REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

PETITION NO 3 OF 2014

(FORMERLY EMBU PETITION NO 1 OF 2014

(CONSOLIDATED WITH PETITIONS NO. 4 OF 2014(FORMERLY NAIROBI PETITION NO. 51 OF 2014 , JUDICIAL REVIEW NO. 6 OF

2014 (FORMERLY NAIROBI JR MISC APPLIC NO. 17 OF 2014) AND MISC. APPLICATION NO. 4 OF 2014

BETWEEN

HON. MARTIN NYAGA WAMBORA.....….....1ST PETITIONER

THE COUNTY GOVERNMENT OF EMBU.....2ND PETITIONER

COUNCIL OF GOVERNORS.....3RD PETITIONER

MARGARET LORNA KARIUKI.....4TH PETITIONER

INTERNATIONAL LEGAL

CONSULTANCY GROUP.....5TH PETITIONER

AND

THE SPEAKER OF THE SENATE.....1ST RESPONDENT

THE CLERK OF THE SENATE.....2ND RESPONDENT

THE ATTRONEY GENERAL.....3RD RESPONDENT

THE DEPUTY GOVERNOR EMBU COUNTY.....4TH RESPONDENT

THE SPEAKER OF THE

COUNTY ASSEMBLY OF EMBU.....5TH RESPONDENT

THE COUNTY ASSEMBLY OF EMBU.....6TH RESPONDENT

AND

THE COMMISSION FOR THE

IMPLEMENTATION OF THE CONSTITUTION.....AMICUS CURIAE

JUDGMENT

Introduction

1. A Constitution is the instrument or law that organizes and manages governance and state power. It defines, distributes and constrains the use of state power and provides a power map for the construction of the society and the running of the affairs of state. The Constitution 2010 adopted two levels of Government; the National and County Governments. County Government in particular are founded upon the concept of decentralization and devolution of power. According to Article 10(2) (a) of the Constitution of Kenya, 2010, devolution and sharing of power are identified as values and principles that guide the Kenyan governance system. It therefore means that in enacting the Constitution 2010 Kenyans settled for a devolved system of Government.

2. The consolidated Petitions seek to challenge the constitutionality of the process leading to the removal of the 1st Petitioner from office as the Governor of Embu County. They also seek an interpretation of Article 181 of the Constitution regarding the threshold for removal of a County Governor from office. The Amended Petition which condensed the issues raised in all the consolidated Petitions, therefore raises pertinent issues with regard to devolution, especially on the law governing removal proceedings of a County Governor.

Backround to the Petition before consolidation

JR NO. 6 OF 2014

3. The first case filed in connection with the subJect matter of the removal of the County Governor of County of Embu was Kerugoya JR No. 6 of 2014 (formerly Nairobi JR No. 17 of 2014). The Applicant Margaret Lorna Kariuki, the County Secretary County Government of Embu filed the Notice of Motion application dated 16th January 2013 against the Speaker County Assembly of Embu, the Clerk County Assembly of Embu, County Assembly of Embu, The Ethics & Anti-Corruption Commission, the Attorney General and the Governor County of Embu seeking the following reliefs;

> ***(a) An order of certiorari to remove into Court and be quashed the finding and or recommendations by the County Assembly of Embu Joint committees of infrastructure, youth and sports on the face lifting of the Embu Stadium made in a meeting held on 6th January 2014.***
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> ***(b) An order of certiorari to remove into Court and be quashed the findings of the County Assembly of Embu Joint committee on the Agriculture, Livestock, Fisheries and Co-operations and Committee on public accounts and investments on maize seeds procurement by the County Executive made in a meeting held on the 6th January 2014.***
>
> ***(c An order of certiorari to remove into court and be quashed the decision of the County Assembly of Embu to adopt the rights, recommendations mad or findings of both the Committee of the Assembly relating to alleged acquisition of defective maize seeds and alleged fraudulent face lifting of Embu County Stadium as contained in the letter by the 2nd Respondent herein to the Secretary /Chief Executive Officers, Ethics and Anti-Corruption commission dated 7th January 2014.***
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> ***(d) An order of prohibition directed at the 4th Respondent prohibiting them from commencing investigations against the Ex-parte Applicant or indeed any civil servant and or officer in the Embu County Public Service on the basis of the reports made by the Joint committees on the procurement of maize seeds and face lifting of the Embu County stadium on the 7th January 2014.***
>
> ***(e) An order of prohibition directed at the Governor the County Government of Embu***

prohibiting them from acting as recommended in the reports made by the Joint committees on the procurement of maize seeds and face lifting of the Embu County stadium on the 6th January 2014 and adopted by the County Assembly of Embu on 7th January 2014.

(f) A declaration that the County Assembly of Embu's resolution made on the 7th January 2014 on the basis of reports made by both Joint committees in relation to the procurement of maize seeds and face lifting of the Embu County stadium is ultra vires the principle of natural Justice and hence null and void.

(g) The costs of these proceedings be provided for.

4. Odunga J upon hearing counsel for the ex-parte Applicant on 17th January 2014 granted leave to the Applicant to commence Judicial Review proceedings against the Respondents. On 21st January 2014 upon hearing all the parties, Odunga J ordered that the status quo be maintained pending the inter partes hearing on 3rd February 2014.

PETITION NO. 3 OF 2014

5. The second Petition to be filed was Petition No. 3 of 2014 (Formerly Embu Petition No. 1 of 2014) filed by the 1st Petitioner Hon. Martin Nyaga Wambora, the Governor of the County Government of Embu and the 2nd Petitioner, the County Government of Embu against the County Assembly of Embu, The Clerk County Assembly of Embu, the County Assembly of Embu, the Speaker Senate and the Attorney General seeking the following prayers;

(a) A declaration that the notice of motion for the removal of the 1st Petitioner and the Deputy Governor from office intended to be debated on the 23rd January 2014 is in contravention of Article 10, 35, 47, 50 and 196 of the Constitution.

(b) A declaration that 1st, 2nd and 3rd Respondents motion for the removal of the 1st Petitioner and the Deputy Governor tabled in the County Assembly on 16th January 2014 contravenes Articles 10, 35, 47 and 96 of the Constitution.

(c) A declaration that the process undertaken by the 1st, 2nd and 3rd Respondents offends the principle of separation of powers envisaged under Articles 179 (6) and 185) of the Constitution.

(d) This Honourable Court be pleased to issue orders of certiorari to quash any resolution made by the 1st, 2nd and 3rd Respondents in relation to the removal of the 1st Petitioner and the Deputy Governor, Embu County from office based on the motion tabled in the County Assembly of Embu on 16th January 2014 or thereabout.

(e) This Honourable Court be pleased to issue an order of prohibition prohibiting the 4th Respondent from convening the Senate to hear charges against the 1st Petitioner and the Deputy Governor based on the motion, initiated and tabled in the County Assembly on 16th January 2014 and or resolutions passed in furtherance of the same matters connected therewith.

(f) A declaration that the 1st, 2nd and 3rd Respondents are in violation of the principles of natural Justice and separation of powers in relation to the 1st Petitioner and the Deputy Governor, County Government of Embu.

(g) A declaration that any motion passed relating to the removal of the 1st Petitioner and the Deputy Governor based on the motion tabled on the 16th January 2014 is null and void.

(h) This Honourable Court be pleased to issue any other order or relief as it may deem fit and Just to ensure that law, order and Constitutionality is observed.

(I) Costs of the Petition.

6. The Petition was placed before Githua J on 23rd January 2014 who granted a conservatory order restraining the Speaker of the County Assembly of Embu, the Clerk County Assembly of Embu, the County Assembly of Embu from holding any impeachment proceedings without having first served the applicant with a notice containing specific grounds/charges upon which the impeachment was being proposed and without giving him an opportunity to be heard.

7. Subsequently, the County Assembly of County of Embu proceeded with its sittings and on 28th January 2014, it approved a motion to remove from office by impeachment the Governor and Deputy Governor of Embu County. The Speaker of the County Assembly of Embu therefore forwarded the resolution to the Speaker of the Senate pursuant to the provisions of Section 33(2) of the County Government Act of 2012. Thereafter the Speaker of the Senate issued Gazette Notice No. 627 dated 31st January 2014 calling for a Special sitting of the Senate for the purposes of transacting inter-alia business concerning the hearing of charges against Mr. Martin Nyaga Wambora and Mrs. Dorothy Nditi Muvhungu, and the legislative sitting was to commence on 4th February 2014.

Petition No. 4 of 2014

8. Meanwhile, The Hon. Martin Nyaga Wambora filed Petition No 4. of 2014 (formerly Nairobi Petition No. 51 of 2014) against The Speaker of the Senate and the Attorney General seeking the following orders;

(a) A declaration that the Motion for the removal of the Petitioner and his Deputy from office was in contravention of a court order and therefore unconstitutional, illegal, null and void and of no effect whatsoever.

