



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO. 27 OF 2015

IN THE MATTER OF INTERPRETATION OF ARTICLE 165, 176,

177 AND 178 OF THE CONSTITUTION OF KENYA 2010.

AND

**IN THE MATTER OF SECTIONS 11 OF THE COUNTY GOVERNMENT ACT NUMBER 17 OF
2012**

**IN THE MATTER OF THE COUNTY ASSEMBLY CAR LOAN (MEMBERS) SCHEME FUND
2014**

AND IN THE MATTER OF THE NAKURU COUNTY ASSEMBLY

MORTGAGE (MEMBERS) SCHEME FUND 2014

BETWEEN

MARGARET WANJIKU KIIRU.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE NAKURU COUNTY ASSEMBLY SERVICE BOARD.....2ND RESPONDENT

THE COUNTY GOVERNMENT OF NAKURU.....3RD RESPONDENT

THE CLERK, COUNTY ASSEMBLY OF NAKURU.....4TH RESPONDENT

FAMILY BANK LIMITED.....5TH RESPONDENT

RULING

The Petitioner **MARGARET WANJIRU KIIRU** has filed in the High Court this petition dated 4th June, 2015 in which she made the following prayers

a. That the court interprets the standing orders of the Nakuru County Assembly against the

backdrop of the Constitution and the County Government Act and makes a findings that –

- i. A motion for the impeachment of the speaker of the County Assembly ought to be given priority over any other business of the assembly;
 - ii. Where the clerk to the assembly fails or refuses to prioritize and present the motion for the impeachment of the speaker for debate of mandamus to comply with the law and present the said motion within a specific time;
 - iii. In this instance, the court issues an order of mandamus to compel the clerk of the county assembly to present the motion for impeachment of the speaker within such a time as the court may deem just.
- b. The court finds that the administration of the car loan scheme and the mortgage scheme of the Nakuru County Assembly by Family Bank is illegal, contrary to the regulations and in contravention of the national values of good governance, integrity, accountability and transparency;
 - c. The court issue an injunction restraining Family Bank from administering the car loan and the mortgage fund;
 - d. The costs of the petition be granted to the petitioner.

BACKGROUND

The petitioner is a member of the Nakuru County Assembly. Following a series of events at the Nakuru County Assembly the Petitioner formed the opinion that the speaker was unfit to hold office. She managed to obtain signature of over 1/3rd of the total members of the County Assembly as required by Section 11 of the County Government Act No. 17 of 2012, and thereafter the Petitioner placed before the clerk of the Assembly a Notice of Motion for the removal of the speaker. The petitioner expected that her motion would be listed in the order of business for the day to be deliberated upon by the assembly, but this was not to be as the business of the assembly for that particular day was disrupted by third parties. The failure by the clerk to list her motion in the order part constitutes the first limb of this petition.

The 2nd and 3rd limbs of this petition relate to the provision of car loans and mortgages to the Assembly members by the **“Public Finance County Assembly of Nakuru Car Loan Members Scheme Fund Regulations 2014”** (herein-after referred to as the car loan regulations) and the **“Public Finance County Assembly of Nakuru Mortgage Members Scheme Fund Regulations 2014”** (hereinafter referred to as the mortgage regulations), schemes for financing of car loans and mortgages for members of the Assembly were set up.

The two schemes were to be managed and administered solely by the management committees established by the respective set of regulations. The committees could at their discretion chose to administer the funds in liaison with a mortgage or a financial institution. Despite the fact that no such management committees were ever established or convened, the management of both the car loan and mortgage schemes was given to Family Bank (the 5th Respondent)

The petitioner also took issue with the fact that the Nakuru County Assembly Service Board (the 2nd Respondent) exceeded the interest Cap of 3% that had been set in the regulations. Family Bank was to charge interest at 4% which according to the petitioner was evidence of collusion between some of the Assembly members and the Bank.

The petitioner further contended that the 2nd respondent was obliged to appoint the financial institution which it intended to manage the two loan facilities by way of tender. She argued that the 5th respondent was appointed in a manner which was opaque and was neither fair open or transparent. She also argued that the County Assembly had **not** established the committees under regulation 7 of the **Public**

Procurement and Disposal (County Government) Regulations, 2013.

