



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CONSTITUTION AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 18 (E001) OF 2020

IN THE MATTER OF CONSTITUTION OF KENYA 2010

IN THE MATTER OF ARTICLES 2,3,10,20,22,47,50,165, 174, 178, 179, 196, 258 & 259

IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2012, SECTIONS

14 & 40

**IN THE MATTER OF REMOVAL FROM OFFICE AS COUNTY EXECUTIVE COMMITTEE MEMBER OR ANY PERSON
OFFICE, UNDER KITUI COUNTY STANDING ORDERS NO. 62, 63 & 64**

AND

IN THE MATTER OF PRINCIPLES OF NATURAL JUSTICE

BETWEEN

HON. JACOB MAUNDU KAKUNDI..... PETITIONER

VERSUS

1. COUNTY ASSEMBLY OF KITUI.....1ST RESPONDENT

2. THE SPEAKER COUNTY ASSEMBLY OF KITUI.....2ND RESPONDENT

3. HONORABLE ALEX WAMBUA MWANGANGI.....3RD RESPONDENT

4. HONORABLE ESTHER K. NDILE.....4TH RESPONDENT

5. HONORABLE GEOFFREY MWALIMU.....5TH RESPONDENT

6. HONORABLE FREDRICK K. NTHURI.....6TH RESPONDENT

7. HONORABLE JOHN MUTUKU MBAKI KISANGAU.....7TH RESPONDENT

AND

8. GOVERNOR, KITUI COUNTY..... INTERESTED PARTY

JUDGEMENT

1. **Jacob Maundu Kakundi**, the Petitioner herein has lodged this Constitutional petition against the County Assembly of Kitui, the **1st Respondent** and **6 Others** and has enjoined the **Governor, Kitui County** as the interested Party. The Petitioner, the following are reliefs from this court namely: -

(a) A declaration that the 3rd Respondent's motion and proceedings for the removal of the Petitioner from the lands, infrastructure, housing and Urban Development County Ministry was conducted in violation of Article 2,3,20,38, 47, 50 and 196 of Constitution of Kenya 2010, **Section 40 of the County Government Act, 2012** and the Kitui County Assembly Standing Orders and hence unconstitutional, illegal, null and void.

(b) A declaration that the ad-hoc committee appointed for purposes of investigating the allegations made against the Petitioner pursuant to the 3rd Respondent's motion for his removal from the position of the County Executive Committee Lands, infrastructure, Housing and Urban Development was not qualified for the task and its appointment was in violation of principles of natural justice hence violation of **Articles 25,47 and 50 of Constitution of Kenya 2010**.

(c) A declaration that the 4th to the 7th Respondents appointed for purposes of investigating the allegations made against the Petitioner pursuant to 3rd Respondent's motion for his removal from the position of the County Executive Member lands, Infrastructure, Housing and Urban Development cannot seek protection under the **County Assemblies Powers and Privileges Act** when they engage in blatant disregard of the Constitution despite protests by the Petitioner.

(d) A declaration that the 4th to the 7th Respondents in acting in the manner that they did, acted recklessly and exposed the 1st Respondent and the entire electorate of Kitui County a risk of financial burden occasioned by legal costs which could have been avoided.

(e) An order of certiorari to quash the resolution by the 1st Respondent on **16th September, 2020** approving the report by the Ad-hoc Committee recommending the removal from office of the petitioner from the position of County Executive Committee Lands, Infrastructure, Housing and Urban Development Kitui County.

(f) An order of injunction restraining the Governor of Kitui, the interested party herein from dismissing the Petitioner from the position of County Executive Member Lands, Infrastructure, Housing and Urban Development based on resolutions passed by the 1st Respondent on **16th September, 2020** and delivered to the interested party vide a letter by the 2nd Respondent dated **18th September, 2020**.

(g) A declaration that the **Notices of Motion** and proceedings held by the 1st Respondent in relation to the Petitioner were undertaken in an arbitrary, erratic, capricious, vindictive manner and therefore a violation of the principles of natural justice and fair hearing.

(h) Any other relief that this court may consider appropriate.

(i) Costs of the Petition

2. In pursuing the above reliefs, the Petitioner has laid down the following facts in support of his case.

3. The Petitioner's Case

The Petitioner claims that on **5th August, 2020**, the 3rd Respondent **Hon. Alex Wambua Mwangangi** presented a motion to the **Clerk County Assembly of Kitui** for the removal of the Petitioner from Office under **Section 40 of the County Government Act 2012** and the **Kitui County Assembly standing Orders No. 62** on the following allegations: -

1) **Gross violation of the Constitution of Kenya 2010 and any relevant laws by: -**

(a) Violation of Chapter 6 of the Constitution of Kenya (integrity and leadership) by managing his office in a manner that does not promote public confidence in integrity of the office by overseeing un-procedural awarding of bush clearing tenders (a programme meant to benefit the vulnerable) to contractors and using the local women and youth to work in contractors absentia only to pay some after a long time and others left unpaid instead of contractors using their monies as working capital for the contracted works to pay the casuals.

