



**REPUBLIC OF KENYA**

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

**CONSTITUTION PETITION NO. 1 OF 2018**

**IN THE MATTER OF ARTICLES, 1,2,3,10,22,23,181,182 AND 259 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE REMOVAL OF A COUNTY GOVERNOR BY WAY OF IMPEACHMENT UNDER ARTICLE 181,  
CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE SECTION 33 OF THE COUNTY GOVERNMENT ACT, 2012 AND THE LEADERSHIP AND  
INTERGRITY ACT NO. 19 OF 2012**

**AND**

**HON. EMILIO MUREITHI KATHURI.....PETITIONER**

**VERSUS**

**HON. MARTIN NYAGA WAMBORA.....RESPONDENT**

**J U D G M E N T**

**1. INTRODUCTION**

This petition dated 07/01/2018 seeks for orders that this court do issue a declaration that in consideration of the judgment and decree in the Supreme Court Petition No. 32 of 2015, the removal process of the respondent Martin Nyaga Wambora as the Governor Embu County that was finalized on the 14<sup>th</sup> February 2014 by the Senate Parliament of Kenya was regular, lawful and valid.

The Second prayer is that this court declares that, consequently, in consideration of Chapter six of the Constitution of Kenya, the respondent Martin Nyaga Wambora is unfit and unsuitable to hold public office including the office of the Governor of Embu County.

**2. BACKGROUND FACTS**

By a motion moved by one Hon. Ibrahim Swaleh member of the County Assembly of Embu representing Kirimari ward, was approved for debate and supported by at least one third of the total membership of the assembly. The gist of the motion was to remove from office the Governor of Embu County for gross violations of the Public Procurement and Disposal Act, 2005, of the Public Finance Management Act, 2012, the County Government Act and the Constitution of Kenya for abuse of office. The motion was passed on the 16/01/2014.

Pursuance to Section 33 (2) of the County Government Act, the Speaker of the County Assembly informed the Senate who convened sittings of the house whereas the respondent was invited to defend himself. Subsequently, the senate found the respondent guilty of the three charges made against him and proceeded to remove him from office by way of impeachment under the provisions of Section 181 of the Constitution of Kenya and Section 33 of the County Governments Act, 2012.

The respondent successfully challenged the process of his removal at Kerugoya High Court in Petition No. 3 of 2014 and was reinstated as Governor. The decision was based on the considered view that the process of removal was flawed for it was taken out in disobedience of a court order made in Kerugoya Petition No. 1 of 2014. The decision ordering reinstatement of the respondent was upheld by the Court of Appeal sitting at Nyeri in Civil Appeal No. 24 of 2015.

The Supreme Court of Kenya in Petition No. 32 of 2015 reversed the decision of the Court of Appeal and that of the High Court and declared

that the order made on 21/01/2014 was unconstitutional, null and void *ab initio*. The judgment of Kerugoya High Court Consolidated Petition No. 3 of 2014 to the extent that the Hon. Speaker of the County Assembly and the Clerk thereto in contempt of court in the removal process of the respondent was declared a nullity.

### **3. THE PETITIONER'S CASE**

The Petitioner relies on the Supreme Court decision and urges this court that a declaration be made to the effect that the respondent's removal from office by the Senate was proper, lawful and regular, well grounded by the law since this court is bound by Section 164 of the Constitution to follow the decision of the Supreme Court.

The petitioner depones in his affidavit that the Senate had rightly found that the respondent had clearly failed in the discharge of the functions and role of the Office of Governor and thereby resulting to loss of public funds that occasioned disenfranchisement, disadvantage, inconvenience, injustice and unfairness on the people of Embu County.

According to the petitioner, the respondent had failed in the discharge of his official functions as the governor and violated the constitutional responsibilities as stipulated under Article 73 and 179(4) of the Constitution, Section 30(3)(f) of the County Governments Act. The petitioner urged this court to find that the respondent is therefore in gross violation of the Constitution and other laws and therefore unfit to hold a public office.

### **4. THE RESPONDENT'S CASE**

In his replying affidavit, the respondent addressed the issue of contractors hired for refurbishment of the Embu Stadium and a tender for supply of maize seeds for distribution to farmers in the County undertaken by the County Government and which the County Assembly claimed to be dissatisfied with. Public funds were said to be lost or misappropriated in the tender award.

The County Assembly summoned the County Secretary to answer questions related to the two tenders. The County Secretary sought for extension of time to put her response in order but the request was rejected and ended in a recommendation to the County Government to suspend the Secretary pending investigations by Ethics and Anti-Corruption Commission.

Before the outcome of the investigations of the Commission, a motion was moved by the County Assembly to impeach the respondent on grounds that he had ignored the recommendations of the County Assembly to suspend the County Secretary.

