governor of Wajir County.
  - l. An order of *certiorari* be issued to remove to this honorable court and quash the resolution passed by the County Assembly of Wajir on the 27/4/2021 on the removal of the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) as Governor of Wajir County.
  - m. An order of *certiorari* be issued to remove to this honorable court and quash the resolution passed by the Senate of the Republic of Kenya on the 17/5/2021 on the removal of the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) as Governor of Wajir County and all consequential Kenya gazette notices issued pursuant to the said resolution.
  - n. A permanent injunction be issued to prevent the 2<sup>nd</sup> interested party, (8<sup>th</sup> respondent) from performing the functions of Governor of Wajir County based on the impeachment resolution of the County Assembly of Wajir on 27/4/2021 and the resolution of the Senate of the Republic of Kenya of 17/5/2021 regarding the removal of the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) by way of impeachment.
  - o. Costs of the petition be paid by the respondents.
4. In petition No E017 of 2021 Council of Governors, (6<sup>th</sup> petitioner) and the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) approached the court through the petition against the County Assembly of Wajir (1<sup>st</sup> respondent) the Speaker of County Assembly of Wajir(3<sup>rd</sup> respondent), the Speaker of the Senate(5<sup>th</sup> respondent), Ahmed Ali Moktar (8<sup>th</sup> respondent), the Assumption of Office of the Governor Committee County Government of Wajir (10<sup>th</sup> respondent) seeking orders for –;
- a) A declaration that the notice of motion dated 19/4/2021 for the removal of the 1<sup>st</sup> petitioner from office and debated on the 27/4/2021 is in contravention of articles 10, 47, 50 and 196 of *the Constitution*.
  - b) A declaration that the 2<sup>nd</sup> respondent violated the 1<sup>st</sup> petitioners' right to fair administrative action as provided under article 47 of *the Constitution* and section 4 of the *Fair Administrative Action Act*, when he caused the placing in the Order paper and the reading of the notice of motion dated 19/4/2021 for the removal of the 1<sup>st</sup> petitioner from office during the 1<sup>st</sup> respondent's sitting of 27/4/2021 before the expiry of the seven (7) days' period as provided under Standing Order 67(4) of the Wajir County Assembly Standing Orders.
  - c) A declaration that Standing Order 67 of the Wajir County Assembly Standing Orders is unconstitutional in so far as it does not provide a structure that allows for effective public participation.
  - d) An order of *certiorari* to bring into this court and quash the resolutions made by the 1<sup>st</sup> and 2<sup>nd</sup> respondents on 20/4/2021 in relation to the removal of the 1<sup>st</sup> petitioner from office based on the notice of motion dated 19/4/2021.
  - e) A declaration that any motion passed relating to the removal of the 1<sup>st</sup> petitioner based on the notice of motion dated 19/4/2021 is null and void.



- f) A declaration that the proceedings for removal of the 1<sup>st</sup> petitioner before the 2<sup>nd</sup> respondent that was held on 27/4/2021 in violation and disregard of court orders were null and void.
- g) This honorable court be pleased to issue orders of *certiorari* to quash any resolution made by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in relation to the removal of the 1<sup>st</sup> petitioner from office based on the notice of motion tabled in the County Assembly of Wajir on 27/4/2021 or thereabout.
- h) A declaration that the impeachment proceedings undertaken by the Senate with respect to the 1<sup>st</sup> petitioner is a nullity on account of violation of the court Order issued in Meru High court Constitutional petition E009 of 2021.
- i) A declaration that the proceedings for removal of the 1<sup>st</sup> petitioner as Governor before the Senate did not meet the threshold required under article 181 of *the Constitution* or the standard of proof required under section 33(3) of the County Government Act of proof beyond reasonable doubt.
- j) A declaration that under article 181 of *the Constitution* and sections 33 and 34 of the County Government Act, a Governor cannot be removed from office under the principle of collective responsibility over acts and omissions of members of the County Executive Committee, County Secretary or County Public Service.
- k) A declaration that the special issue of the Kenya gazette No 4702 dated 17/5/2021 issued by the 3<sup>rd</sup> respondent pursuant to the alleged impeachment of the 1<sup>st</sup> petitioner is invalid.
- l) An order of *certiorari* be and issued to quash the special issue of the Kenya gazette No 4702 dated 17/5/2021 issued by the 3<sup>rd</sup> respondent pursuant to the alleged impeachment of the 1<sup>st</sup> petitioner.
- m) A declaration that the special issue of the Kenya gazette No 4703 dated 17/5/2021 issued by the 5<sup>th</sup> respondent's chairman is invalid.
- n) An order of *certiorari* be and issued to quash the special issue of the Kenya Gazette No 4703 dated 17/5/2021 issued by the 5<sup>th</sup> respondent's chairman.
- o) A declaration that the swearing in of the 3<sup>rd</sup> respondent as the Governor of Wajir County was held in violation and disregard of court Orders and in violation of sections 11(2) and 16(1) of the Assumption to the Office of Governor Act is null and void.
- p) This honorable court be pleased to issue any other order or relief as it may deem fit and just to ensure that law, order and constitutionality is observed.
- q) Costs of this petition.

#### **Historical background and Outline of the petitioners' case**

5. As pleaded the petitioners' case is that on 18/5/2021, 2<sup>nd</sup> interested party (8<sup>th</sup> respondent) herein, took the oath of office as the governor of Wajir County in an unconstitutional, unlawful, irregular and unprocedural assumption of office of the Governor ceremony facilitated by the 3<sup>rd</sup> and 4<sup>th</sup> respondents. The taking of oath of office by the 2<sup>nd</sup> interested party (8<sup>th</sup> respondent) on 18/5/2021 was preceded by a series of unconstitutional conduct by the respondents and the 2<sup>nd</sup> interested party (8<sup>th</sup> respondent) that make the same untenable.
6. That position is grounded on the allegations that the notice of removal of the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) from office of the governor by way of impeachment on allegations of gross violation of *the*



- Constitution and other laws was not supported by the requisite signatures of 1/3 of the members of the 1<sup>st</sup> respondent yet on 19/4/2021, the 3<sup>rd</sup> respondent, upon receipt of, proceeded to notify the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) herein of the impeachment motion against him, which was then tabled for debate on 27/4/2021.
7. Despite having been made aware of the Conservatory Orders issued by the court on 26/4/2021 suspending the notice of impeachment dated 19/4/2021 together with the notification of motion for impeachment dated 20/4/2021, the 4<sup>th</sup> respondent moved the motion of impeachment against the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) for debate on the floor of the 1<sup>st</sup> respondent, which motion was presided over by the 3<sup>rd</sup> respondent.
  8. On 27/4/2021, counsel for the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) registered their objection to the proceedings of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents in respect to the impeachment motion in contravention of the court Orders of 26/4/2021 and the said 3<sup>rd</sup> respondent purported to interpret the Conservatory Order to the effect that the 1<sup>st</sup> respondent had no responsibility to obey a court Order, and that the court had no jurisdiction to injunct the 1<sup>st</sup> respondent upon which interpretation by the 3<sup>rd</sup> respondent, the motion for impeachment was tabled by the 4<sup>th</sup> respondent and debated by the members of the 1<sup>st</sup> respondent, which debate culminated into a resolution to remove the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) from Office of the Governor Wajir County by way of impeachment. Consequently, the 3<sup>rd</sup> respondent forwarded to the 5<sup>th</sup> respondent the resolution of the 1<sup>st</sup> respondent resolving to remove the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) from Office of the Governor Wajir County.
  9. On 29/4/2021, the petitioners moved to court seeking additional orders, this time round, to restrain the 5<sup>th</sup> and 6<sup>th</sup> respondents from proceeding to interrogate the charges and resolution of impeachment as forwarded by the 1<sup>st</sup> respondent upon which motion the court issued Conservatory Orders maintaining the status quo prevailing before the notice of impeachment on the same day. Once again and contrary to the said orders, on 1/5/2021, the 5<sup>th</sup> respondent gazetted a special sitting of the 6<sup>th</sup> respondent to be held on 6/5/2021, to hear the charges against the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) as laid in the resolution to remove him from office.
  10. Undeterred to seek their day in court, the petitioners on 3/5/2021 once again for the 3<sup>rd</sup> time approached the court which then issued the third Conservatory Order restraining the 5<sup>th</sup> and 6<sup>th</sup> respondents from proceeding with the impeachment motion against the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner). That order was served but the 5<sup>th</sup> respondent proceeded to preside over the special sitting of the 6<sup>th</sup> respondent, in disregard of the said court Order and it was resolved by the 6<sup>th</sup> respondent that the charges against the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) would be heard by a committee of eleven members, who were then selected.
  11. On 8/5/2021, the select committee summoned the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) to appear before it on 12<sup>th</sup> and 13<sup>th</sup> May 2021 so as to defend himself against the charges leveled against him. The 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) appeared before the select committee and after duly informing it of the Conservatory Orders issued by the court, the 6<sup>th</sup> respondent nonetheless proceeded to hear the charges against the 1<sup>st</sup> interested party, (7<sup>th</sup> petitioner), and came up with a report and recommendations which were then laid before the 6<sup>th</sup> respondent on the 17/5/2021 by the chair of the committee, Hon Okong'ó Omogeni. The report of the select committee when so tabled before the house showed and established that, out of the 15 charges leveled against the 1<sup>st</sup> interested party, (7<sup>th</sup> petitioner) only the charge of gross violation of article 43 of the Constitution on the right to highest attainable standard of health was substantiated and amounted to a ground for impeachment as provided under article 181 of the



Constitution, and thus resolved to remove the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) from the Office of Governor.