(b) Failing to implement the following County Assembly resolutions amongst others in total breach of **Article 181(1) (a) of the Constitution** on the functions of the County Executive Committees to: -

(i) Procure services for projects within the 2018/2019 financial year for the **Community Level Infrastructure Development Programme (CLIDP)** as provided under the **County Government Annual Development Plan (ADP)** which factors in community development projects which meant that the Kitui people lost key projects.

(ii) Implement the motion on Regulation and Management of Street Trade (hawking) and Boda Boda Operators in Mwingi and Kitui.

(iii) Motion of County importance on bush clearing by Hon. David Thuvi.

(c) Unfair Service Delivery Contrary to **Article 27(3) of the Constitution of Kenya 2010** by discriminative issuance of dozer services to a few selected awards for a period of last three financial years despite demand in other wards.

(d) Failing to provide County Assembly with full and regular reports on matters relating to the **County Ministry Contrary to Article 183(3)** of the **Constitution of Kenya 2010** e.g. Dozer working schedule.

(e) Violation of **County Procurement Procedures Contrary to Section 53** of the **Public Procurement & Disposal Act 2015** by: -

(i) Awarding tenders for both clearing un-procedurally and misusing Kitui residents without pay.

(ii) Awarding tenders for bush clearing to contractors and then using ward and village Administrators to perform the duties.

2) Incompetence failure to effectively control Ministry's Programmes e.g. bush clearing and road grading done shoddily and beyond timelines as stipulated in Work Schedules.

3) **Abuse of Office**

Using County Administrators to perform the role of contractors in contracted works of bush clearing without **facilitation**.

4. **Gross Misconduct**

That he blatantly misled the County Assembly Sectoral Committee on Lands, Infrastructure and Urban Development on the involvement of village administrators in the recruitment of personnel for the contracted bush clearing project for 2018/2019 financial year.

5. The Petitioner claims that the motion to impeach him was supported by more than a 3rd of the members of the County Assembly when it was tabled on **25th August, 2020**.

6. That upon approval of the motion, the 1st Respondent appointed a special Ad-hoc Committee to investigate the allegations and that the following members of County Assembly were appointed namely:

(i) Hon. Esther K. Ndile

(ii) Hon. Geoffrey Mwalimu

(iii) Hon. Francis Kithome Nthuvi

(iv) Hon. John Mutuku Mbaki Kisangau

(v) Hon. Boniface K. Kathumo

7. The Petitioner claims that the said members of the Ad-hoc Committee were biased because they had voted for the motion to impeach her which meant that the verdict would only go against her.

8. The Petitioner faults the said Committee for the following;

(i) Bias and lack of impartiality. He alleges that 4 out of the 5 Ad-hoc Committee Members had signed a motion of her removal from office which meant that her removal was *fait accompli* and that he would not be accorded a fair hearing. He adds that the committee manifested bias against him, lacked objectivity and impartiality in carrying out their duty.

9. He submits that there was nothing he would say or do in his defence to change the minds of the committee members regarding his removal, adding that he was not accorded a constitutional right to a fair hearing.

(ii) Lack of specificity of the particulars on the alleged grounds for removal.

10. The Petitioner contends that the subject motion for his removal from office lacked specific particulars of the alleged offences. He avers that the grounds were neither precise or clear to enable him respond. He cites the first ground of gross violation of the constitution and contends that the charge did not specify the exact Article of the Constitution that the Petitioner was said to have violated. He submits that the general charge or the allegations made in reference to **Chapter Six of the Constitution** made it difficult for him to defend himself. He adds that, without clarity or specific charge against him, the Ad-hoc Committee found a leeway to go on a fishing expedition to crucify him without giving him evidence on which the said allegation was based.

11. The petitioner further alleges that he was not accorded adequate time to prepare his case and respond

comprehensively to the allegations levelled against him. He claims that he received a letter forwarding the subject motion on **2nd September, 2020** requiring him to appear on **3rd September, 2020** before the Ad-hoc Committee. He contends that, having only one day to prepare for a weighty matter such as removal was insufficient.

12. The Petitioner contends that on the overall the motion in his view did not reach the constitutional threshold for removal and contends that the issue of bush clearing cannot be deemed a Constitutional issue adding that the issue was a trivial matter. In his view the members of County Assembly reduced themselves to mere debt collectors for disputing parties over a matter that fell in the realm of law of contract and nothing to do with his docket.

13. He faults the Respondent's action against him, contending that there was non-disclosure of material evidence on the motion of impeachment served on him. He submits he could not properly prepare for what he did not know and that despite the pleas of his counsel, the Ad hoc Committee went ahead with the trial.