(b) A declaration that the Resolution by the Embu County Assembly for the impeachment of the 1st Petitioner and his Deputy was in contravention of a court order and therefore unconstitutional, illegal, null and void and of no effect whatsoever.

(c) A declaration that the Gazette Notice No. 627 by the 1st Respondent convening the Senate to deliberate impeachment on an unconstitutional resolution is unconstitutional, illegal, null and void and of no effect whatsoever.

(d) A declaration that the Speaker of the County Assembly of Embu and 1st Respondent's are in violation of the principles of natural Justice and in violation of the Petitioner's rights as guaranteed under Articles 27, 28, 35, 47 and 50 of the Constitution.

(e) A declaration that the Motion and the Resolution for impeachment was passed in contravention of the rules of natural Justice.

(f) This Honourable Court be pleased to issue an order of Certiorari to quash the Resolution passed by the County Assembly of Embu to impeach the Petitioner.

(g) This Honourable Court be pleased to issue an Order of Prohibition prohibiting the 1st Respondent from convening a meeting based on the illegal and unconstitutional resolution.

(h) This Honourable Court be pleased to issue any other or relief as it may deem fit and Just to ensure that law, order and Constitutionality is observed.

(I) Costs of the Petition.

9. MaJanJa J on 3rd of February 2014, issued a conservatory order restraining the Speaker of the Senate from introducing, discussing, sitting or deliberating the impeachment of the 1st Petitioner based on the resolution forwarded by the County Assembly of Embu. On 4th February 2014, the Learned

Judge transferred Nairobi Petition No. 51 of 2014 to Kerugoya High Court.

10. The Governor, Hon. Martin Nyaga Wambora also filed a Notice of Motion dated 28th January 2014 in Misc Application No 4 of 2014 (formerly Embu Misc Application No. 21 of 2014) against Justus Kariuki Mate and Jim G. Kauma seeking that that they be held in contempt of Court and be committed to civil Jail for six months and an award of costs.

11. On 5th February 2014, Githua J ordered that the files be placed before the Chief Justice for the purposes of empanelling a bench of at least 3 Judges. The current bench was constituted.

PETITION NO. 6 OF 2014

12. This Petition was filed by the Council of Governors against the Senate and the Speaker of the Senate on 18th February 2014, seeking the following orders;

> ***(a) A declaration that resonating the intention of Articles 2(2), 3(1) 10 and within the intendment of Article 159 of the Constitution if the Constitution makes provisions as to how the legislature should conduct its internal affairs or as to the mode of the exercise of its legislative powers, a Court of law can exercise its Jurisdiction to ensure the legislature comply with the Constitutional requirement.***
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> ***(b) A declaration that resonating the intention of Articles 2 (2), 391) 10 and within the intendment of Article 159 of the Constitution the Respondents are subJect to the Jurisdiction of this Honourable Court.***
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> ***(c) A declaration that the impeachment proceedings undertaken by the Senate on Governor Martin Nyaga Wambora of Embu County Government is a nullity on account of violation of Court orders issued in the following cases;***
>
> > ***(i) High Court Petition No. 51 of 2014 Martin Nyaga Wambora and the County Government of Embu and Speaker of the Senate and Attorney General.***
> >
> > ***(ii) Petition No. 1 of 2014 at the High Court of Kenya at Embu, the Notice dated 17th February 2014***
>
> ***(d) A declaration that the special issue of the Kenya Gazette No. 1052 and 1053 issued by the Speaker of the Senate Hon. Ekwe Ethuro pursuant to the alleged impeachment of Governor Martin Nyaga Wambora is invalid.***
>
> ***(e) An order of certiorari be and issued to quash the Special Issue of the Kenya Gazette Notice dated 17th February 2014 No. 1052 and 1053 issued by the Speaker of the Senate Hon. Ekwe Ethuro pursuant to the alleged impeachment of Governor Martin Nyaga Wambora of Embu County.***

MaJanJa J referred the Petition to the Chief Justice who on 19th February 2014 referred it to this bench for determination.

Miscellaneous Application No. 4 oF 2014

13. The first petitioner/applicant obtained leave to file contempt proceedings against the respondents (Justus Kariuki Mate and another). He did file the said proceedings which are the subJect of this miscellaneous application.

Consolidation

14. When parties appeared before us on 24th February 2014 they consented that Petition No. 3 of 2014,

Petition No. 4 of 2014, Petition No. 5 of 2014, Judicial Review No. 6 of 2014 and Miscellaneous application No. 4 of 2014 be consolidated with Petition No. 3 as the lead file. It was further agreed that Petition No. 5 of 2014 would be heard after the hearing of the consolidated petition. Leave to amend and file petitions was sought and granted with the corresponding leave to file amended responses. The amended petitions and responses were subsequently filed and served.

15. The orders sought in the amended Petition No. 3 are as follows;

(a) A declaration that proceedings for impeachment of a Governor under Article 181 of the Constitution are quasi Judicial in nature and are therefore subJect to the Jurisdiction of the High Court under Article 165 (3) (d) of the Constitution.

(b) A declaration that the proceedings and resolution for removal of the 1st Petitioner before the Embu County Assembly that were held in violation and disregard of a Court order were null and void.

(c) A declaration that the proceedings before the Embu County Assembly for removal of the 1st Petitioner as Governor violated the provisions of Section 33(1), (2) & (3)(b) of the County Governments Act No. 12 of 2012 and was therefore null and void.

(d) A declaration that the proceedings and resolution for impeachment of the 1st Petitioner before the Senate that were held in violation and wilful disregard of a Court order were null and void.

(e) A declaration that the proceedings for removal of the 1st Petitioner as Governor before the Senate did not meet the threshold required under Article 181 of the Constitution or the standard of proof required under Section 33(3) of the <u>County</u> <u>Government Act 2012</u> of proof beyond reasonable doubt.

(f) A declaration that under Article 181 of the Constitution of Kenya and Sections 30 and 34 of the County Government Act 2012, a Governor cannot be removed from office under the principle of collective responsibility over acts or omissions or members of the County Executive Committee, County Secretary or Country Public Service.

(g) A declaration that the entire impeachment proceedings conducted by the 1st and 2nd Respondents and consequential Gazette notices, actions, and any communication issued were in contravention of valid Court orders and therefore in violation of the Constitution, null and void and of no effect whatsoever.

(h) A declaration that the Senate has no Jurisdiction to summon Governors under Article 125 of the Constitution to question them on county finance management as the oversight role is vested in County Assemblies under Article 226 of the Constitution.

(I) This Honourable Court be pleased to remove to the High Court and issue an Order of Certiorari to quash the Resolution passed by the County Assembly of Embu to impeach the 1st Petitioner.

(J) This Honourable Court be pleased to remove to the High Court and issue an Order of Certiorari to quash the impeachment proceedings and resolution by the Senate of 14th February 2014. (k)This Honourable Court be pleased to remove to the High Court and issue an Order of Certiorari to quash the Gazette Notice Number 1052 of 17th February 2014 on the resolution of impeachment of the 1st Petitioner.

(l) The Senate be prohibited from summoning Governors and County Finance executive officers to answer queries on county financial management in contravention of the Constitution.

(J) This Honourable Court be pleased to issue any other appropriate order or relief as it may deem fit and Just.

(k) Costs of the Petition.

16. Following the order of consolidation of 24th of March 2014 whereby petition No. 5 of 2014 would be heard separately but concurrently with petition No. 3 we have decided to write a separate Judgment for petition No. 5 of 2014 which raises different issues and has different parties.

The factual background to the Petition

17. The factual background to this Petition is as explained by Hon. Martin Nyaga Wambora in his Amended Petition dated 7th March 2014 and is as follows;

18. Sometimes in 2013 the County Government of Embu procured services of contractors to face-lift the Embu County Stadium **("the Stadium"**) and also advertised a tender for supply of maize seeds for distribution to farmers in the County. The procurement of these services was meant to nurture sport talent and enhance food security in the County.

19. The County Assembly was dissatisfied with the manner in which the refurbishment of the Stadium and the type and quality of maize supplied. On 3rd January, 2014, the County Assembly summoned the County Secretary, (4th Petitioner herein) to appear before two different Joint committees on 6th January 2014 at 11.00 a.m. and 2.30 p.m. to answer queries arising from the two tenders.

20. The summons to attend was received by the 4th Petitioner on the 6th January, 2014 when she reported at work at 8.30 a.m. Because of the short period in which she was required to gather evidence and answer to the charges, the 4th Petitioner wrote to the respective committees requesting for 21 days to enable her prepare for a comprehensive reply to the questions raised with regard to the two tenders.

