



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**(Coram: Odunga, J)**

**CONSTITUTIONAL PETITION NO. 19 OF 2018**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS & FREEDOMS UNDER ARTICLES 2,3,10,19,20,21,22,23,27,48,56, 73, 159,165,174,175,177,196, 197,201,207, 232,258 AND 259 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTIONS 8N AND 35 OF THE COUNTY GOVERNMENT ACT, (ACT NO. 17 OF 2012)**

**AND**

**IN THE MATTER OF SECTION 4 OF THE PUBLIC APPOINTMENTS (COUNTY ASSEMBLIES APPROVAL) ACT NO.5 OF 2017**

**BETWEEN**

**THE COUNTY ASSEMBLY OF MACHAKOS.....PETITIONER**

**-VERSUS-**

**DR. ALFRED NGANGA MUTUA, GOVERNOR,**

**MACHAKOS COUNTY.....1ST RESPONDENT**

**COUNTY GOVERNMENT OF MACHAKOS.....2ND RESPONDENT**

**AND**

**1. JAMES TIMOTHY GUTETAH.....1ST INTERESTED PARTY**

**2. CATHERINE SYOKAU MUTWIWA.....2ND INTERESTED PARTY**

**3. JAMES MUSANGO KATHILI.....3RD INTERESTED PARTY**

**4. PATRICK VONI KIBAYA.....4TH INTERESTED PARTY**

**5. JACINTA MWELU MASILA.....5TH INTERESTED PARTY**

**6. CATHERINE NGARACHU.....6TH INTERESTED PARTY**

**7. ROMANA MWENDE KIMENDE.....7TH INTERESTED PARTY**

**8. JACKS NGALA NTHANGA.....8TH INTERESTED PARTY**

**9. LUCAS MULINGE MWOVE.....9TH INTERESTED PARTY**

**10. JACKSON MUTHINI WAMBUA.....10TH INTERESTED PARTY**

**11. STEPHEN NZIOKI MAILU.....11TH INTERESTED PARTY**

**12. CARLOS HENRY KIOKO.....12TH INTERESTED PARTY**

**13. NEWTON MUSYOKA MUINDE.....13TH INTERESTED PARTY**

**14. JANE MWIKALI MUTHOKA.....14TH INTERESTED PARTY**

**15. THOMAS MUTINNDA KAVIVYA.....15TH INTERESTED PARTY**

**16. MICHAEL MUTURI MAINA.....16TH INTERESTED PARTY**

**17. ROBERT KIOKO MAITHA.....17TH INTERESTED PARTY**

**18. JAMES MUTUKU MUTUNGA.....18TH INTERESTED PARTY**

**19. JUSTUS KASIVU MUSAU.....19TH INTERESTED PARTY**

**20. JOSEPH EDSON OCHWADA.....20TH INTERESTED PARTY**

**21. EMMANUEL KATA KIMEU.....21ST INTERESTED PARTY**

**22. DAMARIS NTHENYA MATIVO.....22ND INTERESTED PARTY**

**23. STEPHEN NGULI KILONZO.....23RD INTERESTED PARTY**

**24. JOHN MUTHAMA KILONZO.....24TH INTERESTED PARTY**

**25. ZUHURA RAJAB KHAMISI.....25TH INTERESTED PARTY**

**JUDGEMENT**

**Parties**

1. The Petitioners herein, **The County Assembly of Machakos,** is established under Article 176(1) and 177 of the Constitution.

2. The 1st Respondent is a Statutory and Constitutional entity established by operation of Articles 177 and 179(2)(a) of the Constitution of Kenya, 2010, and Sections 8(1) 12(1),13(1) 44(1) and 57 of the ***Governments County Act, 2012***. The holder of the said office, the Governor of Machakos County is a state official within the meaning of Article 260 of the Constitution and it is established by operation of Articles 176 (1) and 179(2)(a) of the Constitution of Kenya, 2010, and Section 30 of ***The County Governments Act, 2012***.

3. The 2nd Respondent Machakos County Government is similarly a Statutory and Constitutional entity established by operation of Articles 177 and 179(2)(a) of the Constitution of Kenya, 2010, and Sections 8(1) 12(1),13(1) 44(1) and 57 of the ***Governments County Act, 2012*** and by dint of Section 6 of the ***County Government Act, 2012*** is a body corporate with perpetual succession.

4. The Interested Parties are all adults of sound mind appointed and or re-appointed as Chief Officers in the County Government of Machakos to serve in the respective responsibilities by the 1st Respondent on behalf of the 2nd Respondent. Their appointments are the subject of the instant Petition. They have thus ben enjoined in these proceedings as the holders of the respective positions as appointed as such by the 1st Respondent which decision was published in the Kenya Gazette Number 11725 of 16th November, 2018.

**Petitioners' Case**

5. According to the Petitioner, on the 31st July, 2018 the 1st Respondent (hereinafter referred to as "the Governor") forwarded to the Speaker of the Petitioner (hereinafter referred to as "the Assembly") a list of nominees for vetting by the Assembly for the positions of County Secretary and Chief Officers which letter was received on the 1st August, 2018.Upon receipt of the letter dated 31st July, 2018 by the Governor, the Assembly put a Notice in the newspaper and Notice of invitations for vetting were issued to the nominees as necessary and also sought for confirmation of any adverse reports from the Ethics and Anti-Corruption Commission.

6. In compliance with the provisions of Articles 185 of the Constitution of Kenya, 2010 as read with Section 8 of the ***County Governments Act*** the Petitioner convened a meeting on the 7th August, 2018 and tabled the list of the Nominees before the House and consequently committed the nominees to the relevant sectoral committees pursuant to Standing Order 42(1) of the County Assembly of Machakos

Standing Orders. It was averred that all the sectoral committees of the Petitioner met and made a work plan and schedule for vetting of the County Secretary and Chief Officers as per the list given by the Governor. However, after vetting the Nominees and before the Petitioner in compliance with the provisions of Section 35(3) of the ***County Governments Act, 2012*** and Sections 7,8,9,10 and 11 of the ***Public Appointments (County Assemblies Approval) Act, 2017*** could forward a Report made by the Committee to the Governor either approving or rejecting the names of the Nominees, the Governor made a report vide a press release letter dated 15th November, 2018 that was published in Social Media forums. Consequently, on the 16th November, 2018 the illegal appointments of the Chief Officers by the 1st Respondent was published in the Kenya Gazette Number 11725 as contained in Kenya Gazette Vol.CXX-No. 139.

7. According to the Assembly, the appointment of the Interested Parties herein to serve in the respective responsibilities as Chief Officers in the 2nd Respondent was done prematurely and with impunity as the process of approval of the said nominees is still pending before it.

8. In support, the Assembly relied on section 9 of the ***Public Appointments (County Assemblies Approval) Act, 2017*** and contended that it made a Resolution changing its plenary sittings under the Standing Orders from Tuesday (Half Day - Morning), Wednesday (Full Day) and Thursday (Half Day- Morning) to Tuesdays and Wednesdays on full day basis. However, the days the Assembly is on recess do not count. From the exhibited Minutes, the first sitting of the committee of vetting to deliberate on this issue was on the 7th August, 2018 and the Assembly had up to 4th December, 2018 to finish the 21 sitting days from the date the committee first sat and send back the Report to the 1st Respondent.

9. According to the Assembly, Section 9 of the ***Public Appointments (Parliamentary Assemblies Approval) Act*** cited by the 1st Respondent is inapplicable in the County Government affairs as the said Section has no proviso for deeming as appointed nominees who have been approved and or rejected. It was therefore contended that the actions of the Governor on behalf of the 2nd Respondent are arbitrary, unconstitutional and illegal. In the premises, the offices of the County Secretary and Chief Officers of the 2nd Respondents have been filled by the illegal appointments by the Governor, on behalf of the 2nd Respondent through an illegal, secretive and unlawful process contrary to the provisions of Articles 10 and 232 of the Constitution.

10. The Petitioner contended that the Respondents' actions are inimical to the principles of governance espoused in the Constitution and that it is in violation of the rule of law, democracy, integrity, transparency and accountability, as envisaged in Article 10 of the Constitution. As a result of the aforesaid illegal and unlawful actions of the Respondents, jointly and severally, there is an eminent danger that the Governor will continue interrupting the roles, duties and responsibilities of the Assembly thus the Respondents are exercising their powers arbitrarily and in utter disregard of the Constitution of Kenya, 2010 as read with the ***County Governments Act*** and the ***Public Appointments (County Assemblies Approval) Act, 2017***.

11. It was therefore pleaded that the Assembly was aggrieved by the manner in which the Respondents have exercised their constitutional and statutory powers in regard to the illegal appointments of persons to the positions of the County Secretary and Chief Officers and instituted these proceedings for this Court to intervene and protect the Constitution and the general public and more specifically the residents of Machakos County.

12. To the Assembly, the 1st Respondent's action of appointing the Interested Parties herein while the matter is pending before the County Assembly and before the lapse of the statutory 21 sitting days contravenes the provisions of Article 232 of the Constitution which provides for values and principles of public service which include efficient, effective and economic use of resources ; involvement of people in the process of policy making, accountability for administrative acts, fair competition and merit as the basis of appointments and promotions among others. By appointing the Interested Parties herein while the matter is pending before the County Assembly and before the lapse of the statutory 21 sitting days, the Governor was accused of having contravened the provisions of Article 196 of the Constitution which demands that the County Government must conduct its business in an open manner, and facilitate public participation and involvement of the people in its businesses and the businesses of the Assembly and the Committees.

13. In the Assembly's view, the actions of the 1st Respondent on behalf of the 2nd Respondent are in further Contravention of section 4 of the ***Public Appointments (County Assemblies Approval) Act, 2017*** which provides for the exercise of powers of appointment within the Counties. It was the Assembly's case that the Governor's actions on behalf of the 2nd Respondent are in further Contravention of Section 10 of the ***Public Appointments (County Assemblies Approval) Act, 2017***.

14. On behalf of the Assembly, it was submitted that this Court has the jurisdiction to hear and determine this matter pursuant to Article 165(3) (d) of the Constitution since the Petitioners herein aver that the 1st Respondent contravened the provisions of Articles 10,47,179(2)(b), 192 and 232(g) of the Constitution. Accordingly, the Senate has no jurisdiction to question a public body on matters touching Constitutional breach. In this respect the petitioner relied on **Benson Riitho Mureithi vs. Wakhungu & 2 Others [2014] eKLR**.

15. According to the petitioner, the supremacy of the Constitution binds all persons and state organs and therefore the justification of the Petitioner in challenging the unconstitutional decision of the 1st Respondent in appointing the Interested Parties as Chief Officers without the Approval of the County Assembly. In view of Article 165 (6) (a) – this court has supervisory jurisdiction over the actions of officers appointed under Articles 177 and 178 (Membership of the county assembly and Speaker of the county assembly) and against the Governor in exercising his appointing authority whose proceedings are quasi – judicial in nature and intent.

16. It was submitted that under the Constitution, the courts are given the role as guardians of fundamental rights and freedoms, and are empowered to determine the question of whether a right or freedom has been violated and what redress should be afforded for such a violation of the Bill of Rights. Article 21 of the Constitution imposes a duty on the courts, as it does on other state organs, to protect the Bill of Rights and fundamental freedoms. This is a clear case where the courts under Article 22 and 165(3) (b), should and have a duty to, determine that the Petitioner's fundamental rights and freedoms have been violated and provide appropriate redress. The petitioner relied on Article 258 of the Constitution and asserted that it has *locus standi* before this court and the court has jurisdiction. In this regard reliance was placed on the Court of Appeal decision in **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** and

J**ohn Kipng'eno Koech & 2 others vs. Nakuru County Assembly & 5 Others [2013] eKLR**.

17. In this case it was submitted that since the Petitioner has demonstrated the violation of the Constitution and the law, the Court has the jurisdiction and a duty to interpret the Constitution and the question of its violation based on Article 259 of the Constitution regarding the manner of interpretation of the Constitution. It was submitted that Article 259(11) has provided that if a function or power conferred to a person like the 1st Respondent, is exercisable by the person with the approval or consent by the County Assembly to appoint Chief Officers the function may be performed or power exercised only with that approval or consent except to the extent that this Constitution provides otherwise. The Court was urged to decide the Petition within the parameters of this provision of the Constitution and not any other law since the Constitution under Article 2(1) is the supreme law of the Republic and binds all persons and pursuant to Article 2(4) thereof, any law that is inconsistent with the Constitution is void to the extent of the inconsistency and any act or omission.

18. According to the petitioner, the Governor in seeking to justify his illegal appointments has sought refuge under the ***Public Appointments (Parliamentary Approval) Act No. 33 of 2011***. However, the petitioner submitted that the violations of the Constitution by the Governor cannot be cured or be justified under an Act of Parliament since Article 259(11) is clear on how the court will interpret the violations committed by the Governor in appointing the Interested Parties as Chief Officers without the approval of the County Assembly. That is a requirement under the Constitution and must be interpreted under the Constitution.

19. Secondly, it was submitted that the cited law is not relevant to the County affairs as the relevant law is the County Assembly ***Public Appointments (County Assemblies Approval) Act No. 5 of 2017*.** Therefore, purported reliance on the ***Public Appointments (Parliamentary approval) At No. 33 of 2011*** is null and void for the reasons that the Act was enacted in 2011 and addresses the appointments by Parliament. The same Parliament in 2017 legislated ***Public Appointments (County Assemblies approvals) Act No. 5 of 2017*** and in its own wisdom and knowing about the existence of the Public Appointments (Parliamentary approval) At No. 33 of 2011 legislated section 4 providing for the applicable law in county assembly appointments under the Constitution.

