



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

PETITION NO. 10 OF 2021

**IN THE MATTER OF ARTICLES 2,3,10, 12, 19, 20, 21, 23(2), 28, 38 (3), 47, 48, 50, 165, 174, 176, 177, 178 AND 196 OF THE
CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF SECTION 11 OF THE COUNTY GOVERNMENT ACT 2012

AND

IN THE MATTER OF STANDING ORDERS 58 OF THE KISII COUNTY ASSEMBLY

AND

**IN THE MATTER OF THE ILLEGAL AND UNLAWFUL IMPEACHMENT OF HON DAVID ONDIMU KOMBO AS SPEAKER
KISII COUNTY ASSEMBLY**

BETWEEN

HON. DAVID ONDIMU KOMBO.....PETITIONER

AND

COUNTY ASSEMBLY OF KISII.....1ST RESPONDENT

HON. SAMWEL ANG'ASA ONUKOH.....2ND RESPONDENT

CLERK, COUNTY ASSEMBLY KISII.....3RD RESPONDENT

COUNTY ASSEMBLY SERVICE BOARD4TH RESPONDENT

AND

CALEB GICHANA.....1ST INTERESTED PARTY

VINCENT MOSE GEKONE2ND INTERESTED PARTY

RULING

1. The Petitioner, Hon. David Ondimu Kombo, filed a petition together with a Notice of Motion contesting his removal from the office of Speaker of the County Assembly which he has held since 2017. The 2nd respondent and the 3rd respondent have each raised preliminary objections against the petition and the application.

2. The 2nd respondent opposed the petition on the grounds that;

a. This court lacks jurisdiction to hear and determine this petition and application by virtue of the provision of Article 162 (2) (a) of

the Constitution;

b. This matter is res judicata contrary to section 7 of the Civil Procedure Act by virtue of ELRC Kisumu Petition No. E 001/2021;

c. The petition and application are sub judice contrary to section 6 of the Civil Procedure Act by virtue of the Court of Appeal Kisumu Civil Appeal No. 72 of 2021.

3. While the 3rd respondent opposed the petition on the grounds that;

a. The Honorable court herein is devoid and/or divested of jurisdiction to entertain adjudicate upon and/or dispose of the subject of Petition as well as the Notice of Motion Application;

b. The Petition herein and the presentation of same before this honorable court amounts to Forum-Shopping;

c. The Petition as crafted and filed, is devoid of the requisite particulars of the breach, infringement and/or violation complained of. Consequently, the Petition does not disclose a reasonable cause of action;

d. The Petition violates and constitutes an affront to the provision of Rule 10(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 as well as the decision in the case of **Anarita Karimi Njeru -vs- Republic (1979) eKLR**;

e. The Petition herein is Res judicata and thus barred by the provisions of Section 7 of the Civil Procedure Act, Chapter 21 Laws of Kenya;

f. The Petition herein constitutes a disguised Appeal against the Judgment and/or decision vide Kisumu E & LRC Petition No. E001 of 2021;

g. The Petition and the Notice of Motion Application herein, are supported by a Defective, incompetent and thus invalid Affidavit, contrary to and in contravention of Order 20 Rule 1 of the Civil Procedure Rules, 2010. Consequently, the entire Petition is Irredeemably and/or hopelessly bad; and

h. In any event, the subject Petition constitutes and/or amounts to an abuse of the Due process of the Court.

4. The preliminary objections were canvassed by way of written submissions which I have duly considered. The issues arising for determination from the submissions can be condensed into the following issues;

a. Whether this court is devoid of jurisdiction to entertain the Petition and the Notice of Motion Application;

b. Whether the petition is devoid of the requisite particulars of the violations complained of and thus fails to disclose a reasonable cause of action;

c. Whether this petition is res judicata and sub judice;

d. Whether the Petition and the Application are supported by a defective affidavit contrary to Order 20 Rule 1 of the Civil Procedure Rules, 2010.

