



**THE REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO 6 OF 2016.**

**IN THE MATTER OF ARTICLES 10, 23, 27, 38, 47, 50 AND 178 OF THE CONSTITUTION OF  
KENYA 2010**

**AND**

**THE COUNTY GOVERNMENT ACT, 2012;**

**AND**

**THE STANDING ORDERS OF THE COUNTY ASSEMBLY OF MACHAKOS AND**

**IN THE MATTER OF THE DECISION OF THE SPEAKER OF AND OR THE COUNTY  
ASSEMBLY OF MACHAKOS DATED THE 6TH DAY OF APRIL 2016**

**NATHANAEL NGANGA REUBEN ..... PETITIONER**

**VERSUS**

**THE SPEAKER, MACHAKOS COUNTY ASSEMBLY.....1<sup>ST</sup> RESPONDENT**

**MACHAKOS COUNTY ASSEMBLY .....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

The Petitioner is a duly elected member of the Machakos County Assembly of the County of Machakos, and he claims that on 7th May 2013 he was elected the Deputy Speaker/Chairperson of Committees by the Machakos County Assembly. On 27<sup>th</sup> August 2013 a motion was brought to the assembly, challenging the existence of the office/position of a Deputy Speaker. Upon debate on the Motion, the 1<sup>st</sup> Respondent ruled that the position of a Deputy Speaker was lawful, and that the holder of the position should continue to serve in that capacity.

However, that on 7th April 2016, while the Petitioner was travelling to Nairobi for an examination at a local university, he was informed that a member of the Assembly was moving a motion under Standing Order Number 49(h), that sought a declaration and ruling that the position of a Deputy Speaker was not in existence and that the said position be declared null and void. The grounds upon which the motion was based was that since the petitioner was elected as Deputy Speaker under the old Standing Orders which were promulgated by the Transition Authority and adopted by the 2<sup>nd</sup> Respondent in 2013, the position is not recognized as such under the current Standing Orders that were adopted by the assembly on 14th July

2014 The motion was supported, and after a brief debate, carried the day and it was adopted.

The Petitioner then filed the present Petition dated 11<sup>th</sup> April 2016 seeking the following orders:

- a) An injunction order to restrain the Respondents from electing any member of the county assembly of Machakos as a Deputy Speaker or as a Chairperson of Committees.
- b) A conservatory order staying the decision of the Respondents dated 6th April 2016 that nullified the position of a Deputy Speaker and removed the petitioner from performing the functions of a Deputy Speaker.
- c) A declaration that the Petitioner having been the first to be elected to the position of a deputy speaker of the county assembly of Machakos, his term shall end after the life of the county assembly unless otherwise lawfully removed .
- d) A declaration that the Standing Orders adopted on the 9th July 2014 by the 2<sup>nd</sup> Respondent do not operate retrospectively and /or do not supersede sections 9 and 11 of the County Government Act 2012.
- e) A declaration that the Respondents acted in breach and violation of Articles 10,22,23,27,38,47,50 and 178 of the Constitution.
- f) An order of certiorari to remove to the High Court and quash the decision of the 1st Respondent dated the 6th April 2016 and any other decision that seeks

### **The Petitioner's Case**

The Petitioner's case is that he was elected as Deputy Speaker/ Chairperson of Committees on 5<sup>th</sup> May 2013 under the old Standing Orders as prescribed by the Transition Authority. He stated that the definition of a Chairperson of Committees is provided for under section 2(1) (a) of the said revised Standing Orders as follows:

**"---means the member of the assembly elected by the assembly under Standing Order 14 pursuant to Article 178(2) of the Constitution and section 9(4) of the County Governments Act, 2012 and shall deputize the speaker;"**

Further, that the revised current Standing Orders do not make reference to a Deputy Speaker, but a Chairperson of Committees which means the member of the assembly elected by the assembly under Standing Order 14 pursuant to Article 178 (2) of the Constitution and Section 9 (4) of County Government Act, 2012 and who shall deputize the Speaker.

According to the Petitioner, the Respondents have violated both Article 178 of the Constitution and Section 9(4) and (5) of the County Governments Act, 2012, and have purported to remove the Petitioner without granting him an opportunity to be heard as envisaged under Articles 47 and 50 of the Constitution, and section 11 of the County Government Act, 2012. Further, that the procedure for removal of a Deputy Speaker ought to be the same as the procedure for removal of a speaker .