### **The grievances and alleged constitutional and statutory violations**

12. The petitioners aver that the process of removing the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) from office was flawed from the start, and thus any resolution made from the suspended notice of motion for impeachment dated 19/4/2021 was equally flawed for reasons that the minimum threshold of the members of the assembly supporting the notice of impeachment, as required by section 33(1), County Government Act and the 1<sup>st</sup> respondent's Standing Order No 67(1) and 70(1) was not met and that having been restrained by the court Order, any and everything that was pursued in disregard of the court Order was a nullity ab initio. In addition, it was asserted that the conduct of the two assemblies affronted articles 1, 10, 27, 47, 50 and 177(1) of the Constitution as well as section 4 of the Fair Administrative Actions Act and the 1<sup>st</sup> respondents Standing Orders No 67 and 70. The constitutional principle of public participation in governance imposed by article 196(1) of the Constitution and section 87 of the County Government Act was alleged to have been circumvented thus rendering the entire process null and void. On the proof of the allegations against the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) it was asserted that no proof was made out because no document was tabled before the Assembly nor was any witness called to prove the allegations hence the process fell short of the principles set out by the court of Appeal in Nyeri in Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others [2014] eKLR.
13. For those reasons, in the petition and the affidavit in support, the petitioners plead with the court to invoke its jurisdiction under article 165 of the Constitution and issue the remedies sought so as to uphold the dictates of articles 1, 10, and 259 of Constitution the Constitution by checking on the arbitrariness of the respondents. They relied on Hadkinson v Hadkinson [1952] 2 All ER 567.
14. They then aver that the whole impeachment process by the respondents did not abide by the principles set out by the Court of Appeal in Martin Nyaga Wabora (Supra) as between nexus and standard of proof. They aver that the decision to swear in the 2<sup>nd</sup> interested party (8<sup>th</sup> respondent) was done in violation of sections 11(2) and 16(1) of the Assumption of the Office of the Governor Act, because it was done hurriedly to defeat the rights of the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) to seek redress and clog his right to fair hearing under articles 47 and 50(1) of the Constitution.
15. The petitioners contend that despite there being an automatic statutory stay in line with the provisions of sections 11(2) and 16(1) of the Assumption of the Office of the Governor Act, the 3<sup>rd</sup> and 4<sup>th</sup> interested parties (9<sup>th</sup> and 10<sup>th</sup> respondent) swore in the 2<sup>nd</sup> interested party (8<sup>th</sup> respondent) to the Office of Governor in order to defeat the subject and stratum of this petition. They aver that the respondents failed to comply with the provisions of articles 1, 10, and 196(1) of the Constitution and section 87 of the County Assembly Act on the need to undertake public participation in its legislative and any other business of the Assembly.
16. They aver that the process of removal from office of the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) herein was a pertinent and sensitive issue that could not be undertaken in exclusion of the members of the public, as the same would have the ultimate effect of affecting the manner in which the County Government of Wajir was governed. They aver that before the process of removal from office of the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) commenced and/or before a decision is arrived at, an opportunity must be availed to the voters and residents of Wajir County to air their views, to avoid a situation where an otherwise popular governor is removed from office due to malice, ill will and vendetta on the part of the 1<sup>st</sup> respondent.



17. They aver that public participation ought to precede the filing of the impugned motion of impeachment and assert that the chair of the special committee of the Senate submitted that he was marveled to find that the committee found the allegations to have been substantiated in absence of evidence of public participation. They aver that there was no clear nexus between the alleged gross violation complained of and the conduct of the 1<sup>st</sup> interested party. The petitioners accuse the respondents of abuse of their oversight powers and privileges conferred upon them by article 185 of [the Constitution](#) on the basis that the ground founded on articles 201(a) and 183(3) of [the Constitution](#) do not require the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) to submit to the 1<sup>st</sup> respondent any quarterly expenditure report, and as such, he cannot be deemed to have violated non-existing function. They then fault the respondents for failing to prove that the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) connived, consented or had knowledge of the commission of the violations.
18. It was additionally asserted that the grounds disclosed on the notice of impeachment fell short of meeting the threshold of what amounts to gross violation and relied on the Nigerian case of *Hon Muyiwa Inakoku & others v Hon Abraham Adalolu Adeleke* SC 272/2006 which defined gross violation to include ‘interference with the Constitutional functions of the legislature and the judiciary by an exhibition of unconstitutional executive, abuse of the fiscal provisions of [the Constitution](#), abuse of the Code of Conduct for public officers, disregarding and breach of the provisions on fundamental rights, interference with the local government funds and stealing from the funds, pilfering of the funds for personal gains and subversive conduct which is directly inimical to the implementation of some other major sectors of [the Constitution](#).’
19. They urge the court to uphold the dictates of articles 1, 10 and 259 of [the Constitution](#) by checking on the arbitrariness of the respondents. They aver that the motion for the removal of the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) from office as evidenced by the pleaded particulars of the charge are speculative, hypothetical and none intimates any violation on [the Constitution](#) or any other law, neither showing personal gain on the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner).
20. They stressed the fact that the removal process under article 181 is only applicable where the violation is gross and ought not to be used as a means of meting out a political punishment against the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) for actions and omissions committed by a 3<sup>rd</sup> party, like in the instant case where the grounds advanced were flimsy, vexatious and commenced in bad faith and urge the court to uphold the 1<sup>st</sup> interested party’s (7<sup>th</sup> petitioner) dignity as enshrined under article 28 of [the Constitution](#), from being violated by the respondents.
21. Lastly, a position was taken that the respondents violated Standing Orders 67(1), (3) and 70(1) of Wajir County Assembly, section 33(1) of the County Government Act, articles 1, 10, 27, 43, 47, 50(1) and (2) (c), 177(1) and 196(1)(b) of [the Constitution](#), and section 4 of the Fair Administrative of Actions Act. On the fault that the petitioners lack the requisite *locus standi*, it is asserted that they have the requisite *locus standi* to institute court proceedings on their own behalf or in the interest of other persons claiming contravention of fundamental rights and freedoms, by virtue of articles 22, 258 and 259 of [the Constitution](#) and further that the court is vested with jurisdiction to determine whether a right or fundamental freedom has been denied, violated, infringed or threatened by the provisions of article 165(3)(b), (6) and (7) of [the Constitution](#) and to issue appropriate and befitting remedies.

#### **The 1<sup>st</sup> - 4<sup>th</sup> Respondents’ Response**

22. The 1<sup>st</sup> - 4<sup>th</sup> respondents filed a replying affidavit sworn on 14/12/2021 together with a response and cross petition in opposing the petitions and asserts, first, that the petition is defective as it is



not supported by an affidavit to support the allegations made. According to them, the absence of a supporting affidavit vitiates the competence of the petition and renders it incurably defective.

23. On the merits and substance of the petition, it is asserted that the majority of the county delegations of the Senate voted to uphold the impeachment charge, and that decision was communicated to the general public via gazette notice No 4702 dated 17/5/2021, pursuant to which the 2<sup>nd</sup> interested party (8<sup>th</sup> respondent) was duly sworn in on 18/5/2021, and he assumed office in line with the provisions of article 182(2) of *the Constitution* and section 16(1)a of the Assumption of Office of Governor Act. They deny the petitioners' averments that due process was not followed in the impeachment and assumption of office processes, and maintain that the laid down procedure was followed.
24. It is added that a notice was placed in the local daily calling for submissions of memoranda by members of the public to facilitate public participation and appearance of the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) before the County Assembly in accordance with the provisions of article 196(1) (b) of *the Constitution* and that on 20/4/2021, after the proposed motion for the removal of the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) was submitted by the Clerk to the Speaker of the County Assembly for approval, the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) was invited through a letter dated 20/4/2021 to appear before the County Assembly on 27/4/2021. On his appearance, 37 members of the assembly, more than 2/3 of the full assembly members, voted in favor of the motion to remove the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) thus the impeachment met the threshold provided under article 181(1) of *the Constitution*. Members of the public were equally notified that a copy of the notice of motion could be accessed from the office of the Clerk and/or County Assembly website, therefore public participation was facilitated as per the relevant laws. The decision in *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR, where the Court of Appeal laid down the framework relating to public participation was then cited.
25. In response to the issue of nexus and threshold, it is averred that the special committee found that the charge on gross violation of *the Constitution*, the County Governments Acts, the *Public procurement and Asset Disposal Act* and Finance Management Act had been substantiated and therefore the impeachment provided for both under statute and *the Constitution*, is a non-judicial adjudication as it is the sole power of the house to try all impeachments. To the respondents, the court lacks jurisdiction to hear a challenge to an impeachment process when the same is still before the house, since the doctrine of separation of powers and the procedures adopted for the removal of a governor have to be considered. The decisions in *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2017] eKLR, *Charity Kaluki Ngilu v County Assembly of Kitui & 2 others* [2020] eKLR and *Mike Sonko Mbuvi Gideon Kioko v Clerk Nairobi City County Assembly & 5 others* [2020] eKLR, were cited for the proposition that courts are required to exercise judicial restraint, limiting themselves in determining the grounds for the impeachment of a governor until the same has been heard and determined by the County Assembly and the Senate.
26. The subject impeachment having been conducted during the COVID-19 pandemic, which severely limited interpersonal interactions, the ideal platform for communication was the use of technology, since physical interactions of the residents through public bazaars or town hall meetings were not feasible. They deny any breach or violations of any orders issued by the court, as no formal application for contempt of the said orders was filed in court.
27. Emphasis was then placed on the allegations that the health sector of the County government of Wajir ran into a deplorable state, which has compromised and undermined the realization of the right to highest attainable health standard of the people of Wajir, under the 1<sup>st</sup> interested party's (7<sup>th</sup> petitioner)



supervision who is accused of failing to explain how a colossal sum of money allocated to Wajir County to avert the spread of the COVID-19 pandemic was utilized.

28. In response to the issue of locus standi of the petitioners, the respondents assert that the 6<sup>th</sup> petitioner (Council of Governors) lacks locus to move the petition and cite *Council of Governors v Attorney General & 7 others* [2019] eKLR to buttress the point that the Council lacks the capacity to initiate and maintain a petition of this nature. Further, the 6<sup>th</sup> petitioner was said to have not established a case for grant of orders sought in the petition as the pleadings do not set out with a degree of precision, the 6<sup>th</sup> petitioner's complaint, the manner in which the stated constitutional provisions were infringed and the injury sustained. Reference was made to the decision in *Anarita Karimi Njeru v The Republic* [1979] eKLR and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, on the basic threshold for constitutional petitions. It was asserted that the court lacks jurisdiction to re-open a case that underwent a political process, and as such, the petition should be dismissed.

