



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

PETITION NO. 10 OF 2016

AMINA RASHID MASOUD PETITIONER

VERSUS

THE GOVERNOR LAMU COUNTY..... 1ST RESPONDENT

THE SPEAKER COUNTY GOVERNMENT

OF LAMU 2ND RESPONDENT

THE COUNTY ASSEMBLY OF LAMU 3RD RESPONDENT

HON. ATTORNEY GENERAL 4TH RESPONDENT

RULING

Introduction

The petitioner is the Lamu County Executive Member for Physical Planning, Urban Development, Infrastructure and Water. She was appointed to that post by the governor of Lamu in 2013. On 5th April, 2016, the Lamu County Assembly (hereinafter LCA) initiated impeachment proceedings against her and the motion was passed by the Assembly members. This led to the filing of the petition and the petitioner contemporaneously filed a notice of motion seeking stay of the resolution of the LCA to remove her from office and other injunctive orders.

The Application

The notice of motion dated 27th April, 2016 was subsequently amended on 21st May, 2016. The prayers relevant for this ruling are as follows: -

3. THAT the resolution of the County assembly of Lamu passed on 14th April, 2016 to remove the petitioner/applicant from office as County Executive Member for Physical Planning Urban Development, Infrastructure and Water – Lamu County be stayed pending hearing and determination of the this petition.

5. THAT an order of injunction be issued to restrain the 1st, 2nd, 3rd and 4th respondents from acting on the report of the Select Committee of the County Assembly of Lamu dated 25th April,

2016 to remove the petitioner from office as County Executive Member for Physical Planning, Urban Development, Infrastructure and Water – Lamu County pending hearing and determination of this petition.

7. THAT an order of injunction be issued to restrain the 1st, 2nd, 3rd and 4th respondents from taking or conducting any step, decision, action, proceedings or investigations in relation to any resolution of the County Assembly of Lamu to remove the petitioner/applicant from the office of County Executive Member for Physical Planning, Urban Development, Infrastructure and Water – Lamu County pending hearing and determination of this petition.

8. THAT an order of stay do issue staying the implementation of the resolution of Lamu County Assembly of 28th April, 2016 afternoon sitting adopting and/or approving the Select Committee Report of the Assembly recommending the removal of the petitioner as the County Executive Member for Lands, Physical Planning, Urban Development, Infrastructure and Water – Lamu County pending hearing and determination of this petition.

9. THAT a conservatory order by way of injunction do issue restraining the 1st respondent from receiving, taking or conducting any step and/or complying with the resolution of the County Assembly of Lamu of 28th April, 2016 recommending the removal of the petitioner as the County Executive Member for Lands, Physical Planning, Urban Development, Infrastructure and water – Lamu County pending hearing and determination of this petition.

The application is supported by the petitioner's affidavit sworn on 21st May, 2016.

Submissions by the Applicant

Mr. Ali and Mr. Odera appeared for the petitioner. Counsels relied on the application and its supporting affidavit. Counsels submitted that the entire process which purported to remove the petitioner from office was premised on an illegality and contrary to the Constitution. The speaker of the LCA sent a notice to the Governor on 6th April, 2016 indicating that there was a motion to remove the petitioner from office. The notice cited three grounds namely:

- Incompetence

- Under performance

- Violation of the Law

Counsels contend that the petitioner was alleged to have failed to submit to the County Assembly spatial plans under section 107 of the County Government Act (CGA). That ground was a nullity as section 107 provides in mandatory terms that spatial plans shall be developed by the entire County Executive Committee (CEC). The petitioner is only one member of that Committee.

Secondly, the petitioner was alleged to have failed to submit regular reports of her docket to the LCA. Counsels submit that this charge contravenes the principles of separation of powers and objects of devolution. Under Article 179 of the Constitution, the petitioner is answerable to the Governor. She can respond to questions raised by the Assembly but not give reports. Thirdly, there was a charge of failure to improve performance in her docket. It is submitted that this charge is not provided for under sections 41 and 43 of the CGA. The ground of underperformance is non-existent and it is alien. The claim of underperformance is unknown in law.

Counsels further contend that there were allegations of violation of the Constitution and the law. The petitioner was alleged to have abused her office in relation to some compensation. The law and the Articles of the constitution that were contravened were not itemized. Counsels maintain that the process of removing the petitioner from office contravenes the petitioner's rights as enshrined in the Constitution.

The petitioner's right to equality and freedom from discrimination was contravened. She was singled out of the entire Executive Committee of Lamu as the one to provide the spatial plan. The petitioner's right to be treated with human dignity was violated as uncivilized language was used during the proceedings.

According to the petitioner's counsels, the removal process was an administrative action under section 2 of the Fair Administration of Justice Act. The process was tainted with illegality from the inception. Under Standing Order 44 (3) of the LCA Standing Orders, the speaker was required to ensure that the motion for the petitioner's removal meet certain requirements. The County Assembly speaker should have followed how similar process is conducted in the National Assembly. The process was biased and unfair. The select Committee report stated that the petitioner is uncooperative and hostile to the Assembly. The process took three hours but the petitioner had less than one hour to articulate her case. The Hansard report does not show anywhere that the petitioner is hostile. The petitioner asked for more time to present her case but that request was denied. The mover of the motion and another member of County Assembly (MCA) retreated to the speaker's chambers to deliberate on the request for adjournment before the decision not to adjourn was made. The two members were not members of the Select Committee.

Counsels for the petitioner are of the view that submission of relevant reports or resolutions is done by Cabinet Secretaries under Article 153 (b) of the Constitution. The petitioner is not a Cabinet Secretary. The report of the Select Committee suggests that the petitioner is corrupt and abused her office by allowing her relative and driver to get compensation at Kilelana yet they had no land there. These two people swore affidavits indicating that they had land at Kilelana. The allegations were made with ulterior motive. The Select Committee did not even consider the documents relied upon by the petitioner.

Counsels further contend that the Select Committee had a report on the petitioner even before the proceedings were over. This is contrary to the constitutional requirement of one being presumed innocent until proven guilty. The burden of proof was shifted to the petitioner. The petitioner contends that she was not given ample time to prepare her defence. Her right not to be convicted of a non-existent offence was contravened. The Governor is being called upon to implement an illegal decision.

The petitioner pleads that the notice of motion failed to meet the legal threshold on sufficiency and admissibility of evidence contrary to Article 50 (2) (b), (j) and (n) of the Constitution and Standing Order 62(1) of the LCA. Further. It is stated that the charges the Petitioner faced are unknown in law and the process of her intended removal from office was fraught with violation of the provisions of the Constitution on her rights under the Bill of Rights.