The Secretary filed Judicial Review proceedings Nairobi Misc. Application No. 6 of 2014 whereas the court ordered status quo to be maintained pending disposal of the application. The respondent could not act on the recommendations of the County Assembly to suspend the secretary in view of the orders of *status quo* which had to be complied with.

An order restraining the Speaker of the assembly from holding the impeachment proceedings was issued by Kerugoya High Court. In blatant disobedience of the said orders, the County Assembly went ahead and passed the impeachment motion and informed the senate accordingly. The Senate called for a special sitting to debate the matter.

The respondent obtained a conservatory order restraining the Senate from introducing or discussing the impeachment motion. An application for contempt of court was filed in Embu Miscellaneous Application No. 21 of 2014 against the Speaker of the Assembly and the Clerk in respect of the orders issued thereon which were not complied with.

These two matters were consolidated into Petition No. 3 and heard by a three judge bench of the High Court. The judgment was delivered on 16/04/2014 in favour of the respondent.

A second impeachment motion was moved before the County Assembly on 16/04/2014 and approved by the Speaker on the same day which was followed by a confirmatory resolution in the Senate.

The respondent then filed Embu Constitutional Petition No. 7 and 8 of 2014 against the County Assembly of Embu. Both petitions were consolidated and heard together. The judgment was to the effect that the due process in the removal of the respondent from office had been followed.

The respondent filed an appeal against the said judgment in the Court of Appeal Civil Appeal No. 194 of 2015. On 11/12/2015, the Court of Appeal in its judgment overturned the decision of the Embu High Court in Petition No. 7 of 2014 and allowed the said High Court Petition.

The Court of Appeal in its judgment castigated the Standing Orders of the County Assembly as being inconsistent with the Constitutional requirement of public participation. The court also found that the provisions of Article 181 for impeachment of the respondent was not followed and that there was no nexus between the conduct of the respondent and the allegations that formed the subject of the grounds for removal.

In the same judgment, the issue of contempt of court by the Speaker and the Clerk of the County Assembly were dealt with since it was part of the appeal. The court found that the Speaker and the Clerk were in contempt of court orders issued on 23/01/2014.

It is the respondent's contention that the Supreme Court in allowing the petition before it, only annulled the conservatory orders issued by Githua J. on 23/01/2014 and set aside the judgment and order of the Court of Appeal delivered in Civil Appeal No. 24 of 2014. It is further stated that no binding orders were made on the issue or status of the respondent's removal from office by the Supreme Court. The respondent holds the position that he was not removed from the office at the time the conservatory orders were issued.

In denying the contents of the petition, the respondent contends that there is no judgment that has been passed by any court of law finding him unfit to hold public office. Neither has he been found culpable of any unlawful or corrupt dealings. Indeed, he was elected into office for a second term on 8<sup>th</sup> August 2017. For this reason, this petition has been overtaken by events.

The respondent argued further that he was cleared by Ethics and Anti-Corruption Commission to compete and vie for the office of Governor on 08/08/2017 and declared governor-elect by Independent Electoral Boundaries Commission (IEBC) on 11/08/2017 having garnered the highest number of votes in the Embu gubernatorial race

The petition is referred to as a whimsical witch-hunt calculated to interfere with the respondent's performance of his duties as the Governor of Embu County and it is the respondent's prayer that it be dismissed with costs.

## **5. PETITIONERS SUBMISSIONS**

The petitioner submitted that the finding of the three judge bench decision in Kerugoya HC Petition No. 3 of 2014 on 23/01/2014 was based on the notion that the removal process proceeded in disobedience of a court order was therefore void *ab initio*.

It was further argued that although the Court of Appeal upheld the High Court decision, the Supreme Court declared that the restraining order of Githua J. in Kerugoya Petition No. 3 of 2014 was null and void.

The petitioner argued that in quashing the High Court judgment, the Supreme Court found that the High Court had no jurisdiction to stop a constitutionally mandated process that had specific timelines. It was further submitted that the Supreme Court observed that there was justification for immediate non-compliance as would otherwise been required for an order of a court properly issued.

The petitioner is convinced in his submissions that by virtue of the Supreme Court judgment, the removal process of the respondent from the office of Governor was proper and valid. It follows that the removal of Governor from office by the Senate was lawful and effectual for the purpose for which it was made.

The petition outlined the itemized allegations made by the County Assembly and part of which formed the findings of the Senate. The functions of the office of the governor as set out in the Constitution and the County Governments Act were summarily stated with the petitioner arguing that in the findings of the Senate was that the respondent acted in gross violation of the Constitution and of statute law.

Emphasis was laid on the provisions of Article 73 of the Constitution that every state officer holds his office in public trust to be exercised in a manner that *inter alia* promotes public confidence in the integrity of the office.

