



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CONSTITUTIONAL PETITION NO. 7 OF 2018**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL  
RIGHTS AND FREEDOMS UNDER ARTICLES 1, 2, 3, 4, 6, 10, 19, 20, 21, 22,**

**23, 27, 35, 42, 43, 46, 47, 48, 73, 75, 159, 165, 174, 175, 176, 183, 185, 186,**

**187, 207, 220, 221, 224, 196 AND 259 OF THE CONSTITUTION**

**OF KENYA 2010 AND PART 2 OF FOURTH SCHEDULE**

**OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE PROVISIONS OF THE**

**COUNTY GOVERNMENTS ACT 2012**

**BETWEEN**

**WILFRED MANTHI MUSYOKA.....PETITIONER**

**=VERSUS=**

**1. MACHAKOS COUNTY ASSEMBLY.....RESPONDENT**

**2. THE SPEAKER,COUNTY**

**ASSEMBLY OF MACHAKOS.....RESPONDENT**

**3. THE CLERK, COUNTY**

**ASSEMBLY OF MACHAKOS.....RESPONDENT**

**AND**

**THE GOVERNOR MACHAKOS**

**COUNTY GOVERNMENT.....1<sup>ST</sup> INTERESTED PARTY**

**MACHAKOS COUNTY GOVERNMENT....2<sup>ND</sup> INTERESTED PARTY**

**JUDGEMENT**

1. The Petitioner herein, **Wilfred Manthi Musyoka**, describe himself as a resident of Machakos County and brings this Petition on his

behalf as a human rights defender and in the interest of the People and citizens of Machakos County.

2. The 1<sup>st</sup> Respondent is the County Assembly of Machakos (hereinafter referred to as “the County Assembly”). It is established under Article 178[1] of the Constitution of Kenya.

3. The 2<sup>nd</sup> respondent is the duly elected Speaker of the County Assembly of Machakos County (hereinafter referred to as “the Speaker”).

4. The 3<sup>rd</sup> Respondent is the Clerk of the County Assembly of Machakos (hereinafter referred to as “the Clerk”).

5. The 1<sup>st</sup> Interested Party is the duly elected Governor of County Government of Machakos (hereinafter referred to as “the Governor”). It is a Constitutional Office established both under the Constitution of Kenya and **County Government Act, 2012** (hereinafter referred to as “the Act”).

6. The 1<sup>st</sup> Interested Party is the County Government of Machakos, a body corporate under S. 6 of the **County Government Act** with perpetual succession.

7. According to the Petitioners, the County Treasury presented a **Machakos County Supplementary Bill, 2018** (hereinafter referred to as “the Bill”) on the 7<sup>th</sup> March 2018 for consideration and Approval by the County Assembly. Accordingly, it was committed to Budget Committee of the Assembly which interrogated several officers of the Executive arm of the County Government and presented its report which was adopted by the County Assembly. Thereafter the Bill was sent to the Chief Officer, Legal services but without attaching details of the Bill setting out amounts per vote. The Chief Officer, legal services wrote a letter to the County Assembly requesting for a copy of the entire Bill.

8. It was pleaded that without regard to the letter sent by the Chief Officer, the Amended Version was forwarded to the Governor on the 2<sup>nd</sup> May 2018 for assent but the Governor referred it back to the County Assembly with Memorandum of reasons requesting it to be aligned with the Law. The reasons for doing so, it was averred, were specified as:

1) The bill as passed and forwarded contravenes regulation 37(1) of the **Public Finance Management (County Governments) Regulations, 2015** which enjoins a County Assembly in exercising its budget making duties under section 131 of the **Public Finance Management Act, 2012** to amend the proposal by the Executive by a variation not exceeding 1% either upwards or downwards.

2) The County Assembly has over-stepped its mandate by listing specific projects within a bill as its sacred specific projects within a bill as its sacred role is registration, oversight and representation and not implementation of which is the work of the interested parties herein.

3) The proposal for payment of pending bills were rejected and/or mutilated whereas as per a circular from the office of controller of budget **COBCIRCULAR NO. 2/2018 Ref COB/CIR/002/VOL 1** dated **16/2/2018** advised that pending bills should form the first charge during expenditure.

9. According to the Petitioner the reason for referring the matter back to the Assembly was due to the fact that the supplementary budget, as amended by the Assembly, violated the Constitution, **Public Finance Management Act** and **Public Finance Management (County Government) Regulations 2015**, hence the Controller of Budget could not have acted on it if assented.

10. It was pleaded that upon being referred back by the Governor, the Speaker and the Clerk to the Assembly, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents herein, committed the same to the County Assembly for consideration as per the Law. However, in order to defeat the Governor’s proposed amendments, the County Assembly required a majority of Two Thirds (2/3) of members of the House. However when the same was subjected to vote of the House as required by law, the vote failed to reach the majority of 2/3 (two thirds) required to veto. Instead of the Speaker and the Clerk preparing the Supplementary Budget as per the memorandum by the Governor and forwarding it for assent, the Speaker adjourned the house without giving a ruling that the proposed amendments had passed by dint of S. 24 of **County Government Act**. Instead, the Speaker directed that she would make a Ruling on the matter on the 6<sup>th</sup> June 2018, just a few days before the end of the Government Financial year. To the Petitioner, this was done in clear violation of the Law as the speaker has no voting rights as her role is to declare the outcome of the vote on whether or not the memorandum was defeated.

11. It was therefore the Petitioner’s case that the Speaker’s decision is illegal, unprocedural and unconstitutional and should not be countenanced by the Court as it traverses the infringement of rights of the citizenry. According to the Petitioner, without a budget, provision of essential services like health care, which were devolved by dint of Part 2 of the Fourth Schedule to the Constitution, will be disrupted thereby severely infringing on the rights and fundamental freedoms of the people. According to him, the law does not anticipate a deadlock in the preparation and passing of budget estimates thus the need to have the Court make such determinations.

12. It was the Petitioner’s case that the respondents acted through political influence intended to deny the interested parties funds to run the affairs of the County Government to the detriment of the Machakos County citizens. According to him, the actions of the Speaker and the Clerk to the Assembly are clear indication that they are not willing to guide the County Assembly and that their failure to abide by the law is confusing the whole process and denying the people of Machakos County their right to be provided with services as envisaged in law.

13. The Petitioner lamented that the political situation in the County Assembly is dire and actions are being influenced by political and partisan considerations instead of service delivery to the people. To him, this is illegal bearing in mind that the budget is for the benefit of the people and not for settling political differences of the Respondents and the interested parties. The Petitioner asserted that, as a voter, they were ready to meet the members of the County Assembly while exercising their universal suffrage but under the set down legal and

constitutional timeline.