The Petitioner avers that procedurally, as per the Standing Order 62(1), the MCA was to deliver the written proposed motion to the Clerk of the LCA stating the grounds and particulars. Pursuant to Standing Order 44(3), the Speaker in making the decision on whether or not to approve the motion is enjoined to examine it so as to ensure that it bears the evidentiary requirement and determine that it is in compliance with the Constitution, Act of Parliament or the County Government Act (CGA). The Speaker is also to ensure that the motion satisfy the threshold established by courts of law as to what constitutes gross violation of the constitution and gross misconduct under the Constitution and any other written law.

On the charge of violation of the Constitution, the Petitioner averred that there were no particulars provided nor were documents or affidavits presented in support of the allegation contrary to the Standing Order 63 (2). Furthermore, there is a requirement that the charge must state with a degree of precision the Article of the Constitution or provision of the law alleged to have been grossly violated hence the motion violated the Petitioner's right to human dignity under Article 28.

The Petitioner contend that there was an ulterior motive to oust her as she holds a sensitive docket and that the members supporting the Executive of the Lamu County are few. It is averred that the compensation of beneficiaries was not handled by the Petitioner's office yet she stood accused. In any case, those alleged to have wrongly benefited from the payment were never questioned by the committee nor were their affidavits received. According to the Petitioner since the Standing Orders were not gazette they are a nullity under Article 199 (1) of the Constitution and ought to be declared as such.

Counsels maintain that the petitioner has established a prima facie case. Impeachment process only applies to the President and Deputy President under the Constitution. The motion to be moved was one requiring the Governor to dismiss a member from the Executive Committee. The motion before the LCA did not require the governor to dismiss such a member of the Executive Committee.

Response by 1st Respondent

The 1st Respondent, the Governor of the County Government of Lamu, filed a replying affidavit dated 6th June, 2016 in support of the petition. He confirmed that the Petitioner was a member of the county executive committee appointed under Article 179 (1) (b) of the Constitution and therefore a state officer. It is averred that a Mr. Kassim submitted a motion for the impeachment of the Petitioner for incompetence, under- performance and violation of the Constitution and other relevant laws. The 1st Respondent stated that the motion was illegal as Section 40 of the County Government Act does not provide for impeachment of a member of the county executive committees. According to the 1st Respondent impeachment applies only to the president and the deputy president. That Section 40 of the Act only provides for a motion requiring the governor to dismiss such a member which was not the case with the tabled motion.

The 1st Respondent acknowledged receipt on 6th April, 2015 of a letter dated 5th April, 2016 from the Speaker of the LCA, the motion in issue, a list of signatures of MCA's in support of the motion and a copy of the Standing Orders of the LCA. It is alleged that the mover of the motion failed to give the mandatory notice of the motion as per Standing Order 62 (2) which provides that after the expiry of the period of three days, the motion be placed in the order paper for disposal by the assembly. However in contravention of this, the Speaker of the Assembly prematurely set up the motion, it was moved and a Select Committee set up to investigate the Petitioner.

It is the 1st Respondent's averment that the number of MCA's appointed by the Assembly to the Select committee was seven (7) which was in excess of the number provided for under Section 40 (3) (a) of the Act. He also stated that the Standing Orders which cannot override the Act were also not gazetted.

It is stated that the Select Committee met on two days, on 22nd and 23rd of April in the absence of the Petitioner and comprised of members not appointed to that committee. Besides, on 25th April, 2016, a thirteen member group met as the Select Committee contrary to the Act hence the report by the select Committee was illegal, ultra vires, null and void

According the 1st Respondent, on 29th April, 2016 the Speaker of the County Assembly wrote to inform him that the Assembly had sat on 28th April, 2016 and adopted the report of the committee by a majority. This was contrary to Section 40(6) (a) requiring that the Speaker deliver the resolution to the Governor. A resolution was therefore not delivered requiring the governor to dismiss the Petitioner. He stated further that a court order served upon him on 29th April, 2016 bound him not to dismiss the Petitioner and he did not dismiss her.

According to the 1st Respondent, the County Assembly is bound by Article 196 of the Constitution and Section 91 of the CGA to conduct its business in an open manner, facilitate public participation and involvement in the business of the Assembly and Committees. There was no public participation or involvement in the process contrary to Article 10(2) (a) and 196 (1) and (2) of the Constitution and therefore the process was a nullity. There was no evidence tendered before the Assembly or committees for the removal of the Petitioner.

Furthermore, that the process was in violation of fair administrative action under Article 47 as it was unlawful, unreasonable, and procedurally unfair. The Assembly and the Committee failed to comply with sections 4, 5, and 6 of the Fair administrative Action Act. The Governor maintains that the Speaker acted ultra vires, in error of the law, unfairly, failed to follow procedure, took into account irrelevant considerations and left out the relevant ones and acted in abuse of power. Therefore, the Speaker, the

Assembly and the Committee breached the Petitioner's rights under Articles 35, 41, 47 and 50 and contravened Articles 1(1), 10(2)(a), 174(c) and 196(1)(a) and (b) of the Constitution. The 1st Respondent averred that he believed that the whole process was actuated by extraneous considerations including ill will, malice, vendetta and political rivalry.

The 2nd and 3rd Respondents' Submissions

Mr. Balala appeared for the 2nd and 3rd respondents (hereinafter "the two respondents"). Counsel relied on the replying affidavit sworn by MOHAMED HASHIM SALIM on 9th May, 2016. Counsel submitted that the application is an omnibus one comprising ten prayers and should be struck out for that reason. Counsel is of the view that the applicant is asking the court to step in and perform the functions of the County Assembly. The CGA and the Standing Orders sets up an elaborate process in such cases. Levels of safeguards are provided. The speaker vets the motion and a special committee is constituted to interrogate the complaint. If the complaint is merited, the affected person will be given an opportunity to defend himself/herself. The petitioner's application is tantamount to an appeal against a factual process. It invites the court to step into the functions of the County Assembly contrary to the principle of separation of powers.

Counsel submit that nothing has been shown that by interrogating the applicant on the issue of spatial plans the applicant's rights were violated. The petitioner was given the complaints and she responded to all of them. She was given an opportunity to be represented by a counsel of her choice and indeed her current counsel appeared with her before the Select Committee. The petitioner is sensitive to the language used by the members of the Select Committee. The use of language cannot lead to unconstitutionality. The petitioner knew the risk of taking the position.