5. On the first issue, the 2nd respondent's counsel argued that the petition raised matters that were squarely within the jurisdiction of the labour court as the petitioner had lost his employment with the 1st Respondent and the orders sought in the petition were aimed at having him resume his employment as a Speaker of the 1st Respondent. Counsel submitted that under **Article 162 (2) (b)** of the **Constitution** and **Section 4** of the **Employment and Labour Relations Court Act** the jurisdiction of the labour court was couched in mandatory terms and precluded the High Court from adjudicating on matters of employment and labour relations.

6. On whether the suit was res judicata, counsel submitted that from the pleadings of the 2nd respondent it was evident that Kisumu Petition No. 001 of 2021 concerned the same parties herein and the issue was about the process used for removal of the petitioner from office. The petitioner had lost the petition before the court in Kisumu and the suit filed before this court was abuse of court process.

7. Counsel added that the petitioner had also applied for stay of the judgment in Petition No. 001 of 2021 by filing Miscellaneous Appeal No. 72 of 2021 in the Court of Appeal and when he failed to obtain stay orders he found it necessary to file this petition. The petitioner was accused of shopping around for a court that would issue orders in his favour. This court was urged to strike out the petition and send the petitioner back to Kisumu to pursue his appeal.

8. Similarly, counsel for the 3rd respondent argued that this court is bereft of jurisdiction to entertain the instant petition which pertains to the employment service of the Petitioner. Counsel submitted that since the Speaker is an ex-officio member of the County Assembly, elected by the County Assembly which is also empowered to remove him from office, the Speaker is an employee of the County Assembly. Consequently, the dispute fell under the jurisdiction of the Employment and Labour Relations Court created under Article 162 (2) of the Constitution. To support this argument counsel cited the cases of **United States International University (USIU) vs. Attorney General Nairobi Petition 170 of 2012 [2012] eKLR** and **Beatrice Kedevesia Elachi v Nairobi City County Assembly Service Board & Anor**

9. It was also the 3rd Respondent's submissions that the Petition as crafted did not comply with **Rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice Rules, 2013**. The respondent's counsel argued that it was difficult to discern the violation and infringement of rights and fundamental freedoms from the Petition as crafted. According to learned counsel, there was no semblance of a constitutional Petition and the Petition was in fact a general pleading on breach of various statutory provisions of law. Referring to the renowned decision of *Mumo Matemu v Trusted Society of Human Rights Alliance & amp: 5 others [2013] eKLR*, counsel urged that the petition in this case was short of the particulars prescribed in Rule 10 of the Mutunga Rules. Counsel submitted that the Petitioner was bound to plead his case with some degree of precision and set out the manner in which his constitutional rights were violated but he had failed to do so and the petition ought to be struck out forthwith.

10. As to whether the petition was res judicata, counsel submitted that the removal of the Petitioner by the 1st respondent was sanctioned by the court in Kisumu E & LRC Cause No. E001of 2021 which had heard the issues raised in this petition and given the 1st respondent the liberty to conclude the debate on the removal process. Counsel observed that the petitioner had failed to disclose the fact that the issues raised in the instant Petition had been deliberated upon and a Judgment rendered in that suit.

11. It was submitted that the Petition was a disguised appeal of the decision of the court vide Kisumu E & LRC Cause No. E001of 2021 and that if the court was aware of the decision in that matter it would not have issued the interim orders granted.

12. Lastly, counsel submitted that Daniel Omwoyo Mbaka who had sworn the Affidavit in support of the Petition and the Application was a stranger and not a party to the suit. She further submitted that the affidavits in support of the petition and the application were replete with hearsay thus violating the provisions of Order 19 Rule 3 of the Civil Procedure Rules. The court was thus urged to strike out the affidavits in support of the petition and the application which would have the effect of rendering the Petition and the Application incompetent.