14. The Petitioner further averred that the interested parties cannot discharge their mandate under the Fourth Schedule of the Constitution and **County Government Act** without authorization as envisaged under the Law hence the intervention of this Court is required to avert the infringement of the rights of the Machakos County Citizens.

15. It was pleaded that it is clear from the foregoing that the only way the County Assembly can make decisions is through voting. As such, the Speaker should not have usurped the powers of the Members of the Assembly who had already made a decision and purport to give an opinion later.

16. It was the Petitioner's case that the failure of the Respondents to forward the Bill to the Governor for assent containing the reasons in his memorandum violates national values and principles of governance and in express breach of the provisions of the Constitutions, **County Government Act** and Kenyan laws.

17. It was the Petitioner's case that as a result of the foregoing, the people of Machakos County are in the verge of losing supply of essential services like health care, education bursary, roads & infrastructure and the services devolved to the 1<sup>st</sup> and 2<sup>nd</sup> Interested parties due to the fact that they cannot appropriate funds for their provisions. The Petitioner therefore accused the Respondents of having betrayed the public trust bestowed upon them by the Constitution as state and public officers and continue to do so unabated.

18. The Petitioner insisted that the Speaker has no constitutional mandate whatsoever to act the way she did as she has no voting nor vetoing powers under the Kenyan Laws and her actions of not forwarding the Bill with the amendments proposed in the Memorandum amounts to abuse of office, usurping of powers of the County Assembly and exercise of powers contrary to Article 2 of the Constitution. To the Petitioner the same is done out of ill will, malice and political machinations to arm twist the people of Machakos County.

19. It was the Petitioner's position that he has a legitimate expectation that the Respondents should uphold the law, act with the best interest of the people of Machakos at heart and generally in protection of public interest.

20. The Petitioner averred that money can only be withdrawn from the Revenue Fund of a County Government as authorised by an appropriation by legislation of the County. Therefore by failing to forward the Bill as required, the Government cannot append money to even critical services like health and by ailing to forward the Bill in the form and according to the procedure prescribed in law for assenting by the Governor, the Respondents abandoned their duty and as such the County Government cannot discharge its duties as established under the Kenyan Laws hence defeat the very essence of devolving resources to the people.

21. It was his case that under the law, whenever there is no threshold to veto the proposed amendments by the Governor, the Bill passes with the said amendments and the respondents cannot re-vote on the issue a second time as the law does not allow a second voting as is being mooted by the Speaker and should be interpreted as always speaking and does not envisage a lacuna.

22. Consequently, the Petitioner sought the following orders:

**1. A declaratory Order that failure by the 1<sup>st</sup> Respondent to raise a vote of 2/3 (two-thirds) of its members to veto the governor's Memorandum as per S.24(5) of the Count Government Act meant that Machakos County Supplementary Bill 2018, as incorporating all the reservations by the Governor in his memorandum should be prepared and forwarded to the Governor for Assent.**

**2. A Judicial review Orders in form of mandamus compelling the Respondents to forward the Machakos County Supplementary Bill 2018, as incorporating all the reservations by the Governor in his memorandum to the 1<sup>st</sup> Interested Party within 7 days for Assent.**

**3. THAT in default of forwarding the said Bill, the same to be deemed to have been forwarded and become law.**

**4. A Declaration that the Respondents have infringed or are likely to infringe the Petitioner's Rights under the Constitution, County Government Act and all other relevant laws of Kenya.**

**5. A declaration that the 2<sup>nd</sup> Responded acted in abuse of office and powers by purporting to postpone giving of guidance and/or ruling to the 1<sup>st</sup> Respondent and her actions are ultra Vires.**

**6. Costs of this petition to be borne by the Respondents.**

### **1<sup>st</sup> and 3<sup>rd</sup> Respondents' Case**

23. The Petition was opposed by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.

24. According to them, the proceedings herein are flawed and unsustainable on points of law due to the following reasons:

i) The Petition as drawn has not stated what provisions of the Constitution is said to have been violated and or breached by the Respondents jointly and severally as required the Constitution.

ii) The Petitioner has not stated what rights or fundamental freedoms have been denied, violated or infringed or is threatened by the Respondents that warrant the petition.

iii) The Petition as drawn has not sought for any relief of declaration that any Article of the Constitution has been infringed and or violated by the Respondents.

iv) That further, the Honourable Court is being requested to issue orders which would amount to an infringement of the concept of separation of powers as the matters at hand is business transacted in a legislature on account of which the Courts have severally pronounced themselves to the effect that Courts should not interfere with the legislature when it is discharging its mandate, particularly as the issue of debate and passing of Bills herein is a matter internal to the Assembly and which is governed by internal rules of the Assembly which in this case are the Standing Orders and which the Honourable Court ought not interfere with.

v) That the Petitioner's pleadings are general, speculative and do not disclose a real controversy/ dispute capable of resolution by this Honourable Court. The Petition is thereof are predicated on unspecified anticipated actions by the Respondents who are separate and distinct legal entities. This Honourable Court cannot grant omnibus orders based on non- existent threats of violations of unspecified rights.

vi) The Petitioner's pleadings do not disclose adequate particulars in support of his alleged cause of action/ claim relating to the alleged violations of the Constitution to enable this Honourable Court grant the reliefs sought herein.

vii) The Petition thereof seek to impede the functions of Constitutional office holders and as such, it is frivolous, vexatious and an abuse of the judicious process. One cannot stop a person or an organ of state or any other constitutional body from carrying out their constitutional mandate.

viii) The jurisdiction to interpret the Constitution conferred by Article 165(3) does not exist in a vacuum and this Honourable Court can only invoke its mandate to interpret any provision or provisions of the Constitution under the said Article if there is a real issue in controversy and not in a hypothetical or academic situation.

ix) In the premises, this Honourable Court has no jurisdiction to supervise constitutional bodies carrying out their mandate within the confines of the Constitution and both the Petition and the Application herein are made in bad faith. herein is made

x) That the Petitioners' pleadings offend the **Doctrine of Separation of powers** as the same invite this Honourable Court to direct Parliament and County Assemblies which are Legislative branches of government , on their procedures and how they ought to run their affairs.

25. According to the said Respondents, section 24(5) of the **County Governments Act** does not envisage a situation where the vote of two-thirds majority is not reached and does not compel the Speaker to submit the said Bill, where no such vote is reached to the Governor for assent. It was therefore their position that the Speaker cannot be said to have acted in an unprocedural and unconstitutional manner as alleged by the Petitioner hence the alleged particulars of breach enumerated by the Petitioner under paragraphs 51-56 of the Petition are baseless.