#### **The 5<sup>th</sup> & 6<sup>th</sup> Respondents' Response**

29. Jeremiah Nyegenye, the Clerk of the Senate, in his replying affidavit sworn on 14/7/2021 avers that by a letter dated 28/4/2021, the Speaker of Wajir County Assembly informed the Speaker of the Senate that at its sitting held on 27/4/2021, it had approved a motion for the removal from office by impeachment of the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner). The Speaker of the Senate summoned the house to a special sitting of the Senate on 6/5/2021, through gazette notice No 4196 of 30/4/2021.
30. A special committee was established to investigate the proposed removal of the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) and having heard all the parties in the matter, the committee in accordance with its mandate under section 33(4) of the *County Governments Act* and Standing Order 75(2) of the Senate Standing Orders reported that Charge No 1 had been substantiated.
31. Owing to the committee's finding that one charge had been substantiated, the Senate afforded the Governor of Wajir County an opportunity to be heard and thereafter debated the motion of his removal, which was approved. The Speaker of the Senate published the resolution of the Senate to remove from office by impeachment the Governor of Wajir through gazette notice No. 4702 of 17/5/2021 in due performance of its constitutional duty pursuant to article 181 of *the Constitution*, section 33 of the *County Governments Act* and the Standing Orders of the Senate.
32. He depones that the petitioners have not provided this court with any particulars or evidence of the alleged bias against the impeached governor or the alleged breach of the principles of natural justice then urged the court not to review the decision of the County Assembly and of the Senate and come to the decision that the same was merited and based on the principles of separation of powers. It is then stressed that the impeachment proceedings are quasi-judicial in nature and deliberately assigned by *the Constitution* and the statutes to special state organs.
33. The decision in *Justus Kariuki Mate & another v Martin Nyaga Wambora & another (supra)*, was cited for the holding by the Supreme court that courts should exercise restraint in granting conservatory orders where there are timelines provided to state organs by the law. To the deponent, the Senate discharged its Constitutional and Statutory mandate within the strict timelines provided under the County Government Act, and the said discharge of the Senate's mandate does not amount to violations of *the Constitution* as alleged by the petitioners. It is added that from the report of the special committee, it is evident that the Committee adequately addressed the burden and standard of proof in impeachment, and was satisfied that the evidence tabled met the requisite threshold.

#### **The 2<sup>nd</sup> interested party's (8<sup>th</sup> respondent) Response**



34. The 2<sup>nd</sup> interested party (8<sup>th</sup> respondent) contends that the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) was lawfully and constitutionally removed from office pursuant to impeachment proceedings that were undertaken before the Wajir County Assembly and the Senate after which, he the 2<sup>nd</sup> interested party (8<sup>th</sup> respondent), took his oath of office in accordance with section 16(1) (a) of the Assumption of Office of Governor Act, was issued with a certificate of inauguration by the judiciary pursuant to article 182(2) of *the Constitution* and was subsequently sworn in as governor of Wajir County on 18/5/2021.
35. He relied on *Justus Kariuki Mate & another v Martin Nyaga Wambora & another (supra)*, and asserts that the Supreme court has held that the High court has no jurisdiction to grant any *ex-parte* Conservatory Orders that have the effect of interfering with time bound legislative processes like the impeachment of a governor. To that party, there was no breach or violation of any orders issued by this honorable court, since there is also no evidence of an appropriate application for contempt of court before the court to adjudicate on the alleged disobedience of court Orders. He denied service of the said Orders as required by law and maintains that the County Assembly of Wajir was acting within its constitutional mandate to impeach the Governor, which impeachment was not flawed and met the threshold set out under article 181(1) of *the Constitution* as read with section 33 of the County Government Act. It was further urged that the application for Conservatory Orders dated 26/4/2021 was withdrawn rendering the issue of the suspension of the notice of impeachment moot hence the removal of the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) met and satisfied the principles set by the High court and court of Appeal in *Martin Nyaga Wambora v County Assembly of Embu & 37 others* [2015] eKLR, as to the threshold, standard of proof and nexus between the complaints before the County Assembly of Wajir and the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) as Governor.
36. Section 11(2) as read with 16(1) of the Assumption of the Office of the Governor Act were pointed out to not provide for an order of stay or suspension of the assumption of office and that there had been sufficient, satisfactory and adequate public participation as required by law since there was the notice placed in the dailies calling for submission of memoranda and participation over and above members of the public being notified that a copy of the notice of motion could be accessed from the office of the clerk and/or the assembly website. The matter was equally published in the local radio station with wide local coverage also requesting members of the public to present their memoranda on the proposed removal of the governor. Pursuant to such invitation, members of the public presented a number of memoranda which were considered in the impeachment process.
37. A position was taken that there was a clear nexus between the deplorable standard of health in Wajir County and the tenure of the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner), as the head of the County Executive, and as such, he was personally liable for the failure in provision of health services as required by sections 30(3)(a), (b) and (f) of the *County Governments Act*, which violations met the threshold for an impeachable offence and the petitioners cannot ask this court to sit on appeal on the decision of the Senate, as it is improper in law under the doctrine of separation of powers. In conclusion, it was asserted that the petition lacks merit, does not raise any legitimate issues for determination by this court, is fatally defective and is intended to defend impunity and to that extent, it is against public interest and thus should be dismissed.

### **Submissions**

38. The petition was directed to be heard by way of written submissions with oral highlights. Pursuant to such directions parties filed respective submissions on different dates then attended court on the 20<sup>th</sup> December 2021 for purposes of highlighting. The summary of the submissions is as below.

### **Submissions by the 1<sup>st</sup> - 6<sup>th</sup> Petitioners**



39. These parties submitted that the process of impeachment before the County Assembly was devoid of any legitimacy because it violated the 1st respondent's own Standing Orders, denied the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) a right to fair hearing and was undertaken in violation of clear court Orders. Counsel submitted that although the notice of motion for his impeachment was signed by the mover, the same was and is still substantially void for want of proper execution, validation/verification and affirmation by at least one-third of the members of the 1<sup>st</sup> respondent. The 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) was not accorded an opportunity to be heard contrary to article 50 of *the Constitution* and that the impeachment process was unconstitutional for want of public participation, as the 1st and 2nd respondents failed to either adduce proof of the placement of the notice of impeachment in the local daily or audio clips for the alleged radio interviews, in order to inform the public. Reliance was placed on the decision in *Martin Nyaga Wambora v County Assembly of Embu & 37 others* [2015] eKLR, where it was observed that, "it is misleading to conclude that there was public participation merely because the proceedings in the County Assembly were public."
40. Counsel submitted that article 196(1)(b) of *the Constitution* obligates a County Assembly to facilitate public participation and active involvement of the people in the legislative and other business of the assembly and its committees. He added that the 1st and 2nd respondents proceeded to debate and deal with the impeachment motion despite the fact that there were express court Orders staying the process hence the impeachment did not meet the threshold set out under article 181(1) of *the Constitution*. He submitted that the record of the Hansard of the hearing before the Senate Committee revealed that, the 1st respondent never adduced any evidence or called any witness to prove the alleged gross violation of *the Constitution* leading to his removal from office and further that the charge and allegations for which he was impeached are day to day matters that occur within the County, but are ordinarily addressed by the Health Department of Wajir County Government under the leadership of the County Executive member in charge of that department, and therefore, there was no nexus between him and the charge for which he was found guilty. He relied on *Martin Nyaga Wambora v County Assembly of Embu & 37 others (supra)*, where the court of Appeal held that, for one to have been lawfully impeached, the violation he is alleged to have committed ought to be gross violation and not just any violation of *the Constitution* or any other law. In his view, where the violation is not gross, the removal process under article 181 of *the Constitution* is not available. The failure by the Senate Committee to consider the exonerating evidence on Health as captured by the National Survey Report on Health published in May 2019 amounted to substantial miscarriage of justice.
41. He submitted that in impeaching the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) on the said grounds and the manner it did, the Senate effectively lowered the standard of proof and the threshold on impeachment matters, thus exposing all 47 counties to political upheavals, which amounted to gross violation of *the Constitution* on the part of the 1st - 4th respondents. On the face of the events outlined in the amended petitions, the impeachment process appears to be a political witch hunt, a vice that should not be condoned by the court, for the same sets a precedent that will disrupt governance in all 47 counties. That the court had jurisdiction to determine the constitutionality of a provision of a statute and indeed Standing Orders of any legislative arm, in line with article 165(6) of *the Constitution* and pointed out that Standing Order 67 of the Wajir County Assembly is inconsistent with *the Constitution* in so far as it does not provide for a structure that allows for effective public participation concerning the issues of impeachment of a governor. He cited the South African case of *Borbet South Africa Ply Ltd & others v Nelson Mandela Bay Municipality* 3751 of 2011 [2014] ZA EA PEHC 35 [2014] 5 SA 256, where it was held that, 'the obligation to encourage public participation at local government level goes beyond a mere formulation in which public meetings are convened and information shared. The concept of participatory democracy as envisaged by *the constitution* requires that the interplay



- between the affected representatives' structures and the participating community is addresses by means of appropriate mechanisms'.
42. *King v Attorneys Fidelity Fund Board of Control & anor* [2006] 1 SA 474, a decision by the South African Supreme court was cited for the proposition that 'public involvement might include public participation through submission of commentary and representations; but that is neither definitive nor exhaustive of its content *Doctors for Life International v The Speaker of the National Assembly & others* CCT 12 of 2005 [2006] ZACC 11, was cited on the two aspects of the duty to facilitate public participation while the decision by our Supreme court in *Justus Kariuki Mate & anor v Martin Nyaga Wambora (supra)*, was pointed out not to have set a bar to this court from issuing conservatory orders in cases of impeachment neither is the issuance of those orders a violation of the separation of powers doctrine. In deed that clarification was made in [Anne Mumbi Waiguru v County Assembly of Kirinyaga](#) [2020] eKLR, that, 'the deployment of conservatory orders in the exercise of supervisory jurisdiction by the High court over the other arms of government should be done with utmost restraint and only where overt violation of [the Constitution](#) and the law has been shown.'
  43. He submitted that whenever an applicant is able to show that there is overt violation of his rights even where impeachment proceedings have commenced, the High court can issue conservatory orders so as to preserve the sanctity of the impeachment process and in the alternative that even if the respondents considered the issuance of the orders of the court as irregular, they were obligated to obey them until such a time they would have successfully moved the court to have the orders set aside. He relied on *Wildlife Lodges Ltd v County Council of Narok and anor* [2005] 2EA 344(HCK).
  44. The swearing in ceremony was termed hurried and illegally done with the sole intention to defeat 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) legal rights to ventilate a grievance with the entire impeachment process in court.
  45. The cross petition was termed frivolous, unmerited, riddled with mass misconceptions and a tale of falsehoods and the court was urged to allow the amended petition as prayed and dismiss the cross petition with costs.
  46. On the legal question whether there was compulsion that a supporting affidavit supports the further further amended petition, Rules No 11 of the Mutunga Rules was quoted to employ the use of the permissive word may to make it optional to file or not file an affidavit in support of the petition. That the petition is predicated on documents annexed by all the respondents and that one Abdullahi Issack swore an affidavit that contains all the documents. The factual issues are said not to be contended by the parties and that what is in dispute is a legal issue whether the law was complied with in the impeachment of the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) as initiated in April 2021 by County Assembly of Wajir as pleaded from paragraph 15 to 56.
  47. The other complaint is that on 23<sup>rd</sup> April, 2021 in Nairobi petition No E146/2021 (now Meru Pet No 17/2021) and on 26<sup>th</sup> April 2021, in Meru petition No E009/2021, the court issued Conservancy Orders staying impeachment proceedings which orders were duly and admittedly brought to the attention of the respondents, but they defiantly ignored the same. Over and above the flawed Constitutional process, the disobedience of court orders is itself adequate to upset everything done contrary to the said orders. Both the County Assembly and the Senate are disclosed by their own documents to have disregarded the court orders on the basis that they were not subject thereto. Yet again, on 18<sup>th</sup> May 2021 the court issued further Conservatory Orders staying the operation of the legal Notice dated 17<sup>th</sup> May 2021 which were equally served but once again ignored.