20. According to the Assembly, the Governor in exercising his executive authority is bound by Article 2(1) and (2) of the Constitution, Article 10 of the Constitution, and by the principles of public service under Article 232 especially accountability of administrative actions, fair competition and merit as basis for appointment and promotions. The 1st Respondent has no power under the Constitution to veto the County Assembly and most important to contravene the express provisions of the constitution. The blatant disregard of the constitution and the ***Public Appointments (County Assembly approvals) Act No. 5 of 2017*** demonstrates that 1st Respondent has no regard for the supremacy and provisions of the constitution under which he is elected and exercises power and may not be fit to hold the office of the Governor.

21. It was submitted that the allegation that the county assembly had delayed in vetting process is baseless as demonstrated by the petitioner in the affidavit that the process was to end on 4th December, 2018. The County Assembly was within its timelines in approval process of the Interested Parties. The Governor has demonstrated a high level of impunity and abuse of power and his actions of appointing the Chief Officers without approval of the county assembly undermined the authority of the County assembly and the principle of separation of power. Exercise of power outside the constitutional confines amounts to impunity and illegality. The court was therefore urged to find that the Governor's action of appointing the Interested Parties is unconstitutional, illegal and thus null and void since his executive authority must be exercised within the rule of law and the Constitution and not rule of the mighty. The court was urged to be persuaded by the decision of **Marete, J** in **Moses Kiprotich Langat vs. Kericho County Assembly Committee on appointments & 3 Others [2018] eKLR** where in quashing the appointment of county assembly County executive committee officers Kericho county and granting orders to return the vetting process to the county assembly adopted with approval the holding by **Mabeya, J** in **John Mining Temoi & Another vs. Governor of Bungoma County & 17 Others [2014] eKLR**.

22. This court was urged to find that there is enough evidence placed before the court to disclose on prima facie basis that the process of appointment of the Chief Officers on 16th November, 2018 in Kenya gazette No. **11725** undermined and violated the Constitution and the law. In support of its position the Assembly cited the case of **Republic vs. Attorney General & 3 Others Ex Parte Tom Odoyo Oloo [2015] eKLR**.

23. It was submitted that the Petitioner herein has successfully established that in appointing the Interested Parties as Chief Officers before the County Assembly had done a report of the vetting amounted to arbitrary abuse of power by a Public Officer. Based on the decision of the Court of Appeal in **The County Government of Nyeri & Anor vs. Cecilia Wngechi Ndungu [2015] eKLR,** it was submitted that the actions of the 1st Respondent Governor do not adhere to the values, purposes and principles of the Constitution.

24. Consequently, the Assembly sought the following orders:

> **1. A declaration that the Appointments of James Timothy Gutetah, Catherine Syokau Mutwiwa, James Musango Kathili,Patrick Voni Kibaya, Jacinta Mwelu Masila, Catherine Ngarachu, Romana Mwende Kimende, Jacks Ngala Nthanga, Lucas Mulinge Mwove, Jackson Muthini Wambua, Stephen Nzioki Mailu, Carlos Henry Kioko, Newton Musyoka Muinde, Jane Mwikali Muthoka, Thomas Mutinnda Kavivya, Michael Muturi Maina,Robert Kioko Maitha, James Mutuku Mutunga, Justus Kasivu Musau, Joseph Edson Ochwada, Emmanuel Kata Kimeu, Damaris Nthenya Mativo, Stephen Nguli Kilonzo, John Muthama Kilonzo and Zuhura Rajab Khamisi as Chief Officers by the 1st Respondent , for the County Government of Machakos and published in the Kenya Gazette Number 11725 dated 16th November, 2018 are unconstitutional, illegal , null and void for contravening the provisions of Articles 2,3 10,20,47, 179,192, 196 and 232 of the Constitution of Kenya, 2010.**
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> **2. A declaration that the Appointments of James Timothy Gutetah, Catherine Syokau Mutwiwa, James Musango Kathili,Patrick Voni Kibaya, Jacinta Mwelu Masila, Catherine Ngarachu, Romana Mwende Kimende, Jacks Ngala Nthanga, Lucas Mulinge Mwove, Jackson Muthini Wambua, Stephen Nzioki Mailu, Carlos Henry Kioko, Newton Musyoka Muinde, Jane Mwikali Muthoka, Thomas Mutinnda Kavivya, Michael Muturi Maina,Robert Kioko Maitha, James Mutuku Mutunga, Justus Kasivu Musau, Joseph Edson Ochwada, Emmanuel Kata Kimeu, Damaris Nthenya Mativo, Stephen Nguli**

**Kilonzo, John Muthama Kilonzo and Zuhura Rajab Khamisi as Chief Officers by the 1st Respondent , for the County Government of Machakos and published in the Kenya Gazette Number 11725 dated 16th November, 2018 are illegal , null and void for contravening the provisions of Sections 4, 9 and 10 of the Public Appointments (County Assemblies Approval) Act, No. 5 of 2017 and Sections 8,30,65, 102 and 116 of the County Governments Act, No. 17 of 2012.**

**3. A declaration that it is unconstitutional, illegal, null and void for the Respondents jointly and severally to appoint persons to the positions of Chief Officers while the matter was still pending before the County Assembly.**

**4. An order of *Certiorari* do issue to remove and quash the decision of the 1st Respondent on behalf of the 2nd Respondent contained in Kenya Gazette Number 11725 dated 16th November, 2018 purporting to appoint the Interested Parties namely; James Timothy Gutetah, Catherine Syokau Mutwiwa, James Musango Kathili,Patrick Voni Kibaya, Jacinta Mwelu Masila, Catherine Ngarachu, Romana Mwende Kimende, Jacks Ngala Nthanga, Lucas Mulinge Mwove, Jackson Muthini Wambua, Stephen Nzioki Mailu, Carlos Henry Kioko, Newton Musyoka Muinde, Jane Mwikali Muthoka, Thomas Mutinnda Kavivya, Michael Muturi Maina,Robert Kioko Maitha, James Mutuku Mutunga, Justus Kasivu Musau, Joseph Edson Ochwada, Emmanuel Kata Kimeu, Damaris Nthenya Mativo, Stephen Nguli Kilonzo, John Muthama Kilonzo and Zuhura Rajab Khamisi as Chief Officers.**

**5. In any event, the costs of the petition be awarded to the Petitioner.**

**6. Such other order(s) as this Honourable Court shall deem fit to grant to ensure law, order and constitutionalism.**

**1st Respondents' Case**

25. The petition was opposed by the 1st Respondent. The opposition was two-pronged. On the first front he raised a preliminary objection challenging the jurisdiction of this court. The second front was based on factual matters based on a replying affidavit.

26. According to him, the appointment of the interested parties herein was proper, within the law and the allegations of any violations are both unfounded and in bad faith. It was averred that the Petition is motivated by ill-will, malice and partisan political supremacy wars clothed as legal issues and that leaders cannot politic all through at the expense of the welfare of, and service delivery to, the citizens of Machakos County and the Kenya in general, whose interests the petitioners are duty bound to promote. According to the 1st Respondent, the Governor, the supremacy wars and political underpinnings are consuming too much precious time and resources which would have otherwise been deployed to service delivery and development and yet members and the leadership of the petitioners and other public officers continue to earn salaries and other benefits to their comfort from taxpayers' money without commensurate service.

27. It was contended that this Court lacks jurisdiction to hear and determine this Petition in view of the other set down mechanisms available to the Petitioner. According to the Governor, the Petitioner had not exhausted available mechanisms for resolving their alleged dispute before coming before this Court in that:

a. The Petitioner, as a matter of good faith ought to have written to the Governor requesting information on how the appointments were done before initiating any other move. Assuming they are well meaning, probably the matter would have been settled at this point and save this Court's precious time and resources.

b. The Petitioner ought to exercise her constitutional oversight powers over the county executive to investigate the claims and pass resolutions asking the Governor to implement her recommendations as the first instance, which was not done.

c. The Petitioner, had the opportunity to petition the Senate, which has Constitutional powers to protect the interests of County Governments and ensure the success of devolution to investigate the alleged complaints, and this too was not done.

28. The Governor deposed that after the August 2018 General Elections, he was constitutionally required to constitute the Government of Machakos County as the duly elected Governor. In discharge of those duties, he wrote a letter to the Machakos County Public Service Board (the board) requesting them to competitively start the process of recruiting Chief Officers as per the Law. Accordingly, an advertisement was made on Wednesday, 30th August, 2017 in the *Daily Nation* newspaper inviting qualified members of the public to apply for consideration in the respective vacancies. Following the advert many Kenyans applied giving the board a broad pool of interested persons to shortlist for interviews, which the Board did on various dates through a newspaper advert in the *Daily Nation* of Tuesday, 15th May, 2018.

29. It was averred that after the interviews, County Public Service Board forwarded to the Governor's office the report of the interviews ranking each candidate by their respective performances during the interviews. Upon receipt of the said report, the Governor invited the recommended candidates for interactions to familiarize himself with them so as to make a more informed decision while deciding on who to nominate for vetting. It was his view that in the entire recruitment process the guiding principles were merit, integrity, inclusivity, transparency, capacity to deliver among other connected attributes and the Board and himself remained true to this higher calling.

30. The Governor averred that on the 31st July 2018, he transmitted the names and supporting documents of suitably qualified and experienced nominees, picked from those recommended by the board, to the Assembly for vetting as required under the law. On top of academic, experience and integrity considerations, he averred that the forwarded nominees reflected Machakos county regional diversity, gender equity as well as ethnic, youth and other minority interests in compliance with the Constitution and other laws. Subsequently, the speaker of the Assembly committed the names to the Assembly's respective sectoral committees through a communication on the 7th August 2018 signifying start of vetting process and the said Sectoral Committees sat to set the work plan for the approval process on the 15th August 2018. All the interested parties were invited and did appear before the Assembly for vetting on various different dates.

31. It was averred that the ***Public Appointments (County approvals) Act No. 5 of 2017*** as well as the ***Machakos County Assembly Standing Orders*** establish timelines within which the nominated candidates should be vetted, approved or rejected by the County Assembly. The Governor relied on Section 9(1) ***Public Appointments (County approvals) Act No. 5 of 2017*** as well as Standing Order no. 42 of the ***Machakos County Assembly Standing Orders.***

32. It was emphasised that the Sectoral Committees started Vetting and Approval hearings on the 15th August 2018 which proceeded on different dates. The Governor referred to Standing Order no. 27(1) of the Machakos County Standing Orders and deposed that as per the County Assembly's own Calendar, Sectoral Committees were supposed to have 2 sittings for every Tuesday and 2 sittings for every Wednesday falling between 15th August to 29th August 2018, (12 sitting days) and 18th September to 24 October 2019 (24 sitting days). According to the Governor, this is because, as per the said calendar, the house was to be sitting on the Tuesday and Wednesday, with each day having two sittings (morning and afternoon). He therefore averred that the committee having sat first on the 7th August 2018, time for debate and decision making started running on the same date (inclusive) and, without a motion to extend time, must terminate on the 21st sitting day. In his view, the time was to be computed as follows:

i. 7th August 2018……..…(2 sitting)

ii. 8th August 2018 …….…….(2 sitting)

iii. 14thAugust 2018……..……(2 sitting)

iv. 15th August 2018…….……(2 sitting)

v. 21st August 2018……(2 sittings)

vi. 22nd August 2018……..(2 sittings)

vii. 28th August 2018……...(2 sittings)

viii. 29th August 2018……(2 sittings)

ix. 18th September 2018……(2 sittings)

x. 19thSeptember 2018……..(2 sittings)

xi. 25th September 2018……(2 sittings)

xii. 26th September 2018……(2 sittings)

xiii. 2nd October 2018……...(2 sittings)

xiv. 3rdOctober 2018…..…..…….(2 sittings)

xv. 9th October 2018……(2 sittings)

xvi. 10th October 2018……..……(2 sittings)

xvii. 16th October 2018……..(2 sittings)

xviii. 17th October 2018……..(2 sittings)

xix. 23rd October 2018…….(2 sittings)

xx. 24th October 2018…….(2 sittings)

xxi. 6th November 2018……..(2 sittings)

xxii. 7th November 2018……..(2 sittings)

xxiii. 13th November 2018……(2 sittings)

xxiv. 14th November 2018……..……(2 sittings)

**TOTAL SITTINGS** **48 sittings**

33. It was therefore contended that the 21st Sitting lapsed on the 25th September 2018 meaning that the Sectoral Committees as well as the Petitioner herein fell outside the Statutory set timelines since they did not approve nor reject the names of the nominees within time as required by Law.

34. It was further averred that on the 24th October 2018, the Petitioner unprocedurally amended its Standing Orders to reduce the number of sitting per day from 2 to 1 sitting. Though, the said amendments were the subject of challenge in ***Machakos Constitutional Petition Number 16 of 2018***, the Governor nevertheless contended that the Petitioner had as well exceeded its set down timelines even if the amended Standing Orders were to be used as tabulated herein below;

i. 7th August 2018……..…(2 sitting)

ii. 8th August 2018 …….(2 sitting)

iii. 14thAugust 2018…….(2 sitting)

iv. 15th August 2018…….(2 sitting)

v. 21st August 2018……(2 sittings)

vi. 22nd August 2018……..(2 sittings)

vii. 28th August 2018…….....(2 sittings)

viii. 29th August 2018……(2 sittings)

ix. 18th September 2018……..……..(2 sittings)

x. 19thSeptember 2018…….…….(2 sittings)

xi. 25th September 2018…….(2 sittings)

xii. 26th September 2018…….(2 sittings)

xiii. 2nd October 2018…….…...(2 sittings)

xiv. 3rdOctober 2018…..…..…….…….(2 sittings)

xv. 9th October 2018……..…(2 sittings)

xvi. 10th October 2018……..……2 sittings)

xvii. 16th October 2018…….(2 sittings)

xviii. 17th October 2018…….(2 sittings)

xix. 23rd October 2018……(2 sittings)

xx. 24th October 2018…….(1 sittings)

xxi. 6th November 2018……..(1 sittings)

xxii. 7th November 2018……..(1 sittings)

xxiii. 13th November 2018……(1 sittings)

xxiv. 14th November 2018……(1 sittings)

**TOTAL SITTINGS** **43 sittings**

35. It was further averred that it is a well settled Parliamentary practice that approval of appointments to governmental departments including to the Judiciary, as is consideration of money Bills, are done as a matter of priority. Once Parliament is seized of it, it is expected to deal with it before any other business. As part of this practice, the Governor averred that he was legally advised that Parliament does not proceed on recess during pendency of appointments and in case it had already proceeded on recess, special sittings are always gazetted to allow the House dispense with the business. He therefore averred that the Assembly should not have thus proceeded on recess between 30th August 2018 to 17th September 2018 and 25th October 2018 to 5th November 2018 without considering the names of the nominees herein for approval or rejection. To him, this practice is meant to prioritize creation of structures to facilitate timely dispensation of public services to the sovereign people under Article 1 of the Constitution of Kenya. As such, the Petitioner cannot use delegated power to the detriment of the sovereign citizenry.