21. Both the County Assembly Committees reJected the request for extension of time as requested by the 4th Petitioner and proceeded to make a recommendation that the 1st Petitioner suspends the 4th Petitioner (the County Secretary) pending investigations by the Ethics & Anti-Corruption Commission ('**the EACC").**

22. The 1st Petitioner was not privy to all events regarding the summons until on **7th January, 2014** when the 1st Petitioner was copied on the letter addressed to the Ethics and Anti- corruption Commission asking for the probe of the County Secretary.

23. On the **16th January, 2014** the County Assembly before waiting on the outcome of Ethics and Anti-corruption Commission on the probe of the County Secretary, and without giving the 1st Petitioner and opportunity to be heard proceeded to table a motion of impeaching the 1st Petitioner from office on the grounds that he refused and/or neglected to act on its recommendations. In the motion, it was alleged the aforesaid neglect and/or refusal amounted to a gross violation of the Constitution and also amounted to an abuse of office.

24. On 16th January 2014, the County Secretary filed Judicial Review Miscellaneous Application No. 17 of 2014 asking this Honourable Court to quash the decisions of the County Assembly Joint committees to have her probed by the Ethics and Anti-corruption Commission or removed from the office by the Petitioner, Odunga J upon hearing the Notice of Motion application in presence of counsel for all parties issued an order for maintaince of status quo pending inter partes hearing of on 3rd February, 2014.

25. In obedience to the Orders issued by the High Court, the 1st Petitioner was unable to act on the recommendations of the County Assembly to suspend the 4th Petitioner as to do so would have amounted to contempt of orders of the Court.

26. Despite the Court Orders, members of the Embu County Assembly evinced an intention to proceed to impeach the 1st Petitioner. On 22nd January 2014, the Petitioner filed before the High Court in Embu, Petition No. 1 of 2014 together with an application dated **22nd January, 2014** under certificate of urgency seeking orders restraining the 5th and 6th Respondents from proceeding with any motion for his removal pending hearing of the Petition; and an order restraining the Respondents from holding any proceedings under Article 181 of the Constitution and Section 33 of the County Government Act, 2012 on removal from office of the 1st Petitioner and his Deputy. Upon hearing of the Chamber Summons application ex parte, the Her Ladyship Honourable Justice Cecilia Githua on the 23rd January, 2014 issued the following orders:-

> ***" (a) The matter herein is certified urgent***
>
> ***(b) Conservatory orders be and are granted restraining the 1st, 2nd and 3rd Respondents from holding any impeachment proceedings without having first served the applicant with a notice containing specific grounds/charges upon which the impeachment was being proposed and without giving him an opportunity to be heard***
>
> ***(c) The order will remain in force till 5th February, 2014 when the matter will be placed before the resident Judge, Embu for directions and***
>
> ***(d) The Petitioner to serve all the Respondents with the Petition and the application within the next five days together with a mention notice of 5th February, 2014."***

27. The said orders were served on the 5th Respondent on the 23rd January 2014 and further on the County Assembly offices on the **24th January, 2014**. On the 26th and 27th January 2014, the orders were advertised in both the Daily Nation and the Standard Newspaper to notify all County Assembly Members in the event they were not informed of the Court orders by the 5th and 6th Respondents.

28. Despite having been served and notified, the County Assembly of Embu in blatant and willful disobedience of the orders of the Honourable Court convened the proceedings where the motion for the impeachment of the 1st Petitioner was debated and passed.

29. The 6th Respondent in further contempt of the Court order went ahead and passed a resolution to impeach the 1st Petitioner without supplying the 1st Petitioner with grounds and/or charges upon which the purported impeachment was being proposed.

30. On the 28th January 2014**, the** 1st Petitioner sought leave to institute contempt proceedings against the Speaker and Clerk of the County Assembly of Embu herein and members of the County Assembly participated in the motion in **Miscellaneous Application Number 21 of 2014.** These proceedings are pending hearing before this Honourble Court.

31. On 29th January 2014, the 5th Respondent in further disobedience of the Court order issued on the **22nd January, 2014**, forwarded the illegal resolution of the County Assembly to the Senate purportedly pursuant to the provisions of **Section 33 (3) of the County Government Act, 2012.**

32. On 31st January, 2014, the 1st Respondent acting on the patently unlawful resolution, issued and/or caused to be issued a Gazette Notice Number 627 purporting to convene the Senate for purposes of hearing the complaints against the 1st Petitioner and appointing a special committee to investigate the conduct of the Petitioner.

33. Despite efforts by the 1st Petitioner to obtain copies of the notice and resolution for impeachment, the 5th Respondent has refused to supply the Petitioner with copies of the same.

34. The 1st Petitioner avers that on the 30th December, 2013, the 2nd Petitioner through the County Secretary by a letter to the Controller of Budget and copied to the Salaries and Remuneration

Commission sought advice and clarification on the recruitment and payment schemes of salaries payable to persons employed in the County Assembly Service Board.

35. The advice given by both the Controller of Budget and the Salaries and Remuneration Commission when implemented elicited discontent and discomfort amongst members who had flouted the provisions of the County Government Act, 2012 and the Constitution of Kenya, 2010.

36. It is clear from the foregoing that the recommendation for the suspension and investigation of the 4th Petitioner and the impeachment of the 1st Petitioner was a deliberate scheme hatched to settle scores and was actuated with malice, bad faith, ill spite, witch-hunting and revenge.

37. On 4th February 2014, the 1st and 2nd Petitioners filed Petition No. 51 of 2014 before the High Court Constitution and Human Rights Division where Justice MaJanJa issued a Conservatory Order restraining the 1st and 3rd Respondents from introducing, discussing, sitting or otherwise deliberating the impeachment of the 1st Petitioner based on the resolution forwarded by the Embu County Assembly until further orders of the Court.

38. The Court Orders was duly served on the 1st, 2nd and 3rd Respondents on 4th **February 2014**. Despite having been served with the orders of the Court, the 1st and 2nd Respondents unlawfully proceeded with impeachment proceedings and unanimously purported to impeach the 1st Petitioner from his position as the Governor of Embu.

39. Whereas the Special Committee appointed for purposes of impeaching, the committee found the 1st Petitioner liable for violation of the Public Finance Management Act, 2012 the Public Procurement and Disposal Act, 2005 and the Constitution of Kenya, 2010, particularly Articles 73 and 179 (4) in relation to procurement of goods and services and also Public Finance Management Act, 2012.

The 1st Petitioners' submissions

40. The case of the Governor of Embu is contained in the Amended Petition dated 7th March 2014, his affidavits sworn on 19th February 2014, 23rd February 2014, and his supplementary affidavit sworn on 17th March 2014. And further in the affidavits of Isaac Ruto sworn on 18th February 2014 and affidavit of Margaret Lorna Kariuki sworn on 16th January 2014.

41. Mr. Muite, Senior Counsel and Mr Ahmednasir (SC) led Mr. Nyamu, Mr. NJoroge, Mr. Issa Mansur and Mr. Wanyama in presenting the Petitioners' case.

42. It was Mr. Muite's submission that in deterring this petition, this Court must appreciate upfront the profound change in the governance of this Country ushered in by the Constitution 2010 in regard to devolution. He urged the Court to be guided by the reasoning of the Chief Justice in his concurring opinion in the Supreme Court's ***Advisory Opinion No. 2 of 2013, Speaker of the Senate & Another v Hon. Attorney General & 3 Others*** where the Chief Justice recognised the fundamental change brought about by devolution. He submitted that Article 6(2) of the Constitution creates two levels of Governments which must consult and cooperate. He thus urged the Court to recognise the historical context of devolution in Kenya and read the Constitution wholly so as not to kill devolution and that the Court must bear in mind the importance of devolution and the aspirations of the people of Kenya in enacting the Constitution. He submitted that the obJects of devolution are outlined under Article 174 of the Constitution. Further that, Article 189 calls for cooperation between the National and County Governments.

43. He submitted that pursuant to Article 189 of the Constitution, Parliament enacted the Inter-Governmental Relations Act of 2012 which creates the Summit whose chairman is the President and the 47 Governors are members. That co-operation and consultation are the pillars of governance and not subordination and that the central Government should never use its tyranny of numbers in the senate to dilute Devolution because under Article 6(2) of the Constitution both National and County Governments are Government.