On the issue of the burden of proof the Petitioner relied on the case of **PATRICK KINUTHIA CHEGE & 2 OTHERS VS ATTORNEY GENERAL [2015] eKLR** where the court held that the petitioners therein had failed to prove their case and the only consequence was that the petition must fail. The court dismissed the petition for lack of discharge of the burden of proof. The petitioner submitted that he has satisfied this court of the gross constitutional and statutory violations committed by the respondent.

The case of **BENSON RITHO MUREITHI VS J.W. WAKHUNGU & 2 OTHERS [2014] eKLR** where it was held: -

*In the present case, as the respondents tacitly concede, there are serious unresolved questions with regard to the integrity of the interested party which do not appear to have been considered by the 1<sup>st</sup> respondent in making the appointment to the chairmanship of the Athi Water Services Board. It is the duty of the 1<sup>st</sup> respondent to consider the issues and in exercise of the powers vested in her office under Section 51 of the Water Act, applied in accordance with the Constitution, make a determination of the suitability of the interested party under Chapter 6 of the Constitution. In the premises, this petition succeeds to the extent that the court finds that the 1<sup>st</sup> respondent failed to act in accordance with the Water Services Board fell below the standard set by the Constitution.*

## **6. THE RESPONDENT'S SUBMISSIONS**

It was submitted by the respondent that this court has no jurisdiction to declare that the respondent or any other state officer is unfit to hold public office. Such jurisdiction is vested in the Ethics and Anti-Corruption Commission by the relevant law. He relied on the case of **SAMUEL KAMAU MACHARIA & ANOTHER VS KENYA COMMERCIAL BANK AND 2 OTHERS [2012] eKLR** where it was held: -

*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.*

*.... 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. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.*

A similar observation was made in the case of **YUSUF GITAU ABDALLA VS BUILDING CENTRE (K) LTD AND 4 OTHERS [2014] eKLR** thus: -

***This court can only assume jurisdiction bestowed to it by the Constitution and/or Statute. Just as in the S.K. Macharia case, the court said that it cannot assume jurisdiction by way of judicial craft; this Court will not assume jurisdiction by way of a litigant's pestering. The court's mandate is to do justice, however that justice can only be dispensed through the laid down legal framework.... Courts of justice have the jurisdiction to do justice and not injustice...***

The respondent argued that despite the High Court having unlimited jurisdiction under Article 165 (3) (a) and (b), it lacks jurisdiction to decide whether a state officer or the respondent has abused his office and conducted gross misconduct violating the law. If the court was to assume this kind of jurisdiction as the petitioner wants it to do, such a move would violate the law and interfere with functions of other state organs. The laid down mechanisms of handling such claims would not be followed in the event that a court of law is to assume such jurisdiction. It is the responsibility of the Ethics and Anti-Corruption Commission (EACC) to deal with complaints brought under Chapter 6 of the Constitution by seeking assistance of any state organ.

In this regard the respondent relied on the case of **MICHAEL WACHIRA NDERITU & 3 OTHERS VS MARY WAMBUI MUNENE aka MARY WAMBUI & 4 OTHERS [2013] 1 eKLR** where it was held:

***Where mechanisms and procedures have been established by Statute, in this case the Leadership and Integrity Act and the Ethics and Anti-Corruption Commission Act, to address questions touching on the Integrity of a public officer, the court has no jurisdiction to deal with the matter.***

Similarly, in the case of **CHARLES OMANGA & 8 OTHERS VS ATTORNEY GENERAL & ANOTHER [2014] eKLR** it was held that: -

***The Leadership and Integrity Act establishes procedures and mechanisms for the effective administration of the administration chapter Six of the Constitution.***

In respect to the same principle, the respondents cited the case of **WILLIAM KABOGO VS FERDINARD WAITITU [2016] eKLR** where Onguto, J. declined to hear and determine issues relating to violation of Articles 10(2) and 73 of the Constitution.

The respondent cases to support his submissions that this petition is an abuse of the due process of the court namely: -

***a) Hunter Vs Chief Constable of Midland & Another [1981] 3 ALL ER 727***

***b) Richel Vs Macgrath 14 App. Cas 665***

***c) Graham Rioba Sagwe & Others Vs Fina Bank Ltd & 5 Others [2017] eKLR***

In the above named cases, the meaning and the principle of "abuse of due process of the court" was explained. I pick one of the quotations in the 3<sup>rd</sup> case: -

***"An abuse is done when one makes an excessive or improper use of a thing or employ such thin in a manner contrary to the natural legal rules for its use."***

The gist of the respondent's argument is that the Supreme Court extensively determined the issues before it and that the prayers in this petition were not part of the decision thus rendering this petition an abuse of the due court process.