The Petition was disposed of by way of written submissions. All parties did duly file their written submissions in court. A careful reading of the petition as well as the replies thereto reveals that the following are the main issues arising for determination.

- a. Is the Petition incurably defective?
- b. Is the prayer for impeachment of the County Assembly speaker merited
- c. Was the 5th Respondent lawfully appointed to administer the car loan and mortgage facilities on behalf of the Assembly.

I will proceed to consider each issue individually

(a) Is the Petition Incurably Defective

The 1st Respondent being the Honourable Attorney General filed Grounds of Opposition dated 18th June 2015. The 1st respondent argued that the petitioner had failed to disclose to the court that she too had benefited from the loan schemes in question. The 1st respondent submitted that this court ought not to adjudicate over the matters raised as these could be properly dealt with by House Business Committee of the County Assembly.

The 1st respondent also contended that given the issues raised the petitioner ought to have approached the court by way of Judicial Review and not through a petition.

It was further submitted that the petition was fatally defective and was incompetent as there existed no nexus between the prayer for impeachment of the speaker and the prayer to set aside the appointment of Family Bank as the administrator of the car loan and mortgage facilities. The two claims did not arise from the same transaction and the reliefs were being sought as against different parties. It was therefore submitted that there had been a misjoinder of issues and as such the entire petition was defective and ought to be struck out.

On this question of misjoinder of causes of action the petitioner submitted that joinder of causes of actions is permissible where the causes of action arise in the same transaction and relief is being sought in respect of the same parties. This is intended to ensure that matters arising out of the same transaction are dealt with expeditiously.

In this petition the first issue concerns the recourse available when the clerk to the County failed to prioritize the motion for impeachment of the speaker. The second issue concerned the appointment of the 5th Respondent to administer the car loan and mortgage facilities on behalf of the County Assembly. The petitioner argued that there existed a nexus between these two issues and the remedies being sought were primarily against the same parties. Therefore there court not be said to be a misjoinder of issues.

Further even if there was a misjoinder of issues the petitioner submitted that this was a technical point of objection which ought to be dismissed by the court as no prejudice is alleged to have been suffered by any party due to such misjoinder. The petitioner finally submitted that the issues raised in the petition were weighty and ought to be determined.

It is quite evident and I do agree with the submission of the 1st Respondent that this petition raises two distinct and separate causes of action as described below.

- The impeachment of the speaker of the County Assembly
- The mode of administration of the car loan and mortgage facility.

The two are distinct as they do not form part of the same transaction and each is entirely independent of the other e.g the 5th respondent is not involved in and is not affected by the prayer for Impeachment of the Speaker.

Whilst it is quite true that the Petitioner ought to have filed separate suits to ventilate each claim, striking out a pleading has been held to be a '**draconian step**' that ought not to be taken lightly and even then only in very clear cases.

In a Constitutional Petition the courts should not penalize a party for infractions of procedure especially where weighty matters requiring determination have been raised. This court is also mindful of Article 159(d) of the Constitution of Kenya, 2010 which exhorts courts to administer justice "**without undue regard to procedural technicalities**". In any matter where a cause of action is disclosed then the court has a duty to determine the matter. I therefore find that the joinder of the two causes of action in one petition is not fatal to the petitioner's case. The petitioner has raised substantive issues which require the attention of the court. Therefore this objection is overruled.

(b) Impeachment of the speaker of the Nakuru County Assembly

The Petitioner argued that a motion for the removal of the speaker under Section 11 of the County Government Act must be prioritized by the house. The Petitioner has sought a declaration that in the event that clerk of the Assembly fails/refuses to prioritize such a motion then the court may by way of mandamus compel him to do the same and may give specific time lines within which the motion will be presented to the Assembly.

The Petitioner in her submissions argued that the High Court has jurisdiction under Article 165 (d) (i) & (ii) to determine the question of whether any law is inconsistent with or contravenes the constitution in any way. In this case the court was being called upon to fill the gap in the constitution and the County Government Act by declaring that it had the jurisdiction to compel the clerk of the County Assembly to present the motion for removal of the speaker of the Assembly and give it priority over any other business of the day.

In this counsel for the petitioner relied on the holding in MARTIN NYAGA WAMBORA & 3 OTHERS Vs SPEAKER OF THE SENATE & 6 OTHERS [2014]eKLR, where the court held that no Parliament, no official and no institution is immune to judicial scrutiny. The court in that case also held that under Article 165 (b) of the Constitution, the court's role for purposes of removal of a governor from office is inter alia, supervisory in nature to ensure that the procedure and threshold provided for in both the Constitution and the County Government Act are adhered to.

