



Okoiti & 9 others v Mwenda & 6 others; Gidion & 9 others (Interested Parties) (Constitutional Petition E005, E007, E009, E011, E012, E013, E015, E019 & E021 of 2021 & E433 of 2020 (Consolidated)) [2021] KEHC 463 (KLR) (Constitutional and Human Rights) (24 June 2021) (Judgment)

Okiya Omtatah Okiiti & 9 others v Anne Kananu Mwenda (1st Respondent/Cross-Petitioner) & 6 others; Mike Mbuvi Sonko Kioko Gidion & 9 others (Interested Parties) [2021] eKLR

Neutral citation: [2021] KEHC 463 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E005, E007, E009, E011, E012, E013, E015, E019 & E021 OF 2021 & E433 OF 2020 (CONSOLIDATED)
SJ CHITEMBWE, WK KORIR & WA OKWANY, JJ
JUNE 24, 2021

BETWEEN

OKIYA OMTATAH OKOITI 1ST PETITIONER
HABIB OMAR KONGO 2ND PETITIONER
PATRICK MWANGI KIIRU 3RD PETITIONER
JOSEPHAT KARIUKI 4TH PETITIONER
ANGELA MWIKALI 5TH PETITIONER
MIRURU WAWERU 6TH PETITIONER
THIRDWAY ALLIANCE KENYA 7TH PETITIONER
LAW SOCIETY OF KENYA 8TH PETITIONER
KENYA HUMAN RIGHTS COMMISSION 9TH PETITIONER
GEOFFREY MAKWORO 10TH PETITIONER

AND

ANNE KANANU MWENDA 1ST RESPONDENT
NAIROBI CITY COUNTY ASSEMBLY 2ND RESPONDENT
SPEAKER, NAIROBI CITY COUNTY ASSEMBLY 3RD RESPONDENT



CLERK, NAIROBI CITY COUNTY ASSEMBLY 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 6TH
RESPONDENT
GOVERNMENT PRINTER 7TH RESPONDENT

AND

MIKE MBUVI SONKO KIOKO GIDION INTERESTED PARTY
THE SENATE INTERESTED PARTY
KATIBA INSTITUTE INTERESTED PARTY
POLYCARP IGATHE INTERESTED PARTY
JUBILEE PARTY INTERESTED PARTY
NAIROBI CITY COUNTY EXECUTIVE INTERESTED PARTY
KRISTINA PRATT KENYATTA INTERESTED PARTY
JANE WERU INTERESTED PARTY
UNITED DEMOCRATIC MOVEMENT PARTY INTERESTED PARTY
ISAAC CHEGE NJUGUNA INTERESTED PARTY

A Governor cannot withdraw his/her nomination for the position of Deputy Governor to a county assembly without the assembly's approval.

Reported by Kakai Toili

Devolution – Governor – powers of a governor – withdrawal of nominations for the position of a deputy governor to a county assembly - whether a governor could withdraw their nomination for the position of a deputy governor to a county assembly without the assembly's approval - whether the actions of an elected governor lapsed after the office of the governor fell vacant through death or impeachment – Constitution of Kenya, 2010, articles 179(5), 181 and 182; Interpretation and General Provisions Act, Cap 2, section 51; County Governments Act, 2012, section 33; Elections Act, 2011, section 18; Public Appointments (County Assemblies Approval) Act, 2017, section 11.

Devolution – deputy-governor – appointment of a deputy governor - process to be followed once the nomination of a deputy governor had been approved by a county assembly - whether there had to be a formal appointment of a deputy governor once his/her appointment was approved by the county assembly – Constitution of Kenya, 2010, article 74; County Governments Act, 2012, sections 30(1) and 32D; Public Appointments (County Assemblies Approval) Act, 2017, section 11.

Devolution – county assemblies – speakers of county assemblies – powers of speakers of county assemblies acting as a governor - whether a speaker of a county assembly while acting as a governor could appoint a deputy governor – Constitution of Kenya, 2010, articles 134, 147(3) and 179(5); County Governments Act, 2012, section 32(4).

Constitutional Law – national values and principles of governance – public participation - what were the conditions to be met in order to fulfil the requirement of public participation - Constitution of Kenya, 2010, article 10; Public Appointments (County Assemblies Approval) Act, 2017, section 7(5).

Constitutional Law – Parliament – National Assembly – Speaker of the National Assembly - powers of the Speaker of the National Assembly acting as the President - Constitution of Kenya, 2010, articles 134, 146 and 147(3).



Constitutional Law - separation of powers - exercise of judicial power - whether inquiry into alleged unconstitutional actions by a county assembly infringed on the doctrine of separation of powers.

Civil Practice and Procedure – stay - orders staying the occurrence of a constitutional event - whether a court order staying the occurrence of a constitutional event amounted to a breach of the constitutional timelines.

Brief facts

At the general election held in August 2017, the 1st interested party and the 4th interested party were elected as the Nairobi City County Governor and Deputy Governor respectively. The 4th interested party however resigned creating a vacancy in that office. Later on, the 1st interested party nominated the 1st respondent to be vetted by Nairobi City County Assembly (the County Assembly) with a view to being appointed to fill the vacant position of Deputy Governor. In February 2020, a suit, *Peter Odhiambo Agoro v Anne Kananu Mwenda & another* (the *Agoro* case) was filed challenging the 1st respondent’s nomination as Deputy Governor and conservatory orders were issued blocking her vetting.

In December 2020, the County Assembly passed a resolution to remove the 1st respondent from his position as Governor and subsequently the Senate impeached him. Following the impeachment, the Speaker of the County Assembly (the Speaker) was sworn in as the Acting Governor and the 6th respondent (IEBC) issued Gazette Notice No. 10914 declaring a by-election to be held in February 2021 for the office of the Governor. In January 2021, the orders blocking the vetting and appointment of the 1st respondent were discharged following the withdrawal of the *Agoro* case. Thereafter, the 1st respondent was vetted, approved and appointed as the Nairobi City County Deputy Governor.

Aggrieved, the petitioners filed the instant consolidated petitions challenging the vetting, approval, and appointment of the 1st respondent as Deputy Governor. The petitioners contended that the entire process was a nullity *ab initio* for the reasons that; the 1st respondent’s nomination had been revoked/withdrawn; the 1st interested party had already been impeached; the Speaker had assumed office in accordance with article 181(4) of the Constitution of Kenya, 2010 (Constitution); and the IEBC had gazetted a by-election in compliance with article 181(5) of the Constitution.

Issues

- i. Whether a governor could withdraw their nomination for the position of deputy governor to a county assembly without the assembly’s approval.
- ii. Whether inquiry into alleged unconstitutional actions by a county assembly infringed on the doctrine of separation of powers.
- iii. Whether the actions of an elected governor lapsed after the governor left the office through death or impeachment.
- iv. What were the conditions to be met in order to fulfil the requirement of public participation?
- v. Whether there had to be a formal appointment of a deputy governor once their appointment was approved by the county assembly.
- vi. What was the process to be followed once the nomination of a deputy governor had been approved by a county assembly?
- vii. Whether the Speaker of the National Assembly while acting as the President had the powers to re-constitute the National Government or otherwise exercise the powers of an elected President.
- viii. Whether a speaker of a county assembly while acting as a governor could appoint a deputy governor.
- ix. Whether a court order staying the occurrence of a constitutional event amounted to a breach of constitutional timelines.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 179 - County executive committees

(5) *When the county governor is absent, the deputy county governor shall act as the county governor.*



Elections Act, 2011

Section 18 - Change of deputy county governor nominee candidate

A county governor candidate or a political party shall not at any time change the person nominated as a deputy county governor candidate after the nomination of that person has been received by the Commission:

Provided that in the event of death, resignation or incapacity of the nominated candidate or of the violation of the electoral code of conduct by the nominated candidate, the political party may substitute its candidate before the date of presentation of nomination papers to the Commission.

Interpretation and General Provisions (cap 2)

Section 51 - Power to appoint to include the power to suspend, dismiss, etc., and to reappoint, etc.

1. *Where by or under a written law, a power or duty is conferred or imposed upon a person to make an appointment or to constitute or establish a board, commission, committee or similar body, then, unless a contrary intention appears, the person having that power or duty shall also have the power to remove, suspend, dismiss or revoke the appointment of, and to reappoint or reinstate, a person appointed in the exercise of the power or duty, or to revoke the appointment, constitution or establishment of, or dissolve, a board, commission, committee or similar body appointed constituted or established, in exercise of the power or duty, and to reappoint, reconstitute or re-establish it.*
2. *Where the power or duty of a person under this section is exercisable only upon the recommendation, or is subject to the approval or consent of another person, then the power shall, unless a contrary intention appears be exercisable only upon that recommendation or subject to that approval or consent.*

County Governments Act, 2012

Section 32 - Functions of the Deputy Governor

(4) When acting in office as contemplated in Article 179(5) of the Constitution, the deputy governor shall not exercise any powers of the governor, to nominate, appoint or dismiss, that are assigned to the governor under the Constitution or other written law.

Held

1. The doctrine of separation of powers required that the three arms of government remained separate. That doctrine gave each arm the space to carry out its constitutional functions while bearing in mind the fact that there were checks and balances from the other arms. The Constitution vested the Judiciary with the responsibility of checking the constitutionality of acts carried out by the other arms of the Government while upholding the doctrine of separation of powers.
2. The principle of separation of powers did not deny the court jurisdiction to inquire into the alleged unconstitutionality surrounding the appointment of the 1st respondent as the deputy governor. The court's jurisdiction entitled it to consider the processes undertaken by the County Assembly to vet and approve her.
3. The entire Constitution had to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. Article 259(1) of the Constitution required courts to interpret the Constitution in a manner that promoted its purposes, values and principles, advanced the rule of law and the human rights and fundamental freedoms in the bill of rights, permitted the development of the law and contributed to good governance.
4. A holistic interpretation of the Constitution was quite crucial, especially where there appeared to be a *lacuna* in the law. The duty of the court was to ensure that the constitutional principles and objectives were promoted and fulfilled. Such interpretation should also permit the development of the law and good governance. The court was specifically called upon to make an interpretation that enhanced the objects of devolution and the principles of devolved government.
5. According to the 1st interested party, before the Supreme Court Advisory Opinion in *Re Speaker, County Assembly of Embu* (2018) eKLR, there was a *lacuna* in law relating to the filling of a vacancy in the office of the deputy governor. Whereas the advisory opinion was rendered on March 9, 2018, it took



- the 1st interested party close to two years to act on the Advisory Opinion. From his nomination letter, he only acted after he had been barred from office upon being charged before the Anti-Corruption Court.
6. From the sequence of events preceding the revocation of the nomination, the conduct of the 1st interested party was that of a person who was not in a hurry to fill the vacancy in the office of the deputy governor. The delay in nominating a person to fill the vacancy despite the existence of the Supreme Court's Advisory Opinion when considered alongside the 1st interested party's earlier botched attempt to appoint a person who he knew very well was not a member of his political party, lent credence to the averment that he was not sincere in nominating her or having a deputy governor at all for that matter. The fact that the 1st interested party wanted to take over the *Agoro* case, which was challenging the nomination of the 1st respondent further confirmed the averment that her nomination and subsequent attempted revocation was tainted with malice and ill-will. His actions in respect to the *Agoro* case supported the claim that he was the real sponsor of the move to stop her vetting and approval by the County Assembly.
 7. It was perplexing and hard to believe that a State officer in the high office of a governor could have the temerity to state under oath that he took telephone instructions from ordinary citizens in the execution of his constitutional mandate. The 7th and 8th interested parties' position that they did not contact the 1st interested party in respect of the revocation of the nomination of the 1st respondent was exceedingly likely to be true. That position was fortified by the evidence from the telephone service provider that there was no communication between the 1st interested party's telephone number and that of the 7th interested party.
 8. The nomination of the 1st respondent had been received by the IEBC and the appointed returning officer had issued her with a certificate of nomination on February 10, 2020. There was no evidence that any of the events contemplated in the proviso to section 18 of the Elections Act had occurred in her case. The attempt to withdraw the nomination was unlawful and without basis.
 9. Section 51 of the Interpretation and General Provisions Act, Cap. 2, was not applicable since the Constitution under article 182 provided for the procedure for filling a vacancy in the office of the deputy governor. In any event, were section 51 to be applicable to the circumstances of the instant case, the governor was only a nominating authority and not the approving authority. Under section 51(2) certain appointments were subject to the approval of other bodies and any action regarding such appointments could only be taken with the approval or consent of the other bodies. The 1st interested party could not therefore unilaterally withdraw the nomination without the approval or consent of the County Assembly. Agreeing that he could withdraw the nomination without reference to the County Assembly would violate the principle of separation of powers.
 10. As at the time of the alleged withdrawal of the nomination, the conservatory order issued in the *Agoro* case had not been vacated. The attempt by the 1st interested party to withdraw the nomination was an indirect way of interfering with the ongoing court process.
 11. It was not difficult to agree with the Speaker's averment that the letter allegedly withdrawing the nomination was not delivered to his office for onward transmission to the County Assembly. There was therefore merit in the Speaker's further deposition that he only became aware of the letter through the 1st interested party's cross-petition in the *Agoro* case. The nomination of the 1st respondent was not withdrawn as had been alleged.
 12. From articles 181 and 182 of the Constitution and section 33 of the County Governments Act, the law foresaw a situation where a governor could be removed or be unable to discharge the functions of the office. In all those situations, the end result would be that the governor would not be discharging his duties. It would therefore be absurd to erase all the incomplete actions and decisions that were lawfully being undertaken by the governor at the time of his impeachment. The position of governor was a



- public office for which there had to be continuity such that the exit of a holder of such an office could not sound a death knell on his actions, finished or unfinished.
13. The circumstances of the instant case were unique in that at the time of the impeachment of the 1st interested party, there was already an ongoing process for the appointment of a deputy governor which was completed after the Speaker had assumed the office of the governor in an acting capacity. That was not a scenario that was even envisaged by the Supreme Court in its Advisory Opinion.
 14. The court was called upon to interpret the Constitution so as to fill in any *lacuna* that could exist. While interpreting the law, the court ought to bear in mind that it should make laws when necessary to meet the ends of justice. Legal systems the world over could not grow as had been the case without a great amount of judicial law-making in all fields, constitutional law, common law and statutory interpretation. However, to the extent that judges made laws, they should do so with wisdom and understanding. Judges should be informed on the factual data necessary for good policymaking. That included not only the facts peculiar to the controversy between the litigants before them but also enough of an understanding of how the society worked so that they could gauge the effect of the various alternative legal solutions available in deciding a case.
 15. The court took judicial notice of the fact that there were counties where elected governors had exited office through death or impeachment and that at no time did the actions initiated by them lapse merely because they had left office. It was not far-fetched that an elected deputy governor could become a governor and nominate an un-elected deputy governor who could eventually assume the office of the governor and nominate an un-elected deputy governor. In the scheme of things, such a situation could not be said to be a violation of the political rights under article 38 of the Constitution.
 16. Upon nominating the 1st respondent and after the County Assembly received the nomination, the 1st interested party's role with regard to the process ended, and that were it not for the court order in the *Agoro* case, the process would long have been concluded. The impeachment of the 1st interested party could not have the draconian effect of undoing or terminating the process that was ongoing. There was no error in the action of the County Assembly to conclude the process after the impeachment of the 1st interested party and the subsequent withdrawal of the *Agoro* case.
 17. Article 10(1)(a) of the Constitution listed public participation as one of the national values and principles of governance. That principle allowed the people of Kenya to have a say in the formulation and implementation of legislation and policy at both the national and county levels. Article 174 of the Constitution recognized the necessity to enhance the participation of the people in the exercise of the powers of the State and in the making of decisions affecting them. The provision also recognized the right of communities to manage their own affairs in the furtherance of their development.
 18. Article 196 of the Constitution required county assemblies to conduct their business in a transparent manner and to open their sittings and those of their committees to the public. The county assemblies and their committees were specifically required to facilitate public participation and involvement in their legislative and other businesses. Sections 87 of the County Governments Act, 2012, provided for the principles governing citizen participation, which included timely access to information, reasonable access to the process of policy and law formulation and protection of the rights of minorities. Section 115 of that Act deepened the principle by requiring county assemblies to provide specified mechanisms, unambiguous information and to develop laws and regulations that gave effect to public participation.
 19. The conditions to be met in order to fulfill the requirement of public participation included; providing transportation to and from hearings or hosting radio programs in multiple languages on an important bill, and could well go beyond any formulaic requirement of notice or hearing. In addition, the nature of the legislation and its effect on the provinces undoubtedly played a role in determining the degree of facilitation that was reasonable and the mechanisms that were most appropriate to achieve public involvement. Thus, it was not enough to point to standing rules of the Legislature that provided



