



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E425 OF 2020

(CONSOLIDATED WITH PETITION NO. E014 OF 2021)

HON. MIKE SONKO MBUVI GIDEON KIOKO.....1ST PETITIONER

OKIYA OMTATAH OKOITI.....2ND PETITIONER

VERSUS

THE CLERK, NAIROBI CITY COUNTY ASSEMBLY.....1ST RESPONDENT

THE SPEAKER, NAIROBI CITY COUNTY ASSEMBLY.....2ND RESPONDENT

THE NAIROBI CITY COUNTY ASSEMBLY.....3RD RESPONDENT

THE CLERK OF THE SENATE.....4TH RESPONDENT

THE SPEAKER OF THE SENATE OF KENYA.....5TH RESPONDENT

THE SENATE OF KENYA.....6TH RESPONDENT

HON. ATTORNEY GENERAL.....7TH RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....8TH RESPONDENT

THE ASSUMPTION OF THE OFFICE OF THE COUNTY

GOVERNOR COMMITTEE, NAIROBI CITY COUNTY.....9TH RESPONDENT

THE ACTING GOVERNOR, NAIROBI CITY COUNTY.....10TH RESPONDENT

JUDGMENT

INTRODUCTION;

1. The 1st Petitioner, **Hon. Mike Mbuvi Sonko**, and the 2nd Petitioner, **Okiya Omtatah Okioti**, filed two separate petitions namely; *Nairobi High Court Petition No. E425 of 2020 Hon. Mike Mbuvi Sonko vs The Clerk County Assembly of Nairobi & 7 others* and *Nairobi High Court Petition No. E014 of 2021, Okiya Omtatah Okioti vs Nairobi City County Assembly & 5 Others* respectively. The Petitioners challenge the impeachment of the 1st Petitioner (hereinafter "**Hon. Sonko**") as the Governor of Nairobi City County by the Senate on 17th December 2020.

2. On 20th January 2021 Makau J. consolidated the petitions and later certified them as raising substantial questions of law and accordingly referred them to the Chief Justice for the empanelment of a bench of uneven number of Judges to hear and determine them. On 5th March

2021, the Acting Chief Justice Hon. P. Mwilu directed this bench to hear and determine the petitions.

3. For record purposes, the Petitioner in Petition No. E425 of 2020 named the respective 1st to 9th Respondents as; the Clerk, County Assembly of Nairobi City County; the Speaker of Nairobi City County Assembly; the County Assembly of Nairobi City County; the Clerk of the Senate; the Speaker of the Senate; the Senate of Kenya; the Hon. Attorney General; the Independent Electoral and Boundaries Commission (IEBC); and the Assumption of the Office of the County Governor Committee, Nairobi City County. On 22nd December 2020, upon an application by counsel for the Speaker of the County Assembly, the Speaker of the Nairobi City County Assembly was enjoined as the 10th Respondent in his capacity as the Acting Governor.

4. The respective 1st to 5th respondents in Petition No. E014 of 2021 are the Nairobi City County Assembly; the Speaker of the Senate of Kenya; the Senate of Kenya; the Hon. Attorney General; and the Independent Electoral and Boundaries Commission. Hon. Mike Sonko Mbuvi Gideon Kioko who is the Petitioner in Petition No. E425 of 2020 is named as an Interested Party.

5. Upon consolidation, Petition No. E425 of 2020 became the lead file. Consequently, the parties now appear as follows: -

Hon. Mike Sonko

Mbuvi Gideon Kioko.....1st Petitioner

Okiya Omtatah Okoiti2nd Petitioner

The Clerk, Nairobi City County Assembly.....1st Respondent

The Speaker, Nairobi City County Assembly.....2nd Respondent

The Nairobi City County Assembly.....3rd Respondent

The Clerk of the Senate4th Respondent

The Speaker of the Senate of Kenya5th Respondent

The Senate of Kenya6th Respondent

Hon. Attorney General.....7th Respondent

The Independent Electoral And

Boundaries Commission.....8th Respondent

The Assumption of the Office of the County

Governor Committee,

Nairobi City County.....9th Respondent

The Acting Governor,

Nairobi City County.....10th Respondent

1ST PETITIONER'S CASE

6. Through the petition dated 18th December 2020 and amended on 22nd December 2020, the 1st Petitioner seeks the following orders:

a) A Declaration that the rights and fundamental rights and freedoms under Articles 25(1), 38(3), 47 and 50 of the Constitution of Kenya 2020 of the petitioner have been denied, infringed, violated and/or threatened.

b) A declaration that the resolutions passed by the 1st 2nd and 3rd Respondents on the 3rd day of December 2020 and the Resolution of 17th December 2020 on the removal of the Petitioner from office as Governor of Nairobi County were in violation of the Constitution and legal process hence null, void and invalid.

c) A declaration that the impeachment process undertaken by the 1st, 2nd, 3rd and 4th Respondents was invalidated by the deliberate breaches of the preamble, Articles 10, 25(c) 27, 47(1) (2), 48, 50(2) (b) (c) (4), 174 (a) (i) of the Constitution.

d) A permanent injunction be and is hereby issued restraining the IEBC the 8th Respondent from publishing in the Kenya Gazette, electronic and the print media of national circulation a Notice of holding elections of Gubernatorial seat for Nairobi City County as a consequence of the resolutions passed by the 4th Respondent on 17th December 2020 and published in the Kenya Gazette on the 17th of December 2020 and/or taking any steps towards the replacement of the Petitioner as Governor of Nairobi City County.

e) The Impeachment process undertaken by the 1st, 2nd, 3rd, 4th and 5th Respondents was null, void and invalid for the failure to comply with the principles and values in the Constitution under Article 174(1) and 75 of the Constitution.

f) The impeachment process undertaken by 1st, 2nd, 3rd, 4th and 5th Respondents violated the structure, values, principles and norms of the doctrine of legitimate expectation, separation of powers and the sub-judice rule.

ff1) A declaration that the swearing in of the 2nd Respondent on the 21st December, 2020 as acting Governor for Nairobi City County was conducted in violation of Article 1, 2, 3, 10, 159 and 259 of the Constitution of Kenya, 2010 and Sections 11 and 16 of the Assumption of Office of Governor Act, 2019 hence unconstitutional, illegal, null and void.

ff2) An order of certiorari be and is hereby issued to quash the Nairobi City County Appropriation Act, 2020 signed by the 2nd Respondent on 21st December, 2020.

g) An Order of Certiorari be issued to bring into Court and be quashed Gazette Notice No. Vol. CXXII-No. 227 dated 18th December 2020 signed by Kenneth Lusaka the speaker of the Senate.

h) Any other relief that court may deem just and expedient in the circumstances.

i) That the costs of this petition be borne by the Respondents.

7. The Petition is supported by Hon. Sonko's affidavit dated 18th December 2020, supplementary affidavit dated 23rd December 2020, supplementary affidavit dated 15th April 2021 and annexures thereto.

8. Hon. Sonko's case is that the process of his removal from office through impeachment was unconstitutional and irregular as it was marred by illegalities occasioned and perpetuated by the Respondents. According to him, the facts giving rise to his petition are that through a Motion dated 25th November, 2020 lodged with the Clerk of the Nairobi City County Assembly on 25th November, 2020, **Hon. Michael Ogada**, the Member of the County Assembly for Embakasi Ward sought to have him removed from office. By a letter dated 26th November, 2020 and served upon the County Attorney, he was invited for a hearing slated for 3rd December 2020 before the Nairobi City County Assembly (hereinafter "**the County Assembly**"). His averment is that on 30th November, 2020, before the hearing of the Impeachment Motion, he obtained Conservatory Orders in **Nairobi Employment and Labour Relations Court Case No. 35 of 2020; H.E. Governor Mike Mbuvi vs The Nairobi City County Assembly & 6 Others** (hereinafter "**ELRC Petition No. 35 of 2020**") staying the impeachment proceedings scheduled for 3rd December, 2020. The matter was fixed for *inter partes* hearing on 3rd December, 2020. It is the 1st Petitioner's case that the impeachment motion was debated by the County Assembly on 3rd December 2020 and a resolution made to impeach him despite the existence of the Conservatory Orders.

9. Hon. Sonko avers that the County Assembly thereafter forwarded the resolution to impeach him to the Senate. On 9th December, 2020, he was invited for a hearing before the Senate scheduled for 16th December, 2020. He states that even though he responded to the charges preferred against him without being furnished with any evidence, the Senate served him with four (4) bulky bundles on the evening of 15th December 2020.

10. It is Hon. Sonko's claim that during the impeachment proceedings, the Speaker of the Senate declined to entertain his Preliminary Objection after which the Senate sat in plenary, deliberated on the charges levelled against him and voted to impeach him.

11. Hon. Sonko avers that the Clerk and the Speaker of the County Assembly violated Articles 1, 10, 23, 25, 27, 47, 48, 50, 159 and 258 and 259 of the Constitution, together with Section 14 of the County Governments Act, 2012 and Standing Order No. 67 of the Nairobi City County Assembly Standing Orders ("**County Assembly Standing Orders**") when they approved a Motion which was not verified, accompanied by evidence or sworn affidavits of the Members of the County Assembly ("**MCAs**") in support of the same. The 1st Petitioner further avers that the Clerk and Speaker of the County Assembly abdicated their duty to ensure adherence to the Constitution and the Rule of Law by disregarding the Conservatory Order issued by *Justice Nzioki wa Makau* on 30th November, 2020 in **ELRC Petition No. 35 of 2020** which was still subsisting.

12. The 1st Petitioner states that the decision by the Senate to impeach him was made without the following documents being presented: -

- a) Copy of the Notice of Motion and signatures.
- b) The resolution of the Nairobi City County Assembly reflecting the impeachment proceedings.
- c) Hansard of the Nairobi City County Assembly.
- d) Affirmation form sworn by the mover of the Motion and verification forms sworn by a third of the MCAs.

13. The 1st Petitioner avers that the MCAs were allowed to vote physically or virtually in contravention of the County Assembly Standing Order No. 67 which provides for voting in three ways: acclamation, division (secret ballot) and/or electronic voting. He avers that the said Standing Order contemplates that whatever the form of voting chosen, it is only available for members physically present at the County Assembly Chamber where the symbol of authority (the mace) is located.

14. It is Hon. Sonko's averment that the motion for impeachment could not be sustained as 57 MCAs were not available to vote and therefore the two thirds requirement to sustain an impeachment motion as provided by the County Assembly Standing Order 67(7) was not met. His averment is that the 57 MCAs denied having participated in the impeachment proceedings.

15. It is further the 1st Petitioner's case that the County Assembly did not undertake public participation as required by Articles 10(2)(a), 118(1) and 196 of the Constitution, and sections 94, 95, 100 and 101 of the County Governments Act, 2012 thereby denying the residents of Nairobi County the opportunity to participate in the impeachment process.

16. Hon. Sonko further states that his advocate, Mr. Evans Ondieki, was denied access to the County Assembly Chamber thereby denying him the right to be heard. It is further the 1st Petitioner's evidence that County Assembly Standing Order No. 72 (2) was violated as he was neither furnished with the report of the Select Committee or any evidence presented to the Committee at least three days before the debate on the Motion.

17. The 1st Petitioner avers that he raised a Preliminary Objection on 16th December, 2020 before the Senate on the grounds that the issues discussed in the impeachment Motion were *sub-judice* within the meaning of Senate Standing Order No. 98(1), (2) & (3) of the Senate Standing Orders as they were subject to active court cases; that there was a conservatory order issued in ELRC Petition No. 35 of 2020 prohibiting the County Assembly and the Senate from proceeding with any impeachment motion against him; and that the threshold for impeachment of a governor had not been met, but the Speaker directed that the objection be heard together with the main Motion.

18. The 1st Petitioner deposes that the Senate voted to impeach him without interrogating the charges levelled against him and evaluating the evidence to ascertain whether the charges were substantiated. It is the 1st Petitioner's case that the said failure amounted to breach of Section 33 of the County Governments Act, 2012 and the Constitution which required the Senate to investigate the charges.

19. Hon. Sonko alleges that there was a pre-determined outcome as confirmed by the statement made by the Senator for Kakamega County **Hon. Cleophas Malala** to the effect that there was no need for further submissions as the Senate had already made a decision.

20. It is the 1st Petitioner's averment that the Senate violated the Constitution and the law by finding that he was in breach of procurement procedures when he was not an accounting officer and passing a resolution to remove him based on evidence that did not link him with the acts, omissions and commissions complained about. According to the 1st Petitioner, the Clerk and Speaker of the Senate violated the provisions of Articles 47 and 181 of the Constitution and Section 33 of the County Governments Act, 2012 by voting against the different counts and/or particulars jointly.

21. The 1st Petitioner further avers that the swearing of the Speaker of the County Assembly as the acting Governor on 21st December 2020 contravened Articles 1, 2, 3 and 259 of the Constitution and the Assumption of Office of the Governor Act, 2019.

22. The 1st Petitioner further averred that the Speaker of the County Assembly was hurriedly sworn in as the Acting Governor of Nairobi City County on 21st December, 2020 in flagrant violation of sections 11 and 16 of the Assumption of the Office of the Governor Act. He added that the Acting Governor proceeded to sign the warrants authorizing the implementation of the Nairobi City County Appropriation Bill, 2020 disbursing over Kshs. 13 Billion notwithstanding the existence of a Court Order in Constitutional Petition No. E438 of 2020 suspending the implementation of the Bill. He expressed fears that the Acting Governor may engage in further actions which would jeopardize the administration of the County Government.

23. 2ND PETITIONER'S CASE

24. Through Petition No. E014 OF 2021 dated 12th January, 2021 the 2nd Petitioner seeks the following Orders: -

a) A Declaration that the rights and fundamental rights and freedoms under Articles 25(1) 38 (3), 47 and 50 of the Constitution of Kenya 2010 of the Interested Party have been denied, infringed, violated and/or threatened.

b) A Declaration that the fundamental rights and freedoms under Article 38 of the Constitution of Kenya, 2010 of voters to continue to have their validly elected County Governor in Office until validly removed has been denied, infringed, violated and/or threatened.

c) A declaration that the resolutions passed by the 1st Respondent on the 3rd December 2020, and by the Senate's Resolution of 17th December 2020 on the removal of the Interested Party from office as Governor of Nairobi County, were in violation of the Constitution and legal process hence null, void and invalid.

d) A declaration that the impeachment process undertaken by the 1st and 3rd Respondents was invalidated by the deliberate breaches of Articles 10, 47, 50, 196 (1) of the Constitution and Order 67 of the Nairobi City County Assembly Standing Orders.

e) A permanent injunction be and is hereby issued restraining the 5th Respondent from publishing in the Kenya Gazette, electronic and the print media of national circulation a Notice of holding elections of Gubernatorial seat for Nairobi City County as a consequence of the resolutions passed by the 3rd Respondent on 17th December 2020 and published in the Kenya Gazette on

the 17th of December 2020 and/or taking any steps towards the replacement of the Interested Party as Governor of Nairobi City County.

f) An Order of Certiorari be issued to bring into Court and be quashed Gazette Notice No. Vol. C XXII-No. 227 dated 18th December 2020 signed by the 2nd Respondent.

g) Any other relief that court may deem just and expedient in the circumstances.

h) That the costs of this petition be borne by the Respondents.

25. The 2nd Petitioner's case is premised on the same facts as outlined by the 1st Petitioner. The 2nd Petitioner's case is that the Motion for impeachment of the 1st Petitioner was illegal, null and invalid since it did not meet the requisite legal threshold. The 2nd Petitioner's averment is that the County Assembly and the Senate violated the provisions of Article 47 of the Constitution, Section 33 of the County Governments Act, 2012 and Standing Order No. 67 of the County Assembly by approving a Motion which was not verified and/or accompanied by sworn affidavits of a third of the MCAs or accompanied by evidence in support thereof.

26. The 2nd Petitioner contends that the impeachment procedure at the Senate was skewed against the 1st Petitioner, who was not given the reasons for his removal from office, thus violating his right to fair hearing and contravening the procedure contemplated under Article 181 of the Constitution and the County Assembly Standing Orders. According to the 2nd Petitioner, the 1st Petitioner's right to fair hearing was violated by the introduction of four bulky documents by the Senate on 15th December, 2020 just before the hearing; the refusal by the Speaker of the Senate to allow the 1st Petitioner to argue his Preliminary Objection at the beginning of the Senate proceedings; and the introduction of new evidence and witness statements which was tantamount to expanding or amending the impeachment Motion.

27. It is the 2nd Petitioner's averment that initiating a Motion for the impeachment of the 1st Petitioner without undertaking public participation contravened Articles 1, 10 and 196 of the Constitution. The 2nd Petitioner also deposes that the Senate failed its role by passing a resolution to remove the 1st Petitioner from office without investigating and interrogating the allegations before it, the import of the evidence tabled and the 1st Petitioner's case. Additionally, the 2nd Petitioner states that the Senate erred by voting for all the counts jointly.

28. The 2nd Petitioner cites and relies on Articles 1(2) & 3(a) & (b), 2(1), 3(1), 10, 22(1), 23(1), 47(1), 159(2)(a) & (c), 165(3)(b) & (d)(ii), 181, 196(1), 258(2)(c) and 259. He also relies on Section 33(1) & (2) of the County Governments Act, 2012 and Order 67 and Part XIV of the 2nd Edition of the County Assembly Standing Orders.