The respondent cited the case of **COMMUNICATION COMMISSION OF KENYA VS ROYAL MEDIA SERVICES AND 5 OTHERS Petition No. 14 of 2014 [2014] eKLR** and that of **IEBC VS NASA & ANOTHER [2017] eKLR** to support its argument that the Kenya Constitution in particular Article 10(2) is the Supreme Law and that statutory law must be consistent with it.

It was argued further that the petitioner failed to annex several critical documents in support of his case, yet he is reminding the court to rely on the missing document. The respondent submits that it is trite law that parties are bound by their pleadings and relies on the cases of: -

***a) Nairobi City Council Vs Thabiti Enterprises***

***b) Charles Sande Vs Kenya Co-operative Creameries Limited Civil Appeal No. 154 Of 1992***

## **7. RESPONSE TO RESPONDENT'S SUBMISSIONS**

The petitioner filed supplementary submissions in answer to those of the respondent in which he submitted that it is not in dispute that the respondent was removed from office by the Senate on 14/2/2014 due to gross violation of Public Procurement and Disposal Act and Regulations; violation of the Public Finance Management Act and violation of the Constitution.

The existence of the Supreme Court decision which set aside the High Court and the Court of Appeal decisions is not in dispute. The effect of the said decision was to remove any challenge to the senate resolution to remove the respondent from office.

On the leadership and integrity Act and Chapter VI of the Constitution, the petitioner submits that it is not a legal requirement that one be found culpable of criminal charges for a declaration to issue of unsuitability to hold public office to demonstrate this position, the petitioner

relies on three decisions whereas the lack of integrity was discussed, namely: -

**1. Democratic Alliance Vs the President of SA and 3 others case No. 268 of 2011 [2011] ZA SCA 241**

**2. Trusted Society of Human Rights Alliance Vs AG & 2 Others [2012] eKLR.**

**3. Indian Supreme Court in center for PIL & Another vs Union of India & Another Petition Writ No. 348 of 2010**

The petitioner also responded on issues of the Court and the impact of the failure to annex important documents to the petition.

## **8. ISSUES FOR DETERMINATION**

I have identified the issues for determination in this petition are as follows:-

- 1) Whether this court has jurisdiction hear and determination petition.**
- 2) Whether this petition is an abuse of the due process of the court.**
- 3) Whether the respondent committed gross violation of the Constitution and of statute law.**
- 4) Whether the petitioner is entitled to the orders sought.**
- 5) Who between the parties shall meet the costs.**

## **9. WHETHER THIS COURT HAS JURISDICTION**

Article 165 of the Constitution provides for the jurisdiction of the High Court.

It provides: -

### **165(3)(d)**

*(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;*

*6. The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.*

The respondent argued that matters relating compliance with Chapter 6 of the Constitution and the Leadership and integrity Act are vested in the Ethics and Anti Commutation Commission.

The Supreme Court in the case of **SAMUEL KAMAU MACHARIA AND ANOTHER VS KENYA COMMERCIAL BANK LIMITED [2012] eKLR Civil Application No. 2 Of 2011** put the issue of jurisdiction correctly that:

***A court's jurisdiction flows from either the Constitution or Legislation or both. Thus a Court of law can only exercise jurisdiction as confined by the law. It cannot arrogate itself jurisdiction exceeding that confined by the law.***

In the case of **JUSTUS GITAU ABDALLA VS BUILDING CENTER(K) LTD AND 4 OTHERS** Petition No 27 Of 2014, Ibrahim, SCJ reiterated the same observation: -

***This Court can only assume jurisdiction bestowed to it by the Constitution and/or Statute. Just as in the S. K. Macharia case, the Court said that it cannot assume jurisdiction by way of judicial craft; this Court will not assume jurisdiction by way of a litigant's pestering. The Court's mandate is to do justice, however that justice can only be dispensed through the laid down legal framework. ....Courts of justice have the jurisdiction to do justice and not injustice....***

The petitioner seeks for declaratory prayers. Firstly, that the removal from office of the respondent was lawful, proper and valid. The second and 3<sup>rd</sup> prayers are also declarations sought on related issues.

Article 79 of the Constitution mandates Parliament to establish the Ethics and Anti-Corruption Commission with powers of a commission for purposes of ensuring compliance with, enforcement of the matters relating to Chapter 6 of the Constitution. Under section 4(2) of the Leadership and Integrity Act, the Commission has been assigned the role to oversee the implementation of the Act. This role is complemented to that of the court and it cannot be said that this court has no jurisdiction where a party seeks a remedy that falls under the provisions of Article 165 of the Constitution.

The case of **William Kabogo Vs F. Waititu** (supra) is distinguishable from this petition. The prayers in this petition seek declarations in regard to a matter where the Senate has made a resolution under Article 181 of the Constitution. The **William Kabogo** case sought for a

declaration among others that the respondent had violated Article 10(2) and 73 of the Constitution and is therefore unfit from holding a public office. It is within the functions of the Ethics and Anti-Corruption Commission to deal with matters under Article 73 of the Constitution.

