



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
PETITION NO. 1 OF 2014

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF Articles 1,2,3,19,20,21,22,23,24,25(c),27,28,47,50(1)(2) (a,b,c,g,j,k),
165,175,176,185, 258 & 259 OF THE CONSTITUTION OF KENYA**

BORN BOB MAREN.....PETITIONER

- 1. THE SPEAKER, NAROK COUNTY ASSEMBLY**
- 2. NAROK COUNTY ASSEMBLY.....RESPONDENTS**
- 3. HON. MUNTET DICKSON**
- 4. HON. OLAIMERI OLE YIAMPOY**

J U D G M E N T

INTRODUCTION

1. The factual background giving rise to this Petition is not in dispute and can be restated as follows. The Petitioner is a Member of County Assembly (MCA) for **Ololunga Ward of Narok County**. He was elected to the position through a political party known as the **Kenya National congress (KNC)**, a Minority Party in the Narok County Assembly. Subsequently the Petitioner was elected as the Leader of the Minority Party under the County Assembly Standing Orders.
2. It would seem that on 9th September 2014 a meeting was held by some of the members of the KNC Party, which resolved to replace the Petitioner by electing one of those present, Muntet Dickson, the 3rd Respondent and then Minority Party Whip and MCA Olorropil Ward, as the new Minority Party Leader. The MCA Shangoi Ward, Olaimeri Ole Yiamпой, (4th Respondent) was elected as the Deputy Minority Leader. The decision was communicated to the Speaker Narok County Assembly (1st Respondent) through a letter dated 15th September 2014 by the 3rd Respondent and signed in his capacity as Minority Party Whip.
3. By a Communication from the Chair, the Speaker duly notified the County Assembly of the changes in the leadership of the Minority Parties. It is these developments that prompted the Petitioner to approach the court under Certificate of Urgency through filing the present Petition contemporaneously with a Notice of Motion dated 23rd September 2014. The Notice of Motion was brought *inter alia* under Rules 3,4,11,23 and 24 of the Constitution of Kenya Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2013 (**popularly known as the Mutunga Rules**), and Articles 23, 25,28 and 50 of the Constitution.

4. The Notice of Motion primarily sought interim orders to stay the decision the Respondents and to restrain the 3rd Respondent in particular from assuming the functions of the Leader of the Minority Party. Omondi J. granted stay orders on 24/9/14. The said Notice of Motion and a subsequent one seeking leave to commence contempt proceedings against the 1st Respondent were compromised through a consent recorded in court by the parties on 19/11/14. Under the terms of the consent the parties confirmed the conservatory orders pending determination of the Petition. The parties also agreed to canvass the Petition by way of written submissions. The subject of this judgment therefore is the Petition.

The Pleadings

5. The Petition is expressed to be brought under various articles of the constitution including Articles 1,21,22,23,27,28,47,50,165,258 and 259 of the Constitution. The gravamen of the 44- paragraph Petition is that the procedure adopted by the 1st, 2nd, 3rd and 4th Respondents in removing the Petitioner from office was unlawful, in breach of the Constitution and violated the Petitioner's right to a fair hearing under Article 50 (1) & (2), to administrative justice under article 47 and a violation of Standing Orders No. 16 (1,2,3,4,5) of the Narok County Assembly.
6. The Petitioner also challenges the merits of the decision to remove him terming it as one based on blatant lies and unfounded allegations. He cast doubt on the party affiliation of the 4th Respondent. As against the 1st Respondent, the Petitioner alleges bias and incompetence. He accuses 1st Respondent of acting in collusion with the 3rd and 4th Respondents by accepting and communicating the removal of the Petitioner without confirming that the impugned resolution was arrived at in compliance with the Standing Orders, and by failing to subject the resolution to a vote. The communication of his purported ouster by the 1st and 2nd Respondent to the County Assembly is described by the Petitioner as unprocedural. According to the Petitioner the Assembly's ultimate decision to remove the Petitioner from office was made in violation of the Constitution and County Governments Act.
7. The Petitioner avers that by their respective actions the 1st, 2nd, 3rd and 4th Respondents failed to discharge their respective mandates to promote the rule of law, constitutionalism and to protect public interest. The petitioner therefore seeks the following orders:-
 - a. **An Order of permanent injunction directed at the 1st and 2nd Respondent barring them from tabling any motion, resolution and/or report for the removal of the Petitioner as the Leader of Minority in the Narok County Assembly.**
 - b. **An Order that the Petitioner be allowed to continue carrying out his duties as the Leader of the Minority Party in the Narok County Assembly and be allowed to access his office and carry out his mandate and or duties as stated by law and standing orders.**
 - c. **An order directed at the Respondents restraining them from nominating, electing, presenting, gazzetment, appointing and/or delegating the functions of the Leader of Minority in the Narok County Assembly to Hon. Dickson Muntet and/or any other member of the Narok County Assembly.**
 - d. **A declaration that the process of removal of the petitioner as the Leader of the Minority Party in the Narok County Assembly on the 16th September 2014 is null and void ab initio, unconstitutional and ought to be stayed in the interests of justice.**
 - e. **An Order that the 1st Respondent is unsuitable and unfit to continue serving as the speaker of the Narok County Assembly.**
 - f. **Such further and/or additional orders do issue as may be necessary to ensure that the removal of the Petitioner as the Leader of Minority in the Narok County Assembly meets the requirements of the Constitution of the Republic of Kenya.**