14. The Petitioner specifically accuses the respondents for the following wrongs he claims were visited on him:-

- (a) Bringing a petition before the 1st Respondent when it was clear that there was no legal or factual basis for the same.
- (b) Proceeding to hear and make a report on removal of the Petitioner in disregard of the Petitioner's constitutional right to a fair administrative action.
- (c) Disregarding the petitioner's protest about committee's apparent bias.
- (d) Disregarding the Petitioner's right to adequate notice before the debate of report of select committee. He avers that he was served on **11th September, 2020**, a Friday to appear on **16th September, 2020** contrary to **Standing Order 63(2) Kitui County Assembly Standing Orders**.
- (e) Failing to supply material evidence that the committee relied to make a report on removal of Petitioner.
- (f) Making utterances on local vernacular radio stations that were prejudicial to the committee's perceived impartiality.
- (g) Accusing the petitioner for wrongs done by other people.
- (h) Calling witnesses to give evidence against the petitioner but refusing the Petitioner an opportunity to challenge the same witnesses.
- (i) Introducing in their report matters that were never part of the allegations against the petitioner and making those matters integral part of their report.
- (j) Humiliating the Petitioner by shouting at him using degrading language.
- (k) Arbitrarily amending the motion on removal from office of the Petitioner and that the amendment was aimed at fitting own parochial interests and that despite being clothed with vast judicial powers, they misused those powers to serve political interests.

15. The Petitioner further submits that the Respondents unfairly chose to blame him personally under Article 183 over matters that fell on the entire County Government of Kitui.

16. The Petitioner contends that despite immense public interest involved in the matter of removal of County Executive Committee member, the views of the public were never sought which he submits violated Article 196 of the Constitution.

17. The Petitioner avers that the 1st invitation to appear before select committee was served on him on Wednesday 2nd September, 2020 while the proceeding was slated for Thursday 3rd September, 2020 which violated the Petitioner's right to have adequate opportunity to prepare and present a written response. He avers that his right under **Article 50(2) of the Constitution** was violated.

18. He adds that standing order 63 of Kitui County Assembly Standing Orders provides for the right to be heard but that the same was disregarded by the respondents. He submits that by violating the said standing orders, the respondents breached the provisions of **Section 40 of the County Government Act, 2012** which inter alia provides for a right to be heard and a right to be represented.

19. The Petitioner claims that the 1st Respondent has already passed a resolution to remove him from the position of County Executive Committee member lands, infrastructure, Housing and Urban Development and that the said resolution is an infringement of his fundamental rights under Article 47 and 50 of the Constitution.

20. He submits that his right to be heard was violated and cites the decision in **Martin Nyaga Wambora & 3 Others –vs- Speaker of the Senate and 6 Others (2014) eKLR** where the court found that it was improper for the Governor to be accused of gross misconduct and violation of the Constitution without supplying him with particulars of the alleged gross violation. The Petitioner pleads that his pleas to be given particulars were ignored. He cites the provision of **Article 47 of the Constitution** and avers that the Respondents disregarded it during the motion to impeach him. It is his submissions that the motion and proceedings to remove him from office violated **Article 47** and contends that administrative actions of public offices and state organs and/or other administrative orders are subject to **Article 47(1) of the Constitution of Kenya 2010**. He relies on the decision in the case of **Judicial Service Commission –vs.-Mbalu Mutava and Another (2014) eKLR**.

21. The Petitioner reiterates that select committee appointe to investigate allegations against were biased and that the verdict reached was tainted with biasness. He faults them for not demonstrating impartiality and has urged this court to find that they were biased and were not expected to reach a fair verdict in so far as the accusations made against were concerned. He cites the decisions in **Porter and Weeks –vs.-Magik (House of Lords (2001) UKHL 67** in his proposition that the test applicable is whether the proceedings were seen to be fair and whether a fair-minded and informed observer could conclude that there was possibility of bias on the part of the adjudicator.

He further cites the decisions in the Case of **Beatrice Wanjiru Kimani –vs-Evanson Kimani Njoroge (1995-1998) 1 EA 134** to buttress his position that the standard to be applied is that of reasonable people because justice must be rooted in confidence that a decision has been reached free from bias.

22. The petitioner further submits that he was put through a rushed process that sacrificed his right to due process and Constitutional guarantees. He cites the decision of **Liwen Jie & 2 Others –vs- Cabinet Secretary Interior and Coordination and 3 Others (2017) eKLR** to buttress his position. He submits that he entitled to the reliefs sought in this Petition and argues that this court has jurisdictions to under **Article 23 (3) and 165 (3)** to grant them.

23. **The Respondent’s case.**

The respondents have opposed this petition through grounds of opposition dated 8th November, 2020 replying affidavits sworn by George Mutua Ndotto and the Speaker County Assembly of Kitui sworn on **8th October, 2020**, plus written submissions made through Muinde and Partners Advocates.

24. The Respondents have termed the allegations brought by the Petitioner as scandalous, frivolous and an abuse of the court and opine that the motion to remove the petitioner in their view was well founded and in accordance with the provisions of **Section 40(1) of the County Government Act No. 17 of 2012**.

25. It is the Respondents case this court lacks the mandate to determine whether there was justifiable cause for the removal of the Petitioner from Office. They submit that this court concerns itself only with matters of procedure of impeachment and not the internal affairs of the 1st Respondent and its Committees.