E.K. Mutua & Co. Advocates, the Petitioner's learned counsel, filed submissions dated 16th May 2016, and supplementary submissions dated 23rd June 2016, wherein it was urged that that the position of Chairperson of Committees is the same as the position of the Deputy Speaker , and that the intention of the crafters of the Constitution, of Parliament and the drafters of the Standing Orders was that the Chairperson of Committees is the same as a Deputy Speaker. Reliance was placed on Standing Order 14 which the Petitioner submitted confirms that the person so elected as chairperson of committees has the responsibility of deputizing the Speaker as discerned from the following facts:-

- His election is conducted immediately after the elections of a Speaker.

- The procedure of his election is the same as the one for a speaker.
- His terms is envisaged to run for the entire term of the County Assembly.
- He presides over all Committees of the whole County Assembly.

Further reliance was placed on Article 178 of the Constitution and sections 9 (4) and 9 (5) of the County Government Act, 2012 which create the position of the deputy to the Speaker, and which suggest that the position of the person who is elected to act as a Speaker in the absence of the Speaker is not *ad hoc* in nature, but a position that runs for the entire term of the assembly. It is also the Petitioner's submission that the office of a "Deputy Speaker" is expressly provided for and or recognized under section 21 (3) of the Elections Act provides as follows:-

**"21(3) The Deputy Speaker of a County Assembly shall be elected from among persons who are members of that County Assembly."**

The Petitioner also challenged the legality of the proceedings and decision dated 6th April 2016 by the Respondents, and contended that the motion to remove him from office was brought under Standing Order Number 49(h) which allows members to move certain motions without notice. The Petitioner's contention is that a motion that effectively removes him from office ought to be moved with the requisite notice under Standing Order Number 44, by virtue of the fact that the procedure for election of a Deputy Speaker or Chairperson of Committee is the same as the election of a Speaker and the procedure for his/her removal should therefore *mutatis mutandi* as the one for removal of the Speaker.

According to the Petitioner, the office of the person who deputizes the Speaker is established under both the Constitution and the County Government Act, 2012, and it matters not whether the office is termed as Chairperson of Committees or as a Deputy Speaker. The said office cannot therefore be spared or abolished by any motion, decision or resolution, and to abolish the office is therefore unconstitutional and illegal.

It was also submitted that the Respondents violated the Petitioner's rights to legitimate expectation and a fair hearing. It was urged in this respect that the Respondents are obligated to adhere to Article 47 of the Constitution. However, that in violation of the said Article, the Respondents proceeded to condemn the Petitioner unheard as while knowing that the Petitioner was away and not at the assembly, they proceeded to debate the motion. Further, the motion was moved without notice to the Petitioner who was directly affected by it.

Furthermore, that under Section 9 of the County Governments Act, 2012, there is an express representation in law that the person who is first elected to deputize the Speaker shall hold the said position for the entire term of the assembly. Therefore, that any decision that is taken to deprive the Petitioner of the said benefit is against the principle of legitimate expectation. Various judicial decisions were cited in support of this position including **Republic vs Chief Justice of Kenya & 6 Others Ex-parte Moijo Mataiya Ole Keiwua (2010) eKLR**, **Abdul Waheed Sheikh & Another V Commissioner of Lands & 3 Others, (2012) eKLR**, and **Geoffrey Matana Asanyo V Nakuru Water and Sanitation Services Company & 7 Others, [2014] eKLR**

On the Court's jurisdiction, the Petitioners relied on the decisions in **Mumo Matemu Vs. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**, and **Judicial Service Commission V Speaker of the National Assembly & Another, [2013] eKLR** for the position that under Section 29 of the National Assembly (Powers and Privileges Act) (Cap 6), courts cannot exercise jurisdiction in respect of acts of the Speaker and other officers of the National Assembly, but that under Article 165(3)(d) of the Constitution, this court can enquire into any unconstitutional actions on their part.

Lastly, it was submitted that if the decision by the assembly is found to be illegal, then this court has jurisdiction to issue an order of judicial review under Article 23 (3) of the Constitution.