- generally for public involvement as evidence that public involvement took place; what mattered was that the Legislature acted reasonably in the manner that it facilitated public involvement in the particular circumstances of a given case.
20. The nature and the degree of public participation that was reasonable in a given case would depend on a number of factors. They included;
 1. the nature and the importance of the legislation and the intensity of its impact on the public.
 2. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the Legislature to be astute to ensure that the potentially affected section of the population was given a reasonable opportunity to have a say.
 21. The notice given by the Nairobi City County Assembly through a newspaper advertisement on January 8, 2021, providing clear information on the impending vetting of the 1st respondent met the requirement of section 7(5) of the Public Appointments (County Assemblies Approval) Act, 2017, that the Select Committee on Appointments gave the public 7 days' notice before the vetting.
 22. In seeking to find out whether the need for public participation was met, the court had to look at the circumstances of each particular case. Public participation was both quantitative and qualitative. The requirement for public participation was therefore met.
 23. A reading of section 32D of the County Governments (Amendment) Act, 2020 indicated that a governor could only appoint a deputy governor with the approval of the county assembly. A reading of the provision did not support the suggestion that there had to be a formal appointment once the County Assembly approved the nomination.
 24. Under section 11 of the Public Appointments (County Assemblies Approval) Act, 2017, the appointing authority was required to make a formal appointment upon receiving the approval of the County Assembly. There was the Speaker of the County Assembly who was then acting as the Governor. In the case at hand, on January 15, 2021, *vide* Gazette Notice No. 208, Vol. CXXIII – No. 13, the Acting Governor formally appointed the 1st respondent as the Deputy County Governor of Nairobi City County. Where the county assembly approved a nominee for the position of deputy governor and the specific governor who made the nomination was unable to complete the appointment process, the entire process was not rendered a nullity. Whoever came in to replace the governor who made the nomination could complete the process by appointing the approved deputy governor.
 25. As of March 9, 2018, when the Supreme Court made its Advisory Opinion *In re Speaker, County Assembly of Embu* [2018] eKLR, the Public Appointments (County Assemblies Approval) Act, 2017, had come into force one year earlier on March 29, 2017. According to the advisory, once a deputy governor was nominated and subsequently approved by the county assembly, the only remaining step was the swearing-in of the nominee and that was what happened in the instant case. The 1st respondent took the oath of office of the deputy governor in compliance with article 74 of the Constitution and section 30(1) of the County Governments Act.
 26. The appointment in question straddled two legal regimes having been initiated under the parameters of the Supreme Court Advisory and concluded under section 32D of the County Governments (Amendment) Act, 2020. There was therefore nothing wrong with the conclusion of the appointment process under the law that was operational at the commencement of the process. There was no merit in the suggestion that there ought to have been a formal appointment of the 1st respondent after her approval by the County Assembly.
 27. The submission that article 146 of the Constitution denied the Speaker of the National Assembly, while acting as the President, powers to reconstitute the National Government or otherwise exercise the powers of an elected President was not to be supported by that provision. Articles 134, 146 and 147(3) of the Constitution were applicable to a situation where the President was temporarily absent



- or incapacitated or where he/she decided that the deputy president should act. That scenario was not permanent as the President was expected to come back to office and could not be equated to a situation where the Speaker of the National Assembly was acting as the President for a period of 60 days pending the holding of a presidential election.
28. Section 32(4) of the County Governments Act, 2012 and article 179(5) of the Constitution were similar to articles 134 and 147(3) of the Constitution. They applied to a situation where the governor was temporarily absent from office and could not be equated to a situation where the governor had permanently left office.
 29. Under normal circumstances, a speaker of a county assembly while acting as a governor had limited authority in performing the functions of that office. One of the limitations was that he could not appoint a deputy governor. That was correct in the sense that the speaker was holding the office as he awaited the election of a governor within 60 days. In the instant case, however, the court was not dealing with a perfect case scenario. Had the 1st respondent been vetted and approved or disapproved, upon nomination, the instant predicament would not have arisen as in that case, she would have been a deputy governor before the impeachment, or in the alternative, the 1st interested party would have nominated someone else.
 30. Taking into consideration all the prevailing circumstances, the pending process of vetting the 1st respondent could not be wished away. The process was stopped through a court order and none of the actors, in that case, could take the blame for that state of affairs. It could not, therefore, be held that the impeachment of the 1st interested party extinguished the nomination of the 1st respondent.
 31. The Speaker who was then acting as the Governor was allowed by the law to do anything that would bring that process to fruition. In that regard, the court was guided by the provisions of article 259(3) (a) and (b) of the Constitution. Although a speaker of a county assembly, while acting as a governor under article 182(5) of the Constitution had no power to appoint a deputy governor, the peculiar circumstances of the instant case entitled the Speaker of Nairobi City County Assembly to complete the ongoing process of the appointment of the 1st respondent as a deputy governor.
 32. A court order staying the occurrence of a constitutional event did not amount to a breach of the constitutional timelines. The court could not imagine a situation where an event ordained by the Constitution would not occur simply because it had been postponed.
 33. The request by the 7th and 8th interested parties to expunge any reference to them in the 1st interested party's pleadings was available under order 2 rule 15 and order 19 rule 6 of the Civil Procedure Rules, 2010. The power to strike out pleadings and averments should be exercised cautiously lest the right of access to justice was interfered with. The determination that the 1st interested party's pleadings in relation to the 7th and 8th interested parties were unbelievable, was sufficient protection of their right to correction and deletion of untrue or misleading information. Any infringement of the right to privacy could be pursued through other processes or litigation.
 34. The actions of the IEBC publishing Gazette Notice No. 10914 calling for a by-election for the position of Governor of Nairobi City County, were a direct consequence of the letter from the Speaker of the County Assembly informing the IEBC of the vacancies in the offices of the Governor and Deputy Governor. As at the time of the impeachment of the Governor, the process of the appointment of the nominated deputy governor had been stayed by the court but was soon thereafter reactivated. The IEBC could not be faulted for calling for a by-election. A by-election would have indeed been conducted if the 1st respondent had not been approved by the County Assembly.

Consolidated petitions dismissed; each party to bear their own costs.

Orders

The nomination, vetting, approval and swearing in of the 1st respondent as the Deputy Governor was constitutional and complied with the applicable laws.



Citations

Cases

Kenya

1. *Aramat & another v Lempaka & 3 others* Petition 5 of 2014; [2014] KESC 21 (KLR) - (Explained)
2. *Babayao, Ferninand Ndung'u Waititu v Republic* Civil Appeal 416 of 2019; [2019] KECA 93 (KLR) - (Mentioned)
3. *Birgen, Paul Kiplagat & 25 others v Interim Independent Electoral Commission & 2 others* Miscellaneous Civil Application 156 of 2011; [2011] KEHC 1246 (KLR) - (Explained)
4. *Butler, Suzzane & 4 others v Redhill Investments & another* Commercial Case 2 of 2016 - (Mentioned)
5. *Golden Line International Limited v Bluesea Shopping Mall Limited & 3 others* Civil Application Sup 8 of 2015; [2016] KECA 264 (KLR) - (Explained)
6. *In re Speaker, County Assembly of Embu* Reference 1 of 2015; [2018] KESC 49 (KLR) - (Mentioned)
7. *In the Matter of Kenya National Commission on Human Rights* Reference 1 of 2014; [2014] KESC 33 (KLR); [2014] 2 KLR 356 - (Followed)
8. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR); [2011] 2 KLR 32 - (Explained)
9. *Institute of Social Accountability & another v National Assembly & 4 others* Petition 71 of 2013; [2015] KEHC 6975 (KLR) - (Followed)
10. *Katiba Institute & another v Attorney General & another* Constitutional Petition No 209 of 2016 - (Mentioned)
11. *Kiambu County Government & 3 others v Robert N Gakuru & others* Civil Appeal 200 of 2014; [2017] KECA 459 (KLR) - (Explained)
12. *Kitbeka, Simeon Kioko & 18 others v County Government of Machakos & 2 others* Petition 9 of 2018 - (Mentioned)
13. *Lenolkulal, Moses Kasaine v Republic* Anti-Corruption and Economic Crimes Case 7 of 2019; [2019] KEHC 8100 (KLR) - (Mentioned)
14. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Followed)
15. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Explained)
16. *Mugambi, Imanyara & another v Attorney General & 5 others* Constitutional Petition 399 of 2016; [2017] KEHC 7955 (KLR) - (Mentioned)
17. *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* Constitutional Petition Nos 305 of 2012; 34 of 2013 & 12 of 2014; [2015] KEHC 473 (KLR) (Consolidated) - (Explained)
18. *Mwinzi, Mwendu Maluki v Cabinet Secretary, Ministry of Foreign Affairs & 2 others* Petition 367 of 2019; [2019] KEHC 2293 (KLR) - (Mentioned)
19. *Mworia, Geoffrey v Water Resources Management Authority & 2 others* Constitutional Petition 4 of 2015; [2015] KEELRC 1124 (KLR) - (Explained)
20. *Njenga Mwangi & another v Truth, Justice and Reconciliation Commission & 4 others* Petition 286 of 2013; [2013] KEHC 6227 (KLR) - (Followed)
21. *Njenga v Judicial Service Commission & another; Law Society of Kenya (Interested Party)* Petition 103 of 2019; [2019] KEHC 10901 (KLR) - (Mentioned)
22. *Pkosing v National Super Alliance & 12 others* Petition 19 of 2017; [2017] KESC 9 (KLR) - (Explained)
23. *Republic v Attorney General & another ex parte Francis Chachu Ganya* Miscellaneous Civil Application 374 of 2012 - (Explained)
24. *Republic v Kombo & 3 others ex parte Waweru* Admiralty Claim 1648 of 2005; [2007] KEHC 70 (KLR); (2008) 3 KLR (EP) 478 - (Mentioned)



25. *Speaker of the Senate & another v Attorney General & another; Law Society of Kenya & 2 others (Amicus Curiae)* Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR) - (Followed)
26. *Waititu, Ferdinand Ndung'u v Independent Electoral and Boundaries Commission & 8 others* Election Petition 1 of 2013; [2013] KEHC 6038 (KLR) - (Mentioned)
27. *Wanjohi, George Mike v Steven Kariuki & 2 others* Civil Appeal 272 of 2013; [2014] KECA 878 (KLR) - (Explained)

Uganda

Tinyefuza v Attorney General [1997] UGCC 3 - (Followed)

South Africa

1. *Doctors' for Life International v Speaker National Assembly and others* (CCT12/05) (2006) ZACC 11) - (Explained)
2. *Matatiele Municipality and others v President of the Republic of South Africa and others* [2006] ZACC 12; 2007 (1) BCLR 47 (CC) - (Explained)

Statutes

Kenya

1. Civil Procedure Act (cap 21) section 27 - (Interpreted)
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 2 rule 15; order 19 rule 6 - (Interpreted)
3. Constitution of Kenya articles 1(2); 2(2); 3(2);10(2)(b); 19; 27; 33; 35; 38; 47; 56; 73; 74; 75; 81; 88; 93; 94; 134; 146(2); 147(3); 165; 174; 177; 179;180(1)(5); 181(1)(5); 182(2)(4)(5); 196(1)(b); 259(1); 232(1) - (Interpreted)
4. County Assemblies Powers and Privileges Act (cap 265C) section 10 - (Interpreted)
5. County Governments Act (cap 265) sections 8(1)(a); 32D(1)(b); 32(4); 87; 115 - (Interpreted)
6. Election (General) Regulations, 2012 (cap 7 Sub Leg) rule 51(4) - (Interpreted)
7. Elections Act (cap 7) section 18 - (Interpreted)
8. Interpretation and General Provisions Act (cap 2) section 51(2) - (Interpreted)
9. Law Society of Kenya Act (cap 18) In general - (Cited)
10. National Assembly (Powers and Privileges) Act (cap 6) section 29 - (Interpreted)
11. Public Appointments (County Assemblies Approval) Act (cap 265B) sections 4, 6(2); 7(5); 10(2) - (Interpreted)

Advocates:

1. Attorney General for the 5th respondent
2. Mr Michael Goa for the 6th respondent

JUDGMENT

The Parties

1. The 1st petitioner, Okiya Omtatah Okoiti, describes himself as a public spirited individual, a human rights defender and the Executive Director of Kenyans for Justice and Development Trust, a legal trust incorporated in Kenya.
2. The 2nd petitioner, Habib Omar Kongo, is a resident of Nairobi County. He however withdrew his petition and did not participate in these proceedings.
3. The 3rd petitioner, Patrick Mwangi Kiiru, is a male adult of sound mind and a resident of Nairobi City County.



4. The 4th petitioner, Josephat Kariuki, is a male adult of sound mind and a resident of Nairobi City County.
5. The 5th petitioner, Angela Mwikali, is a female adult and the Deputy Party Leader of the 7th petitioner.
6. The 6th petitioner, Miruru Waweru, is a male adult of sound mind and the National Chairman and Acting Party Leader of the 7th petitioner.
7. The 7th petitioner, the Thirdway Alliance Kenya, is a political party registered in Kenya with the Registrar of Political Parties.
8. The 8th petitioner, the Law Society of Kenya, is established under the [Law Society of Kenya Act, 2014](#) and its mandate is to advise and assist members of the legal profession, the government and the larger public in all matters relating to the administration of justice.
9. The 9th petitioner, Kenya Human Rights Commission, is a non-governmental organization registered in Kenya with the core agenda of campaigning for the entrenchment of human rights and democratic culture in Kenya.
10. The 10th petitioner, Geoffrey Makworo, is a Kenyan citizen and a registered voter in Mathare Constituency within Nairobi City County.
11. The 1st respondent, Anne Kananu Mwenda, is a female adult of sound mind who was nominated to the position of Deputy Governor of Nairobi City County. She also filed petition No E012 of 2021 and after consolidation, was designated as a cross-petitioner in these proceedings.
12. The 2nd respondent, the Nairobi City County Assembly, is the legislative authority of Nairobi City County within the meaning of article 177 of the [Constitution](#).
13. The 3rd respondent, the Speaker of Nairobi City County Assembly, is an *ex-officio* member of the Assembly elected by the members of the County Assembly to preside over it.
14. The 4th respondent, the Clerk, Nairobi City County Assembly, is the chief administrative officer of the Nairobi City County Assembly, responsible for the day-to-day management and functioning of the County Assembly.
15. The 5th respondent, the Hon. Attorney General of the Republic of Kenya, is the principal legal adviser to the Government, with the key mandate of representing the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings.
16. The 6th respondent, the Independent Electoral and Boundaries Commission, is an independent commission established under article 88 of the [Constitution](#) responsible for conducting or supervising referenda and elections to any elective body or office established by the [Constitution](#), and any other elections as prescribed by an Act of Parliament.
17. The 7th respondent is the Government Printer.
18. The 1st interested party, Hon Mike Sonko Mbuvi Gideon Kioko, is the immediate former Governor of Nairobi City County, who nominated the 1st respondent/cross-petitioner to the position of the Deputy Governor, Nairobi City County.
19. The 2nd interested party, the Senate of the Republic of Kenya, is one of the two houses of the Parliament of Kenya established under article 93 of the [Constitution](#).



20. The 3rd interested party, Katiba Institute, is a non-governmental organization registered in Kenya and participates in the entrenchment and observance of the Rule of Law and constitutionalism through strategic litigation.
21. The 4th interested party, Polycarp Igathe, was the Deputy Governor of Nairobi City County until his resignation on January 11, 2018. He did not participate in these proceedings.
22. The 5th interested party, Jubilee Party, is a political party registered in Kenya with the Registrar of Political Parties.
23. The 6th interested party is the Nairobi City County Executive.
24. The 7th and 8th interested parties, Kristina Pratt Kenyatta and Jane Weru, are female adults of sound minds and residents of Nairobi County. They were enjoined in these proceedings by the 1st interested party.
25. The 9th interested party, United Democratic Movement Party, is a political party registered in Kenya with the Registrar of Political Parties. It did not actively participate in these proceedings.
26. The 10th interested party, Isaac Chege Njuguna, is a male adult of sound mind and a prospective candidate for the seat of the Governor, Nairobi City County.

Background

27. The facts leading to the filing of the consolidated petitions are substantially not in dispute. At the General Election held in August 2017, the 1st interested party, Hon Mike Sonko Mbuvi Gideon Kioko (hereinafter “Hon Sonko”) and the 4th Interested Party, Polycarp Igathe, were elected as the Nairobi City County Governor and Deputy Governor respectively. The 4th interested party however resigned through a letter dated January 11, 2018 thereby creating a vacancy in the said office. Thereafter, Hon Sonko nominated Miguna Miguna for appointment as the deputy governor but the nomination was rejected by the County Assembly on the ground that the nominee was not a member of Hon Sonko’s sponsoring political party.
28. On January 6, 2020, the 1st interested party nominated the 1st respondent/cross-petitioner, Anne Kananu Mwenda (hereinafter “Hon Kananu”) to be vetted by Nairobi City County Assembly (hereinafter “the County Assembly”) with a view to being appointed to fill the vacant position of the Deputy Governor.
29. On February 17, 2020, one Peter Odhiambo Agoro challenged Hon Kananu’s nomination as Deputy Governor and obtained conservatory orders blocking her vetting in Nairobi High Court Anti-Corruption and Economic Crimes Division Petition No 1 of 2020 --*Peter Odhiambo Agoro v Anne Kananu Mwenda & another*(hereinafter “the Agoro case”).
30. On December 3, 2020, the County Assembly passed a resolution to remove Hon Sonko from his position as Governor and on December 17, 2020 the Senate impeached him.
31. Following the impeachment of Hon Sonko, the Speaker of the County Assembly, (hereinafter “the Speaker”), was on December 21, 2020 sworn in as the Acting Governor. On the same date, the 6th respondent, the Independent Electoral and Boundaries Commission (hereinafter “IEBC”) in compliance with article 182(4) & (5) of the Constitution issued Gazette Notice No 10914 declaring a by-election to be held on February 18, 2021 for the office of the Governor.