Mr. Balala maintains that the County Executive remains accountable to the County Assembly. To state otherwise is to put the County Executive above the law. How will there be checks and balances if the County Assembly cannot question executive functions? The legislative Authority of the County assembly is derived from Article 185 (3) of the constitution. The assembly has oversight over the Executive Committee. Oversight functions include checking under performance. Under performance is itself a category of incompetence.

Mr. Balala contends that Article 141 on fair labour practice does not apply to political appointees. Article 147 on fair administration action was not breached. There is no evidence that the speaker did not vet the motion. Communication from the speaker of the National Assembly cannot be a precedent to speakers of County Assemblies. Such proposal is an affront to the principles of devolution. It means that the County Assemblies are subordinate to the National Assembly.

According to Mr. Balala, the petitioner was given three hours to defend herself. The process for removal provide strict timelines under the Standing Orders. Those accused should know their fate as soon as possible. The request for adjournment was not well founded. It was based on power blackout and being out of town. The petitioner was only four hours away from town and provided a typed letter yet she complained of power problems. The removal process starts with a Select committee. The committee sat on Friday and Saturday. The petitioner was not expected to respond as those two days were meant for the Committee. There is no evidence of bias and the speaker who declined the request for adjournment does not vote.

Counsel further contends that the standing Orders of the LCA are constitutional. The principle of devolution requires that as far as possible, provisions relating to similar offices be adopted. That is those of the National government vis-a-vis those of the County Assemblies. The procedure to appoint a Cabinet Secretary is followed as nearly as possible in the procedure to appoint a member of the Executive Committee. The petitioner was appointed in office through the County's standing Orders and cannot challenge the same procedures that took her to the office. It is Mr. Balala's position that Article 199 of the Constitution refers to County legislation and not Standing Orders. Further Article 50 of the Constitution on fair hearing is limited to criminal proceedings. The Constitution provides sufficient protection against unlawful practices.

Counsel contends that an order of stay will have a great danger to the public interest. Private interest cannot supercede public interest. No irreparable damage will be suffered. The petitioner can still apply for a public office. Public interest requires a working Executive Committee. Fifteen MCAS out of 20 voted in favour of the petitioner's removal. A member of the Executive Committee is not above the law. She can be impeached. Article 10 of the Constitution allows members of the public to question those holding public office. The CGA was enacted in pursuance to the provision of Article 200 of the Constitution. Section 40 of the CGA provides for removal of a member of the County executive Committee. Impeachment and removal is the same thing as the result is the same.

It is also submitted that the impeachment proceedings met the threshold of fair process as every opportunity was given to the applicant to defend herself within the strict timelines set out in the Standing Orders. The County Assembly is bestowed with investigative and quasi-judicial functions under Article 195 of the constitution.

It is further averred that the LCA in the impeachment process was only discharging its oversight role over the County executive under Article 185 (3) of the Constitution and also in performance of its duty on checks and balances in line with Article 174 (i) of the Constitution. In addition to this, holding a member of the County Executive accountable is an exercise of sovereignty by the people as per Articles 1 and 10 (2) of the Constitution. As a public officer, the Petitioner is accountable to the people through the LCA.

The Respondents averred that the members of the Select Committee conducted themselves with decorum and respect and did not disparage the Petitioner. They averred that it was inconceivable how she may have been mistreated in the presence of her legal counsel. The Respondents countered the allegation that a power blackout interfered with the Petitioner's defence preparation yet she was able to type and print out the letter dated 22nd April. The blackout affected the LCA too but they continued without interfering with the process. The Petitioner was in any case allegedly in communication with the Chief Officer who was helping with the preparation of the documents in her defence.

It is further stated that the resolution for the removal of the Petitioner was passed on 28th April, 2016 and the 2nd Respondent delivered a letter to the Governor notifying him of the said decision. Thus the court order served on 2nd May had been overtaken by events and there is nothing to restrain as the Assembly had become *functus officio*. It is also averred that the role of the Governor upon receiving such a resolution is to act upon it and cannot query its propriety hence a restraining order cannot be implemented against the 1st Respondent. Finally it is stated that the threshold for granting injunctive orders has not been proven.

The 4th respondent, the Attorney General, did not participate in the proceedings.

Analysis and Determination

The issues to be determined by this court are whether or not the Court is walking into the jurisdiction of the County Assembly? Whether or not the application passes the test for granting orders of interlocutory injunction? Whether or not Conservatory orders can be granted and whether the application should be struck out for being omnibus.

Whether or not the Court is walking into the arena of the County Assembly?

This is a jurisdictional question which must be dealt with first. As Nyarangi, J.A put it in the landmark case of OWNERS OF THE MOTOR VESSEL "LILLIAN S" V CALTEX OIL (KENYA) LTD [1989] KLR 1 "***Jurisdiction is everything***". The Respondents argued that the Court was barred by the doctrine of separation of powers from determining the issues. According to them the Petitioner was in essence making an appeal against the factual process of what had transpired before the LCA. The two Respondents have challenged the jurisdiction of the court in determining the application.

What then is separation of powers? The Court of Appeal in **MARTIN NYAGA WAMBORA & 3**

OTHERS V SPEAKER OF THE SENATE & 6 OTHERS [2014] eKLR defined it thus:

“The terms ‘separation of power’ and ‘balance of power’ mean that the power of the three branches of a democratic government– the Legislative, Executive and Judiciary – should not be concentrated in one branch, but should be distributed such that each branch can independently carry out its own respective functions.”

The Court of Appeal had earlier on in **MUMO MATEMU V TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS [2013] eKLR** agreed with the High Court where it had been held that:

“[Separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent.”

In the doctrine of separation of powers, the three arms of government have an element of independence to which the Judiciary must respect and show deference to. This however does not shield them from the scrutiny of the judiciary as it is bestowed with the judicial authority as per **Article 159(1)** of the Constitution and has the ultimate interpretative role of the Constitution and the law. It was held in the **MUMO MATEMU** case (supra) that:

“...the Courts have an interpretive role - including the last word in determining the constitutionality of all governmental actions...”

It is the Constitution that is supreme and not the County Assembly see the case of **PAUL K. SEMOGERERE & 2 OTHERS – V- THE ATTORNEY GENERAL, CONSTITUTIONAL appeal No. 1 of 2002** which was adopted by the Court of Appeal in the **MARTIN NYAGA WAMBORA** case (supra) where it was held that: ***“It is the Constitution, not Parliament nor the executive nor judiciary which is supreme”***.

And as was stated by the Supreme Court of South Africa ***In the matter between The Speaker of the National Assembly and Patricia De Lille (MP) & another, Case No. 297/98*** the dicta of which was similarly adopted in the **MARTIN NYAGA WAMBORA** case (supra) that:

“...No Parliament, no official and no institution is immune from judicial scrutiny...”