44. In regard to the issue of the removal of a Governor, it was Mr. Muite's submissions that the threshold under Article 181 of the Constitution must be very high. That a Governor should be held accountable by the County Assembly and not the Senate since the Governor's position is analogous to that of the Chief Executive or the President. That even in the Ministries, it was the Principal Secretaries that are accountable for finances of the Ministry and not the Minister. He submitted that Article 145 of the Constitution should be contrasted with Article 181 of the Constitution. That the word "***gross***" in Article 181 of the Constitution is used deliberately. It was not Just any violation of the Constitution that was required but **gross violation**. He relied on the Nigerian case of ***Hon. Muyiwa InakoJu & 17 Others v Hon. Ibrahim Adeolu Adeleke Supreme Court of Nigeria S.C 272 0f 2006*** which defined the term ***'gross violation'.*** It was his submissions that not every misconduct could lead to the removal of a Governor but that it must be extreme negative conduct. In that respect, he contented that the County Assembly of Embu recommended removal of the Governor on the basis of violation of the Constitution on several issues and even the Senate in its report did not consider whether the Governor was in ***gross violation*** of the Constitution or any other written law. He urged the Court to define the term ***gross violation.***

45. It was Mr. Muite's submissions that the Governor was not the County's accounting officer. His case was that Article 226(1) (b) of the Constitution provided for the designation of an accounting officer who would be responsible for all the financial management of the County. In its oversight role in Embu County the County Assembly was concerned about money expenditure by the Embu County Government. In that regard, the County Assembly set up two committees to investigate the maize and stadium issues. The said committees investigated the matters and made recommendations for adoption by the County Assembly. One of the recommendations was the suspension of the County Secretary. The County Assembly asked the Governor to effect the suspension which he did not. It was Mr. Muite's submissions that it was improper for the County Assembly to recommend his impeachment on that basis. In any event, Mr. Muite added that, the Governor could not remove the County Secretary when there were Court orders in place stopping her removal from office.

46. With regard to the removal of the Governor, Mr. Muite urged the Court to find that the procedure for his removal was not followed and that this being a quasi - Judicial process, and not a political one, the due process under Article 50 of the Constitution had to be adhered to. He submitted further that the County assembly should have explained to the Governor in clear terms the alleged provisions of the law that he had violated and then granted him an opportunity to be heard on the alleged violations. On the procedure before the Senate, it was the Learned Senior Counsel's contention that at the conclusion of the report, the Senate should have allowed other Constitutional bodies such as the Ethics and Anti-Corruption Commission and Criminal Investigations Department to investigate the matter since they are the bodies granted the powers to investigate. He thus urged the Court to guard against mob lynching.

47. It was Mr. Muite's position that under Article 95(4) of the Constitution, the National Assembly had an oversight role over National revenue and that the Senate does not have an oversight role over the County Government.

48. On the removal/impeachment process, it was the Learned Senior Counsel's submissions that there had to be a framing of the charges stating the alleged ***gross violation*** of the Constitution and any other law. That the impeachment of the 1st Petitioner had been politicized due to the ongoing war between the Senators and the Governors even though the impeachment under the Constitution was not a political process. Rather it is a legal process which starts at the County Assembly and ends with the Senate and that further, one must be given an opportunity to prepare his case.

49. He submitted that by the time the 1st Petitioner appeared before the Senate, he did so under protest. However, the Senate warned him that it would proceed with the impeachment notwithstanding the Court orders. He referred the Court to the scholarly article of ***John Duane and Michael Balboni, 'New York's Impeachment Law and the Trial of Governor Sulzer: A case for Reform" Fordham Urban Law Journal, Vol. 15 issue 3. 1986*** where the writers argue that the impeachment of a Governor must be restrictive as it would affect the rights of his voters. He thus contended that it was the obligation of this Court to set the threshold for the removal of a Governor. He also referred the Court to the article by

Michael Abiodun Oni, 'Judicial Review of Governors LadoJa and Obi Impeachment in Nigerian's Fourth Republic', Singaporean Journal of Business Economics and Management Studies Vol. 1, No. 6 2013 where the authors argue that the Courts can intervene in the removal process of Governors where due process was not followed. It was therefore the Learned Senior Counsel's submissions that from the Nigerians scholarly writings,

it was clear that this Court should question whether;

1. There were substantial grounds for removal of the Governor under Article 181 of the Constitution.

2. There was procedural fairness

3. Due process was followed.

50. It was therefore his case that there were Court orders that were issued before the process started which orders were violated by both the County Assembly and the Senate. He urged the Court to nullify the impeachment because any act done in disobedience of a Court order is a complete nullity thus the removal of the Governor was a nullity and ought to be set aside and the Governor reinstated.

51. In respect to the violation of the right to fair administrative action under Article 47 of the Constitution, it was the Senior Learned Counsel's submissions that the County Assembly did not summon the Governor, and further that, the accusations made against him are not described as of ***gross violation.***

52. On the issue of Jurisdiction, it was Mr. Muite's submissions that this Court has Jurisdiction under Articles 165, 23 and 159 of the Constitution. That the Court was faced with a historical moment to change the history of this country based on the 2010

Constitution which is a transformative charter.

53. On the representation of the Senate, it was Mr. Muite's submission that it had been served and elected not to appear. He thus urged the Court to find that the 1st Petitioner's case against the Senate is not contested and that it was infact treating the Court with further contempt. He claimed that the contempt proceedings in this case are against the Speaker and the Clerk of the Senate and the consequences of such contempt is that anything done in disobedience of a Court order is a nullity. He added that it was not for the Speaker of the Senate or County Assembly to interpret a Court order and choose whether to obey it or not. That even if an order is not properly issued, the remedy was not to disobey it. He called upon the Court that in order to enhance public confidence in the Judicial system it must punish the Speaker and the Clerk of the County Assembly of Embu for disobeying Court orders. He relied on the case of ***Rwanyarare & Others v Attorney General (2003) 2 EA 664*** where it was held that the Court cannot reward a party that has shown contempt for Court orders. He also relied on ***Wildlife Lodges Ltd v County Council of Narok & Another (2005) 2 EA 344*** and ***Judcial Service Commission v Speaker of the National Assembly & Another Petition No. 518 of 2013*** where the Court stated that the whole purpose of litigation would be lost if Court orders are disobeyed.

54. Mr. Wanyama submitted that under Article 182(1) (e) as read with Article 181(1) of the Constitution reveals that a Governor should only be removed for something he did personally. That the 1st Petitioner was removed on allegations based on the Public Finance Management Act of 2012 while he breached nothing under that Act. That the Public Finance Management Act provides for structures for the management of public finance at the County level. And that Article 226 is implemented in the Public Finance Act since it has established an accounting entity and defined who an accounting officer is.

55. He submitted that before the Governors were sworn in on 27th March 2013, there were mechanisms in place under the County Government Public Finance Management Transition Act 2013 and that there was no lacuna at anytime. Under section 3 of that Act, the Governor had no responsibility over County

finances and therefore he could not be said to have misappropriated any funds. Indeed, that Act did not outline any responsibilities of a Governor. He thus contended that it was unprocedural for the County Assembly to allege violation of the Public Finance Management Act when the County Executive Committee had not been summoned to explain the county finances. Further, that under section 103(3) of the Public Finance Management Act, the head of the County Treasury together with the County Treasury established under section 104 of the Public Finance Management Act were responsible for fiscal responsibilities in the County.

56. It was Mr. Wanyama's position that if one is found to have misappropriated funds, section 149(1) Public Finance Management Act provided that the accounting officer is accountable to the County Assembly on financial issues. Thus the impeachment of the Governor for misappropriation of funds was premature and irregular. That the County Assembly should have summoned the County Executive Committee to explain the misappropriation of funds and the steps taken. It was thus illegal to impeach the Governor on the basis of collective responsibility when it had not been demonstrated that he personally violated the law.

57. He submitted that the responsibilities of a Governor are provided for under Section 30 of the County Government Act of 2012. That the function of the Governor was to provide for policy on management and he is accountable to the President. And he urged the Court to find that if there was a conflict between the Public Finance Management Act and the County Government Act, the former overrides the later.

58. On the issue of procurement, Mr. Wanyama submitted that Article 227 of the Constitution had provided guidelines on matters of procurement. He claimed that the Governor had not violated Article 227 of the Constitution in anyway since the allegations of failure to set up procurement committees and procedures on the works in the stadium as made against the Governor were so vague and did not meet the threshold required. That under Regulation 22 of the County (Regulations) 2013 there are systems and guidelines on public procurement. These guidelines stipulate that there must be a tender committee and the Governor was not a member of this committee. In that respect, he submitted that the Governor had been impeached on account of functions of committees that he did not have control over. It was therefore Mr. Wanyama's position that the Court must set down the threshold applicable in the removal of a Governor.

59. Mr. Issa Mansur submitted that the procedure for the removal of any County Official is provided for under section 40 of the County Government Act, which requires that such a motion must be moved by a member of the County Assembly, and after the motion is passed a Committee must be set up to investigate and make a report which is then taken back to the County Assembly. A vote is then taken on the motion. It was thus his position that the Speaker of County of Embu Mr. Kariuki Mate acted unprocedurally and the Governor could not suspend the County Secretary since the matter had been referred to the Ethics and Anti-Corruption Commission.

60. In regard to the proceedings at the Senate for the removal of the County Governor, it was Mr. Issa Mansur’s submissions that the Senate acted in violation of a Court order which it was aware of. He added that the Senate indeed deliberated on the Court order issued by MaJanJa J and deliberately chose not to obey it before the commencement of the proceedings. That under Section 33 of the County Government Act, it was the responsibility of the Speaker to convene the meeting of the Senate. That, having been served with the order he had two options, first to comply with the same by degazetting the Notice summoning the Senate or second, to have the Court order set aside so that Senate would proceed with its session.