In SIMON WACHIRA KAGIRI Vs COUNTY ASSEMBLY OF NYERI & 2 OTHERS [2013]eKLR, the court reiterated that a court reviewing procedure of legislature is not a super-legislature sitting on appeal against the decision of that decision – making organ and that a process cannot be deemed wrong merely because another institution eg the courts would have conducted it differently.

Mr. Joseph M. Malinda the 4th respondent who is the clerk of the Nakuru County Assembly swore an affidavit on 23rd November, 2015, as a reply to the petitioner's allegations. In that affidavit the clerk argued that he could not be faulted for failing to present the impeachment motion for debate, since the petitioner herself admitted by her letter dated 18th March, 2015 that she withdrew or deferred her motion. She was to present the notice on a later date which was to be communicated but this was never done. The 4th respondent therefore submitted that he could not be faulted for failing to prioritize a motion which had been deferred and was never reinstated for debate.

The 4th respondent also argued that the petitioner vide her letter dated 18th March, 2015, alleged that she presented the motion on 10th January, 2014 yet in her supporting affidavit she alleges that the same was presented '**sometimes in March 2015**'. These contradictions in the dates clearly show that the petitioner is merely engaged in a fishing expedition and are evidence of the fact that this petition has been filed in

bad faith.

The 2nd, 3rd and 4th respondents further submitted that the petitioner was guilty of non-disclosure of material facts in that she failed to disclose to the court this fact that the motion had not been deliberated upon because she voluntarily withdrew it and at no time did she ever reinstate that motion for debate.

Finally the respondents submitted that an order of mandamus cannot be granted in a constitutional petition. The order of mandamus is issued to compel a public body to perform a public duty. Therefore such orders would only issue in Judicial Review proceedings where the court exercises supervisory jurisdiction over public bodies. This application for orders of mandamus to compel the clerk to table the motion for impeachment should have been brought by way of Judicial Review.

Section 14 of the County Governments Acts vests in the County Assemblies the powers to regulate their proceedings and procedures by way of Standing Orders. The section states:

(i) A County Assembly

(a) May make standing orders consistent with the Constitution and this Act regulating the procedure of the County Assembly including, in particular, orders for the proper conduct of proceedings.

In exercise of the powers above, the Nakuru County Assembly enacted standing orders to provide for the procedures in the house. The business of the Assembly is listed in the Order Paper which is defined by Standing Order 2(1) of the Standing Orders to mean the paper showing the business to be placed before or taken by the Assembly on a particular day, published and circulated by the Clerk under Standing Order 41(1). The order in which the motions before the Assembly are provided for under Standing Order 41(1) and Standing Order 43(2) which provide-

41. 1) The Order Paper shall be prepared by the Clerk, showing the business to be placed before or taken by the Assembly and the order in which it is to be taken, including a notice paper showing the business for each sitting day of the week, together with such other information as the speaker may from time to time direct and

43 (2) Business shall be disposed of in the sequence in which it appears in that Order Paper or in such other sequence as the speaker may, for the convenience of the County Assembly direct.

The above provisions vest in the Clerk, in the first instance, the powers to determine the priority of the motions that are presented for debate in the Assembly. When preparing the Order Paper, he has discretion to determine which motions should be debated first. The sequence of the motions shall be in the manner in which he has listed them in the Order Paper. The Speaker however retains the powers to direct that a motion be debated first if he deems it necessary for the convenience of the house.

From the arguments advanced by the petitioner, it is apparent that she was under the premise that the clerk and speaker have absolute discretion to determine the priority of business of the Assembly. It is for this reason that she sought the invention of the court to interpret the constitution and the County Governments Act and declare that a motion for impeachment or speaker must be heard on priority basis.