g. The costs of this Petition be borne by the Respondent in any event.

8. The Petition is supported by the affidavit of the Petitioner which substantially replicates the contents of the Petition. Through the Clerk of the Narok County Assembly, one **Shedd Simotwo** the 1st and 2nd Respondents filed an affidavit in opposition to the Notice of Motion but none specifically to counter the Petition. I will consider the sole affidavit to be their response to the Petition as well, where relevant. The 1st Respondent's position is that he was legally obligated upon receipt of communication from the Minority Party Whip to communicate the changes in the Minority Party Leadership to the County Assembly. That further, the 1st and 2nd Respondents are not engaged in the internal affair and politics of the assembly parties as the mandate of electing and removing the party leaders is vested in the political parties.
9. The 3rd Respondent swore an affidavit in his own behalf and on behalf of the 4th Respondent in responding to the Petition and the spent Notice of Motion. Confirming the positions held by the Petitioner and himself prior to the meeting of 9/9/14, the 3rd Respondent narrated in detail the events leading up to the said meeting and his efforts to invite the Petitioner who allegedly declined to attend the said meeting. He deponed that the meeting was a culmination of persistent requests and pressure by Minority Party MCAs who were unhappy with the performance of the Petitioner in his role as Leader of the Minority Party. He defends the decision arrived at in the meeting and asserts that he and the 4th Respondent were duly elected in accordance with the Standing Orders, as the Minority Party Leader and Deputy respectively
10. The 3rd Respondent also contends that the disputed election constitutes a political question the legality of which the court should be reluctant to entertain. Moreover, he asserts that by failing to protest in the Assembly regarding the impugned decision and in handing over the office to the 3rd Respondent the Petitioner had recognized the Petitioner's new position as Minority Party Leader.
11. The Petitioner put in a Supplementary affidavit which in the main reiterated the contents of his Supporting affidavit and maintaining the stand that, the disputed elections failed the test of a proper majority decision as countenanced under Standing Order No. 16 (3). He denied that he was ever served with any notice of the meeting culminating in his ouster. He disputed acquiescence to his removal in the manner alleged by the 3rd Respondent.

THE SUBMISSIONS

12. A preliminary issue concerning the reliance by the 1st and 2nd Respondent upon the submissions of the 3rd and 4th Respondents needs to be addressed. The decision by the said Respondents was communicated by counsel for the said Respondents in court on 10/12/14 in the presence of the counsel for the Petitioner. No objection was raised. In any event it was not demonstrated by the Petitioner how such reliance was unprocedural as asserted in his written submissions. Suits belong to parties and it is upon their counsel to decide how best to prosecute their respective cases. In the circumstances, I do not consider the objection by the Petitioner to be a serious submission and will take the written submissions of the 3rd and 4th Respondents as the answer proffered by the 1st and 2nd Respondents to the Petition.