61. On the issue of the Deputy Governor, it was Mr. Issa Mansur’s submissions that she had changed goal posts. On the one hand, she alleged that Court orders must be obeyed and on the other hand she claimed that she must now be sworn in as a Governor since there was a vacancy in the office of the Governor while the Court pursues those who disobeyed the Court order. It was thus his position that if the motion moved did not comply with the Constitution, the same is null and void and was defective *ab initio.*

62. Mr. Nyamu submitted on the issue of contempt of Court. It was his position that in impeachment proceedings under Section 33(1) of the County Government Act (CGA), a member of the County Assembly may move a Motion to remove a County Governor. That in the instant case this happened on 16th January, 2014, at the Embu County Assembly. That subsequently the same was placed before the Speaker who scheduled it to be moved on 23rd January, 2014 which prompted the 1st Petitioner to move to Court and file Embu Petition No. 1 of 2014. That conservatory orders were issued on 23rd January, 2014 and served on the same day on the Respondents. It was averred that the orders were to the effect that until and unless the County Assembly of Embu served the 1st Petitioner with the grounds and charges on the basis of which they wished to impeach him, they were barred from proceeding with the impeachment proceedings. The 1st Petitioner contended that these conditions were not complied with as he was not served with the charges and neither was he given an opportunity to be heard by the County Assembly.

63. That on 24th January, 2014 the pleadings and orders were again served on the County Assembly of Embu as explained in the affidavit of Service of NJunguna NJoroge sworn on 29th January, 2014. That the motion for the removal of the 1st Petitioner was not moved on 23rd January 2014 as slated but was postponed to 28th January, 2014 when it proceeded under Section 33 (2) of the County Government Act. It was also submitted that by then, the Speaker and Clerk of County Assembly of Embu were aware of the orders of the Court and even filed a Notice of appointment of counsel. According to Mr. Nyamu, this confirms that there was service of the orders of the Court on 23rd January, 2014. That further, there was a letter dated 28th January, 2014 from the Deputy Registrar of Embu writing in response to the County Commander with regard to the authenticity of the order, which letter confirmed the validity of the said order. That furthermore the County Assembly had acknowledged the receipt of the Court Orders.

64. It was therefore submitted that despite receiving the Court orders, the County Assembly went ahead with the motion of the removal of the Governor on 28th January, 2014. Accordingly Mr. Nyamu contends that the 1st Petitioner was able to demonstrate that by the time the impeachment proceedings took place at the County Assembly, the Speaker and the Clerk of the County Assembly of Embu including the County Assembly itself, were aware of the existence of the orders dated 23rd January, 2014.

65. With regard to the Contempt proceedings Mr. Nyamu submitted that as a consequence of the acts of the County Assembly the Petitioner applied for leave to institute contempt proceedings, against the Speaker and the Clerk of the County Assembly of Embu, which leave was granted. That it is clear from the above submissions that the Orders of this Court were intentionally disobeyed by the two Respondents. Mr. Nyamu pointed out that the fact that the said Respondents sought clarification regarding the validity of the said orders is indicative that they were aware of the orders of the Court.

66. He further stated that the Clerk of the County Assembly of Embu deponed in his replying affidavit in response to the contempt motion that he did not violate any Court orders, because he does not sit in the assembly. According to Mr. Nyamu, this stance was misleading as the Clerk of the County Assembly was responsible for the preparation of Order papers, while the Speaker approves and presides over the motion. That therefore the Speaker and Clerk of the County Assembly of Embu were firmly in control of the impeachment proceedings within the County Assembly. Accordingly it was contended that the two were personally liable for their misdeeds when they acted outside their mandate and violated Court orders. It was therefore submitted that both the Speaker and the Clerk of the County Assembly should be held to account and be committed for contempt of court. Mr. Nyamu therefore urged the Court to grant the orders prayed for in the 1st Petitioner's application for contempt dated 28th January, 2014 and filed on 31st January, 2014.

67. With regard to the contempt by the Senate, it was Mr. Nyamu's submissions that as a consequence of the acts of the County Assembly the 1st petitioner on 27th January, 2014 served the Speaker of the Senate with the pleadings with regard to **Embu Petition number 1 of 2014** together with the order of the Court issued on 23rd January 2014. That even then the speaker ignored the Court orders and proceeded under Section 33(2) (a) of the County Government Act and issued a Gazette Notice No. 627 dated 31st January, 2014 convening the Senate. That on 4th February 2014 at 2.30 p.m. the issue of

County Governor and Deputy Governor of Embu was discussed as one of the agenda items in the Senate.

68. Consequently, the 1st Petitioner proceeded to file Nairobi Petition 51 of 2014 on 3rd February 2014 where the Hon. Justice MaJanJa issued Orders stopping the proceedings of impeachment at the Senate until the hearing and determination of the suit. It was submitted that the Court ordered that the Senate be served for hearing on 4th February, 2014 10 a.m. A ruling was made to that effect and served on 4th February 2014 at 7.30 a.m. on the Senate. An Affidavit of service to that effect was then filed on 4th February 2014. Mr. Nyamu also told the court that the Attorney General was served at 9.30 a.m. of the same day. That the Court convened at 10.30 a.m., where the Attorney General appeared for the inter parties hearing, but there was no attendance by the Speaker. That subsequently, the orders issued earlier were extended by the Court and the matter was transferred to Embu High Court for hearing and final determination. According to Mr. Nyamu, the Orders were thereafter extracted and served on the Senate at 2.11p.m to arrest impending impeachment proceedings.

69. He then submitted that by the time the proceedings commenced the Speaker of the Senate was aware of the Court Order. That had the Speaker of Senate adhered to the Order of 3rd February, 2014 and extended on 4th February, 2014 the impeachment would not have proceeded. Mr. Nyamu therefore asserted that the Speaker of the Senate chose to blatantly ignore the Order of the Court by allowing the impeachment proceedings to commence. He urged the Court to find that the impeachment proceedings before Senate were a nullity as the same occurred in disobedience of a Court order.

70. With regard to the argument advanced by the Respondents that by the time the Speaker was served with the order of the Court, he had already convened a meeting of the Senate, Mr. Nyamu contended that upon receiving the Court order, the 1st Respondent should have revoked the Gazette Notice convening the Senate and awaited the outcome of the Court. That the Speaker under the law is given seven days to convene the Senate. It was asserted that by the time the order of Court was issued on 4th February, the seven days were yet to lapse. It was further argued that if the Speaker was worried about the issue of time, he should have moved to this Court and sought to set aside the orders. As such, it was contended that the impeachment proceedings could not stand and that the Court should find that any action taken in disobedience of the Court order was null and void.

71. In regard to the 4th Petitioner's case on the Judicial Review, Mr. Nyamu submitted that the County Secretary was summoned to appear before the two different committees of the County Assembly (the Joint committees of infrastructure, youth and sports; and the Joint committee on the Agriculture, Livestock, Fisheries and Co-operations) (hereinafter referred to as (“***the committees”***) on 6th January, 2014 at 11.00 a.m. and 2.30 p.m. respectively. That the said summonses were through letters from the County Clerk dated 3rd January, 2014 and delivered to the 4th Respondent’s office at 5.30pm on the same day. According to the 4th Respondent, she only saw the aforementioned letters on 6th January, 2014 when she entered her office at 8.30am. It was contended that the 4th Respondent replied to the said letters from the Clerk of the County Assembly of Embu requesting for more time to adequately prepare herself and liaise with other relevant departments with regard to the queries raised by the County Assembly committees. That the said committees did not respond to her request and instead proceeded to make recommendations adverse to her, including the recommendation that the Governor of Embu suspend her from office pending the investigations by the Ethics and Anti-Corruption Commission (EACC). The said recommendation was ratified by the County Assembly and a letter to that effect was issued to the commission and copied to the 1st Petitioner.

72. It was therefore the 4th Respondent’s case that her right to fair administrative action and a fair hearing as enshrined in Articles 47 and 50 of the Constitution were violated as she was condemned unheard. Mr. Nyamu further argued that the 4th Petitioner’s right to prepare an adequate defence under Article 50(2) (c) of the Constitution was also violated. In his submissions, Mr. Nyamu pointed out that the 6th Respondent had a vendetta against the 4th Petitioner as she had sought an advisory opinion from the Salaries and Remuneration Commission (“SRC”), Controller of Budget and Commission for the Implementation of the Constitution (“CIC”) with regard to the recruitment and salaries payable to persons known as ward staff, employed by the County Assembly Service Board. That the responses thereto were to the effect that the said officers were illegally in office as their employment was

unprocedural. It was therefore the submission of the 4th Respondent that this caused discontent and discomfort amongst the County Assembly Members who purportedly hatched a scheme to remove the 4th Petitioner from office.