26. According to the said Respondents, the Petitioner in this matter has failed to disclose material facts of the matter seen from the following chronology of events as regards the subject matter herein:

i) On the 21<sup>st</sup> May, 2018 the Assembly held a special sitting to consider the Governor's Memorandum on the **Machakos County Supplementary Appropriation Bill, 2018** among other items. However, the requirement of two-thirds majority to veto the Governor's Memorandum was not reached and the 2<sup>nd</sup> Respondent advised the Members of the County Assembly that she would give her considered opinion on the scenario on 5<sup>th</sup> June, 2018.

ii) On 28<sup>th</sup> May 2018 the Assembly sat as from 11.06 am deliberate on the Governor's Memorandum on the said Bill.

iii) At 2.01pm the Speaker directed that the matter of the Bill be placed on the Order Paper of the sitting of the Assembly on the same day at 2.30pm.

iv) At 3.36pm the members of Machakos County Assembly considered the Bill and the Committee of the whole House considered the Governor's Memorandum and approved the same with amendments.

v) This Petition was filed on the 25<sup>th</sup> May, 2018 but served on the 29<sup>th</sup> May, 2018 when the Bill had already been approved with amendments hence the same has been overtaken by events as the Bill has already been assent to.

vi) The statement by the second respondent that she would give a ruling on the matter in question on 5<sup>th</sup> June 2018 is not illegal, unprocedural or unconstitutional but is a legislative procedure that is accepted throughout the world.

27. Based on legal advice, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents averred that the Speaker did not violate any law by adjourning the House until 5<sup>th</sup> June 2018 after the vote on the Bill since the Speaker is allowed by Section 24(3) of the **County Government's Act** to follow the appropriate procedures in deliberating on the said Bill. Therefore, while appreciating the fact that if the supplementary Bill is not signed into law, the Assembly will not be able to operate, the said Respondents asserted that the law must be followed in passing the Bill and as such, the supply of the essential services alleged to be in the verge of being lost as per Paragraph 25 of the Petition would not be prejudiced as the Bill has already been forwarded to the Governor for assent.

28. To the said Respondents, an order by the Court will have the exact opposite effect of the objectives of the Petitioner in bringing this petition since it will interfere with the ability of both the county executive and Assembly to appropriate funds for their normal operations before the end of the financial year which is 30<sup>th</sup> June 2018.

29. In any event, it was averred that the memorandum of the Governor to the Assembly did not contain any specific proposed amendments to the Bill in question and therefore they are incapable of being incorporated in the Bill. According to them, the issues raised by the Governor in the memorandum are purely legal matters which were conclusively dealt with by the Assembly.

30. The Respondents asserted that there is no legal requirement for the Assembly to forward to the Governor, documents other than the Bill being assented to itself, once passed by the Assembly. Besides, the detailed programme budget was forwarded to the Governor upon request. Before the final pronouncement of adoption or rejection of a motion, a Bill is subject to the procedures of the House as stipulated in the Standing Orders.

31. It was deposed that according to Standing Order No. 65 unless otherwise provided in the Constitution or any other law, questions arising in the Assembly are decided by a majority of members in the Assembly, present and voting while section 24 of the **County Governments Act** requires two thirds of the membership of the House for such a motion. This, it was contended was not achieved so the motion fails and the Assembly cannot make decisions by default.

32. The said Respondents lamented that were it not for the late submission of the supplementary Budget by the interested parties, the Assembly would have dispensed of the matter in good time.

33. They 1<sup>st</sup> and 3<sup>rd</sup> Respondents therefore argued that it is only fair and in the interest of justice that the entire Petition herein be dismissed with costs to the Respondents as the same has not met the threshold for grant of constitutional orders in that the Petitioner does not disclose what provisions of Constitution have been violated nor pray for any declaration of an illegality or violation of the Constitution by the Respondents.

#### **Interested Parties, Case**

34. The Interested Parties, on their part while not opposing the petition sought directions from the Court on the following issues:

- 1) What should happen if a County Assembly fails to raise 2/3 majority of its house membership to veto a memorandum from a Governor;
- 2) What should happen in event the County Assembly declines or fails to implement the interpretative decision of the Court.

#### **Petitioner's Submissions**

35. It was submitted on behalf of the Petitioner that County Treasury presented a Supplementary Budget for consideration and approval by the Assembly. The supplementary budget was then presented to the budgeted committee which committee interrogated several members of the Executive of the County Government and prepared a report which was adopted by the County Assembly. Thereafter the projected estimates of the supplementary were forwarded to the Governor for assent but the Governor referred the said supplementary budget back to the County Assembly with a memorandum of reasons requesting the County Assembly to align the budget with the provisions of the law based on inter alia the fact that:

1. The bill as passed and forwarded contravenes regulation 37 (1) of the **Public Finance Management (County Governments) Regulations 2015** which enjoins a County Assembly in exercising its budget making duties under section 131 of the **Public Finance Management Act, 2012** to amend the proposal by the Executive by a variation not exceeding 1% either upwards or downwards.
2. The County Assembly has over-stepped its mandate by listing specific projects within a bill as its sacred role is legislation, oversight and representation and not implementation which is the work of the interested parties herein.
3. The proposal for payment of pending bills were rejected and/or mutilated whereas as per a circular from the office of controller of budget **COBCIRCULAR NO. 2/2018 Ref COB/CIR/002/VOL 1** dated **16/2/2018** advised that pending bills should form the first charge during expenditure.

36. Accordingly, it was submitted that the Supplementary Bill after being referred back by the Governor, the Speaker and the Clerk committed the same to the County Assembly for consideration and the County Assembly subjected the proposed amendments for voting which required a 2/3 majority to defeat the amendments as per the provisions of section 24 of the **County Government Act**. However, when the voting took place the vote failed to reach the 2/3 majority required to defeat the amendments. It was submitted that upon the failure to reach the said threshold, the Speaker and the Clerk should have prepared a Supplementary Budget as per the memorandum of reasons by the Governor. Instead of doing so the Speaker directed that she would be making a ruling on the matter on the 6<sup>th</sup> June, 2018.

37. It was submitted that in so doing the Speaker acted outside the provisions of the law as she does not have any right to vote as her role is to declare the outcome of a vote. According to the Petitioner, the Speaker's decision was illegal, un-procedural and un-constitutional and infringes on the rights of the petitioner and those of the citizen of Machakos County.

38. In support of his submissions the Petitioner relied on Articles 1, 2(2), 2(4), 3, 20, 22, 23, 73(i), 175, 207, 224, 258 and 259 of the Constitution. He also relied on sections 8, 20 and 24 of the **County Government Act**.