48. That the senate sat late on 17<sup>th</sup> May 2021 to confirm the impeachment of the Governor, had the same gazetted the same night to enable the deputy governor be sworn on the 18<sup>th</sup> May 2021 was viewed as hurried to violate the court Order and circumvent sections 11 and 16 of the Assumption of Office of Governor Act. The respondents are faulted for having acted contrary to the court Orders and therefore abdication of duty under article 10 with the consequence that the impeachment proceedings and the swearing in of the deputy governor are unconstitutional, null and void.
49. The supreme court decision *Justus Kariuki Mate & another v Wambora and another* [2017] eKLR was pointed out not to have taken away the jurisdiction of the High court to grant Conservatory Orders due to the principle of separation of powers but to have urged caution by the court.
50. They added that there is no evidence placed before the court by the respondents, on public participation, which is both qualitative and quantitative. A governor's removal was termed as a serious matter that must meet the requisite threshold establishing a clear nexus between the governor and the alleged failed health services. He relied on the case law of *Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others* [2014] eKLR, for what the threshold is and the need to establish the nexus.

#### **Submissions by the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner)**

51. Submissions were offered that the principles applicable in the impeachment of Governors are clear for the court to discern and in appropriate cases to avert disregard of *the Constitution* or the law, grant conservatory orders to safeguard the rule of law by invoking the jurisdiction under article 165 of *the Constitution*. The jurisdiction of the court to supervise impeachment was said to remain where such breached fundamental rights as was done in this matter. The notice of impeachment dated 19<sup>th</sup> April 2021 was said to have been invalid since standing order 67 of the County Assembly was not followed, there was no quorum and the process was hurried to ensure the governor was impeached at all costs. The lack of public participation invalidated the impeachment for failure to follow the laid down procedures of impeachment and that Public participation limited before the County Assembly does not constitute public participation.
52. On the need for an affidavit in support of an amended petition, it was submitted that a party need not file a further affidavit where a petition is amended and that under the Mutunga rules one only files a further affidavit under rule 11 if he raises new issues. He urges the court to find that the petition is competent since all facts are not disputed and none of the parties alleges prejudice by failure to file the affidavit in support of the amended petition.
53. Emphasis was put on the Hansard of County Assembly at page 205 to confirm service of the conservatory order and the senate proceedings at page 246 to show service of the order on the senate. Counsel said that the petitioners are not seeking for anyone to be found in contempt but for the court to find that the actions taken in disobedience of the court orders are null and void.
54. To the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner), gross violation means grave violation of *the Constitution* which had not been demonstrated before the two assemblies. It was further submitted that he was denied the right to fair administrative action and fair hearing under article 47 and 50 of *the Constitution* as read with Standing Order 70(1) which was breached hence the impeachment ought to be set aside for being void.

#### **Submissions by the 1<sup>st</sup> - 4<sup>th</sup> Respondents**

55. A position was taken by these parties that the petition E009/2021 is incompetent for not having been supported by an affidavit and that it's true that one does not need an affidavit to support a petition, if one relied on points of law only. It was submitted that rule 10(d) of Mutunga Rules requires the



petitioner to plead injury suffered which had not been done here and that the petition is not seeking any constitutional remedies. To counsel, the law does not allow 1<sup>st</sup>-6<sup>th</sup> petitioners to espouse claims of the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) unless that petitioner be disclosed to be incapacitated.

56. The notice of impeachment of 20<sup>th</sup> April 2021 was affirmed to have been valid and not defective as it was not only duly signed, affirmed and verified in terms of Standing Order No 67 (1) but also lodged with the speaker and received by The Assembly. To counsel, it was yet to be demonstrated that the copy served on the 1<sup>st</sup> interested party (7<sup>th</sup> petitioner) was different from the one tabled and debated in the assembly. Annexures A102 at page 40 of the affidavit, the list of MCAs and their signatures, was said to represent over 85% of the MCAs in the assembly and that the the threshold for impeachment was met.
57. Fair Administrative action and right to a fair hearing were submitted to be different in application and meaning and that the dictates of right to fair administrative action does not apply to the facts of this case because legislation is not an administrative action. In impeachment proceedings only a right to a fair hearing applies under article 50(1) and that the Governor was heard at both the County Assembly and the Senate and thus cannot claim to have been denied the right.
58. For public participation, it was submitted that, there was an advertisement in the daily nation and a public talk organized on local radio stations by members of the assembly hence there was enough public involvement in the process.
59. That the court order was served on the County Assembly was not denied it being pointed out that the Speaker gave a ruling espousing the correct position of the law that the court cannot stop parliamentary proceedings midway but ought to allow the process to go on and interrogate it at the end and determine if it was unlawful. In addition, the question of service of the court order was deemed moot because the petitioners have not applied for contempt of court and the onus was on them to prove that the impeachment did not meet the Constitutional threshold.
60. The Senate was vindicated to have addresses all the issues raised by the petitioners, the committee found that article 43 of *the Constitution* had been breached by the governor on which basis he was impeached. That issue was termed fundamental because the people of Wajir have a right to health and the threshold is that the right to health has been put at the highest pedestal. The Senate having conducted the proceedings in accordance with the law and found the allegations of breach proved, it is not the court's duty to review the decision of the Senate but to consider if the governor was given a fair hearing because article 181 of *the Constitution* does not allow the court to delve into issues outside the impeachment.
61. In regard to the cross petition, the respondents point out that the same is unopposed and ought to be allowed as prayed. It was submitted that the court has no jurisdiction to supervise parliament and that the court of Appeal had held that the governor is accountable and where lack of accountability is proved, as in this case, then the impeachment was lawful. He asked that the petition be dismissed and the cross-petition be allowed, while relying on the case law of *Mike Sonko Mbuvi Gedion Kioko & another v Clerk, Nairobi City County Assembly & 9 others* [2021] eKLR, *Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others* [2014] eKLR, *Mike Sonko Mbuvi Gidion Kioko v Clerk Nairobi City County Assembly & 5 others* [2020] eKLR for the proposition that separation of powers be observed by the courts.

#### **Submissions by the 5<sup>th</sup> & 6<sup>th</sup> Respondents**

62. These parties took the view that the removal of 7<sup>th</sup> petitioner from office was in line with *the Constitution* and the County Government Act and that the Senate only performed its mandate pursuant to article 181 of *the Constitution*, section 33 of the *County Governments Act* and the Standing



Orders of the Senate. The decision as to whether there has been gross violation of the Constitution is a merit decision which based on the principle of separation of powers is the exclusive reserve of the County Assembly and the Senate and as the petitioners have since failed to establish sufficient grounds to invoke the Court's jurisdiction and have failed to establish any basis in law for the grant of the Orders sought in the petition. The process leading to the removal of a governor is submitted to be a special process that is quasi-judicial, deliberately assigned by the Constitution and statutes to special state organs, without being shared by the court, hence the court is urged to note the strict statutory timelines in the County Government Act within which the Senate was required to complete the removal proceedings against the Governor Wajir County. The Senate discharged its constitutional and statutory mandate within the timelines provided which does not amount to violations of the Constitution. The special committee is commended to have adequately addresses the burden and standard of proof in impeachment and was satisfied that the 1<sup>st</sup> charge had been substantiated and the evidence tabled met the threshold and the 7<sup>th</sup> petitioner had willfully violated the law in a manner sufficient to warrant removal from office. To them, the petitioners are inviting the court to interfere with legislative functions, an invitation which is untenable and bad in law hence the petition ought to be struck out.

### **Submissions by the 2<sup>nd</sup> interested party( 8<sup>th</sup> Respondent)**

63. For this party, it was submitted that the further further amended petition is incompetent for having not been supported by an affidavit since the affidavit filed in April 2021 with the initial petition was filed before some parties were enjoined to this case. Counsel pointed out that some petitioners had sought to strike out the further further amended petition when it was agreed by all that the earlier petitions did not apply and they cannot now say otherwise. An affidavit in support of a petition contains evidence in support of the petitioners' claim and an allegation without evidence remains an allegation. An affidavit is the foundation of pleadings and no submissions can be made when the foundational documents are missing. That being the case and position of the law and they having denied all the allegations in the petition, they urge that Petition E009/2021 be struck out.
64. On service of the court orders, it was submitted that the same is required by rule 14 of the Mutunga Rules that proof of service shall be by return of service. The allegation that court orders were disobeyed has no foundation as there is no evidence of service of the said court order. The manner in which the orders were served has not been explained, the orders were made *ex-parte* and there cannot be a presumption that the respondents were aware of the said orders. The court was invited to find that failure to annex an affidavit of service means there is no evidence of service.
65. On the application to set aside the conservatory orders, it was submitted that no arm of government is above the law and no arm of the government should forestall the constitutional processes of another, it being stressed that impeachment proceedings are to be carried out by the Senate and County Assembly in a time bound fashion which the court should not interfere with. That all the procedures were followed to the letter by the County Assembly was underscore and therefore the *ex parte* Conservatory Orders should not have been granted nor extended without hearing the other parties. The County Assembly was absolved by the counsel to have not acted in contempt of any court Order and the Conservatory Orders ought to be set aside for having been given on no basis and without jurisdiction.
66. On the complaint that Assumption to Office of Governor Act was not complied with, the counsel, took the position that the Act does not apply where the governor is impeached and that the current Governor was sworn in within 14 days as required by law. The court was reminded to remember that it does not sit on appeal on the decisions of the Wajir people to impeach their governor. petition E009/2021 was identified to have been initially filed by 5 petitioner who may not have known what happened in the assembly because they are not members of the county assembly. To counsel, the



allegation that there was public participation has not been displaced. He relied on the case law in *Charles Okello Mwanda v Isacc & 3 others* [2014]eKLR, *Gedion Konchella V Julius Ole Senkuli* [2018]eKLR, *Maureen Nyambura v Bou KPLC, Nyamondi Ochieng Nyamogo v K Posts* [1994]eKLR and *Justus Kariuki Mate & Another v Wambora and another* [2017] eKLR on the law when and how the court may intervene on the actions taken by the assembly in its mandate in impeaching a governor and urged the court to dismiss the two petitions.