73. It was Mr. Nyamu's further submission that the EACC deployed an officer (Mr. Japheth Baithalu) to commence investigation at the County Secretary's office who had also sworn an affidavit in response to the instant matter. Mr. Nyamu pointed out that the Ethics and Anti-corruption Commission through the affidavit of Mr. Baithalu had also been categorical that a person under investigation should only be suspended after full investigations had been carried out and criminal charges instituted. Mr. Nyamu consequently claimed that the ex parte applicant's suspension was therefore unlawful. Further, he opined that there were Orders issued by Justice Odunga stopping the suspension of the County Secretary. That these Orders were issued inter parties on 21st January, 2014 and the County Assembly Embu was enJoined and represented in those proceedings.

74. Consequently the 4th Respondent contended that the Court had the Jurisdiction under Article 165 of the Constitution to interfere with the proceedings of the County Assembly as long as they were unlawful. In the foregoing she asked the Court to grant her the reliefs sought.

The Amicus Curiae Submissions

75. Mr. Nani acting as Amicus Curiae and on behalf of the Commission for the Implementation of the Constitution (CIC) with the consent of all other counsels submitted on point of law. He concurred with Mr. Muite's submissions on three issues;

> ***1. That this Court has Jurisdiction***
>
> **2**. ***Any actions in violations of a court order are null and void, thus the removal of the 1st petitioner was null and void***
>
> ***3.That the County Assembly of Embu failed to follow due process in the removal of the Governor.***

76. He then added that the right to hold the seat of the Governor was a political right under Article 38 of the Constitution. And that people have a right to make political choices. And that this right of the citizens was violated by the County Assembly since they limited the 1st Petitioner's rights under Article 24 of the Constituion and the County Assembly violated his right to a due process which demands that the 1st Petitioner ought to have been served with the charges against him and should have been heard at the County Assembly before sending him over to the Senate. It was therefore Mr. Nani's submissions that when exercising a quasi-Judicial function one must follow the due process. He referred the Court to the case of ***Marbury v Madison 5 US 137 (1803)***, adding that even section 33 of the County Government Act does not preclude the County Assembly from invoking Article 25, section 14 of the County Government Act and the County of Embu Standing Orders.

77. On the issue of threshold, it was his submissions that this Court should use the rationality test and must follow the case of ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012*** which applied the rationality test. He thus opined that the Petition should be allowed and the Governor reinstated.

78. On the issue of contempt it was Mr. Nani's submissions that there was disobedience of Court orders. However, the Court could neither fine nor imprison the contemnors by virtue of the immunity they enJoy under Section 4 of the National Assembly Powers and Privileges Act, Section 17 of the County Government Act and Articles 117 and 196 of the Constitution. In his view, the appropriate remedy would be to nullify the proceeding.

The Respondents' submissions

79. All the respondents, save for the 1st and 2nd respondents, addressed us wholesomely with regard to the various issues raised by the petitioners, through their filed pleadings and oral submissions.

80. The 1st and 2nd Respondents did not enter appearance with regard to the Petitions despite service of the pleadings and hearing notices on them by the 1st Petitioner.

The 3rd Respondent's Submissions

81. Mr. Mwangi NJoroge assisted by Mr. Thande Kuria presented the Attorney General's case. He stated that the Constitution had set boundaries between the three arms of Government and the mandate of each arm of Government should not be invaded. He further argued that the free expression of the will of the people as expressed through the election process for both the Members of Parliament and the County Assemblies should be protected by this Court when determining the issue of impeachment. In Mr. Mungai's submission, the Court should interpret the Constitution in a manner that would protect the principles and obJectives of devolution under Article 174 of the Constitution. According to Mr. Mungai, Article 165 (3) (d) (iii) of the Constitution gives the High Court unlimited Jurisdiction to determine any question with regard to the interpretation of the Constitution. That even though such powers are conferred on the Court, it behooves it to exercise maximum restraint when dealing with disputes involving either of the State organs.

82. With regard to the Jurisdiction of the Court on the impeachment process, it was the 3rd Respondent's submission that Article 181 of the Constitution gives the County Assembly and the Senate express authority to remove a County Governor from office and that the same should be devoid of any interference by the Courts . According to the 3rd Respondent impeachment is a process that starts at the County Assembly level. That a motion supported by at least two thirds maJority of the members of the County Assembly has to be passed, before the resolution is passed on to the Senate which then examines the motion to check the excesses of the County Assembly.

83. Mr. NJoroge therefore opined that the impeachment process is self-contained and is meant to safe guard the rights of the Governor. In the opinion of the 3rd Respondent the merits of theoutcome of the process of impeachment at both the County Assembly and the Senate level cannot be subJected to the intervention of the Court. That in the foregoing a Court can only review the process of impeachment at both the County Assembly and Senate level and not the merits of such a decision. Citing the Case of ***Mumo Matemu –vs- Trusted Society of Human Rights Alliances & Others (2004) e KLR*****,** Mr. NJoroge added that if the Court were to review the merits of a decision made by the County Assembly or Senate the same would amount to interference which is in contradiction with the doctrine of the separation of powers. He stated that the impeachment process was a preserve of the Senate and the County Assembly under Article 181 of the Constitution and the County Government Act ("CGA") and that the Courts have no role to play in the process.

84. While citing the case of **Nixon – Vs -USA 506 US 224- Supreme Court 1993** , Mr. NJoroge submitted that the Petitioner acceded to the authority of the Senate. That in the foregoing 1st Petitioner could not came to this Court and raise the issues he had raised at the Senate. He argued that the Court in this case, does not have concurrent Jurisdiction with the Senate. Further it was submitted that the Court must examine whether there are Judicial discoverable standards in resolving the dispute at hand. Mr. NJoroge urged the Court to find that impeachment is a political question that can only be resolved politically. He therefore urged the Court to exercise utmost restraint in the matter and not to encroach on the mandate of other arms of government. While citing the Case of **Shah & Another t/a Lento Agencies V National Industrial Credit Bank Ltd (2005) I KLR,** Mr. NJoroge submitted that if any of the Respondents are able to demonstrate that the Court issued orders in excess of its Jurisdiction, the Court is mandated to revisit the said orders.

85. In a rebuttal to the submissions of the 1st Petitioner that the Governor is not the accounting officer of a county and cannot therefore be held liable for the misuse of the County financial resources, Mr. Thande Kuria urged the Court to examine Section 148 of the Public Finance Management Act and Section 30 (3) of the County Government Act in light of Article 179 of the Constitution which deals with the County

Executive Committee. It was his submission that the office of the Governor and that of the County Executive Committee are so closely intertwined that none can be severed from the other. As such, it was Mr. Kuria's argument that under Article 226(5) of the Constitution, the 1st Petitioner as the holder of the office of Governor was liable for any loss of any public funds that were utilized for a purpose that was contrary to law. He urged the Court to dismiss the Petition.

4th Respondent's Submissions

86. In response to the consolidated Petitions, the 4th Respondent, the Deputy Governor of Embu County filed a replying affidavit sworn on 17th March, 2014. She opposes the consolidated Petition on various legal grounds.

87. Mr. Kibe presented the 4th Respondent's case. He asserted that the Petition was based on the notion of the purported violation of the Constitution and disobedience of Court orders. Mr. Kibe in his submissions, pointed out that under the law, the Petitioners had the duty to plead their case in a concise manner to enable the Court grant the reliefs sought. That in this petition, the Petitioners did not plead the Constitutional provisions violated by the Respondents and the inJury suffered as required under Rule 10 (2) (c) and (d) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (hereinafter referred to as the Mutunga Rules).

88. Further that, under Rule 11(2) of the Mutunga Rules, the Petition was not supported by an affidavit stating the alleged violations or illegality that occurred together with all the annexures necessary. Mr. Kibe was emphatic that Rule 11 (2) required that in a petition seeking orders of certiorari, it was mandatory for such proceedings to be annexed in the Petitioner's affidavit. As such it was submitted that it was essential for the 1st Petitioner to annex the Senate's Report of the Special Committee and the resolution for impeachment thereof. That since the said resolution and proceedings were not availed by the Petitioner, the Court had no Jurisdiction to quash any resolution as prayed for by the 1st Petitioner. The 4th Respondent relied on the case of **Prof. Daniel Mugendi –v- Kenyatta University & 3 others Nairobi Court of Appeal Civil Appeal No. 6 of 2012 (UR)** and the **Mumo Matemu Case (supra)** in support of that contention.