THE PETITIONERS' SUBMISSIONS

1st Petitioner's submissions

29. The 1st Petitioner filed two sets of written submissions dated 28th April 2021 and 3rd May 2021. The 1st Petitioner also filed a list of authorities dated 3rd May 2021. He made submissions on the following issues.

a. Whether the Court has power to review decisions of the county assemblies and the Senate and whether such review violates the separation of powers doctrine;

30. The 1st Petitioner asserts that the perverse conduct of the County Assembly in this case consists of violation of the Constitution, the County Governments Act and its Standing Orders. The case of *Martin Nyaga Wambora & 30 others vs County Assembly of Embu & 4 Others [2015] eKLR* (hereinafter referred to as "**Wambora High Court 2**") is cited as holding that the High Court has power to review how the county assemblies and the Senate exercises their power where their conduct was "*perverse to normal conduct to the extent of perplexing and agitating the mind of the ordinary person*".

31. The 1st Petitioner relies on the decision of the High Court in the case of *Trusted Society of Human Rights Alliance vs Attorney General and 2 others [2012] eKLR* and submits that the High Court has the duty of interrogating whether a decision has been made in compliance with the prescribed constitutional threshold. It is the 1st Petitioner's contention that the Senate ought to have inquired whether the County Assembly had conducted a proper impeachment process. He added that failure to do so would grant this Court power to review the decision within the meaning of Article 47 of the Constitution.

32. The 1st Petitioner additionally submits that while the removal of a governor from office by way of impeachment is the preserve of the county assemblies and the Senate, a court inquiring into the propriety of the removal process cannot be said to be violating the separation of powers doctrine. According to the 1st Petitioner, all State organs are bound by the Constitution and the law. Reliance was placed on the holding in *Martin Nyaga Wambora & 4 others vs Speaker of the Senate & 6 others 2014] eKLR* (hereinafter "**Wambora High Court 1**") where it was observed that the court being the only arm of government vested with the power to interpret the Constitution, and to safeguard, protect and promote its provisions has the duty and obligation to intervene in actions of other arms of government and state organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation.

33. Hon. Sonko submitted that impeachment has to be conducted in accordance with the Constitution and the law, the contravention of which attracts the Court's intervention. Reference was made to the decision in the South African case of *Doctors for Life International vs. Speaker of the National Assembly & Others (CCT 12/05) [2006] ZACC*.

b. Whether the Senate met the constitutional threshold for impeachment

34. It is the 1st Petitioner's submission that in light of the evidence tendered, the Senate did not meet the threshold established in Article 181 of the Constitution. In support of this statement, the 1st Petitioner asserts that the members of the Senate voted without evaluating the evidence against each of the nine charges levelled against him. It is further the 1st Petitioner's case that a nexus between a governor and the alleged violations must be established by a substantive interrogation of the charges and the evidence. In his view, no evidence was submitted that could have formed the basis for a sustainable claim against him. According to the 1st Petitioner, the charges and documentation presented at the Senate did not directly link him to any unlawful acts or omissions. In support of the assertion, the 1st Petitioner relied on the holding in the case of ***Martin Nyaga Wambora & 3 others vs Speaker of the Senate & 6 others [2014] eKLR; Court of Appeal at Nyeri Civil Appeal No. 21 of 2014*** (hereinafter "**Wambora Court of Appeal 1**") that it is incumbent upon the High Court to determine if the facts in support of the charges against a Governor meet and prove the threshold in Article 181 of the Constitution.

35. The 1st Petitioner contends that the Senate has a duty to give reasons for the impeachment of a governor and that it failed to do so in his case as no report reflecting any deliberations and considerations was served upon him. He further contended that the Senators voted uniformly in respect of all the charges without assigning any reasons. It is therefore the 1st Petitioner's case that in the absence of written reasons for the Senate's decision to remove him, the Senate violated Article 10(1)(c) of the Constitution, which requires it to ensure good governance, integrity and accountability in exercising its powers. He cited the decision in ***Re Posyer and Mills Arbitration [1964] 2 QB 467*** for the statement that a decision-maker has a duty to give adequate reasons for his or her decision and the reasons must not only be intelligible but should also deal with the substantial points that have been raised.

c. Whether the Nairobi City County Assembly and the Senate violated the 1st Petitioner's right to fair administrative action

36. The 1st Petitioner asserts that the County Assembly acted unlawfully in the manner in which it handled the impeachment motion and that the Senate ought not to have proceeded with his impeachment. He referred to the statement of Prof. Migai Akech in Administrative Law (Strathmore Law Press, 2016) at Pg.59 that the rule of law is a culture that mandates adherence to procedures. It is submitted that adherence to the rule of law requires the county assemblies and the Senate to abide by the promulgated procedures for removal of governors from office. He argued that where the county assemblies and the Senate fail to adhere to such procedures, it is likely to occasion injustice to the individual governor sought to be removed from office. It is asserted that in the instant case the County Assembly violated the provisions of its Standing Orders Nos. 67, 72, 73, 74 which regulate the removal of a governor from office by impeachment. The 1st Petitioner relied on the decision in ***Speaker of the Senate & Another vs the Attorney General & others, Advisory Opinion No. 2 of 2013*** where the Supreme Court stated that courts have the competence to determine whether a legislative body has complied with the prescribed procedures in carrying out its functions.

37. The 1st Petitioner concludes on this issue by submitting that the failure by the County Assembly to give reasons and to adhere to its Standing Orders in processing the Motion for his removal from office amounted to violation of Articles 10, 25(1), 38(3), 47 and 50 of the Constitution and the objects and principles of devolved governance.

d. Whether the requirement for public participation was complied with.

38. The 1st Petitioner submits that contrary to the requirement of the Constitution, both the Senate and the County Assembly failed to ensure public participation in the process of removing him from office. It is urged that Article 118(1) of the Constitution enjoins the Senate to facilitate public participation in its processes and that the lack of participation of the people of Nairobi in his removal meant that the threshold was not met. It is additionally the 1st Petitioner's position that it has not been demonstrated that the Senate gave the public appropriate information and opportunity to participate in the impeachment either prior to or during the debate. For this argument reference was made to ***Martin Nyaga Wambora vs County Assembly of Embu & 37 others [2015] eKLR; Court of Appeal at Nairobi Civil Appeal No. 194 of 2015*** (hereinafter "**Wambora Court of Appeal 2**") where it was held that the removal of a governor is not any other ordinary business of a county assembly and the electorate ought to be involved since a governor is directly elected by the voters in the county.

e. Whether the removal of the 1st Petitioner from office was conducted in accordance with the Constitution and the Law.

39. The 1st Petitioner submits that the key question for determination is whether his removal from office was in line with the Constitution and the set laws. He points out that the removal of a governor from office is provided for in Article 181 of the Constitution, whereas the procedural law giving effect to the constitutional provision is Section 33 of the County Governments Act 2012 which is further expounded by the provisions of Order 67 of the County Assembly Standing Orders. According to him, the impeachment process being administrative in nature should adhere to Article 47(1) of the Constitution which demands that any administrative action should be '*expeditious, efficient, lawful, reasonable and procedurally fair*'. He cited the case of ***Dry Associates Limited vs Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd [2012] eKLR*** for the proposition that Article 47 of the Constitution is intended to subject administrative processes to constitutional discipline.

40. The 1st Petitioner states that Standing Order No. 67(3) of the County Assembly which requires a seven days' notice calling for impeachment of the governor was not adhered to. He submits that since the Motion was served upon the Clerk of the County Assembly on 25th November, 2020, received and approved by the Speaker of the County Assembly on the 26th November, 2020 and debated by the Assembly on 3rd December 2020, the Standing Order was violated as the earliest date the Motion could have been debated was 4th December, 2020.

41. It is further the 1st Petitioner's case that placing the Motion on the Order Paper before the expiry of the mandatory notice period invalidates any decision made by the County Assembly. It is urged that failure to follow the mandatory requirement of Standing Order No. 67(4) of the County Assembly amounted to a violation of Article 10 of the Constitution. He relied on the cases of ***Floriculture International***

Ltd vs Central Kenya Ltd and Others [1995 – 1998] 1 EA 61 and ***Commissioner of Lands & Another vs Kunste Hotel Limited [1997] eKLR*** to buttress this argument.

42. The 1st Petitioner submits that his rights were violated on the grounds that he was not accorded the right to legal representation before the County Assembly; that he was not given the necessary documentation as per Standing Order No. 67(1) of the County Assembly; and that he was not personally served. In addition, he contends that he was not given adequate notice or full disclosure of the proceedings. Further, that the failure to adhere to procedural requirement in Standing Order No. 67(4) of the County Assembly was prejudicial to him. It is his case that all the actions violated his right to fair administrative action as provided for in Article 47 of the Constitution and the Fair Administrative Action Act, 2015.

43. The 1st Petitioner argued that County Assembly Standing Order 67(4) which requires that a Motion proposing the impeachment of a governor must be supported by a third of the MCAs, who must verify their signatures with depositions filed with the Clerk, was also violated. He submits that 60 MCAs swore affidavits to confirm that they never appended their signatures to endorse the purported Impeachment Motion dated 25th November, 2020 proposed by the MCA for Embakasi Ward, **Hon. Michael Ogada**.

44. The 1st Petitioner submits that the County Assembly contravened Court Orders issued on 30th November 2020 barring it and the Senate from passing any resolution on the Motion for his removal. For this, he relied on a number of texts and decided cases, including: ***Administrative Law by Sir William Wade & Christopher Forsyth 10th Ed; Halsbury's Laws of England 4th Ed Vol. 5; Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828; and Wildlife Lodges Ltd vs County Council of Narok and Another [2005] 2 EA 344.***

45. Regarding the Senate proceedings, the 1st Petitioner contends that although the Standing Orders of the County Assembly require the mover of the Motion for impeachment to file the Motion together with evidence in support of the charges, and even though he received an invitation letter on 9th December, 2020, he was not served with any evidence until very late on 15th December, 2020 after he had filed his response. According to the 1st Petitioner, this denied him an opportunity to make an informed response as he was denied the right to file a supplementary reply or additional documentation. Further, that the Senate Speaker's action of allowing the County Assembly to introduce witnesses whose evidence was not placed before the County Assembly contravened Standing Order 19 of the Senate Standing Orders, which prohibits the introduction of evidence that was not part of the allegations before the County Assembly.

46. The 1st Petitioner states that his Notice of Preliminary Objection was rejected by the Speaker of the Senate in violation of Standing Order 12 of the Senate on the ground that the same would be argued with the substantive Motion.

47. He submits that the actions of the Clerk, the Speaker and the Senate itself as spelt out above violated his right to fair trial as envisaged in Article 50 (1) of the Constitution. Further, that the rejection of his Preliminary Objection exposed him to double jeopardy thus prejudicing him and violating his right under Article 50(2)(o) of the Constitution. He further submits that his right under Article 50(2)(a) of the Constitution was violated because he had the right to be presumed innocent despite the existence of the criminal cases against him.

48. The 1st Petitioner argues that it is not enough to merely claim that a governor has violated the Constitution as there is need for investigations into the allegations and the testing of the evidence adduced. It is his assertion that the provisions of Article 181(1)(b) of the Constitution cannot be invoked against him with regard to the criminal charges pending before the courts. For these assertions, he relied on several decisions including ***Joram Mwenda Guantai vs The Chief Magistrate [2007] 2 EA 170; Prime Salt Works Ltd vs Kenya Industrial Plastics Ltd [2001] 2 EA 528; Nduyabo vs Attorney General [2001] 2 EA 485; and Trusted Society of Human Rights Alliance v Attorney General and 2 others [2012] eKLR.***

49. Hon. Sonko further asserted that Standing Order 75(1)(b)(i) & (ii) of the Senate grants the Senate the discretion to determine whether to investigate a governor upon receiving the resolution of the County Assembly. He asserts that a special committee should have been formed to investigate the matter. It is submitted that the court can intervene where the discretion was not exercised judicially or fairly. For this argument, he relied on the cases of ***Republic vs The Council of Legal Education ex parte James Njuguna & 14 Others [2007] eKLR; and Padfield & Others v Minister of Agriculture, Fisheries and Food & Others [1968] AC 997 at 1006.*** Reference was also made to the Supreme Court decision in ***Speaker of the Senate & Another v the Attorney General & others, Advisory Opinion No. 2 of 2013*** where it was determined that courts have the competence to pronounce on the compliance of a legislative body with its prescribed processes for carrying out its functions.

50. The 1st Petitioner therefore concludes that the whole process of his impeachment from commencement to completion did not meet the threshold set out in the Constitution and the law.

The 2nd Petitioner's Submissions

51. The 2nd Petitioner filed written submissions dated 21st April 2021. He states that Article 3(1) of the Constitution obligates every person to respect, uphold and defend the Constitution. His case is that by dint of Articles 3(1) as read with Articles 22 and 258 of the Constitution, he has the *locus standi* to file the petition as it raises questions of public interest. He relies on several cases including ***Timothy Otuya Afubwa & another vs County Government of Trans Nzoia & 3 others [2016] eKLR; Khelef Khalifa El-Busaidy vs Commissioner of Lands & 2 others [2002] eKLR; John Harun Mwau and 3 Others vs Attorney General and 2 Others [2012] eKLR; and Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012.***

52. On the issue as to whether this Court has jurisdiction to entertain his case, the 2nd Petitioner noted that jurisdiction is indeed critical as held in the cases of the ***Owners of Motor Vessel "Lillian S" vs Caltex Oil Kenya Limited [1989] KLR 1653 (C.A.); and John Kipng'eno Koech & 2 Others vs Nakuru County Assembly & 5 Others [2013] eKLR.*** He submitted that this Court has jurisdiction to entertain the Petition by virtue of Articles 22, 23 and 165(3)(d) of the Constitution. He also cited the case of ***Peter O. Ngonge vs Francis Ole Kaparo & 4***

Others [2007] eKLR.

53. The 2nd Petitioner asserts that the County Assembly, the Speaker of the Senate and the Senate violated the principle of the rule of law since the Notice of Motion for impeachment dated 25th November 2020 was incompetent for lack of verification forms as required by Section 33(1) of the County Governments Act, 2012 and the County Assembly Standing Order 67(1) as evidenced by affidavits of 52 MCAs.

54. The 2nd Petitioner further submitted that the County Assembly deliberated on the Motion for impeachment in contempt of the conservatory orders staying the said impeachment proceedings issued in ELRC Petition No. 35 of 2020. It is on this premise that the 2nd Petitioner submits that the proceedings were null and void to that extent as observed in the cases of **Wambora High Court 1** and **Judicial Service Commission vs The Speaker of the National Assembly & Another [2013] eKLR**.

55. It is the 2nd Petitioner's submission that the impeachment proceedings contravened Senate Standing Order 98(1), (2) & (3), as well as the County Assembly Standing Order 94(3)(c) because they were *sub-judice* owing to the existence of active cases in **Nairobi CM ACEC 1 of 2020, Republic vs Mike Mbuvi Sonko & 20 others**; and **Nairobi CM ACEC 31 of 2020, Republic vs Mike Mbuvi Sonko & 16 others**. Additionally, he asserts that the impeachment proceedings violated Article 50(2)(a) of the Constitution which entitles the 1st Petitioner to be presumed innocent until proven guilty.

56. On the issue of the proceedings before the County Assembly the 2nd Petitioner submitted that the virtual proceedings contravened sections 6A and 7B (2) of the County Governments Act, 2012 as amended in 2016 and 2020 which provides for physical meetings and physical voting. According to the 2nd Petitioner, the Members must be physically present in the Chamber for any matter to be debated and voted on by the Assembly.

57. The 2nd Petitioner asserts that the County Assembly, the Speaker of the Senate and the Senate in carrying out their responsibilities in this matter violated their leadership mandate as spelt out under Article 73 of the Constitution as read with Section 52(1) of the Leadership and Integrity Act by failing to observe the guiding principles of leadership and integrity. Additionally, it is submitted the said Respondents' action violated Articles 10, 25(1), 38(3)(c), 47, 181, 200 and 259(1) of the Constitution. Consequently, the 2nd Petitioner argues that violating the constitutional imperative of the rule of law, through the purported impeachment of the 1st Petitioner is unconstitutional and invalid. This argument was supported by the decisions in **Dr. Christopher Ndarathi Murungaru vs AG and another, Civil Application No. Nai. 43 of 2006 (24/2006)**; **In the Matter of the Speaker of the Senate & another [2013] eKLR (Advisory Opinion No. 2 of 2013)**; **The Matter of the Interim Independent Electoral Commission, Advisory Opinion No. 2 of 2011**; **Mumo Matemu case (supra)**; **Wambora High Court 1**; and **Doctors for Life International (supra)**.

58. The 2nd Petitioner submits that the failure to personally serve the 1st Petitioner with the letter dated 26th November 2020 requiring his attendance in the County Assembly on 3rd December 2020 subjected him to miscarriage of justice as he was denied both a fair hearing and a fair trial. This, it is submitted, was in direct violation of the County Assembly Standing Order 72(2) which requires personal service. It is further urged that by proceeding with the impeachment motion without giving the 1st Petitioner an opportunity to be heard violated the rules of natural justice and the right to fair administrative action guaranteed under Article 47 of the Constitution and Section 4(3) of the Fair Administrative Action Act, 2015. In support of this view the 2nd Petitioner relied on the cases of **Judicial Service Commission vs Mbalu Mutava & Another [2015] eKLR**; and **President of the Republic of South Africa and Others vs South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1** which underscored the importance of fair administrative action.