13. The Petitioner's counsel countered that the arguments by the 2nd and 3rd Respondents that this court lacked jurisdiction to hear this matter were anchored on a misapprehension of the issues raised in the Petition. He urged that the petition mainly called upon this Court to exercise its supervisory power over the 1st Respondent in determining whether the impeachment of the Petitioner followed due process of the Law. Counsel relied on the case of *David Sifuna v Clerk, County Assembly of Trans Nzoia & Another [2014] eKLR*, *James Wahome Ndegwa versus Zachary Mwangi Njeru & 5 Others Nyandarua County Assembly (Interested Party) [2021] ECLR* and *Attorney General & 2 Others versus Okiya Omtata Okoiti & 14 Others [2020] eKLR* in support of the submissions that it was the High Court and not the Employment and Labour Relations Court that had the jurisdiction to hear a petition challenging the impeachment of a Speaker of the County Assembly.

14. This court was further urged to make a finding that the election of a Speaker by members of a County Assembly did not constitute 'employing' the Speaker into office. It was argued that the impeachment of a Speaker from office was a quasi-judicial process exercised by the County Assembly which the High Court had a supervisory role to examine and determine the legality of such removal.

15. On the second issue, counsel submitted that without turning to the merits of the case, the Court would be able to easily pick out from the petition that the main issue was whether the process of removal of the Petitioner as the Speaker of the 1st Respondent was lawful. Counsel submitted that the parties had full notice of the nature and extent of violation and the actions violating the constitutional provisions. Therefore, the petition met the set standards of pleading for constitutional petitions. That in any event, drafting a Constitutional Petition did not necessarily require mathematical precisions or formalism to meet the test of Constitutional Petition as held by the court in *Trusted Society of Human Rights Alliance v AG & 2 Others [2012] eKLR* which was upheld by the Court of Appeal in *Mumo Matemu (supra)*.

16. As to whether the petition was res judicata, counsel urged that the instant petition raised issues that were substantially different from the ones that had been raised in the Kisumu Petition for the following reasons. Firstly, at the time of lodging the Kisumu Petition the Petitioner had not been impeached from the office of the Speaker but the instant Petition was lodged upon the impeachment of the Petitioner. Secondly, at the time of instituting the Kisumu Petition, the Petitioner was still the Speaker of the 1st Respondent herein and his moving to Court on the 4th January, 2021 was anchored on the action of the Respondents, more importantly one Hon. Samuel Ang'asa Onukoh who had been elected as an acting Speaker on the 18th November, 2020 and had continued to present himself as an acting Speaker, frustrating the Petitioner from carrying on the duties of Speaker. Thirdly, the orders sought by the Petitioner in the Kisumu Petition were not similar to those sought in the instant Petition.

17. Counsel argued that whereas the orders in the Kisumu Petition sought to restrain the Respondents from impairing the Petitioner in the discharge of his duties as the Speaker of the Assembly and to bar the Respondents from debating the motion to impeach the Petitioner, the instant Petition was challenging the legality of the process culminating into the Petitioner's impeachment as the Speaker. Citing the case of *Martin Nyaga Wambora v Speaker of the County Assembly of Embu & 3 Others [2014] eKLR*, counsel argued that the set of circumstances in the instant Petition were wholly different and the matter was not res judicata.

18. Regarding the validity of the affidavits sworn in support of the Petition and the Application, the Petitioner's counsel submitted that the 3rd respondent's argument that the affidavit had been sworn by a stranger and constituted hearsay were argumentative issues that called for evidence and could not be disposed of preliminarily. It was submitted that these could not be grounds for striking out pleadings and it was open for the 3rd Respondent to apply to the Court to have them expunged.

19. In the same vein, counsel for the 1st and 4th respondents argued that this court had jurisdiction to hear the Petition and the Application. He submitted that the Office of the Speaker to a County Assembly is a creation of Article 178 of the Constitution and as such it was not created by any of the Respondents thus there did not exist a contractual or employment relationship between the Petitioner and any of the respondents. It is counsel's submission that devoid of such a relationship, it was legally incorrect to classify the suit as an Employment dispute.

20. Counsel submitted that the 2nd and 3rd respondents had incorrectly interpreted the Application and the Petition as related to employment issues whereas the suit related to the propriety of the impeachment of the Petitioner. He submitted that courts had found that while most disputes relating to the impeachment of Speakers of County Assemblies had in the past been litigated in the Employment and Labour Relations Court, issues that relate to the administrative fairness dictates of the were unrelated to an employment dispute. He cited the cases of *James Wahome Ndegwa (supra)* and the case of *Attorney General & 2 Others versus Okiya Omtata Okoiti & 14 Others (supra)* to buttress his submissions.