The Petitioner's Submissions

13. The parties' written submissions took cue from the pleadings filed. In their respective submissions the parties framed what they viewed as the issues arising for determination. The Petitioner for his part framed the following issues:-
 - a. **Whether the 1st and 2nd Respondents failed in carrying out their Constitutional duties.**
 - b. **Whether the court has jurisdiction over this matter.**
 - c. **Whether due process was followed in the removal of the Leader of Minority.**

- d. **Whether the rules of natural justice and fair administrative action were adhered to.**
- e. **Who should meet the costs of the Petition.**

Whether the 1st and 2nd Respondents failed in carrying out their Constitutional Duties.

14. With regard to the 1st issue the Petitioner set out to establish the Constitutional anchoring of the institution of 1st and 2nd Respondents and the Narok County Assembly Standing Orders. It was argued that the Respondents violated both the Standing Orders and the Constitution by their respective actions of effecting, accepting and sanctioning unprocedural changes in the Minority Party leadership. Thus, it was argued that the 1st Respondent violated Article 73 (2) b that requires objectivity and impartiality in the performance of his functions.
15. Furthering his argument in this regard the Petitioner cited two authorities. The first was **The Speaker of the Senate and the Senate of the Republic of Kenya –Versus- Hon. Attorney General, The speaker of the National Assembly and three others (hereinafter Advisory opinion No. 2 of 2013)**. The Authority was cited for the proposition that parliament (or in this case the County Assembly) must operate within the limits of the Constitution which is the supreme law of the land, and, that a violation of procedural requirements of the Constitution is liable to be questioned by the courts in asserting the supremacy of the Constitution.
16. This is also the dictum in the South African case in the **Doctors for Life International –Versus- Speaker of the National Assembly and others (CCT 12 of 2005) (2006) ZACC 11** which was also relied upon by the Petitioner. In asserting the absolute supremacy of the Constitution over institutions, including parliament, the presidency and state officers, the Petitioner relied on the case of **John Kipngeno Koech and 2 others –Versus- Nakuru County Assembly and 5 others (2013) eKLR** where the famous South African case of **Speaker of the National Assembly and others –Versus- De Lille, MP and another (297/98) (1999) ZASCA 50** was quoted with approval.
17. The Petitioner submitted that the failure by the 1st Respondent to satisfy himself that due procedure process was followed in effecting the Petitioner's removal exhibited bad faith and was contrary to the legitimate expectation of the Petitioner to due process. To support this submission the Petitioner called to his aid the case of **Joseph Subalu Mutara –Versus- the Attorney General and Another (2014) eKLR** as authority that decision making bodies whose procedures are laid down by statute are responsible for applying their procedures and that provided the procedures result in fairness the courts will not interfere.

Whether the Court has Jurisdiction over this matter.

18. The Petitioner's position on this question is that the Constitution binds all persons and state organs under Article 2 (1). Similarly, under Article 21 (1) the state and every state organ has a fundamental duty to observe, respect, protect, promote and fulfill the rights and fundamental freedoms contained in the Bill of Rights. As regards locus, Article 22 (1) and 258 of the Constitution were cited as enabling the Petitioner to institute the present proceedings in enforcing his constitutional rights, both vertically (against the state), and horizontally (against a private citizen). In supporting this proposition the Petitioner cited several cases including **Satrose Ayuma and 11 others –Versus- Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme & 3 others (2013) eKLR** and **Isaac Ngugi –Versus- Nairobi Hospital & 3 others (2013) eKLR** and **Motala & Another –Versus- University of Natal (1995) 3 BCLR 374**, among other authorities.
19. The Petitioner submitted that Article 22, 23 and 165 (3) of the Constitution vest in the High Court the jurisdiction over matters concerned with alleged breach, denial, violation or threat of any right and fundamental freedom, and the power to grant relief. (**See Nancy Makokha Baraza –Versus- Judicial Service Commission & others (2013) eKLR**). He urged the court to adopt a purposive