However the duty of the Clerk and the Speaker of the Assembly to give priority to a motion for removal of the Speaker stems from the Assembly's own Standing Orders at Order 69(1) which provides:-

(1) A Motion for the removal of a person from office under this part (Part XIV) shall take priority over all other business on the Order Paper for the day. (Emphasis mine)

The question which follows then is whether this court can compel the Clerk and Speaker of the Assembly to comply with the above Standing Order. It is trite law that where powers are conferred in a body, those powers should be exercised by that body. Under the doctrine of separation of powers each of the bodies

set up under the Constitution is independent and autonomous and is not subject to the control of the other in performing its functions and duties. The doctrine provides that none of the other arms of government can interfere with the functions of the other. However, this autonomy is not absolute and the constitution creates a system where there is an overlap of the functions of each body that allows for a check and balance system.

In COUNTY ASSEMBLY OF KISUMU & 2 OTHERS Vs KISUMU COUNTY ASSEMBLY SERVICE BOARD & 6 OTHERS [2015]eKLR the Court of Appeal held that the doctrine of separation of powers restrains the court from interfering with the internal working of the legislature. It can only determine questions that touch on the constitutionality of its actions. It states thus:

“With regard to the issue before us, under the doctrine of separation of powers, the court should not interfere with the freedom of speech and debate of legislative bodies. The court must resist unwarranted intrusion into internal procedures of Parliament and the County Assemblies unless they act unconstitutionally. As this court stated in Martin Nyaga Wambora & Others Vs Speaker of the Senate & Others, where it is shown that in conducting its proceedings, a legislative authority has acted within the confines of the constitution, courts have no jurisdiction and ought not to interfere simply because anybody is aggrieved by a decision passed by the legislative authority. However, where they have not, the court can interfere. This is because the legislative assemblies, like all other organs of state and indeed every person must act in accordance with the constitution”.

The Supreme Court in THE SPEAKER OF THE SENATE & ANOTHER VS ATTORNEY-GENERAL & 4 OTHERS [2013]eKLR also held as follows:

“It is therefore clear that while the legislative authority lies with Parliament the same is to be exercised subject to the dictates of the Constitution. While Parliament is within its general legislative mandate to establish procedures of how it conducts its business, it has always to abide by the prescriptions of the Constitution. It cannot operate besides or outside the four corners of the constitution. This court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the working of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.”

The court, on its own, cannot dictate to the Assembly to give priority to certain motions where such requirement is a preserve of the Assembly. It cannot set timelines for the legislature on when to complete its duties on what the court perceives to be the reasonable time. The court’s function is to uphold the rule of law and in so doing must not usurp the functions of other bodies. In MUMO MATEMU VS TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS [2013]eKLR the court cautioned that the checks and balance system under the doctrine of separation of powers is not a license to take over the powers vested elsewhere. In MARTIN NYAGA WAMBORA VS SPEAKER OF THE SENATE & 6 OTHERS [2014]eKLR states that the province of the court is solely to decide on the rights of individuals and not to inquire how the county Assembly and Senate perform their duties in which they have discretion.

Therefore it is only the County Assembly that can determine the order of business of its house. However once the procedural requirement is expressed in the Standing Orders then it can be enforced by the courts. The court in SPEAKER OF THE SENATE & ANOTHER Vs ATTORNEY GENERAL & 4 OTHERS [2013] SUPRA argued that the power to legislate is conferred by the constitution. Therefore, all actions which are connected to the discharge of the constitutional mandate to legislative can be the subject of the court. Thus the Standing Orders made to regulate the house of Parliament may be enforced by the courts. It was stated that:-

“The context and terms of the new Constitution, this court believes, vests in us the mandate when called upon, to consider and pronounce ourselves upon the legality and propriety of all constitutional processes and functions of state organs. The effect, as we perceive it is that the

Supreme Court's jurisdiction includes resolving any question touching on the mode of discharging of the legislative mandate.

.... It is clear to us that it would be illogical to contend that as the Standing Orders are recognized by the Constitution, this court, which has the mandate to authoritatively interpret the Constitution itself, is precluded from considering their constitutionality merely because the Standing Orders are an element in the 'internal procedures' of Parliament. We would state, as a legal and constitutional principle that courts have the competence to pronounce on the compliance of a legislative body, with the process prescribed for the passing of legislation”.

In **REPUBLIC VS NATIONAL ASSEMBLY COMMITTEE OF PRIVILEGES & 2 OTHERS EX-PARTE ABABU NAMWAMBA [2016]eKLR** the court held that:

“Failure to comply with the rules regulating the execution of business by a legislature will surely attract the court's intervention. Parliament like any other constitutional organ must play by the rules set for it by the constitution. Where it has made rules to guide its operations, it ought to comply with such rules”.