36. While the Governor appreciated that a reading of Section 9 of the ***Public Appointments (County Assemblies Approval) Act*** does not state the procedure to be followed when the nominees are not vetted within the 21 day's statutory period, he referred to section 8(2) of the ***County Governments Act*** which applies National Legislations to matters before the County Assembly where the Petitioner has failed to enact a corresponding County Legislation. It was averred that the Assembly passed Standing Orders to guide the process of vetting for approval or rejection of Chief Officers. However, they only set out the timelines within which the vetting should take but declined to legislate on what should happen in case it fell out of the set down timeline. In this regard the Governor relied on **Supreme Court Advisory Opinion [Reference no. 1 of 2015]** where the Court while finding that there was no procedure provided for in law for appointment of Deputy Governor in case of a vacancy, resorted to other provisions of the law relating to appointment of Deputy President to cure the legal lacuna. It was his view that the above is the general norm and part of the rules of interpretation of statutes whenever there is a lacuna. Guided by the same, he reverted to the procedure established for vetting of corresponding positions in the national government, specifically section 9 of ***Public Appointments (Parliamentary Approval) Act No. 33 of 2011*** for guidance.

37. The Governor's position was therefore that he had no choice but to appoint the County Chief Officers as per the ***Public Appointments (Parliamentary Approval) Act No. 33 of 2011*** to fill the lacuna left by the parent statute and the petitioner's standing orders. He reiterated that by the date the names were gazetted on the 16th November 2018, the Petitioner and its Sectoral Committees had clocked more 48 sittings (more than double the set timeline of 21 days).

38. He believed that failure to dispense with the nominations within the stated timelines and the continued sabotage on the approval of candidates as nominated without justifiable reasons is a clear indication that the County Assembly is acting in a rogue manner, as if they are a law unto themselves. According to him, there was a good reason why the Senate and the Petitioners' standing orders provided for clear time line of 21 sitting days' period for approval of rejection of the names and these provisions cannot be idle and must have been intended for situations like this. In his view, the Petitioner being a state organ is bound by the Constitution specifically the national values and principles of governance to operate within the four corners and limits of the Law and after lapse of time for approval or rejection, the interested parties were duly gazetted as required under the law and legally took office. To him, even if the appointments were not done, the nominees, upon lapse of time, having gone through the entire rigorous process of recruitment and vetting, would be deemed appointed by operation of the law and would legitimately have expected to be remunerated. The Governor lamented that the County Executive cannot function properly without Chief Officers as they are the Accounting Officers under Sections 45 and 46 of the ***County Governments Act*** and the ***Public Finance Management Act***.

39. It was however averred that in any event, the 3rd, 5th, 14th and 24th Interested Parties did not require re-vetting before re-appointment to their respective departments because they had been vetted before their initial appointment and there was no need to undergo the same process afresh. Having presented all Clearance Documents certifying their integrity, nothing had changed since their initial vetting and approval. Accordingly, their re-appointment was proper and within the law and in any event, the Petitioner has not provided any evidence or complaint that their integrity has since changed.

40. The Governor disclosed that after his appointments, he was surprised to receive a Communication on 4th December 2018 from the Assembly purporting to have considered the nominees for vetting way beyond the set down timelines and contrary to the law. In the report, the Assembly purported to abolish most of the departments created by the County Executive, amalgamate and create new departments not created by the County Executive and approve nominees for positions which they were never nominated to. He was dismayed by the action of the Petitioner to arrogate itself the role of creating and abolishing departments in the County Executive contrary to the clear and express provisions of Section 46 and Section 59 of ***County Governments Act*** which are express powers conferred by law to the executive arm.

41. According to the Governor, despite inviting all the Interested Parties for interviews, taking them through time consuming vetting exercise, having vetting and report writing meetings in costly luxurious hotels at taxpayers cost, and *ultra- vires* the cited sections of the law, the Assembly, without reasonable cause, further purported to reduce the number of departments and hence render some nominees department-less and arrogate themselves the power to appoint by approving persons to positions other than the ones they had been nominated to. After the appointments had been duly made and gazettement done, the petitioner purported to approve only eight nominees and entirely declined to approve the others based on the illegal and unconstitutional reduction of departments by the Petitioner. Comparatively, the Governor averred that other Counties have appointed similar or near similar number of Chief Officers to serve in different County departments for purposes of increasing efficiency in service delivery. It was surprising to him that the Assembly was challenging even the eight nominees whom they subsequently approved.

42. According to the Governor, the said resolutions were adopted by a section of the petitioner's members belonging to one party, specifically WIPER, after the rest of the members were denied an opportunity to participate in preparation of the final reports through trickery as to venue of meetings as well by open threats and violence. In order to justify the rejection of some of the nominees, this section of MCA's maliciously purported to amend committees' original reports, and excluded members opposed to such manoeuvres, which reports had scored all the nominees highly and recommended their approval. According to him, had the Assembly followed the reports of the committees and the objective criteria set out in law, all the nominees would have approved without much ado.

43. The Governor disclosed that the Speaker of the Assembly has on several occasions informed the Members of the Assembly that they should not approve my nominees awaiting the outcome of the Supreme Court appeal on the validity of the Governor's election. To him, it was thus clear that the Assembly was playing Politics with its constitutional mandate of vetting and approvals contrary to the Current

Constitutional dispensation and the court is merely being hoodwinked through this petition. Accordingly, the delay in processing the nominations was intentional, calculated, in-ordinate and contrary to public interest as the Assembly had all the time to process the nominations from the time he presented them on 31st July, 2018 until 15th November, 2018 when he appointed them, a cumulative period of 107 calendar days but failed to do so despite these having not been other pressing and more urgent business for the Assembly.

44. The Governor noted that the grant of the orders sought would bring the County operations, including those of the petitioner, to a halt because there will be no persons to requisition and manage funds, prepare and appear before the petitioners' committees for county plans, among other duties, all these to the detriment of the citizens of Machakos County and other beneficiaries of county programs. In his view, the orders sought by the petitioner are akin to asking the court to aid an illegality in that the County Assembly failed to exercise its mandate within legally set timelines and courts of law are the custodians of the rule of law.

45. From the foregoing it was averred that the petition lacks merit and ought to be dismissed with costs.

46. On behalf of the Governor, it was submitted that this Court lacks Jurisdiction to hear and determine the Application and Petition herein before the Petitioner exhausts the other established legal avenues based on **The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Ltd (1989) KLR** (1). The Governor relied **Diana Kethi Kilonzo & Another vs. Independent Electoral & Boundaries Commission & 10 Others [2013] eKLR** and submitted that where the Constitution and Statutes establish other mechanisms for settlement of disputes and allegation, the Court ought to exercise restraint before entertaining a petition.

47. It was submitted that section 45(3) of ***County Government Act*** provides that a county chief officer shall be responsible to the respective county executive committee member for the administration of a county department as provided under section 46. Expressly therefore, the Chief Officers are answerable to County Executive Committee Members under the Law. In turn, the Constitution empowers County Assemblies and Senate to exercise oversight powers over Executive Committees of County Governments. To the Governor, there is no doubt that under Article 179 of the Constitution, the County Governor is a member of the County Executive Committee and relied on Article 185(3) of the Constitution.

48. Since the Assembly has oversight powers, in the first instance, to oversight on any actions of the Governor, it was submitted that it has immense powers to secure attendance of witnesses or persons of interest on the subject of investigation and oversight. The reason why the drafters of the constitution gave such powers to the County assembly was to ensure that unsubstantiated claims [*as made herein by the Petitioner*] could not arise. More importantly, when exercising that power and authority, the County Assembly possesses the powers equal to that of this Court. To the Governor, if the Court of law were to accept to adjudicate on all matters within the republic, it would thus defeat the intention of the drafters of the constitution and as ratified by the Citizens. In this regard he relied on Article 195 of the Constitution.

49. It was submitted that the predecessor of the Petitioner went further to adopt the ***Machakos County Assembly Standing orders of the 9th July 2014*** under which standing order no. 194, provides an elaborate procedure on presenting Petitions to the interested Party herein. In addition, the Standing Orders provide clear mechanisms for sanctioning Executive Committee members who do not comply with summons or directives of the interested Party herein.

50. It was further submitted that Standing Order no. 185 establishes Public Accounts and Investments Committee while Standing Order no. 186 establishes Budget and Appropriations Committee with power to monitor the implementation of the County budget and report to the County Assembly. In addition, Standing Order no. 188 Establishes yet another committee known as Committee on Implementation. In this case, it was submitted that since there is no report or evidence before this Court showing that the Assembly approached the Governor for settlement of their alleged grievance, this Court cannot thus be called upon to take up the powers of the County Assembly, at the first instance and therefore there is no single provision allowing this Honourable Court or granting it to Jurisdiction to question any of the issues raised in the Petition.

51. In addition to County Assemblies, the Governor submitted that the Senate under Articles 96(1), 119 and 125 of the Constitution is empowered to exercise somehow similar powers as the County Assembly to address the issues being raised in this Petition and that a careful reading of the powers granted to Senate and County Assembly show that they are quasi-judicial in nature. That is to mean therefore that, it is only after a decision is made by the Senate or the Petitioner herein that the Court is clothed with jurisdiction under Article 165(6) and (7).

52. It was therefore submitted that the Court lacks jurisdiction to deal with the issues raised as they fall within the purview and powers of Senate and the County Assembly until properly moved.

53. As regards the merit of the petition, the court was urged to find that the appointments were proper and proceed to dismiss the Petition. According to the Governor, unlike the appointment of ***County Executive Committee Members*** where Article 179(2)(b) requires express vetting and approval by the Petitioner, there is no single Constitutional provision requiring Approval or vetting of Chief Officers by the Assembly. Therefore, approval of Chief Officers by the Petitioner is not applicable within the contextual text of Article 259(11) of the Constitution.

54. To the Governor, the requirement for vetting and Approval is set out in ***County Government Act***, ***Public Appointments (County approvals) Act No. 5 of 2017*** and ***Public Appointments (Parliamentary Approval) Act*** [*which are not the Constitution of Kenya as contemplated under Article 259(11) of the Constitution*]. As such, Article 259(11) of the Constitution id not Applicable to the vetting or Approval of Chief Officers as alleged by the Assembly and the Court should thus reject that invitation.

55. According to the Governor, it is not in dispute that the names of the nominees were competitively recruited by the County Public Service Board as contemplated under S. 25(2) of the County Government Act; that there was advertisement for the public to submit Applications; that thereafter, those who qualified were shortlisted; that shortlisted Applicants underwent interviews; that Names of successful Applicants were forwarded to him the County Public Service Board for nomination by him; that the 1st Respondent nominated and forwarded the names to the Assembly for Approval; that sectoral Committees sat to set the work plan for the approval process on the 7th August 2018; and that for

purposes of vetting and approval, the first sitting was on 15th August 2018.

56. The Governor's position was that the ***Public Appointments (County approvals) Act No. 5 of 2017*** provides the procedure for the nomination and appointment of the Chief Officers and the Governor is given the exclusive mandate to make them and relied on the interpretative S. 2 of the said Act as well as the objects and purposes of the Act in S. 3 thereof.

57. Guided by the above provisions of the law, the Governor in discharge of his powers and roles donated by section 8(1)(a) submitted the names of nominees to the Assembly on the 31st July 2018 for vetting and approval and subsequently, the speaker of the Petitioner committed the names to the Assembly through a communication on the 7th August 2018. It was submitted that the ***Public Appointments (County approvals) Act No. 5 of 2017*** as well as the ***Machakos County Assembly Standing Orders*** establish timelines within which the nominees should be vetted, approved or rejected by the County Assembly. In support of his positon the Governor relied on S. 8(1)(a) of ***County Government Act***, S. 9(1) ***Public Appointments (County approvals) Act No. 5 of 2017*** and ***Standing Order no. 42 of the Machakos County Assembly Standing Orders.***

58. In the Governor's view, there is a conflict between ***Public Appointments (County approvals) Act No. 5 of 2017*** and the Standing Orders on the timelines within which vetting should be concluded. Based on the hierarchy of Laws, the Acts prevails over the Rules. That is to mean therefore that the interested Party ought to have vetted, approved and/or rejected the nominees within 21 days. After the speaker of the Petitioner committed the names to the Assembly through the said Communication, the respective County Assembly Sectoral Committees started Vetting and Approval hearings on the 7th August 2018 which proceeded on different dates.