39. The Petitioner, in support of his petition also relied on **John Mining Temoi and Another vs. Governor of Bungoma County and 16 Others (2014) eKLR** and submitted that the petitioner herein has brought this petition under Article 22 and 258 on the ground that the actions of the respondents if not stopped by an order of this court he stands to have his fundamental right to health care and other rights denied, violated, threatened and/or denied. He also cited **Tyson Ng'etich & Another vs. Governor, Bomet County Government & 5 Others (2015) eKLR** which adopted with approval the reasoning in **Trusted Society of Human Rights vs. MumoMatemu and another (2013) EKLR** and averred that he had clearly illustrated to this court the provisions of the Constitution that stand to be violated if the actions of the respondent are allowed to stand and that the petition was brought under Articles 1, 2, 3, 4, 6, 10, 19, 20, 21, 22, 23, 27, 35, 42, 43, 46, 47, 48, 73, 75, 159, 165, 174, 175, 176, 183, 187, 207, 220, 221, 224, 196 and 259 of the Constitution of Kenya 2010. Further, it was submitted that the petitioner had proved to this court that his right and the rights of the citizen of Machakos County to health care and education stand to be infringed on if the actions by the respondents are allowed to stand. Since the petition by the petitioner starts with a description of the parties; it gives a background of the petition, the legal foundation of the petition, more particulars of breach or alleged breach, reliefs sought and an affidavit in support of the petition, it was submitted that the petitioner herein had met the principles laid out in the case of **Trusted Human Rights vs. Mumo Matemu and Another (2013) eKLR** with regards to filing of constitutional petitions hence the same ought to be allowed as presented.

40. As regards the supremacy of the Constitution the petitioner relied on **Supreme Court of appeal of South African in Speaker of the National Assembly and others vs. De Lille. M.P and another [297/298] [1999 ZASCA** as cited by the Court of Appeal in **MumoMatemu vs. Trusted Society of the Human Rights Alliance and 5 others (2013) eKLR**.

41. According to the Petitioner, the ***County Government Act*** no. 17 of 2014 operationalises the provisions of Article 175 of the Constitution and creates the legal framework for the establishment and operation of County Governments. Section 20 of the ***County Government Act*** provides for the process of voting in the county assemblies while section 24 thereof provides for the process to be followed by the Governor of the County Assembly in assenting into law bills. To the Petitioner, since the Constitution is supreme and the source of all legislative authority, every Kenyan citizen regardless of his/her standing in the society is bound to act within the provisions of the Constitution hence the respondents cannot purport to act outside the provisions and the provisions of the ***County Government Act*** which derives its powers from the Constitution. Any act or omission that is done against the provisions of the constitution is null and void and should not be allowed to stand. According to him, failure by the Respondents not to incorporate the memorandum of reasons by the Governor into the ***Machakos County Supplementary Bill 2018*** goes against the letter and spirit of the Constitution and should not be allowed to stand. To him, there are laid down procedures of opposing the Memorandum of reasons by the County Assembly provided for in the County Government Act which the respondents should have employed.

42. In its submissions the Petitioner relied on **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR** as adopted in **Rep vs. Cabinet Secretary for Internal Security exparte Gragory Oriaro Nyauchi & 4 others (2017) eKLR** as well as **Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707** and submitted that he has sought orders of mandamus compelling the Respondents herein to forward the ***Machakos County Supplementary Bill 2018*** as incorporating the reservations of the Governor within the next seven days for assent. An order of mandamus is usually directed to a specific person, corporation and/or inferior tribunal requiring them to perform a specific duty which they ought to have done. The respondents herein are mandated by the Constitution of Kenya and the County Government Act to interrogate and approve the Supplementary Budget presented to the by the County Treasury. Failure by the respondents to carry out their duty of interrogation and approval any person aggrieved can sue for orders of mandamus compelling the respondents to perform their duties as provided for in the Constitution and the ***County Government Act***.

43. As regards the doctrine of separation of powers the Petitioner relied on the decision of the Court of Appeal in **Mumo Matemu vs. Trusted Society of Human Rights Alliance and 2 Others, Okiya Omtatah and 5 Others vs. Attorney-General and 3 Others [2013] eKLR** and submitted that Article 174 of the Constitutions establishes the devolved governments. Article 175 provides for the principles of devolved governments and amongst the principles is democratic principle and separation of powers. Article 176 provides for the arms of the county government to include the County Assembly and the County Executive. The principle of separation of powers in county assemblies is supposed to be exercised as between the County Assembly and the County Executive. The County Executive and the County Assembly each have specific functions which are provided for by the law to perform. Each of the two organs of the government is required to carry out its duty independently without interference from the other organ of the government unless to the extent provided for under the law.

44. It was further submitted that it is the role of the County Executive to prepare the Supplementary Budget which is interrogated and approved by the County Assembly and forwarded to the Governor for assent. The County Assembly cannot therefore purport to engage in the process of preparing the subject because that is the sole responsibility of the County Executive. Amongst the reason that the Governor failed to assent to the Supplementary Bill forwarded to him by the County Assembly was the respondents had overstepped their mandate and purported to list specific projects within the Supplementary Bill they wanted performed. They also purported to mutilate and/or reject payment of pending bills which was not within their mandate. The mandate of the County Assembly is oversight and representation and not budget making.

45. Based on the procedures through which County Bills are assented into law in section 24 of the County Government Act, it was submitted that the Constitution and the ***County Government Act*** no. 17 of 2014 do not provide for instances when a county assembly fails to attain a two thirds majority vote to veto the memorandum of reasons given by the governor but only contemplates instances whereby a vote of two thirds majority is achieved. In the instant case the County Assembly conducted a vote to veto the memorandum of reasons given by the Governor but failed to attain a two thirds majority of the County Assembly and therefore the veto power as envisaged in section 24 of the ***County Assembly Act*** failed. The 2<sup>nd</sup> respondent on the other hand adjourned the assembly without giving a ruling on the way forward. To the Petitioner, upon the failure by the County Assembly to pass a vote of a majority of two thirds to veto the memorandum of reasons given by the Governor, the bill should have been amended to incorporate the memorandum of reasons by the Governor and forwarded to him for assent.

46. In light of the foregoing it was submitted that the respondents whose duty is to interrogate and approve the supplementary budget and present it to the 1<sup>st</sup> interested party have failed, refused, ignored and/or neglected to present the supplementary budget to the 1<sup>st</sup> respondent due to reasons well known to them. The Petitioner therefore prayed that the petition be allowed as sought.