26. The Respondents through the 2nd Respondent aver that the motion to remove the petitioner from his position was tabled on 25th August, 2020 after the 3rd respondent had tabled it before the Speaker as required. In their view, the motion contained serious allegations which required investigations. They aver that when the motion was tabled more than one third (1/3) of the members if County Assembly of Kitui supported it.

27. It is the Respondents case that a Special Committee Comprising Hon. Esther K. Ndile, Hon. Geoffrey Mwalimu, Hon. Francis Kithome Nthuvi, Hon. John Mutuku Mbaki Kisangu and Hon. Boniface K. Katumo were appointed to investigate the matter and report back within 10 days as to whether the allegations against the Petitioner were well substantiated. In their view, the resolution of the select committee was done by all members pursuant to provisions of **Section 40(3)(a) of the County Government Act**.

28. They deny allegations of bias and that the Select Committee were not directed to come up with a particular verdict. They add that **Section 14 (1) (b)** gives the 1st Respondent to establish committees and that all members of the County Assembly are always interested in the outcome of motion no matter who is elected.

29. The Respondents further aver that they invited the Applicant via a letter dated **1st September, 2020** to appear on **3rd September, 2020**. They contend that the invitation letter was received by the Petitioner on 2nd September, 2020 but adds that when the Petitioner appeared with his Counsel before the select committee on 3rd September, 2020, they asked for more time and that the select committee gave them more time to submit their defence. They assert that they were given time up to the close of business on **7th September, 2020**. The respondents claim that the Applicant did not submit any additional evidence in his defence complaining of time factor. They also concede that they wrote another letter dated 4th September, 2020 requiring the petitioner to give answers to some other allegations but the letter did not solicit any answer or reply.

30. The respondents have given the following specific responses to allegations made by the Petitioner in this petition.

a) On bias and lack of impartiality, the respondent contend there can never be an issue of impartiality or bias because every potential member is part of the Assembly and has an interest in any motion. They submit that the power granted to select committee is only to investigate but the decision on the outcome of the investigations is left to County Assembly.

(b) On the question of lack of specificity in the grounds for impeachment, the respondents allege that evidence was attached to every allegation save for ground on Chapter 6 of the Constitution which, they add, had reference to the specific acts.

(c) On the issue of insufficient Notice to respond to allegations, the respondents allege that they gave time to the petitioner to respond but that he chose not to defend himself adding that impeachment motions have very strict timelines which they point out are 10 days only.

(d) They deny that the allegations made against the petitioner were trifles. They contend that the allegations contained in the subject motion were serious and met the threshold for impeachment.

(e) On lack of disclosure, the respondents claim that the

Petitioner was supplied with all the documents necessary for his defence preparations.

31. The respondents deny mistreating the Petitioner when he appeared before the Select Committee and have contended that the allegations of mistreatment cannot be verified arguing that select committee recorded every event that took place.

32. The respondents have also contested the Petitioner's allegations that he received a letter dated 4th September 2020 on 7th September, 2020 which required him to respond by the same day. It is the respondents' contention that the letter was received on **4th September, 2020** as per stamp seen in the said letter and have urged this court to find the Petitioner's allegations as misleading. They also term the allegations that the Select Committee deliberations were held outside Kitui to be misleading as well.

33. They insist that the Select Committee concluded that all grounds for removal of the Petitioner were substantiated save for allegations of abuse of office. They further add that the Petitioner did not ask for opportunity to cross examine the witnesses and term the allegations that he was denied opportunity as an afterthought.

34. The Respondents further aver that once the allegations were found to be substantial, the Petitioner was informed of his rights to be heard pursuant to Standing Order 63 of the Kitui County Assembly Standing Orders and that he was invited vide a letter dated **10th September, 2020** and invited to appear on **16th September, 2020** which to them was sufficient notice since it was a 4th day notice.

35. The Respondents submit that the Petitioner is inviting this court vide this petition to delve into internal affairs of the 1st Respondent and overrule the reasoning behind the impeachment of the Petitioner. In their view, the same is beyond the supervisory jurisdiction of this court as it is tantamount to usurping the Constitutional mandate of the 1st Respondent and its respective committees. They rely on the decision of **Gilbert –Vs- County Assembly of Kericho & 2 Others (2010) eKLR** in their contention that this court can only look into the process and not the end result of such an impeachment motion.

36. They further contend that, the Petitioner cannot fairly call for Public participation in his removal when in the first place there was no public participation in his appointment. They submit that in any event, the 1st Respondent comprises representatives of the people/public and having approved his appointment, they can also impeach him adding that the County Assembly is an open gallery open to members of public and the press.

37. The Respondents submit that on **17th September, 2020**, the 2nd Respondent duly delivered the resolution reached by the 1st Respondent to the interested party here and that they adhered to the provisions of the **Section 40 of the County Government Act**.