59. As for what amounts to a sitting, the Governor relied on Standing Order no. 2(1)(a) of the same Standing Orders as well as Standing Order no. 27(1) thereof. According to him, as per the County Assembly's own Calendar, it was contended that the Sectoral Committees should have had 2 sittings for every Tuesday and 2 sittings for every Wednesday because as per the said calendar, the Petitioner was to be sitting on Tuesday and Wednesday, with each day having two sittings (morning and afternoon). The committees having sat first on the 7th August 2018, time for debate and decision making started running on the 7th August 2018 (inclusive) and terminated on the 21st sitting day.

60. In his computation, the Governor submitted that the 21st Sitting lapsed on the 25th September 2018 meaning that the Sectoral Committee as well as the County Assembly of Machakos fell outside the Statutory set timelines and having neither approved nor rejected the names of the nominees, in the absence of a provision in of S.9 of the ***Public Appointments (County Assemblies Approval) Act*** stating the procedure to be followed when the nominees are not vetted within the 21 day's statutory period, based on section 8(1)(a) of ***County Government Act*** the vetting and approval of the nominees ought to be undertaken as per County Government Act or any other law. He therefore relied on section 8***(2)*** of ***County Government Act***.

61. It was submitted that in line with the above section, the County Assembly of Machakos is mandated to under Section 14 of ***County Government Act*** to make standing orders to regulate conduct and procedure of the County Assembly. However, although the said Standing orders were formulated, the interested Party did not prescribe what would happen in case they did not vet and approve or reject the names of the nominees. In the absence of a Specific Provision of an Act of Parliament or said Standing orders as stated above, the procedure established for vetting of similar vacancies in the national government, specifically, ***Public Appointments (Parliamentary Approval) Act No. 33 of 2011*** would thus apply by dint of S. ***8(2) of County Government Act*** and section 9 thereof.

62. After the lapse of the 21 days' deadline established under S. 9(1) ***Public Appointments (County approvals) Act No. 5 of 2017,*** and by dint of S. 9 ***Public Appointments (Parliamentary Approval) Act No. 33 of 2011,*** the Governor's position was that the names of the nominees were deemed to have been approved thus the final appointment as per the ***Public Appointments (Parliamentary Approval) Act No. 33 of 2011.*** In support of this position the Governor relied on the Supreme Court Advisory Opinion [Reference no. 1 of 2015] **In re Speaker, County Assembly of Embu [2018] eKLR.**

63. It was therefore his submission the Supreme Court set the precedent that where there is a legal Lacuna, the Court should revert back to any other legislation regulating a similar scenario and make declaration based on it.

64. According to the Governor, the failure to approve the nominations within the stated timelines and the continued sabotage on the approval of the members as nominated without any justifiable reasons is clear indication that the county assembly is not acting for the wellbeing and benefit of the people of Machakos County which they purport to represent.

65. As to what should happen where the Assembly declines to approve nominees as Chief Officers within the set down timelines, reliance was placed on the said decision of the Supreme Court where the Court relied on Article 259(1) and (3) for guidance and submitted that it is now settled law that when the Court is interpreting the Constitution, it must construe all the provisions as a whole but not in isolation. In this regard the Governor relied on the case of **Karisa Charo Dunda & 2 Others vs. Francis Wanjohi Wang'ang'a & 4 Others [2015] eKLR** .

66. It was further submitted that the Court cannot interpret Articles 2(1), 2(2), 10, and 232 in isolation of Article 259 of the Constitution. Since the County Government cannot function without Chief Officers as they are the Accounting Officers as contemplated under Sections 2, 45 and 46 of ***County Government Act and Public Finance Management Act,*** the inaction of the County Assembly to vet and approve the nominees without any justifiable reasons shows open sabotage of the County Government by the Petitioner to the detriment of the citizens who are supposed to benefit from a well-functioning government. The Court was therefore urged to adopt an interpretative module compatible with promoting the intentions and the goals of devolution which includes service delivery to the residents of a particular County.

67. It was disclosed that during the pendency of this Petition, the Assembly purported to prepare a Report where it purported to abolish most of the departments created by the County Executive, amalgamate and create new departments not created by the County Executive and; approve nominees for positions which they were never nominated to. The Governor contended that by that action the Petitioner arrogated itself the role of creating and abolishing departments in the County Executive contrary to the clear and express provisions of S. 45, 46 and S. 59 of ***County Governments Act,*** power which are expressly conferred by law to the executive arm of the Government.

68. In this case it was submitted that the Petitioner, without reasonable cause, purported to take away the powers of the Governor under S. 45(5) of re-assigning Chief Officers by stating that all nominees must have specific qualifications for all sub-units within a Single Department. Interestingly and at the same time, they purported to reduce the number of departments as created by the Executive under the Advisory of County Public Service Board hence playing political card as can further be shown by Petitioner challenging even the eight nominees whom they subsequently approved.

69. The Governor submitted that the orders sought by the petitioner/applicants are akin to asking the court to aid an illegality in that the County Assembly has deliberately and without any justifiable reasons whatsoever rejected and declined to approve the nominees for Chief Officers within the legal timelines which amounts to violation of the constitution and rights of the people of Machakos County to get proper service delivery.

70. The Court was therefore urged to allow the Preliminary Objection with costs and dismiss Petition be dismissed for want of merit and for being an abuse of the court process with costs to 1st Respondent.

**2nd Respondent's Case**

71. The 2nd Respondent relied on a replying affidavit sworn by **Grace Muluki Munguti**, the County Secretary and head of civil service. According to her the County Service Board is established under Article 235 of the Constitution for the purposes of staffing in County Governments and its powers are donated under section 59 of the ***County Governments Act*** and they include appointment of persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm such appointments on behalf of the County Government.

72. It was averred that the office of the Chief Officer is an office in the County Public Service as provided for under section 45(2) of the Act hence within the purview of the Board on behalf of the Governor and County Executive. Further, the appointment of the said officers is done by the Governor based on the recommendation of the Board as to their competency and qualifications. In making such appointments, the Board is guided by section 65 of the Act.

73. In this case it was averred that on or about 24th August, 2017 the Board received a request for the County Governor pursuant to section 59 of the Act to facilitate the appointment of Chief Officers. Pursuant thereto the Board duly advertised the position through newspapers inviting competent and highly qualified members of the public to apply for the vacant chief officers' position, an advert which was self-explanatory. In addition to the qualifications, the applicants were expected to possess mandatory integrity clearances including clearance from Kenya Revenue Authority, Credit Reference Bureau, Criminal Investigation Department, Ethics and Anti-Corruption Department, Higher Education Loans Board and clearance from employer where need be.

74. According to the deponent, the response was excellent with close to 671 applicants applying for the various positions and provided a sufficient pool to enable the Board conduct the shortlisting. Upon finalising the shortlisting exercise, the Board placed an advert in the local dailies on 15th May, 2018 inviting the applicants to appear before the Board on various dates for interviews. And all the invited persons turned up. According to the Board apart from putting questions to the said persons they also scrutinised the original certificates and other documents that were in their possession comparing them with the copies that had been supplied and graded the applicants on various parameters that had been developed to ensure only competent and qualified persons were appointed.

75. At the conclusion of the interviews, it was averred that the Board forwarded the report of the process with each candidate's performance to the Governor for nomination and onward transmission to the Assembly for vetting. The deponent disclosed that pursuant to Article 235 of the Constitution, section 45 and 59 of the Act, the County Executive and the Board came up with an organizational structure of the County Government of Machakos thereby creating the departments to be headed by the chief officers.

76. It was deposed that the Governor thereafter nominated one person for each of the various departments created within the County Executive for purposes of efficient execution of the functions of the County Government and later invited then for a familiarisation meeting prior to forwarding their names to the Assembly. Thereafter, the Governor forwarded their names to the Assembly on 31st July, 2018.

77. It was averred that the Assembly then placed an advert inviting the shortlisted candidates for interviews before their various committees.

78. It was therefore the second respondents position that the interested parties formally applied for the positions of the Chief Officers as advertised; they were shortlisted, interviewed and found competent and qualified for appointment; they all possessed the necessary integrity documentations as required; and that their nomination was a step in compliance with the values as provided for under Article 232 of the Constitution.

79. According to the 2nd respondent after the lapse of the 21 days provided for in the Assembly Standing Orders, the Governor Gazetted the nominees as duly appointed. Based on legal advice, the 2nd Respondent believed that this petit0on goes against the spirit of devolution, is bad in law as the Assembly is an organ of the County Government of Machakos as provided under Article 176 of the Constitution hence the petition is tantamount to the Petitioner suing itself.

80. It was in any case contended that the petitioner had not exhausted all available remedies under the Constitution more so as it has power to summon and oversight any person or organ of the County Executive.

81. In its submissions, the 2nd Respondent contended that the Petitioners herein lack *locus standi* to institute the Petition. According to them, in as much as the Constitution of Kenya 2010, confers wide scope to individuals in form of a substantive test in determining *locus standi*, the Court ought to take into account the sentiments of the Court of Appeal in **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others.**

82. The 2nd Respondent then proceeded to submit on matters which were not factually deposed and which I have ignored.

83. According to the 2nd Respondent, the Assembly did not exhaust all available remedies to them before petitioning this Court. Firstly, the Assembly did not write to the Governor requesting for information on how the appointments were done. Secondly, section 15 (1) of the ***County Government Act 2012***, and Part XXII of the ***County Government of Machakos County Assembly standing Orders*** provides that an aggrieved party has a right to petition the Interested Party herein to consider any matter within its authority. The Assembly disregarded the role of the Interested Party herein when they moved this Honourable Court on matters that are capable of being dealt with by the Interested Party. That further, the Petitioners failed and/or neglected to Petition the Senate of the Republic of Kenya, which has supervisory powers over the County Governments, to investigate the alleged complaints.

84. It was submitted that there exists a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. In this regard the 2nd Respondent relied on **Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425, Kenya Revenue Authority & 2 others vs. Darasa Investments Limited [2018] eKLR** relying on a retinue of authorities; **Kenya Revenue Authority vs. Keroche Industries Ltd. - Civil Appeal No 2 of 2008; Grain Bulk Handlers Ltd. vs. KRA [2018] eKLR, Cortec Mining Kenya Limited vs. Cabinet Secretary Ministry of Mining [2017] eKLR** and **Mumbi Ngugi, J** in **Rich Productions Limited vs. Kenya Pipeline Company & Another [2014] eKLR.**

85. According to the 2nd Respondent, this Court is barred from reviewing an administrative actions or decisions thereunder by the Governor unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Even without a legislative provision barring such a course, to proceed in such a manner would amount to playing lottery with the Court and render legal proceedings a circus, which clearly is an abuse of the Court process. In this regard the 2nd Respondent relied on **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229** and submitted that the Assembly cannot invoke the jurisdiction of the court and keep petitioning it first in Petition 10 of 2018 and then again even before judgment is entered, institute this Petition. It also relied on **Mitchell and others vs- Director of Public prosecutions and Another (1987) LRC (const) 128.**

86. It was submitted that whereas this Court may in exceptional cases excuse the failure to exhaust all available remedies, instituting Petition 10 of 2018 and even before the judgment is entered institutes this Petition amounts to abuse of the process of the Court. As much as this Honourable Court has discretion, it ought to consider the conduct of the applicant which in our humble view would be to permit its process to be subject to abuse as the Petitioners conduct amounts to playing lottery with the due process.

87. As regards the question whether the appointment of the 3rd to 12th Rrespondents' to the office of County Executive Committee was constitutionally and lawfully done, the 2nd Respondent substantially reiterated the position adopted by the Governor. It was submitted that the Petitioners herein filed this Petition in order to frustrate the working of the County Government functions as outlined under ***Article 183*** of the ***Constitution*** and ***section 36*** of the ***County Governments Act No. 17 of 2012***. The Assembly did this fully knowing that the County Government cannot function without an Executive Committee and if the orders sought are granted the County Executive operations will come to a halt to the detriment of the residents of Machakos County. According to the 2nd Respondent, it is in the interest of justice, fairness and protection of the rights guaranteed under the Constitution of Kenya, 2010, good governance and constitutional order, that the Petition herein be denied.

**1st, 2nd, 4th, 6th to 13th, 15th to 23rd and 25th Interested Parties' Case**

88. According to the 1st, 2nd, 4th, 6th to 13th, 15th to 23rd and 25th Interested Parties' (hereinafter referred to as "the fresh appointees"), the Petition in its entirety is misconceived, misguided, bad in law and should be dismissed with costs to the Interested Parties as the said application and Petition are made in bad faith, misrepresent the true position, and do not raise constitutional issues worth of determination by this Honourable court.

89. The said interested parties averred that the Petition raise general, vague and speculative disputes camouflaged as constitutional disputes and as such is flawed and incompetent for want of compliance with the law and precedents on pleadings relating to Constitutional Petitions seeking redress for alleged Constitutional violations. Furthermore, it is meant to impede and interfere with statutory and constitutional functions of the County Government and as such a clear case of gross abuse of court process.

90. Their position was that the entire Petition does not, with specificity, point to the actual Constitutional provision that has been violated or a constitutional wrong that has been committed by either the Respondents or the Interested Parties herein and as such, ought to be dismissed forthwith with costs.

91. According to them, the Constitution of Kenya 2010 creates two levels of Governments, being the National Government and the County Government with Article 176 establishing County Governments for all counties consisting of the County Executive and the County Assembly while Article 179 of the Constitution vesting County Authority on the County Executive which consists of the Governor and the Executive Committee members. Article 183 then proceeds to give the functions of the County Executive as being among others the implementation of county legislation and the management and coordination of county administration and the county departments. The County Governor acts as the Chief Executive Officer of the County. In this regard reference was made to section 45 of the ***County Governments Act*** which provides for the Appointment of Chief Officers.