### **The Scheme, Analysis and Determination**

67. The two petitions before the court, in our analysis and appreciation challenge the impeachment of the 1<sup>st</sup> interest party on the twine issues of process and substance. The challenge on the process front takes the face of whether the process as initiated and concluded complied with the law while the the other attack questions whether the established threshold was met.
68. The two petitions were on the 20.12.2021 ordered consolidated to be heard together and one decision rendered. Based on that direction by the court, we set to consider the matter as one with a view to coming up with one determination.
69. In this petition, the six petitioner, who chose to be represented by different counsel challenge the impeachment of the 1<sup>st</sup> petitioner on several grounds, already set out, among them for reasons that the law was never complied with in the entire process. As a consequence of such failure and breach of the law, it is contended, the 3<sup>rd</sup> respondent was sworn into office of the Governor in a process also wanting in compliance with the law.
70. However, before we delve into the merits of the matter, there are technical issues raised by the respondents regarding the competence of the petition which we need to determine beforehand. The issues are whether the amended petition having not been supported by an affidavit deserves consideration by the court and if as drafted and filed, the petition meets the jurisprudential threshold that a petition must plead the alleged violations with sufficient particularity.
71. On the question of the affidavit in support of the petition, we readily confirm from reading of the file that the amended petition was indeed not accompanied by any affidavit. Our task however is to determine whether that failure is fatal or if it is a mere technicality which should never be a hindrance to the court considering the merits of the matter. We have studied the file and noted that indeed prior to the amendment, the initial petition was indeed supported by an affidavit of one Aden Ibrahim Mohammed which affidavit exhibited the documents sought to be relied upon to prove the alleged violations. That affidavit remains part of the file unless expunged by an order of the court. In addition, we find that subsequent to the filing of the initial petition, parties have filed other affidavits all confirming that there were constant developments and changes of circumstances which necessitated amendments. While we appreciate that in ordinary litigation an amended of pleadings is the only pleading to be considered by the court, we also appreciate the matter before us to be a constitutional litigation governed by the provision of *the Constitution* itself and the procedural rules made thereunder. We take guidance from article 22(3) d that that formalities be kept at bare minimum and that the court is entitled to entertain a matter lodged by way of informal documentation. In our view, the obligation to file an affidavit in support of the petition is a requirement of rule 11(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The rules must remain handmaids, and not masters, of justice designed to aid the administration of substantial justice and not to defeat it. This we take to be the current jurisprudence on the interpretation of article 159(2)



d for we are bound to follow the Supreme court in its decision in *Raila Odinga vs IEBC and 4 others* Petition (No 5 of 2013), where it pronounced itself on the matter thus;

“The essence of that provision is that a court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course.”

72. In the a recent decision by the court of appeal in *Martha Wangari Karua & another v Independent Electoral and Boundaries Commission & 3 others* [2017] eKLR, the court of appeal while underscoring the place of substantial justice in electoral dispute had this to say;-

“As has been oft stated by courts in this country, election petitions are sui generis, and akin to public interest litigation. These are not disputes that are primarily between only the parties to the petition; there is a greater concern because the electorate has an interest in knowing the winner; and if they were disenfranchised in the conduct of that election. It therefore behoves, courts to undertake and place substantive considerations above those of procedure, especially where the procedural infractions are curable...

“We reject the respondents’ argument that failure to comply with the said Rule goes to the jurisdiction of the court. In the petition before the court, the contest did not concern the date of declaration or the fact that the 3rd respondent was declared the winner of the Kirinyaga County gubernatorial election. The contest revolved primarily around the manner in which the 3rd respondent came to win the election. We fail to see how the non-compliance with Rule 8(1) undermined the jurisdiction of the court to hear and determine this issue...

...In this appeal as well, justice should not have been sacrificed at the altar of the procedural requirements of Rule 8(1), particularly because those lapses did not go to the fundamental dispute that was before the court. This does not mean that procedural rules should be cast aside; it only means that procedural rules should not be elevated to a point where they undermine the cause of justice.

....

The elevation and prominence placed on substantive justice is so critical and pivotal to the extent that article 159 of *the Constitution* implies an approach leaning towards substantive determination of disputes upon hearing both sides on evidence. Any other construction placed on Rule 8(1) in view of the fact that the materials allegedly not produced by the petitioner were before court and supplied by the respondents, was an attempt to move the goal posts after the ball had been kicked. There is nothing in the language of rule 8(1) that suggests that documents in the court file, courtesy of another party other than the petitioner, can be ignored or be a basis for dismissing or striking out the petition.”

73. For us here, we refuse to go technical and abdicate the duty to interrogate whether the impeachment process admitted by all sides to have taken place, did take place in compliance with the law. As was done by the two courts above us, we chose to disregarded technicalities that would have shielded us from determining the dispute on the merits by striking out. We follow those decisions and hold that the failure to file an affidavit to support the amended petition is not fatal but a mere lapse in the procedural requirements.



### How about the need to plead the cause with particularity?

74. In any litigation, pleadings play the very important role of informing parties as well as the court on what the dispute is. Therefore, clarity in pleadings also help the court in its obligation and mandate to deal with disputes in a proportionate and expedient manner. It has thus been our law since *Anarita Karimi Njeru v Republic* [1979] eKLR that a constitutional petition must set out with reasonable precision the rights alleged to have been violated or threatened with violation and the manner of violation.
75. In this matter we read and understand the petition to clearly precisely and specifically plead that the law under *the Constitution* on grounds of impeachment, right to be heard fairly, those under the County Government Act and the Assembly Standing Orders on the process and steps to be taken were not complied with. We find no merit on this challenge against the petition to be able to defeat it.
76. On the merits, we have identified and isolated the following issues to arise for the determination by the court:-
- i) Whether there was public participation in the process leading to the impeachment?
  - ii) Whether the removal of the 1<sup>st</sup> petitioner from office was in compliance with *the Constitution* and the law?
  - iii) Whether the court properly granted the conservatory orders?
  - iv) Whether the County Assembly and the senate properly exercised their constitutional mandate on the facts of the case?
  - v) Whether the matters pleaded established a threshold for removal by impeachment?
  - vi) What is the appropriate relief?
- Whether there was public participation in the process leading to the impeachment?
77. The dictate upon state organ, state officers, public officer and all person to ensure public participation, whenever any of them interprets *the Constitution*, makes or implements public policy, is no longer debatable. It isn't a suggestion but an obligation and a command. In the words of the court of Appeal in *British American Tobacco Ltd vs Cabinet Secretary for the Ministry of Health & 5 others* [2017] eKLR quoted with approval in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* [2018] eKLR, the concept is consistent with the principle of sovereignty of the people that permeates *the Constitution* and in accordance with article 1(4) of *the Constitution* is exercised at both national and county levels.
78. For the petitioner, it was imperative in law under articles 10 and 196 of *the Constitution* as read with sections 3(f) and 87 of the that the people of wajir county participate in the in the process that would culminate into his removal from office to which he was duly elected, but that imperative was sidestepped by the 1<sup>st</sup> and respondents. Having alleged so, the respondent in the two replying affidavits sworn by Hon Abdullah Issack, in both petitions on behalf of the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> respondents, on the 14.12.2021 asserted that the process was legally undertaken and the 3<sup>rd</sup> respondent, H E Ahmed Ali Muktar had been sworn and taken office of the governor Wajir.
79. Specifically, in answer to the complaint of failure to allow the public participate in the process, the deponent asserted that there was duly undertaken public participation in that a notice was placed in the local daily, the Daily Nation, on the 23<sup>rd</sup> April, 2021, calling for submission of memoranda. In addition , a copy of the notice of motion was deposited and could be accessed from the office of the clerk and on the Assembly website. The third media was said to have been the use of local radio stations



being Wajir Community Radio,90.9fm and Wajeer FM where some member of the assembly went and made public statements calling for submission of memoranda on the said issue. In support of the assertions alleging elaborate invitation for public participation, there was no document exhibited to support such assertion.

80. We take the view that the duty to conduct and ensure participation by the people was an obligation of the Assembly as a state organ, its leadership and members as public officer. When, therefore, there was an allegation that the duty had not been discharged, it was not for the petitioners to prove the negative, failure to conduct public participation, but it was for the duty of the respondents to avail evidence showing compliance, as a way of discharge of duty under article 10(2). in the context of this matter and with the assertion that a newspaper advert was made, the easiest thing would have been to exhibit at least a copy of the advert or such other document showing invitation of the public to give views. In the absence of such evidence, we find that no invitation was made to the public and that no public participation was conducted or afforded in violation of the constitutional duty imposed upon the respondents, being the county assembly, its clerk and the speaker.
81. We say that because public participation should always be real[1] and not treated as a mere formality but one of substance[2]. The test on whether there has been due public participation rests with the court, on case to case basis, upon consideration of many a factor including the goodwill or *bona fides* of the public actor(s), the nature of the matter, the length and quality of engagement and the mechanisms or media used to reach the people. See In the matter of the Mui Coal Basin Local Community [2015] eKLR wherein the three-Judge bench expressed the expectation on compliance to be that:

“It is not possible to come up with an arithmetic formula or litmus test for categorically determining when a court can conclude that there was adequate public participation. However, as we have alluded above, the Courts look at the bona fides of the public actor, the nature of the subject matter, the length and quality of engagement and the number of mechanisms used to reach as many people as possible.”

82. We find and hold that failure to uphold the requirement for public participation as the very heartbeat of devolution and principle of governance runs affront the supremacy of *the Constitution* and any act that is undertaken pursuant to such derogation is nothing null and void and incapable of bestowing any right or obligation on a citizen. We therefore find and declare that the process of impeachment, initiated by Hon Abdullah Issack and approved by the speaker of the county Assembly for debate and consideration by the County assembly violated the requirement for public participation and was thus null and void.