## **1<sup>st</sup> and 3<sup>rd</sup> Respondents' Submissions**

47. On behalf of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents, it was submitted while reiterating the contents of the replying affidavit that Chapters Eight (Legislature), Nine (Executive) and Ten (Judiciary) of the Constitution are clear that each of these arms of government are independent of each other and shall perform their respective functions in accordance with the Constitution. This therefore means that the Principle of Separation of Powers is well spelt out in the Constitution and for this court to halt the work of a legislative constitutional body will be interfering with that body's powers and or functions. Since Article 175(a) of the Constitution provides that County Governments shall be based on democratic principles and the separation of powers, it was submitted that the High Court cannot interfere with another arm of government's function unless a clear cut case is brought on which provisions of the law are being infringed or threatened to be infringed by a body carrying out its mandate within the confines of the Constitution. To the said Respondents, the process of debating and passing of Bills as contained in sections 20-24 of the **County Government's Act**, No. 17 of 2012 is purely legislative hence the court cannot interfere with the proceedings of the 2<sup>nd</sup> Respondent, which is a legislative body as the proceedings of the 2<sup>nd</sup> Respondent of the 6<sup>th</sup> April, 2016 were conducted in compliance with the rules and regulations provided for and this Honourable Court has no jurisdiction to supervise a constitutional body on how to conduct its business.

48. The said Respondents in support of their submissions relied on **Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 Others ( 2013) eKLR** , **Bernard Muia Tom Kiala –vs- The Speaker of Machakos County Assembly & 4 Others**, and in particular **Simon Wachira Kagiri vs County Assembly of Nyeri & 2 Others [2013] eKLR**.

49. In their view, this Court cannot interfere with an independent process by the 1<sup>st</sup> Respondent since the Petition has not specified which provisions of law have been breached and or violated and or are threatened to be violated. Reliance was also placed in **John Harun Mwau & 3 Others –vs- A.G & 2 Others John Harun Mwau & 3 Others –vs- A.G & 2 Others [2012] eKLR**.

50. According to the said Respondents, the Petitioner has not disclosed to this Honourable Court the following chronology of events and as such is not deserving of any orders of this Honourable Court:

- i) On the 21<sup>st</sup> May, 2018 the Assembly held a House held a special sitting to consider the Governor's Memorandum on the ***Machakos County Supplementary Appropriation Bill, 2018*** among other items. The requirement of two-thirds majority to veto the Governor's Memorandum was not reached and the Speaker advised the Members of the County Assembly that she would give her considered opinion on the scenario on 5<sup>th</sup> June, 2018.
- ii) The Assembly sat as from 11.06 am on the 28<sup>th</sup> May 2018 to deliberate on the Governor's Memorandum on the ***Machakos County Supplementary Appropriation Bill, 2018***.
- iii) At 2.01pm the Speaker directed that the matter of the ***Machakos County Budget and Appropriation Bill 2018*** be placed on the Order Paper of the sitting of the Assembly on the same day at 2.30pm.
- iv) At 3.36pm the members of Machakos County Assembly considered the ***Machakos County Budget and Appropriation Bill No. 1 of 2018*** and the Committee of the whole House considered the Governor's Memorandum and approved the same with amendments.
- v) This Petition was filed on the 25<sup>th</sup> May, 2018 but served on the 29<sup>th</sup> May, 2018 when the Bill had already been approved with amendments hence the same has been overtaken by events. The Bill has already been assent to.
- vi) The statement by the second respondent that she would give a ruling on the matter in question on 5<sup>th</sup> June 2018 is not illegal, unprocedural or unconstitutional. It is a legislative procedure that is accepted throughout the world.

51. It was therefore submitted that the Speaker did not violate any law by adjourning the House until 5<sup>th</sup> June 2018 after the vote on the ***Machakos County Supplementary Bill 2018*** since the County Assembly is allowed by section 24(3) of the **County Governments Act** to follow the appropriate procedures in deliberating on the said Bill. It was their contention that whereas if the supplementary Bill was not signed into law, the Assembly would not have been able to operate, the law must be followed in passing the Bill and as such, the supply of the essential services alleged to be in the verge of being lost as per Paragraph 25 of the Petition will be prejudiced. The Bill has already been forwarded to the Governor for assent and published into law as aforementioned and an order by the court stopping the forwarding thereof would have the exact opposite effect of the objectives of the Petitioner in bringing this petition as it will interfere with the ability of both the county executive and Assembly to appropriate funds for their normal operations before the end of the financial year which is 30<sup>th</sup> June 2018.

52. It was reiterated that in any event and without prejudice to the foregoing, the memorandum of the Governor to the Assembly did not contain any specific proposed amendments to the Bill in question and therefore they are incapable of being incorporated in the Bill. The issues raised by the Governor in the memorandum are purely legal matters which were conclusively dealt with by the Assembly.

53. According to the Respondents, there is no legal requirement for the Assembly to forward to the Governor, documents other than the Bill being assented to itself, once passed by the Assembly. Besides, the detailed programme budget was forwarded to the Governor upon request. Before the final pronouncement of adoption or rejection of a motion, a Bill is subject to the procedures of the House as stipulated in the Standing Orders. According to Standing Order No. 65 unless otherwise provided in the Constitution or any other law, questions arising in the Assembly are decided by a majority of members in the Assembly, present and voting. Section 24 of the **County Governments Acts** requires two thirds of the membership of the House for such a motion. This was not achieved so the motion fails. The Assembly cannot make decisions by default.

54. It was therefore submitted that it is only fair and in the interest of justice that the entire Petition herein be dismissed with costs to the

Respondents as the same has not met the thresholds for grant of constitutional orders in that the Petitioner does not disclose what provisions of Constitution have been violated not pray for any declaration of an illegality or violation of the Constitution by the Respondents.

55. According to the said Respondents, it is clear that:

- i) The court cannot prevent the Respondents from forwarding the said Bill to the 1<sup>st</sup> Interested Party;
- ii) The court cannot interpret the Constitution so as to create a violation of a non-existent procedure and or provision;
- iii) The court cannot interfere with the proceedings of the 1<sup>st</sup> Respondent, which is a legislative body as the proceedings of the 1<sup>st</sup> Respondent of the 21<sup>st</sup> May, 2018 were conducted in compliance with the rules and regulations provided for and this Honourable Court has no jurisdiction to supervise a constitutional body on how to conduct its business.

56. The Respondents therefore prayed that the petition be dismissed with costs to them.

### **The Submissions of the Interested Parties**

57. On behalf of the Interested Party, the factual averments were reiterated and it was submitted that after the vote failed to reach the 2/3 majority, the respondents should have prepared a Supplementary Budget as per the memorandum of reasons by the Governor and forward the bill to the Governor for assent. However the Speaker directed that she would be making a ruling on the matter on the 6<sup>th</sup> June, 2018. According to the interested parties, the actions by the Speaker not to hold that failure by the County Assembly Members to raise a vote of a two thirds majority the County Assembly had failed to veto the memorandum of reasons by the Governor and the same should have been incorporated into the supplementary budget and the same forwarded with amendments to the Governor for assent.