- interpretation of the Constitution as envisaged by Article 259 (1) b, c and d. The Petitioner referred to a passage in the Court of Appeal decision in **Mumo Matemu–Versus- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR** to the effect that even though under the doctrine of separation of powers courts must defer to the independent functioning of the legislature and the executive, they play an interpretative role and have the “**last word in determining the constitutionality of all government activities.**”
20. With regard to the jurisdiction of the Political Parties Tribunal, established under the Political Parties Act, the Petitioner submitted that the dispute he placed before the court relates to the breach of the Standing Orders by the Respondents and infringement of his Constitutional rights arising from the alleged unprocedural removal, sanctioned by the Respondents’ communication of changes “not properly laid before the County Assembly,” as well as the failure by the 1st and 2nd Respondents to table the motion for removal before the Assembly for adoption or rejection. He relied on the case of **Republic –Versus- Kenya National Examination Council exparte Ian Mwamuli (2013) eKLR** for the argument that this court has jurisdiction in maintaining the balance against the biased, oppressive and arbitrary use of power by defining the limits of power by those who wield it.
21. He cited the **De Lille** case and Article 2 of the Constitution to argue that a citizen who considers himself aggrieved by any unconstitutional order or action by a public body is entitled to the protection of the courts as no body or authority is immune to judicial scrutiny. (See **Njenga Mwangi and Another –Versus- the Truth Justice and Reconciliation Commission & 4 others Nairobi High Court Petition No. 286 of 2013**). Finally he submitted that the collective actions of the Respondents resulted in a breach of the Petitioner’s rights and are a nullity in law.

The Respondents’ submissions.

22. Before proceeding to set out the Petitioner’s submissions relating to the 3rd and 4th issues, I consider it opportune at this stage to lay out the submissions of the 3rd and 4th Respondents upon which the 1st and 2nd Respondents also relied. This is because the said submissions primarily deal with the jurisdictional question which looms large in these proceedings.
23. The Respondents have taken the position that the question placed before the court through the Petition pertains to the removal of the Petitioner from the position of Leader of the Minority Party in the Narok County Assembly by his party or coalition members. Therefore they urge this court not to be drawn into the internal political affairs of the legislature or political party by entertaining the dispute.
24. Raising the political question doctrine, the Respondents argue that political questions are not justiciable and that the court must exercise restraint in interfering with decisions of the legislature founded upon the Standing Orders. The Respondents contend that Standing Order No. 16 stipulates the manner in which holder of the position of the Leader of Minority Party, created under Section 10 (3) of the County Governments Act, is elected and removed. According to the Respondents the responsibility of the 1st Respondent was merely to communicate the decision made by the Petitioner’s Party to the County Assembly.
25. They urged the court to adopt the path taken by **Majanja J. in Republic –Versus- County Assembly of Migori & 4 others Exparte Johnson Omolo Owiro (2014) eKLR** concerning the removal of Majority Party Leader in the Migori County Assembly. To the effect that, the office being of a kind assumed through elections conducted under internal legislative arrangements namely the Standing Orders, the court could not impose a leader on the members of his party or coalition.
26. It was the Respondents’ contention that the present dispute does not involve the leadership of the County Assembly being a party dispute, and therefore subject to the jurisdiction of the Political Parties Disputes Tribunal in the first instance, by virtue of section 39 and 40 of the Political

Parties Act. The Respondents relied on the decision of the High Court in Nakuru in **Judicial Review No. 20 of 2014 Republic –Versus- Susan Kihika and 2 others exparte George Mwaura Njenga** where the court stated that a political party dispute should in the first instance be handled by the Political Parties Disputes Tribunal. On these grounds the Respondents urged the court to dismiss the Petition with costs.

FURTHER ISSUES RAISED BY THE PETITIONER’S SUBMISSIONS.

27. For reasons that will become apparent, as well as the overlapping nature of the remaining issues with the Petitioner’s issues No. 1 and 2 above, I now return to the remainder of the submissions by the Petitioner and will restate them in summary.

Whether Due Process was followed in the Removal of the Leader of Minority Party.

28. The Petitioner, quoting the provisions of Standing Order 63 (1 & 2) & 64 of County Assembly Standing Orders which provide for a fair hearing, on priority basis for any person faced with a petition or proposal for his removal, argued that his removal was not in compliance with the laid out procedure, and that he is entitled to damages from the 1st Respondent in connection with the 1st Respondent’s improper exercise of his authority. The Petitioner relied on the decision in **Republic –Versus- Attorney General and Another Exparte Alfred Koroso (2013) eKLR.**

Whether the Rules of Natural Justice were adhered to.