89. The 4th Respondent also sought to distinguish the case of **Hon. Muyiwa InakoJu & 17 Others – vs- Hon. Ibrahim Adeolu Adeleke Supreme Court of Nigeria S.C 272/2006 (UR)** cited by the 1st Petitioner in support of his case. He submitted that that case was not helpful to the 1st Petitioner's case. According to Mr. Kibe, the said case involved the removal of a Speaker, while the instant case involves the question of the removal of a Governor. That further, there was an issue with regard to the numbers required for the motion of the removal of the Speaker to succeed. That in the said case, the court determined that the number had not been met which rendered the impeachment a nullity. It was therefore Mr. Kibe's view that the case can be distinguished since the two thirds maJority by the members of the Senate and the County Assembly had been met in removing the 1st petitioner from office. That the same issue also arose in the case of **Hon. Michael Dapianlong –v- Chief (Dr.) Joshus Chibi Dariye Supreme Court of Nigeria S.C 39/2007 (UR).**

90. With regard to contempt of court the 4th Respondent associated herself with the submissions of the 5th and 6th Respondents with respect to the Order of the Court issued on 23rd January, 2014 against the County Assembly of Embu. In relation to the Order issued by MaJanJa J on 3rd February, 2014 and extended on 4th February, 2014, it was Mr. Kibe's argument that the same was not directed against the Senate, but at the Speaker of the Senate and the Attorney General. That furthermore the Court could not assume or infer that any person disobeyed a Court order without a specific finding of such disobedience. In his submission, Mr. Kibe pointed out that a formal application for contempt of Court orders by the 1st Petitioner against the Speaker of the Senate and the Senate had to be made before the Court determines the issue of contempt. That Contempt is a matter of proof which can only be done through instituting proceedings under Section 5(1) of the Judicature Act, such as the proceedings instituted against the Speaker and the Clerk of the County Assembly of Embu. Mr. Kibe relied on the cases of; **R-v- Gachoka and Another (1999) 1EA 392**, **Mutitika –vs- Baharini Farm Limited (1985) KLR, 227** and **Commercial Bank of Africa Ltd –vs- Ndirangu (1990- 1994) EA 64 (CAK), 69** in

support of these arguments.

91. It was the 4th Respondent's disposition that by the time the Order was made on 3rd February, 2014 and served on 4th February 2014, the Speaker of the Senate had already convened a meeting of the Senate vide Gazette Notice Number 627 dated 1st February 2014. That the Senate thereafter resolved to form a Senate Committee to deliberate on the matter on 5th February, 2014. The 4th Respondent thus argued that by the time the Order was made, the Speaker had already discharged his role of convening the Senate and that the order dated 3rd February, 2014 had been overtaken by events and was therefore of no effect. Accordingly, the same did not bar the Senate from instituting a Special Committee to investigate the Conduct of the 1st Petitioner. As such, it was submitted that the decision by the Senate to impeach the 1st Petitioner was not in disobedience of any Court order. Further, that the Court cannot set aside the Senate's decision based on the disobedience of a Court order, since the Senate had not been made a party to the proceedings in which the order was made. The case of **Royal Media –vs- Telkom Kenya (2001) EA, 210** was cited in support of this proposition.

92. On the issue of separation of power, Justiciability and Jurisdiction of this Court, Mr. Kibe alleged that this Court has to ensure that each organ of the state has the space to discharge its mandate. Therefore the Court cannot assume powers vested in other organs of the State. Mr. Kibe stated that the Court has a duty to protect the supremacy of the Constitution and that when a Court seeks to impeach the acts of another State Organ it must do so on the premise that the acts of such an organ were unconstitutional. He referred to the case of ***Matembe & Others –vs- A.G 2005 2 EA 200*** where it was held that when Parliament was seized of a matter the Court could not intervene.

93. With regard to Justiciability, Mr. Kibe submitted that impeachment is an inquiry that has political connotations and controversies and as such, the Courts in various Jurisdictions have been reluctant to wade into such issues due to their political nature. Mr. Kibe further claimed that even where the Court may have Jurisdiction with regard to the impeachment process there are certain issues that the Court cannot determine. These include the threshold of impeachment and what is to be construed as gross misconduct and ***gross violation*** of the Constitution and any other written law.

94. Furthermore it was Mr. Kibe's case that the Senate's Committee may not have applied procedures that were appropriate or convenient to the 1st Petitioner but nevertheless that such inappropriateness and inconvenience cannot lead to the nullification of the process unless there was a Constitutional failure on the part of the Senate. He relied on the case of ***Nairobi Metropolitan PSV Saccos & 25 Others –vs- County of Nairobi Government & 3 others Nairobi High Court Petition No. 486 of 2013*** in support of this argument.

95. Mr. Kibe further argued that it was important to look at the political reactions and consequences of a reversal of the Senate's decision. In his assessment, the Court should restrain itself from such an invitation as held in the ***Nixon Case (Supra)*** where the Court held that the reason for forbidding the Court's intervention in cases of impeachment was to ensure political stability. From this standpoint, the 4th Respondent urged the Court to hold and find that the process of impeachment was non- Justiciable. That further, a member of County Assembly cannot be inJuncted from bringing a motion for impeachment and in addition, once a motion is filed in both the Senate and the County Assembly, no Court can inJunct the process. Mr. Kibe therefore urged the Court to find that while the senate or its committee (s) is seized with the Resolution of the County Assembly no Court can intervene as it is a political process.

96. It was Mr. Kibe's further submission that this petition raises non–Justiciable issues in light of Section 12 of the National Assembly (Powers and Privileges) Act, Cap 6 Laws of Kenya which stipulates that no proceedings of the Parliament and the County Assemblies can be questioned in Court. That effectively, Section 12 of the aforesaid Act ousts the Court's Jurisdiction in relation to any decision of the Assembly. According to the 4th Respondent, even though the ouster clause is contained in an Act of parliament, the Court is bound to exercise its Jurisdiction under both the Constitution and Statute Law. That unless Section 12 of the National Assembly (Powers and Privileges) Act is declared unconstitutional the Court is bound by the same and cannot interfere with matters vested in the County

Assembly, National Assembly and Senate.

97. Further, on the point of Justiciability and Jurisdiction, it was Mr. Kibe's argument that under article 165(3) of the Constitution, the Court must exercise its Jurisdiction over other organs of the State under very extreme circumstances. That one such circumstance is if the Motion to impeach the 1st petitioner was not passed by a two thirds maJority of either the Senate or County Assembly or if such removal was not based on the grounds laid down in Article 181 of the Constitution. Mr. Kibe was of the opinion that any other failure would fall within the internal processes of Parliament.

98. On the appropriateness of the orders sought in the Amended Petition, Mr. Kibe submitted that that responsibility has been given to the County Assembly and Senate to ensure County Governors govern in a lawful and effective manner. That Impeachment was included in the law to provide for a mechanism for good governance. It was thus his contention that this purpose would be defeated if these first case with regard to enforcing good governance and accountability succeeded in the County Assembly and Senate but failed to do so in the Court**.**

99. Mr. Kibe also took issues with the submission of the Commission for the Implementation of the Constitution made by Mr. Nani that the Court cannot punish the 5th and 6th respondents for contempt but it can choose to annul the resolutions of both the Senate and the County Assembly as consequences of disobedience of Court orders. According to Mr. Kibe such an approach is erroneous as a finding of contempt can only be determined through an inquiry and cannot be presumed. That as long as Section 12 of the National Assembly Powers and Privileges Act is still in force, the 5th and 6th respondents were protected by the law. The 4th Respondent however submitted that should the Court find that there was indeed disobedience of a Court order, the Court can order the 5th and 6th Respondents to pay costs or a fine, but that the option of committal was not viable.

100. On the issue of reinstatement of the 1st Petitioner as the Governor of Embu, it was Mr. Kibe's submission that the Amended Petition did not disclose such a prayer. That an order for reinstatement must be specifically prayed for. In addition that even if the Court were to find the Senate's decision was unlawful, the Court would have to consider whether the 1st petitioner contributed to that decision. Mr. Kibe pointed out that the 1st Petitioner was found guilty of three out of the five counts he had been charged with by the Senate.

101. Lastly, Mr. Kibe submitted that the Constitution 2010 is still at the nascent stages of implementation and therefore the Court should uphold the principle of Constitutionalism. He requested the Court to find that public officers must be held to account through the Constitution. Therefore he urged the Court to preserve the Resolutions of the County Assembly and the Senate for the Constitution to have meaning and prayed for the dismissal of the amended petition.

The 5th and 6th Respondents' Submissions

102. In response to the consolidated Petitions, the 5th Respondent (the Speaker of the County Assembly) and the 6th Respondent (the County Assembly of Embu) filed Replying Affidavits sworn by Hon. Justus Kariuki Mate the Speaker of the County Assembly on 24th February, 2014 and 14th March, 2014 and Jim Kauma the Clerk of the County Assembly sworn on 24th February, 2014.

103. Mr. NJenga together with Mr. Ng'ang'a presented the 5th and 6th Respondent's case together with County Clerk's case in respect to the Misc Application No. 4 of 2014 and Judicial Review No. 6 of 2014.