32. On January 4, 2021 the orders blocking the vetting and appointment of Hon Kananu as the Deputy Governor of Nairobi City County were discharged following the withdrawal of the Agorocase by the petitioner in that case. Thereafter Hon Kananu was vetted, approved and appointed as the Nairobi City County Deputy Governor thereby opening the floodgates for the petitions that are the subject of this judgment namely; Petition No E005/2021, which was later consolidated with Petition Nos E433/2020, E007/2021, E009/2021, E011/2021, E012/2021, E013/2021, E015/2021, E019/2021 and E021/2021.
33. All the petitions, except Petition Nos E011 of 2021 and E012 of 2021 challenge the vetting, approval, and appointment of Hon Kananu as Deputy Governor. The petitioners contend that the entire process was a nullity *ab initio* for the reasons that; Hon Kananu's nomination had been revoked/withdrawn; Hon Sonko had already been impeached; the Speaker had assumed office in accordance with article 181(4) and of the Constitution; and the IEBC had Gazetted a by-election in compliance with article 181(5) of the Constitution.

The 1st Petitioners Case

34. The 1st petitioner, Okiya Omtatah Okoiti, filed Petition No E005 of 2021 on January 8, 2021 and amended it on January 18, 2021. He filed written submissions on April 21, 2021. He challenges the vetting, approval and appointment of Hon Kananu as the Deputy Governor of Nairobi City County and seeks the following reliefs: -

A declaration that:

- a. Both the offices of the Nairobi City County Deputy Governor and the Governor are vacant and should be filled by the Governor elected at the scheduled by-election to be held by the IEBC in terms of the Supreme Court Advisory Opinion in Re Speaker, County Assembly of Embu [2018] eKLR.
- b. The 1st interested party's decision to revoke/withdraw his nomination of Anne Kananu Mwenda for vetting and approval for appointment as Deputy Governor of Nairobi City County was lawful, valid and binding.
- c. Anne Kananu Mwenda, the 4th respondent, was ineligible to be considered under the law for appointment as the Nairobi City County Deputy Governor.
- d. The purported vetting, approval, appointment and swearing into office of Anne Kananu Mwenda as the Deputy Governor of Nairobi City County was illegal and unconstitutional.
- e. Anne Kananu Mwenda's irregular, illegal and unconstitutional assumption of office as the Deputy Governor of Nairobi City County is an affront to the rule of law, democracy and constitutionalism.
- f. Anne Kananu Mwenda is ineligible to be appointed as the substantive Governor of Nairobi City County because only a serving Deputy Governor in office when a County Governor vacates office, including by being impeached and removed from office by the Senate, can take over as a County Governor.
- g. In the absence of a substantive Governor to make the appointment, a nominee for Deputy Governor is vetted and approved by a County Assembly in vain, as he or she cannot be appointed to be sworn into office as the Deputy Governor, and the newly elected Governor will appoint his own deputy as a running mate.



- h. The decision by the Speaker of the Nairobi City County Assembly to purport to relinquish the office of the Acting Governor of Nairobi City County and hand over the instruments of power to Anne Kananu Mwenda was a gross violation of the Constitution and, therefore, invalid, null and void.
- i. All decisions made by Anne Kananu Mwenda either as the Nairobi City County Deputy Governor or as Governor are invalid null and void.
- j. A declaration that the 1st, 2nd, 3rd and 4th respondents should pay the costs of this suit.

An Order:

- i) Prohibiting the 1st, 2nd and 3rd respondents and their agents and any persons howsoever acting from vetting, appointing and/or swearing Anne Kananu Mwenda, the 4th respondent, into office as Governor of Nairobi City County and, subsequently prohibiting Anne Kananu Mwenda from taking oath of office as Governor or having so taken oath from continuing in office as Governor Nairobi City County.
 - ii) Compelling the 4th respondent, IEBC, to prepare and conduct the scheduled by-election for the election of the Governor as provided for in law.
 - iii) Quashing the vetting, approval, appointment and swearing of Anne Kananu Mwenda, the 4th respondent, into office as the Deputy Governor of Nairobi City County.
 - iv) Quashing the swearing of Anne Kananu Mwenda, the 4th respondent, into office as the Governor of Nairobi City County.
 - v) Quashing all and any decisions made by Anne Kananu Mwenda either as Deputy Governor or as Governor of Nairobi City County.
 - vi) Compelling the 1st, 2nd and 3rd respondents to pay to the petitioner the costs of this suit.
35. Through his pleadings and submissions, the 1st petitioner argued that the vetting and approval of Hon Kananu for the position of the Deputy Governor could only have been valid if Hon Sonko had not withdrawn/revoked her nomination and was still a Governor at the time she was vetted and approved. It is the 1st petitioner's contention that since Hon Kananu was not the Deputy Governor at the time Hon Sonko was impeached, her appointment violated article 182(2) of the Constitution.
36. According to the 1st petitioner, upon the removal of Hon Sonko as the Governor, the opportunity for the County Assembly to vet Hon Kananu for appointment as the Deputy Governor had been overtaken by events and irrevocably extinguished.
37. The 1st petitioner posits that the vetting, approval and assumption of office of the Deputy Governor by Hon Kananu without being appointed by the Governor, is an unconstitutional travesty, a reversal and manipulation of constitutional processes and, therefore, null and void *ab initio*. The 1st petitioner pointed out that under article 182(4) of the Constitution, if a vacancy occurs in the office of the governor and that of deputy governor, or if the deputy governor is unable to act, the speaker of the county assembly shall act as county governor and by virtue of article 182(5) an election shall be held within sixty (60) days. The petitioner maintained that there is no reverse gear to this constitutional process and cited the Supreme Court Advisory Opinion In Re Speaker, County Assembly of Embu [2018] eKLR, as reiterating the constitutional provision.
38. It was further submitted that in view of the fact that Hon Sonko had revoked Hon Kananu's appointment, she could not subsequently be vetted, and if approved by the County Assembly, be



- appointed as Deputy Governor, by the Speaker who was holding the office of governor in an acting capacity.
39. The 1st petitioner argued that such appointment of a Deputy Governor by the Acting Governor breached section 32(4) of the [County Governments Act, 2012](#).
 40. The 1st petitioner further argued that in the same way that article 146(2) of the [Constitution](#) prohibits the Speaker of the National Assembly, while acting as the President, from reconstituting the national government or otherwise exercising the powers of an elected President, an Acting Governor has no powers to exercise the powers of an elected governor.
 41. It was submitted that the vetting, approval and assumption of office of deputy governor by Hon Kananu was unlawful and unconstitutional because the appointment of a deputy governor involves several stages. It begins with the nomination of the candidate by the governor who is then cleared by IEBC. Thereafter, the governor presents the nominee's name to the county assembly for vetting and approval. Once approved, the governor appoints the nominee as the deputy governor pursuant to section 32D(1)(b) of the [County Governments Act](#), as amended by section 12 of the [County Governments \(Amendment\) Act, 2020](#).
 42. The 1st petitioner emphasized that in the absence of a substantive governor in office, there is nobody with the constitutional power or authority to appoint the nominee to the office of the deputy governor. It was the 1st petitioner's contention that with the enactment of section 32D of the [County Governments \(Amendment\) Act, 2020](#) the power to appoint the deputy governor rests with the governor.
 43. The 1st petitioner submitted that any by-election to be held should be for the governor and deputy governor and a constitutional crisis would ensue if the governor would then be asked to appoint another deputy governor who has been vetted and approved by the county assembly. It was the 1st petitioner's position that the election of a governor must result in the election of their deputy and that according to article 180 of the [Constitution](#), the two positions are inseparable.
 44. Mr Omtatah noted that a further crisis will ensue if the elected governor is from a different party from Jubilee to which Hon Kananu belongs since the governor and deputy governor cannot belong to different parties. Such a scenario would undermine the harmony desired by the framers of the [Constitution](#) when they left it to the governor to nominate the deputy with approval of the electorate at elections, or the County Assembly.
 45. It was submitted that Hon Kananu cannot be the Governor as the Deputy Governor can only assume the office of the Governor if the vacancy in the office of the Governor arises while both the Governor and the Deputy Governor are in office at the date of the vacancy.
 46. The 1st petitioner urged this court to invalidate the vetting, approval, and assumption of the office as the Deputy Governor by Hon Kananu considering that Hon Sonko had revoked her nomination and had been impeached by the time of her vetting and approval.
 47. According to Mr Omtatah, the [Constitution](#) contemplates that for a person to ascend to the office of the deputy governor, such an appointment can only be valid if the governor is in office. The 1st petitioner argued that since Hon Kananu was not a deputy governor when Hon Sonko was impeached on December 17, 2020, an election for the governor and deputy governor must be held unless the impeachment of the Hon Sonko is reversed by the Court.



48. It was submitted that the 2nd respondent's conduct in purporting to preside over the vetting and approval of Hon Kananu violated articles 10 and 75 of the Constitution for failing the test of good governance and integrity.
49. The 1st petitioner also took issue with the Speaker's decision of January 18, 2021, to vacate office as the Acting Governor and hand over the instruments of power to Hon Kananu thereby making her the *de facto* substantive Governor of Nairobi City County which, in his view, is a gross violation of the Constitution. It was the 1st petitioner's case that the Speaker could only vacate office as the Acting Governor upon handing over to a duly elected governor.

2nd Petitioner's Case

50. The 2nd petitioner filed his petition and supporting affidavit on January 10, 2021. He however withdrew the petition and did not subsequently participate in these proceedings.

The 3rd Petitioner's case

51. The 3rd petitioner, Patrick Mwangi Kiiru, filed Petition No E433 of 2020 dated December 29, 2020. The petition is supported by his affidavit sworn on the same date. He challenges the entire process of nomination, vetting, approval and swearing in of Hon Kananu. We note that the substance of the petition is premised on the allegation that the 4th interested party, Polycarp Igathe, had not resigned as a deputy governor of Nairobi City County. It is on record that the said Mr Igathe informed this court that he formally resigned as the deputy governor and had no interest in these proceedings. We opine that this Petition has been rendered otiose and the issues raised have become moot.

The 4th Petitioner's Case

52. The 4th petitioner, Josephat Kariuki, filed the petition No E011 of 2021 dated 11th January 2021. His case is that the constitutional rights of the residents of Nairobi City County under articles 1(2), 19, 27 38, and 47 of the Constitution have been violated by the inordinate delay in filling the position of the Deputy Governor.
53. He challenges the IEBC's Gazette Notice No 10914 of Vol CXXII- No 232 calling for a by-election for the position of governor of Nairobi City County on the basis that the notice violates articles 10, 38, 81, 180 and 182 of the Constitution, and section 18 of the Elections Act as read together with rule 51(4) of the Election (General) Regulations, 2012. He contends that the IEBC cannot call a by-election for the position of the Governor of Nairobi City County before the conclusion of the vetting exercise on the IEBC's certificate of nomination of Hon Kananu dated February 10, 2020.
54. According to the 4th petitioner, the issue for determination is whether by disregarding the certificate of nomination issued by IEBC to Hon Kananu and calling for a by-election for the position of the Governor Nairobi City County, the constitutional rights of Hon Kananu and those of the residents of Nairobi County have been violated.
55. The 4th petitioner seeks the following prayers: -
- a. A declaration that the 1st respondent acted *ultra vires* the law in publishing the Gazette Notice No 10914 of Vol CXXII- No 232
 - b. A declaration that Gazette Notice No 10914 of Vol CXXII- No 232 is null and void
 - c. A prerogative order of certiorari to bring this honourable court and quash the Gazette Notice No 10914 of Vol CXXII- No 232



- d. A declaration that the 1st respondent curtailed and/or infringed the powers of the 2nd respondent by disregarding the certificate of nomination issued on the February 10, 2020 to the 2nd respondent
 - e. A declaration that at the time of publishing the gazette notice No10914 of Vol CXXII- No 232 there existed no vacancy in the position of (sic) capable of being filled under the provisions of articles 180 and 182(5) of the Constitution.
 - f. A declaration that the Gazette Notice No 10914 of Vol CXXII- No 232 has threatened and/or violated the constitutional rights of the petitioner, the 1st and 2nd interested parties and the residents of Nairobi City County.
 - g. Costs of the suit.
56. The advocates for the 4th petitioner submitted that by issuing a Gazette Notice for the by-election for the office of the Governor and deputy governor of Nairobi City County, the IEBC violated Hon Kananu's right to fair administrative action as the nomination certificate issued in her favour had not been revoked. It was urged that allowing the by-election to proceed will be tantamount to revoking Hon Kananu's nomination certificate.
57. Counsel distinguished the circumstances in the present petition from the facts in the Supreme Court Advisory Reference No 1 of 2015 and noted that the Supreme Court did not address the situation where a vacancy occurs in the office of the governor where the name of a nominee for the office of the deputy governor is pending vetting and approval by a county assembly. Counsel submitted that the declaration of a by-election by IEBC should have awaited the conclusion of the vetting.

The 5th, 6th and 7th Petitioners' Case

58. The 5th, 6th and 7th petitioners filed petition No E015 of 2021 dated January 11, 2021 challenging the vetting and subsequent swearing in of Hon Kananu as the Deputy Governor of Nairobi City County. It is their case that the action of swearing in Hon Kananu usurps the sovereign power of Nairobi City County residents to exercise their democratic right under article 38 of the Constitution to elect their Governor. According to the petitioners the vetting and approval of Hon Kananu as the Deputy Governor of Nairobi City County offends the provisions of articles 3, 181 and 182 of the Constitution thereby rendering the process illegal and a nullity. They therefore seek the following orders: -
- a) A declaration that as at the date of impeachment of the Governor of Nairobi County on December 18, 2020, there was no Deputy Governor in office capable of assuming the role of governor for the remainder of the term of the impeached Governor as envisaged under article 181(1) of the Constitution
 - b) A declaration that as at December 18, 2020 there occurred a vacancy in the office of both the County Governor and that of the deputy governor hence the speaker of the national assembly of Nairobi shall act as the County Governor and hold office until the newly elected county governor assumes office following a by- election to be held within 60 days in accordance with article 180(1) of the Constitution
 - c) A declaration that any vetting, approval and subsequent swearing in of the second respondent as a deputy governor and as a substantive governor of Nairobi City County is unconstitutional, illegal, null and void



- d) That an order of injunction be issued restraining the 1st respondent from vetting, approving or in any manner proceeding with any process whose end result would be to have her sworn in as the deputy governor and or substantive governor of Nairobi City County
 - e) That an order of injunction be issued restraining the 2nd respondent from participating in her vetting, approval or in any other manner proceeding with any process whose end result would be to have her sworn in as the Deputy Governor and or substantive Governor of Nairobi County
 - f) Costs of this petition
59. Counsel for the petitioners submitted that article 182 of the Constitution clearly provides for the circumstances under which a deputy governor may be sworn in as governor and does not need any further interpretation.
60. It was submitted that given that Nairobi City County had no deputy governor, as at the time the office of the Governor fell vacant, the county speaker would have served for 60 days, as the IEBC conducts a by-election in which the elected governor would then serve up to the next general election.
61. It is the petitioners' submissions that upon the declaration of a by-election for February 18, 2021 by IEBC, the 7th petitioner nominated Miguna Miguna and the 6th petitioner (Angela Mwikali) as its candidates for the positions of governor and deputy governor respectively.
62. It was submitted that the respondents violated articles 1,3, 38,181,182 of the Constitution by vetting and installing Hon Kananu to the office of deputy governor. According to the petitioners, section 32D of the County Governments (Amendment) Act, 2020 requires that the governor who nominates the deputy governor formally appoints the nominee as deputy governor after the approval of the County Assembly.
63. The petitioners further contended that Hon Sonko ceased holding office on account of impeachment and no one else was capable of appointing Hon Kananu as deputy governor.
64. The petitioners further submitted that the respondents' actions are an affront to article 3 of the Constitution which provides that every person has an obligation to respect, uphold and defend the Constitution, and that any attempt to establish a government, otherwise than in compliance with the Constitution is unlawful. Reliance was placed on the decision in Katiba Institute & Another v Attorney General & another [2017] eKLR.
65. It was submitted that the County Assembly having contravened the Constitution by vetting and swearing in Hon Kananu, her continued occupation of the office of the deputy governor is an illegality and ought to be declared null and void.
66. It was the petitioners' case that having been sworn in as the acting Governor, the Speaker of the County Assembly of Nairobi who assumed the office of county governor under article 182(4) was required to hold office until the newly elected county governor assumed office following an election held under article 180(1) of the Constitution.