Whether the removal of the 1<sup>st</sup> petitioner from office was in compliance with *the Constitution* and the law?

83. Article 181 of *the Constitution* sets out the ground upon which a governor may be removed and obligates parliament to enact legislation providing the procedure for such removal. Pursuant to the legislative mandate, parliament enacted section 33 of the county Government Act, No 17 of 2022 which stipulates that a member of a County Assembly may by a notice to the speaker, supported by at least one thirds of the members, move a motion for the removal of the governor, which motion if approved in a resolution by at least two thirds of the members, will be notified to the speaker of the senate within two days so that the impeachment proceedings be undertaken.
84. Pursuant to section 14 of the County Government Act, the 1<sup>st</sup> respondent on the 25<sup>th</sup> February adopted, the County Assembly of Wajir standing Orders, to regulate its procedures, in particular, the



proper conduct of its proceedings. It is of not that the Standing order any County Assembly is legally permitted to make must be consistent with *the Constitution*.

85. The Standing orders exhibited to court does provide to procedures of removal of a Governor at part XIV, sections 67. we read and understand that law to require that a member of the Assembly may, before giving a notice of motion under section 33, of the County Government Act, deliver to the speaker of the Assembly, a copy of the proposed motion for removal of the governor on the grounds of Gross violation of *the Constitution* of other law. The notice of motion is decreed to be affirmed by the member and verified by the member and at least one third of all the members of the assembly, on a verification form provided by the clerk, that the particulars of the allegations contained in the motion are true to the best of their own Knowledge and belief. The notice is designed to be received by the clerk who submits it to the speaker for approval and upon approval, the mover of the motion shall give a notice of at least seven day calling for the impeachment of the governor. It is only after the seven days' notice shall have expired that the motion is put on the order paper for debate and disposal within three days. What is more, when all those conditions have been complied with, the mover must garner the support of at least two thirds of all the members of the Assembly, which evidence may be availed by the clerk preparing a list entitled 'Signatures in support of a motion for removal of governor by impeachment' and presented to the speaker at least one hour before the assembly sits.
86. We read the law to mandate that that the allegations be cogent and affirmed by the member moving the motion and also be verified by at least one third of all the members of the assembly in writing. We consider the need for affirmation and verification to underscore the gravity of the matter. The matter is a grave one because the office of a governor is a public office acquired through an election by the majority of the voters in an election in that regard. It is also grave on the basis that an impeachment that when one is impeached for abuse or misuse of a state office or breached chapter six of *the Constitution*.
87. With the foregoing observations, the first issue for interrogation is whether the notice was affirmed and verified by the mover and the members supporting the same. In legal parlance, an affirmation is the substitute or equivalent of an oath where the one objects to taking of an oath on account of the fact that he has no religious belief or that the taking of an oath is contrary to his religion. Accordingly, when the Standing Orders impose the duty upon the mover of a motion of impeachment to give an affirmation, such affirmation must take the form that a statutory declaration would take. One would expect that in the absence of an appropriate template, the form provided under section 15 of the *Oaths and statutory declarations Act* would suffice with befitting modifications. We hold that the mover of the notice of motion was obligated to give an affirmation to the facts and allegations in the notice of motion and therefore our duty is to establish if any such affirmation was given.
88. We have gone through the record of the file and have been unable to find a document that would pass as or by the name affirmation and we have come by none. Even in the filed papers, none of the parties has made any allusion to the existence of an affirmation of the truth of the allegations made. Once again, without evidence that the affirmation was given, we find that the notice of motion was defective for failure to meet the demands of the law and was thus invalid for purposes of founding the impeachment process and proceedings.
89. The law in the standing orders also sets timelines for moving the motion of impeachment and limits such time to not less than seven days between the date of approval and the date of being tabled before the assembly. We see the rationale for this to secure for the person sought to be impeached to prepare a defence and be ready to defend self.
90. To answer the question posed as an issue, we must subject the facts disclosed to the law. The fact which are not contested are that the notice to the speaker with a notice of motion was lodged with the clerk



who submitted same to the speaker on the 20<sup>th</sup> April 2021 and the approval was made the same day. There is evidence that the document was served upon the office of the Governor on the 21.4.2021 in terms of Standing Order No 67(4), seven days from the said date of service had to expire for the notice of motion to be placed on the order paper for disposal.

91. Now, on computation of time under order 50 rule 8 of the *Civil Procedure Act* and article 259(5) of *the Constitution*, provide that the first day is excluded from the computation of time while the last day is included. With such formula, we have excluded the 21<sup>st</sup> April 2021 from the seven day and determined that the seven days' period was due to expire on the 28<sup>th</sup> April 2021. It was after that date that the motion could be placed on the order paper for deliberation. Accordingly, therefore, when the same was tabled on the 27<sup>th</sup> April 2021, the legal period to incubate the notice of motion was yet to expire and therefore the notice of motion was prematurely tabled. We find that such tabling was done contrary to the standing orders adopted by the assembly to help regulate orderly proceedings. It is now trite that a party should not be allowed to benefit from a violation of the law. On that trite position, we hold that the proceedings of the 1<sup>st</sup> respondent of the 27.4.2021, done in violation of express requirements of its own Standing Orders were void and nothing founded thereon can stand.

#### **Whether the court had jurisdiction to issue the conservatory orders**

92. Standing Order 67 of the County Assembly of Wajir Standing Orders is titled 'Procedure for removal of Governor by impeachment'. This is the law that should guide the County Assembly when deliberating on an impeachment motion.
93. Standing Order No 67 (1) provides that the impeachment notice of motion shall be signed by a member who shall affirm that the particulars of allegations contained in the motion are true to his knowledge. As discussed hereinabove, the impeachment notice of motion filed before the Assembly was not affirmed by the mover which was in contravention of Standing Order No 67 (1).
94. On the other hand, Standing Order 67 provides that an impeachment motion shall only be placed on the order paper upon expiry of 7 days after notice of the motion of impeachment is given which section we find was similarly not complied with and this non-compliance we have similarly found was not complied with and had the effect of denying the 7<sup>th</sup> petitioner adequate time to prepare his defence in contravention of article 50(2)(c) of *the Constitution* and Standing Order 67 (3) and (4).
95. Article 50(2) (b) of *the Constitution* guarantees the right to a fair trial which includes the right to be informed of the charge, with sufficient detail to answer it. The County Assembly recognizes the right to fair hearing while considering a petition for removal of a Governor from office under Standing Order 70 (3) which states that:

“The person being removed from office shall be availed with the report of the select Committee together with any other evidence adduced and such not or papers presented to the Committee at least three days before the debate on the motion.”

96. The 7<sup>th</sup> petitioner's contention that the notice of motion for his impeachment was not accompanied by evidence in support thereof has not been controverted. We therefore find that 1<sup>st</sup> petitioner's right to a fair hearing under article 50(2) (b) of *the Constitution* and Standing Order 70 (3) were contravened.
97. On 26/4/2021, Mr Ndegwa advocate for the 7<sup>th</sup> petitioner sought conservatory orders to preserve the status quo concerning the impeachment of the 7<sup>th</sup> petitioner. He argued that the impeachment motion which was set for hearing on 27/4/2021 was incompetent and that the statutory notice issued by 3<sup>rd</sup> respondent was contrary to section 33 of County Government Act and Order 67(1) of the County Assembly standing orders. He similarly argued that the 7<sup>th</sup> respondent had not been served



with requisite documentary evidence forming the substance of the case and could therefore not submit his defence. He additionally argued that the impeachment process had not been subjected to public participation, that the process had not been supported by the statutory 1/3 membership and that the notice of motion was approved on 19/4/2021 and the verifying signatures belatedly filed on 20/4/2021 in an attempt to cure the anomaly.

98. From our analysis, it has been demonstrated that what was argued before the court on 26<sup>th</sup> April, 2021 albeit in the absence of the respondent was the correct position.
99. In Supreme Court Petition No.32 of 2014, *Justus Kariuki Mate & another vs Martin Nyaga Wambora*, the court held that:

“Where an inquiry would show the County Assembly to have been operating within the constitutional scheme of devolution, separation and running its legislative processes within the ordinary safeguards of the separation of powers, there would hardly be any scope for the deployment of the court’s conservatory orders more particularly without first hearing the petitioners.”

The Court of Appeal took a similar position in *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others* [*supra*] .

100. All state organs are bound by *the Constitution* and the law and courts retain the power to interpret, protect and promote *the Constitution*. A careful and thorough consideration of the impeachment process of the 1<sup>st</sup> petitioner demonstrates that the County Assembly was not operating quite properly, within its Constitutional mandate to impeach the Governor.
101. We thus find that this court was quite legitimately within its Constitutional duty to issue conservatory orders as it did on 26<sup>th</sup> April, 2021 to protect the rights of the 1<sup>st</sup> petitioner which were threatened by the non-compliance, by the respondents, with *the Constitution* and the County Assembly of Wajir Standing Orders as discussed above.
102. The impeachment of the 1<sup>st</sup> petitioner was confirmed by the Senate in its deliberations of 17<sup>th</sup> May, 2021. Subsequently on the same day, the Speaker of the Senate caused to be published a notice notifying the public of the Removal from Office By Impeachment of Hon Mohamed Abdi Mohamud, The Governor of Wajir vide gazette notice No 4702.
103. The 4<sup>th</sup> respondent by his affidavit sworn on 16<sup>th</sup> June, 2021 annexed Minutes of a virtual meeting of the Assumption of Office of Governor Committee that was held on 17<sup>th</sup> May, 2021 from 09.30 pm in which the committee resolved that the Deputy Governor Mr Ahmed Ali Mukhtar be sworn as Governor of the County Government of Wajir.
104. Subsequently, the Chairperson of the Assumption of Office of Governor Committee caused to be published a notice notifying the public of the swearing in ceremony of Mr Ahmed Ali Mukhtar as Governor of the County Government of Wajir on Tuesday, 18<sup>th</sup> May, 2021 at the Wajir County Headquarters starting at 10.00 am vide Wajir City County Gazette Vol 1 No 1 dated 17<sup>th</sup> May, 2021 and Kenya gazette notice No 4703 dated 17<sup>th</sup> May, 2021.
105. On 18<sup>th</sup> May, 2021, a notice of urgency was filed on behalf of the 7<sup>th</sup> petitioner seeking Conservatory Orders staying and/or suspending the implementation of the gazette notice issued on 17<sup>th</sup> May, 2021 notifying the 6<sup>th</sup> respondent’s resolution passed on 17<sup>th</sup> May, 2021 purporting to remove the 7<sup>th</sup> petitioner herein from office of the Governor of Wajir by way of impeachment and restraining the Speaker of the County Assembly of Wajir County or anybody, organ or authority from implementing