29. On this score, it is further contended by the Petitioner that he was denied a fair hearing in violation of the provisions of Article 50 of the Constitution, and the common law *audi alteram partem* rule, as affirmed and applied in the case of **Peris Wambogo Nyaga –Versus- Kenyatta University (2014) eKLR.** He contended that where an act of parliament vests decision-making functions on administrative bodies, two sequential presumptions arise; firstly, that the body will act fairly towards those affected by its decisions, and secondly, that the consequence of non-observance of the rule is to render null and void any decision reached.

30. Authority for this proposition were the cases of **O’Reilly –Versus- Mackman (1983) 2AC 237 and Republic –Versus- Commission for Racial Equality exparte P. Hillingdon LBC (1982) Ac 779.** The Petitioner submits that he is entitled to equal protection of the law but that he was treated in a manner that is obviously discriminatory, unfair or biased. He therefore seeks the prayers contained in the Petition.

ANALYSIS AND DETERMINATION

31. I have carefully considered the parties respective pleadings, affidavits and submissions. In my opinion two primary issues stand out for determination and are the matters upon which this case turns. These issues can be stated as questions in the following manner:-

1. **What is the nature of the dispute presented by the petition?**
2. **Is this court the proper forum for determining the dispute?**

What is the Nature of the Dispute presented by the Petition?

32. The starting point must be the pleadings themselves. The Petition head and body cites several articles of the Constitution, which the Petitioner claims were violated and others that give him legal standing to present his Petition before this court. The key complaint articulated in the Petition is the alleged violation by the Respondents of the Petitioner’s right to fair administrative action (Article 41) and the right to a fair hearing (Article 50 (1), as well as violation of the Standing Orders of the Narok County Assembly. The enforcement articles relied on are *inter alia* Articles 20 to 23, 165 and 258 of the Constitution.

33. It appears from a reading of the Petition that the Petitioner's complaint as against the 1st and the 2nd Respondent was that they accepted and effected what was in the Petitioner's view an unprocedural decision made at the meeting of 9/9/14 by members of his Minority Party including the 3rd and 4th Respondents to remove him from office. The assertion that the decision was unprocedural was primarily based on the allegation that first, the Petitioner was not accorded a fair hearing by all the Respondents before arriving at their respective decisions, and secondly that with respect to the removal itself the decision was not a majority decision of the Minority Party, and finally, that the minutes of the meeting were not authenticated.

34. The Petitioner accused the 1st Respondent of failing to satisfy himself concerning these matters of propriety before making the communication to the 2nd Respondent for notification and or sanction. Essentially, the removal of the Petitioner involved a two- step process, governed by Standing Order 16 (1-5) which provides as follows:

“1. The Minority Party or coalition of parties in the County Assembly shall elect a member of the County Assembly belonging to the party or coalition of parties to be the Leader of the Minority Party.

2 In electing member under paragraph (1), the Minority Party or coalition of parties in the County Assembly shall take into account an existing coalition agreement entered into pursuant to the Political Parties Act.

3. A member elected under paragraph (2) may be removed by a Majority of votes of all members of the Minority Party or coalition of parties in the County Assembly.

4. The removal of a member from office under paragraph (3) shall not take effect until a member is elected in the manner provided for under paragraph (1).

5. The Whip of the Minority Party or coalition of parties in the County Assembly shall forthwith, upon a decision being made under this Standing Order, communicate to the Speaker, in writing the decision together with the minutes of the meeting at which the decision was made.”

35. The first step involved the holding of elections by the Minority Party and the second the communication of their decision to the 1st Respondent and ultimately to the 2nd Respondent. It must be recalled that the genesis of this dispute is the first step, the party election resulting in the Petitioner's removal. This is the step which set in motion the second step, nominal in nature, which involves the communication of the removal by Minority Party, first to the 1st Respondent and in turn to the 2nd Respondent.