21. As to whether the petition discloses the violations complained of, counsel argued that **Article 22 (3) (b)** of the **Constitution** provides that technicalities do not bar an individual to petition a Court of a Law. That contrary to the assertions of the 3rd Respondent, the respondents are able to decipher and comprehend the issues raised in the Petition and have responded to it precisely.

22. The argument that the petition is res judicata was also strongly refuted by the 1st and 4th respondents' counsel who contended that the issues raised in this Petition are different in substance from the raised in the Kisumu Petition. He argued that at the time of filing the Kisumu Petition, the impeachment of the Petitioner from the Office of the Speaker had not been conducted, whereas the instant Petition was filed upon breach of law and procedure in a second attempt to impeach him. He further argued that the orders sought in the previous Petition are not similar as the ones sought in the instant Petition. That in this Petition the Petitioner is challenging the process that culminated into his purported impeachment as the Speaker and further seeks orders that the impeachment be set aside for being unprocedural and having been carried out in a manner that was inconsistent with the Constitution and the Law. The Kisumu Petition on the other hand, sought to bar the Respondents from restraining the Petitioner from discharging his duties as the Speaker and to bar them from debating and or purporting to impeach him.

23. It is also submitted that the present petition is anchored on a separate and distinct cause of action that took place on 26th May, 2021 based on a new set of facts from the one raised in the Kisumu petition that took place on 1st December, 2020. Counsel asserted that once a Speaker had been impeached from office, the Court had supervisory jurisdiction to examine the process culminating into the impeachment as held in the case of *James Wahome Ndegwa (supra)*.

24. The argument by the 3rd respondent that the contents of the affidavit constitute hearsay was also dismissed by the 1st and 4th respondents. Counsel argued that this argument did not constitute a preliminary objection as it was subject to argument and evidence being called to substantiate it.

ANALYSIS AND DETERMINATION

a. Whether this court lacks jurisdiction to entertain the Petition and the Notice of Motion Application;

25. . The 2nd and 3rd respondents contend that this court lacks jurisdiction to hear the Petition and the Application for the reason that the issues raised therein concern the employment of the Petitioner. They argue that since the Speaker was elected by the County Assembly which is also empowered to remove him from office, he was an employee of the Assembly and his removal from office is a dispute that falls under the jurisdiction of the Employment and Labour Relations Court.

26. The petitioner and the 3rd respondent were strongly opposed to the argument that the Speaker was an employee of the Assembly. They argued that the question for determination in the Petition and the Application is whether the 1st respondent followed due process in the impeachment process which called for the exercise of the High Court's supervisory power over the 1st Respondent.

27. The Employment and Labour Relations Court is established under **Article 162 (2) (a)** of the **Constitution**. The Court has original and appellate jurisdiction to hear and determine all disputes relating to employment and labour relations.

28. The 3rd respondent relied on the case of *Beatrice Kedeveresia Elachi v Nairobi City County Assembly Service Board & Anor [2019] eKLR* where the Employment and Labour Relations Court asserted its mandate to hear and determine the case involving the impeachment of the Petitioner who was the Speaker of the County Assembly of Nairobi County. The court held as follows;

“I thus find that this court has the jurisdiction to hear this matter as it involves an alleged gross violation of the Constitution and the Petitioner's rights to employment as a Speaker of the County Assembly of Nairobi. The court cannot then turn a blind eye to these allegations while hiding under the justification of the doctrine of separation of powers...this court in exercising its judicial authority must only and intends to confine its jurisdiction to interrogating the Respondent's procedures and operations to the extent of their purported infringement of the Petitioner's rights vis-a-vis constitutional and legislative mandate...”