- the 6<sup>th</sup> respondent's Resolution passed on 17<sup>th</sup> May, 2021 and gazetted vide gazette notice published on 17<sup>th</sup> May, 2021 and from conducting and/or presiding over the taking the oath of office of Mr Ahmed Ali Mukhtar as Governor of the County Government of Wajir.
106. We have considered the provisions of the *Assumption of the Office of Governor Act* No 4 of 2019 and more particularly section 11 which deals with swearing in of the Governor and section 16 that deals with Swearing in of Deputy Governor who assumes office of County Governor. section 11 provides that:
- (1) The Committee shall publish, by notice in the Kenya Gazette and the county Gazette, the date, time and place for the conduct of the swearing-in ceremony.
  - (2) The County Governor-elect shall be sworn-in on the first Thursday after the tenth day following the declaration of the final results of the election of the County Governor by the Commission.
  - (3) The swearing-in of the County Governor-elect shall be conducted in a public ceremony before a High court
107. Section 16 of the Act provides that:
- (1) The provisions of this Act relating to the swearing in ceremony of a County Governor-elect shall apply, with the necessary modifications—
    - (a) to the swearing in ceremony of a Deputy Governor who assumes the office of the County Governor;
    - (b) to the swearing in ceremony of a Deputy Governor who is nominated to fill in a vacancy in the office of the Deputy Governor upon assumption by the Deputy Governor of the office of the County Governor; or
    - (c) to swearing of a speaker of a county assembly who assumes office under article 182(5) of *the Constitution*.
108. There is no doubt that the Assumption of the Office of Governor Committee published in the Kenya Gazette and the County Gazette that Mr Ahmed Ali Mukhtar, the 8<sup>th</sup> respondent was to be sworn in as Governor of the County Government of Wajir on Tuesday, 18<sup>th</sup> May, 2021 at the Wajir County Headquarters starting at 10.00 am.
109. Mr Ahmed Ali Mukhtar, 8<sup>th</sup> respondent was indeed sworn in as Governor of the County Government of Wajir by a High court Judge.
110. Section 11 (2) as read with section 16 (1) (a) of the Act provides that a Deputy Governor who assumes the office of the County Governor shall be sworn-in on the first Thursday after the tenth day following the declaration of the final results and in this case, following the publication of a notice notifying the public of the removal from office by impeachment of the Governor.
111. As stated hereinabove, the notice notifying the public of the removal from office by impeachment of the Governor was published on 17<sup>th</sup> May, 2021. The first Thursday after the tenth day following the publication of a notice notifying the public of the removal from office by impeachment of the Governor was on 27<sup>th</sup> May, 2021.
112. Clearly, the swearing in of the 8<sup>th</sup> respondent that took place on 18<sup>th</sup> May, 2021 which was only a day after publication of a notice notifying the public of the removal from office by impeachment of the



- Governor contravened the mandatory provisions of section 11 (2) as read with section 16 (1) (a) of the Act.
113. We therefore find that this court was quite legitimately within its Constitutional duty to issue conservatory orders as it did on 18<sup>th</sup> May, 2021 staying and/or suspending the implementation of the gazette notice issued on 17<sup>th</sup> May, 2021 notifying the 6<sup>th</sup> Respondent's resolution passed on 17<sup>th</sup> May, 2021 purporting to remove the 7<sup>th</sup> petitioner herein from office of the Governor of Wajir by way of impeachment and restraining the Speaker of the County Assembly of Wajir County or anybody, organ or authority from implementing the 6<sup>th</sup> Respondent's Resolution passed on 17<sup>th</sup> May, 2021 and gazetted vide gazette notice published on 17<sup>th</sup> May, 2021 and from conducting and/or presiding over the taking the oath of office of Mr Ahmed Ali Mukhtar as Governor of the County Government of Wajir.
114. With these findings, we reiterate that Judicial authority of the court under the constitutional Bill of Rights imports both anticipatory and post facto power to respectively restrain or remedy breach or violation of rights. The judicial authority exists where rights and fundamental freedoms are violated or threatened with violation, in the textual provisions of article 22.
115. Just as in judicial review, a party cannot be required to suffer an illegality, breach of his rights and resultant injustice on the solace that his grievance will be remedied upon appeal or other review after the damage has been done.
116. It is the singular authority of the court to deal with such threatened violations before they happen and to give appropriate relief, including conservatory orders, in terms of article 23 (3) of *the Constitution*.
117. An application to set aside Conservatory Orders filed after refusal to comply with court orders is mischievous and incompetent on the principle of *Hadkinson v Hadkinson* [1952] 2 All ER 567 (Somervell, Denning and Romer LJJ) in which the general rule was laid down to the effect that:  
...”it was the unqualified obligation of every person against, or in respect of whom, an order had been made by a court of competent jurisdiction, to obey it unless and until that order was discharged....”
118. In *Wildlife Lodges Ltd v County Council of Narok and anor (supra)*, the court expressed itself thus:  
“..... A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed.....Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice.....”
119. Consequently, we find no merit in the notice of motion dated 10<sup>th</sup> August, 2021 filed on behalf of Mr Ahmed Ali Mukhtar 8<sup>th</sup> respondent and which seeks to set aside and discharge the conservatory orders issued on 26<sup>th</sup> April, 2021 and were extended on 29<sup>th</sup> April 2021 and 03<sup>rd</sup> May, 2021 and the Conservatory orders of 18<sup>th</sup> May, 2021.

**Whether the threshold for removal of a Governor was established**



120. Article 181 of *the Constitution* provides for the threshold for the removal of a Governor from office as follows:

“

“181. Removal of a county governor

A county governor may be removed from office on any of the following grounds—

- (a) gross violation of this Constitution or any other law;
- (b) where there are serious reasons for believing that the county governor has committed a crime under national or international law;
- (c) abuse of office or gross misconduct; or
- (d) physical or mental incapacity to perform the functions of office of county governor.”

121. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have by their Cross-petition dated 14<sup>th</sup> December 2021 sought to have this court confirm the complaints in the 4<sup>th</sup> respondent’s notice of motion for removal of Governor by specific orders as follows:

“Prayers in Cross-petition dated 14<sup>th</sup> December 2021

Reasons wherefore, the 1<sup>st</sup> and 2<sup>nd</sup> respondents humbly pray for judgment against the 1<sup>st</sup> petitioner for:

- a) A declaration that the 1<sup>st</sup> petitioner is in gross violation of articles 201(e) and 183(3) of *the Constitution* and sections 149 and 166 of the *Public Finance Management Act 2012* when he failed to account for the financial resources allocated to the County Government of Wajir and appropriated by the County Assembly of Wajir;
- b) A declaration that the 1<sup>st</sup> petitioner is in gross violation of articles 201(3) of *the Constitution* and section 107(2) of the Public Finance Management Act 2012 for the 1<sup>st</sup> petitioners failure to account for the management of the County resources;
- c) A declaration that the 1<sup>st</sup> petitioner is in gross violation of section 123 of the Public Finance Management Act 2012 for the failure to draft the medium-term strategy for the financial year 2020/2021
- d) A declaration that the 1<sup>st</sup> petitioner is in gross violation of articles 176(1) and 185 of *the Constitution* for the 1<sup>st</sup> petitioners disregard of the County Assembly of Wajir as an arm of the County Government of Wajir;
- e) A declaration that the 1<sup>st</sup> petitioner is in gross violation of articles 10, and 201(a) of *the Constitution* and sections 87, 91 and 115 of the County Government Act 2012, sections 137 of the Public Finance Management Act 2012 for his failure to establish the county budget and Economic Forum for the County Budget consultation process;
- f) A declaration that the 1<sup>st</sup> petitioner is in gross violation of sections 30(2)(k) of the County Government Act 2012 for his failure to deliver the Annual state of the County address;



- g) A declaration that the 1<sup>st</sup> petitioner is in gross violation of sections 30(2)(j) of the County Government Act 2012 for his submit to the County Assembly an annual report of the implementation status of the county policies and plans;
- h) A declaration that the 1<sup>st</sup> petitioner is in gross violation of regulation 167(1) of the *Public Finance Management [County Governments] Regulations, 2015* for his failure to establish an audit committee for the County of Wajir;
- i) A declaration that the 1<sup>st</sup> petitioner is in gross violation of sections 19 of the Wajir County Disaster Management Act for the failure to seek approval of payments out of the emergency fund;
- j) A declaration that the 1<sup>st</sup> petitioner is in gross violation of regulation 82(1)(b) of the Public Finance Management (County Governments) Regulations 2015 by operating nineteen (19) bank accounts in local commercial banks;
- k) A declaration that the 1<sup>st</sup> petitioner is in gross violation of regulation 25(1)(b) of the Public Finance Management (County Governments) Regulations 2015 by exceeding the expenditure limit of 35% County Governments total revenue;
- l) A declaration that the 1<sup>st</sup> petitioner is in gross violation of section 119(5) of the Public Finance Management Actions 2012 for his failure to keep a complete record of all the bank accounts required under the provisions of *the Constitution* and thee supporting legislation on public finance;
- m) A declaration that the 1<sup>st</sup> petitioner is in gross violation of articles 201(a)(d) and 226(5) and 227(1) of *the Constitution* for the failure to follow the due process of the law when it comes to the procurement of goods and services;
- n) A declaration that the 1<sup>st</sup> petitioner is in gross violation of articles 227 of *the Constitution*, section 47 of the *Public Procurement and Asset Disposal Act* 2015 for his failure to prudently manage the County Wajir resources by engaging in the procurement of goods and services without a system that is fair, equitable, transparent, competitive and cost effective;
- o) A declaration that the 1<sup>st</sup> petitioner is in gross violation of articles 235 and 236 of *the Constitution* of Kenya for being in abuse of power and authority when it comes to staffing of county governments an protection of public officers and as such is in abuse of office;
- p) A declaration that the 1<sup>st</sup> petitioner is in gross violation of articles 73(2)(b) of *the Constitution* by failing to be objective and partial when it comes to decision making and in ensuring that the decisions are not influenced by nepotism, favoritism and other improper motives or corrupt practices and as such is in abuse of office;
- q) A declaration that the 1<sup>st</sup> petitioner is in gross violation of section 59(1)(b) of the County Government Act 2012 as he sought to usurp the power the powers of the County Public Service Board to appoint persons to hold or act in office of the county public service board and as such is in abuse of office;
- r) Costs of this cross-petition be awarded to the petitioners;
- s) Any other order that this honorable court may deem just and fit in the circumstances.”