58. They were therefore of the view that the Speaker's actions were illegal, unprocedural, and unconstitutional and infringed on the rights of the Citizens of Machakos County.

59. In support of their position, they relied on the same legal provisions that the petitioner relied on as well as the authorities cited by the petitioner and submitted that the Governor acted within the provisions of section 24 of the **County Government Act** by refusing to assent to the **Machakos County Supplementary Budget 2018** and referred the same back to the respondents with reasons for not assenting to the bill and that the Respondents had their options provided for in section 24 of the **County Government Act**. They should have either amended the bill as per the reasons provided by the Governor and returned the bill to him for assenting into law or by a majority of two thirds of the members of the County Assembly passed the bill without amendment. The respondents chose the latter however they were unable to raise a two thirds majority to defeat the memorandum of reasons by the 1<sup>st</sup> respondent. The memorandum of reason by the County Assembly were not defeated by the vote by the County Assembly members and therefore the respondents ought to have amended the bill as per the recommendations of the Governor and forwarded the same to the him for assenting into law.

### **Determination**

60. I have considered the Petition, the affidavits both in support of and in opposition thereto as well as the submissions and authorities cited.

61. As regards the issue of *locus standi*, in **Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010**, the Court expressed itself as follows:

“over time, the English Courts started to deviate and depart from their contextual application of the law and adopted a more liberal and purposeful approach. They held that it would be a grave lacuna in the system of public law if a pressure group or even a single spirited taxpayer, were prevented by an outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The strict rule of *locus standi* applicable to private litigation is relaxed and a broad rule is evolved which gives the right *locus standi* to any member of public acting *bona fide* and having sufficient interest in instituting an action for redress of public wrong or public injury by a person who is not a mere busybody or a meddlesome interloper; since the dominant object of Public Interest Litigation is to ensure observation of the provision of the constitution or the law which can be best achieved to advance the cause of the Community or public interest by permitting any person, having no personal gain or private motivation or any other oblique consideration, but acting, *bona fide* and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery in motion like *action popularis* of Roman Law whereby any citizen could bring such an action in respect of public delict. Standing will be granted on the basis of public interest litigation where the petition is *bona fide* and evidently for the public good and where the Court can provide an effective remedy...In Kenya the Court has emphatically stated that what gives *locus standi* is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population. The court equally has recognised that organisations have rights similar to that of individual private member of the public. A new dawn was the ushered in and the dominion of Private Law and its restrictive approach was dealt a final blow. A new window of opportunity emerged in the area of Public Law and shackles of inhibition in the name of *locus standi* were broken and the law was liberalised and a purposeful approach took the driving seat in the area of Public Law. In human rights cases, public interest litigation, including lawsuits challenging the constitutionality of an Act of Parliament, the procedural trappings and restrictions, the preconditions of being an aggrieved person and other similar technical objections, cannot bar the jurisdiction of the court, or let justice bleed at the altar of technicality. The court has vast powers under section 60 of the Constitution of Kenya, to do justice without technical restrictions and restraints; and procedures and reliefs have to be moulded according to the facts and circumstances of each case and each situation. It is the fitness of things and in the interest of justice and the public good that litigation on constitutionality, entrenched fundamental rights, and broad public interest

protection, has to be viewed. Narrow pure legalism for the sake of legalism will not do. We cannot uphold technicality only to allow a clandestine activity through the net of judicial vigilance in the garb of legality. Our legal system is intended to give effective remedies and reliefs whenever the Constitution of Kenya is threatened with violation. If an authority which is expected to move to protect the Constitution drags its feet, any person acting in good faith may approach the court to seek judicial intervention to ensure that the sanctity of the Constitution of Kenya is protected and not violated. As part of reasonable, fair and just procedure to uphold the Constitutional guarantees, the right to access to justice entails a liberal approach to the question of *locus standi*. Accordingly in constitutional questions, human right cases, public interest litigation and class actions, the ordinary rules of Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from. In these types of cases, any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused or to a defined class of persons represented, or for a contravention of the Constitution, or injury to the nation. In such cases the court will not assist on such a public-spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception...”

62. The Court continued:

“In the interest of the realisation of effective and meaningful human rights, the common law position in regard to *locus standi* has to change in public interest litigation. Many people whose fundamental rights are violated may not actually be in a position to approach the Court for relief, for instance, because they are unsophisticated and indigent, which in effect means that they are incapable of enforcing their fundamental rights, which remain merely on paper. Bearing this in mind, where large numbers of persons are affected in this way, there is merit in one person or organisation being able to approach the court on behalf of all those persons whose rights are allegedly infringed. This means that human rights become accessible to the metaphorical man or woman in the street. Accessibility to justice is fundamental to rendering the Constitution legitimate. In this sense, a broad approach to *locus standi* is required to fulfil the Constitutional court’s mandate to uphold the Constitution as this would ensure that Constitutional rights enjoy the full measure of protection to which they are entitled.”

63. In Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012 the Court of Appeal stated at page 16 as follows:

“Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for *locus standi* that places hurdles on access to the courts except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the argument of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1<sup>st</sup> respondent had the *locus standi* to file the petition. Apart from this, we agree with the superior court below that the standard guide for *locus standi* must remain the command in Article 258 of the Constitution.”

64. 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.*

65. 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.*

66. Long before the promulgation of the current Constitution, it was held on 11<sup>th</sup> March, 1970, in *Shah Vershi Devji & Co. Ltd vs. The Transport Licencing Board* Nairobi HCMC No. 89 of 1969 [1970 EA 631; [1971] EA 289 that:

“Section 70 of the Constitution of Kenya itself creates no rights but merely gives a list of the rights and freedoms which are protected by other sections of Chapter V of the Constitution. It may be helpful in interpreting any ambiguous expressions in later sections of Chapter V. The word “person” is defined in section 123 as including “any body of persons corporate or unincorporated. Thus, a company is a “person” within the meaning of Chapter V of the constitution which is headed “Protection of Fundamental Rights and Freedoms of the Individual” and would be entitled to all the rights and freedoms given to a “person” which it is capable of enjoying. The word “individual” can be misunderstood. It is not defined in the Constitution nor in the Interpretation and General Provisions Act (Cap 2). But the meaning of it in the context in which it is used is clear. If a right or freedom is given to a “person” and is, from its nature, capable of being enjoyed by a “corporation” then a “corporation” can claim it although it is included in the list of rights and freedoms of the individual”. The word “individual” like the word “person”, does, where the context so requires include a corporation. The word must be construed as extending, not merely to what is commonly referred to as an individual person, but to a company or corporation. Supposing the right to be given by a special Act of Parliament to a limited company, it seems impossible to suppose that they would not be within the word “individual”. “Individual” seems to be any legal person who is not the general public.”