The Court in the **MARTIN NYAGA WAMBORA** case (supra) did also hold that the doctrine of separation of powers rests on the principle that:

“..., ..., all branches of government are bound by the rule of law.”

Article 23 as read together with Article 165 (3) (b) of the Constitution mandates the High Court to determine whether or not a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. This jurisdiction applies to matters relating to constitutional violations by the Legislature or the executive. The 5 judge bench in the constitutional petition in **PETER O. NGOGE –V- FRANCIS OLE KAPARO & 4 OTHERS [2007] eKLR** held that: -

“The High Court has the power to strike out a law or legislation passed by Parliament which is in conflict with the Constitution. The same applies to any privileges, immunities or powers claimed by Parliament which are in conflict with the Constitution. Nothing is immune from the courts scrutiny, if in conflict with the Constitution”. (own emphasis)

Majanja, J in **COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION –V- NATIONAL ASSEMBLY OF KENYA & 2 OTHERS [2013] eKLR** held as follows: -

[37] I have taken the trouble to reference the above Constitutional provisions to drive the point

home that the Constitution is the Supreme law of the land and that it binds every person, every state organ, state officer, public officer and authority. It is the obligation of every person to respect, uphold and defend the Constitution. And that includes the Parliament. As was articulated in the case of *Trusted Society of Human Rights Alliance v Attorney General & 2 others*, Nairobi HC Petition 229 of 2012[2012] E KLR, at Para. 71,

“...there is nothing like supremacy of Parliament outside the Constitution. There is only supremacy of the Constitution. Given that the Constitution is supreme, every organ of State performing a constitutional function must perform it in conformity with the Constitution. Where the State fails to do so, the court as the ultimate guardian of the Constitution, will point out the transgression. As the cases cited above demonstrate, however, there is a legitimate question of how far the authority of the Court to review the decisions of other State Organs which exercise independent constitutional authority go. There are some areas where the Court can simply not go; some outer limits on its power to review the decisions and actions of other branches and State Organs.”

Therefore, as regards the question as to whether this court has jurisdiction to entertain the petition, the answer can only be in the affirmative; as to what lengths the Court can actually go in doing so is a second level inquiry based on the circumstances of each case. The jurisdiction of the High Court to adjudicate on constitutional matters is wide and is now settled. In short therefore, this Court is endowed with the proper jurisdiction to scrutinize the County Assembly of Lamu in accordance with the Constitution. What the County Assembly was conducting was an administrative function which is subject to the court's assessment in terms of compliance with the Constitution.

Whether or not the application passes the test for granting orders for interlocutory injunction?

The case of *GIELLA V CASSMAN BROWN* is the focal reference for the ingredients to be considered in applications for injunctions, namely -

- i) whether the applicant has established a prima facie case with a likelihood of success*
- ii) whether the applicant stand to suffer irreparable harm: and if in doubt the court to consider*
- iii) on which side does the balance of convenience lies.*

The petition seeks the determination that the process of removing the petitioner from office violated the Constitution. The law pertaining to removal of a member of a county executive committee is Sections 31 (a) and 40 (1) and 40 (2) of the CGA. This process has its grounding upon Article 200 (1) and (2) (c) of the Constitution which provides that: -

(1) Parliament shall enact legislation providing for all matters necessary or convenient to give effect to this Chapter.

(2) In particular, provision may be made with respect to —

(c) the manner of election or appointment of persons to, and their removal from, offices in county governments, including the qualifications of voters and candidates;

Section 31 (a) of the CGA provides that: -

The governor may, despite [section 40](#), dismiss county executive committee member at any time, if the governor considers that it is appropriate or necessary to do so.

Section 40 (1) of the CGA provides that: -

Subject to subsection (2), the Governor may remove a member of the county executive committee from office on any of the following grounds-

a. incompetence;

b. abuse of office;

c. gross misconduct;

d. failure, without reasonable excuse, or written authority of the governor, to attend three consecutive meetings of the county executive committee;

e. physical or mental incapacity rendering the executive committee member incapable of performing the duties of that office; or

f. gross violation of the Constitution or any other law

Under Section 40 (2) of the CGA, an MCA may move a motion for removal of a county executive member. It provides that: -

A member of the county assembly, supported by at least one-third of all the members of the county assembly, may propose a motion requiring the governor to dismiss county executive committee member on any of the grounds set out in subsection (1).

Section 40(2) of the CGA is the scenario that is facing the Petitioner. The motion for removal from office was presented to the Clerk by an MCA of the Lamu County Assembly and approved by the Speaker. It had three grounds namely: incompetence, under-performance and violation of the Constitution and other relevant laws. On the allegation of incompetence, the Petitioner banked on Section 110 (3) of the CGA to demonstrate that the particulars thereof which were failure to submit spatial plans to the LCA was not grounded in law. Section 110 (3) of the CGA provides that: -

Each county spatial plan shall be developed by the county executive committee and approved by the respective county assemblies in accordance with procedures approved by the respective County Assembly.

A “county executive committee” is defined under **Section 2** of the CGA as: -

'a county executive committee established in accordance with Article 176 of the Constitution'

Article 176 (1) of the Constitution provides that: -

There shall be a county government for each county, consisting of a county assembly and a county executive.

Article 179 (2) provides that the Executive Committee consists of the Governor, Deputy Governor and Executive Committee members.

It is clear from a reading of Sections 2 and 110 (3) of the CGA together with Article 176 (1) of the Constitution that a member of the county executive committee is not the county executive committee and neither is it the sole onus of a County Executive Committee Member to formulate the county spatial plan alone. There is therefore an element of picking on the Petitioner to shoulder the responsibility of the whole County Executive Committee yet it is not her duty to do so. Under section 110 (3) of CGA, the County Assembly is expected to have established the procedures for the preparation of the spatial plans by the Executive Committee. There is no evidence that such procedures are in place. Section 110 is specific on the County Special Plans. These are detailed documents depicting the social and economic development status of a County. The petitioner tried to explain her side during the hearing but the Select Committee Members were interested on the time it has taken for the plans to be ready. It is clear that it is the petitioner who is endowed with the responsibility of preparing the plans. However, the plans cannot be prepared by one docket independently without the input of the other dockets. Such plans will capture

education, cultural, social and economic activities such as farming and fishing. This information is not contained in one docket. That is why section 110 (3) gives the responsibility to the entire Executive Committee. A consultant has been recruited to undertake the work.