59. Turning to the question of public participation in the impeachment process, the 2nd Petitioner submits that failure to subject the removal process to public participation was fatal. According to the 2nd Petitioner, the County Assembly did not adduce any evidence to show that it facilitated an adequate opportunity for effective public participation by the people of Nairobi. This, it is urged, was in direct violation of Article 196(1)(b) of the Constitution that obligates county assemblies to facilitate public participation and involvement in their legislative and other businesses. In support of the necessity of the public to participate in governance affairs, he referred to the cases of **Kenya Human Rights Commission Vs Attorney General & Another [2018] eKLR**; **Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya, Nairobi High Court (Judicial Review Division) Miscellaneous Application No. 374 of 2012**; **Nairobi Civil Appeal No. 224 of 2017, Independent Electoral and Boundaries Commission & Others vs. The National Super Alliance & Others**; **Doctors for Life International (supra)**; **Wambora Court of Appeal 2**; and **Wambora High Court 2**.

60. On whether the County Assembly, the Speaker of the Senate and the Senate abdicated their roles under Article 181 of the Constitution and Section 33 of the County Governments Act, 2012, the 2nd Petitioner asserts that the said respondents failed to comply with the law during the impeachment of the 1st Petitioner. It is submitted that on the issue of gross misconduct, the Senate voted without considering the fact that the allegations were based on issues not within the 1st Petitioner's mandate hence contravening Article 181(1) of the Constitution. He therefore contends that this Court should determine whether the removal of the 1st Petitioner was done in accordance with the Constitution, and in particular whether the facts laid before the Senate to support the allegations made against the 1st Petitioner met the threshold set in Article 181 of the Constitution.

61. The 2nd Petitioner urged that having established that the impeachment of the 1st Petitioner was unconstitutional, null and void, the IEBC should not conduct a by-election for the position of the governor of Nairobi City County.

62. On whether the Court should grant the orders sought in his Petition, the 2nd Petitioner submitted that Article 23(3) of the Constitution empowers the Court to grant appropriate reliefs, including an order of judicial review. It is submitted that the 1st Petitioner's constitutional rights as well as those of the people of Nairobi City County were violated by the County Assembly, the Speaker of the Senate and the Senate and as a result this Court should grant the Orders sought together with any other appropriate relief. It is further submitted that when exercising its constitutional jurisdiction, this Court is concerned with upholding or vindicating the constitutional right which has been contravened as was observed in the case of **Siewchand Ramanoop vs The AG of T&T, PC Appeal No. 13 of 2004**.

63. The 2nd Petitioner submits that this Court in exercising its power under Article 23 of the Constitution should grant the appropriate reliefs so as to promote the rule of law and constitutionalism. To support this contention, he relied on the cases of **Kenya Human Rights Commission vs Non- Governmental Organizations Co-Ordination Board [2016] eKLR**; **The Centre for Human Rights and Democracy & Others vs The Judges and Magistrates Vetting Board & Others, Eldoret Petition No. 11 of 2012**; **Minister of Health & Others vs Treatment Action Campaign & Others (2002) 5 LRC 216**; and **Hoffmann v South African Airways (CCT17/00) [2000] ZACC 17**.

64. The 2nd Petitioner urges this Court to award him costs against the County Assembly, the Speaker of the Senate and the Senate as they were at all material times aware of the grounds and procedures for the removal of the Governor but opted to act contrary and in violation of the Constitution and the law. He further submits that in the unlikely event that the Petition is unsuccessful, he should not be condemned to pay costs since the Petition was filed in public interest under Articles 22 (2) and 258 of the Constitution. To sustain this view, the 2nd Petitioner relied on the cases of **John Harun Mwau and Three Others vs Attorney-General & 2 Others [2012] eKLR**; and **Boaz Waruku vs Kenya Universities & Colleges Central Placement Service & 3 Others [2020] eKLR** that set the law on the award of costs in matters brought under Articles 22 and 258 of the Constitution.

THE RESPONDENTS' CASE

1st Respondent's case

65. The Clerk of the County Assembly, **Mr. Edward Ombwori Gichana**, opposed the petitions through a replying affidavit sworn on 31st March, 2021 on his own behalf and on behalf of the County Assembly. According to Mr. Gichana, the notice for the removal of the 1st Petitioner from office was lodged in his office on 25th November, 2020. He points out that the 1st Petitioner having admitted that he was invited to appear before the committee of the whole house renders his allegation of lack of personal service baseless and without merit.

66. The 1st Respondent additionally avers that the 1st Petitioner had the option of attending the proceedings physically, through his duly appointed advocate or virtually but that he instead opted to take a vacation to Mombasa. It is deposed that there is no evidence that the advocate allegedly sent to the County Assembly by the 1st Petitioner had instructions from him.

67. In respect of ELRC Petition No. 35 of 2020, he states that the same was filed on 28th February, 2020 and not 30th November, 2020 as alleged by the 1st Petitioner. It is his averment that there was no court order barring the impeachment of the 1st Petitioner on 3rd December, 2020 as the orders issued on the said date were as follows: -

a) That the Court shall peruse the file and give a ruling and/or further directions at 11.30am;

b) That the Order made earlier is stayed with fresh directions to issue in open Court at 11.30am in the presence of all Advocates;

c) That the Application by the Petitioner seeking adjournment of today's hearing is declined; and

d) That the hearing of the Application to go on as Ordered by the Court on 30th November 2020.

68. According to Mr. Gichana, the conservatory orders issued on 30th November, 2020 were suspended on 3rd December, 2020 and that by the time the impeachment motion was moved at 3.00pm there were no conservatory orders in place.

69. As regards the impeachment process, he avers that he complied with the law governing the impeachment of the governor of Nairobi City County as stated under Article 181 of the Constitution, Section 33 of the County Governments Act, 2012 and Standing Order 67 of the County Assembly. It is his deposition that in compliance with Standing Order 67(1) **Hon. Michael Ogada** delivered a copy of the proposed motion stating the grounds and particulars for removal of the 1st Petitioner to his office. According to him the motion signed by **Hon. Michael Ogada** was accompanied by a list of one-third of the members who were supporting it. His evidence is that after ensuring that there was compliance with the law he forwarded the motion to the Speaker on 26th November, 2020.

70. Mr. Gichana avers that under County Assembly Standing Order 49 a motion for the impeachment of a governor is a special motion which the Speaker must dispose of within seven days of its receipt from a member. He adds that such a motion shall be given by the member within 3 days following the approval by the Speaker. He states that the Speaker accordingly communicated to the County Assembly, through Communication No. 32 of 26th November 2020, that the impeachment motion that had been tabled by **Hon. Peter Imwatok** in February 2020 stood withdrawn by effluxion of time. Further, that the introduction of a fresh motion for the removal of the Governor by another MCA, who was not party to ELRC Petition No. 35 of 2020, was regular and legal as there were no orders barring such a member from introducing the new motion.

71. It is the Clerk's case that the allegation of forgery of login credentials of some MCAs is not supported by any evidence.

72. He dismissed the claim that some of the MCAs were absent from the Chambers and did not therefore participate in the proceedings as of no consequence. He explained that as result of the Covid-19 pandemic the County Assembly had amended its Standing Orders to allow for virtual proceedings.

73. On the Petitioners' allegation that the public was not involved in the impeachment process, Mr. Gichana avers that there was adequate public participation in compliance with Article 196(1)(b) of the Constitution. His evidence is that public participation was conducted between 30th November, 2020 and 3rd December, 2020 and questionnaires were manually distributed across the County through the County Assembly ward offices.

The 1st Respondent's Submissions

74. The 1st Respondent submits that the respective offices of the County Assembly acted within the law as provided under the Constitution, Section 16(2) of the Assumption of Office of the Governor Act, County Governments Act, 2012 and the County Assembly Standing Orders. According to him this was confirmed by the following: -

- a) The Impeachment Motion was validly lodged in the Clerk's Office;
- b) All the laws were complied with including the Court Orders in transmitting the Notice of Removal/Impeachment of the 1st Petitioners to the Speaker of the County Assembly and in the assumption of office by the Speaker of the County Assembly as acting Governor; and
- c) Ensuring that the number of the MCAs prescribed under the Standing Orders that is 82 out of 122 was surpassed when the impeachment motion was passed.

75. It is further the 1st Respondent's submission that the Motion of Impeachment by Hon. Michael Ogada, was valid for the following reasons:

- a) That the previous Motion by Hon. Peter Imwatok was discharged by virtue of being non-compliant with the County Assembly Standing Order 49(2);
- b) That the Motion by Hon. Michael Ogada was a fresh motion;
- c) That the Motion by Hon. Michael Ogada was different and independent from the motion brought by Hon. Peter Imwatok;
- d) That Hon. Michael Ogada, the Motion mover was not a party to the alleged ELRC Petition No. 35 of 2020;
- e) That there was no order barring Hon. Michael Ogada from moving the Impeachment Motion.

76. On the issue of whether the Impeachment Motion was validly lodged in his Office, the 1st Respondent refuted the claim that the notice for removal was lodged on 26th November, 2020, and submits that the notice was presented on 25th November, 2020. The Clerk further submits that the Notice of Motion was supported by more than one third of the MCAs. He submits that the procedure laid down under Standing Order No. 67 (1) of the County Assembly Standing Orders was fully complied with and that the grounds stated in the Motion were in tandem with the grounds for removal of a Governor.

77. The Clerk further submits that the signatures of the MCAs in support of the impeachment motion was conclusive of the fact that they had gone through the Motion and affirmed the particulars of the allegations therein. It is his contention that the affirmation of the mover of the Motion of impeachment needed not be made under oath since an affirmation is only a solemn declaration allowed to those who conscientiously object to taking an oath. According to the Clerk, after being satisfied that the Notice of Impeachment was properly lodged and had met the threshold he transmitted it to the Speaker of the County Assembly in accordance with Standing Order 67(7).

78. While acknowledging the solemn duty to obey Court Orders, the Clerk of the County Assembly submits that the duty stops once the order is discharged. He submits that the Interim Orders issued on 28th February, 2020 in ELRC Petition No. 35 of 2020 were reviewed on 2nd March, 2020 to allow the impeachment motion to proceed provided that the law was complied with. He referred to the case of **Margaret Wambogo Nyaga vs Clerk to Embu County Council & 2 Others [2010] eKLR** for the argument that once a conservatory order is discharged it ceases to have a binding effect on parties. He submits that in any case, interim orders are not meant to exist in perpetuity as was held in the case of **St. Patricks Hill School Ltd vs Bank of Africa Kenya Ltd [2018] eKLR**.

79. The 1st Respondent submits that the voting on the Impeachment Motion was conducted using a hybrid system whereby some MCAs appeared physically while others voted online. He refutes the Petitioners' claim that electronic voting obligates all members to be present at the County Assembly and submits that voting was through the Zoom Platform using a link sent to the phone numbers or email addresses which the MCAs had provided in advance.

80. The Clerk additionally asserts that the petitioners have not established, through the production of evidence of a cybercrime expert, that the voting system was hacked. Further, that the evidence of the handwriting expert cannot be used to support the allegation that the online voting was tampered with.

81. The Clerk further submits that the Petitioners have failed to prove that there was lack of quorum as the claim is based on the erroneous argument that the Standing Orders did not allow virtual proceedings including electronic voting. He contends that the allegation that fifty-four MCAs did not vote is not true for the reason that twenty-four of the MCAs retracted their averments that they did not vote through new affidavits. Further, that of the remaining affidavits, at least three have glaring discrepancies as they are unsigned, undated and bear the wrong identity card numbers of the deponents.

82. The Clerk maintains that considering that there was no order in Constitutional Petition No. E348 of 2020 stopping the assumption of office of the governor by the Speaker, the Speaker proceeded to assume the said office according to the procedure outlined under Article 182 of the Constitution and Section 16(2) of the Assumption of Office of the Governor Act in filling the position within the timelines. He cited the case of **Re Speaker, County Assembly of Embu [2018] eKLR** where the Supreme Court rendered itself on the critical role of the office of the Deputy County Governor and the need to fill any vacancy therein.

83. On whether the orders sought should be granted, the Clerk submits that the Court should interpret the Constitution and relevant statutes in a manner that promotes good governance and efficiency as was held in the case of *Mugambi Imanyara & another vs Attorney General & 5 others [2017] eKLR*. Reference is also made to the case of *Re Speaker, County Assembly of Embu [2018] eKLR* where the Supreme Court addressed its mind to the crucial roles of the offices in the County Government structures that abhors any vacancy.

84. The Clerk submits that granting the orders sought in the petitions would amount to interference with the independence of the county assemblies while discharging their lawful duties. Further, that such orders will contravene Section 10 of the County Assemblies Powers and Privileges Act, 2017 which bars courts from questioning the proceedings or decisions of a county assembly or the Committee of Powers and Privileges while acting in accordance with the Act. The Clerk rejects the Petitioners' suggestion that the decision in *Wambora Court of Appeal 1* renders Section 10 unconstitutional pointing out that the decision was made three years prior to the enactment of the County Assemblies Powers and Privileges Act in 2017. He consequently urged this Court to dismiss the consolidated Petitions with costs.

The 2nd Respondent's Case

85. The Speaker of the County Assembly, **Hon. Benson Mutura**, opposed the petitions through the replying affidavit sworn on 21st January 2021. He avers that the Petitioners' case is premised on unsubstantiated grounds which have been overtaken by events as the impeachment proceedings initiated by the Motion dated 25th November 2020 and concluded vide the resolution of the Senate on 17th December 2020 complied with the provisions of Article 181 of the Constitution, Section 33 of the County Governments Act, 2012 and County Assembly Standing Orders 1, 67 and 72.

86. Mr. Mutura avers that the 1st Petitioner's claim that he was not served with the Motion for Impeachment is unfounded as he at the same time confirmed that he had sent his Advocate Mr. Evans Ondieki to represent him during the debate on the Motion. Further, that the 1st Petitioner did not inform him that he would send an advocate to represent him during the debate and neither did the counsel present any documentary evidence authorizing him to act for the 1st Petitioner. He therefore asserts that the 1st Petitioner's claim that he was not granted a fair hearing is without basis as the hearing of his impeachment was grounded on materials that had already been availed to him.

87. It is further deposed that the mover of the Motion of Impeachment complied with the provisions of County Assembly Standing Order 67(1) which does not require a deposition by at least one third of the MCAs verifying their signatures and the grounds for the Impeachment. Further that there is no requirement for affirmation under oath by the mover of the Motion. It is the Speaker's averment that the 1st Petitioner's allegation that over 60 MCAs swore affidavits indicating they never endorsed the Impeachment Notice is thus incorrect. He notes that the County Assembly has 122 members and the Impeachment Motion only required 41 MCAs to support it before it could be debated.

88. The Speaker avers that the approval of the Motion on 26th November, 2020 and its debating on 3rd December, 2020 complied with the requirement for a seven days' notice as prescribed by the County Assembly Standing Order 67(3). It is further deposed that the 1st Petitioner's allegation that no select committee was set up to investigate the charges in the impeachment Motion is unfounded.

89. The Speaker avers that the conservatory orders barring debate on the Motion of impeachment issued in ELRC Petition No. 35 of 2020 lapsed on 3rd December 2020 when the 1st Petitioner's counsel declined to prosecute the application for conservatory orders on 3rd December 2020.

90. The Speaker states that the County Assembly proceedings were conducted both physically and virtually because of the Covid-19 pandemic that called for social distancing as one of the containment measures. He avers that on 3rd December 2020 when the impeachment motion was debated, 26 MCAs participated in the proceedings virtually while 65 were physically present in the Chamber. He states that 88 MCAs out of the total of 122 voted in support of the motion thereby meeting the two thirds threshold set out under Standing Order 75(5) of the County Assembly Standing Orders and Section 33(1) of the County Governments Act. He states that the Speaker of the Senate was thereafter accordingly informed of the passing of the resolution in accordance with the requirements of Section 33(2)(a) of the County Governments Act. Further, that in compliance of Section 33(3)(a) of the County Governments Act, the Speaker of the Senate proceeded to issue a seven days' notice calling for a special sitting through a Gazette Notice and that the 1st Petitioner did indeed present his defense before the Senate on 17th December 2020.

91. On the Petitioners' allegation that there was no public participation, the Speaker deposes that there was adequate public participation in the impeachment proceedings.

92. On the issue of separation of powers, he avers that impeachment of Governors is the preserve of the Senate and county assemblies. He observes that all the constitutional and legal requirements and in particular Articles 10 and 181 of the Constitution, Section 33 of the County Governments Act and the Standing Orders of the County Assembly were met. He maintains that by dint of the doctrine of separation of powers, this Court should not be quick to interfere with the parliamentary procedures which are the sole mandate of the legislature. He cited the decisions in *Supreme Court Petition No.32 of 2014, Justus Kariuki Mate & another vs Martin Nyaga Wambora*; and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR* in support of the assertion that courts should adhere to the doctrine of separation of powers.