38. The respondents submit that the petition lodged herein was brought as an afterthought and that the petitioner has failed to discharge the burden placed on him by the law to prove that the respondents were biased or unfair to him or that he was exposed to an action that violated **Fair Administrative Action Act** and the **Constitution of Kenya 2010**.

39. **The Interested Party's case**

The Hon. Governor, Kitui County entered appearance in this matter and supported the petition herein. She swore an affidavit dated **28th September, 2020** stating that she appointed the petitioner herein to his docket and that the 1st Respondent duly approved his nomination.

40. The interested party avers that the petitioner has discharged his duties well to her satisfaction and in accordance with the law. She adds that the Respondents had never raised any issue on the performance of the Petitioner prior to his impeachment and that as an appointing authority the 3rd Respondent should have first registered his displeasure with her if he was acting in good faith. She contends that the motion to impeach the Petitioner was motivated by other factor other than good governance and service delivery to the people of Kitui.

41. The interested party avers that the Petitioner was not given responsibility of awarding tenders and therefore the respondents' accusation that Petitioner grossly violated the Constitution by "overseeing un-procedural awarding of bush clearing tenders" was farfetched.

42. She further avers that the 2nd ground of impeachment to witness 'failure to implement some assembly resolution in breach of **Article 183 (1) (a)** of the **Constitution of Kenya** was also unfounded because in her view a County resolution is not and cannot be deemed a County legislation and cites **Article 260** of the Constitution that define County legislation as Law made by County government or under authority conferred by a County Assembly. She further cites the provisions of **Article 183(1)(a)** (that states that "a County executive shall implement County legislation.") and submits that no requirement was made to the County Executive to implement any County legislation and that as head of the County Executive Committee under **Article 179(2) of Constitution**, she is not aware of any demand made by the 1st Respondent for implementation of any legislation. She also wonders why the petitioner is being made to shoulder or bear the consequences/responsibility over alleged inaction of the County Executive Committee.

43. The interested Party has also poured cold water on the allegations of discriminative issuance of dozer services terming the allegations baseless and unfounded.

44. She avers that the Petitioner is fit and competent and there was no expert called to demonstrate that bush clearing and road grading anywhere in the County was shortly done as alleged in one of the grounds of impeachment. The interested party alleges that the Respondents are not interested in service delivery but are only interested in painting her officers as incompetent and incapable of delivering services to the people of Kitui county.

She alleges that the respondents are only out to frustrate her by painting her government in negative light in the eyes of the electorates for their own ulterior motives.

45. **Analysis and Determination**

This court has considered this Petition, the grounds raised and the submissions advanced. I have also considered the response made by the

respondents and their written submissions. I have at the same time considered the issues raised by the interested party in this petition.

In my considered view, the following issues for determination have cropped up namely: -

- (i) Whether the removal or impeachment of the Petitioner by the Respondents met the procedural/Constitutional threshold.
- (ii) If the answer in (i) above is in the negative whether this court has jurisdiction to intervene.
- (iii) Whether the Petitioner is entitled to the reliefs sought.

46. Whether the removal/Impeachment of the Petitioner met the constitutional and Procedural threshold.

The Law

There is no contest in this petition that impeachment/removal of office of a Public/State Officer is a serious matter and one that is well provided by law.

The **Constitution of Kenya 2010** does provide establishment of County Executive Committee under Article 179 and it provides that County Executive Committee in a County consist of: -

- (a) The County Governor and the Deputy County Governor.**
- (b) Members appointed by the County Governor with the approval of the County Assembly.**

The Constitution further provides that the members of the County Executive Committee are accountable to the County Governor. The Constitution does not specifically provide for the removal of the members of the County Executive Committee but **Article 181 of the Constitution** lists the grounds that can be used to impeach a Governor. They are namely: -

- (a) Gross violation of the Constitution or any other Law.**
- (b) Commission of Crime under National or International Law.**
- (c) Abuse of Office or gross misconduct or**
- (d) Physical or mental incapacity to perform duties.**

It is therefore follows that any member of County Executive Committee can also be impeached or removed from office on any of the above grounds since the Governor as noted above is also a member of County Executive Committee Member.

47. The clear provisions for removal of a member of CEC (County Executive Committee) are contained in the statute law namely the **County Government Act, 2012**.

Section 40(1) of the Act provides as follows: -

“Subject to subsection (2), the Governor may remove a member of the County Executive Committee from office on any of the following grounds: -”

- (a) Incompetence.**
- (b) Abuse of office;**
- (c) Gross misconduct**
- (d) Failure, without reasonable excuse or written authority to attend 3 consecutive meetings of the County Executive Committee,**
- (e) Physical or mental incapacity rendering the executive Committee member incapable of performing the duties of that office; or**
- (f) Gross violation of the Constitution or any other Law.”**

48. The law clearly states that removal of a member of County Executive Committee (C.E.C) is subject to due process.

The provision state that the removal is “**subject to**” subsection (2) subsection (2) states: -

“A member of the County assembly supported by at least one-third ($\frac{1}{3}$) of all the members of the County Assembly may propose a motion requiring the Governor to dismiss a County Executive Committee member on any of the grounds set out in subsection (1).”