The court found that it had no jurisdiction to deal with the integrity of the respondent since there are bodies with the mandate to address the issue. The petitioner in this petition is not asking the court to find respondent culpable under Article 73 but to make declarations based on the decision of a higher court. I therefore hold that this court in its supervisory and constitutional jurisdiction has power to hear and determine the issues raised in this petition.

On the failure to annex pleadings, the respondent argued that parties are bound by their pleadings and urged this Court to only refer on the three judgements of the High Court, Court of Appeal and Supreme Court and disregard the other documents referred but not availed by the petitioner. The missing documents are as follows: -

*i. Two reports of the County Assembly.*

*ii. Notice of Motion Filed before the county Assembly dated 16/01/2013.*

*iii. Letter of the County Assembly to the Senate dated 28/01/2014.*

*iv. Senate Report of the Special Committee investigating the respondent.*

The petitioner submitted that this court is enjoined by Section 60(b) of the Evidence Act Cap. 80 of the Laws of Kenya to take judicial notice of all Parliamentary and County Assembly proceedings.

*Section 60(b) provides: -*

*(1) The courts shall take judicial notice of the following facts-*

*(b) the general course of proceedings and privileges of Parliament, but not the transactions in their journals;*

The petitioner further argued that the documents in issue are set out in the three judgements provided to the court.

By virtue of Section 60(b) of the Evidence Act, this takes judicial notice of the following documents: -

- a) Senate impeachment report
- b) County Assembly Reports
- c) Letter of the County Assembly to the Senate

## **9. WHETHER THIS PETITION IS AN ABUSE OF THE COURT PROCESS**

The respondent relied on the case of **Hunter** (supra) in which it was held: -

***The abuse of the process of which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack on a final decision against the intending Plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.***

From the nature of this petition, it appears that the petitioner was motivated by the success of his petition in the Supreme Court to file this declaratory petition.

The court cleared Speaker and the Clerk of the Embu County Assembly of contempt of court charges by quashing the conservatory orders issued by the High Court.

Unlike the case of **Hunters** (supra), the issues before this court, relate to several declarations. I agree with the respondent that these matters would have been raised and canvassed before the Supreme Court. I am of the view that the fact that the issues were not raised or canvassed in the highest court of the land, does not amount to an abuse of the court process. It is clear from the judgment that the petition in the Supreme Court dealt with only part of the Kerugoya High Court judgement. I find that the petition has raised solid issues that call for determination.

## **10. THE LAW**

The petition relies on Article 185 of the Constitution as read together with Section 8 of the County Government Act which confers on the County Assembly an oversight role over the County Executive organs on accountability and transparency.

Article 185 of the Constitution provides: -

*(1) The legislative authority of a county is vested in, and exercised by, its county assembly.*

*(2) A county assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule.*

*(3) A county assembly, while respecting the principle of the separation of powers, may exercise oversight over the county executive committee and any other county executive organs.*

*(4) A county assembly may receive and approve plans and policies for— (a) the management and exploitation of the county's resources; and (b) the development and management of its infrastructure and institutions.*

Section 8 of the County Government Act provides: -

**8. (1) The county assembly shall—**

*(a) vet and approve nominees for appointment to county public offices as may be provided for in this Act or any other law;*

*(b) perform the roles set out under Article 185 of the Constitution;*

*(c) approve the budget and expenditure of the county government in accordance with Article 207 of the Constitution, and the legislation contemplated in Article 220(2) of the Constitution, guided by Articles 201 and 203 of the Constitution;*

*(d) approve the borrowing by the county government in accordance with Article 212 of the Constitution;*

*(e) approve county development planning; and*

*(f) perform any other role as may be set out under the Constitution or legislation.*

*(2) If a county assembly fails to enact any particular legislation required to give further effect to any provision of this Act, a corresponding national legislation, if any, shall with necessary modifications apply to the matter in question until the county assembly enacts the required legislation.*

Under Article 179(4) the governor is the head of the County Executive and is therefore accountable for use of County resources. The Embu County Assembly is said to have uncovered massive violation of procurement law and procedure and found it appropriate to exercise its oversight role on the respondent who was at that time the Executive Head in Embu County Government. A summary of the allegations of violations are given in the petition as follows: -

*a) Direct procurement of maize seeds in a tender and which seeds bought did not germinate.*

*b) Irregular procurement of works for the facelift of Embu Stadium that was floated at a cost of Kshs.8,000,000/= and later expanded to Kshs.50,000,000/=.*

*c) Direct procurement of motor vehicles by the Governor and County Secretary.*

*d) Failure to establish a tender committee as required by the law.*

*e) Other violations included in the tender report for the year 2013.*

The County Assembly served the respondent with a recommendation to suspend the County Secretary due to the alleged violations. When he failed to act, a motion to remove him for gross violation was passed by the County Assembly.