The 8th and 9th Petitioners' Case

67. The 8th and 9th petitioners filed petitions Nos E019 of 2021 and E021 of 2021 respectively all dated January 18, 2021 through which they seek identical orders as follows: -



- a) A declaration that the decision of the County Assembly to vet and approve Anne Kananu Mwenda as Deputy Governor of Nairobi City County on January 15, 2021 without undertaking public participation contravenes article 10 of the Constitution as read together with article 196(1)(b) of the Constitution of Kenya .
- b) A declaration that the process of appointing Anne Kananu Mwenda as Deputy Governor Nairobi City County when the Speaker of the County Assembly has been sworn in to act as Governor for sixty days pending the election of Governor and Deputy Governor- violates:
 - i. Article 2(2) of the Constitution of Kenya.
 - ii. Article 3(2) of the Constitution of Kenya.
 - iii. Article 10 of the Constitution of Kenya.
 - iv. Article 38(3) (b) of the Constitution of Kenya.
 - v. Article 73 of the Constitution of Kenya.
 - vi. Article 81 of the Constitution of Kenya.
 - vii. Article 94 of the Constitution of Kenya.
 - viii. Article 174 of the Constitution of Kenya.
 - ix. Article 175 of the Constitution of Kenya.
 - x. Article 182(4) & (5) of the Constitution of Kenya.
- c) A declaration that the action of Anne Kananu Mwenda of taking the oath of office and assuming the position of Deputy Governor of Nairobi City County without a formal appointment by the Governor as required by section 32D of the County Government Act, 2012 is unlawful.
- d) An order of *certiorari* to remove into this court and quash the decision of the County Assembly made on January 15, 2021 to approve the nomination of Anne Kananu Mwenda as the Deputy Governor of Nairobi City County.
- e) An order of *certiorari* to remove into this court and quash the decision of the respondents of January 15, 2021 to swear into office Anne Kananu Mwenda as the Deputy Governor of Nairobi City County Governor.
- f) An order of permanent injunction to restrain the swearing into office of Anne Kananu Mwenda as the Governor of Nairobi City County Government.
- g) An order directing the Independent and Electoral Boundaries Commission to conduct the election of Governor and Deputy Governor of Nairobi City County Government within sixty days from the date of Judgement.
- h) Costs of the petition.

68. The 8th and 9th petitioners contested the manner in which Hon Kananu was vetted, approved, appointed and sworn in as the Deputy Governor of Nairobi City County on January 15, 2021 and submitted that as of December 18, 2020 when Hon Sonko was impeached, the office of the deputy governor was vacant and article 182(2) of the Constitution was therefore not applicable in the circumstances. The Petitioners asserted that the applicable provision was article 182(4) of the



- Constitution which was complied with as the Speaker was sworn in as Acting Governor. Therefore, a by election should have been held within 60 days as announced by the IEBC.
69. The 8th and 9th petitioners argued that since Hon Kananu had not been vetted by the County Assembly by the time the office of the Governor fell vacant, she could not be appointed as a deputy governor as the events contemplated under article 182 of the Constitution had crystallized. They explained that the legal rights attached to Hon Kananu's nomination could not be revived for the reasons that there was no substantive governor in office to appoint her as deputy governor; that the actions undermined the constitutional objective of a by-election envisioned by article 182(5); and that the actions denied Nairobi residents a chance to exercise their democratic rights under article 38(3)(c) to elect a new governor of their choice.
70. The petitioners argued that the election of a governor and deputy governor are so intricately intertwined, in the scheme of the elective mandate, such that the deputy governor must be considered to derive his authority directly from the electorate. According to the petitioners, Hon Sonko's authority was derived from the electorate and once he was impeached, the nomination of Hon Kananu lost its legitimacy.
71. The petitioners added that Hon Kananu's nomination as deputy governor was dependent on Hon Sonko's continued stay in office as the two were joined at the hip. They opined that given that both seats were vacant, they would both be filled through a by-election. The petitioners relied on the Supreme Court's decision in Re Speaker, County Assembly of Embu [2018] eKLR.
72. Regarding the issue of whether section 32D of the County Governments (Amendment) Act, 2020 applies retrospectively to the instant petitions, it was submitted that the Act was enacted on July 9, 2020 and came into force on July 27, 2020 when the office of the Deputy Governor was vacant, and that it therefore meant that any subsequent appointment of a deputy governor should be done in compliance with the said Act.
73. It was submitted that after the vetting and approval by the County Assembly of a deputy governor nominee, section 32D of the County Governments (Amendment) Act, 2020 as read with section 4 of the Public Appointments (County Assemblies Approval) Act, 2017 requires a formal appointment by the governor. According to the petitioners this appointment shall be in writing and made under a county public seal. They contended that this step of making the appointment was bypassed after the approval by the County Assembly and that the respondents unlawfully proceeded to swear in Hon Kananu into office without any formal appointment by the Governor.
74. It was submitted that retrospective application of the law is valid if applied appropriately. Reference was made to the decision in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR where the Supreme Court stated that a retroactive law is not unconstitutional unless it inter alia impairs obligations under contracts, divests vested rights or is constitutionally forbidden. They submitted that the nomination of Hon Kananu does not fall under any of these exemptions.
75. On whether the process of a by-election after the occurrence of vacancies in the offices of Governor and Deputy Governor under article 182(5) of the Constitution can be reversed, it was submitted that a court of law has no powers to stop the running of constitutional timelines. They relied on the decision of the Supreme Court in George Mike Wanjobi v Steven Kariuki & 2 others [2014] eKLR for the proposition that time set by the Constitution cannot be enlarged.
76. On the issue of whether the speaker acting as a governor, can lawfully appoint a Deputy Governor, the petitioners submitted that the Speaker has no such powers. According to them, the office of a



deputy governor is an elective office which draws its authority and legitimacy directly from the people as opposed to the speaker who is elected by the members of the County Assembly. They argued that the Speaker is not a choice of the people and cannot perform the function of appointing a deputy governor without creating constitutional absurdities.

77. It was also submitted that the Speaker's act of appointing a deputy governor offends the doctrine of separation of powers. The petitioners relied on the decision in *Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others* [2018] eKLR.

The 10th Petitioner's Case

78. The 10th petitioner, Geoffrey Makworo, filed Petition No E013 of 2021 dated January 12, 2021 which he amended on January 20, 2021. The petition is anchored on the alleged violation of articles 38, 47, 56, 94, 180(5), 182(2) and 259(1) of the *Constitution*.
79. The 10th petitioner's case is that the actions of the respondents violated the rights of the voters of Nairobi City County by robbing them of the opportunity to participate in the Nairobi City County gubernatorial election. He states that article 47 of the *Constitution* was violated to the extent that the intended vetting did not comply with the constitutional principles of fair administrative action. With regard to article 180(5) of the *Constitution* he states that the vetting process was illegal since nomination of Hon Kananu was revoked by Hon Sonko.
80. He avers that the rights of the marginalized groups and minorities would not be represented thus violating article 56 of the *Constitution*.
81. The 10th petitioner further contends that upon impeachment of a governor, only a deputy governor serving at the time of impeachment can ascend to the position of a governor.
82. It was the 10th petitioner's case that all the actions and processes initiated by Hon Sonko that were incomplete as at the time of his impeachment lapsed with the impeachment and further, that as at the time the speaker took over, the office of the Governor and Deputy Governor remained vacant and the Speaker's role could not exceed 60 days.
83. The petitioner argued that the Speaker could perform the functions of a governor except the duty of appointing anyone as a deputy governor. He contends that gubernatorial positions are elective and not appointive and that as at the time of the vacancy in the office of the governor, there was no deputy governor to assume office.
84. The 10th petitioner consequently seeks the following prayers: -
- a. A declaration that Anne Kananu is ineligible to be vetted, appointed or sworn in as a deputy governor of Nairobi city county for reasons that only a serving deputy governor in office when a County governor is impeached can take over as a County Governor
 - aa. A declaration that the decision of the County assembly to vet and approve Anne Kananu Mwenda as Deputy Governor Nairobi City County on January 15, 2021 without a formal appointment by the governor as required by section 32D of the County Government Act 2012 is unlawful
 - bb. A declaration that the process of appointing Anne Kananu Mwenda as deputy governor Nairobi City County when the speaker has been sworn in to act as governor is illegal, null and void since it violates the *Constitution*



- cc. A declaration that after the impeachment of a governor and in the absence of a deputy governor the speaker takes over in acting capacity with legal restrictions that apply with those of article 134 of the *Constitution mutatis mutandis*
 - b. A declaration that the office of the Deputy County Governor Nairobi County was vacant by the time the 1st interested party Hon Mbuvi Sonko was impeached and removed from office
 - c. This honourable court issues an order of *certiorari* quashing the decisions of the 1st, 2nd, and 3rd respondents made on January 15, 2021 to approve the nomination, swear in and appoint Anne Kananu Mwenda as Deputy Governor Nairobi County and subsequently the Governor Nairobi County.
 - d. This honourable court issues an order of prohibition against the 1st, 2nd and 3rd respondents whether by themselves, their agents, servants or any other person from however acting from vetting, appointing and/or swearing in Anne Kananu Mwenda, the 1st interested party into office as the deputy governor of Nairobi and subsequently governor of Nairobi
 - e. This honourable court issues an order of prohibition against the 4th respondent whether by themselves, their agents, third parties or any other person acting on their behalf or their own behalf from gazetting the 1st interested party as the Deputy Governor and subsequently Governor Nairobi county
 - f. This honourable court issues an order compelling the 4th respondent, the Independent Electoral and Boundaries Commission to conduct the election of the Governor and deputy governor Nairobi county within 60 days from December 21, 2020 or from any other date as stipulated by this honourable court
 - g. The costs of this petition be borne jointly or severally by the respondents.
 - h. Any such other order(s) as this honourable court shall deem just in the circumstances.
85. The 10th petitioner identified the main issue for determination as whether Hon Kananu was validly nominated, vetted and approved as deputy governor of Nairobi City County. He submitted that only a deputy governor in office when a governor is impeached can take over the office of the governor. According to him, Hon Kananu's nomination had been revoked and she had not assumed office at the time Hon Sonko was impeached and was therefore ineligible to be vetted and appointed as a deputy governor.
86. It was further submitted that all incomplete actions and processes initiated by a governor as at the date of his impeachment lapsed with the impeachment and that they cannot be subsequently resurrected for finalization.
87. According to the 10th petitioner, by the time the Speaker took over as Acting Governor of Nairobi City County, both the offices of the Governor and the Deputy were vacant. His position is that the Speaker, while acting as a governor has powers to appoint County Executive Committee (CEC) members but cannot appoint a deputy governor.
88. The 10th petitioner's case was that the entire process of vetting and appointing Hon Kananu was illegal and against the constitutional principles, section 32D of the *County Governments Act, 2012* and section 4 of the *Public Appointments (County Assemblies Approval) Act, 2017*.



89. It was the 10th petitioner's case that the Nairobi City County gubernatorial by-election can only be avoided if the impeachment of Hon Sonko is quashed by the court. Reference was made to the decision in Reference No 1 of 2015, In [*The Matter of the Speaker, County Assembly of Embu*](#).

The 1st Respondent/Cross-Petitioner's Case

90. Hon Kananu filed replying affidavits in response to the petitions wherein she avers that she was on January 5, 2020 duly nominated by Hon Sonko for appointment to the position of the Deputy Governor of Nairobi City County. She states that the nomination letter was received by the Speaker on the January 6, 2020 after which the IEBC issued her with a nomination certificate thereby clearing the way for her vetting by the County Assembly.
91. She states that even though the County Assembly was keen on vetting her so that she could assume the position of the Deputy Governor, Hon Sonko, on his part, was not sincere in his nomination as he was aware that once she assumed office as the Deputy Governor he would be impeached by the County Assembly. She adds that Hon Sonko's ill motive became apparent when, on January 13, 2020, he sponsored the filing of the *Agoro* case wherein, through a proxy, sought and obtained orders to restrain the County Assembly from vetting her.
92. Hon Kananu further explains that Hon Sonko's action to sponsor the *Agoro* case was premised on the fact that he had no authority or power to withdraw the nomination once it had been tabled before the County Assembly as this would have violated the doctrine of separation of powers.
93. It is Hon Kananu's position that the letter dated December 7, 2020 by Hon Sonko purporting to revoke her nomination was void *ab initio*. She further avers that the filing of these petitions was motivated by the withdrawal of the *Agoro* case which granted the County Assembly the leeway to proceed with her vetting.
94. Hon Kananu states that the impeachment of Hon Sonko did not in any way affect the validity and legitimacy of the constitutional process of filling the vacant position of the Deputy Governor, which the County Assembly had commenced. In her view, her nomination, vetting and appointment was predicated on articles 179 (4) & (5), 180 (5) & (6) and 259(1), (3) & (8) of the [*Constitution*](#) as expounded by the Supreme Court Advisory Opinion in Reference No 1 of 2015: In the [*Matter of the Speaker, County Assembly of Embu*](#).
95. Hon Kananu contends that the constitutional process of her appointment as Deputy Governor, had commenced and was on-going as at the time Hon Sonko was impeached. In her view, the process should be allowed to run its full course and that the by-election scheduled to be conducted by the IEBC is prejudicial to her constitutional right to be appointed as Deputy Governor, Nairobi City County.
96. She further states that there is no vacancy in the position of governor and deputy governor within the meaning of article 182(4) of the [*Constitution*](#) and there was therefore no reason for holding a by-election as envisaged by article 182(5).
97. According to Hon Kananu, although the [*County Governments \(Amendment\) Act, 2020*](#) was enacted after her nomination, under section 32D(3) of the Act, she was deemed to have been approved for appointment by the County Assembly after the lapse of 14 days.
98. Counsel for the 1st respondent submitted that, by making provisions for the automatic takeover of the position of a governor by the deputy in the event of the governor's impeachment, death or inability to continue the functions of the office of governor, the drafters of the 2010 Constitution intended to



avoid expensive and interruptive mid-term by-elections. Counsel urged the court to adopt a purposive approach in interpreting the provisions of the *Constitution* that are relevant to this case.

99. It was the 1st respondent's case that Hon Sonko's letter of December 7, 2020 purporting to withdraw her said nomination was ill-motivated, an afterthought, and had no legal effect. Counsel observed that no reasons were given for the alleged withdrawal of the nomination and that the leave of the County Assembly was not sought.
100. It was submitted that the petitions have been overtaken by events following the ruling of Justice Mrima authorizing her vetting.
101. On whether public participation was conducted during the vetting process, it was submitted that the publication of advertisements in the local dailies calling for the submission of views by members of the public and the participation of the Members of the County Assembly (MCAs) during the vetting constituted sufficient public participation. Counsel urged this court to exercise restraint and caution in dealing with matters that have been deliberated upon by other arms of government, in this case the County Assembly, so as not to run afoul of the doctrine of separation of powers.
102. It is necessary to note that Hon Kananu filed Petition E012 of 2021 dated January 11, 2021 restating her above arguments. Her petition seeks the following orders: -
 - a. A declaration that the constitutional process for the appointment of the Petitioner as the deputy governor of Nairobi City County commenced by the former Governor of Nairobi whilst he was the Governor of Nairobi City County is valid and legitimate.
 - b. A declaration that the constitutional process for the appointment of the petitioner as the deputy governor of Nairobi City County commenced by the former Governor of Nairobi whilst he was the Governor of Nairobi City County should be completed first prior to the by-election for the position of Governor Nairobi County being held.
 - c. Costs of this Petition.
 - d. Any other order that this honourable court deems fit and just in the circumstances.

The 2nd Respondent's Case

103. The 2nd respondent, the Nairobi City County Assembly, opposed the petitions through grounds of opposition dated January 12, 2021 and a replying affidavit sworn by the Leader of Majority Party Hon Paul Kados Kiguathi on January 13, 2021. The 2nd respondent confirms that its role as provided for under section 8 of the *County Governments Act*, includes the vetting and approval of nominees for appointment to county public offices which process is governed by the *Public Appointments (County Assemblies Approval) Act*, 2017.
104. The 2nd respondent further confirms that before the *County Governments (Amendment) Act, 2020* came into effect, there was no substantive procedural law to be followed in the appointment of a deputy governor. It was however observed that the Supreme Court in Advisory Opinion Reference No 1 of 2015; *In the matter of the Speaker of the County Assembly of Embu* [2018] eKLR had prescribed the general procedure for appointment of deputy governors. Thereafter, the IEBC formulated guidelines to further aid county governments in making such appointments. It was the 2nd respondent's position that at the time of Hon Kananu's nomination to the Office of the Deputy Governor, there was no requirement in law for Hon Sonko to call for applications to fill the position of deputy governor.