The 2nd Respondent's Submissions

93. The Speaker of the County Assembly filed written submissions and a list of authorities dated 10th May, 2021 and isolates the issues for determination as follows: -

a. Whether the Impeachment motion was validly lodged.

94. The Speaker submits that contrary to the 1st Petitioner's claim that the impeachment motion was lodged on 26th November 2020, it was presented to the clerk of the County assembly on 25th November 2020. It is his submission that he admitted the Motion for debate upon satisfying himself that it complied with the Constitution and the Standing Orders.

95. According to the 2nd Respondent, the signatures of the MCAs were sufficient to affirm their support for the Motion. It is additionally submitted that it was not necessary for the affirmations for the impeachment be made under oath.

b. Whether there was non-compliance with any court order

96. The Speaker of the County Assembly submits that there was no court order against the County Assembly stopping it from debating the impeachment motion. He argues that the interim orders issued in ELRC Petition No. 35 of 2020 could not have existed in perpetuity. He cited the decision in *St Patricks Hill School Ltd vs Bank of Africa Kenya Ltd [2018] eKLR* in support of his position. He pointed out that even if there were orders in ELRC Petition No. 35 of 2020 the said orders could not bind the mover of the impeachment motion since he was not a party to the petition.

97. According to the Speaker of the County Assembly, the Order of the Court in ELRC Petition No. 35 of 2020 did not in any case bar him, the Clerk and the County Assembly from carrying out their oversight role. He noted that the order only barred impeachment proceedings that were not in strict compliance with the provisions of Standing Orders 67 and 72 of the County Assembly. He maintained that there was no disobedience of any court order in the impeachment of the 1st Petitioner as the initial Motion by Hon. Peter Imwatok failed to meet the timelines as prescribed in Standing Order 49(2).

98. The Speaker pointed out that when ELRC Petition No. 35 of 2020 came up for hearing, Mr. Kinyanjui counsel for the 1st Petitioner declined to prosecute the application for conservatory orders and hence there was no extension of the interim orders. It is consequently submitted that the 1st Petitioner's attempt to discredit the legality of the process based on the proceedings in Court on 3rd December 2020 is misconceived, as there was no existing order by the time the motion was preferred.

99. As regards the 1st Petitioner's allegation of the existence of court orders in Constitutional Petition No. E348 of 2020, the Speaker submits that the said matter is still pending hearing and determination and that the 1st Petitioner is at liberty to prosecute it.

c. Quorum and the voting System

100. The Speaker of the County Assembly acknowledges that under Section 33 of the County Governments Act, 2012 as read together with the County Assembly Standing Orders, the impeachment of the governor of Nairobi City County requires the support of 82 MCAs which is equivalent to two thirds of the 122 MCAs. He contends that having been aware that some MCAs were physically present in the Chamber while others were following the proceedings virtually, he directed that the voting be conducted through the virtual platform having ensured that the requisite number had been met.

101. The 2nd Respondent maintains that the County Assembly Standing Orders were amended on 2nd June, 2020 and Standing Order 231D introduced. The amendment allowed the Assembly to conduct its business virtually and in particular Paragraph (2)(d) incorporated virtual voting. He submits that the procedure as laid down in Standing Order 231D was strictly adhered to and in order to ensure the security of the voting process, the login credentials were only shared with the MCAs.

102. It is urged that taking into account the aforementioned, the 1st Petitioner's assertions that some of the MCAs were away and could not vote are unfounded. Additionally, it is submitted that the Petitioner's claims that the electronic voting obligates all members to be present at the assembly is an inaccurate legal interpretation as the voting was done on the zoom platform.

103. The 2nd Respondent submits that contrary to the 1st Petitioner's contention that 54 MCAs were in Kwale County at the time of voting and could not have voted on that day and that 52 MCAs swore an affidavit to state that they did not participate in the voting, 24 MCAs had retracted their averments. According to him, the 1st Petitioner's deliberate attempt to facilitate the members' non-attendance during the voting was in direct violation of Section 28 of the County Assemblies Powers and Privileges Act, 2017 which outlaws any form of inducement. Reference was made to the decision in *Re Snowden Jeneby Mawira vs Annwhiller Mwende Rugendo & Another [2017] eKLR*.

104. The 2nd Respondent also submitted on the alleged illegality in his assumption of office of the Governor of the Nairobi City County. According to him, the issue has since been overtaken by events and does not warrant further deliberations. It is submitted that upon the successful impeachment of the 1st Petitioner, Article 182 of the Constitution was activated as a vacancy had occurred in the office of the governor. Further, that since the 1st Petitioner did not have a substantive deputy governor owing to the delay in clearing his nominee, Article 182(4) of the Constitution was further activated. It is therefore his case that the procedure in Section 16(2) of the Assumption of Office of the Governor Act was followed.

d. The Remedies

105. On the question of the available remedies, it is submitted that as the case relates to devolution of services and good governance, this Court is required to interpret the Constitution and the relevant statutes as an integrated and cohesive whole and in a manner that promotes the stated objectives. He therefore urged the court to dismiss the consolidated Petitions with costs.

The 3rd Respondent's Submissions

106. Although the Clerk of the County Assembly and the County Assembly filed a joint reply to the consolidated Petitions, the two respondents filed separate submissions. The County Assembly filed written submissions dated 10th May 2021.

a) Whether the 1st Petitioner was lawfully and/or regularly impeached;

107. On the regularity of the impeachment of the 1st Petitioner, the County Assembly submits that the removal of a governor is not an alien process but one that is well contemplated and ordained in law. It is submitted that a governor's impeachment is a two-step process which is provided by Article 181 of the Constitution, Section 33 of the County Governments Act, 2020 and Order 67 of the County Assembly Standing Orders. It is the County Assembly's position that the simple issue for the determination of this Court is whether there was adherence to the procedure provided by the law.

108. It is submitted that the 1st Petitioner does not contest the fact that a Member of the County Assembly delivered to the Clerk of the County Assembly a motion in writing stating the grounds and particulars for his proposed removal. According to the County Assembly, the motion was proper as it was signed by the mover thus affirming the particulars of the allegations contained therein.

109. On the 1st Petitioner's claim that the motion was not verified by each of the members who supported it, it is asserted that the verification was done when each of the more than two-thirds of the MCAs appended their signatures to the motion, and in particular the document titled: "SIGNATURES IN SUPPORT OF A MOTION FOR THE REMOVAL OF GOVERNOR BY IMPEACHMENT." It is urged that the MCAs could not have appended their signatures to the motion if they had not verified the correctness of the information contained therein. It is submitted that there is no legal requirement for the filling of verification forms by the MCAs.

110. The County Assembly submits that the 1st Petitioner was duly served with the motion for his removal as governor and thus cannot claim to have been deprived of the opportunity to defend himself. Further, that the conduct of the proceedings virtually was in accordance with the Standing Orders as amended on 2nd June 2020 and that the 1st Petitioner cannot therefore claim violation of his right to a fair hearing on the fact that the impeachment was conducted virtually.

b) Whether the Petitioners have made a case for the grant of the prayers sought

111. As to whether the Petitioners have established a case for grant of orders, the County Assembly submits that their pleadings do not set out, with a degree of precision, their complaint, the manner in which the stated constitutional provisions were infringed, and the injury sustained. Reference is made to the case of *Anarita Karimi Njeru vs the Republic [1979] eKLR*, and *Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 others [2013] eKLR*. It is their argument therefore that the Petitions have not satisfied the basic threshold for constitutional petitions.

Who should bear the costs of these Petitions?

112. On the issue of costs, the County Assembly submits that it is set in law that costs follow the event and that the same is awarded at the Court's discretion as provided in Section 27(1) of the Civil Procedure Act, Cap 21. It is submitted that where a court does not follow the general principle it should give reasons as held in the case of *Joseph Oduor Anode vs Kenya Red Cross Society Civil No. 66 of 2009; (2012) eKLR*. It is further submitted that award of costs is not a penal measure but a mechanism that enables the successful litigant to recoup its expenses as held in *Cecilia Karuru Ngayu vs Barclays Bank of Kenya & another [2016] eKLR*. It is thus urged that the Petitions be dismissed with costs.

The 4th, 5th & 6th Respondents' Case

113. The Clerk of the Senate, the Speaker of the Senate and the Senate of Kenya opposed the consolidated Petitions through a replying affidavit sworn on 22nd April, 2020 by the Clerk of the Senate, **Mr. Jeremiah Nyegenye**. It is averred that under Article 96 of the Constitution the mandate of the Senate is to represent the counties and protect the interests of the counties and their governments. He states that the County Governments Act, 2012 on the other hand provides for the functions, powers and responsibilities of the county governments. He points out that Article 181 of the Constitution and Section 33 of the County Governments Act, 2012 set out the grounds for the removal of a governor from office.

114. Mr. Nyegenye deposes that on 4th December, 2020, the Senate received a resolution from the Speaker of the County Assembly for the removal of the 1st Petitioner from office. The grounds stated in the resolution were; gross violation of the Constitution or any other law including the County Governments Act, 2012, the Public Procurement and Disposal Act, 2015 and the Public Finance Management Act, 2012; abuse of office; and crimes under the national law. He averred that the Senate, which was in recess, was summoned for a special sitting. His evidence is that a Select Committee established on 9th December, 2020 to investigate the proposed impeachment of the 1st Petitioner resolved to have the impeachment heard by way of plenary pursuant to Senate Standing Order 75 thus foregoing the need for a Committee Report. According to Mr. Nyegenye, through Gazette Notice No. 10309 the Speaker of the Senate gazetted 16th & 17th December, 2020 for the special sitting of the Senate.

115. The Clerk of the Senate avers that the 1st Petitioner was on 10th December, 2020 invited to appear before the plenary on 16th December, 2020 and was asked to submit his response to the impeachment motion. Further, that pursuant to rules 4(b) and 7 of Part 1 of the Fifth Schedule of the Senate Standing Orders, the County Assembly was equally notified to appear before the plenary on 16th December 2020.

116. The Clerk of the Senate deposes that all the parties invited for the Plenary confirmed attendance and filed documents which were forwarded to the other parties pursuant to Rule 8 of Part 1 of the Fifth Schedule to the Senate Standing Orders. Further, the proceedings in the Senate had the requisite quorum and was open to the public. The Senate accorded all the parties the right to fair hearing as reported in the

Hansard. He adds that pursuant to Article 181 of the Constitution, Section 33 of the County Governments Act and Senate Standing Order 75, the Senate voted and accordingly resolved to remove the 1st Petitioner from office. The resolution of the Senate was subsequently published in the Kenya Gazette of 18th December, 2020 vide Gazette Notice 10904.

117. The 4th, 5th and 6th Respondents urge this court to hold that the Petitioners have failed to provide particulars or evidence of the alleged bias or breach of the principles of natural justice. The court is therefore urged not to review the merits of the decision to impeach the 1st Petitioner which is the exclusive preserve of the County Assembly and the Senate in their quasi-judicial capacities. The 4th, 5th and 6th Respondent's contend that Article 259 requires the Constitution to be interpreted in a manner that promotes good governance.

118. According to the 4th, 5th, and 6th Respondents, there was public participation in the impeachment proceedings by virtue of the fact that the proceedings were open to the public.

119. The 4th, 5th and 6th Respondents argue that the 1st Petitioner was allowed to canvass his Preliminary Objection at length and a ruling was rendered on 16th December, 2020 directing that the preliminary objection should be subsumed in the impeachment debate.

120. In response to the Petitioners' claim that the impeachment proceedings contravened the sub-judice rule, the three respondents submitted that the invocation of the sub-judice rule must be supported by evidence and that the rule gives leeway for the Speaker to determine its applicability to certain circumstances and that the removal of a governor entirely falls within the constitutional mandate of the Senate.

121. The 4th, 5th and 6th Respondents confirm that both parties were served with the invitation to appear before the Senate on the same day and had a similar period to respond to the documentation. According to the Respondents, this did not in any way amount to amendment of the charges against the 1st Petitioner. Further, that the Constitution and the Senate Standing Orders allow the Speaker upon request by the County Assembly, to invite or summon witnesses to testify in impeachment proceedings.

122. The Respondents submitted that the voting procedure at the Senate is provided for under Articles 122 and 123 of the Constitution, and Senate Standing Order No. 80. The three respondents assert that after the closing statements by the parties, the Senate retreated to an *in-camera* session to deliberate on the issues raised and therefore the Petitioners claim that the 1st Petitioner's was prejudiced and his rights breached are incorrect and lack basis in law.

The 4th, 5th and 6th Respondents' Submissions

123 The 4th, 5th and 6th Respondents identified the issues for determination as follows: -

i) Whether the removal of the 1st Petitioner from office complied with the Constitution and the law.

ii) Whether the Petitions warrant the intervention of this Court.

124. On the first issue, the 4th, 5th and 6th Respondents reiterated the averments contained in the Replying Affidavit and submitted that the impeachment proceedings were in accordance with the Articles 96,122, 123 and 181 of the Constitution and Section 33 of the County Governments Act, 2012.

125. On whether the Petitions warrant the intervention of this court, the three respondents submit that the decision regarding gross violation of the Constitution under Article 181 is a merit decision reserved for the County Assembly and the Senate. According to them, the Court should not review of the decision as its role is limited to ensuring adherence to the procedure under the law. The respondents have relied on the cases of ***Commission for the Implementation of the Constitution vs National Assembly of Kenya & 2 Others [2013] eKLR***, ***Okiya Omtata Okoiti vs The Attorney General & 5 Others [2014] eKLR***, ***Kinsella vs Jaekle, 475 A. 2D 243, 253 (Conn. 1984)***, and ***Republic vs Registrar of Societies & 5 Others ex parte Kenyatta & 6 Others [2007] eKLR***.

The 7th Respondent's Case

126. The 7th Respondent (the Attorney General) opposed the petitions through Grounds of Opposition dated 28th April, 2021. He states that the Petitions do not disclose or demonstrate the Constitutional provisions violated or threatened. He avers that the impeachment process complied with the relevant provisions of the Constitution and the law. Additionally, that the petitions violate the concept of separation of powers.

7th Respondent's Submission

127. The 7th Respondent filed Submissions dated 29th April 2021 in opposition to the Consolidated Petitions. He submitted that the petitions do not demonstrate the constitutional provisions alleged to have been violated and that the impeachment process complied with the Constitution and the law. He therefore submits that the only issue for determination is whether the Petitioners have made a case for the grant of the orders sought.

128. It is submitted that the Petitioners have not discharged the burden of proof required in a constitutional petition in that the constitutional provisions allegedly infringed and the particulars of infringement have not been set out as was held in the cases of ***Anarita Njeru vs. Republic No.1 (1979) I KLR, 54***, ***Mumo Matemo vs. Trusted Society of Human Rights Alliance (2013) eKLR*** and ***David Gathu Thuo vs. Attorney General & Another (2021) eKLR***.

129. On the 1st Petitioner's claim that he was not served with the Notice of Motion for his removal, the 7th Respondent contends that the 1st

Petitioner was aware of the impeachment motion as a copy of the motion was sent to him through the County Attorney. To buttress this submission, reliance was placed on the case of **Dickson Daniel Karaba vs. John Ngata Kariuki & 2 others (2010) eKLR** where it was held that the purpose of service is to notify a litigant of the existence of a suit against him/her. The 7th Respondent distinguished this case from that of **Mwai Kibaki vs. Daniel Toroitich Arap Moi (1999) eKLR** where personal service was upheld stating that the law then only recognized personal service.

130. It is submitted that the Petitions are an invitation to act contrary to the doctrine of separation of powers as is an interference with the exercise of authority of the legislative arm of government. For this argument, reliance was placed on the case of **Peter O. Ngoge vs. Francis Ole Kaparo & 4 others (2007) eKLR** where it was held that it is not the function of the court to interfere with the internal affairs of Parliament unless it can be shown that they violate the Constitution. Also relied on is the case of **Kenya Youth Parliament & 2 Others vs. Attorney General & 2 others (2012) eKLR**.

131. The 7th Respondent submits that there is no vacancy in the office of the deputy Governor so as to warrant the holding of a by-election. Further, that the constitutional timelines within which the election should have been held have already lapsed and that in the circumstances of this case, it is not in the public interest to hold a by-election. Reference was made to the cases of **George Mike Wanjohi vs. Steven Kariuki & 2 others (2014) eKLR**, **Attorney General & Another vs. Tolphin Nafula & 5 others; Attorney General (Interested Party) (2021) eKLR** and **Law Society of Kenya vs. Anne Kananu Mwenda & 5 others; IEBC (Interested Party) (2021) eKLR** for the argument that the Court has no power to stop the running of constitutional timelines.

132. The 7th Respondent consequently asserts that the substance of the Petitions has been overtaken by events and there is no cause of action for the Court's intervention. He urged the court to dismiss the petitions while relying on the case of **Emmanuel Chengo Kenga vs. Kenya Ports Authority & 2 Others; Catherine Mturi-Wairi & Another (Interested Parties) (2018) eKLR**.