### **The Respondent's Case**

The response by the Respondents is in a replying affidavit sworn on 22<sup>nd</sup> April 2016 by Hon. Bernard Muteti Mungata, the 1<sup>st</sup> Respondent herein. In summary, the Respondents state that this Court cannot exercise the jurisdiction granted to it under Article 165 of the Constitution, nor grant the orders sought, as the Petition is speculative and does not disclose a real controversy or dispute capable of resolution. This is for reasons that it is predicated on an assumption that there exists an office of a Deputy Speaker whereas there is absolutely no provision for such an office in any existing laws in this country. Further, that the Petition does not disclose adequate particulars in support of the claim relating to the alleged violations of the Constitution, to enable this Court grant the reliefs sought herein.

It is also alleged that this Court has no jurisdiction to supervise constitutional bodies carrying out their mandate within the confines of the Constitution, and that the Petition herein was made in bad faith, and offends the doctrine of Separation of powers, as it invites this Court to direct County Assemblies which are Legislative branches of government on their procedures and how they ought to run their affairs. Further, that the proceedings of the 2<sup>nd</sup> Respondent cannot be subject to these proceedings as the same are subject to the provisions of Article 196(3) of the Constitution as read with Sections 16 and 17 of the County Governments Act, and Sections 12 and 29 of the National Assembly (Powers and Privileges) Act, which protect members from prosecution with respect to matters said in a debate, petition, motion or other proceedings of the county assembly.

The Respondents contend that the Petitioner is not sure of what position he was elected to and/or which position is the subject of these proceedings, as he alleges to have been elected as a chairperson of committees, and at the same time elected as Deputy Speaker, and this being a court of law, it cannot be engaged in speculation. The 1<sup>st</sup> Respondent denied that he made a communication that the position of Deputy Speaker was lawful during debate of the motion brought to the Assembly challenging the existence of the office/ position of a Deputy Speaker, and reproduced excerpts of the debate where he stated that the said position is not provided in any law.

The Respondents conceded that in the year 2013, the County Assembly's business was conducted pursuant to Interim County Assembly Standing Orders as prescribed by the Transition Authority, and stated that the said Interim County Assembly Standing Orders in section 2(1) did not recognize the Office of the Deputy Speaker but that of Chairperson of Committees. Further, that 1<sup>st</sup> Respondent in compliance with Section 14(1) of the County Government Act made Standing Orders consistent with the Constitution that regulate the procedure of Committees established therein which were adopted on the 9<sup>th</sup> July, 2014, and which did not make any reference to a Deputy Speaker.

According to the Respondents, they acted within the confines of Articles 10 and 178 of the Constitution of Kenya, 2010 as read with Sections 9 and 14, of the County Government Act in that a Motion was moved by a Member of the County Assembly for the sparring of the office of the Deputy Speaker, which is not a creature of any law so as to realign with the 2<sup>nd</sup> Respondent's Standing Orders, and that this Court has no jurisdiction to impede a Constitutional body from performing its functions.

In addition, that the said Motion was moved under Standing Order 49(h) which allows for the same to be moved without notice. Consequently, that it is untenable for the Petitioner to allege that he ought to be accorded an opportunity to be heard and to defend himself, and he has also not proved he was actually absent on the date the Motion was tabled and deliberated on; or that he has been discriminated against by the Respondents for his alleged belief and association with a Political Party, and that his right have been infringed by the Respondents' actions which are well within the law.

The above arguments were also reiterated in submissions dated 13<sup>th</sup> June 2016 that were filed in Court by Kamende D.C. & Company Advocates and in which reliance was placed on various judicial authorities including **Bernard Muia Tom Kiala -vs- The Speaker of Machakos County Assembly & 4 Others,(2014) e KLR**, in **Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 Others , (2013) eKLR**, and **Simon Wachira Kagiri vs County Assembly of Nyeri& 2 Others, (2013) eKLR** for the position that this Court had no jurisdiction on account of the doctrine of separation of powers.

## **The Issues and Determination**

I have read and carefully considered the pleadings and submissions made herein. The same raise four issues for determination. The first is whether this Court has jurisdiction to entertain this Petition. Secondly, what is the applicable law as regards creation of offices in the County Assembly of Machakos, Thirdly, whether the office of deputy speaker of the County Assemble of Machakos exists in law. Fourthly, whether the Petitioner's rights have been infringed by the Respondents. And lastly, whether the Petitioner is entitled to the relief sought.