105. It is the 2nd respondent argument that after the petitioner in the *Agoro* case withdrew his case on January 7, 2021, and the court's refusal to allow Hon Sonko's application to lodge a cross-petition, the conservatory orders of February 17, 2020 lapsed thereby paving way for the vetting of Hon Kananu.
106. It was submitted that the Notification of Withdrawal of the nomination of Hon Kananu by Hon Sonko dated December 7, 2020 addressed to the Speaker was not brought to the attention of the County Assembly as provided for under its Standing Orders. Relying on the replying affidavit of the Speaker of the County Assembly, the 2nd respondent asserts that the withdrawal letter is a forgery which is the subject of police investigations.
107. It was submitted that the offices of the governor and that of the deputy governor are separate and distinct constitutional offices and the actions and decisions made, performed or undertaken by the occupants of either of these two independent offices in discharge of their constitutional mandates survives any subsequent vacancies in those offices. According to the 2nd respondent, the impeachment of Hon Sonko could not have affected the nomination of Hon Kananu and her subsequent vetting, approval, appointment and swearing in.
108. The 2nd respondent argued that since the vetting of Hon Kananu following her nomination by Hon Sonko had commenced, it must be allowed to run its course and the position cannot be filled through a new vetting or election process.
109. Counsel for the 2nd respondent relied on the decision in *Mugambi Imanyara & Another v Attorney General & 5 others* [2017] eKLR and submitted that the courts should fill in the gaps where the *the Constitution* is vague or imprecise or has a glaring *lacuna*. Counsel acknowledged that a deputy governor can, under the *Constitution*, assume office through an election or nomination. It was submitted that in the present case the circumstances are unique in that at the time of the impeachment of the governor, there was already an on-going process for the appointment of a deputy governor which was completed after the Speaker had assumed the office of the governor in an acting capacity.
110. The 2nd respondent urged the court not to interfere with its vetting and approval of Hon Kananu as the deputy governor on the grounds that the governor becomes *functus officio* once he nominates a person for appointment as a deputy governor; that the *County Governments (Amendment) Act, 2020* whose commencement date is July 27, 2020 cannot be applied retrospectively; and that section 10 of the *County Assemblies Powers and Privileges Act, 2017* bars the court from interfering with the proceedings of a county assembly as it offends the doctrine of separation of powers between arms of government.
111. The County Assembly urged this court to dismiss the petitions as they do not disclose any cause of action against it.

The 3rd Respondent's Case

112. Hon Benson Mutura the Speaker of the County Assembly is the 3rd respondent. He filed a replying affidavit dated March 31, 2021 in opposition to the petitions. He states that Hon Kananu was validly nominated to be vetted by the County Assembly for the position of deputy governor. He contends that following the withdrawal of the *Agoro* case that had stopped the County Assembly from vetting Hon Kananu, nothing stopped the County Assembly from proceeding with the vetting exercise.
113. The Speaker further stated that the impeachment of Hon Sonko did not affect the pending vetting of Hon Kananu as her name had been submitted to the County Assembly prior to the impeachment. He noted that there is no provision in law to the effect that a nomination that is pending approval by the County Assembly lapses when the appointing authority leaves office.



114. He further deposes that the nomination of the deputy governor cannot be impugned on the basis that it was made by a governor who had been barred from accessing his office as a bail condition. He supported his argument by reference to the Court of Appeal decisions in *Moses Kasaine Lenolkulal v Republic* [2019] eKLR and *Ferdinand Ndung'u Waititu Babayao v Republic* [2019] eKLR.
115. The Speaker also averred that there was no valid withdrawal of Hon Kananu's nomination by Hon Sonko as alleged by the petitioners and adds that he only became aware of the alleged withdrawal letter on January 7, 2021 when Hon Sonko filed a cross-petition in the *Agoro* case. He further stated that the stamp on the letter did not have any signature indicating the person who received it, as is the procedure, and neither does the letter exist in the register in his office in which all documents, letters and correspondences are recorded.
116. The Speaker dismissed the petitioners' suggestion that an acting governor can only perform certain tasks and stated that this argument had no legal basis as no law bars an acting governor from performing all the functions of the office of the governor.
117. Counsel for the 3rd respondent argued that the current situation was not anticipated under the *Constitution* and as was appreciated by the Supreme Court in Advisory Opinion Reference No 1 of 2015; *In the matter of the Speaker of the County Assembly of Embu* [2018] eKLR, the *Constitution* cannot foresee and provide for every scenario. Counsel therefore urged the court not to take a mechanical approach in interpreting the *Constitution* so as to discern its purpose.
118. It was submitted that section 32D of the *County Governments (Amendment) Act, 2020* had not been enacted in February 2020 when Hon Kananu was nominated for the position of the Deputy Governor and its provisions should not apply retrospectively. For this argument, counsel cited the decision in *Golden Line International Limited v Bluesea Shopping Mall Limited & 3 others* [2016] eKLR where the court held that statutes should have no retrospective effect unless the same statute says so.
119. According to counsel, a gubernatorial by-election for Nairobi City County can longer be held since the constitutional timelines have lapsed and cannot be expanded. For this argument, counsel relied on the Supreme Court's decision in *George Mike Wanjohi v Steven Kariuki & 2 others* [2014] eKLR.
120. On the question as to whether there was public participation in the vetting of Hon Kananu, counsel for the 3rd respondent submitted that the public was involved in the process.

The 4th Respondent's Case

121. The 4th respondent, the Clerk, Nairobi City County, Mr Edward Ombwori Gichana opposed the petitions through the replying affidavit dated March 31, 2021. His case is that article 182(4) and (5) of the *Constitution* provides for the holding of an election whenever there is a vacancy in the office of the governor and deputy governor. In such a scenario, the Speaker of the County Assembly acts as a governor for 60 days within which period an election must be held. He states that in this particular case, there was a validly nominated Deputy Governor at the time the Governor was impeached.
122. The 4th respondent states that before the enactment of the *County Governments (Amendment) Act, 2020*, the general procedure prescribed in the Supreme Court of Kenya Advisory Opinion rendered on March 9, 2018 in Reference No 1 of 2015 - *In Re Speaker, County Assembly of Embu*, was applied in the event of a vacancy in the Office of the Deputy Governor. The 4th respondent contends that following the nomination of Hon Kananu by Hon Sonko on January 6, 2020; and her acceptance on January 21, 2020, the County Assembly became exclusively seized of all the matters pertaining to her nomination, vetting and approval.



123. On the claim that Hon Sonko could not nominate Hon Kananu as he was barred from accessing his office as a bail condition, the 4th respondent argues that such a condition did not invalidate any decision made by the Governor as the condition was not equivalent to removal from office. Reliance was placed on the decisions in Moses Kasaine Lenolkulal v Republic [2019] eKLR, and Ferdinand Ndung'u Waititu Babayao v Republic [2019] eKLR.
124. It was the 4th respondent's further argument that the nomination of Hon Kananu was conducted in accordance with the law in place at the time and that the IEBC designated a County Returning Officer for purposes of Hon Kananu's nomination via Gazette Notice No 913 of February 3, 2020 after which she was cleared for vetting by the County Assembly. The 4th respondent noted that the approval hearings were however stopped by the court through an Order dated February 17, 2020 in the Agoro case which order was later vacated upon the withdrawal of the case on January 7, 2021.
125. The 4th respondent avers that after the Conservatory Orders were vacated, he issued a notice dated January 8, 2021 inviting the public to attend the vetting hearings of Hon Kananu whereupon the County Assembly through his office, invited for the re-tendering of Hon Kananu's credentials so as to confirm her suitability. The credentials were delivered on January 11, 2021 after which the nomination was approved in a special sitting of the County Assembly and thereafter the general public was notified of the swearing in ceremony and assumption of office via Gazette Notices.
126. The 4th respondent contends that the decisions and processes of the County Assembly are, under section 10 of the County Assemblies Powers and Privileges Act, 2017, protected from judicial interference. He adds that the petitions offend the doctrine of separation of powers between the three arms of government by interfering with matters properly regulated by article 182 of the Constitution, the County Governments Act, the Public Appointments (County Assemblies Approval) Act, 2017, and the County Assembly Standing Orders.

The 5th Respondent's Case

127. The 5th respondent, the Attorney General, opposed the petitions through grounds of opposition dated January 13, 2021 and April 29, 2021.
128. The AG's case was that none of the petitioners and interested parties cited any legal provision to support their assertion that a deputy governor cannot be sworn into office in the absence of a governor. It was submitted that the petitions do not meet the parameters of a constitutional petition as stated in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR.
129. It was submitted that the assumption of office by Hon Kananu was validated by the ruling delivered by Mrima J on February 9, 2021.
130. On whether the nomination of Hon Kananu was revoked by Hon Sonko, counsel submitted that once a constitutional office holder discharges his/her duty, in this case, nominates a deputy governor, and the nomination is acted upon by another constitutional body, the officer cannot recall that action as he becomes *functus officio*. Counsel opined that the nomination could only be reversed if Hon Kananu rejected it.
131. It was submitted that it is not in the public interest to hold an election for the office of the governor when there is a validly nominated and appointed deputy governor in office.



The 6th Respondent's Case

132. The IEBC opposed the petitions through the replying affidavit of its Director of Legal and Public Affairs Mr Michael Goa, sworn on April 14, 2021.
133. The IEBC's case is that upon being informed by the Speaker of the County Assembly of vacancies in the offices of the governor and the deputy governor of Nairobi City County, it proceeded to fix a date for the by-election of the governor as provided by article 182(4) & (5). It is its submission that it acted as required by the law and cannot be said to have violated any constitutional provisions. The IEBC pointed out that at the time the vacancies occurred, the vetting of Hon Kananu by the County Assembly had been stayed in the Agoro case.
134. Counsel for the IEBC submitted that elections could not be held as there was a stay order issued by Makau J on January 21, 2021 and that it cannot be said that the election has been overtaken as the same order froze but did not expand the constitutional timelines. According to counsel, the stopping of an event by the court cannot be equated to expansion of constitutional timelines and that the petitioners had misinterpreted the decision in [George Michael Wanjohi](#) case.

The 7th Respondent's Case

135. The 7th respondent did not participate in these proceedings.

The 1st Interested Party's Case

136. The 1st interested party, Hon Sonko, filed Petition No E007 of 2021 which was supported by his affidavit dated January 7, 2021. He filed a supplementary affidavit dated April 20, 2021. He also filed a replying affidavit dated April 19, 2021 in support of the consolidated petitions. His petition is premised on the assertion that the nomination of Hon Kananu as deputy governor is unlawful as he revoked her nomination on December 7, 2020. His case was that Hon Kananu's name could not therefore be tabled before the County Assembly for vetting as there was no provision for re-tendering a nomination that had been revoked.
137. Hon Sonko faulted the County Assembly for failure to conduct public participation during the vetting of Hon Kananu.
138. In summary, Hon Sonko submitted that a deputy governor cannot be appointed when there is a vacancy in the office of the governor and that article 182(4) of the [Constitution](#) kicks in as soon as the Speaker of the County Assembly is sworn in as an acting governor.
139. He further submitted that the moment he was impeached, all his uncompleted decisions or actions lapsed and that the Speaker, acting as a governor, has no powers to appoint a deputy governor.
140. He submitted that Hon Kananu's appointment as deputy governor is soiled in dirt, disrepute, impunity and is completely unacceptable in which case, she has no legal authority to govern the County. He added that the court should restore sanity in the management of the affairs of the County by making an order that will enable him to resume his duties.
141. Regarding the allegations against the 7th and 8th interested parties, Hon Sonko averred that the 7th interested party contacted him immediately prior to his impeachment requesting him to appoint the 8th interested party, as the Nairobi City County Deputy Governor, *in lieu* of Hon Kananu.
142. Through his petition, he sought the following reliefs: -



- a. A declaration do issue that Hon Benson Mutura while holding the position of the Acting Governor Nairobi City County in purporting to hire, re-appoint, or reassign CECs, dismiss the current County Secretary or appoint any Chief of Staff, Legal Advisor or execute any such mandate reserved for an elected Governor, acted *ultra vires* section 32(4) of the [County Governments Act](#);
 - b. A declaration do issue that Anne Mwenda Kananu is ineligible to be vetted, nominated, or appointed as the Nairobi City County Deputy Governor current, or otherwise howsoever, her initial nomination as such Deputy Governor by a letter dated January 6, 2020 having been revoked by the petitioner herein by a letter dated December 7, 2020;
 - c. A declaration do issue that Hon Benson Mutura as the Acting Nairobi City County Governor, is prohibited from exercising any of the powers of the substantive Governor, and shall not exercise any powers of the substantive Governor to nominate, appoint or dismiss any person in the Nairobi City County Government and any such action, appointment, or dismissal in breach of section 32(4) of the [County Governments Act](#) by the said Hon Benson Mutura is null and void;
 - d. A declaration do issue that any resolution purportedly passed by the Nairobi City County Assembly purporting to vet or appoint Anne Kananu Mwenda as the Governor, Nairobi City County Deputy Governor, is null and void, and *ultra vires* the [County Governments Act, 2012](#) for *inter alia* being unlawful and for want of public participation;
 - e. A declaration do issue that the averments contained in the letter by Hon Benson Mutura dated January 8, 2021 purporting to dismiss, re-appoint and appoint persons specified therein the said decision being *ultra-vires* section 32(4) of the [County Government Act](#);
 - f. An order of prohibition do issue to prohibit the 2nd respondent from vetting, accepting for nomination or appointment of for swearing in of the 3rd respondent as the Deputy Governor of Nairobi City Council;
 - g. An order of prohibition do issue to prohibit the 4th and 5th respondents from forwarding to the 1st respondent for vetting, accepting for nomination or appointment and from swearing in the 3rd respondent as deputy Governor of Nairobi City County;
 - h. An order of prohibition do issue to prohibit Hon Benson Mutura as the Acting Governor of Nairobi City County from exercising any powers of the substantive Governor and shall not exercise any of the powers of the substantive to nominate, appoint or dismiss any person in the Nairobi City County Government and any such action, appointment or dismissal in breach of section 32(4) of the [County Government's Act](#); and
 - i. Costs of the petition be awarded to the petitioner.
143. In support of the consolidated petitions, Hon Sonko averred that Hon Kananu's cross-petition has no enforceable cause of action. He conceded that he nominated Hon Kananu to be vetted for appointment as deputy governor by the County Assembly but that the process was stopped by a court order issued in the *Agoro* case. He further states that he wrote to the Speaker on December 7, 2020 revoking the nomination of Hon Kananu.
144. Hon Sonko averred that immediately prior to his impeachment, the 7th interested party, Kristina Pratt Kenyatta, contacted him on his cell phone requesting him to nominate the 8th interested party, Jane



- Weru, as the Nairobi City County Deputy Governor in place of Hon Kananu which conversation he recorded and exhibited through a CD audio recording.
145. He averred that section 32D which was introduced by [County Governments \(Amendment\) Act, 2020](#) had no retroactive effect, and Hon Kananu cannot rely on the same to support her revoked nomination. He asserts that there is no way an appointment could have crystallized legally without a sitting and substantive Governor appointing her because an acting Governor cannot execute such a mandate.
 146. The 1st interested party filed written submissions dated April 20, 2021 in support of the consolidated petitions and in opposition to Hon Kananu's cross-petition.
 147. Hon Sonko submitted that based on the predominant issue test and article 165 of the [Constitution](#) this court has the necessary jurisdiction to hear this matter. Submitting on the predominant issue test, it is asserted that the court in making a determination in the consolidated petitions is required to consider the core issue arising out of the petitions. It is averred that the main issue is the court's interpretation of article 182(1), (4) & (5) of the [Constitution](#). For this argument reliance was placed on the cases of *Suzzane Butler & 4 others v Redhill Investments & another* [2017] eKLR and [Adrian Kamotho Njenga v Judicial Service Commission & another; Law Society of Kenya \(Interested Party\)](#) [2019] eKLR which applied the predominant issue test.
 148. Hon Sonko submitted that Hon Kananu was unlawfully appointed as the deputy governor as her nomination had been revoked by the appointing authority, *vide* a letter dated December 7, 2020. He stated that Hon Kananu never challenged the contents of the said letter and that she had acknowledged the existence of the letter at paragraphs 22 and 23 of her replying affidavit sworn on January 13, 2021. He compared his relationship with Hon Kananu to that of an employer – employee. For this argument, he cited the decision in [Geoffrey Mworira v Water Resources Management Authority and 2 others](#) [2015] eKLR where the court noted it can only sparingly interfere in such a relationship.
 149. Hon Sonko further submitted that there is no procedure set out either in the [County Governments Act](#) or the Supreme Court's Advisory in [Re Speaker, County Assembly of Embu](#) [2018] eKLR, for the revocation of a nomination of a deputy governor by the governor where such a nomination is pending confirmation by the County Assembly. He averred that the only statutory provision addressing this matter is section 10(2) of the [Public Appointments \(County Assemblies Approval\) Act, 2017](#) which provides that a nominating authority cannot resubmit the name of a candidate once rejected by the County Assembly. Hon Sonko therefore argued that since he had revoked Hon Kananu's nomination she was no longer eligible to be appointed as the deputy governor of the Nairobi City County. He referred to the case of [Paul Kiplagat Birgen & 25 others v Interim Independent Electoral Commission & 2 others](#) [2011] eKLR and argued that there being no provision for the revocation of a nomination for the deputy governor, he did not breach any law by revoking the nomination of Hon Kananu. Further that Hon Kananu had no proprietary interest in the revoked nomination. This argument was buttressed by the case of [Mwende Maluki Mwinzi v Cabinet Secretary, Ministry of Foreign Affairs & 2 others](#) [2019] eKLR.
 150. On the issue of whether Hon Kananu could re-tender her nomination as deputy governor, Hon Sonko submitted that she was no longer eligible. It was additionally submitted that section 51 of the [Interpretation and General Provisions Act](#), cap 2 empowered him to revoke Hon Kananu's nomination. Reliance was placed on the case of [Republic v Kombo & 3 Others ex parte Waweru](#) (2008)3 KLR (EP) 478 where it was held that the section provides the general law of interpretation in respect of appointments, suspensions and revocation of appointments. He therefore argued that the County Assembly had no jurisdiction to vet or approve the appointment of Hon Kananu.