The 8th Respondent's Case

133. The 8th Respondent filed a relying affidavit sworn by **Michael Goa** on 16th April 2021 in response to the Petitions. He avers that the IEBC discharged its obligations in accordance with the Constitution, the enabling statutes and regulations. It is averred that on 18th December 2020 the Speaker of the Senate published a Gazette Notice confirming the removal of the 1st Petitioner from office. Additionally, that vide a letter dated 18th December 2020, the Speaker of the County Assembly wrote to the 8th Respondent notifying them of vacancies in the offices of the Governor and the Deputy Governor of Nairobi City County. The Speaker of the County Assembly informed the IEBC that he would assume the office of Governor in an acting capacity for a period of sixty days as provided by the Constitution.

134. The 8th Respondent further deposes that it on 21st December 2020 published Gazette Notice No.232 of 2020 issuing a Notice of a By-Election for County Governor, Nairobi City County Government which was to be held on 18th February 2021. It is averred that on 20th January 2021 through these proceedings, the Court (differently constituted) issued an order freezing the 60 days' timeline as envisaged under Article 185 (2) of the Constitution.

The 8th Respondent's Submissions

135. The 8th Respondent filed written submissions dated 3rd May 2021 wherein it submits that the only issue for determination was whether it was justified in issuing the Gazette Notice No. 232 of 2020 declaring a by-election for the position of the Governor, Nairobi City County. It is submitted that the Gazette Notice was proper in view of the fact that the Governor had been impeached and there was no Deputy Governor in office at the time.

The 10th Respondent's case

136. As stated at the beginning of this judgment, the Speaker of Nairobi City County, **Hon. Benson Mutura**, who is the 2nd Respondent was later enjoined in these proceedings as the 10th Respondent in his capacity as the acting governor of Nairobi City County. He filed a response and submissions that essentially reiterated the position he had taken as the 2nd Respondent.

Analysis and Determination.

137. We have carefully considered the pleadings, the written and oral submissions and the authorities of the parties. We have also considered all the issues as framed by the parties. In our view we are required to first determine whether we have jurisdiction to determine the petitions. If we establish that we have jurisdiction, the key issues that we are required to determine are whether the 1st Petitioner was accorded fair administrative action during the impeachment proceedings and whether the impeachment met the constitutional threshold.

Jurisdiction

138. The Speaker of the County Assembly urged us to find that the impeachment of governors is the preserve of the Senate and county assemblies. He maintained that the impeachment process having complied with the constitutional and statutory requirements, this court is barred by the doctrine of separation of powers from entertaining the petitions. He emphasized that by dint of the doctrine of separation of powers, this Court should not be quick to interfere with parliamentary procedures which are the sole mandate of the legislature.

139. On his part, the Attorney General argued that the petitions violate the concept of separation of powers. He submitted that the Petitioners are inviting this court to act contrary to the doctrine of separation of powers which precludes the courts from interfering with the functions of other arms of government.

140. The Petitioners took a contrary view to that of the Respondents. The 1st Petitioner asserted that the conduct of the County Assembly was

so perverse that it amounts to the violation of the Constitution thereby requiring the intervention of this court. Further, that this court has the duty of interrogating whether an impeachment has met the prescribed constitutional threshold.

141. According to the 1st Petitioner, the failure by the Senate to enquire whether the County Assembly had conducted a proper impeachment process attracts this court's jurisdiction to review it. The 1st Petitioner added that even though the mandate for the impeachment of a governor falls within the purview of the county assemblies and the Senate, the court in inquiring into the propriety of the removal process cannot be said to be violating the separation of powers doctrine. This is in view of the fact that all state organs are bound by the Constitution and the law and courts retain the power to interpret, protect and promote the Constitution.

142. One of the pillars of the Rule of Law is the doctrine of separation of power between the arms of government in a constitutional system. The doctrine upholds that the three organs of government remain separate. The distinction, separation and functions of the organs are envisaged under Article 1(3) of the Constitution which is the delegated power of the people. The Constitution vests the judiciary with the responsibility of checking the constitutionality of acts carried out by the other arms of government while upholding the doctrine of separation of powers. This doctrine is one of the foundation stones of a democratic state like Kenya. It gives each arm of government the space to carry out its constitutional functions while bearing in mind the fact that there are checks and balances from the other arms.

143. In discussing the doctrine, the Supreme Court in *Re Matter of the Interim Independent Electoral Commission Advisory Opinion No. 2 of 2011* expressed itself 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.”

144. The Court of Appeal took a similar position in *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR when it held that: -

“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.”

145. In the case of *Doctors for Life International vs Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11 the Constitutional Court of South Africa stated that:

“The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle ‘has important consequences for the way in which and the institutions by which power can be exercised.....

But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament ‘must act in accordance with, and within the limits of, the Constitution’, and the supremacy of the Constitution requires that ‘the obligations imposed by it must be fulfilled’. Courts are required by the Constitution ‘to ensure that all branches of government act within the law’ and fulfil their constitutional obligations. This Court ‘has been given the responsibility of being the ultimate guardian of the Constitution and its values’. Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations. This section gives meaning to the supremacy clause, which requires that ‘the obligations imposed by [the Constitution] must be fulfilled’. It would therefore require clear language of the Constitution to deprive this Court of its jurisdiction to enforce the Constitution.”

146. Guided by the above cited decisions, we find that the doctrine of separation of powers does not inhibit this court's constitutional power to examine and interrogate the impeachment proceedings of the County Assembly and the Senate where a party alleges that there was violation of the Constitution and the law. This finding leads to the inevitable conclusion that this court has the jurisdiction to hear and determine the petitions.

Fair Administrative Action

147. In addressing the issue as to whether the 1st Petitioner was accorded fair administrative action during the impeachment proceedings, this court is called upon to consider whether there was a proper Notice of Motion for impeachment before the county assembly, whether the 1st Petitioner was properly served with the said motion, whether there was quorum in the County Assembly during the debate and the voting on the motion, whether there was fair hearing both at the County Assembly and the Senate.

148. The 1st Petitioner contended that the action of the County Assembly to receive the motion, debate and pass a resolution impeaching him as the Governor of Nairobi City County contravened the Constitution, particularly Articles 1, 10, 48, 50, 174, 181 (2), 196 and 200. It was submitted that the motion dated 25th November, 2020 was not verified or accompanied by sworn affidavits of the MCAs supporting it and

that this violated the Constitution and the County Assembly Standing Order No. 67. It was further submitted that this action deprived the 1st Petitioner of any evidence that was to be adduced against him in total violation of Standing Order No. 72 (2).

149. Another aspect of the above issue is the 1st Petitioner's contention that at the time the motion mover **Hon. Michael Ogada Okumu** presented his motion, there was already a pending motion by **Hon. Peter Imwatok** that had been stayed by the court in ELRC Petition 35 of 2020. It was also submitted that the motion was debated on 3rd December 2020 before the expiry of the 7 days' period provided by County Assembly Standing Order 67(4).

150. On their part, the respondents maintained that the motion for impeachment of the Governor was properly presented before the Assembly and that the 1st Petitioner was immediately notified about it. Further, it is submitted that an impeachment motion is a special motion that has to be disposed by the Speaker within seven of receipt from a member and deliberated upon within three days following approval by the Speaker. It was the Respondents' position that a special motion lapses if there is failure to comply with the set timelines. According to the respondents, the motion by **Hon. Imwatok** had lapsed by the time **Hon. Ogada's** motion was lodged.

151. Standing Order 67 of the County Assembly provides for the procedure for the presentation of a motion to impeach the governor. The record shows that the motion by Hon. Michael Ogada was delivered to the Clerk on 25th November, 2020 and received by the Speaker on 26th November 2020. Standing Order 67(4) stipulates as follows: -

(4) Upon the expiry of seven (7) days, after notice given, the Motion shall be placed on the Order Paper and shall be disposed of within three days: Provided that if the County Assembly is not then sitting, the Speaker shall summon the Assembly to meet on and cause the Motion to be considered at that meeting after notice has been given.

152. Standing Order 67 is titled '**Procedure for removal of Governor by impeachment**'. This is the law that should guide the County Assembly when deliberating on an impeachment motion. The respondents have correctly pointed out that under Standing Order 49, an impeachment motion is a special motion which has to be disposed of by the Speaker within 7 days of notice from a member. We nevertheless observe that Standing Order 49(2) permits a lesser or longer period as specified by the Constitution, any written law or the Standing Orders. Standing Order No. 67(4) provides that an impeachment motion shall only be placed on the order paper upon expiry of 7 days and that is the provision to be followed in the impeachment of a governor.

153. Article 259 of the Constitution provides for the manner in which the Constitution should be interpreted. Of relevance to us are sub-articles (5) and (6). Sub-article (5)(a) states as follows: -

(5) In calculating time between two events for any purpose under this Constitution, if the time is expressed—

(a) as days, the day on which the first event occurs shall be excluded, and the day by which the last event may occur shall be included;

154. On the other hand, sub-article (6) provides: -

(6) If a period of time prescribed by this Constitution for any purpose is six days or less, Sundays and public holidays shall not count when calculating the time.

155. Applying Article 259 (6) to Standing Order 67(4), we find that the notice of 7 days required therein includes Sundays and public holidays. From the record, the motion by **Hon. Ogada** was presented to the Clerk on 25th November 2020 and approved by the Speaker on 26th November 2020. Under Order 67(3), upon approval of the motion by the Speaker, the mover shall give a 7 days' notice calling for the impeachment of the governor. By virtue of Article 259 (5)(a), 26th November 2020 is excluded from the 7 days' period. However, the 3rd of December 2020 is included. We find that contrary to the Petitioners' averments, the 7 days' period requirement was complied with.

156. Standing Order 67(1) requires that the motion be verified and signed by at least one third of the MCAs to confirm that the particulars of the allegations contained in the motion are true to their own knowledge. The evidence on record shows that the notice of motion delivered to the office of the Clerk was supported by 86 MCAs who appended their signatures to it.

157. The 1st petitioner's position was that the motion presented before the County Assembly was not properly verified by the mover of the motion as well as by one third of the members of the County Assembly. He submitted that the mover of the motion ought to have affirmed, in a deposition, the veracity of the allegations made in the notice of motion but failed to do so. It is alleged that there were no verification forms signed by each of the one third of members of the County Assembly. We have perused the motion together with a list containing 86 names and signatures of the MCAs who supported it. We note that none of the signatories came forward to dispute the same. In our considered view, by signing the motion, a member confirms its veracity. It would be absurd to expect an MCA to go and swear an affidavit before a Commissioner of Oaths in support of a motion he/she intends to move before the county assembly.

158. There is the averment by **Emmanuel Kenga** that the 1st Petitioner's advocate **Mr. Evans Ondieki** sent him a list of 88 names with a request for a forensic analysis in order to determine if the list was generated by the same person. We have examined the handwritten list of the MCAs who supported **Hon. Ogada's** motion and note that it is the same list sent to **Mr. Kenga**.

159. According to **Mr. Kenga**, only five entries in the list were made by the same hand. We observe that none of the five MCAs identified by **Mr. Kenga** has disowned the entries. Furthermore, the report by **Mr. Kenga** dated 12th December 2020 found that all the 88 signatures on the list "**were all written in different styles. They were written by different authors.**" The above finding by the 1st Petitioner's expert

witness leads us to the logical conclusion that each MCA signed against his/her name. In any event, in order to achieve the one third threshold, only 41 of the 122 MCAs were required to support the motion and we therefore find that the motion had the support of more than one third of the MCAs.

160. On the issue of whether two impeachment motions existed concurrently, we note that the order by Ongaya J. of 2nd March 2020 was to the effect that the Imwatok motion that was scheduled for debate on 3rd March 2020 could proceed as long as there was strict compliance with Standing Orders 67 and 72. Our understanding of the court order is that the deliberation on the motion was not stopped as the court orders simply required compliance with the law. For the above reason, we find that by the time the Ogada motion was presented in November 2020, the Imwatok motion had lapsed for not being processed within the timelines as provided under Standing Orders 49 and 67.

161. On whether the impeachment motion was supported by two thirds of the MCAs as required by Section 33(2) of the County Governments Act and County Assembly Standing Order 67(7), the petitioners contend that there was no quorum during the deliberation of the motion on 3rd December, 2020. Their case is that there was need to have at least two thirds out of the 122 MCAs physically present in the Chamber during the debate. According to the petitioners, this number could not be attained because 57 MCAs were with the 1st Petitioner in Kilifi County.

162. It was also the contention of the Petitioners that the gazetted Chamber for the County Assembly is located in Nairobi and no member could have participated in the debate if not in Nairobi.

163. On their part, the respondents maintained that the County Assembly's Standing Orders had been amended to allow for virtual proceedings and voting. According to the respondents it was therefore not a mandatory requirement that all members of the Assembly be physically present in the Chamber in order to vote.

164. We note that on 2nd June, 2020 an amendment was introduced via Standing Order 231D titled '**Use of Technology**'. The amendment enabled the Speaker to conduct virtual proceedings. Standing Order 231D (3) allowed MCAs to vote virtually. It is our finding that there was therefore no requirement for all the MCAs to be physically present in the Chamber in order to vote on the motion. This finding also answers and convinces us to reject the Petitioners' assertion that voting is only available to members physically present at the County Assembly Chambers where the symbol of authority (the mace) is located. Additionally, this court takes judicial notice of the advent of virtual proceedings as a mode of conducting business in response to the Covid-19 Pandemic and therefore the physical presence of the MCAs in Nairobi is no longer necessary. We find that while some of the MCAs were physically present in the Chamber during the debate and voting, others attended the session virtually.

165. Still on the issue of quorum, the Petitioners alleged that 57 MCAs, who were with the 1st Petitioner in Kilifi County did not participate in the voting.

166. On their part, the respondents argued that login credentials were availed to all MCAs who subsequently voted virtually. Further, that the petitioners did not provide any expert evidence to support the allegation that the virtual accounts of some of the MCAs were hacked. It is further argued that the identities of the 88 MCAs who voted in favour of the motion and how they voted is not verifiable hence failing the requirement of Article 10 as read with Article 81 (a) and (e) of the Constitution.

167. According to the Petitioners, the voting process lacked integrity as accounts of some MCAs were used without their authority. Although the 1st Petitioner averred that he had annexed affidavits of 57 MCAs who claimed that they did not vote virtually, the court record reveals that he attached 39 such affidavits sworn by the following MCAs: -

1. Hon. Patrick Musili Mbangula 21651322
2. Hon. Paul Shilabu 13581666
3. Hon. David Ayo 13859883
4. Hon Jared Akama Ondieki 22054537
5. Hon. Elijah Mputhaia Ikura 2455854
6. Hon. Mark Mugambi 28421666
7. Hon. Wilson Ochola Not stated
8. Hon Joseph Wambugu Not stated
9. Hon. Jared Okoth Not stated
10. Hon. Redson Otieno Not stated.
11. Hon. Solomon Odanga Magembe 4164708
12. Hon. Osman Adow Ibrahim 4877669
13. Hon. Clarence Munga 21894669
14. Hon. Alvin Olando Palapala 22943676
15. Hon. Nancy Muthami 21963430
16. Hon. Patrick Karani 23867390
17. Hon. Anne Thumbi 26428748
18. Hon. Millicent Jagero 23861265
19. Hon. Naftali Owuor Ogola 2743950
20. Hon. Anthony Gatune 25661504

21.Hon. Fredrick Okeyo	22865612
22.Hon Mary Njambi	4679286
23.Hon. Mutheu Musyimi	24149418
24.Hon. John Kyalo	20658436
25.Hon. Mwangi Njihia	9722571
26.Hon. Elizabeth Nyambura Kuria	26459620
27.Hon. Leah Supuko	7269043
28.Hon. Hassan Abdi Mohamed	27517271
29.Hon. Stephen Gikonyo	21449842
30.Hon. Peter N. Njau	12651486
31.Hon. Doris Kanario	14446317
32.Hon John Mukiri, Nganga	8290284
33.Hon. David Ruongo Okelo	20558847
34.Hon. James Kariuki Kiriba	9574121
35.Hon. Francis Otieno Ngesa	23091940
36.Hon. Paul Ndungu	22721558
37.Hon. Eunice W. Marimbi	18643608
38.Hon. Ongwae Matara	23576367
39.Hon. David Mbithi	22207337

168. In his replying affidavit, the Speaker of the County Assembly annexed affidavits in which 24 of the 39 MCAs listed hereinabove averred that they voted on the impeachment motion on 3rd December, 2020. The provided list contains the following names: -

NAME	ID
a. Hon. Abraham Mwangi Njihia	xxxxxxx
b. Hon. Elizabeth Nyambura	xxxxxxxx
c. Hon. John Ng'ang'a Mukiri	xxxxxxx
d. Hon. Patrick Karani	xxxxxxxx
e. Hon. Jared Akama	xxxxxxxx
f. Hon. Paul Shem Shilaho	xxxxxxxx
g. Hon. Mark Mugambi	xxxxxxxx
h. Hon. Redson Otieno	xxxxxxxx
i. Hon. Clarence Munga	xxxxxxxx
j. Hon. David Ruong'o Okelo	xxxxxxxx
k. Hon. Jared Okoth	xxxxxxxx
l. Hon. Carolyn Mayunzu	xxxxxxxx
m. Hon. Maurice Otieno	xxxxxxxx
n. Hon. David Ayoi	xxxxxxxx
o. Hon. Wilson Ongele Ochola	xxxxxxxx
p. Osman Adow	xxxxxxx
q. Hon. Hicholas Okumu Ouma	xxxxxxxx
r. Hon. Okeyo Fredrick Onyango	xxxxxxxx

s. Hon. Peter Wahinya Kimuhu	xxxxxxx
t. Hon. Alvin Olando	xxxxxxx
u. Hon. Stephen Gikonyo	xxxxxxx
v. Hon. Francis Otieno	xxxxxxx
w. Hon. James Kuibe	xxxxxxx
x. Hon. Evans Otiso	xxxxxxx

169. The court is now left with two separate sets of affidavits that present contradictory positions. On the one hand some MCAs averred that their login credentials were forged and that they never participated in the voting process on 3rd December, 2020 and even went to the extent of making a report at the Kwale Police Station. On the other hand, 20 out of the same 39 MCAs swore fresh affidavits on 4th December, 2020 stating that they willingly voted on 3rd December, 2020.