### ***Does this Court have jurisdiction to entertain this Petition?***

The Respondents have urged that this Court is not the forum to deal with the Petitioners' claim on account of the doctrine of separation of powers, and it was further urged that the Court should not impede their constitutional functions on this account.

Jurisdiction is always granted by law or other like instrument as held by the Court of Appeal in **The Owners of the Motor Vessel "Lilian S" –VS- Caltex (Kenya) Ltd [1989]** KLR 1 .

**“By jurisdiction is meant the authority which a court has to decide matters presented in a formal way for its decision. The limits of this authority are imposed by the stature, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”**

The Petitioner has in this respect argued that his rights were infringed by the Respondents, and more specifically his right to a fair hearing under Articles 47 and 50. Further, that Article 165 (3) (d) of the Constitution in this respect provides that the High Court shall have jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of—

- (i) the question whether any law is inconsistent with or in contravention of the Constitution;
- (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
- (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
- (iv) a question relating to conflict of laws under Article 191; and Article 22 (1) provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article 23(1) specifically gives jurisdiction to the High Court in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

The Respondents have argued in this respect that Article 165 of the Constitution is inapplicable to them for reasons that the investigation for removal of a member of the county assembly is a legislative function. My stated view on this issue is that it is indeed the correct position that Courts should not ordinarily interfere with the exercise of the legislative authority or executive functions of a constitutional body in line with the doctrine of separation of powers, and ought to exercise judicial restraint in matters

which deal with legislative authority of County Governments.

However, where a question arises as to whether an action is inconsistent with the Constitution or is passed in contravention of the Constitution, as is the case in the instant Petition, the High Court is the institution constitutionally empowered to determine such an issue, subject to appellate jurisdiction given to the Court of Appeal and the Supreme Court. This Court therefore not only has jurisdiction to hear and determine this Petition, but is also in the circumstances exercising its constitutional function within the doctrine of separation of powers.

In addition, as seen from the holding in **The Owners of the Motor Vessel “Lilian S” –VS- Caltex (Kenya) Ltd [1989]** KLR 1, any limitation as the jurisdiction of a court must also by law be granted. There is nowhere in the cited Articles that the jurisdiction granted thereunder to the High Court is limited as regards the actions of County Assemblies, County Public Service Board or any other constitutional or statutory bodies.

Lastly, it is my view that the question of whether the Court in exercising its jurisdiction will be offending the doctrine of separation of powers is one that can only be decided upon after the parties have canvassed their respective cases, upon which the Court can then make a decision one way or another as to whether the dispute is one that can be resolved by way of judicial processes or by other processes. In other words an objection as to infringement of the doctrine of separation of powers is not a jurisdictional issue, but a substantive and factual issue to be determined upon hearing of evidence and argument.

***What is the applicable law as regards creation of offices in the County Assembly of Machakos?***

I will at the outset on this issue assert that the supreme law that provides for the governance structures in Kenya is the Kenya Constitution. The Constitution firstly in Article 1(3) and (4) after affirming that the sovereign power rests with the people of Kenya, proceeds to set out the structures by which that sovereign power may be exercised as follows:

**“(3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—**

**(a) Parliament and the legislative assemblies in the county governments;**

**(b) the national executive and the executive structures in the county governments; and**

**(c) the Judiciary and independent tribunals.**

**(4) The sovereign power of the people is exercised at—**

**(a) the national level; and**

**(b) the county level.”**

Various chapters of the Constitution detail out the composition, offices in, and operationalization of these governance structures. For legislative assemblies in the County governments, of which the Machakos County Assembly is one, the provisions of chapter eleven on devolved government are key. Article 176 of the Constitution in the said chapter creates a county government for each county, consisting of a county assembly and a county executive. The members and offices of the County Assembly are provided in Article 177(1) of the Constitution which provides as follows:

**“(1) A county assembly consists of—**

**(a) members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;**

- (b) the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender;**
- (c) the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and**
- (d) the Speaker, who is an *ex officio* member.”**

The term of a county Assembly is five years under Article 177(4).