92. According to the new appointees, on 30th August 2017, the Machakos County Public Service Board did run an advertisement in the Nation Newspaper inviting qualified members of the public to apply for the position of Chief Officers within the County Government of Machakos which application were to be received by 15th September 2017. Following the said advertisement, they did apply for the said advertised position as they had all the qualifications sought to hold the positions of Chief Officers within the County Government of

Machakos.

93. They disclosed that they also obtained clearances from the Higher Education Loans Board, the Ethics and Anti-Corruption Commission, the Directorate of Criminal Investigations, the Credit Reference Bureau, the Kenya Revenue Authority among others confirming that they were indeed qualified both academically and on issues of integrity in order to hold a public office. Pursuant to the functions and powers conferred on the County Public Service Board under section 59 of the ***County Governments Act***, the Machakos County Public Service Board did carry out interviews for the shortlisted candidates wherein they attended and were interviewed pursuant to which their names were forwarded to the Governor recommending their proposed appointments as Chief Officers in the 2nd Respondent.

94. Pursuant to the powers conferred upon the Governor under the provisions of Section 40 (1) of the ***County Government Act***, the Governor nominated them for appointment to the position of chief officers in the 2nd Respondent. Pursuant to the above, they were called for a familiarisation meeting with the Governor wherein they were informed that they had been successful in the interviews and that the Governor was proceeding to forward their names to the County Assembly of Machakos for their approval for my appointment to the respective positions of Chief Officers.

95. It was averred that in compliance with the law, the Governor on 31st July 2018 forwarded their names to the County Assembly of Machakos for their concurrence in their appointment to the said positions. Following the above, the Assembly published a notice in the *Daily Nation* Newspaper of 28th August 2018 inviting them for a vetting session with the relevant committee of the assembly and also sent them letters inviting them for the same and further asking them to provide certain documents/clearances as stated therein. The said appointees appeared before the Committee of the Assembly as notified wherein they were thoroughly grilled and also did present all the documentations as required and called upon by the Applicant in their letter to me dated 27th August 2018.

96. They deposed that thereafter, on 16th November 2018, their names were gazetted and appeared under Kenya Gazette Number 11725 of 16th November 2018 confirming their appointments to the respective positions of Chief Officers. Upon their appointments, they took up their positions as appointed and are now employees of the 2nd Respondent within the County Public Service and thus under the disciplinary control of the Machakos County Public Service Board. They therefore averred that they have no other gainful employment or means of livelihood and as such, any adverse action will not only be punitive but of great consequences and loss to themselves as they left every other gainful means of livelihood and took up their positions as Chief Officers after a rigorous process of approval and upon appointment and as such, now subject to disciplinary processes as carried out by the County Public Service Board and not any other.

97. The said appointees therefore contended that the entire petition is in bad faith and ought to be dismissed forthwith as it seeks to quash a process that is complete and one that has vested the control of interested parties including their fate on employment on a 3rd Party who is not party to these proceedings; the Machakos County Public Service Board.

98. It was reiterated that no constitutional right of the Petitioner has been infringed or is threatened to be infringed and as such, the Petition, being a Constitutional Petition ought to be disallowed.

99. On behalf of the fresh appointees it was submitted that the Interested Parties herein did not breach any law, and neither has the Petitioner alleged any breach or contravention on the part of the Interested Parties. The process as required in law and especially from the Interested Parties towards their appointment was not only sound, but succinct.

100. According to the said appointees, County Governments are creations of the Constitution of Kenya, 2010 and specifically pursuant to the provision of Article 176 of the said Constitution while Article 177 establishes the County Assembly. Article179 of the Constitution on the other hand creates the County Executive.

101. The Constitution then goes on to provide under article 200 that Parliament shall enact legislation to give effect to Chapter 11 of the Constitution which deals with devolved governments. Pursuant thereto, the ***County Government Act*** was enacted by the Parliament for the sole purpose of giving effect to Chapter 11 of the Constitution and section 45 of the Act deals with the appointment of Chief Officers.

102. From the above, it was submitted that Chief Officers are recruited competitively by the Public Service Board which then recommends them to the County Governor who is then required to appoint them with approval of the County Assembly.

103. The Chief Officers then become officers within the County Public Service and answerable to the County Executive Committee Members leading their various dockets and their terms of employment are thus contractual and as such serve under the disciplinary control of the County Public Service Board. In regard to approval of nominees, it was submitted that the ***Public Appointments (County Assemblies Approval) Act 2017*** is applicable and the objects of the said Act as captured under section 3 is for the provision of a framework for the procedure of approval of appointment by the county assemblies and also for the providing of clarity and guidance to the County Assemblies as they exercise their functions of approving public appointments. Pursuant to section 9 thereof the Assembly has 21 days to vet and issue a report on the nominees. However, the County Assembly of Machakos has its Standing Orders which are instrumental in carrying out approval hearings particularly, Standing Order 184.

104. According to the said appointees, it is clear that even the standing orders for the Machakos County Assembly do not have any provisions for the vetting of Chief Officers, the said standing orders are categorical that the Committee on Appointments is only tasked with the duty of vetting County Executive Committee Members only to the exclusion of all others. It was therefore the view of the said appointees that in so far as they are concerned, all processes and procedures as required from them leading to their appointment was proper, lawful, constitutional and in compliance with the law and that the Assembly has not alleged any breach on their part therefore confirming that they were properly appointed and the procedure leading to their appointment was proper.

105. It was further submitted that this matter as filed has been brought as a constitutional petition seeking redress for alleged breach of the

fundamental rights and freedoms under the Constitution. It was however their submission that these alleged breaches are non-existent as they have not been proved by the Assembly. What the Assembly has done is to simply quote numerous constitutional provisions and alleged breaches but without showing how the said breach was occasioned. This is itself makes this matter a clear case of abuse of court process. In this respect, they relied on **Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) vs. Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & Another [2018] eKLR**, **Benard Murage vs. Fine serve Africa Limited & 3 Others [2015] eKLR and Damian Delfonte vs. The Attorney General of Trinidad and Tobago CA 84 of 2004.**

106. This court was urged to reach a similar finding as the County Assembly herein has not shown that its fundamental rights and freedoms have been violated, how these fundamental right and freedoms have been violated and that based on those breaches, it seeks redress for such breach. A dispute between a County Assembly and a County Government is not one that is proper for litigation before a court of law and especially in the manner of a Constitutional Petition.

107. According to the said appointees, looking at the complaints being brought to this court by the Petitioner, it is also clear that the same cannot amount to constitutional violations and or failures that would warrant the intervention of this court. This is because the issue of recruitment, nomination and approval for appointment of chief officers in a county Government is not a constitution issues, but a statutory one. The same cannot be argued and clothed as a constitutional question requiring a constitutional interpretation and resolution as a constitutional dispute.

108. From the above it was submitted that this matter is not a proper case for determination as a constitutional petition on the breach of fundamental rights and freedoms under articles 22 of the constitution as it does not reach the required standard and further due to the fact that none has been proved at all. Further, the Petition is a proper candidate for dismissal as it is filed by the County Assembly against the County Government whereas the County Assembly is part of the County Government since the County Government your Lordship is made up of the County Assembly and the County Executive. Furthermore, this is a dispute that ought to have been resolved in a different manner and through the known administrative process within the County Government and not in court in the guise of a constitutional petition seeking to enforce fundamental rights and freedoms under the bill of rights.

109. To them, it is also important to note that a County Government cannot function without chief Officers as they are the authorised and accounting officers for departments within the County Government as contemplated by the ***County Governments Act***.

110. The said Interested Parties submitted that they already took up the positions they were nominated to and have been working since then. They also left their previous employments and their only source of livelihood is the current positions held by themselves as Chief Officers. Having been nominated and appointed to those positions after a rigorous process of advertisement, application, interviews, shortlisting, recommendation, committal to the county assembly, vetting by the county assembly and finally appointment through a gazette notice and subsequently having signed contracts for their engagement with the county. The Interested parties therefore have a legitimate expectation that any process that may lead to their removal from office ought to comply with the law on employment and on removal of Chief Officers who are on contract, and who are employees of the County Government. The Current constitutional petition is not a proper forum for the said process as they are under the disciplinary control of the County Public Service Board.

111. The court was therefore urged, based on the said submissions, to dismiss the Petition with costs to them.

**The 3rd, 4th, 5th and 24th Interested Parties' Case**

112. According to the 3rd, 4th, 5th and 24th Interested Parties (hereinafter referred to as "the serving officers") the Petition in its entirety is misconceived, misguided, bad in law and should be dismissed with costs to the Interested Parties as the said application and Petition is premature and misrepresents the true position. In their view, the petition is meant to impede and interfere with their statutory and constitutional functions as the Chief Officers of the County Government of Machakos and as such a clear case of gross abuse of court process.

113. They averred that on or about 9th July, 2014 having been subjected to interviews by the Public Service Board and vetted by the 1st County Assembly, they were appointed to serve as the Chief Officers for a period of Five (5) Years) which lapses on 9th July, 2019. However, on 30th August 2017, the Machakos County Public Service Board did run an advertisement inviting qualified members of the public to apply for the position of Chief Officers within the County Government of Machakos including their positions. Following the said advertisement, they did apply for the said advertised positions as they had all the qualifications sought to hold the position of Chief Officer within the County Government of Machakos.

114. They averred that pursuant to the functions and powers conferred on the County Public Service Board under section 59 of the ***County Governments Act***, the Machakos County Public Service Board did carry out interviews for the shortlisted candidates for the position of Chief Officers and indeed proceeded to forward their names to the Governor recommending their qualification for appointment as a Chief Officer in the 2nd Respondent. On 15th June 2018 they received a letter from the County Secretary addressed to the Governor stating that their positions were not vacant as their terms of service had not lapsed and could not therefore be filled. As a result, the Governor agreed with the said advice and withheld the forwarding of their names to the Assembly for vetting.

115. The serving officers therefore believed that the Petition against their appointment is unfounded, premature and an abuse of the process of this court as their positions were and are still not vacant and thus the process of vetting by the Assembly could not be commenced until the lapse of their contract. They therefore prayed that the petition be dismissed with costs.

116. In their submissions, the serving officers contended that the appointment of the County Chief Officers is provided for under Section 45 of the ***County Government Act.*** From the above cited provisions of the Act, it was submitted that while the Chief Officers are appointed by the Governor, their offices are offices within the County Public Service and unlike the Chief Executive Committee whose term lapses after

General election as provided in section 42 of the Act, there is no similar provision for the Chief Officers. It was therefore submitted that the terms of service of Chief Officers is determined by the County Public Service Board and Governed by the ***Employment Act***. In support of this position the serving officers cited the Court of Appeal decision in **Kisumu County Public Service Board & Another vs. Samuel Okuro & 7 Others [2018] KLR.**

117. Based on the said decision it was submitted that the positions of the serving officers were not vacant as at the time of advertisement for the reason that their contracts were still 'alive' and therefore the decision of the County Public Service Board and the Governor was sound in law. According to them, had the County Service Board and the Governor carried on with their action of appointing new Chief Officers to take over from the Four, the same would have amounted to constructive dismissal inviting a similar suit as the one filed by the dismissed Chief Officers in the said ***Kisumu Case*** and following the decision reached by the Appellate Court, that action would have amounted to *"violation of their fundamental rights and acting in a manner that contravenes the Constitution and the statute"*.

118. It was therefore submitted that the serving officers are legally in office pursuant to the terms of employment stated in the appointment letters of 9th July, 2014. Their terms would, unless renewed, lapse on 9th July, 2019. As such, the Petition against them is premature, unmerited and baseless since their names could not be submitted for vetting as theirs was neither an appointment nor a reappointment. They were still legally in office.

119. The Petitioners unfortunately lumped all the Interested Parties as if all their names had been submitted for vetting which was not the case. Indeed, the Petition as drafted has no allegations of any wrong doing in light of the facts aforestated in respect of the serving officers hence the Petition and the Prayers against them are devoid of any merit and thus the same be dismissed with costs to them.

**Determinations**

120. I have considered the issues raised in this Petition.

121. Since the Respondents raised the issues revolving around this Court's jurisdiction to grant the orders sought herein, it is important that the said issue be resolved *in limine*. This was the position adopted by **Nyarangi JA** in **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1** where he stated that:

> **"Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

122. Similarly, in **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** the same Court expressed itself as follows:

> **"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."**

123. Lastly, on the same issue, the Supreme Court in the case of **Samuel Kamau Macharia vs. Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011**, observed that:

> **"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings… Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."**

124. The issue of jurisdiction in this matter is however based on the fact that since there exist alternative mechanisms for resolving disputes between the Assembly and the Respondents, those mechanisms ought to be exhausted before resort can be made to this court's supervisory jurisdiction.

125. Before dealing with the said matter, both the Assembly and the Respondents alluded to the doctrine of separation of powers. According to the Assembly, by appointing the Chief Officers of the 2nd Respondent before the Assembly completed their mandate of vetting the said appointees, the Governor acted with impunity and in violation of the doctrine of separation of powers. On the other hand, the Respondents contended that by assigning the nominees to the position to which they were not nominated by the Governor, the Assembly similarly violated the same doctrine.