The Petitioner pleaded and submitted that the grounds provided for under Section 40(1) of the CGA do not include 'under-performance' as a ground for removal. In her view, the motion for removal from office ought not to have been allowed to the floor for debate without an amendment. In response, it is submitted that under-performance is a category of incompetence, it was not elaborated further and did not feature in the replying affidavit of the Respondents. 'Incompetence' is defined by the Oxford Dictionary as 'Inability to do something successfully; ineptitude' 'Ineptitude' is defined as 'Lack of skill or ability'. 'Underperformance' is derived from the verb to 'underperform' which is defined as 'Perform less well than expected' whereas to 'perform' is defined as to 'Carry out, accomplish, or fulfil (an action, task, or function)'

It can be stated from the definitions that incompetence has some elements of *underperformance* in that the task, duty etc is not carried out successfully or as expected. The statutory word used is incompetence. Did Parliament intend that any other synonym can be cited in place of the grounds laid out? *I am guided by the Court of Appeal finding in County GOVERNMENT OF NYERI & ANOTHER V CECILIA WANGECHI NDUNGU [2015] EKLR where it was held that:*

“...the cardinal rule for construction of a statute; that is, a statute should be construed according to the intention expressed in the statute itself. Halsbury’s Laws of England, 4th Edition (Reissue), Butterworths, 1995, Vol. 44(1), para 1372 provides:-

The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context...

Given the fact that under performance is part of incompetence, I do find that the charge of under-performance is applicable. It cannot be simply dismissed that it is not provided by the law.

On the issue of submission of regular reports to the LCA, the Petitioner countered that a member of the county executive committee is only accountable to the Governor. Article 179 (6) of the Constitution provides that:

(6) Members of a county executive committee are accountable to the county governor for the performance of their functions and exercise of their powers.

Section 30 (2) of the CGA provides that:

(2) Subject to the Constitution, the governor shall—

(i) by a decision notified in the county Gazette, assign to every member of the county executive committee, responsibility to ensure the discharge of any function within the county and the provision of related services to the people;

Therefore under Section 30(2) (i) of the CGA each member of the county executive committee has an assigned duty. The Section further provides that: the governor shall-

(j) submit to the county assembly an annual report on the implementation status of the county policies and plans: -

(i) sign and cause to be published in the county Gazette, notice of all important formal decisions made by the governor or by the county executive committee.

Section 30 (2) of the CGA puts the onus of reporting **regularly** to the County Assembly on the

implementation status of the county policies and plans and for gazetting of the important formal decisions by the county executive committee to the Governor. The Act does not extend this onus to a member of the county executive committee. However, in exercise of its supervisory role, the County Assembly can call for information or a report to be submitted separately by a member of the County Executive Committee at any time.

The ground of under-performance if taken to be an extension of the ground of incompetence is resisted by paragraph 32 of the Petitioner's supporting affidavit. The Petitioner has annexed the Annual County Government Budget Implementation Review Report 2014/2015 by the Office of the Controller of Budget which indicates that the docket manned by the Petitioner had utilized monies for development purposes which included water projects and infrastructure. Could it be said that there was under-performance? This calls for oral evidence from both sides.

The concern on gross violation of the Constitution through abuse of office by allocation of compensation to unmerited persons is challenged by paragraph 23 (ix) of the Petitioner's supporting affidavit which annexes affidavits of persons and list of beneficiaries said to have been wrongfully compensated. An indication that she may have been wrongfully accused hence the need to iron it out during the hearing of the petition.

The foregoing in mind, the Speaker was out of line with the Constitution Article 47 on fair administrative action when Standing Order 44 (3) (b) as read together with Standing Order **62 (1)** is taken into consideration. Standing Order 62 (1) requires that a motion under Section 40 of the CGA be submitted to the Clerk and then to the Speaker for approval.

Standing Order 44 (3) (b) provides that: -

If the Speaker is of the opinion that any proposed Motion-

(b) is contrary to the Constitution, or an Act of Parliament or County Assembly, without expressly proposing appropriate amendment to the Constitution or the Act of Parliament of County Assembly;

The Speaker may direct either that, the Motion is inadmissible, or the notice of it cannot be given without such alteration as the Speaker may approve or that the motion be referred to the rejuvenate committee of the County Assemble, pursuant to Article 114(2) of the Constitution.

Standing Order 62 (2) requires the member after the Speaker's approval to give a three day notice calling for the dismissal of a member of the county executive committee by the Governor. Standing Order 62 (3) provides upon the expiration of the three days the motion to be placed on the Order Paper and be disposed of within three days. The 1st Respondent has averred in his replying affidavit that he was notified on 6th April, 2016 after the Motion had been presented to the LCA on 5th April, 2016. The three day notice period was not followed.

It is in dispute as to the time granted to the Petitioner to state her case. The two Respondents claim that out of the two-hour period as per Standing Order 63(1) (b) (ii) she was granted three hours. The Petitioner claims that out of the three hours allocated she was granted less than an hour. This hints on infringement of right to fair hearing under Article 50 (1) and fair administrative action under Article 47 of the Constitution. From the Hansard record, over one hour was spent on the request to have the matter adjourned to the following day.

The Petitioner claims that non-members of the Select Committee were involved in the process and one retreated into the Speaker's chambers at the time of deciding upon the prayer for adjournment of the proceedings by the Petitioner. The speaker is supposed to be an independent arbiter and does not need the advice of the members while making decisions. Further, this was a Select Committee. The Chairperson of the Committee in consultation with her other four members were to decide on the request for adjournment and not the Speaker.

Furthermore, the report of the Select Committee indicates that non-select committee members were part of the process and seven persons appointed into the Select Committee. Section 40 (3) (a) of the CGA provides that after an MCA's motion is moved for the removal of a member of the County Executive Committee and is supported by at least one-third of the members of the county assembly then: -

(a) the county assembly shall appoint a select committee comprising five of its members to investigate the matter;

All the above point out to procedural unfairness and undue process by a quasi-judicial tribunal to which the rules of natural justice automatically apply.

In STEPHEN NENDELA –V- COUNTY ASSEMBLY OF BUNGOMA & 4 OTHERS [2014] eKLR Justice Mabeya held that Section 40 (3) of the County Governments Act was unconstitutional in so far as it was inconsistent with Article 50 (1) of the Constitution. The respondents insist that the Governor, the 1st respondent, has no choice but to implement the resolution recommending the removal of the Petitioner. However, it is alleged that Section 40 (3) of the CGA was flaunted thereby violating Article 50 (1) of the Constitution on fair hearing. My view on section 40 (3) is that the section is not unconstitutional. However, its implementation requires the County Assembly to exercise extreme objectivity and adherence to principles of fair administration of justice. Where the motion to remove a member of the Executive Committee is not based on complaints from members of the public but from the Assembly Members themselves, great caution should be exercised to avoid condemning the state officer before even hearing him/her.