170. The Hansard, which is the official record of the County Assembly, shows that 90 MCAs voted in respect to **Hon. Ogada's** motion. In view of the contradictory averments by some of the MCAs who were alleged to have been in Kwale, coupled with lack of any expert evidence to support the alleged hacking, we find that the Petitioners did not establish that the two thirds statutory requirement for impeachment of a governor was not met. It is trite law that he who alleges must prove and it was incumbent upon the Petitioners to provide evidence in support of their averment that the two third requirement was not met.

171. On the issue of breach of the right to fair hearing under the Article 50 of the Constitution, the 1st petitioner submitted that he was not given a hearing before the County Assembly as he was not furnished with the charges and accorded adequate time to prepare for his defence. Further, that he was not furnished with any evidence to support the purported impeachment proceedings and that his counsel was denied access to the County Assembly Chambers during the impeachment proceedings. The 1st petitioner further contended that the entire impeachment process was rendered void and invalid since there was breach of Sections 3 and 4 of the Fair Administrative Action Act, 2015 as well as Article 47 of the Constitution.

172. The 2nd Respondent maintained that the County Assembly complied with Standing Order 67 during the hearing of the impeachment motion. It is his submission that the 1st Petitioner did not inform him, in advance, that he would send an advocate to represent him during the hearing of the impeachment motion. Further, that Mr. Evans Ondieki did not have any document or proof that he had been instructed to act for the 1st Petitioner. According to the Speaker, since the 1st Petitioner had been invited to attend the session virtually the Governor ought to have officially notified him that he had appointed an advocate to act for him so as to avoid a situation where the Governor disown the representation by the advocate.

173. Article 47 of the Constitution provides *the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. It also requires that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*

174. The right to a fair hearing under Article 50 (1) of the Constitution provides that *every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another **independent and impartial tribunal or body.***

175. Section 4 of the Fair Administrative Action Act, 2015 provides the parameters of the right to fair administrative action as follows: -

(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

(a) attend proceedings, in person or in the company of an expert of his choice; Administrative action to be taken expeditiously, efficiently, lawfully etc.

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 41 of the Constitution, the administrator may act in accordance with that different procedure.

176. Section 33 of the County Governments Act, No. 17 of 2012 states that;

(1) A member of the county assembly may by notice to the speaker, supported by at least a third of all the members, move a motion for the removal of the governor under Article 181 of the Constitution.

(2) If a motion under subsection

(1) is supported by at least two-thirds of all the members of the county assembly— (a) the speaker of the county assembly shall inform the Speaker of the Senate of that resolution within two days; and

(b) the governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section.

(3) Within seven days after receiving notice of a resolution from the speaker of the county assembly—

(a) the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the governor; and

(b) the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.

(4) A special committee appointed under subsection (3)(b) shall—

(a) investigate the matter; and

(b) report to the Senate within ten days on whether it finds the particulars of the allegations against the governor to have been substantiated.

(5) The governor shall have the right to appear and be represented before the special committee during its investigations.

(6) If the special committee reports that the particulars of any allegation against the governor—

(a) have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or

(b) have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the impeachment charges.

(7) If a majority of all the members of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.

(8) If a vote in the Senate fails to result in the removal of the governor, the Speaker of the Senate shall notify the speaker of the concerned county assembly accordingly and the motion by the assembly for the removal of the governor on the same charges may only be re-introduced to the Senate on the expiry of three months from the date of such vote.

177. The right to be heard is provided for under Nairobi City County Assembly Standing Order 72 which provides;

(1) Whenever the Constitution, any written law or these Standing Orders –

(a) requires the County Assembly to consider a petition or a proposal for the removal of a person from office, the person shall be entitled to appear before the relevant Committee of the County Assembly considering the matter and shall be entitled to legal representation;

(b) requires the County Assembly to hear a person on grounds of removal from office, or in such similar circumstances, the County Assembly shall hear the person –

(i) at the date and time to be determined by the Speaker;

(ii) for a duration of not more two hours or such further time as the Speaker may, in each case determine; and

(iii) in such other manner and order as the Speaker shall, in each case, determine.

(2) The person being removed from office shall be availed with the report of the select Committee, together with any other evidence adduced and such note or papers presented to the Committee at least three days before the debate on the Motion.

178. The Senate recognizes the right to fair hearing while considering a petition for removal of a person from office under Standing Order No. 76 which states;

“76. Right to be heard

Whenever the Constitution or any written law requires the Senate to consider a petition or a proposal for the removal of a person from office, the person shall be entitled to appear before the relevant Committee of the Senate considering the matter and shall be entitled to legal representation.”

179. The right to fair administrative action under Article 47 and the right to fair hearing under Article 50 have been the subject of several judicial decisions. In *Ridge v. Baldwin* [1964] AC 40 the House of Lords stated that the rules of natural justice, in particular right to fair hearing, *audi alteram partem* rule, applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties. The House of Lords distilled three ingredients of natural justice as the right to be heard by an unbiased tribunal; the right to have notice of charges of misconduct; and the right to be heard in answer to those charges.

180. In *Judicial Service Commission vs Mbalu Mutava & another* [2015] eKLR, the Court of Appeal stated that: -

“Without attempting to lay an exhaustive distinction, the right to fair administrative action under article 47 is a distinct right from the right to fair hearing under article 50(1). Fair administrative action on the other hand refers broadly to administrative justice in public administration. It is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. The right to fair administrative action, though a fundamental right, is contextual and flexible in its application and as article 24(1) provides, can be limited by law. “Fair hearing” in article 50(1) as the text stipulates applies where any dispute can be resolved by the application of the law and applies to proceedings before a court or, if appropriate, another independent and impartial tribunal or body. It is clear that fair hearing as employed in article 50(1) is a term of art which exclusively applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law to facts. By Article 25 that right cannot be limited by law or otherwise.”

181. In *Walid Khalid vs County Assembly of Mombasa & 2 Others* [2018] eKLR, it was held that: -

“It is trite law that the power to remove a public officer or state officer for that matter, is a Siemens (sic) twin with duty to follow due process and the two are conjoined at the hips. Under the constitution every person in authority who for any lawful and justifiable reason contemplates removing a public officer or state officer from office is duty bound to follow the tenets of a fair process.”

182. While discussing Article 47 in *Dry Associates Limited vs Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd* [2012] eKLR the Court opined that;

“The primary consideration is whether the procedure adopted is fair. In this regard I adopt the sentiments of Lord Pearson in the case of *Pearlberg v Varty (Inspector of Taxes)* [1972] I WLR 534 at page 547 where he stated, “Fairness, however does not necessarily require a plurality of hearings or representations and counter representations. If there were too much elaboration of procedural safeguards nothing could be done simply and quickly and cheaply. Administrative or executive efficiency and economy should not be too easily sacrificed.” This is the reason why Article 47 not only has the element of procedural fairness but also provides that administrative action must be “expeditious, efficient, lawful and reasonable” All these elements are relevant and ought to be considered to give effect to the provisions of the Article.”

183. With regard to the duty to give reasons under Article 47(2) it was stated in *Regina vs Secretary of State for the Home Department Ex parte Doody* [1994] 1 AC 531 that: -

“I accept without hesitation, --- that the law does not at present recognise a general duty to give reasons for an administrative decision. Nevertheless, it is equally beyond question that such a duty may in appropriate circumstances be implied.”

184. One of the ingredients of the right to fair administrative action is the right to be afforded sufficient time to prepare a defence as was held in *County Assembly of Kisumu & 2 others vs. Kisumu County Assembly Public Service Board & 7 Others* as follows:-

“Whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now well settled. In granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it. The person charged is entitled to what, in legal parlance is referred to as the right to “notice and hearing.” That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary.

What amounts to sufficient notice also varies from case to case. But as stated, the notice must contain substantial information with sufficient details to enable the person charged to ascertain the nature of the allegations made against him. The notice must also comply with any statutory requirements where the same are provided.”

185. In *Republic vs Clerk County Assembly of Baringo Exparte William Kamket (2015) eKLR*, which was a case involving the removal of a speaker by the county assembly, the Court emphasized that;

“Quite clearly, removal of a speaker must follow a fair administrative action. The rules of natural justice must apply. The office is ring-fenced by requiring disclosure of grounds or reasons for removal, service of notice and a very high threshold to carry the motion.”

186. In light of the above cited authorities, our understanding of the law is that the right to fair administrative action applies in both judicial, quasi-judicial proceedings or any administrative process that affects the rights of an individual. As the adage goes, ‘*no man should be condemned unheard*’. It therefore follows that any person or administrative body exercising a judicial or quasi-judicial function must ensure that the affected party is accorded the right to be heard. This calls for the issuance of a notice detailing the allegations against the affected person(s), sufficient time to make a response, ample time to be heard by an impartial tribunal, the right to legal representation, and where necessary provision of the reasons for the decision. These are the standards that the Senate and the Nairobi City County Assembly were expected to comply with.

187. Applying the above standards to the present case, we find that the 1st Petitioner was notified of the charges against him through the Speaker’s letter dated 26th November 2020. We have perused the said letter which, we observe, was accompanied by a copy of the motion detailing the charges levelled against the 1st Petitioner and the list of MCAs who supported the impeachment motion. We note that the motion sufficiently explained the charges made against the 1st Petitioner. Our finding is that the 1st Petitioner was accorded the opportunity to respond to the charges and that explains why he sent his advocate with bundles of documents to counter the charges. We note that the impeachment process is a quasi-judicial exercise where the MCAs are the umpires. This means that they were expected to make a decision on the motion. It therefore defeats logic as to why the 1st Petitioner opted to ferry the MCAs to far-flung Kwale County yet they were expected to make a resolution on the motion. Instead of joining the proceedings using the link sent to him or appearing in person, the 1st Petitioner opted to watch the proceedings live on television and processed a video that he attached to his Petition as an annexure. He also failed to formally introduce his advocate to the Speaker and the Speaker cannot therefore be blamed for having restrained the advocate from participating in the proceedings.

188. The 1st Petitioner’s actions portrays him as a man who was fully aware of the case against him but was out to frustrate the impeachment proceedings and it cannot therefore be said that he was not accorded an opportunity to be heard. Moreover, his action of spiriting away some of the MCAs to Kwale was in clear violation of Section 28 of the County Assemblies Powers and Privileges Act, 2017 which provides as follows: -

28. (1) A person shall not, by fraud, intimidation, force, insult or threat of any kind, or by the offer or promise of any inducement or benefit of any kind, or by any other improper means-

(a) influence a member in the performance of the member's functions as a member;

(b) induce a member to be absent from a county assembly or a committee at a particular time; or

(c) attempt to compel a member to declare himself or herself in favour or against a matter pending before or proposed or expected to be submitted to a county assembly or a committee.

(2) A member shall not solicit, receive or accept any fee, compensation, gift, reward, favour or benefit of any kind for the member or another person for in respect of-

(a) voting in any particular manner or not voting on a matter before a county assembly;

(b) promoting or opposing anything pending before or proposed or expected to be submitted to a county assembly; or

(c) making a representation to a county assembly.

(3) A person who contravenes this section commits an offence.

189. In conclusion, we find that the motion, which sufficiently contained the charges, was served upon the 1st Petitioner; the notice period was in compliance with the County Assembly Standing Orders; the 1st Petitioner was clearly informed that he could appear in person or through a legal representative; and was facilitated to defend himself virtually via a link. We are therefore satisfied that the impeachment process complied with the constitutional and statutory requirements.

Public Participation

190. On the issue of public participation, the 1st Petitioner submitted that contrary to the requirement of the Constitution, both the Senate and the County Assembly failed to ensure public participation in the process of removing him from office. It was additionally the 1st Petitioner's position that it has not been demonstrated that the Senate gave the public appropriate information and opportunity to participate in the impeachment either prior to or during the debate. The 1st Petitioner's case is that the removal of a governor is not any other ordinary business of a county assembly and the electorate ought to be involved since a governor is directly elected by the voters in the county.

191. On his part, the 2nd Petitioner submitted that failure to subject the removal process to public participation was fatal. He accused the County Assembly of not adducing any evidence to show that there was public participation in the impeachment process.

192. In response to the Petitioners' claim that the principle of public participation was not complied with, the County Assembly insisted that there was adequate public participation. The Speaker of the County Assembly supported this position.

193. On their part, the 4th, 5th, and 6th Respondents were of the view that the requirement for public participation was complied with by virtue of the fact that the proceedings were open to the public.

194. One of the main pillars of the Constitution is the principle of public participation which allows the people to have a say in the manner in which they are governed. This applies both at the national and devolved governments in their legislative and policy functions. Public participation is a cornerstone to democratic governance as evidenced by its listing amongst the national values and principles of governance under Article 10 of the Constitution.

195. Article 118 of the Constitution requires Parliament to conduct its business in an open manner and facilitate public participation and involvement of the people in its legislative and other business.

196. Amongst the objects of devolution, as provided under Article 174 of the Constitution, are to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them; and to recognize the right of communities to manage their own affairs and to further their development.

197. Article 196 specifically commands county assemblies to conduct their business in an open manner, and to hold their sittings and those of their committees in public; and in particular to facilitate public participation and involvement in the legislative and other business of the assemblies and their committees.

198. Additionally, the County Governments Act, 2012 in Section 87 provides for the principles upon which citizen participation shall be based. These 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 provides for mandatory participation and facilitation of the public in planning processes through specified mechanisms by providing clear and unambiguous information on any planning process as well as developing laws and regulations to give effect to public participation.

1999. In *Doctors' For Life International vs The Speaker National Assembly and Others (CCT12/05) (2006) ZACC 11* the South African Constitutional Court interpreted the principle of public participation as follows: -

“The right to political participation is a fundamental human right, which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements: a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected.... Significantly, the ICCPR guarantees not only the “right” but also the “opportunity” to take part in the conduct of public affairs. This imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation.....The right to political participation includes but is not limited to the right to vote in an election. That right, which is specified in article 25(b) of the ICCPR, represents one institutionalization of the right to take part in the conduct of public affairs. The broader right, which is provided for in article 25(a), envisages forms of political participation, which are not limited to participation in the electoral process. It is now generally accepted that modes of participation may include not only indirect participation through elected representatives but also forms of direct participation.....”

200. The Court went further to state as follows: -

“The phrase “facilitate public involvement” is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are “facilitate” and “involvement”. To “facilitate” means to “make easy or easier”, “promote” or “help forward”. The phrase “public involvement” is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of “involve” includes to “bring a person into a matter” while participation is defined as “[a] taking part with others (in an action or matter); . . . the active involvement of members of a community or organization in decisions which affect them”. According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the

legislative process. That is the plain meaning of section 72(1) (a). This construction of section 72(1)(a) is consistent with the participative nature of our democracy. As this Court held in *New Clicks*, “[t]he Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies.” The democratic government that is contemplated in the Constitution is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process.”

201. In *Mui Coal Basin Local Community & 15 others vs Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR the court summarized the principles of public participation as follows: -

a. First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.

b. Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.

c. Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See *Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya* (JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:

“Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.”

d. Fourth, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

e. Fifth, the right of public participation does not guarantee that each individual’s views will be taken as controlling; the right is one to represent one’s views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.

f. Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

202. The nature, extent and amount of public participation that is acceptable was discussed in *Matatiele Municipality and Others vs 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.”

203. In *Wambora Court of Appeal 2* the necessity of public participation in the impeachment proceedings was emphasized as follows: -

“[41] In particular Article 196(1)(b) of the Constitution obligates a County Assembly to facilitate public participation and involvement in the legislative and other business of the assembly and its committees; while section 91 of the County Government Act requires a County Government to establish particular structures for information, communication technology based platforms, town hall meetings, notice boards for announcements of matters for public interest, avenues for the participation of people’s representatives and establishment of citizens fora at county and decentralized units.”

204. Guided by the above cited cases on the issue of public participation, we now turn to consider the evidence placed before this court over the same. The 1st Petitioner relied on the affidavit of **Mr. Newton Munene Njiru**, the Nairobi City County Chief Executive Officer in Charge of Information Technology and Communications to support the argument that public participation was not undertaken. **Mr. Munene**

averred that there was no online platform that could have enabled the residents to participate in the impeachment process, there was no committee report evidencing that there was any public participation at the committee level, there was no single FM radio or TV station advert inviting the public to engage in the impeachment proceedings and that the charges levelled against the governor were not uploaded in the County Assembly website.