29. However, in the more recent case of *James Wahome Ndegwa (supra)*, the High Court found that although matters relating to the impeachment of Speakers of the County Assembly had previously been dealt with by the Employment and Labour Relations Court, there were certain issues arising from the removal of a Speaker which were not related to employment disputes. The court in that matter held as follows;

13. ... While most disputes relating to the impeachment of Speakers of County Assemblies have, in the past, been litigated in the ELRC, the specific issues presented in this case are not disputes contemplated under section 12 of the ELRC Act. The kernel of the dispute is whether the Deputy Speaker can exercise certain powers regarding the conduct of a motion to remove a substantive Speaker vide an impeachment motion; and what are the correct procedures to be followed in order to abide by the administrative fairness dictates of the Constitution, the County Government Act and the Fair Administrative Actions Act (FAAA). These are matters which, in following the binding decision in *Attorney General & 2 others v Okiya Omtata Okoiti & 14 others (supra)* are unrelated to an employment dispute as delineated in section 12 of the Employment and Labour Relations Act and which should, therefore, be litigated at the High Court.”

30. The decision of the Court of Appeal in *Attorney General & 2 others v Okiya Omtata Okiiti & 14 others (supra)* is also applicable in this case. In that matter, the Court of Appeal was called upon to determine whether the Employment and Labour Relations Court had jurisdiction to determine the constitutionality of the appointment of the chairperson and members of the National Land Commission. The Court held;

From the above provisions of the Constitution and the Act, it is obvious that the jurisdiction of the ELRC is precise and limited rather than unlimited. The straight forward jurisdictional question in this appeal therefore is whether recruitment of members of the National Land Commission falls within the meaning of a dispute relating to employment and labour relations. We have already set out the provisions of the Constitution regarding the Commission which indicate that it is an independent constitutional Commission whose members are appointed in accordance with a special procedure provided by the Constitution and the Act; upon appointment they are only subject to the Constitution and the law and not subject to the direction or control of any person or authority; they enjoy security of tenure and cannot be removed from office except for cause and following a specific procedure entailing recommendations of an independent tribunal as is the case with judges; and their terms and benefits cannot be varied to their prejudice, again just like judges.

...

What all this suggests to us is that the appointment and removal from office of the commissioners of these independent commissions is not a labour and employment issue as the ELRC erroneously held, but a special constitutional innovation, a sui generis devise to address challenging governance needs and gaps. The appointment of the chairperson and members of the Commission did not involve any of the parties or raise any of the employment and labour relations issues contemplated by section 12 of the Act. With due respect, it was completely off the mark for the learned judge to hold that the recruitment of the chairperson and members of the commission raised employment and labour relations issues merely because they were to be remunerated from the Consolidated Fund. On the parity of that reasoning, the election or removal from office of the President of the Republic or appointment and removal of Judges of the Superior Courts would amount to employment and labour relations issues, merely because they are remunerated from the consolidated fund.

We have no doubt in our minds that the ELRC did not have any jurisdiction to entertain the three petitions that led to this appeal. A burning and well-founded desire to remedy what are perceived to be violations of the Constitution does not justify seeking redress from a forum in which the Constitution has not vested the power to issue a remedy... The Constitution has granted the High Court the requisite jurisdiction to hear and determine those issues and that is where they ought to have been raised.

29. Similarly, the election and removal of the Speaker of the County Assembly from office is provided for under the Constitution and in an Act of Parliament. **Article 178** of the Constitution establishes the office of the Speaker of the County Assembly and provides under sub article 3 that Parliament is to enact legislation providing for the election and removal from office of Speakers of the County Assemblies. Parliament enacted the County Government Act which provides for the election and removal of the Speaker of the County Assembly from office under **Section 7 (1) (b)** and **11** of the Act respectively.

30. The dispute in this petition concerns the removal of the Speaker of the County Assembly by the 1st respondent, contrary to the Constitution, the County Government Act and Standing Orders of the Assembly. The Petition is neither based on the claim that the Petitioner was unlawfully suspended from office in breach of his terms of employment nor does the Petitioner contend that any of his terms of employment were breached by his employer.