My further observation on the provisions of section 40 (2) and 40 (3) is that it can be effected fairly in Counties with a County Assembly composed of at least more than 30 members. section 40 (2) requires that the motion be supported by at least one third of the members of the County Assembly. There is a Select Committee of five people under section 40 (3) who are to investigate the matter. In Lamu County, there are only twenty members of the County Assembly. Ten elected and ten nominated. One third of those members is seven. That leaves thirteen members of the Assembly who can be said not to be supporting the motion. Ordinarily, the five members of the Select Committee ought to be amongst those who have not appended their signature in support of the motion. This again leaves only eight members who can be said to be seeing the report of the Select Committee for the first time when tabled in the Assembly. For a member of the Executive Assembly to survive the allegations, he/she requires a large number of objective members who will interrogate the report for the first time. Where the entire Assembly is composed of few members, it is evident that almost every member will be aware of the motion or petition for the removal of the County Executive Member and would have already formed an opinion on it by the time the Select Committee's report is tabled for deliberation.

In the current case, the complainant MCA Abdu Kassim Ahmed, forwarded the motion to the Clerk of the County Assembly on 5th April, 2015. The Speaker, Hon. Mohamed Hashim Salim forwarded the motion to the Governor on 6th April, 2016. What is worrying is the fact that the motion was accompanied by a list of the members who were in support of the motion. The list show that fourteen out of the twenty members were already in support of the motion. This is more than the minimum one third. It is in fact double the minimum on third threshold. It is not illegal to do so but this calls in the fundamental right to be subjected to a fair and impartial process. When the members vote under section 40 (6), a simple majority carry the day. Fourteen members in support of the motion are more than the simple majority of eleven members in the Lamu County Assembly. It can be argued that members are free to vote against the motion at the Assembly. Under Standing Order Number 62 of the LCA, any signature appended in support of the motion cannot be withdrawn. This sense of solidarity can be extended to the time of voting.

I have further observed that section 40 (2) of the CGA can be easily abused by County Assembly Members. What has been annexed as “IAT 3” by the 1st respondent is the motion by the complainant, MCA Abdu Kassim Ahmed. The motion itself is suggesting the names of the members to be in the Select Committee. It reads as follows: -

Mr. Speaker, I beg to move the following motion

That aware that the Department motion of Ms Amina Rashid Mashud, the County Executive Committee member for Land, Physical Planning, Infrastructure, Urban Development and Water was passed in accordance with standing order No. 62, further aware that standing order No. 62 (6) requires the Assembly to appoint a special committee to investigate the matter and shall report to the Assembly whether it finds the allegations against the member of County Executive Committee to be substantiated and concerned that this is a priority motion as stipulated in standing order No. 64 (1), I therefore urge this Assembly to appoint the following to investigate into the matter and table a report to this Assembly within ten (10) days as the law dictates

MCA Zahara Shee Mohamed – Chairperson

MCA Paul Kimani Njuguna

MCA Omar Mohamed Said Lali

MCA Anthony Njomo Maina

MCA Athman Mohamed Amin

MCA Monicah Njambi Kirunyu

MCA Azhar Ali Mbarak

The normal process would be for the motion to be tabled and then the Assembly members agree on who to be in the Select Committee. Unfortunately, the seven members proposed by the movers of the motion are amongst those who appended their signature in support of the motion. By supporting the motion, what it means is that you support the allegations being levelled against the member of the Executive Committee. All the members proposed in the motion were the same members who sat in the Select Committee. Only two, MCA Azhar Ali and MCA Paul Kimani Njuguna were not included as members of the Select Committee as per its sitting on Monday 25th April, 2016. However, four other members namely Amina Kale, Abdulkasim Ahmed – the complainant, Azhar Mbarak and Edith Munyu, were said to be in attendance. The Speaker also participated in the proceedings. Ordinarily the Speaker would wait for the Select Committee's report to be tabled by the Select Committee. There could be more than one Select committee at one given time and the Speaker does not need to attend their meetings. Indeed, the comments by the Speaker on the governor and the Executive Committee Member being probed as per the Hanzard report is quite appalling. Comments such as "...can you confirm to this house if the Governor is competent enough to have that office" or "Madam Amina is confirming that the Governor has violated the Constitution" or "do we have acting Chief Officers" were made in quite derogatory manner. MCA Azhar Mbarak was appearing not as a member of the Select Committee. He was more active in the proceedings than the Committee Members themselves. He had appended his signature in support of the motion and followed it to the Select Committee with much zeal and extreme commitment. Indeed at page 25 of the 1st respondent's bundle, the Hon. MCA indicated that "the Agenda is to prove that Madam Amina is not able or she is not capable to be in her office". That is not a sign of objectivity.

Turning back to the provisions of section 40 (2) and 40 (3), where the Assembly is composed of few members like the LCA, the fate of the executive Committee Member is sealed even before the proceedings begin. It is tantamount to passing a judgement and then conducting proceedings to justify the judgement. The Select Committee and even the entire Assembly operates like a quasi Judicial Tribunal wherever conducting its business under section 40 (2) and 40 (3) of the CGA. Any quasi Judicial Tribunal should observe the rule of law and the principles of fair hearing under Article 50. Fair hearing applies to both criminal and civil cases. I do not agree with Mr. Balala's position that Article 50 is confined to criminal cases only since the Constitution has other mechanism of fair handling of civil matters. Section 40 (2) and (3) becomes problematic if the Governor who appoints his Executive

Committee is satisfied with the work of his member who is targeted for removal. Mr. Balala talked of a working Executive Committee. The Governor is in support of his Executive Committee member. Who then should be the one to decide that the Executive Committee member is incompetent? The Executive Committee comprises the Governor, Deputy Governor and members of the Executive Committee. In the **COUNTY GOVERNMENT OF NYERI & ANOTHER** case (supra), the Court of Appeal observed as follows on the Executive Committee: -

The County Executive Committee comprises of the governor, Deputy Governor, members of the County Executive Committee who are appointed by the governor. The members of the County Executive Committee assist the Governor to carry out his mandate under the law. It is the Governor who assigns to every member of the County Executive Committee responsibility to ensure the discharge of any function in the County. This is the reason why the County Executive Committee members are individually and collectively accountable to the Governor in the exercise of their powers and performance of their duties and responsibilities. (See article 179 (6) of the Constitution and Section 39 of the County Governments Act.) A County Executive Committee member is the governor's right hand in his/her respective office. Hence the Governor has to have confidence in the County Executive Committee member.