The subsequent subsection 3(a) and (b), 4, 5 and 6 further gives specific procedure to be followed including selection of a select committee to investigate the allegations made and report back to the assembly within **10** days, the right of the member of County Executive member to appear and the right to representation and the manner in which the report on the allegations is to be implemented.

49. The principles behind the elaborate procedural requirements in the cited provisions above underpin the values and principles that are enshrined in the Constitution of Kenya 2010. The right to a fair trial under **Article 50**, rights to be heard and other fundamental rights under Article 19, right to fair administrative actions under **Article 47** to mention just a few relevant provisions in the Constitution cannot be gain said.

As a matter of Law, a right to a fair trial under **Article 25 (c)** is one of the inalienable rights of the Constitution that binds all state organs and agencies as clearly stipulated under **Article 20** of the Constitution.

The same can never be overlooked or disregarded and anyone doing so even remotely is tantamount to embarking on a perilous journey that ends nowhere.

50. In addition to the above, **Article 10 of the Constitution of Kenya 2010** in my view, is one of the greatest pillars and foundation of all the values and principles of Constitution. The same now provide a standard measure upon which all actions and regulations/laws are tested for compliance. It is the grundnorm and a guiding factor in every decision making by Public and/or State agencies in Kenya.

51. Having given a general outline of the law which in my estimation applies to the dispute at hand, this court will now consider the contestation between the Petitioner and the interested party on one hand and the Respondents on the other.

2. The Evidence

I have considered the evidence tendered by both the I.P, the Petitioner and the Respondent in regard to the motion to impeach the Petitioner. This court will not repeat everything put forward but suffices to state that what is important is to determine whether the impeachment/removal of the Petitioner met the Constitutional or Procedural threshold.

The big question to be considered here is did the motion to impeach the Petitioner follow due process? Did it follow the tenets of the Constitution as outlined above?

53. This court has noted from evidence (JMK-1) tendered by the Petitioner that the motion to impeach the Petitioner was duly placed before the Speaker a motion dated **5th August, 2020** after the mover, the third(3rd) Respondent herein, garnered the support of **33** members of Kitui County Assembly which number all the parties in this petition agree, was more than a third ($\frac{1}{3}$) of all the members of County Assembly of Kitui. The legality and the procedure of tabling the motion of impeachment of the Petitioner up to that point was beyond reproach.

54. What however elicited hue and cry from the Petitioner and the interested party is what the 1st Respondent did when the impeachment motion was tabled and passed for the next stage of removal which was appointment of a special select committee pursuant to the provisions of **Section 40(3) (a)**.

The section provides as follows: -

“If a motion under subsection (2) is supported by at least one third of the members of the County Assembly.”

(a) The County assembly shall appoint a select committee comprising five of its members to investigate the matter and

(b) The select committee shall report, within ten days to the County assembly whether it finds the allegations against the County Executive Member substantiated.”

55. My reading of the above provision and the appointment of the five members of select committee to investigate

whether allegations contained in the said motion were substantial or not in my view met the statutory requirement save for the claims of bias and impartiality made by the Petitioner against the members selected. The Respondents have openly conceded that the concept of impartiality is at times a tall order for them because according to them, every member of the Assembly has an interest in any motion brought before the Assembly which begs the question is impartiality in the County assembly a mirage?

56. This court takes the position that while it might have been tricky for the Respondent to embrace this value in the manner they conducted their business, it was a Constitutional imperative that their actions (investigation of the allegations) should be free of bias or partiality. This because the Select Committee in their investigation was expected to act as a tribunal or exercise quasi-judicial mandate and in so doing were required to exhibit actions free of bias and observe all the national values and principles enshrined under **Article 10 of the Constitution**. The principles include inter alia transparency, human rights, integrity and accountability to state but a few.

57. The above was the minimum standard requirement that the Constitution demanded of the select committee. As a matter of principle my reading of **Article 47(2)** of the Constitution demands that where a member finds himself in a situation where he/she must carry out a duty or action despite clear position of bias, he/she should write to the person to be affected by the decision giving reasons as to why he/she must discharge the mandate despite having an interest in the matter. **Article 47 (2)** states: -

“(i) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

58. My interpretation of the above provision indicates that the respondents should have responded in writing to the Petitioner when he complained about the perceived bias by four out of five members of the select committee he had flagged for bias and/or partiality. Failure to respond in writing to the serious allegation went against both the spirit and the letter of the Constitution which require public servant's/state officers to be transparent and accountable in whatever action taken. The Respondents in a nutshell fell short of the aforesaid Constitutional demands and to that extent, this court finds them at fault in the manner they proceeded with the investigations of the allegations made against the Petitioner without first addressing the issue of bias raised against them.