126. That the doctrine of separation of powers applies to the national government as well as devolved governments was appreciated in **Simon Wachira Kagiri vs. County Assembly of Nyeri & 2 Others (2013) eKLR** at page 13 thereof where it was held as follows:

> **"County governments are miniature national governments structures and ordered in line with traditions and principles that govern the national Government. To this extent the doctrine of separation of powers apply with equal measure."**

127. **Montesquieu** had sought to address this doctrine in his work, ***De L'esprit Des Lois*** [***The Spirit of the Laws*** (1948)]in the following words:

> ***When the legislative and Executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, there is no liberty if the power of judging is not separated from the legislative and Executive, there would be an end to everything, if the same man or the same body were to exercise those three powers.***

128. That this principle is reflected in our own Constitution appears in Article 1(3) thereof which provides that sovereign power which pursuant to Article 1(1) of the Constitution ***"belongs to the people of Kenya and shall be exercised only in accordance with this Constitution***":

> ***"…is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—***
>
> ***(a) Parliament and the legislative assemblies in the county governments;***
>
> ***(b) the national executive and the executive structures in the county governments; and***
>
> ***(c) the Judiciary and independent tribunals.***

129. This was appreciated by the High Court in **Trusted Society of Human Rights v. The Attorney-General and Others, High Court Petition No. 229 of 2012; [2012] eKLR**, at paragraphs 63-64 where it held as follows:

> **"Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuian influence is palpable throughout the foundational document, the Constitution, regarding the necessity of separating the Governmental functions. The Constitution consciously delegates the sovereign power under it to the three branches of Government and expects that each will carry out those functions assigned to it without interference from the other two."**

130. Thus, while the Constitution provides for several State organs, including commissions and independent offices, the people's sovereign power is vested in the *Executive, Legislature* and *Judiciary.*

131. The broad principle of "separation of powers", certainly, incorporates the scheme of "checks and balances"; but the principle is not to be applied in theoretical purity for its ultimate object is good governance, which involves phases of co-operation and collaboration, in a proper case. This perception emerges from **Commission for the Implementation of the Constitution vs. National Assembly of Kenya, Senate & 2 Others [2013] eKLR where Njoki, SCJ** opined that:

> "**The system of checks and balances that prevents autocracy, restrains institutional excesses and prevents abuse of power apply equally to the Executive, the Legislature and the Judiciary. No one arm of Government is infallible, and all are equally vulnerable to the dangers of acting** ultra vires **the Constitution. Whereas, the Executive and the Legislature are regularly tempered and safeguarded through the process of regular direct elections by the people, the discipline of an appointed and unelected Judicial arm of Government is largely self-regulatory. The parameters of encroachment on the powers of other arms of Government must be therefore clearly delineated, [their] limits acknowledged, and restraint fully exercised. It is only through the practice of such cautionary measures, that the remotest possibility of judicial tyranny can be avoided."**

132. The spirit and vision behind separation of powers is that there be checks and balances, and that no single person or institution should have a monopoly of all powers. This was restated by **Twinomujuni, JA** in **Masaluand Others vs. Attorney General [2005] 2 EA 165 (CCU)** as follows:

> **"The Constitution, the supreme law, vests all judicial power of the people in the Judiciary and whether the dispute involves the interests of the Judiciary or individual judicial officers or not, it is only the judiciary which is vested with judicial power to resolve it. However the judiciary must resolve the dispute "in the name of the people and in conformity with law and with the values, norms and aspirations of the people"……The Constitution was framed on the fundamental theory that a larger measure of liberty and justice would be assured by vesting the three great powers, the legislative, the executive and the judicial in separate department, each relatively independent of the others; and it was recognised that without this independence if it was not made both real and Enduring, the separation would fail of its purpose. All agreed that restraints and checks must be imposed to secure the requisite measure of independence; for otherwise the legislative department, inherently the strongest, might encroach on or even come to dominate the others, and the judicial, naturally the weakest, might be dwarfed or swayed by the other two, especially the legislature…The executive not only dispenses honour but holds the sword of the community. The Legislature not only commands the purse, but also prescribes the rules by which the duties and rights of every citizen are to be regulated. The Judiciary on the contrary has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgement. This simple view of the matter suggests several important consequences. It proves incontestably that the Judiciary is beyond comparison the weakest of the three departments of**

**power; that it can never attack with success either of the two; and that all possible care is requisite to enable it defend itself against their attacks. The complete independence of the Courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, it is one, which contains certain specified exceptions to the legislative authority; such as for instance that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without all this, all the reservations of particular rights or privileges would amount to nothing…A Judge has to pass between the Government and the man whom the Government is prosecuting; between the most powerful individual in the community and the poorest and the most unpopular. It is of the last importance, that in the exercise of these duties he should observe the utmost fairness. The judicial department comes home in its effects to every man's side; it passes on his property, his reputation, his life, his all. It is to the last degree important that he should be rendered perfectly and completely independent with nothing to influence or control him but God and his conscience. The greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent Judiciary."**

133. The Supreme Court has ably captured this fact in **Re the Matter of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011** where it 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."**

134. As regards the existence of alternative remedies, it is my view that if confronted with a question as to which remedy a litigant ought to seek, a Court should examine whether the alternative remedy provides an efficacious and satisfactory answer to the litigant's grievance. Articles 22, 23 and 165(3) (b) of the Constitution grants to every person the right to institute Court proceedings claiming that a right or fundamental freedom has been violated or is threatened with an infringement. That right, to access this Court, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms except in the circumstances established by the Court of Appeal of Trinidad and Tobago in the case of **Damian Belfonte vs. The Attorney General of Trinidad and Tobago C.A 84 of 2004.**

135. In my view, it would not be fair, convenient or conducive to the proper administration of justice to require a Petitioner to split its case into two or more causes and file them before different Tribunals when the matter can be dealt with by one Tribunal. In my view the Petitioner in such circumstances ought to commence the case before the Tribunal with the jurisdiction to hear and determine all the questions in controversy and grant all the reliefs sought.

136. As was held by this Court in Nairobi High Court Petition No. 613 of 2014 – **Patrick Musimba vs. The National Land Commission and Others**:

**"…it would be ridiculous and fundamentally wrong, in our view, for any court to adopt a separationalistic view or approach and insist on splitting issues between the Courts where a court is properly seized with a matter but a constitutional issue not within its obvious exclusive jurisdiction is raised."**

137. Article 2(4) of our Constitution which provides as follows:

***Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.***

138. Under Article 165(3)(d)(i) and (ii) the High Court is clothed with the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether any law is inconsistent with or in contravention of the Constitution and the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. Therefore, whereas the legislative authority vests in Parliament and the County legislative assemblies while executive authority is exercised by the national executive and the executive structures in the county governments, where a question arises as to whether any act or omission contravenes Constitution, the High Court is the institution constitutionally empowered to determine such an issue subject to the appellate jurisdiction given to the Court of Appeal and the Supreme Court. This is in recognition of the fact that there is nothing like supremacy of the legislative assembly outside the Constitution since, under Article 2(1) and (2), the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government and no person may claim or exercise State authority except as authorised under the Constitution. Therefore, there is only supremacy of the Constitution and given that the Constitution is supreme, every organ of State performing a constitutional function must perform it in conformity with the Constitution. So, where any State organ fails to do so, the High Court, as the ultimate guardian of the Constitution, will point out the transgression. This jurisdiction is in harmony with its duty to be the custodian of the Constitution, which pronounces its supremacy at Article 2. Similarly, the general provisions of the Constitution, which are set out in Article 258 contain the express right to every person to **"…** *institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention*."

139. My position is supported by the decision in **Coalition for Reform and Democracy (CORD) & Another versus the Republic of Kenya & Another (2015) eKLR** where the court stated *inter alia* at paragraph 125 that:

**"Under Article 1 of the Constitution sovereign power belongs to the people and it is to be exercised in accordance with the Constitution. That sovereign power is delegated to Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals. There is however a rider that the said organs must perform their functions in accordance with the Constitution. Our**

**Constitution having been enacted by way of a referendum, is the direct expression of the people's will and therefore all State organs in exercising their delegated powers must bow to the will of the people as expressed in the Constitution…Article 2 of the Constitution provides for the binding effect of the Constitution on State Organs and proceeds to decree that any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid…"**

140. Under Article 165(3)(d)(i) and (ii) the High Court is clothed with the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether any law is inconsistent with or in contravention of the Constitution and the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution.

141. Therefore, when an issue arises as to the constitutionality of any act done or threatened by either the Legislature or the Executive, it falls upon the laps of the Judiciary to determine the same. As was held in **Jayne *Mati & Another vs. Attorney General and Another* - Nairobi Petition No. 108 of 2011** at paragraph 31:

**"…separation of powers between the judiciary, executive and legislature is one of the hallmarks of our Constitution. Each body or organ of state is bound by the Constitution and should at all times acquaint itself of its provisions as it works within its sphere of competence. Constitutional interpretation is not the sole preserve of the judiciary but the judiciary has the last word in the event of a dispute on the interpretation and application of the Constitution."**

142. On that note, the Supreme Court in **Speaker of National Assembly -vs- Attorney General and 3 Others (2013) eKLR** stated that:

**"Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering its opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act."**

143. The Court went on to state as follows:

**"Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of "right" and "wrong" in such cases, short of a resolution in plebiscite, is only the Courts."**

144. As was held the case of **De Lille & Another vs. The Speaker of the National Assembly (1998) (3) SA 430(c)** in which the Court stated as follows:

**"The National Assembly is subject to the Supremacy of the Constitution. It is an organ of state and therefore it is bound by the Bill of Rights. All its decisions and acts are subject to the Constitution and the Bill of Rights. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution. It is subject in all respects to the provisions of our Constitution. It has only those powers vested in it by the Constitution expressly or by necessary implication or by other statutes which are not in conflict with the Constitution. It follows therefore that Parliament may not confer on itself or on any of its constituent parts, including the National Assembly, any powers not conferred on them by the Constitution expressly or by necessary implication."**

145. On appeal the Appellate Court in **Speaker of National Assembly vs. De Lille MP & Another 297/98 (1999)(ZASCA 50)** rendered itself as follows:

**"This enquiry must crucially rest on the Constitution of the Republic of South Africa. It is Supreme- not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No parliament, no official and no institution is immune from Judicial scrutiny in such circumstances."**

146. The South African Constitutional Court in ***Minister of Health and Others vs. Treatment Action Campaign and Others* (2002) 5 LRC 216, 248 at** paragraph 99 **underscored** the Court's role to protect the integrity of the Constitution thus:

***"The primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the State to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state***

***policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive that is an intrusion mandated by the Constitution itself."***

147. I am duly guided and this Court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, 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. In that regard, the invitation to do so is most welcome as that is one of the core mandates of this Court.

148. This however does not mean that the Judiciary should superintend the other two arms of government in all their undertakings in order to determine whether their decisions are "right" or "wrong". As was appreciated by the Court of Appeal in **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012; eKLR [2012]**:

> **"It is not in doubt that the doctrine of separation of powers is a feature of our Constitutional design and a per-commitment in our Constitutional edifice. However, separation of power 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 licence to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore cannot agree with the High Court's dicta in the Petition, subject of this Petition that -**
>
> > **'Separation of powers must mean that the courts must show deference to the Independence of the legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet as the Respondents concede, the courts have an interpretive role including the last word in determining the constitutionality of all government actions.'"**

149. It was therefore appreciated by **Ngcobo, J** in **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)** that:

> **"The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court. It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation… By contrast, where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that obligation has been fulfilled, trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers. This is precisely what the obligation comprehended in section 72(1)(a) does."**

150. In the words of **Ackermann, J** in the South African case of **National Coalition for Gay and Lesbian Equality & Others 13 Others, Case CCT No.10/99**:

> **"the other consideration a court must keep in mind, is the principle of the separation of powers and, flowing therefrom, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature."**

151. The rational for exercise of restraint was explained in **Okiya Omtatah Okoiti & 3 Others vs. Attorney General & 5 Others [2014] eKLR** in which a 3 judge bench of the Court stated that:

> **"In our view, Members of Parliament should not look over their shoulders when conducting debates in Parliament. They must express their opinions without any fear. The Court should be hesitant to interfere, except in very clear circumstances, in matters that are before the two Houses of Parliament and even those before the county assemblies."**

152. In **Patrick Ouma Onyango & 12 others vs. Attorney General and 2 Others [2005] eKLR** the court, on the issue of whether it should interfere with a political or legislative process stated:

> **"The answer the court gives to this question is that whatever the technicalities or the legal theory, sound constitutional law must be founded on the bedrock of common sense and the courts must now and in the future appreciate the limitations on formulation of policy, legislative process and practical politics because the courts are ill equipped to handle such matters."**

153. It is now trite that the doctrine of separation of powers requires that each of the three arms, the Judiciary, the Legislature and the Executive stick to their lanes and that they ought not to trespass onto the lanes of the other organs. In this case, the Petitioner's case is that the 1st and 2nd Respondents, which fall under the executive arm have unlawfully and unconstitutionally purported to exercise their mandates in a manner that contravenes the doctrine of the separation of power. If that contention is true, then that is an issue falling within the ambit of Article 165(3)(d)(ii) and (iii) of the Constitution. That being the case, this Court cannot be barred from inquiring into the matter on the basis of separation of powers.