This was in exercise of the powers vested in the County Assembly under Article 181 of the Constitution and Section 33 of the County Government Act.

The report was forwarded to the Senate whose Special Committee heard the matter and gave the respondent a chance to defend himself. The Senate by majority votes resolved that the respondent was guilty and that he be removed from office.

As stated earlier, the respondent had obtained conservatory orders in Kerugoya High Court Petition No. 3 of 2014. Nonetheless, the Assembly proceeded to discuss and pass the motion for removal. The judgement in the petition was in favour of the respondent reinstating him to office. The petitioner argues that judgements of the High Court and Court of Appeal Nyeri were based on the evidence that the Speaker and the Clerk of the Assembly proceeded with the motion for removal in total disregard of the conservatory orders of the High Court thus rendering the removal process unlawful and void *ab initio*.

The judgement of the Supreme Court set aside the decision of the Court of Appeal in Civil Appeal No. 24 of 2014 as well as the conservatory orders issued by the High Court on 23/01/2014. It is this judgement that the petitioner relies on seeking several declarations the main one being that the respondent's removal from office by the Senate was lawful and that he should be declared unfit to hold a public office.

Article 10 of the Constitution provides: -

*(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—*

*(a) applies or interprets this Constitution;*

*(b) enacts, applies or interprets any law; or*

*(c) makes or implements public policy decisions.*

*(2) The national values and principles of governance include—*

*(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;*

*(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;*

*(c) good governance, integrity, transparency and accountability; and (d) sustainable development.*

As I have stated, the functions for enforcement and ensuring compliance are vested in the Ethics and Anti-Corruption Committee under Article 79 of the Constitution and Section 4(2) of the Leadership and Integrity Act.

It is trite law that the responsibility and functions of the Office of the Governor is neither criminal nor civil. It is a collective responsibility which is a policy issue as well as one of governance and accountability. The question of removal from office must take into consideration the relevant constitutional provisions. Article 226(5) of the Constitution provides that: -

Article 226(5)

*(5) If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not.*

In view of the collective responsibility, the threshold for removal of a governor from office must be strictly in accordance with the Constitution and with statute law.

I am aware of Article 163(7) of the Constitution which provides that: -

*“All courts other than the Supreme Court are bound by the decisions of the Supreme Court.”*

Bearing in mind this provision of the law and the principle of *stare decisis*, it is established law that this court is bound by the decisions of the Supreme Court so long as it relates to issues in the case before it. I am alive to the fact that each case depends on its own facts and circumstances which the court requires to examine and give due consideration in making its determination.

Article 181 of the Constitution governs removal of a governor from office while Section 33 of the County Government Act provides for the procedure to be followed in the process of removal. The County Assembly made the requisite resolution for removal and forwarded it together with all the necessary documents to the senate.

Out of five charges, the Senate found the respondent guilty of three charges, namely: -

*1) Violation of the Public Procurement and Disposal Act 2005 and Regulations 2013.*

*2) Violation of the Public Finance Management Act, 2012*

*3) Violation of the Constitution of Kenya*

The issue of determining whether the Senate met the constitutional threshold under Article 181 is the duty of the High Court. I have perused the authorities relied on by the parties and find that the issue was exhaustively dealt with the Court of Appeal in Civil Appeal No. 194 of 2015.

The respondent submitted that the judgment of the Supreme Court only dealt with the issue of contempt of court. This may be interpreted to mean that all the other declarations and orders of the High Court in Kerugoya H.C. Petition No. 3 of 2014 are still valid.

The court made the following orders: -

*(a) We declare that the proceedings for impeachment of a Governor under Article 181 of the Constitution are quasi-Judicial in*

nature and are therefore subject to the Jurisdiction of the High Court under Article 165(3)(d) and 6 of the Constitution.

(b) We declare that the proceedings, resolution, consequential gazette notices, actions and any communications with regard to the removal of the 1st Petitioner before the Embu County Assembly and the Senate were held in violation and in disregard of court orders and were therefore null and void.

(c) We hereby issue an order of certiorari to remove to the High Court and quash the resolution passed by the County Assembly of Embu dated 28th January 2014 and the Resolution of the Senate dated 14th February 2014 to remove the 1st Petitioner from office as the Governor of Embu County.

(d) We hereby issue an order of certiorari to remove to the High Court and quash the Gazette Notice No. 1052 of 17th February 2014 on the resolution of impeachment of the first Petitioner.

(e) We hereby direct that summons be issued and served on the Respondents in Misc. Application No. 4 of 2014, namely, Mr. Justus Kariuki Mate and Mr. Jim G. Kauma to appear before this Court on 15th May 2014 for further orders.