It becomes quite difficult for a member of the Executive Committee who is appointed by the Governor to be removed from office by the members of the County Assembly yet the Governor is satisfied by the work of that Executive Committee member. The governor is rendered helpless as section 40 (6) (b) requires the Governor to effect the resolution of the assembly and dismiss his Executive Committee member.

Mr. Brother Justice Mabeya went ahead and declared section 40(2) as unconstitutional in the **STEPHEN NENDELA** case (supra). My approach on the section is similar to that of Justice Byram Ongaya when he dealt with the cases of **GEORGE MAINA KAMAU V COUNTY ASSEMBLY OF MURANGA & TWO OTHERS (2016) eKLR** and that of **RICHARD BWOGO BIRIR V NAROK COUNTY GOVERNMENT [2014] eKLR**. My position is that it all depends on how the section is applied. If those who are supposed to follow that section misuse their powers, the court will be justified to interrogate their actions. The case of **RICHARD BWOGO BIRIR** ended in the Court of Appeal [Nyeri Civil Appeal No. 74 of 2014]. The Court of Appeal held that the Governor of Narok County Government had violated the petitioner's rights to fair administrative action under Article 47 and fair labour practices under Article 41 of the Constitution.

Was the process an impeachment or removal from office process? The Petitioner submitted that impeachment process only applies to the president and deputy president. This is under Articles 145 and 150 of the Constitution. The letter dated 5th April, 2016 the 1st Respondent annexed to his affidavit as '*IAT1 clearly*' indicates that it was an impeachment/removal process. A perusal of the annexures reveal that the process was triggered by an MCA under Section 40 of the CGA on removal of a member of the County Executive Committee. There was no suggestion that the process applied the same impeachment process of the president or deputy president. By analogy, under Section 33 of the CGA the removal of a governor is not referred to as impeachment save that at subsection (6) & (7) there is reference to impeachment charges. In fact the Court of Appeal in the **MARTIN NYAGA WAMBORA** case (supra) comfortably referred to the process of removal of governor as an impeachment process.

In my view therefore, the process of removal of a member of the county executive committee from office differs from that of the president or his deputy but the terminology used is one and the same thing and is just a matter of semantics. The process cannot be faulted for the sole reason that it used the term impeachment and not removal. The Black's Law Dictionary, 8th ed, defines '*Impeachment*' as: -

1. The Act (by a legislature) of calling for the removal from office of a public official, accomplished by presenting a written charge of the official's alleged misconduct.

Has a *prima facie* case been set out? The two respondents have averred that a strong *prima facie* case has not been established. The principles upon which interlocutory injunctive orders are granted do not state

that the *prima facie* case has to be watertight but one with a likelihood of success. In my view, *prima facie* case has been established.

The second limb in determining whether or not to grant interlocutory injunctive orders is to establish whether or not there is irreparable harm that the Petitioner may suffer if the report by the Select Committee and the subsequent resolution is implemented? The 1st Respondent indicates that the Petitioner is still in office by dint of the Court Order served upon him on the 29th April, 2016. However if the ball is to be kept rolling, the effect of its implementation would be the removal of the Petitioner from a state office position and the Petitioner may be barred from holding a public office.

Article 260 of the Constitution designates the Petitioner as a Public Officer and in particular a State Officer. It provides that: -

“public officer” means—

(a) any State officer; or

(b) any person, other than a State Officer, who holds a public office;

“State office” means any of the following offices—

(h) member of a county assembly, governor or deputy governor of a county, or other member of the executive committee of a county government;

The Constitution requires that a holder of a public office to have integrity and competence. See Article 73 and 75 of the Constitution which provide that: -

Article 73. (1) Authority assigned to a State officer—

(a) is a public trust to be exercised in a manner that—

(i) is consistent with the purposes and objects of this Constitution;

(ii) demonstrates respect for the people;

(iii) brings honour to the nation and dignity to the office; and

(iv) promotes public confidence in the integrity of the office; and

(2) The guiding principles of leadership and integrity include—

(a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections; (own emphasis)

Article 75. (1) A State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids—

(a) ...;

(b) ...; or

(c) demeaning the office the officer holds.

(2) A person who contravenes clause (1), or Article 76, 77 or 78 (2)—

(a) shall be subject to the applicable disciplinary procedure for the relevant office; and

b) may, in accordance with the disciplinary procedure referred to in paragraph (a), be dismissed or otherwise removed from office. (own emphasis)

(3) A person who has been dismissed or otherwise removed from office for a contravention of the provisions specified in clause (2) is disqualified from holding any other State office. (own emphasis)

As it appears that the Petitioner is aiming for a life under public service. The implementation of the report and subsequent resolution shall cause her to endure unwarranted irreparable harm in the event that the process of her removal from office is found to be wanting after hearing the petition.

Whether or not Conservatory orders can be granted?

The two respondents deem that the Petitioner does not deserve the orders as prayed. The Petitioner on the other hand leans on the finding of Justice Odunga, in KEVIN K. MWITI case (supra). Conservatory orders are aimed at maintaining the subject matter *in situ* by striking a delicate balance between the functioning of public bodies and public interest. The respondents are of the view that the petitioner has elevated her grievances above the public interest. The Supreme Court in the application for conservatory orders in the case of GATIRAU PETER MUNYA V DICKSON MWENDA KITHINJI & 2 OTHERS [2014] EKLK held that:

[86] “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

In my view, the petitioner having demonstrated that she has a *prima facie* case with probability of success, there is the likelihood of suffering irreparable harm and most importantly in the interest of the public not to have the functioning of the County Executive Committee unduly interfered with, then a conservatory order ought to be granted. The County Assembly should be objective and impartial while dealing with issues calling for the implementation of sections 40 (2) and (b) of the CGA. A quasi Judicial body ought to be impartial by nature. If the complainant had already convinced fourteen of his colleagues including the Chairperson of the Select committee to support the motion, then the distinct lines of impartiality fades and open bias is revealed. I wish to refer to the case of THE COUNTY GOVERNMENT OF NYERI & THE GOVERNOR, NYERI & THE GOVERNOR, NYERI COUNTY V CECILIA WANGECHI NDUNGU. In that case, the Governor exercised his powers under section 31 (a) of the CGA and relieved the respondent of her duties as the County Executive Secretary in charge of Culture, Gender and Social Development. The Court of Appeal upheld the decision of the Labour and Employment Court reversing the Governor’s decision and had this to say: -

We are of the considered view that the section 31 (a) grants power to a governor to dismiss a member of the County Executive Committee at any time that is, at his pleasure. However, we find that the said power is qualified to the extent that he can only exercise the same reasonably and not arbitrarily or capriciously.