67. The issue of standing was also dealt with by Nyamu, J (as he then was) in *Mureithi & 2 Others (for Mbari ya Murathimi Clan) vs. Attorney General & 5 Others* Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443 as follows:

“It will be equally difficult to restrain the public spirited citizen or well organised and well equipped pressure groups from articulating issues of public law in our courts. It is for this reason that I think Courts have a wide discretion on the issue of standing and should use it well in the circumstances of each case. The words person aggrieved are of wide import and should not be subjected to a restricted interpretation. They do not include, if course, a mere busybody who is interfering in things that do not concern him but this include a person who has a genuine grievance because an order has been made which prejudicially affects his interests and the rights of citizens to enter the lists for the benefit of the public or a section of the public, of which they themselves are members. A direct financial or legal interest is not required in the test of sufficient interest.”

68. The Petitioner herein describes himself as a resident of Machakos County and brings this Petition on his behalf as a human rights defender and in the interest of the People and citizens of Machakos County. He claims that by the actions or inactions of the Respondents, his constitutional rights and those of the people of Machakos have been either violated or threatened with violation. Article 22(1) and (2) of the Constitution permits him 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 and he can do this in the public interest. Apart from that Article 258 of the Constitution permits the Petitioner to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention and similarly in this case he can do so not only in his own interest, but in the public interest as well. Under the current constitutional dispensation Article 3(1) provides that every person has an obligation to respect, uphold and defend the Constitution. Accordingly where a person is of the *bona fide* view that a provision of the Constitution has been violated or is threatened, the person is not only entitled to but is enjoined to bring an action to protect the Constitution. I therefore have no hesitation in my mind in finding that the Petitioner herein was within his rights in bringing this Petition to ventilate issues which in his view were geared towards upholding and defending the Constitution.

69. As regards as regards the doctrine of separation of powers, in his separation of powers theory, **Montesquieu** had sought to address the eternal mischief of abuse of power by those to whom it is entrusted. He observed [*The Spirit of the Laws* (1948)]:

*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.*

70. 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.*

71. 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 Montesquieuan 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.”

72. 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*.

73. 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."**

74. The system of checks and balances serves the cause of accountability, and it is a two-way motion between different State organs, and among bodies which exercise public power. The commissions and independent offices restrain the arms of Government and other State organs, and *vice versa*. 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.

75. 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."**

76. However, 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.***

77. 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 where a question arises as to whether an enactment is inconsistent with the Constitution or is passed in contravention of the 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. The contrary argument, in our view, runs counter to the constitutional provisions with respect to the jurisdiction of this Court. The jurisdiction of the Court to invalidate laws that are unconstitutional 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."

78. 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..."**

79. 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.”

80. 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. ”

81. 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.”

82. 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) on his part expressed himself as follows:

“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.”

83. The Court went on to state as follows:

“While it imposes a primary obligation on Parliament to facilitate public involvement in its legislative and other processes, including those of its committees, it does not tell Parliament how to facilitate public involvement but leaves it to Parliament to determine what is required of it in this regard. A review by a court of whether Parliament has complied with its obligation under section 72(1)(a) calls upon a court to intrude into the domain of a principal legislative organ of the state. Under our Constitution, this intrusion is reserved for this Court only. A construction of section 167(4)(e) which gives this Court exclusive jurisdiction to decide whether Parliament has complied with its constitutional obligation to facilitate public involvement in its legislative processes is therefore consistent with the principles underlying the exclusive jurisdiction of this Court. An order declaring that Parliament has failed to fulfil its constitutional obligation to facilitate public involvement in its legislative process and directing Parliament to comply with that obligation constitutes judicial intrusion into the domain of the principle legislative organ of the state. Such an order will inevitably have important political consequences. Only this Court has this power. The question whether Parliament has fulfilled its obligation under section 72(1)(a) therefore requires this Court to decide a crucial separation of powers question and is manifestly within the exclusive jurisdiction of this Court under section 167(4)(e) of the Constitution.”

84. 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.”*

85. I am are 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.

86. I must however caution that Courts must exercise restraint where the Legislative arm of the State is still undertaking its legislative mandate must not interfere, save in exceptional circumstances, where the legislative process is still in motion.

87. As regards the issue of precision in pleadings relating to interpretation and application of the provisions of the Constitution, it is my view that the decision in **Anarita Karimi Njeru vs. The Republic (1976-80) 1 KLR 1283**, must now be read in light of the provisions of Article 22(3)(b) and (d) of the Constitution under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the applicant ought to set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss an application merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3)(b) under which proceedings may even be commenced on the basis of informal documentation. This is not to say that the Court ought to encourage and condone sloppy and carelessly drafted petitions. What it means is that:

**“the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out. But the new approach is not to say that the new thinking totally uproots all well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice.”**

See **Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 2 Others Civil Appeal (Application) No. 152 of 2009.**

88. It must similarly be remembered that a High Court is by virtue of the provisions of Article 165 of the Constitution a Constitutional Court and therefore where a constitutional issue arises in any proceedings before the Court, it is enjoined to determine the same notwithstanding the procedure by which the proceedings were instituted.

89. In my view where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of would amount to this Court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is our view and we so hold that the later ought to prevail over the former.

90. Being so guided, the main issue for determination in this Petition is the interpretation and application of sections 20 and 24 of the **County Governments Act**. The said provisions state as follows:

**20. (1) Except as otherwise provided in the constitution in this Act or in other legislation any question proposed for decision by the County Assembly shall be determined by majority of the members of the County Assembly present and voting.**

**(2) On question proposed for decision by a County Assembly-**

**a) The speaker of the County Assembly has no vote and**

**b) In the case of a tie, the question is lost**

**24(1) The speaker shall within 14 days forward a bill passed by the County Assembly to the governor.**

**(2)The governor shall within 14 after receipt of bill**

**a) Assent to the bill or**

**b) Refer the bill back to the County Assembly with a memorandum outlining reasons for referral**

**(2)If the Governor refers a bill back to the County Assembly, the County Assembly may following the appropriate procedure under this section**

**a) Amend the bill taking into account the issues raised by the governor, or**

**b) Pass the bill without amendment**

***(3) If a County Assembly amends the bill taking into consideration the issues raised by the governor the speaker shall within fourteen days submit the bill to the governor for assent.***