31. Although the Employment and Labour Relations Court has the jurisdiction to hear and determine issues concerning violations of the Constitution, that mandate is restricted to matters that fall within its specialized jurisdiction. The High Court, on the other hand, has unlimited jurisdiction under Article 165 to hear any question relating to the interpretation of the Constitution. The High Court also has supervisory jurisdiction over any person, body or authority exercising a judicial or quasi-judicial function. The Petition and the application before this court do not concern employment and labour relation but rather whether the respondents adhered to the provisions of statute and the Constitution in the removal of the Petitioner from office. The matter does not fall within the jurisdiction of the Employment and Labour Relations Court. Accordingly, the objection to this court's jurisdiction is dismissed.

b. Whether the petition is devoid of the requisite particulars of the violations complained of and thus fails to disclose a reasonable cause of action;

32. Secondly, the 3rd respondent contends that the petition as drawn does not comply with **Rule 10** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice Rules, 2013**. He argues that the petitioner has not elaborated the manner in which the provisions of the constitution were infringed and the nature of the injury suffered by the petitioner as a result.

33. Section 10 of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice Rules, 2013** provides;

10. (1) An application under rule 4 shall be made by way of a Petition as set out in Form A in the Schedule with such alterations as may be necessary.

(2) The petition shall disclose the following—

(a) the Petitioner's name and address;

(b) the facts relied upon;

(c) the constitutional provision violated;

(d) the nature of injury caused or likely to be caused to the Petitioner or the person in whose name the Petitioner has instituted the suit; or in a Public interest case to the Public, class of persons or community;

(e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;

(f) the Petition shall be signed by the Petitioner or the Advocate of the Petitioner; and

(g) the relief sought by the Petitioner.

33. The need for precision in crafting constitutional petitions was emphasized in the cited case of **Anarita Karimi Njeru v Republic [1979] eKLR** echoed in the case of **Mumo Matemu (supra)**. In the case of **Anarita Karimi** the Court of Appeal held;

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

34. A reading of the petition shows that there is sufficient compliance with the principles set out under Section 10 above and in the case of **Anarita Karimi**. The petition gives a description of the parties, it sets out the constitutional provisions violated, it gives particulars of the violations of the constitutional provisions by the respondents and sets out the reliefs sought by the Petitioner. The petition has sufficient information to notify the respondents of the nature of the issues that are likely to be raised by the petitioner.

35. The purpose of the requirement that constitutional petitions be drawn with a degree of precision is to give the other party sufficient detail of the rights claimed to have been infringed and give them an opportunity to prepare their defences. In this case, the petitioner gave adequate detail of the provisions said to be infringed and the manner in which they were infringed. Whether or not the respondents acted in violation of the Constitution is a matter that must await the hearing of the case on its merits.

c. Whether this petition is *res judicata* and *sub judice*;

36. The 2nd and 3rd respondents further contend that the issues being raised in the petition before this court had been canvassed by a differently constituted court vide Kisumu E& LRC Petition No. E 001 of 2021. The 2nd respondent further claims that the issues in this case are *sub judice* in light of the appeal filed against the decision in Petition No. E 001 of 2021 before the Court of Appeal.

37. The doctrine of *res judicata* bars a suit from being heard when it is proved that;

a. The matter or issue directly and substantially in issue in a subsequent suit is the same matter or issue directly and substantially in issue in the former suit;

b. The former suit was between the same parties or between the same parties under whom they or any of them claim;

c. Those parties were litigating under the same title in the former suit; and

d. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

38. The parties in the former suit before the Employment and Labour Relations Court were Hon. David Ondimu Kombo against the County Assembly of Kisii, County Assembly Service Board, Kisii and Hon Samuel Angasa Onukoh who are also parties to the instant Petition. The Clerk of the County Assembly is the only party who was not joined to the former proceedings. However, the addition of a party to a subsequent suit does not of itself render the doctrine of *res judicata* inapplicable. (see **Omondi v National Bank of Kenya Ltd & Others [2001] EA 177**)