205. **Mr. Munene** further averred that the 1st Petitioner's advocate notified him that by 2nd December 2020, about 40,000 memoranda from the Nairobi residents had been received by his law firm opposing the impeachment. He averred that none of the memoranda was acknowledged or even canvassed during the impeachment proceedings on 3rd December 2020.

206. We note, from the affidavit of **Mr. Munene**, that he introduced himself as the CEC in charge of Information Communication Technology and e-Government (ICT department). His averment was in respect to the executive arm of the county government and cannot be taken to be the position of the County Assembly. Indeed, the County Assembly in its report titled '**Public Participation findings – Impeachment Motion**' observed at part 1.0 as follows: -

“It has been noted that the County Executive commissioned a separate survey separate from the one by the County Assembly. The said survey cannot be the basis of the public participation process envisioned under Article 196 of the Constitution since it was not commissioned by the Assembly. As such, its findings cannot be relied upon.”

207. According to the County Assembly, adequate notice of the impeachment was issued to Nairobi residents. Questionnaires were circulated to the residents and a report dated 3rd December 2020 was prepared and annexed to the Speaker's affidavit. According to the report, the residents were asked if they were aware of the impeachment and if they supported it. The report concluded that a majority of the residents were aware of the impeachment motion, the reasons for the proposed removal of the Governor and that they supported it.

208. There was also the averment that the County Assembly Clerk published a notice of the impending impeachment in the daily newspapers of 27th November 2020. It was also the Clerk's position that online platforms were opened to enable residents air their views on the issue of impeachment.

209. With regard to the issue of public participation we find that there is sufficient evidence to show that the County Assembly conducted a survey in Nairobi County seeking the views of the residents. A report to that effect was prepared and tabled before the Assembly. We further note that on 27th November 2020, the Clerk to Assembly published the impending impeachment motion in the daily newspapers (see for instance, page 31 of the Daily Nation Newspaper) and called on the residents to deliver their representations to the Assembly physically or through provided postal or email addresses. The Clerk also informed the residents that they could access the impeachment motion from the County Assembly website which he also provided.

210. The fact that there was sufficient public participation is indeed also confirmed by the averment of **Mr. Munene** that at least 40,000 residents had provided their views, on the impeachment, to the 1st Petitioner's advocate.

211. We take judicial notice of the fact that the current impeachment happened during the Covid-19 Pandemic which severely limited interpersonal interactions and some of the avenues for public participation that require physical interaction of the residents such as public *barazas* or town hall meetings may not have been available.

212. From the above exposition, we are satisfied that the County Assembly was aware of the need for public participation in the impeachment process and indeed complied with the requirement. We therefore find that the constitutional and statutory requirement for public participation was met.

The Senate Proceedings

213. Turning to their complaint against the Senate, the Petitioners contended that before accepting the impeachment resolution from the County Assembly, the Senate ought to have evaluated the Assembly proceedings in order to satisfy itself that the law was complied with. They also complained that the 1st Petitioner's Preliminary Objection was improperly dismissed. The Petitioners also argued that the County Assembly was allowed to introduce new evidence before the senate at the eleventh hour. Another complaint was in respect to the manner in which the Senate served the 1st Petitioner with voluminous evidence on the evening of 15th December 2020 yet he was expected to defend himself the following day. It was further submitted that the Senate was biased against the 1st Petitioner and had a predetermined outcome. The 1st Petitioner also contested the manner in which the Senate voted on all the four counts while arguing that it was sufficient proof that the Senate was not impartial. The 1st Petitioner also complained that he was not given the reasons for the impeachment and that no report was availed to him by the Senate.

214. On their part, the respondents argued that all the constitutional and statutory requirements were adhered to in the entire impeachment process.

a. Preliminary Objection

215. In respect to the Preliminary Objection, the 1st Petitioner's case was that he invoked Rule 19 of the Senate's Rules on Removal of a Governor by Impeachment and raised a Preliminary Objection. According to the 1st Petitioner he was not accorded an opportunity to prosecute his Preliminary Objection as provided under Rule 13 and that the Speaker instead invoked Rule 29 and consolidated the preliminary objection with the impeachment proceedings.

216. The grounds of the Preliminary Objection were that the issues discussed in the impeachment Motion were *sub-judice* within the meaning of Senate Standing Order No. 98(1), (2) & (3) as they were subject to active court cases; that there was a conservatory order issued in ELRC Petition No. 35 of 2020 prohibiting the County Assembly and the Senate from proceeding with any impeachment motion against the 1st Petitioner; and that the threshold for impeachment of a governor had not been met.

217. We have perused the Hansard of the Senate and note that on 16th December, 2020 the Speaker indicated that there were two applications. One application was by County Assembly requesting that eleven other witnesses be summoned to testify before the Senate. The other application was the said Preliminary Objection by the 1st Petitioner. After brief arguments by the parties' advocates, the Speaker made a ruling in which he allowed the County Assembly to summon three additional witnesses.

218. On the Preliminary Objection the Speaker stated, *inter alia*, as follows:

“On the procedural and substantive questions raised, it is clear to me that these are matters requiring evidence in order to prove and for which the other side has an opportunity of rebuttal with evidence.

The Senate can only make a fair determination having heard the evidence on both sides. This is the essence of this investigation. The investigation before the Senate is both in respect of procedural, as well as substantive matters.

To that extent and following precedence, it is clear to me, and I so rule, that pursuant to Rule 29 of the Fifth Schedule of the Senate Standing Orders, any preliminary objection, both procedural and substantive should be properly subsumed in the evidence of either party and presented at the time allocated to that party.

On the objection based on subjudice, it is important to note the following three things –

(1) Subjudice is a rule of the Senate itself, for its own convenience; (2) It is also a rule requiring evidence for it to be invoked; and,

(3) It is not an absolute rule as Standing Order No. 98(5) of the Senate Standing Orders provides that notwithstanding that Standing Order, the Speaker may allow reference to any matter before the Senate or a Committee, and following the precedents. It is quite clear that the competence and jurisdiction of the Senate to hear a proposed removal from office is a constitutional mandate of the Senate independent of the mandate of the Judiciary or any other organ.”

219. Considering the manner in which the Speaker handled the applications before the Senate, we find that he properly dealt with the preliminary objection. A contrary finding would have meant that the Senate would not have proceeded with the impeachment until all the cases filed by the 1st Petitioner were heard and determined. We find that the Senate exercised its constitutional mandate in dealing with the impeachment which was subject to stringent timelines. The decision by the Speaker cannot be said to have violated the 1st Petitioner's right to fair hearing because what the Speaker did was simply to subsume the Preliminary Objection in the main hearing.

b. Evaluation of the proceedings before the County Assembly

220. On the complaint by the petitioners that the Senate ought to have first established the lawfulness of the proceedings of the County Assembly, we reiterate our finding above that the Speaker of the Senate had correctly disposed of the issue in his ruling on the Preliminary Objection. Additionally, we find that the deliberations of the Senate are part and parcel of the its evaluation of the impeachment proceedings before the County Assembly. It is further our finding that in voting on the impeachment motion, whether as a committee or in the plenary, the senators make a decision on all the issues touching on the proceedings including the lawfulness of the impeachment.

c. New Evidence

221. On the Petitioners' complaint regarding the County Assembly's alleged introduction of new evidence before the Senate, we find that no new evidence or charges were presented before the Senate as what was contained in the Notice of Motion by **Hon. Ogada** is the same information that was presented before the Senate. The mover of the motion reiterated what he had stated before the County Assembly. The other two witnesses who testified before the Senate only expounded on the charge of abuse of office and did not introduce any new issue. On 15th December 2020 the 1st Petitioner filed a detailed response to all the allegations made against him. He was, at the hearing, also given an opportunity to challenge the evidence through cross-examination of the witnesses and presentation of his own testimony. We therefore find the allegation that the Senate entertained new evidence has not been established.

d. Late Service of Evidence

222. On the complaint regarding service with voluminous documents/evidence on the evening of 15th December 2020, we established from the record that the Clerk to the Senate sent invitation letters to both the County Assembly and the 1st Petitioner on 9th December 2020 in which he called upon both parties to file their respective documents by the 15th December 2020. All the parties filed their documents on 15th December 2020 and the same were duly dispatched by the Clerk to the respective parties on the same date in which case no party can claim that he was disadvantaged by such service. Whereas the County Assembly was called upon to prosecute its case on 16th December 2020, the 1st Petitioner had up to 17th December 2020 to defend himself. We therefore find that the late service of voluminous documents did not impinge on the 1st Petitioner's right to fair administrative action and hearing.

e. Voting in the Senate

223. Regarding the complaint on the manner of voting on the counts before the Senate, the 1st Petitioner stated that the Senate was biased because the senators uniformly voted on all the four counts. He further argued that the senators had a predetermined position on the matter going by the statement by **Hon. Cleophas Malala** that the Senate should not waste time on the debate as a decision had already been made.

224. It is our finding that this was a debate before the Senate in which each senator was entitled to voice his own views. The Senate Hansard report does not indicate that the senators had previously met and reached a decision to impeach the 1st Petitioner so as to justify the Petitioners' claim that the vote was predetermined. Since each senator was exercising his/her quasi-judicial role as an umpire in the matter, this court cannot question their decision to consistently and uniformly vote in support of or against each of the charges. In any event, even if the 1st Petitioner was to be found culpable on only one charge, the end result would still have been that the impeachment motion was successful.

f. Reasons for the Impeachment

225. On the complaint that no reasons were given for the impeachment and that no senate report was availed to the 1st Petitioner, we find that the senate's Hansard report contains the entire impeachment proceedings which include the reasons for the impeachment. In our considered view, the decision by the senators to proceed by way of plenary is lawful as provided under Section 33(3)(b) of the County Governments Act and Senate Standing Order 75 which gives the Senate the discretion to proceed through plenary or special committee. We note that where the Senate proceeds through plenary, there is no provision for the preparation of a report. It is only when the Senate proceeds by way of a special committee that the committee's report is presented to the plenary.

226. Although it does not fall within our remit to direct the legislature on how to perform its functions, we are of the considered view that impeachment of a governor is a serious undertaking as the end result can lead to the removal of a popularly elected governor. For this reason, we recommend that it will be desirable that future impeachments proceed through the committee route as opposed to the plenary. We say so because when the special committee is appointed, it has 10 days to deliberate on the matter thus giving ample opportunity to the parties to adequately prepare their cases. The committee gives the perception that each member is actually engaged in the process as opposed to the plenary which can be perceived to be a mob lynching process. This view is vindicated by the Senate Hansard which shows that there were several interventions by the senators thereby eating into the time set aside for the parties to present their cases.

The Threshold for Impeachment

227. Another issue raised by the petitioners is whether the charges levelled against the 1st Petitioner met the constitutional and statutory threshold and if the same were sufficiently established.

228. We need not belabor the fact that this court has jurisdiction to determine whether the constitutional threshold for removing the Governor has been met. We are guided by the decision in **Wambora Court of Appeal 1** where the judges held: -

"52 In our view, in addition to the supervisory jurisdiction of the High Court under Article 165 (6) of the Constitution, the High Court has a specific constitutional jurisdiction under Article 165 (3) (d) (ii) and (iii) of the Constitution. These paragraphs vest upon the High Court jurisdiction to hear any question on whether anything said to be done under the authority of the Constitution or any law is inconsistent with or in contravention of this Constitution; and to hear and determine any matter relating to constitutional powers of state organs in respect of county government. It is not contestable that removal of a Governor from office is a thing done under the authority of the Constitution and it is the duty of the High Court to determine if such removal is inconsistent with or in contravention to the Constitution.

53. It is incumbent upon the High Court to determine if the facts in support of the charges against a Governor meet and prove the threshold in Article 181 of the Constitution. For example, was the 4th appellant an employee of the 1st appellant or of the County Government" Is a Governor to bear personal vicarious liability for the acts and omissions of officers of the County Government" We are of the view that Article 181 and Section 33 of the County Governments Act are not ouster clauses that limit or oust the jurisdiction of the High Court as conferred by Article 165 (3) (d) (ii) and (iii) of the Constitution. Though the process of removal of a governor from office is both a constitutional and a political process, the political question doctrine cannot operate to oust the jurisdiction vested on the High Court to interpret the Constitution or to determine the question if anything said to be done under the authority of the Constitution or of any law is consistent with or in contravention of the Constitution."

229. The above position was reaffirmed in **Wambora Court of Appeal 2** where it was held: -

"[48]Thus in determining the petition before it, the High Court had to go beyond its supervisory mandate, by invoking its constitutional mandate to determine whether the removal of the appellant was done in accordance with the Constitution, and in particular whether the facts laid before the Senate in support of the allegations made against the appellant had met the threshold in Article 181 of the Constitution that lays down the grounds upon which a Governor can be removed....

[51] It is evident from the above that the High Court only exercised its supervisory jurisdiction by reviewing the exercise of the Senate's powers in so far as the report of the Special committee was concerned. The High Court failed to discharge its constitutional mandate that required it to go beyond mere review, and determine whether the charges levelled against the appellant had met the threshold of Article 181 of the Constitution. Article 165(3)(d)(iii) of the Constitution gives the High Court jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of any matter relating to constitutional powers or state organs in respect of County Governments and any matter relating to the constitutional levels relating to the constitutional relationships between the levels of Government.

[52] The High Court put a caveat to the exercise of its constitutional mandate by stating that it did not have the facts which it

could interrogate to enable it determine the issue of nexus and threshold with regard to the exercise of the Senate's power in the removal of the appellant as Governor. In undertaking the process of removal of the appellant as Governor of Embu County, the 1st and 2nd respondent, and the Senate, were exercising constitutional and statutory powers. A question having arisen regarding the exercise of those powers, the High Court was obligated to make a determination whether what was done was consistent with the Constitution.

[53] In that regard, it was material that the nexus and threshold regarding the allegations upon which the appellant was being impeached be established. As already noted the evidentiary burden was upon the 1st and 2nd respondent whom it was not disputed, caused the motion for removal of the appellant to be debated in the County Assembly and its resolution carried to the Senate. That burden was also upon the Senate that passed the resolution for removal to satisfy the Court that there was nexus and threshold to meet the constitutional standard required for removal of the appellant as County Governor. This is information that was especially within the knowledge of the 1st and 2nd 3rd and 4th respondents. Interestingly, the 3rd and 4th respondents did not even challenge the petition! Again in this regard, the learned judges not only misdirected themselves in regard to the burden of proof, but also failed to discharge its constitutional mandate of determining whether nexus between the appellant's governance function and the impugned procurement process was established such as to meet the threshold of Article 181 of the Constitution."

230. The 11th Edition of Black's Law Dictionary at Page 901 defines impeachment as;

"The act (by a legislature) of calling for the removal from office of a public official, accomplished by presenting a written charge of the official's alleged misconduct; esp., the initiation of a proceeding in the U.S. House of Representative against a federal official, such as the President or a judge."

231. The Constitution, under Article 181(1), provides the grounds for the removal of a county governor as follows: -

181(1) A county governor may be removed from office on any of the following grounds--

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

232. We have elsewhere in this judgment reproduced Section 33 of the County Governments Act, 2012 which provides for the procedure to be followed in the removal of a governor.

233. The roles of the various state organs in relation to the removal of a governor were explained in *Wambora Court of Appeal 1* as follows:

"31. Our reading and interpretation of Article 181 of the Constitution as read with Section 33 of the County Governments Act shows that removal of a Governor is a constitutional and political process; it is a sui generis process that is quasi-judicial in nature and the rules of natural justice and fair administrative action must be observed. The impeachment architecture in Article 181 of the Constitution reveals that removal of a Governor is not about criminality or culpability but is about accountability, political governance as well as policy and political responsibility. Section 33 of the County Governments Act provides for the procedure of removal of an erring Governor. The organ vested with the mandate at first instance to move a motion for the removal of a County Governor is the County Assembly. Neither the Courts nor the Senate have the constitutional mandate to move a motion for the removal of a County Governor. The Senate's constitutional mandate to hear charges against a Governor is activated upon receipt of a resolution of the County Assembly to remove a Governor. Upon receipt of such a resolution, the Senate shall convene a meeting to hear the charges against the Governor and may appoint a Special Committee to investigate the matter. It is our considered view that the jurisdiction and process of removal of a Governor from office is hierarchical and sequential in nature. There are three sequential steps to be followed: first is initiation of a motion to remove the Governor by a member of the County Assembly; second there is consideration of the motion and a resolution by two thirds of all members of the County Assembly and third, the Speaker of the County Assembly is to forward the County Assembly's resolution to the Senate for hearing of the charges against the Governor.