***(4) If a County Assembly passes the bill a second time without amendment or with amendments which do not accommodate the governor's concerns by a vote supported by 2/3 shall within seven days re-submit the bill to the governor and the governor shall within seven days assent to the bill.***

***(5) If a county assembly passes the Bill a second time, without amendment, or with amendments which do not accommodate the governor's concerns by a vote supported by two-thirds of members***

***the county assembly, the speaker shall within seven days re-submit the Bill to the governor and the governor shall within seven days assent to the Bill.***

***(6) If the governor does not assent to a Bill or refer it back within the period referred to under this section, the Bill shall be taken to have been assented to on the expiry of that period.***

91. It is therefore clear that there are certain scenarios expressly contemplated by the said provisions. First, the Bill may upon being received by the Governor, be assented to in the manner submitted. In that event it becomes law. Secondly, the Governor may sit on the Bill without taking any action at all in which event at the expiry of the fourteen days from the date of its submission, the bill automatically becomes law. The third scenario is that the governor may within fourteen days of receipt of the Bill refer the bill back to the Assembly. This reference is however required to be accompanied with a memorandum outlining reasons for the referral. In this event the County Assembly has two options. It may amend the Bill incorporating the issues raised by the governor and then the speaker shall within fourteen days submit the bill to the governor for assent. *It is here important to note that the fourteen days period is only for the submission of the Bill after the same is approved. There is no period provided by these provisions for the County Assembly to debate the re-submitted Bill.* The other option is that the County Assembly may pass the Bill without amendment, or with amendments which do not accommodate the governor's concerns. In other words the County Assembly may disregard the governor's concerns completely and resubmit the Bill in the form in which it was originally presented or it may incorporate fresh issues which were not in the original Bill and which were not raised by the governor in the referral. In that event if, *and if and only if*, the Bill is by a vote supported by two-thirds of members the County Assembly, the governor has no option but to assent to the Bill within seven days of its re-submission.

92. What then is the scenario where, upon the Bill being referred to the Assembly, it is voted on but the two thirds threshold is not achieved? In my view, it means that if the Bill is resubmitted to the governor, he is not bound to assent to it. He may still refer the Bill back to the Assembly in that event.

93. The question that arises is whether in the event of the failure by the Assembly to meet the threshold, the Bill must be deemed to have been passed incorporating the governors concerns. With due respect, I do not subscribe to this interpretation. That the doctrine of separation of powers apply to the County Governments as well as the National Government was clearly appreciated in **Simon Wachira Kagiri vs County Assembly of Nyeri & 2 Others** (supra) where it was held at page 13 thereof that:

***“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.”***

94. As appreciated above, when the Legislative and Executive powers are united in the same person, there can be no liberty. The system of checks and balances serves the cause of accountability, and it is a two-way motion between different State organs, and among bodies which exercise public power. If it was intended that in the event that the County Assembly does not meet the threshold for vetoing the decision of the governor to decline to assent to the Bill, the issues raised by the governor would be automatically incorporated in the Bill, the law would have expressly stated so. In any event the governor's concerns may not necessarily be geared towards the amendment of the Bill but may just be concerns noted for consideration by the Assembly and it would be impossible to term such concerns as a Bill unless the governor takes over the role of the County Assembly and draws the Bill to suit his concerns. Such an action, with due respect would be in conflict with the doctrine of separation of powers.

95. It is therefore clear that the law does not expressly provide for situations where the voting exercise does not meet the threshold for vetoing the decision of the governor not to assent to the Bill and the Speaker does not remit the Bill back in its original form, which in my view the law does not expressly prohibit, save that as I have stated hereinabove, the governor is not bound to assent to it. It is contended that the Speaker had no role to play in this grey area since she had no vote. This calls for a discourse on the role of the Speaker.

96. Clause 1 of the *Machakos County Assembly Standing Orders* provides as follows:

***(1) Where a matter is not expressly provided for by these Standing Orders or by other Orders of the House, any procedural question shall be decided by the Speaker.***

***(2) The decisions made in paragraph (1) shall be based on the Constitution of Kenya, statute law and the usages, forms, precedents, customs, Speaker procedures and traditions of the Assembly and the Parliament of Kenya and other jurisdictions to the extent that these are applicable to this Assembly.***

97. It is therefore clear that where there is a lacuna in the procedure to be adopted by the Assembly, it falls upon the Speaker to decide the question in accordance with Constitution of Kenya, statute law and the usages, forms, precedents, customs, Speaker procedures and traditions of the Assembly and the Parliament of Kenya and other jurisdictions to the extent that these are applicable to Machakos County Assembly. Although the Petitioner has insisted that the Speaker had no role in the matter after the conduct of the voting, no provision was pointed out to me that barred the Speaker from ruling on the procedural step to be taken after that process. As I have noted hereinabove there is no express

period prescribed within which the County Assembly is to determine a referral made by the governor on a bill. However in debating the same, the County Assembly is enjoined to take into account other constitutional and legislative timelines provided for the conduct of its business. It has however not been pointed to me that in reserving its ruling the Speaker contravened any express constitutional or legislative provision.

98. It is therefore my view that the Speaker was within her rights to make a decision on the way forward following the stalemate occasioned by the governor's referral as well as the subsequent proceedings. As to whether the Speaker's ruling would be lawful or not, it could not be challenged before its delivery. If any person was aggrieved by the delay in delivery of the decision, the right action would have been to institute proceedings to compel her to make a decision and not to declare her as yet to be made decision unlawful.

99. Accordingly, I have no reason to fault the decision taken by the Speaker.

100. Apart from that it is now clear that this Petition was overtaken by events upon the assenting the *Machakos County Supplementary Bill, 2018*. While I have clarified the issues raised herein, even if I had found fault with the manner in which the Speaker acted I would still have declined to grant the orders sought herein. As was held in John Harun Mwau & 3 Others –vs- A.G & 2 Others [2012] eKLR at page 26 where it was held that:

**“...this court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the Constitution conferred under Article 165 (3)(d) does not exist in a vacuum and it is not exercised independently in absence of a real dispute. It is exercised in the context of a dispute or controversy.....”**

101. Having considered the issue raised in this petition I find the same unmerited and the same is hereby dismissed.

102. Considering the state of the law and the fact that the petition was clearly a public interest litigation there will be no order as to costs.

103. Judgement accordingly.

**Dated at Machakos this 30<sup>th</sup> day of July, 2018**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Musya for Mr Nthiwa for the Interested Parties***

***Miss Mutuku for Miss Kamende for the Respondent***

***CA Geoffrey***