122. These reliefs largely mirror in effect the determination by the Senate of the motion to remove the Governor where it was resolved as follows:

“Senate Resolution of 17<sup>th</sup> May 2021

Now therefore, pursuant to section 33 (6) (b) of the County Government Act and Standing Order 75 (4)(b), the Senate, after according to Honourable Mohammed Abdi Mohamud, the Governor of Wajir County an opportunity to be heard, resolves to impeach the Governor of Wajir County on the ground of gross violation of *the Constitution* of Kenya, 2010, the *County Governments Act* 2012, the *Public Procurement and Asset Disposal Act* 2015 and the Public Finance Management Act 2012.”

123. It is the proper province of the County Assembly and the Senate in removal proceedings determine the issues raised in the cross-petition which, if proved, would qualify as “gross violation of this Constitution or any other law” under article 181 (a) of *the Constitution*. To entertain and determine the cross-petition would clearly be to affirm the decision of the Senate without a valid appeal before us. On the other hand, the court cannot determine that there was no merit in the complaint against the Governor by the 4<sup>th</sup> respondent who moved the Motion of removal of the Governor from office. The court is not exercising an appellate review of the Senate determination.
124. The Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Ors* (*supra*), a case involving the vetting of appellant for appointment to the Ethics and Anti-Corruption Commission, upheld the doctrine of separation of powers and said:

“(54) In our view, the test is whether the means applied by the organs of appointment to meet their legal duty has been performed in compliance with the object and purpose of the Ethics and Anti-Corruption Act as construed in light of article 79 of *the Constitution* of Kenya. Under this test, the courts will not be sitting in appeal over the opinion of the organ of appointment, but only examining whether relevant material and vital aspects having a nexus to the constitutional and legislative purpose of integrity were taken into account in the actual process. Stated otherwise, the analysis turns on whether the process had a clear nexus with a determination that the candidates meet the objective criteria established in law rather than a judgment over the subjective state of mind of the decision makers. This in our view provides a fact-dependent objective test that is judicially administrable in such cases....

(56) The question then becomes, what is the standard or the test of the review? It was the contention of the appellant that the standard of review must be deferential given that appointments are committed to the other organs of government. In view of our constitutional design and the institutional competences attendant to it, it seems to us that this view cannot and has not been seriously contended in principle by any of the respondents. Deference is multi-directional, and we are prepared to hold that in the same way the other branches are to defer to the jurisdiction of the courts, the courts must also defer to the other branches where the constitutional design so ordains. We hold that the standard of judicial review of appointments to State or Public Office should therefore be generally deferential, although courts will not hesitate to be searching where the circumstances of the case demand a heightened scrutiny



provided that the courts do not purport to sit in appeal over the opinion of the other branches.”

See also *Martin Wambora & 3 others v Speaker of the Senate & 6 others (supra)*.

125. In this matter, the court cannot sit, and is not sitting, on appeal from the determination of the County Assembly or the Senate, and it may not, therefore, make a finding on the merits of the notice of motion for removal of the Governor. For the same reason, the court cannot make a determination of the matters raised in the Cross-petition by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent, the County Assembly, Clerk and Speaker that the 1<sup>st</sup> petitioner has violated the specified articles of *the Constitution*, the *County Governments Act* and the Finance Act as that merit determination is within the province of County Assembly and the Senate.
126. As *Mumo Matemu and Martin Wambora* cases held what the court is required to consider is “whether relevant material and vital aspects having nexus to the constitutional and legislative purpose” or “whether the process had a clear nexus with the determination”. Had the process of initiating and prosecution of the motion for removal be conducted in accordance with the constitutional safeguards on fair administrative action and the statutory provisions of the *County Governments Act* and the Standing Orders of the County Assembly, giving the 7<sup>th</sup> petitioner a fair trial and opportunity to defend himself on the allegations, the merit determination by the County Assembly and the Senate may have been valid as decisions of the organs constitutionally mandated to deal with the question of removal of Governor from office.
127. The court has found that the impeachment proceedings were conducted in breach of the constitutional and statutory provisions and in disobedience of the orders of the court made by the High court, as the constitutional court, prior to the commencement of the impeachment trial proceedings. The Proceedings of the County Assembly were null and void, as were the subsequent confirmation at the Senate flowing from the County Assembly determination and, having so decided, we must decline the invitation by the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> respondents through their cross-petition of 14<sup>th</sup> December 2021 to make the declarations sought therein.
128. For the same reason, we do not find it necessary to consider whether a nexus was established between the complaint in the notice of motion of the 4<sup>th</sup> respondent and the grounds of impeachment as to warrant removal from office of the 7<sup>th</sup> petitioner Governor.

### Orders

129. Accordingly, for the reasons set out above, the court makes the following orders:
  - a. A Declaration that the impeachment process initiated by the 4<sup>th</sup> respondent, Abdullahi Issack through the notice of motion dated 19<sup>th</sup> April 2021, was conducted in violation of the right to public participation and the 7<sup>th</sup> petitioner’s right to fair administrative action and fair hearing, under articles 10, 47 (1) and 50 (1) of *the Constitution* of Kenya and in breach of statutory procedures of the *County Governments Act* 2012 and the Standing Orders of the County Assembly of Wajir.
  - b. A declaration that the proceedings for removal of the 7<sup>th</sup> petitioner before the 1<sup>st</sup> respondent (County Assembly of Wajir) held on 27/4/2021 was in violation and disregard of court orders and therefore null and void.
  - c. A Declaration that the 7<sup>th</sup> petitioner, Amb. Mohammed Abdi Mohammud, was not validly removed from the office of the Governor of the County of Wajir by the impeachment process which was held in contravention of articles 10, 47, 50 and 196 of *the Constitution*.



- d. A Declaration that the appointment of the 8<sup>th</sup> respondent, Ahmed Ali Mukhkar, as Governor of Wajir County and his subsequent nomination and appointment of a Deputy Governor is null and void.
  - e. The Cross-petition by the 1<sup>st</sup> and 3<sup>rd</sup> respondents, respectively the County Assembly of Wajir and the Speaker of the County Assembly, dated 14<sup>th</sup> December 2021 is declined.
  - f. The application for setting aside dated 10<sup>th</sup> August 2021 filed by the 8<sup>th</sup> respondent, Ahmed Ali Mukhkar, is dismissed.
  - g. An order of *certiorari* to bring into this court and quash the decision made by the 3<sup>rd</sup> respondent on 20/4/2021 in relation to the removal of the 1<sup>st</sup> petitioner (7<sup>th</sup> petitioner) from office based on the notice of motion dated 19/4/2021.
  - h. An order of *certiorari* to quash any resolution made by the 1<sup>st</sup> and 3<sup>rd</sup> respondents in relation to the removal of the 1<sup>st</sup> petitioner (7<sup>th</sup> petitioner) from office based on the notice of motion tabled in the County Assembly of Wajir on 27/4/2021 or thereabout.
  - i. An order of *certiorari* be and issued to quash the special issue of the Kenya Gazette No. 4702 dated 17/5/2021 issued by the 5<sup>th</sup> respondent pursuant to the purported impeachment of the 7<sup>th</sup> petitioner.
  - j. An order of *certiorari* be and issued to quash the special issue of the Kenya gazette No 4703 dated 17/5/2021 issued by the 10<sup>th</sup> respondent's chairman.
  - k. As appropriate consequential relief, an order of mandatory injunction is granted against the 8<sup>th</sup> respondent Ahmed Ali Mukhkar, compelling him to handover and restore the office of the Governor of the County of Wajir to the 7<sup>th</sup> petitioner, Amb Mohammed Abdi Mohammud.
  - l. A declaration that the 8<sup>th</sup> respondent Ahmed Ali Mukhkar remains the Deputy Governor for the remainder of the current term of the Office of Governor of County of Wajir.
  - m. In the interests of a smooth hand-over of the affairs of the Office of Governor of Wajir County, the resumption of Office by the 7<sup>th</sup> petitioner shall be stayed for twelve (12) days to take effect on 1/3/2022 to allow the preparation of full inventory of hand-over reports, as may be necessary.
  - n. As this is a matter of public interest nature, the parties shall each bear their own costs of the petition.
130. We record our thanks to the counsel for their robust participation by oral and written arguments on the matter, and only reiterate the call for decorum in litigation which we made previously in the course of the proceedings herein.

**DATED SIGNED AND DELIVERED THIS 16<sup>TH</sup> DAY OF FEBRUARY 2022**

**EDWARD M. MURIITHI**

.....

**PRESIDING JUDGE**

**PATRICK J.O OTIENO**

.....



**JUDGE**

**WAMAE T.W CHERERE**

.....

**JUDGE**

**APPEARANCES**

Mr. Wanyama for the 1-6 petitioners

Prof Ojienda SC with Mr. Kamwaro and Mr. Kere for the 7th petitioner

Mr Ahmednassir SC with Ms Hannan and Ms Wangui for the 1st – 4th respondents

Ms Thanji for the 5th and 6th respondents

Mr. Issa Mansur for the 8th respondent

N/A For 7th, 9th and 10th respondents

**FURTHER ORDER**

Upon hearing counsel for the 1<sup>st</sup> – 4<sup>th</sup>, 5<sup>th</sup> & 6<sup>th</sup> and 8<sup>th</sup> respondents and responses by counsel for the petitioners on a request for stay of execution pending appeal to Court of Appeal the court makes the following order:

The order for the taking over by the 7<sup>th</sup> petitioner of the Office of the Governor of Wajir County shall take effect on the 10th of March 2022.

**DATED SIGNED AND DELIVERED THIS 16<sup>TH</sup> DAY OF FEBRUARY 2022**

**EDWARD M. MURIITHI**

.....

**PRESIDING JUDGE**

**PATRICK J.O OTIENO**

.....

**JUDGE**

**WAMAE T.W CHERERE**

.....

**JUDGE**