*32. In all the sequential steps identified above, courts have neither been vested with jurisdiction to initiate a motion, consider a resolution nor to hear the charges levied against the Governor. This position is in tandem with the core function test and the concept of separation of powers. The constitutional and statutory mandate to initiate and consider a motion to remove a County Governor is vested in the County Assembly and the Senate. Section 33 of the County Governments Act which is an implementing legislation for Article 181 of the Constitution does not vest the courts with the jurisdiction to hear charges relating to the removal of a Governor from office. From the dicta in *Marbury – vs- Madison*, – 5 US. 137, it is our considered view that in so far as the process of removal of a Governor from office is concerned; the province of the court is solely to decide on the rights of individuals and not to enquire how the County Assembly and Senate perform duties in which they have discretion.*

*34. Our reading of Article 165 (6) of the Constitution reveals that the role of the High Court for purposes of removal of a Governor from office is inter alia supervisory in nature to ensure that the procedure and threshold provided for in the Constitution and the County Governments Act are followed. If the process for removal of a Governor is unconstitutional, wrong, un-procedural or illegal, it cannot be said that the court has no jurisdiction to address the grievance arising therefrom. (See *Mumo Matemu – vs- Trusted Society of Human Rights Alliance & 5 Others* (supra)). In its supervisory role, the jurisdiction of the High Court is dependent on the process and constitutionality of the action taken. In the instant case, in its supervisory role,*

the High Court is to examine whether any procedural law was violated by the County Assembly or Senate in arriving at their decision. We are of the view that Article 181 of the Constitution as well as Section 33 of the County Governments Act can neither be interpreted as clauses that oust the supervisory jurisdiction of the High Court, nor limit the power of the High Court to interpret Article 181 nor be construed as provisions that prohibit the right of a citizen to access a court of law where there is an allegation of infringement of a constitutional right to hold a public office under Article 38 (3) (c) of the Constitution.”

234. With regard to what amounts to gross violation of the Constitution, it was observed in *Wambora Court of Appeal 1* that the Constitution does not provide a definition for gross misconduct. It was however stated that the determination of whether conduct is gross or not would depend on the peculiar facts and circumstances of each case. The Court relied on the Nigerian Supreme Court decision in *Hon. Muyiwa Inakoju & Others vs. Hon. Abraham Adalu Adeleke, S.C.272/2006* for the ingredients of gross violation or breach of the Constitution as follows: -

- a) interference with the constitutional functions of the legislature and the judiciary by an exhibition of over constitutional executive power;*
- b) abuse of the fiscal provisions of the Constitution;*
- c) abuse of the Code of Conduct for public officers;*
- d) disregard and breach of the provisions on fundamental rights;*
- e) interference with local government funds and stealing from the funds, pilfering of the funds...for personal gains...;*
- f) instigation of military rule and military government and*
- g) any other subversive conduct which is directly inimical to the implementation of some other major sectors of the Constitution.*

235. In our view, the above list is not conclusive and we would for instance add, consistent violation of court orders and failure to perform constitutional and statutory duties.

236. Internationally, legislatures are clothed with powers to ensure that the executive perform its functions within the laws of the land and in accordance to the constitution. One of the tools of ensuring compliance with the Constitution and the laws is the concept of impeachment.

237. The motion presented before the County Assembly contained four charges, namely; Gross violation of the constitution or any other Law; gross misconduct; abuse of office and crimes under national law.

238. In respect of the first charge, the 1st Petitioner was alleged to have violated the constitution, the County Government's Act, 2012, The Public Procurement and Disposable Act, 2015 and the Public Finance Act, 2012.

239. Under the charge of abuse of office, it was alleged that the 1st Petitioner had violated Article 75 of the Constitution as read together with sections 11 and 13 of the Leadership and Integrity Act, 2012 on conduct of state officers. The Governor was accused of having persistently intimidated, harassed and molested officers of the County Executive. This included blackmailing the County Executive members and Chief officers with one year contracts with arbitrary renewal thus creating a climate of fear, uncertainty and discordance. It was alleged that in May 2019, the 1st Petitioner failed to renew the contracts of all the twenty-three (23) Chief officers and asked them to hand over to their directors.

240. On the charge of gross misconduct, the allegation was that the 1st Petitioner failed to promote public confidence in the integrity of the office of the Governor as he was charged before the Anti-Corruption court. This compromised the social contract and trust bestowed on the Governor by the Nairobi residents. The 1st Petitioner was also accused of violating Articles 73 and 75 of the constitution. It was also alleged that there were serious reasons to believe that the Governor had committed crimes under National Law, specifically the Anti-Corruption and Economic Crimes Act.

241. The specific allegations for the charge of gross misconduct included the following: -

- (i) The procurement process for the Dandora Stadium. The County Government was indicted by the Public Procurement Regulatory Authority (PPRA) for paying Ksh. 196 million to the contractor.
- (ii) That between 2018 and early 2019 contrary to the Law, the office of the County Executive Committee Member for Finance and that of Chief Officer Finance were held by the same person, **Ms Winfred Gathangu**.
- (iii) That after signing the deed of transfer of functions, the Governor refused to hand over necessary documents to enable the Kenya Revenue Authority (KRA) undertake optimal revenue collection.
- (iv) Violation of Article 201 of the Constitution on prudent use of financial resources by unilaterally and arbitrarily issuing tax waivers in total disregard to the County Tax Waivers Administration Act.
- (v) Interference with the award of the tender for construction of Dandora Stadium leading to loss of funds.

(vi) Massive loss of County funds in three years of office as indicated in the Auditor General's 2018/2019 report where Ksh. 204.2 million on projects was flagged.

(vii) Refusal to hand over crucial information to the Nairobi Metropolitan Service hence sabotaging the transfer of functions.

(viii) Using public funds to pay for the 1st Petitioner's daughter to travel to New York, USA to attend the County First Lady's conference.

(ix) Being barred by the Court from accessing his office thus becoming incapable of performing his functions.

(x) Admitting that he was intoxicated and not in the right frame of mind when he signed the deed of transfer with Nairobi Metropolitan Services (NMS). The governor admitted that he was intoxicated by stating "***Hawa watu wa State House Waliniconfuse na pombe kwanza by the time I was meeting the President for signing, I was seeing zigzag.***" Such allegations bring disrepute, ridicule, hatred and contempt to the office of the President and Governor.

(xi) Failing to diligently report to work yet drawing salary and hefty allowances.

(xii) Use of abusive, embarrassing, inappropriate and unprintable language which undermines the office of the Governor. Publicity and publishing abusive and unbecoming words and language in social media posts and numerous rants thus undermining and demeaning the office of the Governor.

242. At the hearing before the Senate, the mover of the motion, Mr. Michael Ogada Okumu, expounded on the above allegations and testified that the 1st Petitioner diverted Ksh. 297 million for needy students to other purposes such as garbage collection and legal fees thus causing 3000 bursary beneficiaries to drop out of school.

243. **Hon. Ogada** also accused the 1st Petitioner of failing to assent to the Appropriation Bill 2020 by rejecting it thus denying the residents of Nairobi City County the much needed services. He also blamed the 1st Petitioner for arbitrarily granting tax waivers without involving the County Assembly.

244. **Hon. Ogada** testified that although the 1st Petitioner had signed the Deed of Transfer of certain functions between the County Government and NMS, he later instructed the acting County Secretary not to release relevant documents to facilitate the transfer thus frustrating delivery of services.

245. It was Hon. Ogada's additional evidence that at the 1st Petitioner's instance, his daughter travelled to New York on first class air ticket disguised as a Ward Administrator and that a chopper was hired to take her around New York City at the County's expense.

246. **Hon. Ogada** decried the high turnover of staff at the county and gave the example of the finance docket which in a span of 40 months had been served by ten (10) County Executive Committee Members (CECs) and eight (8) Chief Officers.

247. The second witness, **Ms. Janet Muthoni Ouko**, a former CEC member for education, testified that she was unable to perform her functions in the said docket due to persistent outlandish oral instructions from the 1st Petitioner. She testified that her relationship with the 1st Petitioner was characterized by blackmail, intimidation and insults. Further, that failure to comply with the 1st Petitioner's unlawful demands would be met with threats of non-renewal of her contract.

248. **Ms Joyce Kinyanjui** was the last witness for the County Assembly. She testified that the 1st Petitioner's daughter travelled to New York City at the County's expense yet she was not an employee of Nairobi City County.

249. The 1st Petitioner denied all the allegations made against him and instead accused **Hon. Ogada** of having been paid over Ksh. 800,000 for a trip to Dubai yet he did not travel. He contended that he was not an accounting officer in terms of Section 154 of the Public Finance Management Act and that bursaries and legal services were budgeted items over which he had no control. He added that no specific breaches of the law or Constitution had been established against him.

250. The 1st Petitioner denied the allegation that he refused to sign the Nairobi City County Appropriation Act, 2020 and explained that its implementation had been suspended in Constitutional Petition No. 348 of 2020. Further, that he did not sign the budget as it violated values and principles of Article 201 (a) as read with Article 10 (2) (c) of the Constitution. He accused the County Assembly of unilaterally inflating the budget from ksh. 31,434,000,000 to ksh. 37 Billion in excess of its mandate. He added that there is no legal framework governing the transfer of funds from the County to NMS and that this had been confirmed by the Cabinet Secretary, Treasury in writing.

251. The 1st Petitioner also denied the allegations of waiver of taxes and stated that waiver of rates falls within the ambit of the County Executive Committee and he is only mandated to gazette the Committee's decision. He denied the allegation that he intimidated, harassed or molested any CEC member and maintained that he did not use his office to enrich himself.

252. With regard to the New York City visit, he stated that he had no role to play in the said visit and stated that there was a letter from the Head of Civil Service, **Dr. Joseph Kinyua**, requesting the Cabinet Secretary for Public Service, **Professor Margret Kobia** to include the names of **Mrs Primrose Mwelu Nyamu** (County first lady) and **Ms Saumu Agnes Mbuvi** as part of the Kenyan delegation.

253. The 1st Petitioner's first witness, **Hon. Silvia Museiya** testified that the impeachment process was procured largely by duress and

coercion to serve the interests of individuals, especially, the leadership of the County Assembly. She stated that about 67 MCAs who supported the 1st Petitioner were teargassed when they met at his office in Upper Hill, Nairobi and that this explains why they decided to move to Kwale and switch off their phones which were ringing nonstop.

254. **Mr. Emmanuel Kenga**, also testified in support of the 1st Petitioner's case as we have already noted elsewhere in this judgment.

255. **Mr. Douglas Ouma Nyakach**, a driver in the firm of Ondieki & Ondieki advocates told the Senate that he drove Mr. Ondieki to the County Assembly on 3rd December 2020 at 2pm but they were blocked by policemen from accessing the Chamber. He testified that they had carried some documents which they intended to serve on the Assembly Speaker.

256. **Kelvin Omari Nyabera**, Advocate Ondieki's personal assistant informed the Senate that he took photographs using his mobile phone while they were being blocked from accessing the County Assembly premises. He also processed a video to that effect.

257. The standard of proof in impeachment proceedings was set in *Wambora Court of Appeal 1* as follows: -

"42. What standard should be applied in implementing the threshold for removal of a Governor? The learned Judges of the High Court stated that there is need to maintain a high threshold for removal of the Governor and the need to ensure that the law is strictly followed. We do concur with the learned Judges and add that the standard of proof is neither beyond reasonable doubt nor on a balance of probability. Noting that the threshold for removal of a governor involves "gross violation of the Constitution", we hold that the standard of proof required for removal of Governor is above a balance of probability but below reasonable doubt."

257. An impeachment is an important remedy but one of last resort. It is one to be used where there is an injury to the people. The remedy should be limited to only the gravest political wrongs. This is because the person to be removed came to office through a popular mandate. The will of the people should therefore not be overturned on flimsy grounds. It must therefore be shown that the wrong committed by the official proposed to be impeached cannot wait to be corrected through the ordinary electoral cycle. There should therefore be a clear nexus between the alleged wrongs with the public trust bestowed on the governor by the electorate.

259. Our observation finds support in the quotation found in an article titled '*Memorandum Regarding Standards For Impeachment*' by David E. Kendall, *et al* dated 2nd October 1998 that: -

"Impeachment is a constitutional remedy addressed to serious offenses against the system of government. . . It is not controlling whether treason and bribery are criminal. More important, they are constitutional wrongs that subvert the structure of government, or undermine the integrity of office and even the Constitution itself, and thus are 'high' offenses in the sense that word was used in English impeachments. . . The emphasis has been on the significant effects of the conduct -- undermining the integrity of office, disregard of constitutional duties and oath of office, arrogation of power, abuse of the governmental process, adverse impact on the system of government. . . Because impeachment of a President is a grave step for the nation, it is to be predicated only upon conduct seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the president office."

260. We have carefully analyzed the evidence presented by the parties over the allegations/charges levelled against the 1st Petitioner before the Senate. The issue that this court has to grapple with is whether the charges were substantiated and if there was a nexus between the charges and the 1st Petitioner.

a. The evidence placed before the Senate and the County Assembly was that 1st Petitioner signed a Deed of Transfer of some functions of the Nairobi City County government to Nairobi Metropolitan Services (NMS). Subsequently, however, the 1st Petitioner refused to facilitate NMS with relevant documents in order to complete the process thus hampering the delivery of services to the people of Nairobi City County. One of the grounds in support of the charges was that the 1st Petitioner admitted that he was not in the right frame of mind when he signed the deed of transfer with NMS as he was intoxicated. The 1st Petitioner did not deny that he signed the deed of transfer and neither did he deny that he refused to complete the process of transfer. Before the Senate his defence was that there was no legal framework for transferring money from Nairobi City County to NMS. This does not answer Hon. Ogada's contention that the admission by Hon. Sonko that he was intoxicated when he signed the deed of transfer brought disrepute, ridicule, hatred and contempt to the office of the President and Governor. We find that the conduct of Hon. Sonko does not meet the high standards expected of a governor. The deed of transfer was an important document that cannot be seen to have been dealt with in circumstances where Hon. Sonko was not sure of his state of mind. This is our view is a violation of the trust bestowed upon the office of a governor by the electorate as it does not portray good governance, accountability and integrity as expected of state officers under Article 10 of the Constitution.

261. There is the evidence that there was high turnover of CECs and Chief Officers. These are county officials that are directly appointed by a governor. Hon. Ogada gave the example of the finance docket which in a span of 40 months had been served by ten CECs and eight Chief Officers. On her part, **Ms. Janet Muthoni Ouko**, a former CEC member for education, testified that she was unable to perform her functions in the said docket due to persistent outlandish oral instructions from Hon. Sonko and that failure to comply with the unlawful demands would be met with threats of non-renewal of her contract.

262. Hon. Ogada told the Senate that between 2018 and early 2019 the office of the CEC for Finance and that of the Chief Officer Finance were both held by the same person. **He also stated that Hon. Sonko** persistently intimidated, harassed, blackmailed and molested officers of the County Executive and this was evidenced by the fact that he gave one year contracts to the CECs and Chief Officers thus creating a climate of fear, uncertainty and discordance. Further, that in May 2019, the 1st Petitioner failed to renew the contracts of all the twenty-three Chief Officers and asked them to hand over to their directors.

263. From the proceedings before the Senate, we note that Hon. Sonko merely denied intimidating, harassing or molesting any member of the county executive. We however note that he never denied allegation that there was a high turnover of senior staff in his government. Instead, he attempted to divert attention from these serious allegations by accusing the mover of the motion, Hon. Ogada, of having been paid Kshs. 800,000 for a trip to Dubai, which he did not make. We say so because Hon. Ogada was not the accused before the County Assembly and the Senate.

264. Hon. Sonko was also accused of using abusive, embarrassing, inappropriate and unprintable language which undermines the office of the Governor. Further, that he published abusive and unbecoming words in social media posts thus undermining and demeaning the office of the Governor. Video clips and extracts from social media were exhibited at the impeachment hearing. Hon. Sonko did not deny this ground at all. The office of a governor represents the aspirations of the residents. It is a seat of honour and respect. The holder of such an office is expected to carry himself with dignity, humility, integrity, comportment and respect for others. Where a governor fails to meet those standards, his stay in office is no longer tenable and the county assembly and the Senate can invoke the impeachment remedy.

265. This court is not called upon to evaluate every single accusation made against Hon. Sonko by the mover of the motion. We have, in this judgment, only highlighted a few of the charges and we are satisfied that the allegations made were connected to Hon. Sonko and were substantiated to the required standard. We therefore cannot fault the County Assembly and the Senate for their decision to impeach Hon. Sonko.

266. There was the allegation that the President of the Republic of Kenya was behind the impeachment of Hon. Sonko. From the material placed before this court, which is the only material that we are required by law to consider, we do not see any external hand in the impeachment of Hon. Sonko. It would be a sad day for this country to imagine that county assemblies and Parliament are puppeteers of external forces. These, as per the Constitution, are independent organs that are expected to carry out their duties only in compliance with the Constitution and the law. We therefore find no merit in the claim that the impeachment of Hon. Sonko was engineered or instigated for any other reason other than those provided by Article 181 of the Constitution.

Disposition

267. From the evidence presented before this court, we come to the irresistible conclusion that the impeachment of Hon. Mike Sonko Mbuvi Gideon Kioko fully complied with the Constitutional and statutory requirements. We therefore find that the two petitions lack merit and are accordingly dismissed.

Costs

268. We note that the petitions raised substantive issues of law involving the interpretation of the Constitution. Further, that the issue of an impeachment of a governor who has been elected by the people is a matter of great public interest. Ordinarily, costs follow the event unless, for good reason, the court orders otherwise. Given the circumstances of this case, we find that the appropriate order is to direct each party to meet own costs.

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

.....

S.J. CHITEMBWE

JUDGE

.....

W. KORIR

JUDGE

.....

W. OKWANY

JUDGE