From the foregoing it is clear that the clerk has an obligation to list a motion for removal of the Speaker of the Assembly on priority when preparing the Order Paper of the day pursuant to Order 69(1) of the Nakuru County Assembly Standing Orders. Should he abrogate this duty, then this court has the powers to enforce the said Standing Orders by way of mandamus by which the court would only be compelling the clerk of the Nakuru County Assembly to act in the manner prescribed by the Standing Orders

The scope of the order of mandamus was define in **KENYA NATIONAL EXAMINATION COUNCIL Vs REPUBLIC, EXPARTE GEOFFREY GATHENJI & 9 OTHERS, SUPRA** citing an excerpt from **Halsbury's Law of England, 4th Edition** Volume 1 at page 111 from paragraph 89 which provides.

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet the mode of redress is less convenient, beneficial and effectual”.

At paragraph 90 headed '**the mandate**' it is stated:

“The order must command no more than that which the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way”.

The court then stated:

“What do these principles mean? They mean that an order or mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed”.

For the order to be issued, the aggrieved party must show that the body refused to perform the statutory duty despite being asked to perform it. This was the holding on the court in **REPUBLIC Vs KENYA VISION 2030 DELIVERY BOARD & ANOTHER EX-PARTE ENG JUDAH ABEKAH [2015]eKLR** where it held thus-

“Therefore, the fulcrum of an order of mandamus is that a statutory duty must be owed to an applicant and the public officer or public body, after being asked to perform the duty, has refused or failed to discharge that duty and there is no other adequate remedy”.

In this case the petitioner has failed to prove that the clerk failed to list her motion on priority notwithstanding a request to do so. The motion was not debated by the House on the first day it was listed in the Order Paper due to the fact that on that day the business of the house was disrupted. This disruption was not attributed to and cannot be blamed on the 4th respondent nor indeed any of the respondents.

The petitioner subsequently withdrew the motion before the next session of the house and she did not re-submit the motion for debate thereafter. In the circumstances it cannot be said that the Clerk of the Assembly **refused** to act in accordance with Order 69(1). Consequently an order of mandamus cannot issue and this prayer is hereby declined.

(c) Was the 5th respondent lawfully appointed to administer the car loan and mortgage facility on behalf of the Nakuru County Assembly

The genesis of this limb of the petition was that vide a circular dated 15th November, 2013 addressed to all clerks of County Assembly **the Salaries and Remuneration Commission** (SRC) directed that all members of County Assembly (MCA’s) were entitled to a car loan of up to Ksh 2.0 million as well as a mortgage facility of up to Ksh 3.0 million. By a further circular dated 14th February, 2014 the SRC provided that the funds disbursed under the two loan schemes would either be administered internally by the County Assembly or could be outsourced to a financial/lending institution to administer on their behalf. In any event the County Assemblies were mandated to enact regulations to operationalize and manage the loan schemes.

To this end the Nakuru County Assembly enacted **The Nakuru County Assembly Car Loan (Members) Scheme Fund Regulations, 2014** and did vest in the committees established under those regulations, the powers to manage the funds.

In her submissions the petitioner contended that the appointment of the 5th respondent (Family Bank) to administer the Car Loan and Mortgage funds on behalf of the County Assembly constituted an act of procurement as defined by **The Public Procurement and Disposal Act**. Article 27 of the Constitution of Kenya 2010 provides that where a state organ or public entity contracts for goods or services, it must employ a system that is fair, equitable, transparent, competitive and cost-effective. These the petitioner insists was not complied with.

The 5th respondent was appointed despite the fact that it charged on interest rate which was 1% above the rate which had been set by the regulations. That County Assembly did not have absolute discretion to appoint the administrators of the loan facilities. The regulations had to be complied with. Any appointment made unlawfully was unconstitutional and must therefore be set aside.

The respondents countered that contrary to the petitioner’s assertion, the appointment of a financial institution to administer the loan funds was not a preserve of the Committee. Regulations 16 and 17 of both regulations vested in the County Assembly Service Board (the 2nd Respondent) the powers to appoint a financial institution to administer the funds on behalf of the relevant committee if it so considered it appropriate.