The court further observed as follows: -

...Section 31 (a) provides that a Governor may dismiss a County Executive Committee member at any time, if he/she considers that it is appropriate or necessary to do so. We find that the provision places an obligation on the Governor to exercise the said power only when necessary or appropriate. In our view this entails reasonableness on the part of the Governor in exercising

this power.

Further, by virtue of the fact that a Governor ought to exercise his powers for the public good he should not act on selfish motives but for the benefit of his/her County. We find that the reasons for exercising the said power ought to be valid and compelling and will depend on the circumstances of each case. Consequently, the power to dismiss a member of the County Executive is qualified to the extent that the same ought to be for the benefit of the County and in accordance to the principles of devolutions set out herein above.

Under section 31 (a) of the CGA the Governor has powers to relieve a member of the Executive Committee on his own volition. The section does not give any conditions to be complied with by the Governor as opposed to section 40 (1) and 40 (2) where the Governor and the County Assembly are supposed to follow the conditions or qualifications stipulated under that section. Therefore even the absolute authority of the Governor under section 31 (a) of the CGA has to be exercised in accordance with the law. It is not unqualified. That is the reasoning behind the case of COUNTY GOVERNMENT OF NYERI & ANOTHER V CECILIA WANGECHI NDUNG [supra].

Whether or not the application is an omnibus

The two respondents have argued that as the application is omnibus in nature, it ought not to be granted. The Supreme Court in AVIATION & ALLIED WORKERS UNION KENYA V KENYA AIRWAYS LIMITED & 3 OTHERS [2015] eKLR held that: -

*“[20] We have noted that the applicant has cited Sections of the Supreme Court Act and Rules which are applicable when one seeks leave, and grant of certification. In **HERMANUS PHILLIPUS STEYN V. GIOVANNI GNECCHI RUSCONE, Sup. Ct. Application 2 of 2012**, this Court stated [paragraph 23]: -*

“ ... It is trite law that a Court of law has to be moved under the correct provisions of the law.”

A party who moves the Court, has to cite the specific provision(s) of the law that clothes the Court with the jurisdiction invoked. It is improper for a party in its pleadings, to make ‘omnibus’ applications, with ambiguous prayers, hoping that the Court will grant at least some.”

The Supreme Court in that case allowed the application. The application before this court has specifically pointed out the provisions of the law and does not bear ambiguous prayers. This notwithstanding, the Court ought in considering the lower risk of justice as elaborated in the SULEIMAN VS. AMBOSELI RESORT LTD [2004]2 KLR 589 ask itself whether the granting of the prayers would be the lower risk. The two respondents have argued that personal interest by the Petitioner ought not to be elevated above the public interest. The allegation is that rights under the bill of rights have been infringed upon a person holding public office. At times private interest should be considered to avoid denying Kenyans their rights as contained in the Bill of Rights on the pretext that those rights are subservient to public interest

The Court of Appeal adopted the industrial court’s finding in the case of NAROK COUNTY GOVERNMENT & 2 OTHERS (2014) eKLR VS RICHARD BWOGO BIRIR where it was held that the doctrine of due process applies to the removal of public servants, which the petitioner is one, from office. Hence I differ in thought with the two respondents proposal and would call for the granting of the orders of interlocutory injunction and the conservatory prayers.

The petitioner and the 1st respondent contend that the standing orders of the LCA are unconstitutional for lack of gazettment. They referred to Article 199 of the Constitution. Article 199. (1) Provides that: -

County legislation does not take effect unless published in the Gazette.

However in my view legislation does not include Standing Orders Legislation is defined under Article

260 to include -

14 (1) A County assembly -

(a) an Act of Parliament, or a law made under authority conferred by an Act of Parliament; or

(b) a law made by an assembly of a county government, or under authority conferred by such a law;

Section 14 of the CGA states as follows: -

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; and

b. subject to standing orders made under paragraph (a), may establish committees in such manner and for such general or special purposes as it considers fit, and regulate the procedure of any committee so established.

In the case of **NDERITU GACHAGUA V DR THUO MATHENGE & 2 OTHERS, Civil Appeal No. 14 of 2013 (Nyeri)** the Court of Appeal states the following on the issue of gazettment: -

The Gazette does not as it were constitute the notice or the law itself but rather the official announcement of its existence or coming into force. Such that the validity or otherwise of a law or notice is not resident in the Gazette but the persons or bodies tasked with the responsibility to make such laws or issue such notices in accordance with the law and the Constitution. The Gazette merely confers a seal of authority or officialdom to existence of the notice or the law.

The standing orders of the Lamu County Assembly need not be gazzetted. They are not unconstitutional. All what is required under section 14 of the CGA is for the standing orders to be in line with the constitution. The standing orders are valid and lawful.

There is the minor issue of the applicability of the Employment Act to the petitioner. I am well guided by the decision of the Court of Appeal in the **COUNTY GOVERNMENT OF NYERI & ANOTHER V CECILIA WANGECHI NDUNGU** (supra) case when the court stated as follows: -

We are of the considered view that the Employment Act does not apply to state Officers. A State Officer's terms and conditions of service are regulated by the Constitution or the relevant Statute, principles of fair administrative action and rules of natural justice. It therefore follows that a member of the County Executive Committee being a State Officer is not subject to the provisions of the employment Act.

Given the manner in which the County Assembly conducted the process of the removal of the petitioner as a member of the Lamu County Government Executive Committee, I do find that the application herein establishes a prima facie case with probability of success. The petitioner will suffer irreparable damage if the orders being sought are not granted. This is not tantamount to upholding private rights against public interest. The Constitution does safeguard private rights and such rights have to be protected by the court. What I have noticed from the dispute is that there is cold war between the Governor and the Speaker of the County assembly. Had the two sat together and deliberate on the problem, the motion could not have proceeded. The Governor has powers to transfer one Executive Committee Member from one department to the other. Members of the Assembly may be having problems dealing with the petitioner in relation to the departments such as issues to do with land and water. The petitioner is indeed incharge of a very wide docket. She can be transferred to another docket as her competence is not in doubt. Members of the County assembly should understand that allocating resources to a department is one thing and availing

those resources to the department is another. Implementing the projects is a tedious process which requires patience and support of the members of the Assembly. The budgetary allocations have to be followed up with the disbursement of actual funds to carry out the activities.

The upshot of this is that the application dated 27th April, 2016 is merited and is hereby granted as prayed. Costs shall follow the outcome of the main suit.

Dated and delivered in Malindi this 29th day of September, 2016.

S.J. CHITEMBWE

JUDGE