59. The Respondents in their response to the allegations of bias appear conflicted because on one hand they have claimed that the Petitioner has failed to tender evidence of bias while on another, they claim that impartiality in their case cannot arise because in their view every member of County Assembly had an interest in the motion of impeachment. So the question posed is were members of the County Assembly Partial because they could not help it? In my considered view, the members of the County Assembly could as well have their views or positions depending on their political persuasions or leaning but what is required of them is discharge their duties without bias otherwise the hearings or investigations conducted will be a farce.

60. One other important issue raised by the Petitioner and which has got the attention of this court, is the allegation that the Petitioner was denied the right to be heard. A right to be heard is a key ingredient of a fair trial as provided under the law. One of the fundamental rights sacrosanct in the Constitution is a right to a fair trial. It is an inalienable right that cannot be overlooked in any circumstance in a trial whether conducted by a court of law, a tribunal or any other body or authority exercising quasi-judicial function or inquiry. That right is further stipulated under **Article 50(1) of the Constitution of Kenya 2010** which States: -

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

In my view, one cannot be exposed to a biased tribunal or body and presume that the person will have a fair trial. That is not possible.

61. A right to be heard has to be interpreted to mean that where one is called to answer charges of impropriety for example, he/she must as a matter of law, be given sufficient information and particulars of the charge(s) he/she faces to enable them prepare adequately for defence. In this instance the Petitioner claims that he was not supplied with specific particulars of the charges brought against him in the impeachment motion. This court has considered the response by the Respondents who partly concedes that out of the four grounds of impeachment there was one ground which had a blanket particulars indicated as breaches of chapter 6 of the Constitution without specificity. That concession coupled with the manner in which the proceedings of the select committee was conducted in my view did not inspire confidence that the inquiry was being conducted fairly and transparently. The reasons why I have come to that conclusion are given here below: -

62. In the first place the select committee invited the Petitioner to appear before it on 3rd September, 2020 on account of an impeachment motion tabled on 25th August, 2020. That motion had four grounds already highlighted above to wit: -

(a) Gross violation of the Constitution.

(b) Incompetence

(c) Abuse of office

(d) Gross misconduct.

When the Petitioner appeared on 3rd September 2020, he was confronted with what the select committee describes in their report as: -

“Additional allegations and other relevant laws”. In the “additional grounds” the Petitioner was accused of disobeying a court order issued vide **ELC case No. 109 of 2008 in Machakos ELC Court** among other allegations like “un-procedural subdivision of community land” demand of taxes on non-existent parcels etc. In my view, the select Committee went outside their mandate by inquiring into allegations that were not part of the basis upon which the motion of impeachment had been tabled. The select committee perhaps realised that the grounds listed for impeaching the Petitioner were inadequate or insufficient to support the impeachment because why would they add new allegations which were a complete departure of what the Petitioner had been accused of. It also amounted to impeachment by ambush because the Petitioner had been served with grounds of removal of office and invited to defend himself and when he turned up with Counsel, he was confronted with new set of allegations. This was unfair and against the rule of natural justice. The select committee in bringing up new set of allegations in effect denied the Petitioner his basic right to be heard. This is clearly discerned from the fact that the Petitioner was served on 2nd September, 2020 to appear on 3rd September, 2020 which time in my view was insufficient and besides that even if the respondents claim that they gave him up to 7th September to respond to the allegations, the Petitioner hardly got reasonable time because 3rd was a Thursday while 7th September, 2020 was a Tuesday and so with a weekend in between one would understand why the Petitioner felt that he had been hard done by the demand to not only respond to the 4 grounds but other additional grounds as well that did not form part of the impeachment motion.

63. Secondly, it is apparent that the witness summoned by the select committee gave their evidence in the absence of the Petitioner. He was denied the opportunity to cross examine them and challenge the evidence tendered. There is no way you can talk of a fair hearing when the Petitioner who stood accused could not have a chance to cross examine those summoned to give incriminating evidence against him. The select committee relied on the evidence of those witnesses who claimed to be youths and women engaged to clear bushes by village administrators but were never paid. The select committee findings were majority hinged on the evidence that were un-procedurally tendered because the Petitioner was not given a chance to challenge (through cross examination) the same. The select committee and by extension the respondents clearly breached a cardinal rule of natural justice which rule is embedded in the **Constitution of Kenya 2010 (under Article 25, 47 and 50)** and the statute (**Section 4(4) of Fair Administrative Act, 2015**).

64. Thirdly, though the respondents submit that the mandate to determine whether the grounds listed in the impeachment were impeachable or not is exclusively theirs, I disagree. This court takes the position that although the doctrine of separation of powers supports the Respondents view to some extent, they cannot run away from the Constitutional demands of adhering to national values and Principles as stipulated under **Article 10 of the Constitution of Kenya 2010**. Their decision must be transparent, accountable and inspire public confidence that the decision is rational and arrived at in the wider interest of the public. My reading of **Article 47** and the enabling statute that is **Fair Administrative Act, 2015**, shows that a decision reached by a County Assembly can be challenged in a court of law.

Article 47(1) states: -

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”.