In this case of the 2nd respondent found it prudent to invoke its powers under regulations 16 and 17 as members of the committee were not appointed by the Assembly members and in view of the fact that members of Assembly only serve for a determined period of time. Regulations 12 and 14 of the Car and Mortgage Loan Facilities Regulations provide that any loans advanced under the two schemes must be fully repaid within a maximum period of 48 months, which period should not exceed the term of the member of the County Assembly. Given the need to operationalize the scheme without undue delay and taking into account the nature of the facilities required to do so, out-sourcing the administration of both

schemes from a credible financial institution presented the better option.

The 4th respondent contended that the process of appointment of the 5th respondent was done in an open, transparent and competitive manner. The 2nd respondent invited tenders from institutions willing to administer the funds and received applications from

- Credit Bank Limited
- Chase Bank (Kenya) Limited
- Family Bank Limited
- Rafiki Micro Finance Bank

After considering the tenders during deliberations in meetings held on 26th and 30th April, 2014 the 5th respondent was appointed to administer the loan schemes.

The 4th respondent explained that the 5th respondent was chosen firstly because it offered the lowest interest rate of 4% per annum and secondly Family Bank was the more convenient option given that the County Assembly already operated an account in this bank. The 2nd and 4th respondents insist that the 5th respondent has continued to manage the loan schemes successfully and submitted that the petitioner's allegations had no basis and ought to be dismissed.

MR. JOSPEH MWAURA the Branch Manager of the 5th respondent filed his Replying Affidavit dated 27th July, 2015. He explained that the 4% interest rate being charged fell within the 3% limit set by the regulations as the actual interest charged on the loans was 3% whilst the additional 1% was to cover the management costs of the schemes as provided by regulations 15 (2).

The 5th respondent contended that it has undertaken the management and administration of the fund in accordance with the regulations and with integrity, accountability and transparency. It asked that the petition against it be dismissed.

As stated earlier the directive by the Salaries and Remuneration Commission as contained in circular Ref No. SRC/TS/WB/3/14 dated 14th February, 2014 gave the County Assemblies two options on how to administer the funds given to them for the car loan and mortgage facilities to members. They could either administer the funds internally by establishing committees for this purpose or they could outsource a financial or lending institution to administer this for them.

The Nakuru County Assembly passed the Public Finance County Assembly Nakuru Car Loan (Members) Scheme Fund Regulations, 2014 (the car loan regulations) and the Public Finance County Assembly of Nakuru Mortgage (Members) Scheme Fund Regulations, 2014 (mortgage regulations) where they established the members car loan management committee and the members mortgage management committee, respectively, to manage the funds on behalf of the members. However the Assembly, at regulations 16 and 17 of the Regulations vested in the 2nd Respondent the powers to appoint a financial institution to administer the funds on behalf of the relevant committee if it considered it appropriate to do so.

By appointing the 5th respondent to administer the funds instead of the respective committees, the 2nd respondent was acting pursuant to the powers conferred upon it by the regulations. It explained that its decision to appoint the 5th Respondent was because of the delay in appointing the members of the committee. This was pertinent because the members of the Assembly serve for 5 years and the regulations require that any loan advanced should be repaid in full over a maximum period of 48 months which period should not exceed the last month of the end of the term of the member of the county assembly. Therefore in doing so, the 2nd respondent did not contravene the regulations of the assembly.

The 5th respondent contended that it has undertaken the management and administration of the fund in accordance with the regulations and with integrity, accountability and transparency. It asked that the petition against it be dismissed.

Upon exercising the option to outsource the services of a financial institution, as in the present case, to regulate the fund on its behalf, the assembly was required to abide by the law regulating procurement of public bodies. The appointment of a financial institution constituted a procurement within the meaning of 2 of the Public Procurement and Disposal Act which defines it as

“The acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination”.

The County Assembly was therefore bound by Article 227 (1) of the constitution, the provisions of the Public Procurement and Disposal Act and the Public Procurement and Disposal (County Governments) Regulations, 2013. Article 227 (1) above provides that-

“Where a state organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair equitable, transparent, competitive and cost effective.”

The Public Procurement and Disposal Act gives effect to sub-article (2) of Article 227 which mandates Parliament to provide for a framework within which the policies relating to procurement and disposal of assets shall be implemented. Section 27(1) states that-

“27. (1) A public entity shall ensure that this Act, the regulations and any directions of the Authority are complied with respect to each of its procurements”.