154. I am well aware of the principle established by the Court of Appeal of Trinidad and Tobago in the case of **Damian Belfonte vs. The Attorney General of Trinidad and Tobago C.A 84 of 2004** that where there is a means of redress that is inadequate, the Court should not exercise restraint. In that case the Court held:

> **"The opinion in Jaroo has recently been considered and clarified by the Board in A.G vs Ramanoop. Their lordships laid stress on the need to examine the purpose for which the application is made in order to determine whether it is an abuse of process where there is an available common law remedy. In their lordship's words:**
>
> > **"Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the Court's process. Atypical, but by no means exclusive, example of such a feature would be a case where there has been an arbitrary use of state power...Another example of a special feature would be a case where several rights are infringed, some of which are common law rights and some for which protection is available only under the constitution. It would not be fair, convenient or conducive to the proper administration of justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights".**

155. I entirely agree and confronted with a question as to which remedy a litigant ought to seek, a Court should examine whether the alternative remedy provides an efficacious and satisfactory answer to the litigant's grievance. Therefore, confronted with a question as to which remedy a litigant ought to seek, a Court should examine whether the alternative remedy provides an efficacious and satisfactory answer to the litigant's grievance. In other words, the Court ought to consider whether the alternative remedy is less convenient, beneficial and effectual. It must be appreciated that judicial review has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. See **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43.**

156. The right to access this Court should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms except in the circumstances noted in **Belfonte (supra).** The Petitioner instituted these proceedings claiming a violation of the constitutional doctrine of separation of powers. The Respondents and interested parties contend that looking at the complaints being brought to this court by the Petitioner, it is also clear that the same cannot amount to constitutional violations and or failures that would warrant the intervention of this court. This is because the issue of recruitment, nomination and approval for appointment of chief officers in a county Government is not a constitution issues, but a statutory one. Whereas, it is true that the Constitution does not specifically deal with the appointment of the Chief Officers as opposed to the County Executive Committee Members, a requirement that nominees by the executive be approved by the Assembly is a reflection of the doctrine of the Constitutional doctrine of separation of powers hence is a constitutional issue. I associate myself with the decision in **John Kipng'eno Koech & 2 others vs. Nakuru County Assembly & 5 Others [2013] eKLR** where **Emukule, J** that:

> **"The Court is thus vested with the jurisdiction to determine the constitutionality of the process of appointments by the County Assembly of the nominees by the Governor, as well as the constitutionality of making such appointments by the Governor. The scope of the court's jurisdiction extends to the procedural improprieties, as well as the legality of the appointment decision to determine whether it accords with the constitutional threshold. The court applies an objective test where each case is determined on its own merit."**

157. Where therefore an issue arises as to whether that doctrine has been adhered to, the mandate and jurisdiction to determine that question lies in this Court under Articles 22, 23(3) and 165(3)(d) of the Constitution. Neither a committee of the 2nd Respondent nor the Senate has the jurisdiction to determine alleged violations of the Constitution -See **Wananchi Group (Kenya) Ltd vs. The Communications Commission of Kenya Petition No.98 of 2012**. **Majanja J** in **Isaac Ngugi vs. Nairobi Hospital and Another Petition No. 461 of 2012** found on the same lines when he expressed himself as follows:

> **"For instance, the Court will be reluctant to apply the Constitution directly to horizontal relationships where specific legislation exists to regulate the private relations in questions. In other cases, the mechanisms provided for enforcement are simply inadequate to effectuate the Constitutional guarantee even though there exists private law regulating a matter within the scope of the Application of the Constitutional right or fundamental freedoms. In such cases, the Court may proceed to apply the provisions of the Constitution directly."** (Emphasis added).

158. It is therefore my view that this Court has the jurisdiction to entertain the issues raised in this petition and further that the so called alternative remedies do not offer the petitioner efficacious remedies since the said forums are not proper forums in which the issues raised herein which touch on the application of the Constitution, the supreme law of the land, can be fully and properly ventilated.

159. The other issue is whether the Petitioner could properly file this petition against the 1st and 2nd Respondents. Article 22(1) and (2) of the Constitution provides that:

***(1) Every person has the right to institute court proceedings***

***claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.***

***(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—***

***(a) a person acting on behalf of another person who cannot act in their own name;***

***(b) a person acting as a member of, or in the interest of, a group or class of persons;***

***(c) a person acting in the public interest; or***

***(d) an association acting in the interest of one or more of its***

***members.***

160. Article 258 of the Constitution which provides as follows:

***(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.***

***(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—***

***(a) a person acting on behalf of another person who cannot act in their own name;***

***(b) a person acting as a member of, or in the interest of, a group or class of persons;***

***(c) a person acting in the public interest; or***

***(d) an association acting in the interest of one or more of its members.***

161. Article 260 of the Constitution defines "person" as including "a company, association or other body of persons whether incorporated or unincorporated". To my mind the fact Article 165(3)(d)(iii) empowers this Court to determine "any matter relating to constitutional powers of State organs in respect of county governments" is a clear pointer to the fact that the Constitution contemplates conflicts between constitutional powers of state organs including the Legislature and the Executive whether at national or county level. I therefore do not agree with the 1st and 2nd Respondents that the Petitioner has no locus to invoke this Court's jurisdiction to determine the question whether the actions of the 1st and 2nd Respondents impedes the petitioner's constitutional and legal mandate.

162. The gist of the Petitioner's case is that the Governor, the 1st Respondent herein appointed the interested parties without recourse to the Assembly, yet the Assembly was clothed with the powers to approve the interested' parties' nominations.

163. I wish to first deal with the 3rd, 5th, 14th and 24th interested parties' appointments. According to the said interested parties, they were appointed in 2014 for a period of 5 years. Therefore, their period of employment by the Board had not yet run its course. This factual averment has not been controverted by the petitioner. Section 45 of the ***County Governments Act***, provides that:

***(1) The governor shall—***

***(a) nominate qualified and experienced county chief officers from among persons competitively sourced and recommended by the County Public Service Board; and***

***(b) with the approval of the county assembly, appoint county chief officers.***

***(2) The office of a county chief officer shall be an office in the county public service.***

***(3) A county chief officer shall be responsible to the respective county executive committee member for the administration of a county department as provided under section 46.***

***(4) The county chief officer shall be the authorized officer in respect of exercise of delegated power.***

***(5) The governor may re-assign a county chief officer.***

***(6) A county chief officer may resign from office by giving notice, in writing, to the governor.***

164. This provision was the subject of the decision by the Court of Appeal in **Kisumu County Public Service Board & Another vs. Samuel Okuro & 7 Others [2018] eKLR,** the Court of Appeal held that:

> **"[40] We have perused the CGA and the relevant provisions relating to the county public service in the Constitution, but are unable to find a provision similar to Article 179(7) of the Constitution that ties the term of employment of county chief officers to the term of the governor who employed them. It is apparent that unlike the position of the county executive member, the intention of the framers of the Constitution in providing for the establishment of County Public Service Boards, was to ensure that there is a corporate body similar to the Public Service Commission in the national Government that is responsible for the regulation of employment of officers in the county public service. This was to ensure some element of stability in the management of the human resource in the county public service given that the county executive committee would keep changing.**
>
> **[41] Indeed, the respondents were employed on a five year "renewable" contract that did not correspond with the term of the governor who employed them. If the term of employment was intended to correspond with that of that governor, then, the respondents would have been given a contract term that ends with the term of the governor who employed them, with no provision for renewal. We are therefore in agreement with the learned judge that the employment of the respondents was not pegged on the term of the governor who employed them."**

165. I am guided and in my view, clearly this petition, in so far as it seeks to nullify the appointments of the said interested parties whose terms are due to lapse in July, 2019 is misconceived.

166. The first issue for determination is whether the nomination of persons for appointment as Chief Officers of the 2nd Respondent require to be approved by the Assembly before the appointments are effected. According to the Governor, unlike the appointment of ***County Executive Committee Members*** where Article 179(2)(b) requires express vetting and approval by the Petitioner, there is no single Constitutional provision requiring Approval or vetting of Chief Officers by the Assembly. Therefore, approval of Chief Officers by the Petitioner is not applicable within the contextual text of Article 259(11) of the Constitution which provides thus;

> ***"If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise"***

167. To the Governor, the requirement for vetting and Approval is set out in ***County Government Act***, ***Public Appointments (County approvals) Act No. 5 of 2017*** and ***Public Appointments (Parliamentary Approval) Act*** [*which are not the Constitution of Kenya as contemplated under Article 259(11) of the Constitution*]. As such, Article 259(11) of the Constitution is not Applicable to the vetting or Approval of Chief Officers as alleged by the Assembly and the Court should thus reject that invitation.

168. It is true that Article 179 of the Constitution that creates the County Executive provides as follows:

> ***(1) The executive authority of the county is vested in, and exercised by, a county executive committee.***
>
> ***(2) The county executive committee consists of—***
>
> ***(a) the county governor and the deputy county governor; and***
>
> ***(b) members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly.***

169. Whereas under the said Article the Chief Officers of the 2nd Respondent are not mentioned, under Article 200 of the Constitution, Parliament is obligated to enact legislation to give effect to Chapter 11 of the Constitution which deals with devolved governments and pursuant thereto, Parliament enacted the ***County Government Act*** which in section 45 deals with the appointment of Chief Officers in the following terms;

> ***(1) The governor shall—***
>
> ***(a) nominate qualified and experienced county chief officers from among persons competitively sourced and recommended by the County Public Service Board; and***
>
> ***(b) with the approval of the county assembly, appoint county chief officers.***
>
> ***(2) The office of a county chief officer shall be an office in the county public service.***
>
> ***(3) A county chief officer shall be responsible to the respective county executive committee member for the administration of a county department as provided under section 46.***
>
> ***(4) The county chief officer shall be the authorized officer in respect of exercise of delegated power.***

***(5) The governor may re-assign a county chief officer.***

***(6) A county chief officer may resign from office by giving notice, in writing, to the governor.***

170. It is therefore clear that the appointment of the Chief Officers is by competitive recruitment by the Public Service Board which then recommends them to the County Governor who is then required to appoint them with approval of the County Assembly. Since the County Governments Act is a legislation enacted pursuant to constitutional provisions, unless it is shown that any of its provision is unconstitutional, this court cannot ignore its provisions.

171. It is therefore my view and I hold that the appointment of the Chief Officers of the 2nd Respondent must be done by the Governor with approval of the County Assembly.

172. It is however contended that all processes and procedures as required from them leading to the appointment of the interested parties was proper, lawful, constitutional and in compliance with the law and that the Assembly has not alleged any breach on their part therefore confirming that they were properly appointed and the procedure leading to their appointment was proper. What is before me is however a constitutional petition as opposed to a civil litigation. If it is shown to this court that the process leading to the appointment of the interested parties was contrary to the law and the Constitution, it matters not that the interested parties were not parties to the said action since such an action must be invalidated. It is null and void. In this regard, I associate myself with the decision in **Benson Riitho Mureithi vs. Wakhungu & 2 Others [2014] eKLR,** where the court held that:

> **"if the process of the appointment is unconstitutional, wrong, unprocedural and illegal, it cannot lie for the Respondents to say that the process is complete and this Court has no jurisdiction to address the grievance raised by the Petitioners. In our view, even if the five appointees have been sworn in, this Court has jurisdiction to entertain and deal with the matter."**

173. Section 9 of the ***Public Appointments (County Assemblies Approval) Act, 2017*** provides as follows:

***(1) Unless otherwise provided in any law, a committee shall consider a nomination and table its report in the County Assembly for debate and decision within twenty-one sitting days from the date on which the committee first sits to consider the nomination.***

***(2) At the conclusion of an approval hearing, the committee shall prepare its report on the suitability of the candidate to be appointed to the office to which the candidate has been nominated and shall include in the report such recommendations as the Committee may consider necessary, including a recommendation on whether or not the nominee should be approved for appointment to public office.***

174. According to the Assembly, it made a Resolution changing its plenary sittings under the Standing Orders from Tuesday (Half Day - Morning), Wednesday (Full Day) and Thursday (Half Day- Morning) to Tuesdays and Wednesdays on full day basis. However, since the days the Assembly is on recess do not count and from the exhibited Minutes, the first sitting of the committee of vetting to deliberate on this issue was on the 7th August, 2018, it was contended that the Assembly had up to 4th December, 2018 to finish the 21 sitting days from the date the committee first sat and send back the Report to the Assembly. However, the names were prematurely gazetted by the 1st Respondent Governor on 16th November, 2018.

175. It is not contested that Standing Order no. 2(1)(a), defines "sitting" as:

***a period during which the Assembly is sitting continuously without adjournment and includes any period during which assembly is in committee.***

176. According to the 1st Respondent, the ***Public Appointments (County approvals) Act No. 5 of 2017*** as well as the ***Machakos County Assembly Standing Orders*** establish timelines within which the nominated candidates should be vetted, approved or rejected by the County Assembly. The Governor relied on Section 9(1) ***Public Appointments (County approvals) Act No. 5 of 2017*** as well as Standing Order no. 42 of the ***Machakos County Assembly Standing Orders*** the latter which provides as follows:

***(a) Upon receipt of a notification of nomination for appointment to an office as is under the constitution or under any other legislation required to be approved by the house, the nomination shall stand committed to the relevant sectoral committee of the house for consideration.***

***(b) Despite paragraph (1), appointments under Article 179(2)(b) of the constitution shall stand committed to the committee of appointments.***

***(c) ….***

***(d) The Committee shall conduct a hearing on the proposed appointment and shall, unless otherwise provided in law, table its report in the house within 14 days of the date on which the notification was received under paragraph (1).***

177. While it is patently clear that there is a conflict between ***Public Appointments (County approvals) Act No. 5 of 2017*** and the Standing Orders on the timelines within which vetting should be concluded, the provisions of the Act obviously take precedent over the Standing Orders. Therefore, the Assembly was required to vet, approve or rejected the nominees within twenty-one sitting days from the date on which the committee first sits to consider the nomination.

178. It was emphasised that the Sectoral Committees started Vetting and Approval hearings on the 15th August 2018 which proceeded on different dates. According to the Governor, Standing Order no. 27(1) states as follows:

> ***"Unless the Speaker, for the convenience of the House otherwise directs, the house shall meet at 10.00 am on Wednesday and at 2:30 pm on Tuesdays, Wednesday and Thursday, but more than one sitting maybe directed during the same day."***

179. It was deposed that as per the County Assembly's own Calendar, Sectoral Committees were supposed to have 2 sittings for every Tuesday and 2 sittings for every Wednesday falling between 15th August to 29th August 2018, (12 sitting days) and 18th September to 24 October 2019 (24 sitting days). According to the Governor, this is because, as per the said calendar, the house was to be sitting on the Tuesday and Wednesday, with each day having two sittings (morning and afternoon). He therefore averred that the committee having sat first on the 7th August 2018, time for debate and decision making started running on the same date (inclusive) and, without a motion to extend time, must terminate on the 21st sitting day. In his view, going by the Standing Orders prior to the amendment the 21st Sitting lapsed on the 25th September 2018 meaning that the Sectoral Committees as well as the Petitioner herein fell outside the Statutory set timelines since they did not approve nor reject the names of the nominees within time as required by Law.