39. According to the decision of the court in Kisumu Petition No. E001 of 2021, a member of the County Assembly gave the Clerk of the Assembly a notice of Motion for the Petitioner's removal from the office of the Speaker of the County Assembly on 18th November 2020. The Clerk notified the Petitioner of the Motion through a letter dated 20th November 2020 and invited him to respond in writing. The Petitioner responded on 23rd November 2020, and on 24th November 2020, he vacated the seat of Speaker to enable the Assembly to discuss the Motion. The Motion was moved on 1st December 2020 when the Petitioner was accorded an opportunity to respond to the allegations. When the Motion was put to the vote, chaos erupted and the acting Speaker adjourned the Assembly. However, on the same day in the afternoon, the Petitioner reconvened the Assembly and declared that the Motion had been lost. He proceeded to move the Court on 4th January 2021 alleging that the Respondents and more particularly Hon Samuel Angasa Onukoh, the 2nd Respondent in this case, who had been elected acting Speaker on 18th November 2020, had continued to present himself as acting Speaker, frustrating him from carrying on the duties of his office as Speaker thus violating his rights as well as breaching the provisions of the Constitution and the Standing Orders of the Assembly.

40. The Employment and Labour Relations Court identified two issues for determination. The first was whether the Petitioner's removal was lawful and the second was whether the County Assembly considered the motion for removal within 14 days as stipulated under Section 11 (8) of the County Governments Act.

41. On the first issue, the court held that the petitioner had been given an opportunity to defend himself and at the close of the debate, members voted through a secret ballot. The voting process was however interrupted, and it was not clear where the petitioner got the results he declared, as the Hansard report did not indicate that the voting and counting process was concluded.

42. On the second issue, the court found that the petitioner's conduct of assuming the duties of Speaker before the county assembly had made a decision to remove him from office was unlawful and contributed significantly to the Assembly's failure to conclude the vote counting process within the 14-day window stipulated in the Act. The court held that it was up to the Assembly to go back to its Standing Orders to confirm whether it had reserved residual power to conclude the debate on the removal process or not.

43. In the petition before this court, the petitioner has challenged the events that took place subsequently. It is apparent from the decision of the court in Petition No. 001 of 2021, summarized above, that the voting process and the counting process had not been concluded by the time that suit was filed. In the instant case, the petitioner challenges the process culminating in his impeachment which was communicated by the 2nd respondent through a Notice dated 26th May 2021. He calls to question the voting and counting processes which he claims did not meet the legal threshold to remove him from office.

44. Evidently, the circumstances in the present case are different from the circumstances in the previous suit. The court in the previous suit did not make a finding on whether the removal of the Petitioner from office was legal as the process was not complete. In this case, it is alleged that the 1st respondent has completed the process of removal. As stated above, this court has the requisite jurisdiction to determine whether the impeachment process was done in accordance with the Constitution and the law. It has also not been demonstrated that the appeal against the decision of the court in Petition No. E 001 of 2021 raises issues similar to those raised in this case. I therefore find that the principle of res judicata and sub judice do not apply to the petition before this court.

d. Whether the Petition and the Application are supported by a defective affidavit contrary to Order 20 Rule 1 of the Civil Procedure Rules, 2010.

45. Lastly, the 3rd respondent argued that one Daniel Omwoyo Mbaka who had sworn the affidavit in support of the Petition and the Notice of Motion was a stranger to the suit. It was also contended that the affidavit sworn in support of the petition was replete with hearsay. The court was therefore urged to strike out the two affidavits.

46. In my view, this objection by the 3rd respondent does not raise pure points of law. It is based on contested facts that are not accepted by either side. It does not therefore meet the parameters of a preliminary objection.

47. In the end, I find no merit in the preliminary objections raised by the 2nd and 3rd respondents they are hereby dismissed.

48. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT KISII THIS 28TH DAY OF SEPTEMBER, 2021

R.E. OUGO

JUDGE

In the presence of;

Mr. Ochoki For the Petitioner

Mr. Ondimu For the 1st & 4th Respondent

Mr. Kipngetich For 3rd Respondent

Mr. Nyambati For the 2nd Respondent

Vincent Gekone & Caleb Gichana Present

Ms Rael Court Assistant