The Public Procurement and Disposal (County Governments) Regulations, 2013 also applies to the Assembly being a procuring entity within the meaning of Regulation 1 and 5 (b). Regulation 10 thereof provides that-

“10. A county procuring entity shall ensure that it complies with the provisions of the Act, all the Public Procurement and Disposal Regulations, 2006, these Regulations, the directions of the Authority and the Administrative Review Board in respect of its procurement and disposal activities”.

Regulation 7 of the Public Procurement and Disposal (County Government) Regulations provides that any procurement by a procuring entity must be done by the ad hoc committees established under the regulation or in the event it is unable to comply then it should seek the advice of the authority, being the Public Procurement Oversight Authority established under Section 8 of the Public Procurement and Disposal Act, 2005. The said regulation states-

7. (1) For the purpose of ensuring that procurement and asset disposal decisions are made in a systematic, corporate and structured manner, a county procuring entity shall establish the following standing committees from within its members of staff-

(a) Tender committees specified in the schedule to these regulations;

(b) Disposal committee; and

(c) Such other bodies as prescribed under the Act.

(2) For greater certainty a county procuring entity shall establish the following ad hoc committees-

(a) Tender opening committee

(b) Tender evaluation committee

(c) Negotiation committee; and

(d) Inspection and acceptance committee

(3) Where a county public entity lacks capacity to comply with paragraph (2), the accounting officer shall seek advice from the authority.

In the instant case the County Assembly vested powers in the 2nd respondent to **directly** appoint a financial institution to administer the funds. The County Assembly had no authority to accord powers to the 2nd Respondent to conduct procurement. The 3rd respondent could vest in the 2nd respondent powers to determine that the funds would be administered by an independent financial institution notwithstanding that it had established committees to undertake the administration. However it could not vest in the 2nd respondent's powers to appoint the financial institution. Once the 2nd respondent determined it was prudent to outsource a financial institution, the process of outsourcing it was to be done in accordance with regulation 7 above.

The above provisions are couched in mandatory terms and bind all public entities undertaking procurement whether of services or goods. Indeed section 5(1) of the Public Procurement and Disposal Act Provides that-

"If there is a conflict between this Act or the regulations made under this Act and any other Act or regulations, in matters relating to procurement and disposal, this Act or the regulations made under this Act shall prevail" (own emphasis)

Regulations 16 of the Nakuru county Assembly Car Loan (Members) Scheme Fund Regulations and 7 of the Nakuru County Assembly Mortgage (Members Schemes Funds) Regulations, 2014 are in conflict with regulations 7 of the Public Procurement and Disposal (County Government) Regulations, 2013 and accordingly pursuant to section 5(1) above are null and void to the extent of the inconsistency.

Based on the above I therefore find that the appointment of Family Bank as the financial appointment was unlawful and contravened the procedures provided for under the Act and regulations. The 3rd Respondent could not vest in the 2nd respondent authority to appoint a financial institution in a manner other than that which was provided for under Article 227 (1) of the constitution, the provisions of the Public Procurement and Disposal Act and the Public Procurement and Disposal (County Government) Regulations, 2013.

Based therefore on the foregoing analysis I hereby find and make orders as follows

- i. A motion for impeachment of a speaker of the Nakuru County Assembly under section 11 of the County Government Act must be given priority over any other business of the Assembly as provided for by of the Standing Order 69 (1) Nakuru County Assembly Standing Orders;
- ii. Where the clerk of the Assembly fails to list the motion on priority at the time of preparing the Order Paper, this court may be by way of Mandamus compel him to comply with Standing Order 69(1);
- iii. The prayer for an order of mandamus to compel the clerk of the Nakuru County Assembly to present the motion for impeachment of the speaker within such a time as the court may deem just is hereby denied.
- iv. The process of appointment of the 5th respondent to administer the car loan scheme and the mortgage scheme of the Nakuru County Assembly contravened regulation 7 Public Procurement and Disposal (County Governments) Regulations 2013;

v. An injunction is hereby issued restraining Family Bank (the 5th respondent) from administering the car loan and the mortgage fund'

vi. Costs of this petition are awarded to the petitioner

Dated and Delivered in Nakuru this 21st day of March, 2017.

Maureen A. Odero

Judge