(f) On costs, Rule 26 of the Constitution of Kenya (Protection of Rights and fundamental freedoms) Practice and procedure Rules, 2013 provides that an award of costs is at the discretion of the Court. Taking into account the determination we have made in this matter, we order that each party should bear their own costs.

The Court of Appeal Nyeri in **Civil Appeal No. 24 of 2014** upheld part of the Kerugoya High Court judgment in its pronouncement made on 30/04/2014. The subject of the appeal was expressly stated in the judgment as follows: -

*“This is an appeal against part of the judgment of the High Court dated 16<sup>th</sup> April 2014 in Kerugoya Misc. Application no. 4 of 2014. The part of the judgment that is subject to this appeal, is in orders issued on 23/01/2014. The appellants are the speaker and clerk of the County Assembly of Embu respectively.”*

It is crystal clear that the Court of Appeal judgment delivered on 30/09/2014 was only about the contentious conservatory orders issued by Githua J. on 23/01/2014. There is no doubt that the Court of Appeal in Civil Appeal No. 24 of 2014 upheld the finding of the High Court in respect of the said orders.

The judgment of the Supreme Court in Petition No. 32 of 2015 the Court of Appeal judgment upholding the finding of the High Court on the conservatory orders. It is clear in the orders of the highest court on the land that it did not set aside the other orders of the Kerugoya High Court save for those related to the conservatory orders.

The petitioner’s argument is that the judgment of the Supreme Court by setting aside the conservatory orders effectively means that the impeachment of the respondent by the Senate is valid and that this court ought to declare him unfit to hold a public office.

I am convicted to give due consideration on the basis of the findings of the High Court in regard to the impeachment by the Senate. The relevant orders are worded as follows: -

a) We declare that the proceedings for impeachment of a governor under Article 181 of the Constitution are quasi-judicial in nature and are therefore subject to the jurisdiction of the High Court under Article 165(3) (d) and (6) of the Constitution.

b) .....

c) .....

d) We hereby issue an order of certiorari to remove to the High Court and quash the Gazette Notice no. 1052 of the 17<sup>th</sup> February 2014 on the resolution of impeachment of the 1<sup>st</sup> petitioner.

The High Court examined the facts and circumstances leading to the impeachment of the respondent as well as the process of both the County Assembly and the Senate and pronounced itself on the relevant issues. In regard to Section 33 which does not provide for a right to be heard for the Governor by the County Assembly the court stated: -

...“We are persuaded to find, which we hereby do, that even a the County Assembly, the right to a hearing must be accorded to a Governor at any time that the motion proposing removal from office is being debated before it is approved or rejected.”

It was further observed that: -

“As we have noted earlier, the County Assembly of Embu had already made provisions as to the right to a hearing in its Standing Orders but for unknown reasons, they chose to violate their own Standing Orders. It is therefore our finding that in so doing, they also violated the 1<sup>st</sup> petitioner’s right to fair administrative action enshrined under Article 47 of the Constitution. We make this finding bearing in mind that it is not disputed in this case, that in passing the resolution proposing removal of the 1<sup>st</sup> petitioner from office the County Assembly was acting as a quasi-judicial body.....”

*It is therefore clear in our minds that the right to be heard should apply whenever Section 33(1) of the Act is being invoked by any County Assembly.”*

In regard to the Senate proceedings, conservatory orders were issued in Nairobi Petition No. 51 of 2014 by Majanja J. on 4/02/2014 restraining the Speaker of the Senate from introducing, discussing, sitting or deliberating the impeachment of the 1<sup>st</sup> petitioner.

The High Court confirmed that service had been effected on the speaker of the Senate on the same day. The Speaker of the Senate ignored the court orders and proceeded to introduce the motion which was followed by other processes that culminated in the resolution for removal of the respondent.

The orders of Majanja J. issued on 04/02/2014 were not a subject of the Supreme Court Petition and have not been quashed, yet they were disobeyed. The nullification of the conservatory orders issued by Githua J. did not affect the orders of Majanja J. which were relied on extensively by the High Court in determining the validity and constitutionality of the resolution of the Senate.

In regard to the Senate resolution, the court held: -

*“The removal of the governor from office by the Senate was null and void **ab initio** and therefore amounted to a nullity in law.”*

The respondent also relied on the **Civil Appeal no.194 of 2015 Court of Appeal Nairobi MARTIN NYAGA WAMBORA VS 37 OTHERS [2015] eKLR.**

This appeal was against the orders of a three judge bench of the High Court (R. Mwangi, J. Korir W, J. and Odunga G, J.) dismissing Petitions No. 7 and 8 of 2014 (consolidated) where the petitioners separately sought to stop the removal motion against the governor in the County Assembly of Embu. The High Court dismissed the petitions which became the subject of this appeal. The Court of Appeal overturned the High Court decision and allowed the appeal making several declarations and orders.