151. On the question of the effect of the court order staying the by-election, Hon Sonko submitted that the election ought to have been held within 60 days upon the Speaker assuming the position of Acting Governor on December 21, 2020. He therefore argued that the constitutional timelines cannot be expanded or constricted by the court or any person as was held in the cases of *Ferdinand Ndung'u Waititu v IEBC & 8 others* [2013] eKLR, *David Pkosing v National Supper Alliance & 12 others* [2017] eKLR and *Lemanken Aramat v Harun Meitamei Lempaka & 2 others* [2014] eKLR.
152. Hon Sonko maintained that the effect of Hon Kananu's appointment was devoid of public participation which is mandatory as provided by section 6(2) of the *Public Appointments (County Assemblies Approval) Act, 2017* and is in direct violation of articles 10(2)(b) and 232(1) of the *Constitution*. He faulted the County Assembly for not informing the public about the vetting 7 days prior to its occurrence as required by the law. He added that the vetting was not advertised in a national newspaper and neither was the hearing done publicly.

The 2nd, 6th and 9th Interested Parties' Cases

153. The 2nd, 6th and 9th interested parties did not actively participate in these proceedings.

The 3rd Interested Party's Case

154. The 3rd interested party herein, Katiba Institute, did not file any pleadings in the matter apart from the written submissions dated February 21, 2021 in support of the consolidated petitions.
155. Counsel for the 3rd interested party reiterated the petitioners' submissions and added that the Speaker was aware of the provisions of the *Constitution* when, upon assuming office as an acting governor, he wrote to the IEBC to prepare for a by-election.
156. It was submitted that following the impeachment of Hon Sonko, the pending nomination of Hon Kananu, which had in any case been withdrawn, was voided by law.
157. Counsel submitted that the ruling by Mrima J allowing the vetting of Hon Kananu was a decision made per incuriam and is therefore not binding on this court.

The 7th Interested Party's Case

158. The 7th interested party, Kristina Pratt Kenyatta, swore a replying affidavit on April 9, 2021 in opposition to Hon Sonko's averment that she called him and asked him to appoint the 8th interested party, Jane Weru, as a deputy governor for Nairobi City County. She asserts that she did not have any identifiable stake and legal interest in the matter and that she was enjoined solely on the basis of an alleged false, non-existent and fabricated telephone conversation that purportedly transpired immediately prior to Hon Sonko's impeachment in December 2020.
159. She states that Hon Sonko fraudulently falsified and concocted a CD audio recording and transcript of the alleged telephone conversation in order to support his false claim that he withdrew the nomination of Hon Kananu as the deputy governor at her behest and with the approval of the President of the Republic of Kenya.
160. She avers that Hon Sonko's actions were malicious and done in bad faith and that the disclosure of her personal mobile phone number to the general public amounts to gross violation of her constitutional right to privacy and seriously jeopardize her personal safety which has been threatened severally by numerous calls and messages that she has received from strangers. She consequently seeks the dismissal of Hon Sonko's petition with costs.



The 8th Interested Party's case

161. The 8th interested party, Jane Weru, swore a replying affidavit on April 9, 2021 in opposition to Hon Sonko's petition dated January 7, 2021. She states that she did not have any identifiable stake or legal interest in the matter and that she was enjoined in the petition solely on the basis of a false allegation alluding to her involvement in the purported revocation of the nomination of Hon Kananu through fabricated and non-existent telephone conversation between Hon Sonko and the 7th interested party.
162. Counsel for the 7th and 8th interested parties drew the court's attention to the 7th interested party's averment that the telephone service provider denied the existence of any telephone conversation between Hon Sonko and the 7th interested party as alleged.
163. It was submitted that the court should not attach any probative value to the alleged telephone conversation or the letter allegedly revoking Hon Kananu's nomination. Counsel further urged the court to expunge the false allegations by Hon Sonko from the court record. He relied on article 33 of the Constitution on the need to respect the rights and reputation of others and article 35 on the right to correction or deletion of misleading and untrue information.

The 10th Interested Party's Case.

164. The 10th interested party, Isaac Chege Njuguna, similarly filed submissions in support of the consolidated petitions and reiterated Katiba Institute's submissions. He emphasized that the mere fact that Hon Kananu was nominated for the position of deputy governor did not connote that she had been appointed to the said position.
165. Counsel for the 10th interested party submitted that there was no iota of evidence to show that Hon Kananu ever appeared before the County Assembly for vetting and added that no public participation was carried out prior to the vetting. It was submitted that a Gazette Notice having been issued by the IEBC in respect to the by-election, the 10th interested party had legitimate expectation that he would participate in the by-election.

Analysis and Determination

166. We have carefully considered the parties' respective pleadings, submissions and the cited authorities. We find that the main issues for determination are as follows: -
 - a) Whether the court has jurisdiction to determine the consolidated petitions;
 - b) Whether the nomination of Anne Mwenda Kananu for the position of the deputy governor of Nairobi City County was revoked by Hon Sonko on December 7, 2020, and if so what was the effect of the revocation.
 - c) What was the effect of the impeachment of Hon Sonko on the nomination of Hon Kananu;
 - d) Whether there was public participation in the appointment of Hon Kananu as Nairobi City County Deputy Governor;
 - e) What is the import of section 32D of the County Governments (Amendment) Act, 2020 and the Public Appointment (County Assemblies Approval) Act, 2017 on the appointment of Hon Kananu as Deputy Governor;



- f) Whether the Speaker, while acting as a governor pursuant to article 182(5) of *the Constitution*, can appoint as a deputy governor a person whose nomination was *in situ* prior to the impeachment of the governor;
- g) Who should bear the costs of the petitions.

Jurisdiction

167. The 1st, 2nd and 4th respondents argued that this court lacks jurisdiction to entertain the petitions as the issues raised therein run afoul the doctrine of separation of powers and specifically that section 10 of the *County Assemblies Powers and Privileges Act, 2017* bars courts from interfering with the proceedings of a county assembly.
168. On his part, Hon Sonko submitted that the court has jurisdiction, under article 165 of *the Constitution*, as it has been called upon to interpret article 182(1), (4) & (5) of the *Constitution*.
169. The doctrine of separation of powers requires that the three arms of government remain separate. This doctrine gives each arm the space to carry out its constitutional functions while bearing in mind the fact that there are checks and balances from the other arms. The *Constitution* vests the judiciary with the responsibility of checking the constitutionality of acts carried out by the other arms of the government while upholding the doctrine of separation of powers.
170. In *Re Matter of the Interim Independent Electoral Commission*, Advisory Opinion No 2 of 2011 the Supreme Court explained the doctrine as follows: -
- “The effect of the *Constitution's* detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation.”
171. Likewise, the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR observed: -
- “It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other’s functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function.”
172. On the claim that section 10 of the *County Assemblies Powers and Privileges Act, 2017* bars the courts from interrogating the actions of the county assemblies, we are guided and agree with the finding of Lenaola J (as he then was) who when dealing with a similar provision being section 29 of *National*



Assembly (Powers and Privileges) Act in Njenga Mwangi & another the Truth Justice and Reconciliation Commission & 4 others Petition No. 286 of 2013 held that: -

“I am also in agreement that under section 29 of National Assembly (Powers and Privileges) Act, courts cannot exercise jurisdiction in respect of acts of the Speaker and other officers of the National Assembly, but I am certain that under article 165(3)(d) of the Constitution, this court can enquire into unconstitutional actions on their part.”

173. The cited decisions lead us to the irresistible conclusion that the principle of separation of powers does not deny this court jurisdiction to inquire into the alleged unconstitutionality surrounding the appointment of Hon Kananu as the deputy governor. Our jurisdiction entitles us to consider the processes undertaken by the County Assembly to vet and approve her.

Interpretation of the Constitution

174. Before proceeding to determine the core issues in the consolidated petitions, it is important to allude to the principles that guide courts in interpreting Constitutional provisions. That the Constitution should be read as a whole was emphasized in the Ugandan case of Tinyefuza v Attorney-General, Const Pet No 1 of 1996 (1997 UGCC3), where it was held that:

“[T]he entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other.”

175. The Constitution should be interpreted in a holistic manner as the Supreme Court stated in the case of In Re the Matter of Kenya National Commission on Human Rights [2014] eKLR that: -

“But what is meant by a ‘holistic interpretation of the Constitution’? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.”

176. Article 259(1) requires courts to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.

177. The court in the case of Institute of Social Accountability & another v National Assembly & 4 others High Court, [2015] eKLR, emphasized the importance of interpreting the Constitution in order to address the circumstances of a given case when it stated that: -

“We are duly guided by the principles we have outlined and we accept that while interpreting the impugned legislation alongside the Constitution, we must bear in mind our peculiar circumstances. Ours must be a liberal approach that promotes the rule of law and has jurisprudential value that must take into account the spirit of the Constitution.”

178. From the cited case law, this court is called upon to interpret the Constitution in a manner that enhances its spirit and purpose. A holistic interpretation of the Constitution is quite crucial especially where there appears to be a *lacuna* in the law. The duty of the court is to ensure that the constitutional principles and objectives are promoted and fulfilled. Such interpretation should also permit the



development of the law and good governance. In the case at hand, the court is specifically called upon to make an interpretation that enhances the objects of devolution and the principles of devolved government.

Revocation of Nomination

179. Hon Sonko argued that since he had revoked Hon Kananu's nomination through the letter dated December 7, 2020, she was no longer eligible to be appointed as the deputy governor. According to him, the withdrawal letter was sufficient and he did not breach any law as there was no procedure set out either in the *County Governments Act* or the Supreme Court's Advisory in *Re Speaker, County Assembly of Embu* [2018] eKLR, for withdrawing a nomination that was yet to be approved by a county assembly.
180. Hon Sonko additionally submitted that section 51 of the *Interpretation and General Provisions Act*, cap 2 empowered him to revoke the nomination. He therefore urged us to find that upon the withdrawal of the nomination, the County Assembly had no jurisdiction to vet or approve the appointment of Hon Kananu.
181. In a rejoinder, Hon Kananu submitted that the purported withdrawal of her nomination was ill-motivated, an afterthought, and had no legal effect. According to her, no reasons were given for the alleged withdrawal and that the leave of the County Assembly was not sought.
182. The County Assembly's position was that the withdrawal of nomination letter was not brought to its attention as provided for under its Standing Orders. The 2nd respondent submitted that, as averred by the Speaker of the County Assembly, the withdrawal letter is a forgery which is the subject of police investigations.
183. The Speaker of the County Assembly submitted that there was no letter from Hon Sonko withdrawing the nomination of Hon Kananu for the position of deputy governor. He maintained that he only became aware of the alleged withdrawal letter on January 7, 2021 when Hon Sonko filed a cross-petition in the Agorocase. He added that the stamp on the letter did not have any signature indicating the person who received it as is the procedure and neither does the letter exist in the register of documents and letters kept in his office.
184. The 7th and 8th interested parties denied the allegation by Hon Sonko that they were involved in the revocation of the nomination of Hon Kananu. According to them, there was no telephone conversation between them and Hon Sonko over the issue of the position of the deputy governor of Nairobi City County. They urged the court not to attribute any probative value to the alleged telephone conversation and by extension the letter allegedly revoking the nomination.
185. We have perused Hon Sonko's letter dated January 6, 2020 nominating Hon Kananu as the deputy governor. The letter which was addressed to Hon Beatrice Elachi, the then Speaker of Nairobi City County Assembly, stated as follows: -

“Dear Madam Speaker,

RE: Nominee for the Position of Deputy Governor

In March, 2018, the Supreme Court of Kenya gave an advisory regarding the nomination of a Deputy Governor once a vacancy occurs, as has been the case of Nairobi City County.

Notably, there was a legal vacuum then, which has not been cured to this day, to provide for a clear framework for the replacement of a Deputy Governor. This is a position the



Senate concurred with when I appeared before the Senate Committee on Devolution and Intergovernmental Relations in April, 2019.

Since then, the Senate found necessity to embark on the amendment of the County Government Act to cure this *lacuna*. The Bill is currently before the mediation committee of the Senate and the National Assembly, and is yet to become law.

However, the complexity of the situation in Nairobi became more intricate following my arraignment in court in December, 2019, and the subsequent bail terms that, among other things, require me, as Governor, to stay out of office until the determination of the matter.

Given the foregoing, and in the interest of ensuring stability at Kenya's Capital City and largest County by economy and population. I do hereby nominate Anne Kananu Mwenda to the position of Deputy Governor.

This decision is in line with article 180(5) of the [Constitution of Kenya](#), and the Supreme Court Advisory of March, 2018.

I therefore humbly urge the Assembly to expedite the vetting process of the said nominee, for purposes of appointment, as per the provisions of the [County Government Act](#), section 8(1)(a).

As a law abiding citizen, I will continue to abide by the bail terms granted to me, and ensure that the operations of the County are not affected in any way, to guarantee the great people of Nairobi uninterrupted services.

Lastly, I wish to call upon the Honourable Members of the County Assembly and all members of staff of the Nairobi City County Government to continue doing their part in serving our residents.

God bless Nairobi. God bless Kenya.

Sincerely,

HE Mike Mbuvi Sonko, EGH,

Governor, Nairobi City County”

186. The court record shows that on December 3, 2020, the County Assembly passed a resolution to impeach Hon Sonko. Shortly thereafter, Hon Sonko on December 7, 2020 wrote the letter allegedly withdrawing the nomination of Hon Kananu. The contents of the letter are: -

“Hon Benson Mutura,

The Speaker,

Nairobi City County Assembly.

City Hall Nairobi

RE: Withdrawal of my Nominee for the Position of Deputy Governor of Nairobi City County

On January 06, 2020 through letter Ref NCC/GOV/VOL 1/Jan 20/001, I nominated one Ann Kananu Mwenda and forwarded the same for consideration by the Nairobi City County Assembly, in accordance with article 180(5) of the [Constitution of Kenya](#), and the Supreme Court Advisory of March 8, 2018.



However, a resident of Nairobi by the name Peter Odhiambo Agoro filed Petition No 1 of 2020 at the Anti-Corruption and Economic Crimes Division of the High Court challenging the said nomination.

To this day, the matter is yet to be determined, and has since denied the people of Nairobi an opportunity to enjoy their Constitutional right of representation through a substantive Deputy Governor as espoused in article 179 of the [Constitution of Kenya](#). As it stands, a date is yet to be given since the last hearing of the matter which was on October 29, 2020.

It is for these reasons that I formally withdraw the nomination of Ann Kananu Mwenda pending the determination of the said matter, to enable me consult with the Jubilee Party leadership and the Nairobi City County Assembly on suitable replacement.

Sincerely,

HE Mike Mbuvi Sonko, EGH

Governor.”