Article 200 of the Constitution also gives power to Parliament to enact legislation to give effect to the provisions of chapter on devolved government as follows:

- (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—**
  - (a) the governance of the capital city, other cities and urban areas;**
  - (b) the transfer of functions and powers by one level of government to another, including the transfer of legislative powers from the national government to county governments;**
  - (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;**
  - (d) the procedure of assemblies and executive committees including the chairing and frequency of meetings, quorums and voting; and**
  - (e) the suspension of assemblies and executive committees.**

The legislation enacted by Parliament in this respect is the County Governments Act, which expounds on the membership of a County Assembly under section 7 as follows:

- (1) In addition to the members who are elected under Article 177(a), or nominated under Article 177(b) of the Constitution, a county assembly shall comprise—**
  - (a) six nominated members as contemplated in Article 177(c) of the Constitution; and**
  - (b) the speaker, who is an *ex officio* member elected in accordance with Article 178 of the Constitution.**
- (2) The political party nominating persons under subsection (1) shall ensure that—**
  - (a) community and cultural diversity of the county is reflected in the county assembly; and**
  - (b) there is adequate representation to protect minorities within the county in accordance with Article 197 of the Constitution.**
- (3) The number of members nominated under subsection (1)(a) shall be reviewed to accord with the number of Wards determined by the Independent Electoral and Boundaries Commission under section 27(3)(a).**

The above cited laws are the substantive laws that provide for the members and offices in a County Assembly. In this regard I agree to a certain extent with the arguments put forward by the Respondents that such offices are incapable of being created by Standing Orders, for the reasons that Standing Orders

are subordinate rules of procedure for the conduct of business in legislative assemblies, and are provided for as such under section 14 (1) of the County Government Act which states as follows:

**(1) 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; 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.**

Any interpretation of Standing Orders can therefore only be in the context of procedure, and not substance, and this Court will revert back to the issue as to whether it is within its remit to interpret the Standing Orders later on in this judgment. As regards the issue at hand it suffices to state that the applicable law as regards the creation of offices in the County Assemblies is the Constitution and County Government Act and not Standing Orders

***Does the office of Deputy Speaker of the County Assembly of Machakos exist in law?***

The provisions detailed out in the foregoing clearly do not provide for the position of a Deputy Speaker in County Assemblies. The only non-elective member and office in the County Assembly provided for in the Constitution is that of a Speaker, who is an *ex officio* member of the County Assembly, and Article 178 of the Constitution details out the procedures of appointments and duties of the Speaker as follows:

**(1) Each county assembly shall have a speaker elected by the county assembly from among persons who are not members of the assembly.**

**(2) A sitting of the county assembly shall be presided over by—**

**(a) the speaker of the assembly; or**

**(b) in the absence of the speaker, another member of the assembly elected by the assembly.**

**(3) Parliament shall enact legislation providing for the election and removal from office of speakers of the county assemblies.**

Other offices in the county assemblies created by the County Government Act are the County Assembly Service Boards and the Clerk and staff of the County Assembly under sections 12 and 13 of the Act. The County Assembly Service Board are made up of the following members;

**(a) the Speaker of the county assembly as the chairperson;**

**(b) the leader of the majority party or a member of the county assembly deputed by him or her, as the vice-chairperson;**

**(c) the leader of the minority party or a member of the county assembly deputed by him or her; and**

**(d) one person resident in the county, appointed by the county assembly from among persons who have knowledge and experience in public affairs, but who is not a member of the county assembly.**

**(4) The county assembly clerk shall be the secretary to the county assembly service board. It is**

**also provided that office of the clerk of the county assembly and the offices of members of the staff of the clerk of the county assembly shall be offices in the county assembly service board.**

A plain reading of Article 178 is that any member of the county can be elected to preside over a sitting of the County assembly, and no substantive position of Deputy Speaker is expressly or by implication created by the Article. Likewise the provisions of the County Governments Act relied on by the Petitioner, being section 9(4) and (5) do not create any substantive post of Deputy Speaker, and state that any member of the County Assembly can be elected to act as Speaker and only during the absence of the Speaker, and can also be removed from that position during the term of the Assembly. The said provisions are as follows:

**“(4) At any time in the absence of the speaker of the county assembly or in matters that directly affect the speaker, the county assembly shall elect a member to act as speaker as contemplated under Article 178(2)(b) of the Constitution.**

**(5) Unless otherwise removed, the first member elected under subsection (4), shall, in the absence of the Speaker, preside over the sittings of the assembly for the term of the county assembly.**

In addition, the provisions of the Standing Orders relied on by the Petitioner as indicated in the foregoing do not create any substantive office, and indeed may vary from county assembly to county assembly as regards the procedures that will be followed as the assembly undertakes its legislative functions.