The petitioner argued that he was not a party to Petition No. 7 and 8 of 2014 and that the decision of the High Court and that of the appellate court was not relevant to this petition.

The Consolidated Petition No. 7 of 2014 sought to stop a second round of removal from office of the respondent after he was reinstated by the High Court sitting at Kerugoya in its judgment delivered on 16/04/2014. The subject in the petition was the validity and constitutionality of the removal of the respondent herein for a second time. The facts of Petition No. 7 of 2014 and those of the Kerugoya Petition No. 3 of 2014 are similar and dealt with the application of constitutional and statutory provisions in the removal of the same Governor from office by the same County Assembly.

In my considered view, the Court of Appeal decision is relevant to this petition in that the facts and the issues are similar. The prayers in this petition and the issues arising thereto do overlap with those in Nairobi Petitions No. 7 and 8 of 2014 in regard to the threshold of impeachment of a governor from office.

The Court of Appeal in allowing the appeal held: -

- i. That the process of removal of the appellant (respondent herein) from the office was vitiated by lack of public participation.*
- ii. That the report of the Special committee of the Senate was vitiated by the appearance of bias on part of the Special committee of the senate.*
- iii. That Article 181 of the Constitution was not complied with for no nexus was established between the conduct of the appellant and the allegations that led to the grounds for removal.*
- iv. That the resolutions to remove the appellant as governor of the County Assembly on 29/04/2014 and the Senate on the 13/05/2014 be quashed.*
- v. That the senate’s resolution to impeach the Governor of Embu County be quashed.*

In its judgment, the Court of Appeal observed that there was lack of public participation in the process leading to the resolution of the County Assembly.

In my considered view, this finding is based on a constitutional principle under Article 196 of the Constitution and which is applicable to the resolution of the County Assembly made during first round of removal which is the subject of this petition.

Indeed, the Court of Appeal declared the Standing orders of the Embu County Assembly inconsistent with the constitutional requirement of public participation because of the stringent timelines.

During the first round of removal, the Embu County Assembly in passing their resolution was guided in the process by the same Standing orders. The resolution was quashed by the Kerugoya Court on 16/04/2014 and the County Assembly moved immediately to the 2<sup>nd</sup> impeachment. It is important to note that the Senate carried out its investigation and hearing of the Special committee relying on the resolution of the County Assembly which was wanting on compliance with Constitutional provisions.

The Court of Appeal stated: -

*“The appellants’ impeachments in January 2014 and on 29/04/2014 were based on the same grounds”.*

The **High Court Petition No. 7 of 2014** was alive to the twin nature of the two impeachments when it said: -

*“The basis of the impeachment presently complained of, is a replication of the first impeachment process. The substance of the facts giving rise to the complaints allegedly occurred in 2013. This act of replication exhibited open bias on the part of the County Assembly and the Senate against the respondent. The Court of Appeal castigated the act of the Senate constituting a special committee of the same members who conducted investigations of the first round of removal and reached a finding the Senate could not be expected to be fair.”*

## **11. CONCLUSION**

I come to the conclusion that the decision of the Supreme Court did not set aside the declarations and orders of the three judge bench in Kerugoya Petition No. 3 of 2014. The said orders are in my view still valid until set aside by a court of competent jurisdiction.

In my view, a court of law pronounces itself clearly for avoidance of doubt or to avoid creating ambiguity in the judgment. The court set aside the entire judgement of the Court of Appeal in Civil Appeal No.124 of 2014. There is no reason why the court did not do the same with the entire High Court judgment if it found that kind of order appropriate.

The conservatory orders set aside by the Supreme Court were issued on interim basis and except the order directly related or based on these orders, the rest of the judgment of the court are still valid. In effect, therefore, the orders regarding the quashing of the impeachment by the Senate are in my view still valid.

The petitioner cannot wish away the failure by the County Assembly to comply with constitutional provisions of public participation and purport to rely on the resolution for removal based on the County Assembly Standing Orders that have been declared unconstitutional by a court of competent jurisdiction.

The Court of Appeal overturned the finding of the three judge bench in Petition No. 7 of 2014 on their holding that the Senate had attained the threshold for removal under Article 181 of the Constitution. It was held that the threshold of “gross violations” had not been achieved by the Senate and that the nexus between the allegations and the governor was not established.

## **12. FINAL ORDERS**

It is my considered opinion that the Supreme Court decision only dealt with the subject of the conservatory orders issued on 23/01/2014. The petitioner has failed to establish his case that he is entitled to the orders sought in this petition.

I find that the petition lacks merit and dismiss it with costs to the respondent.

It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 30<sup>TH</sup> DAY OF OCTOBER, 2018.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Mr. Ahmednasir for Respondent**

**Petitioner present**