187. As can be seen from the nomination letter dated January 6, 2020, the gist of the appointment was that Hon Sonko was facing criminal charges and had been barred from accessing his office. For this reason, he did not want the operations of the County to be affected by his absence from office. Hon Sonko states that he withdrew the nomination because the Agorocase had taken too long to be resolved. According to Hon Sonko, before the Supreme Court Advisory Opinion in [Re Speaker, County Assembly of Embu](#) [2018] eKLR, there was a *lacuna* in law relating to the filling of a vacancy in the office of the deputy governor. We note that whereas the advisory opinion was rendered on March 9, 2018, it took Hon Sonko close to two years to act on the Advisory Opinion. From his nomination letter, we can deduce that he only acted after he had been barred from office upon being charged before the Anti-Corruption Court.
188. From the above narration of the sequence of events preceding the revocation of the nomination, it is our finding that the conduct of Hon Sonko is that of a person who was not in a hurry to fill the vacancy in the office of the deputy governor. The delay in nominating a person to fill the vacancy despite the existence of the Supreme Court’s Advisory Opinion when considered alongside Hon Sonko’s earlier botched attempt to appoint Miguna Miguna, who he knew very well was not a member of his political party, lends credence to Hon Kananu’s averment that he was not sincere in nominating her or having a deputy governor at all for that matter. The fact that Hon Sonko wanted to take over the Agorocase, which was challenging the nomination of Hon Kananu further confirms Hon Kananu’s averment that her nomination and subsequent attempted revocation was tainted with malice and ill-will. His actions in respect to the Agorocase support Hon Kananu’s claim that he was the real sponsor of the move to stop her vetting and approval by the County Assembly.
189. The inconsistency of Hon Sonko as to the reasons for the withdrawal of the nomination of Hon Kananu clearly emerges when one considers his averment before this court that it was the 7th interested party who requested him to nominate the 8th interested party in place of Hon Kananu. This is an entirely new reason that is not found in his withdrawal letter. We are perplexed and find it hard to believe that a State Officer in the high office of a governor can have the temerity to state under oath that he took telephone instructions from ordinary citizens in the execution of his constitutional mandate. Without saying more on this point, it is apparent that the 7th and 8th interested parties’ position that they did not contact Hon Sonko in respect of the revocation of the nomination of Hon Kananu is exceedingly likely to be true. Our position is fortified by the evidence from the telephone service



provider that there was no communication between Hon Sonko's telephone number and that of the 7th interested party.

190. Another reason why Hon Sonko could not legally revoke the nomination of Hon Kananu is found in section 18 of the [Elections Act](#) which stipulates that: -

Change of deputy county governor nominee candidate

A county governor candidate or a political party shall not at any time change the person nominated as a deputy county governor candidate after the nomination of that person has been received by the Commission:

Provided that in the event of death, resignation or incapacity of the nominated candidate or of the violation of the electoral code of conduct by the nominated candidate, the political party may substitute its candidate before the date of presentation of nomination papers to the Commission.

191. In the instant case, it is not disputed that the nomination of Hon Kananu had been received by the IEBC and that the appointed Returning Officer had issued her with a Certificate of Nomination on February 10, 2020. There is no evidence that any of the events contemplated in the proviso to section 18 of the [Elections Act](#) have occurred in her case. It is therefore our finding that the attempt to withdraw the nomination was unlawful and without basis.

192. Hon Sonko relied on section 51 of the [Interpretation and General Provisions Act](#), cap 2 as authorizing him to withdraw the nomination. The said section provides as follows: -

Power to appoint to include power to suspend, dismiss, etc, and to reappoint, etc.

(1) Where by or under a written law, a power or duty is conferred or imposed upon a person to make an appointment or to constitute or establish a board, commission, committee or similar body, then, unless a contrary intention appears, the person having that power or duty shall also have the power to remove, suspend, dismiss or revoke the appointment of, and to reappoint or reinstate, a person appointed in the exercise of the power or duty, or to revoke the appointment, constitution or establishment of, or dissolve, a board, commission, committee or similar body appointed constituted or established, in exercise of the power or duty, and to reappoint, reconstitute or re-establish it.

(2) Where the power or duty of a person under this section is exercisable only upon the recommendation, or is subject to the approval or consent of another person, then the power shall, unless a contrary intention appears be exercisable only upon that recommendation or subject to that approval or consent.

193. We find that the above cited section is not applicable since the [Constitution](#) under article 182 provides for the procedure for filling a vacancy in the office of the deputy governor. In any event, were section 51 to be applicable to the circumstances of this case, the governor is only a nominating authority and not the approving authority. We note that under section 51(2) certain appointments that are subject to the approval by other bodies and any action regarding such appointments can only be taken with the approval or consent of the other bodies. We find that Hon Sonko could not therefore unilaterally withdraw the nomination without the approval or consent of the County Assembly. Agreeing with Hon Sonko that he could withdraw the nomination without reference to the county assembly would violate the principle of separation of powers.



194. We are also in agreement with the decision made in Petition E019 of 2021 by Mrima J on February 9, 2021 that: -

“The County Assembly of Nairobi City County is governed by the Constitution, the law and its Standing Orders. Once a matter is received by the County Assembly, it can only be dealt within the said constitutional and legal confines. Unless the contrary is proved, such a matter becomes a property, so to say, of the County Assembly.”

195. We additionally observe that as at the time of the alleged withdrawal of the nomination, the conservatory order issued in the *Agoro* case had not been vacated. The attempt by Hon Sonko to withdraw the nomination was an indirect way of interfering with the ongoing court process.

196. From our foregoing observations, it is not difficult to agree with the Speaker’s averment that the letter allegedly withdrawing the nomination was not delivered to his office for onward transmission to the County Assembly. In this regard there is therefore merit in the Speaker’s further deposition that he only became aware of the letter through Hon Sonko’s cross-petition in the *Agoro* case. In a nutshell, we are not persuaded that the nomination of Hon Kananu was withdrawn as has been alleged.

Effect of the Impeachment of Hon Sonko on the Nomination of Hon Kananu

197. The 1st petitioner submitted that upon the removal of Hon Sonko from office, the opportunity for the County Assembly to vet and approve Hon Kananu for appointment as the Deputy Governor was overtaken by events and irrevocably extinguished.

198. The 8th and 9th petitioners argued that Hon Kananu’s nomination as deputy governor was dependent on Hon Sonko’s continued stay in office and opined that since both seats were vacant, they would both be filled through a by-election.

199. On his part, the 10th petitioner contended that all the actions and processes initiated by Hon Sonko that were incomplete as at the time of his impeachment lapsed.

200. Hon Sonko submitted that the moment he was impeached, all his uncompleted decisions and actions lapsed.

201. In a rejoinder, the Speaker stated that the impeachment of Hon Sonko did not affect the pending vetting of Hon Kananu as her name had already been submitted to the County Assembly prior to the impeachment. According to him, there is no legal provision that a nomination pending approval by the County Assembly lapses when the governor is removed from office.

202. Article 182 of the Constitution provides for the circumstances under which the office of a governor can become vacant. The said article stipulates as follows: -

Vacancy in the office of county governor

(1) The office of the county governor shall become vacant if the holder of the office —

(a) dies;

(b) resigns, in writing, addressed to the speaker of the county assembly;

(c) ceases to be eligible to be elected county governor under article 180(2);



- (d) is convicted of an offence punishable by imprisonment for at least twelve months; or
 - (e) is removed from office under this Constitution.
- (2) If a vacancy occurs in the office of county governor, the deputy county governor shall assume office as county governor for the remainder of the term of the county governor.
 - (3) If a person assumes office as county governor under clause (2), the person shall be deemed for the purposes of article 180(7)—
 - (a) to have served a full term as county governor if, at the date on which the person assumed office, more than two and a half years remain before the date of the next regularly scheduled election under article 180(1); or
 - (b) not to have served a term of office as county governor, in any other case.
 - (4) If a vacancy occurs in the office of county governor and that of deputy county governor, or if the deputy county governor is unable to act, the speaker of the county assembly shall act as county governor.
 - (5) If a vacancy occurs in the circumstances contemplated by clause (4), an election to the office of county governor shall be held within sixty days after the speaker assumes the office of county governor.
 - (6) A person who assumes the office of county governor under this article shall, unless otherwise removed from office under this Constitution, hold office until the newly elected county governor assumes office following the next election held under article 180(1).

203. Article 181 of the *Constitution* on the other hand provides for the removal of a governor through impeachment. Section 33 of the *County Governments Act* provides for the removal procedure. From the foregoing provisions, it is clear that the law foresaw a situation where a governor could be removed or be unable to discharge the functions of the office. In all these situations, the end result would be that the governor would not be discharging his duties. It would therefore be absurd to erase all the incomplete actions and decisions that were lawfully being undertaken by the governor at the time of his impeachment. Needless to say, the position of governor is a public office for which there must be continuity such that the exit of a holder of such an office cannot sound a death knell on his actions, finished or unfinished.

204. We do appreciate that, as submitted by counsel for the County Assembly, the circumstances of this case are unique in that at the time of the impeachment of Hon Sonko, there was already an on-going process for the appointment of a deputy governor which was completed after the Speaker had assumed the office of the governor in an acting capacity. This is not a scenario that was even envisaged by the Supreme Court in its Advisory Opinion In *re Speaker, County Assembly of Embu* [2018] eKLR.



205. We are therefore called upon to interpret the Constitution so as to fill in any *lacuna* that may exist. We therefore agree with the statement made in Mugambi Imanyara & another v Attorney General & 5 others [2017] eKLR that: -

“Finally while interpreting the law, the court should bear in mind that they should make laws when necessary to make the ends of justice. Legal systems world over could not grow as has been the case without a great amount of judicial law making in all fields, Constitutional law, Common Law and statutory interpretation. However, to the extent that judges make laws, they should do so with wisdom and understanding. Judges should be informed on the factual data necessary to good policy making. This includes not only the facts peculiar to the controversy between the litigants before them, but also enough of an understanding of how our society works so that they can gauge the effect of the various alternative legal solutions available in deciding a case.”

206. We also find guidance in the concurring opinion of the retired Chief Justice Mutunga in the case of In the Matter of the Speaker of the Senate & another [2013] eKLR where he stated that: -

“The court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the courts that the country turns, in order to resolve these contradictions; clarify draftsmanship-gaps; and settle constitutional disputes. In other words, constitution-making does not end with its promulgation; it continues with its interpretation. It is the duty of the court to illuminate legal penumbras that constitutions borne out of long drawn compromises, such as ours, tend to create. The constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. The limitations of mind and hand should not defeat the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the court as the searchlight for the illumination and elimination of these legal penumbras.”

207. We observe that before his impeachment, Hon Sonko had voluntarily nominated Hon Kananu as the deputy governor. The County Assembly picked up the nomination and had commenced the vetting process before the court issued conservatory orders to stop the vetting in the *Agoro* case. As we have already noted in this judgment, the withdrawal of Hon Kananu’s nomination was done after the resolution by the County Assembly to impeach Hon Sonko. We observe that even after his impeachment by the Senate and as late as January 7, 2021 when Ong’udi J allowed the withdrawal of the *Agoro* case, Hon Sonko still felt that he could pursue the issue of nomination by filing a cross-petition. This confirms that he knew that the nomination did not die with his impeachment.

208. We take judicial notice of the fact that there are counties where elected governors have exited office through death or impeachment and that at no time did the actions initiated by them lapse merely because they had left office. For the above reason, we find that it is not far-fetched that an elected deputy governor can become a governor and nominate an unelected deputy governor who may eventually assume the office of the governor and nominate an unelected deputy governor. For instance, had Hon Kananu, who was not elected, been vetted and approved when her name was submitted to the County Assembly, in January 2020, she would have assumed the office of governor upon impeachment of Hon Sonko and gone ahead to appoint an unelected deputy governor. This would mean that the Nairobi



City County would have been governed by an unelected leadership. In our scheme of things, such a situation cannot be said to be a violation of the political rights under article 38 of the *Constitution*.

209. It is our considered view that upon nominating Hon Kananu and after the County Assembly received the nomination, Hon Sonko's role in regard to the process ended and that were it not for the court order in the *Agoro* case, the process would long have been concluded. The impeachment of Hon Sonko cannot have the draconian effect of undoing or terminating the process that was ongoing. We therefore find no error in the action of the County Assembly to conclude the process after the impeachment of Hon Sonko and the subsequent withdrawal of the *Agoro* case.

Public Participation in the Appointment of Hon Kananu

210. Hon Sonko took the position that Hon Kananu's appointment was devoid of public participation thereby violating section 6(2) of the *Public Appointments (County Assemblies Approval) Act, 2017* and articles 10(2) (b) and 232(1) of the *Constitution*. He specifically averred that the public was not given a 7 days' notice of the impending vetting and neither was the vetting advertised in a daily newspaper with national circulation nor was the vetting done publicly.
211. The 10th interested party's case was that Hon Kananu was not vetted at all but added that no public participation was carried out prior to the vetting.
212. In response to the alleged lack of public participation, Hon Kananu submitted that the public was invited to submit views on her suitability through advertisements in the local dailies. She contended that the fact that the Members of the County Assembly (MCAs) vetted her was in itself a form of public participation.
213. Article 10(1)(a) of the *Constitution* lists public participation as one of the national values and principles of governance. This principle allows the people of Kenya to have a say in the formulation and implementation of legislation and policy at both the national and county levels.
214. Article 174 of the *Constitution* recognizes the necessity to enhance the participation of the people in the exercise of the powers of the State and in the making of decisions affecting them. The provision also recognizes the right of communities to manage their own affairs in the furtherance of their development.
215. Article 196 requires county assemblies to conduct their business in a transparent manner, and to open their sittings and those of their committees to the public. The county assemblies and their committees are specifically required to facilitate public participation and involvement in their legislative and other businesses.
216. Sections 87 of the *County Governments Act, 2012* provides for the principles governing citizen participation, which include timely access to information, reasonable access to the process of policy and law formulation and protection of the rights of minorities. Section 115 of the same Act deepens the principle by requiring county assemblies to provide specified mechanisms, unambiguous information and to develop laws and regulations that give effect to public participation.
217. The importance of public participation internationally and locally has been affirmed in various court cases including; *Doctors' For Life International v The Speaker National Assembly and Others* (CCT12/05) (2006) ZACC 11); *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR; *Republic v The Attorney General & another ex parte Hon Francis Chachau Ganya* (JR Misc App No 374 of 2012) and *Kiambu County Government & 3 others v Robert N Gakuru & others* [2017] eKLR.



218. The conditions to be met in order to fulfil the requirement of public participation were summarized in the South African case of *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) as follows: -

“This may include providing transportation to and from hearings or hosting radio programs in multiple languages on an important bill, and may well go beyond any formulaic requirement of notice or hearing. In addition, the nature of the legislation and its effect on the provinces undoubtedly plays a role in determining the degree of facilitation that is reasonable and the mechanisms that are most appropriate to achieve public involvement. Thus, contrary to the submission by the government, it is not enough to point to standing rules of the legislature that provide generally for public involvement as evidence that public involvement took place; what matters is that the legislature acted reasonably in the manner that it facilitated public involvement in the particular circumstances of a given case. The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors. These include the nature and the importance of the legislation and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say.

219. We have considered the evidence provided by the parties herein and note that on January 8, 2021, the Nairobi City County Assembly placed an advertisement in the Daily Nation Newspaper informing residents about the impending vetting of Hon Kananu scheduled for January 15, 2021. The advertisement stated that: -

“Members of the public are invited to attend the approval hearing, and/or submit any information or comments on the suitability or otherwise of the nominee. The submissions should be made by way of sworn statements or affidavits and should be accompanied by any documentary evidence. The submissions may be sent or hand delivered to the clerk of the Nairobi City County Assembly....”

220. We do find that through the advertisement, the County Assembly provided clear information regarding the impending vetting of Hon Kananu. Members of the public were given information on how and where to submit their views. Contrary to the assertion by Hon Sonko that the notice did not meet the requirement of section 7(5) of the *Public Appointments (County Assemblies Approval) Act, 2017* that the Select Committee on Appointments gives the public 7 days’ notice before the vetting, this requirement was indeed fulfilled.

221. In seeking to find out whether the need for public participation was met, the court has to look at the circumstances of each particular case. Public participation is both quantitative and qualitative. The circumstances of this case are that the nomination of Hon Kananu was done in January 2020 and the public was all along aware of her impending vetting which had unfortunately stalled as a result of the court orders issued in *Agoro* case. Upon the lifting of the restraining orders, the County Assembly once again notified members of the public that the nominee would be vetted on January 15, 2021.

222. There is uncontroverted evidence placed before this court by Hon Kananu through her replying affidavit sworn on January 22, 2021 to the effect that she appeared before the Select Committee on Appointments on January 15, 2021. The County Assembly Order Paper for the same day had one of its orders of business as a motion to adopt the report of the Select Committee on Appointments of the



vetting for the position of deputy governor. It is therefore our finding that the requirement for public participation was met.

The import of section 32D of the [County Governments \(Amendment\) Act, 2020](#) and the [Public Appointments \(County Assemblies Approval\) Act, 2017](#) on the appointment of Hon Kananu.