A further perusal of **Section 41 (1) and 2 of the Fair Administrative Act, 2015** clearly indicates that a tribunal or any authority are not only required to **them** decision meets the laid down procedural requirements, but must be sound, fair and rational. Section 7 of the same statute gives liberty to any person aggrieved by any decision to challenge the same on grounds of *inter alia* abuse of discretion, irrationality and other grounds.

65. This court in the light of the above discourse has no hesitation to find the respondents plea that this court should not check at the rationality of their decisions to be a bit of escapism. The Respondents like any statutory or public body cannot escape the attention of the Constitution or any other written law. I have considered the response filed by the interested party and the Hon. Governor of Kitui County and find that her concerns regarding the rationality of the impeachment motion are legitimate.

66. The Petitioner was accused of violating procurement law through overseeing un-procedural award of tenders related to bush clearing and though the select committee found out that he was not responsible for awarding of

tenders, a fact supported by the interested party, they still found him culpable in the manner in which the work was carried out and in particular the fact that the contractor engaged the local women and youth but failed to pay them which pegs the question if it is true that there were some youths or women contracted to carry out a specific work by a contractor, is not a question, of a breach of contract as between the contractor on one hand and the women or the youth on the other side. How does the Petitioner come in for blame particularly given that his accusers gave their evidence in his absence as observed above? If the youths and women who were engaged by the contractor who won the tender to clear bushes (if that was the case) then the remedy lies not in an impeachment, as it were, but in a cause of action by whoever felt short-changed.

67. From the foregoing discourse, the answer to the first issue for determination as framed above can only be in the negative.

The removal/impeachment of the Petitioner by the Respondent failed to meet the minimum procedural and constitutional threshold as postulated above. This court finds that the impeachment process was imperilled by procedural shortcomings I have pointed out. The petitioner's right to a fair trial was violated by the respondents acts of commissions and omissions. His legitimate expectations to be subjected to fair administrative action by the Respondents via their oversight role was breached and in the face of the impugned impeachment motion in all its facets, the same could simply not stand the test of law.

68. Whether this Court has the jurisdiction to intervene.

The Respondents have raised an important principle of law regarding the doctrine of separation of powers. This doctrine requires different arms of government to wit the executive, parliament and the Judiciary to remain distinct and independent of each other to ensure that none of the different arms of government encroach into the arena of the other. The rationale undermining this principle is the need to have checks and balances and to have power spread to the 3 arms to facilitate Constitutionalism. It is on that basis that courts would normally exercise judicial restraint when called upon to intervene in the manner in which each arm discharges its mandate. However, under the current Constitutional dispensation, the manner in which the exercise of power by the 3 arms of the government can only be done in accordance with the constitution. No arm can act in a conspicuous way because everyone is under the law and under Article 1 (i) of the Constitution sovereign power is vested on the people and the power donated to each arm has to conform with the Constitution. Under **Article 160** of the **Constitution of Kenya** the judicial authority vests on the courts and when read together with **Article 165(3) (b) and (c)** it becomes clear that the supervisory jurisdiction vested in this court extends to actions carried out by the other 2 arms of the government that is the Executive and Parliament or County Assembly for that matter. So where there are circumstances obtaining that calls for intervention such as it is obviously obtaining in this current case, a court for that matter is clothed with jurisdiction to intervene and can intervene.

69. Whether the Petitioner is entitled to the reliefs sought

Having found all the above issues in the positive it logically follows that the Petitioner has proved his case to the required standard in law. He is therefore entitled to the reliefs sought and this hereby enters judgment against the respondents jointly and severally and is granted the following reliefs.

(a) A declaration that the 3rd Respondent's motion and proceedings for the removal of the Petitioner from his docket was conducted in violation of Article 10,25,47 of the **Constitution of Kenya and Section 4 of the Fair Administration Act 2015** and hence unconstitutional, illegal, null and void.

(b) A declaration that the Select Committee appointed for purposes of investigating the allegations made against the Petitioner pursuant to the 3rd Respondent's motion for his removal from the position of the County Executive Member Lands, Infrastructure, Housing and Urban Development was not qualified for the task and its appointment was in violation of principles of natural justice and violation of **Article 25, 47 and 50** of the **Constitution of Kenya 2010**.

(c) An order of certiorari is hereby issued to quash the Resolution by the 1st Respondent on **16th September, 2020** approving the Report by the Select Committee recommending the removal from the position of County Executive Committee Lands, Infrastructure, Housing and Urban Development Kitui County.

(d) An order of injunction restraining the Governor of Kitui, the interested party herein from dismissing the Petitioner from his docket based on resolutions by the 1st Respondent on **16th September, 2020** and delivered to the said Governor vide a letter dated **18th September, 2020**.

(e) A declaration that the Notice of Impeachment and proceedings held by 1st Respondent in relation to the petitioner were undertaken in an arbitrary, capricious manner besides being in violation of the principles of natural justice and fair hearing.

The Respondents shall pay costs of this petition to be agreed and/or taxed.

Dated, Signed and Delivered at Kitui this 23rd day of February, 2021.

HON. JUSTICE R. K. LIMO

JUDGE