36. Although the positions of the Majority and Minority Party Leaders are created under section 10 of the County Governments Act, it is the Standing Orders which provide for the process of election and removal of the Majority and Minority Party Leaders by the party members. The process is clearly a matter involving the internal affairs of a political party as the Petitioner has conceded in his submissions. His further submissions that the matter ceases to be such once the party decision is communicated to the County Assembly is difficult to accept for the following reason.

37. The Minority or Majority Party Leader comes into office through an election which is an expression of the wishes, of his party. Equally he remains in office at the pleasure of his party. As Majanja J. succinctly stated in **Republic –Versus- County Assembly of Migori & 4 others** expert **Johnson Omollo Owiro**:

“The election of the Majority Leader is a prerogative of the members of the party or coalition having the Majority in the Assembly.....His position is in the hands of the Party or coalition.....”.

This statement applies with equal force with regard to the position of the Leader of the Minority Party in the Assembly.

38. It may well happen that the elections held to fill these positions do not conform to the standard set by the Standing Orders for one reason or another. Indeed it may be true as alleged by the Petitioner herein that his party colleagues did not accord him a fair hearing to defend himself against their allegations before removing him, or even that the allegations leveled against him were false. He is entitled to seek a remedy for his grievance and has done so by way of a Constitutional Petition. In my considered view the Petitioner's restatement of the law regarding the right to a fair hearing and fair administrative action correctly state the law as it applies. However, in the context of the Petition before the court, this does not transform the dispute from what is primarily a political one into a pure constitutional matter of violation of rights which only the High Court can and should address under Article 165 (3) (b) of the Constitution.

39. A perusal of the prayers in the Petitioner fortifies this view. Except for prayers 5 and 7, the thrust of the remaining prayers appears to have one aim in view: to ensure that the Petitioner retains his position as the Majority Party Leader. **In Nakuru Judicial Review No. 20 of 2014 Republic – Versus- Susan Kihika and 3 others exparte George Mwaura Njenga** the court grappled with a dispute involving the removal of the Leader of the Majority Party by his party coalition. Citing violation of his constitutional rights to a fair hearing *inter alia*, the Leader sought an order of certiorari to quash the decision of the members of his coalition and an order of mandamus to compel the newly elected Majority Leader to vacate the office.

40. A Preliminary Objection was raised with respect to the jurisdiction of the court on grounds, *inter alia*, that the question of the election and removal of a Majority Party Leader in a County is a political process and that, the matter therefore lay within the mandate of the Political Parties Dispute Tribunal under section 40 of the Political Parties Act. This is what Mshila J. stated in upholding the Preliminary Objection:-

“It is not in dispute that the dispute herein is political as it relates to a member of a political party and the decision of the members of the political party to remove the subject from the position as the leader of Majority of the Jubilee Coalition in the Nakuru County Assembly and replace him with the 2nd Respondent.”

41. I too find that the questions relating to the process and the decision by the Minority Party to remove the Petitioner from the position of the leader of Minority Party and to replace him with the 3rd Respondent is a political matter involving the internal affairs of the Minority Party or parties. The minutes of the meeting of 9/9/14 demonstrate this fact starkly. Parliament, in recognition that such disputes will occur within political parties, has provided a mechanism for dealing with them. Hence the provisions of Sections 39 and 40 of the Political Parties Act. Section 39 provides for the establishment of the Political Parties Disputes Tribunal while Section 40 sets out its jurisdiction as hereunder:

Section 40(1):

“The Tribunal shall determine-

- a. **“Disputes between the members of a political party;**
- b. **disputes between a member of a political party and a political party;**
- c. **disputes between political parties**
- d. **disputes between an independent candidate and a political party;**
- e. **disputes between coalition parties and;**
- f. **appeals from the decisions of the Registrar under this Act.”**

42. To reinforce the independence of political parties in the management of their internal affairs including disputes Section 40 (2) provides as follows:

(2) “Notwithstanding subsection (1) the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c), or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanism”.