It is noteworthy in this regard that the chairperson of committees is the member of the county assembly that the Machakos County Assembly has provided will deputise for the Speaker in proceedings in the County Assembly as envisaged in Article 178 and section 9(4) and (5) of the County Governments Act. The County Assemblies are in this regard at liberty and have the powers under section 14 of the County Governments Act to designate any member of the assembly to deputise for the Speaker in their Standing Orders in his duties, and name the member as they prefer, including naming that member a deputy speaker or chairperson of Commissions. Likewise they can provide for the appointment and removal of such member in the Standing Orders. What is important is to note that the provisions do not create a constitutionally recognized position of Deputy Speaker, and are only limited to the specific procedures of a county assembly. As noted earlier, such procedures can indeed differ amongst the different county assemblies.

The Petitioner in this regard also relied on the Elections Act section to argue that it recognizes the office of Deputy Speaker in law. Section 21 (1) -(3) provides as follows:

**(1) The speaker of a county assembly shall be elected by each county assembly in accordance with the Standing Orders of the county assembly, from among persons who are qualified to be elected as members of a county assembly but are not such members.**

**(2) For the purpose of the election of the speaker of the county assembly after the first election under the Constitution, the procedure set out in the First Schedule shall apply.**

**(3) The deputy speaker of a county assembly shall be elected from among persons who are members of that county assembly.**

**(4) The First Schedule shall, with necessary modifications, apply to the election of the deputy speaker after the first election under the Constitution.**

The purpose of the Elections Act is to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and county assembly; to provide for the conduct of referenda; and to provide for election dispute resolution and for connected purposes. To the extent that the substantive applicable law as illustrated in the foregoing does not create the office of a Deputy Speaker, the provisions of section 21(3) and (4) the Elections Act are to this extent unconstitutional and

substantively *ultra vires*.

***Were the Petitioner's rights infringed by the Respondents?***

Arising from the findings in the foregoing, it is evident that there is no constitutional or statutory position of a Deputy Speaker of a county assembly created. As the premise of the Petitioner's case was the existence of such a position, and given that the Respondents followed the applicable procedures in their Standing Orders to remove the Petitioner as Chairperson of Committees, I further find they did not infringe on any constitutional rights, or legitimate expectation of the Petitioner.

The Petitioner has also urged that there was infringement of his right to fair hearing and that the wrong Standing Orders were applied. It is his argument that the motion to remove him from office was brought under Standing Order Number 49(h) which allows members to move certain motions without notice, and Standing Order Number 44 ought to have applied in his removal.

In this respect I agree with the Respondents arguments that a decision on the application and interpretation of Standing Orders do not fall within the purview of this Court, and indeed, it is the role and duty of the Speaker of a legislative assembly to interpreting the rules governing procedures in that assembly, and to make a rule on a matter on which there is a conflict or for which there is no provision in the current parliamentary rules. The Petitioner ought to have raised his concerns in the County Assembly and sought a ruling on the same.

Therefore this is one of the cases where the Court should exercise judicial restraint. The Supreme Court of Canada in this regard in the case of **Canada (House of Commons) v. Vaid [2005] 1 SCR 667** provided a "doctrine of necessity" in explaining the areas where Courts should exercise restraint as regards parliamentary and County assembly proceedings which are closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly's work in holding the government to account.

The restraint by the Courts to interfere with the workings of Parliament and County Assemblies on account of their mandate and privilege has also been expressed in various Kenyan judicial decisions, including the decision by the Court of Appeal (**Okwengu, GBM Kariuki, & Mohamed JJA**) in **Martin Nyaga Wambora v County Assembly of Embu & 37 others [2015] eKLR** with respect to the exercise of powers by County Assemblies on the removal of state officers.

**Is the Petitioner is entitled to the relief sought?**

The sum total of the foregoing findings is that this Court cannot grant the Petitioner the reliefs he seeks.

The Petitioner's petition therefore fails for the foregoing reasons and each party shall bear their respective costs of the Petition. The interim conservatory orders issued herein on 26<sup>th</sup> June 2015 are accordingly also discharged.

Orders accordingly.

**Dated Signed and Delivered at Machakos this 14<sup>th</sup> day of December 2016**

**P. NYAMWEYAPetition dismissed.**

**JUDGE**