223. The 1st petitioner submitted that section 32D(1)(b) of the [County Governments \(Amendment\) Act, 2020](#) was not complied with as there was no substantive governor in office to appoint Hon Kananu after the conclusion of her vetting by the County Assembly. It was his contention that the stated provision vests the power to appoint the deputy governor upon the governor.
224. The 8th and 9th petitioners submitted that section 32D of the [County Governments \(Amendment\) Act, 2020](#) is applicable to the process of vetting and appointing as it was done after the Act was enacted on July 9, 2020 and came into force on July 27, 2020 when the office of the Deputy Governor was vacant. According to the two petitioners, the cited provision as read with section 4 of the [Public Appointments \(County Assemblies Approval\) Act, 2017](#) required that upon the vetting of Hon Kananu by the County Assembly there was need for a governor to complete the process by way of a formal appointment into office and that such appointment should be in writing under the county seal. It was the Petitioners' position that the crucial step of appointment was bypassed as Hon Kananu was not formally appointed after the vetting process since there was no sitting governor to appoint her.
225. The 10th petitioner echoed the submissions of the other petitioners that the process of vetting and appointing Hon Kananu was an illegality for failure to comply with section 32D of the [County Governments Act 2012](#) and section 4 of the [Public Appointments \(County Assemblies Approval\) Act, 2017](#).
226. Hon Sonko joined hands with the said petitioners and contended that there is no way Hon Kananu's appointment could have crystallized legally without a sitting and substantive Governor appointing her because an acting Governor cannot execute such a mandate.
227. Hon Kananu was not averse to the suggestion by the petitioners that section 32D applied to her appointment but argued that it applied from the time of the Act coming into force. She additionally urged that by dint of section 32D (3) of the Act, she was deemed to have been appointed as a deputy governor upon the lapse of 14 days from the date of her approval by the County Assembly.
228. On his part, the 3rd respondent argued that section 32D of the [County Governments \(Amendment\) Act, 2020](#) should not be applied to the nomination of Hon Kananu which happened in February 2020 prior to its enactment in July 2020.
229. Section 32D of the [County Governments \(Amendment\) Act, 2020](#) stipulates as follows: -
- (1) Where a vacancy arises in the office of a deputy governor as provided for under section 32C, the governor shall—
 - (a) within fourteen days, nominate the deputy governor; and
 - (b) with the approval of the county assembly, appoint a deputy governor.
 - (2) A person nominated for appointment as deputy governor under subsection (1) shall be a person eligible for election as governor.
 - (3) The county assembly shall—
 - (a) consider a motion for approval for the appointment of the deputy governor, within fourteen days, and resolve whether to approve the motion; and



- (b) be deemed to have approved the motion for the appointment of the deputy governor upon the lapse of fourteen days and having failed to make a resolution.
- (4) A motion for the approval for appointment of a deputy governor shall be supported by a majority of the members of a county assembly.
- (6) A person appointed as deputy governor under subsection (1) shall, for purposes of article 180(7) of the Constitution, be deemed—
- (a) to have served a full term as county deputy governor if, at the date on which the person is appointed, more than two and a half years remain before the date of the next regularly scheduled election under article 180(1) of the Constitution; or
- (b) not to have served a term of office as county deputy governor, in any other case.
230. Section 4 of the Public Appointments (County Assemblies Approval) Act, 2017 provides that: -
4. An appointment under the Constitution or any Exercise of other law for which the approval of a County Assembly is required shall not be made unless the appointment is approved by the relevant County Assembly in accordance with this Act.
231. Prior to the enactment of section 32D, the Supreme Court gave guidance In re Speaker, County Assembly of Embu [2018] eKLR on the procedure to be followed in the appointment of a person to fill the vacancy in the office of the deputy governor by stating as follows: -
- “61. The foregoing principle calls for a reading of article 182 of the Constitution alongside article 149, which makes provision for the procedure and timelines for filling a vacancy in the Office of the Deputy President. From the signal embodied in article 149 of the Constitution, and in the absence of any applicable legislative provision, we hold that, where a vacancy occurs in the Office of the Deputy County Governor, the Governor shall within fourteen days, nominate a person to fill such vacancy. The County Assembly shall vote on the nomination within sixty days after receiving it. Where a vacancy occurs in both the offices of County Governor and Deputy County Governor at the same time, the office of the Deputy County Governor shall remain vacant until the election of a new Governor. The new Governor shall nominate a person to fill the vacancy within fourteen days after assuming office. The County Assembly shall vote on the nomination within sixty days after receiving it. For the avoidance of doubt, we hereby state that this holding shall obtain in all circumstances pursuant to which the Office of the Deputy Governor may become vacant as contemplated by the Constitution, ie death, resignation or impeachment.”
232. The court went ahead and held that after approval by the county assembly, the only remaining step was for the deputy governor to take an oath of office.
233. Section 32D appears to have adopted the opinion of the Supreme Court. A reading of that section clearly shows that a governor can only appoint a deputy governor with the approval of the county assembly. Our reading of the provision does not support the suggestion by the Petitioners that there has to be a formal appointment once the County Assembly approves the nomination.



234. The petitioners have however referred us to the [Public Appointments \(County Assemblies Approval\) Act, 2017](#) which at section 4 requires the approval of the county assembly for any appointment made under the [Constitution](#) or any other law. Section 11 of the same Act additionally provides that: -
- (1) The Clerk shall notify the appointing authority of the decision of the County Assembly within fourteen days of the decision.
 - (2) The appointing authority shall, upon the approval of the nominees for appointment by the County Assembly and subject to the applicable written law, appoint the nominee within a period of seven days from the date of notification of the decision of the Assembly under subsection (1).
235. Under the above section, the appointing authority is required to make a formal appointment upon receiving the approval of the County Assembly. There was the Speaker of the County Assembly who was then acting as the governor. In the case at hand, we note that on January 15, 2021, *vide* Gazette Notice No 208, Vol CXXIII – No 13, the Acting Governor, Benson Mutura, formally appointed Ms Anne Kananu Mwenda as the Deputy County Governor of Nairobi City County. It does not follow that where the county assembly approves a nominee for the position of deputy governor and the specific governor who made the nomination is unable to complete the appointment process then the entire process is rendered a nullity. In our view, whoever comes in to replace the governor who made the nomination can complete the process by appointing the approved deputy governor.
236. We also observe that as at March 9, 2018 when the Supreme Court made its Advisory Opinion [In re Speaker, County Assembly of Embu](#) [2018] eKLR the [Public Appointments \(County Assemblies Approval\) Act, 2017](#) had come into force one year earlier on March 29, 2017. According to the advisory, once a deputy governor is nominated and subsequently approved by the county assembly, the only remaining step is the swearing in of the nominee and this is what happened in the present case. It is undisputed that Hon Kananu took the oath of office of the deputy governor in compliance with article 74 of the [Constitution](#) and section 30(1) of the [County Governments Act](#).
237. It is also important to appreciate that we are dealing with an appointment that straddled two legal regimes having been initiated under the parameters of the Supreme Court Advisory and concluded under section 32D of the County [Governments \(Amendment\) Act, 2020](#). There was therefore nothing wrong with the conclusion of the appointment process under the law that was operational at the commencement of the process. We therefore find no merit in the suggestion that there ought to have been a formal appointment of Hon Kananu after her approval by the County Assembly.
- The powers of the Speaker of a county assembly, under article 182(5) of the [Constitution](#).
238. On the issue of whether the Speaker, while acting as a governor can appoint a deputy governor whose nomination was ongoing when a governor is impeached, the 1st petitioner made reference to article 146(2) of the [Constitution](#) and submitted that the Speaker of the National Assembly, while acting as the President, pursuant to the provisions of that article cannot reconstitute the national government or otherwise exercise the powers of an elected President. He urged the court to draw parallels from the said provision and find that a Speaker of a county assembly acting as a governor pursuant to the provisions of article 182(5), cannot exercise the powers of an elected governor. According to the 1st petitioner, the [Constitution](#) does not contemplate a situation where the Speaker while acting as a governor can relinquish the office to any other person apart from an elected governor.
239. On their part, the 8th and 9th petitioners submitted that the Speaker while acting as a governor has no powers to appoint a deputy governor. They contended that the office of a deputy governor is an elective office which draws its authority and legitimacy directly from the people as opposed to the speaker who



is elected by the members of the County Assembly and it would be a constitutional absurdity for the Speaker to appoint a deputy governor.

240. The 10th petitioner joined issue with the other petitioners and argued that the Speaker cannot appoint a deputy governor as the position is elective and not appointive.

241. We find that the submission by the 1st petitioner that article 146 denies the Speaker of the National Assembly, while acting as the President, powers to reconstitute the national government or otherwise exercise the powers of an elected President not to be supported by that provision. We will let the article speak for itself as follows:

146 Vacancy in the office of President

- (1) The office of President shall become vacant if the holder of the office—
 - (a) dies;
 - (b) resigns, in writing, addressed to the Speaker of the National Assembly; or
 - (c) otherwise ceases to hold office under article 144 or 145 or under any other provision of this Constitution.
- (2) When a vacancy occurs in the office of President—
 - (a) the Deputy President shall assume office as President for the remainder of the term of the President; or
 - (b) if the office of Deputy President is vacant, or the Deputy President is unable to assume the office of President, the Speaker of the National Assembly shall act as President and an election to the office of President shall be held within sixty days after the vacancy arose in the office of President.
- (3) A person who assumes the office of President under clause (2)(a), or following an election required by clause (2)(b), shall, unless otherwise removed from office under this Constitution, hold office until a newly elected President is sworn in following the next regularly scheduled election under article 136 (2)(a).
- (4) If the Deputy President assumes office as President under clause (2)(a), or a person is elected to the office of President under clause (2)(b), the Deputy President, or the person elected, shall be deemed for the purposes of article 142(2)—
 - (a) to have served a full term as President if, at the date on which the person assumed office, more than two and a half years remain before the date of the next regularly scheduled election under article 136(2)(a); or
 - (b) not to have served a term of office as President, in any other case.

242. We however note that article 134 of the [Constitution](#) provides as follows: -

134. Exercise of presidential powers during temporary incumbency

- (1) A person who holds the office of President or who is authorised in terms of this Constitution to exercise the powers of the President—
 - (a) during the period commencing on the date of the first vote in a presidential election, and ending when the newly elected President assumes office; or



(b) while the President is absent or incapacitated, or at other times contemplated in article 147(3), may not exercise the powers of the President specified in clause (2).

(2) The powers referred to in clause (1) are—

- (a) the nomination or appointment of the judges of the superior courts;
- (b) the nomination or appointment of any other public officer whom this Constitution or legislation requires the President to appoint;
- (c) the nomination or appointment or dismissal of Cabinet Secretaries and other State or Public officers;
- (d) the nomination or appointment or dismissal of a high commissioner, ambassador, or diplomatic or consular representative;
- (e) the power of mercy; and
- (f) the authority to confer honours in the name of the people and the Republic.

243. Article 147(3) states that: -

3 Subject to article 134, when the President is absent or is temporarily incapacitated, and during any other period that the President decides, the Deputy President shall act as the President.

244. The cited provisions are applicable to a situation where the president is temporarily absent or incapacitated or where he/she decides that the deputy president should act. This scenario is not permanent as the president is expected to come back to office and cannot be equated to a situation where the Speaker of the National Assembly is acting as the President for a period of 60 days pending the holding of the presidential election. We find that no useful insights, which can be of help to the petitioners' argument, can be gleaned from the above scenario.

245. The 1st petitioner relied on section 32(4) of the [County Governments Act, 2012](#) in support of his argument that the Speaker, while acting as a governor cannot exercise the full powers of the office of the governor. The provision states: -

(4) When acting in office as contemplated in article 179(5) of the [Constitution](#), the deputy governor shall not exercise any powers of the governor, to nominate, appoint or dismiss, that are assigned to the governor under the [Constitution](#) or other written law.

246. Article 179(5) provides that: -

When the county governor is absent, the deputy county governor shall act as the county governor.

247. The cited constitutional and statutory provisions are similar to articles 134 and 147(3) of the [Constitution](#) which we have already discussed above. They apply to a situation where the governor is temporarily absent from office and cannot be equated to a situation where the governor has permanently left the office.

248. The petitioners' argument is essentially that a Speaker of the county assembly while acting as a governor has limited authority in performing the functions of that office. Their argument is that one of the limitations is that he cannot appoint a deputy governor. Under normal circumstances this argument is correct in the sense that the Speaker is holding the office as he awaits the election of a governor within 60 days. In the present case however, we are not dealing with a perfect case scenario. Had Hon



Kananu been vetted and approved or disapproved, upon nomination, the current predicament would not have arisen as in that case, she would have been a deputy governor before the impeachment or in the alternative, Hon Sonko would have nominated someone else.

249. Taking into consideration all the prevailing circumstances, the pending process of vetting Hon Kananu cannot be wished away. The process was stopped through a court order and none of the actors in this case can take the blame for that state of affairs. It cannot therefore be held that the impeachment of Hon Sonko extinguished the nomination of Hon Kananu.
250. Having reached the conclusion that the process of appointing Hon Kananu did not violate the Constitution, it follows that the Speaker who was then acting as the governor was allowed by the law to do anything that would bring that process to fruition. In that regard we are guided by the provisions of article 259(3)(a) & (b) which stipulates as follows:

Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and, therefore, among other things—

- (a) a function or power conferred by this Constitution on an office may be performed or exercised as occasion requires, by the person holding the office;
- (b) any reference in this Constitution to a State or other public office or officer, or a person holding such an office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time;

(Emphasis ours)

251. From the above analysis, we find that although a speaker of a county assembly, while acting as a governor under article 182(5) of the Constitution has no power to appoint a deputy governor, the peculiar circumstances of this case entitled the Speaker of Nairobi City County Assembly to complete the ongoing process of the appointment of Hon Kananu as a deputy governor. The process had been stopped by the court in the Agoro case and it is the same court which vacated the conservatory orders hence allowing the process to proceed to its legitimate and logical conclusion. Had Hon Kananu not been approved by the County Assembly, the gubernatorial by-election would then have been held.

Other issues

252. There was the argument by some of the parties that the gubernatorial election having not been held within 60 days from the date of the impeachment of Hon Sonko by the Senate, no election can now be held as it has been overtaken by events. A contrary position was taken by the IEBC to the effect that a conservatory order only freezes time and cannot be equated to expansion of constitutional timelines. Interestingly, all the parties relied on the decision in George Michael Wanjohi case to advance their competing positions.
253. In view of our findings herein above, this issue no longer requires our extensive analysis. Nevertheless, our brief answer to the question is found in George Michael Wanjohi case where the Supreme Court held that: -

“(45) Consequently, any statutory process or act done *ultra vires* the provisions of the Constitution, this court will not hesitate to declare them void. Hence, a stay order will not be tantamount to stopping a constitutional process. We hasten to add that what the court cannot do is to extend the 90 days period within which the election should be held. That period is sacred as it is provided for in the Constitution and even this court, a creature of the Constitution, cannot extend it.”



[Emphasis ours]

254. We therefore agree with the IEBC's position that a court order staying the occurrence of a constitutional event does not amount to a breach of the constitutional timelines. We cannot imagine a situation where an event ordained by the Constitution will not occur simply because it has been postponed.
255. Another Issue was the request by the 7th and 8th interested parties that we expunge any reference to them in Hon Sonko's pleadings. This request is indeed available under order 2 rule 15 and order 19 rule 6 of the Civil Procedure Rules, 2010. We have, in this judgment, already made our determination regarding the veracity of Hon Sonko's pleadings and averments over this issue. Our view is that the averments and pleadings of Hon Sonko conveyed his case as he perceived it. The power to strike out pleadings and averments should be exercised cautiously lest the right of access to justice is interfered with. Our determination that Hon Sonko's pleadings in relation to the 7th and 8th interested parties are unbelievable is sufficient protection of their right to correction and deletion of untrue or misleading information. Any infringement of the right to privacy can be pursued through other processes or litigation.
256. Regarding the issue as to whether the IEBC violated the law by publishing Gazette Notice No. 10914 calling for a by-election for the position of governor of Nairobi City County, we do find that the actions of the IEBC are a direct consequence of the letter from the Speaker of the County Assembly informing the commission of the vacancies in the offices of the governor and deputy governor. We observe that as at the time of the impeachment of the governor the process of the appointment of the nominated deputy governor had been stayed by the court but was soon thereafter reactivated. It is therefore our finding that the IEBC cannot be faulted for calling for a by-election. As we have already stated in this judgment, a by-election would have indeed been conducted if Hon Kananu had not been approved by the County Assembly. Before we leave this issue, we find that an order of *certiorari* quashing the Gazette Notice is no longer necessary in view of our findings.

Disposition

257. Having regard to our above analysis, it is our finding that the nomination, vetting, approval and swearing in of Hon Kananu as the Deputy Governor was constitutional and complied with the applicable laws. Consequently, we find that all the petitions challenging her ascendancy to the position of Deputy Governor are without merit and are hereby dismissed. Conversely, our above holding is sufficient to take care of the prayers in Hon Kananu's cross-petition and that of the 4th petitioner, Josephat Kariuki.

Costs

258. The general rule, as provided under section 27 of the Civil Procedure Act, is that costs ordinarily follow the event unless for good reason the court orders otherwise. The consolidated petitions are in respect of a novel issue concerning the governance of county governments. The appropriate order in the circumstance is to direct each party to bear their own costs.
259. Before we sign off, we take this opportunity to appreciate the parties and their advocates for the industry and research that they put in these consolidated petitions.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2021.

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S. CHITEMBWE
JUDGE

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W. KORIR
JUDGE

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W. OKWANY
JUDGE