43.As emphasized by the Petitioner, the Constitution is supreme and binding upon all state organs, and the High Court has the mandate under Act 165(3) to scrutinize the constitutionality of the actions of state organs purported to be done under the authority of the Constitution, and to enforce the Bill of Rights. However, this authority must be exercised by the courts within the delicate contours of the doctrine of separation of powers between Courts, the Legislature and the Executive. That is the essence of the passage quoted from the case of **Mumo Matemu** by the Petitioner which is reproduced hereunder:

“It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However separation of powers does not only proscribe organs of government from interfering with other functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by the other organs of government. Such powers are, however, not a licence to take over functions vested elsewhere. There must be judicial, legislative and executive deference to repository of the function”.

44.As the Court of Appeal proceeded to state in the said case, the courts have the last word in interpreting the Constitution and in determining the constitutionality of actions by state organs. Other state organs including the tribunal established under Section 39 of the Political Parties Act are bound by and do interpret the Constitution in the course of executing their mandates. The interpretation and application of the Constitution including the Bill of Rights is not the exclusive mandate of the courts, in this case the High Court.

45.Neither does every failure by an organ of state or body necessarily constitute a contravention or violation of a human right liable to be addressed exclusively through a Constitutional Petition. With regard to the second step about which the Petitioner is aggrieved, the 1st and 2nd Respondents are accused of violating the Petitioner’s right to a fair hearing by their joint action of accepting and sanctioning his removal from the County Assembly as particularized elsewhere in the judgment.

46.In the now well-known case of **Kemrajh Harrikissoon -Versus- Attorney General of Trinidad and Tobago [1979] 3 WLR 63** the court held that:

“The notion that whenever there is a failure by an organ of government or a public authority or officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed under Chapter 1 of the Constitution is fallacious. The right exists to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedom is violated but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. The mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or freedom.”

47. Upon a careful perusal of the averments in the Petition, the affidavit of the Petitioner and the submissions, it appears that the Petitioner's complaint against the 1st and 2nd Respondents was that they did not review, debate and subject to a majority vote the removal of the Petitioner from his position as the leader of the Minority Party. The alleged breach is stated to be a contravention *inter alia* of the Standing Orders of the Narok County Assembly, namely No.16. The Standing Orders are internal rules of the County Assembly which have been put in place to regulate the business of the assembly. Nothing in Standing Order 16 on the face of it appears to place any duty on the 1st and 2nd Respondents in the manner suggested by the Petitioner. Equally, Standing Orders 63 and 64 cited in submissions relate not to removal of Leader of the Minority Party but to the removal of other persons by way of petitions or proposals.
48. Contrary to the assertions of the Petitioner, it is an inescapable fact that, rightly or wrongly, the Petitioner was removed from the position of the Leader of the Minority Party by his own party acting under the Standing Orders of the Narok County Assembly, and not by the County Assembly itself. It therefore seems to me that the joinder of the 1st and 2nd Respondents as 'accomplices' is strained. Their nexus with the Petitioner's woes appears to be based on the peripheral formality of receiving and communicating the decision of the Petitioner's Party to the County Assembly and no more.
49. The decision of **Anarita Karimi Njeru (No 1) [1979] KLR 54** which the Court of Appeal reaffirmed in the **Mumo Matemu** case is still good law. The rights and fundamental freedoms contained in the Bill of Rights in the 2010 Constitution are specific, and a party approaching the court must set out with a sufficient level of particularity the specific right and how it has been violated or threatened. With respect to the 1st and 2nd Respondents the Petitioner has clearly failed to do this. Indeed that is also true concerning the 4th Respondent. Yet one of the prayers in the Petition seeks the removal of the first Respondent from office for violation of the Constitution. Undoubtedly, the process for the removal of the 1st Respondent under the Standing Orders is a matter within the mandate of the County Assembly. (See Section 11 of the County Governments Act).
50. Perhaps, by joining the 1st and 2nd Respondents and by alleging violations of the Constitution against them, the Petitioner hoped to remove this dispute from the realm of the Political Parties Dispute Tribunal where it really belongs. I would go further to state that even if indeed a clearer connection was evident between the 1st and 2nd Respondents and the alleged violations of the Petitioner's rights, this court would be slow to descend into the arena of the internal workings of the County Assembly and to purport to supervise the same [see **Mumo Matemu** case]. Deference would seem a more prudent approach.
51. For the chief reason that, the County Assembly is a separate entity with its distinct functions and authority and, secondly, that the dispute between the Petitioner and the 3rd and 4th Respondents is really one centred around affairs of their mutual political party, KNC.
52. This is demonstrated clearly by the nature of allegations that were recorded in the minutes of the meeting of 9/9/2014 as the basis of the Petitioner's removal. They include the alleged statement by the Petitioner during a press briefing that there were no minorities [read Minority Party] in the County Assembly, failure to call party meetings and absenteeism from the Assembly. These matters are also stated in the Replying affidavit of the 3rd and 4th Respondents (**Paragraph 11**).
53. Whether true or not, these allegations reflect matters related to the operations and internal workings of the KNC Party and the leadership offered by the Petitioner therein. Similarly, the elections held to remove the Petitioner and to replace him with the 3rd Respondent represent an internal political process. The initiators of the process were members of the KNC Party. The 1st and 2nd Respondents could not initiate the removal process.