180. It was however averred that on the 24th October 2018, the Petitioner unprocedurally amended its Standing Orders to reduce the number of sitting per day from 2 to 1 sitting. That the Standing Orders were amended is conceded by the Petitioner which stated that it made a Resolution changing its plenary sittings under the Standing Orders from Tuesday (Half Day - Morning), Wednesday (Full Day) and Thursday (Half Day- Morning) to Tuesdays and Wednesdays on full day basis. The Assembly however did not disclose when this happened. It has however not disputed that the said resolution was made on 24th October, 2018. Going by the said undisputed fact, it is therefore clear that the computation of the sitting days by the 1st Respondent following the amendment to the Standing Order must be correct. Accordingly, even taking into account the amendments to the Standing Orders, by the time the appointees were gazetted, the 21 days' sittings period prescribed under the Act had lapsed.

181. What then are the consequences of such lapse? According to the Assembly, Section 9 of the ***Public Appointments (Parliamentary Assemblies Approval) Act*** cited by the 1st Respondent is inapplicable in the County Government affairs as the said Section has no proviso for deeming as appointed nominees who have been approved and or rejected. In the Assembly's view, the actions of the 1st Respondent on behalf of the 2nd Respondent are in further Contravention of section 4 of the ***Public Appointments (County Assemblies Approval) Act, 2017*** which provides for the exercise of powers of appointment within the Counties to the effect that:

> ***"an appointment under the Constitution or any other law for which the approval of a County Assembly is required shall not be made unless the appointment is approved by the relevant County Assembly."***

182. According to the petitioner, the Governor in seeking to justify his illegal appointments has sought refuge under the ***Public Appointments (Parliamentary Approval) Act No. 33 of 2011***. However, the petitioner submitted that the violations of the Constitution by the Governor cannot be cured or be justified under an Act of Parliament since Article 259(11) is clear on how the court will interpret the violations committed by the Governor in appointing the Interested Parties as Chief Officers without the approval of the County Assembly. That is a requirement under the Constitution and must be interpreted under the Constitution.

183. Secondly, it was submitted that the cited law is not relevant to the County affairs as the relevant law is the County Assembly ***Public Appointments (County Assemblies Approval) Act No. 5 of 2017*****.** Therefore, purported reliance on the ***Public Appointments (Parliamentary approval) Act No. 33 of 2011*** is null and void for the reasons that the Act was enacted in 2011 and addresses the appointments by Parliament. The same Parliament in 2017 legislated ***Public Appointments (County Assemblies approvals) Act No. 5 of 2017*** and in its own wisdom and knowing about the existence of the Public Appointments (Parliamentary approval) At No. 33 of 2011 legislated section 4 providing for the applicable law in county assembly appointments under the Constitution.

184. According to **Emukule, J** in **John Kipng'eno Koech & 2 Others vs. Nakuru County Assembly & 5 Others [2013] eKLR**:

> **"12.01 "Section 10 *(Rejection of Nomination)*, of the Public Appointments (Parliamentary approval) Act, says -**
>
> > ***"10. Where the nomination of a candidate is rejected by Parliament, the appointing authority may submit to the relevant house the name of another candidate, and the procedure for approval specified in the Act shall apply accordingly."***
>
> **12.02 There is no similar provision in the County Governments Act, 2012. The Public Appointments (Parliamentary Approvals) Act 2011 (No. 33 of 2011) is an earlier Act and came into force on 14.11.2011. The County Governments Act is a later Act, and came into effect on 4th or 5th March 2013 depending upon when the final results of the Elections of 4th March 2013 were announced.**
>
> **12.03 It is thus clear to me that if Parliament had intended the provisions of Section 10 of the Public Appointments (Parliamentary Approval) Act to apply to appointments under the County Governments Act it should have incorporated it expressly. Though Section 14 of the County Governments Act refers to incorporation or adoption of standing orders of the National Assembly, there is no express provision for adoption of the practice under Section 10 of the Public Appointments (Parliamentary Approval) Act. The provision would in my view only be regarded as directory and not mandatory in relation to rejected nominees."**

185. While the Governor appreciated that a reading of Section 9 of the ***Public Appointments (County Assemblies Approval) Act*** does not state the procedure to be followed when the nominees are not vetted within the 21 day's statutory period, he referred to section 8(2) of the

***County Governments Act*** which applies National Legislations to matters before the County Assembly where the Petitioner has failed to enact a corresponding County Legislation. It was averred that whereas the Assembly passed Standing Orders to guide the process of vetting for approval or rejection of Chief Officers, they only set out the timelines within which the vetting should take but declined to legislate on what should happen in case it fell out of the set down timeline.

186. In this regard the Governor relied on Supreme Court Advisory Opinion [Reference no. 1 of 2015] **In re Speaker, County Assembly of Embu [2018] eKLR** where the Court found that there was no procedure provided for in law for appointment of Deputy Governor in case of a vacancy. The Court therefore resorted to other provisions of the law relating to appointment of Deputy President to cure the legal lacuna by stating as follows:

> ***"[50] In the National Land Commission, Supreme Court Advisory Opinion Reference No. 2 of 2014, the Court reaffirmed its earlier position in, In the matter of* Gender *Representation in the National Assembly and the Senate, Supreme Court Advisory Opinion No. 2 of 2012, which had been thus stated [paragraph 83]:***
>
> > ***"We would state that the Supreme Court, as a custodian of the integrity of the Constitution as the country's charter of governance, is inclined to interpret the same holistically, taking into account its declared principles, and to ensure that other organs bearing the primary responsibility for effecting operations that crystallize enforceable rights, are enabled to discharge their obligations, as a basis for sustaining the design and purpose of the Constitution."***
>
> ***[56] Does the Constitution contemplate a situation in which the office of Deputy County Governor would remain vacant indefinitely, as suggested by learned counsel, Mr. Onyiso? From the position that the Constitution accords priority to the Deputy County Governor as the candidate to assume the office of Governor, in the event of a vacancy in the Governor's office, would the same Constitution be contemplating a vacuum in such a vital office in the governance structure of County Government***
>
> ***[60] We would adopt the observations of this Court in earlier advisory opinions, regarding the requisite approach to constitutional interpretation, in view of the provisions of Article 259 of the Constitution. Article 259 (3) provides that:***
>
> > ***"Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking…"***
>
> ***[61] The foregoing principle calls for a reading of Article 182 of the Constitution alongside Article 149, which makes provision for the procedure and timelines for filling a vacancy in the Office of the Deputy President. From the signal embodied in Article 149 of the Constitution, and in the absence of any applicable legislative provision, we hold that, where a vacancy occurs in the Office of the Deputy County Governor, the Governor shall within fourteen days, nominate a person to fill such vacancy."***

187. It was therefore his submission the Supreme Court set the precedent that where there is a legal Lacuna, the Court should revert back to any other legislation regulating a similar scenario and make declaration based on it.

188. Guided by the same, he reverted to the procedure established for vetting of corresponding positions in the national government, specifically, ***Public Appointments (Parliamentary Approval) Act No. 33 of 2011*** for guidance. Section 9 thereof provides as follows:

> ***If, after expiry of the period for consideration specified in section 8, Parliament has neither approved nor rejected a nomination of a candidate, the candidate shall be deemed to have been approved***.

189. The Governor's position was therefore that he had no choice but to appoint the County Chief Officers as per the ***Public Appointments (Parliamentary Approval) Act No. 33 of 2011*** to fill the lacuna left by the parent statute and the petitioner's standing orders. He reiterated that by the date the names were gazetted on the 16th November 2018, the Petitioner and its Sectoral Committees had clocked more 48 sittings (more than double the set timeline of 21 days).

190. With due respect I agree with the position adopted by the 1st Respondent. To my mind there is a good reason why Parliament prescribed express period within which nominees are to be approved or rejected by the Assembly. The role of the Chief Officers as accounting officers in the proper administration of the County Government cannot be overemphasised. The Constitution in my view did not contemplate a situation where such positions would remain vacant indefinitely while there is a back and forth tug of war between the County Assembly and the County Executive.

191. The system of devolution as entrenched in our Constitution has a historical genesis. This was appreciated by the Supreme Court in **Speaker of the Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR** where **Mutunga, CJ** expressed himself as follows:

> **"The current devolution provisions in Chapter 11 of the new Constitution are a major shift from the fiscal and administrative decentralisation initiatives that preceded it. It encompasses elements of political, administrative and fiscal devolution. There is a vertical and horizontal dispersal of power that puts the exercise of State power in check... Devolution is the core promise of the new Constitution. It reverses the system of control and authority established by the colonial powers and continued by successive Presidents. The large panoply of institutions that play a role in devolution-matters, evidences the central place of devolution in the deconstruction-reconstruction of the Kenyan state..."**

192. The learned President of the Supreme Court continued:

> **"Given Kenya's history, which shows the central government to have previously starved decentralized units of resources, the extent to which the Constitution endeavours to guarantee a financial lifeline for the devolved units is a reflection of this experience and, more specifically, an insurance against recurrence. Indeed, in practically all its eighteen Chapters, only in Chapter Twelve (on public finance with respect to devolution) does the Constitution express itself in the most precise mathematical language. This is not in vain. It affirms the "constitutional commitment to protect"; and it acknowledges an inherent need to assure sufficient resources for the devolved units... Article 96 of the Constitution represents the *raison d'être* of the Senate as "to protect" devolution. Therefore, when there is even a scintilla of a threat to devolution, and the Senate approaches the Court to exercise its advisory jurisdiction under Article 163 (6) of the Constitution, the Court has a duty to ward off the threat. The Court's inclination would not be any different if some other State organ approached it. Thus, if the process of devolution is threatened, whether by Parliamentary or other institutional acts, a basis emerges for remedial action by the Courts in general, and by the Supreme Court in particular... It is relevant to consider the range of responsibilities shouldered by these nascent county governments. The Bill of Rights (Chapter 4 of the Constitution) is one of the most progressive and most modern in the world. It not only contains political and civil rights, but also expands the canvas of rights to include cultural, social, and economic rights. Significantly, some of these second-generation rights, such as food, health, environment, and education, fall under the mandate of the county governments, and will thus have to be realized at that level. This means that county governments will require substantial resources, to enable them to deliver on these rights, and fulfil their own constitutional responsibilities…National values and principles are important anchors of interpretive frameworks of the Constitution, under Article 259 (a). *Devolution* is a fundamental principle of the Constitution. It is pivotal to the facilitation of Kenya's social, economic and political growth, as the historical account clearly indicates. In my view, the constitutional duty imposed on the Supreme Court to promote devolution is not in doubt. The basis of *developing rich jurisprudence on devolution* could not have been more clearly reflected than in the provisions of the Constitution and the *Supreme Court Act.*"**

193. To my mind, the law should be an agency for realisation of the peoples' aspirations. It ought not to be a source of agony and anguish to them. It is an instrument through which the people realise their potentiality. It should therefore not be used to thwart such potentiality and aspirations. In my view where the people are denied the opportunity to gainfully benefit from the product of their collective will as expressed in an election, the courts must step in to alleviate their suffering. Accordingly, it is my view and I hold that where the County Assembly, without any reasonable or lawful justification, sits on the nominees of the Governor for a period in excess of the prescribed period, it must be deemed that the Assembly has no ground for rejecting the said nominees in which case, the nominees must be deemed to have been approved by the Assembly.

194. In this case I have found that the Assembly unjustifiably failed to make a decision within the prescribed period. It follows that the 1st Respondent, Governor was wholly justified in gazetting the nominees, the interested parties herein.

195. As regards the legality of the decisions made by the Assembly since that was not a matter that was properly before me I decline the temptation to deal with it.

**Findings and Disposition**

196. In the result I find:

> **(1) That the appointment of the Chief Officers of a County Government by the Governor is subject to the approval of the County Assembly.**
>
> **(2) That in undertaking the process of approval of the nominees, a committee of the Assembly shall consider a nomination and table its report in the County Assembly for debate and decision within twenty-one sitting days from the date on which the committee first sits to consider the nomination.**
>
> **(3) That the Chief Officers whose terms of service/employment have not lapsed are not affected by the change in the holder of the office of Governor and therefore their terms of service are governed by their letters of appointment.**
>
> **(4) That in this case the 3rd, 5th, 14th and 24th interested parties were not subject to the approval by the Assembly.**
>
> **(5) That the Assembly failed to consider the interested party's nomination and to table its report in the County Assembly for debate and decision within twenty-one sitting days from the date on which the committee first sat to consider their nominations.**
>
> **(6) That as a result the interested parties were deemed as duly approved by the Assembly and the 1st Respondent was properly entitled to gazette them as duly appointed.**

**Order**

197. In the premises, this petition fails and is dismissed.

198. As regards the costs, it is clearly appreciated by all the parties that this was a dispute revolving around "sibling" rivalry pitting the County Assembly and the County Government of Machakos. The interested parties found themselves caught up in the said "friendly fire" and therefore became "collateral damage". Further, the matter was a public interest litigation in which the people of Machakos County had a stake in its outcome. In the premises, each party will bear own costs.

199. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 24th day of June, 2019.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Ms Kamende for the Petitioner**

**Mr Musya for Mr Nthiwa for the 1st Respondent and holding brief for Mr Mutua for the 1st, 2nd, 4th, 6th, 13th, 15th to 23rd, and 25th interested parties and Mr Maritim for the 3rd, 5th, 14th and 24th interested parties.**

**CA Geoffrey.**