Is this Court the proper Forum to Determine this Dispute?

54. The answer to the above question must be in the negative.

This in no way denies the jurisdiction of this Court under Article 165(3) of the Constitution and elsewhere to look into allegations of violations of rights or to inquire into the constitutionality of actions carried out by persons or state bodies under the authority of the Constitution. The exercise of the Court's authority under Article 165 must be guided by restraint, giving scope and opportunity and thereby empowering the relevant constitutional bodies or state organs to deal with the disputes or matters statutorily committed into their jurisdiction (**see International Centre for Policy and Conflict and five Others -Versus- the Hon. Attorney General and four Others [2013 eKLR and Matemu Case]**). As Lenaola J. aptly observed in **Papinder Kaur Atwal - Versus- Manjit Singh Amrit, Nairobi Petition No. 236 of 2011**, "not every pain can be addressed through the Bill of Rights and alleged violations thereof".

55. No authority is required for the now trite proposition that where the law provides for a certain procedure for obtaining redress, the same ought to be strictly followed. Where statute provides for first instance mechanisms for resolutions of disputes, it is a prerequisite that before approaching the High Court for relief, the aggrieved party must first exhaust the stipulated primary dispute resolution mechanism. There is no evidence that the Political Parties Dispute Tribunal is unwilling or incapable of handling the present dispute.

56. Mumbi J. noted while dealing with a Petition raising matters that the court considered to fall under the ambit of the Tribunal created under the Retirement Benefits Authority Act, but brought to court as a constitutional petition in **Tom Kusienya and Others –Versus- Retirement Board Authority [2013] eKLR**:

“However it ought to be remembered that the fundamental rights and freedoms guaranteed under the Constitution are also actualized within the framework established by law, in this case the RBA Act. The Petitioners’ right to fair administrative action in the context of the RBA Act must be realized within the legal framework and the institutions created under the said Act, provided that the process under the Act is fulfilled, and the same is not unconstitutional, then there would be no basis for complaining.”

57. So too in this matter: the Political Parties Act has established a mechanism for the initial resolution of disputes within the framework of the law. These mechanisms had not been exhausted as the Petitioner invoked this court's jurisdiction directly instead. His action is premature. In the case of **Minister for Home Affairs –Versus- Bickle and Others [1985] LRC** which Lenaola J. cited in the **Papinder Kaur** decision, the Constitutional Court stated that:

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”

58. The Petitioner's redress in this matter lies, firstly, with his party's internal mechanisms and in the second instance, with the Political Parties Dispute Tribunal. That is the essence of Section 40 of the Political Parties Act. I therefore decline to assume jurisdiction in respect of this dispute. In light of all the foregoing, the most efficacious order that commends itself to the Court is that with respect to the 1st and 2nd Respondents the Petition is dismissed with costs, but with regard to the 3rd and 4th Respondents the Petition is struck out with costs.

It is so ordered.

Delivered and signed at Narok, this 27th day of January, 2015 in the presence of:

No Appearance for the Petitioner

Mr. Kamuaro for the 1st and 2nd Respondents and holding brief for Mr.

Chelanga for the 3rd and 4th Respondents.

Cc: Steven

C. MEOLI

JUDGE