104. Mr. NJenga contended that the amended petition is speculative, unfounded and without merit and bent on defeating the Constitution. He alleged that the same was instituted to defeat the purpose and obJectives of devolution as enshrined in the Constitution. He argued that devolution was about democracy and accountability. He pointed out that Article 175 of the Constitution was clear that County Governments shall be based on democratic principles and the separation of powers. It was further submitted that the County Assembly comprised of elected officials who exercised the oversight function over the County Executive Committee, whose members are selected and are answerable to the Governor

elect. Mr. NJenga further told the Court that County Executive Committees are charged with the responsibility of managing and controlling the systems with regard to the resources allocated to a County. In that regard he submitted that under Section 30 (3) (a) of the County Government Act, the Governor is charged with the responsibility of providing leadership in the County's governance and development. That further Section 30 (3) (f) of the County Government Act also provides that a County Governor shall be responsible and accountable for the management and use of County resources. It was against this background that the 5th and 6th Respondents submitted that the Governor must always be called to account for county resources and blame must not be shifted to Junior officers in case of any irregularities with regard to utilization of County Resources. That in view of Section 30 (3) (f) of the County Government Act, the role of the Governor cannot be construed as Just providing policy and executive directions to the County as argued by the 1st Petitioner.

105. He argued that the County Assembly of Embu while exercising its oversight role made a resolution to impeach the 1st Petitioner as the County Governor of Embu. That the said resolution was submitted to the Senate for investigation. Mr. NJenga therefore alleged that the reason for the resolution was based on the misuse of county public resources with regard to the procurement of maize seedlings and the Embu stadium renovation. That the said issue with regard to the misappropriation of funds was brought to the attention of the 1st Petitioner who chose to do nothing about the irregularities. It was contended that the 1st Petitioner resorted to shielding the 4th Respondents together with other officers within his office from investigation. Mr. NJenga pointed out that the argument advanced by the 1st Petitioner that there was a court order barring him from suspending the County Secretary ,who is the 4th Petitioner, was misleading as no such order was brought to the attention of this Court.

106. Mr. NJenga contended that the order issued by **Odunga J** with regard to the Judicial Review dated 21st January 2014 did not restrain any person from taking any action against the 4th Petitioner but directed that the status quo should remain. On the question of what was the status quo, Mr. NJenga explained that it meant that the suspension of the 4th Respondent was still in force and the 1st Petitioner had to still account for his inaction to the County Assembly as he was the person in charge of managing the resources of the County of Embu.

107. With regard to the issue of Jurisdiction to impeach the 1st Petitioner, it was Mr. Nganga's submission that the Petitioners were asking the Court to substitute the decision of the Senate with its own. He thus contended that the Court did not have such Jurisdiction, and in particular, to interrogate the merits of a decision made by the Senate. He claimed that the crux of the petitioners' case was premised on Article 181 of the Constitution and Section 33 of the County Government Act. That under the County Government Act, a clear process had been set out on the removal of the Governor. Mr. Ng'ang'a therefore argued that when the court is invited to interrogate the threshold of Article 181 of the Constitution the same is tantamount to sitting on an appeal against the Senate's decision which amounts to usurpation of the Senate's role.

108. On the issue of the threshold applicable in the removal of a Governor, Mr. Ng'ang'a submitted that it was clearly set out in Article 181 of the Constitution and this Court cannot therefore set its own threshold. He argued that the Court cannot add any other further grounds of removal of a County Governor as claimed by the Petitioners. He referred the Court to the cases of ***Kenya Pipeline Limited –vs- Hyosung Ebara Company Limited & 2 others Civil Appeal Number 145 of 2011,*** ***Mumo Matemu –vs- Trusted Society of Human Rights Alliances & Others (2004) e KLR*** and ***The Supreme Court Advisory Opinion No. 2 of 2013*** **(supra).**

109. It was Mr. Ng'anga's further position that the Courts should allow other organs to decide their matters in the best way they know how. That since the Senate was seized with the Jurisdiction to hear the impeachment of the Governor, the Senate had a right to either be correct or wrong on the issue of what Gross violation of the Constitution and any other written law amounted to, without the interference of the Court. Accordingly, Mr. Ng'ang'a argued that the Senate followed due procedure and assigned its minds to the charges against the 1st Petitioner.

110. With regard to the absence of the 1st and 2nd Respondents in this Petition, Mr. Ng'ang'a asserted

that the mere fact that the Senate and its Speaker did not enter appearance in the Petition, the Court should not make a finding that the Petitions are unopposed. Mr. Ng'ang'a therefore urged the Court to interrogate all the documents from the Senate that have been brought to its attention when arriving at a determination of the issues before it.

111. On the question of Justiciability, Mr, Ng'ang'a contended that impeachment of the 1st Petitioner is not Justiciable as the same is a political process here in Kenya and that the process of the removal of a County Governor is left to the Senate and not to the Courts. He relied on the ***Nixon Case (supra).***

112. On the issue of due process, Mr. Nganga submitted that due process begins at the Senate level and not at the County Assembly. It was argued that the 1st Petitioner did not deny appearing before the Senate. That in the face of such an admission, the 1st Petitioner acceded to the Jurisdiction of Senate. It was also submitted that the process of impeachment at the senate was fair. That in compliance with the Senate's standing orders, the Special Committee of the Senate invited the1st Petitioner to appear before it and allowed him to file documents and call witnesses in support of his defence. It was further pointed out that the issue of the 1st Petitioner appearing under protest or without preJudice is deceptive since the Senate invited the 1st Petitioner and did not summon him. That in the case of invitation to appear, the 1st Petitioner had the option of not appearing which is in contrast with a summons that bears penal consequences for those who do not honour them. It was therefore contended that the only reason why the 1st Petitioner filed the current Petitions was because he lost at the Senate. According to the 5th and 6th Respondents the Petitions now before this Court were for the sole purpose of forum shopping which is an abuse of the Court process.

113. Mr. NJenga submitted extensively on the issue of disobedience of court orders in relation to **Miscellaneous Application Number 4 of 2014 (Hon. Martin Nyaga Wambora & County Government of Embu –vs- Justus Kariuki Mate & Jim G. Kauma)** and the order issued by MaJanJa J on 3rd February 2014 in **Petition number 4 of 2014 (Hon. Martin Nyaga Wambora & County Government of Embu –v- The Speaker of the Senate & The Hon. Attorney General**).

114. He was of the opinion that when a party alleges disobedience of a Court order, there must be proof of such disobedience. According to Mr. NJenga, the 5th and 6th Respondents had denied being served with the Court orders in their replying affidavits. That in the foregoing, it was incumbent on the 1st Petitioner to demonstrate how such service was carried out. It was further contended that there was no affidavit of service to show that the 5th and 6th Respondents were personally notified of the existence of the Court Order dated 24th January, 2014. As such it was Mr. NJenga's submission that the order was not served in the manner prescribed by law.

115. He further pointed out that the 1st Petitioner in his Notice of Motion dated 28th January, 2014 with regard to contempt had annexed a Newspaper cutting with regard to the said order. In Mr. NJenga's submission this amounted to substituted service which requires the leave of the Court. That in this case no such leave was sought. He thus contended that there was no basis for service by way of publication and the Court should ignore the same. Furthermore the placing of such an advertisement in the newspaper was a clear admission on the part of the 1st Petitioner that no service had been effected with regard to the Court order.

116. Mr. NJenga further submitted that when the Motion to remove the Governor was introduced in the County Assembly by the Hon. Ibrahim Swaleh, through a private member's motion on 16th January, 2014, there was no order of the Court inJuncting the said impeachment proceedings. That the Court order was issued on 23rd January, 2014 well after the proceedings had started. It was therefore the argument of Mr. NJenga that the order was incapable of compliance by the Respondents. It was also his submission that the motion constituted part of the proceedings of the Assembly which brought it under the ambit of Section 6,12 and 29 of the National Assembly (Powers and Privileges) Act Cap 6 Laws of Kenya. Therefore the County Assembly members including the Speaker and the County Assembly Clerk were immune against Civil or Criminal proceedings for acts committed on the floor of the house. He therefore alleged that the Speaker and Clerk of the County Assembly of Embu cannot be committed for contempt as prayed by the 1st Petitioner.

117. While referring to the case of **Dr. Florence Musau –v- Minister for Health & Others, HC Misc.No.12 of 2007 (UR),** Mr. NJenga also argued that the standard of proof in matters of contempt of Court is always beyond reasonable doubt. That it must be proved that the contemnor knew of the existence of the order. He took the view that the application for contempt was incompetent given that the Petitioner had not demonstrated that the 5th and 6th Respondents had the knowledge of the existence of such an order. Mr. NJenga further took issue with the fact that a notice to the Attorney General was not made before instituting the contempt proceedings. That the issuance of such a Notice was a mandatory provision as held in the case o*f **Godfrey Kilatya Kituku & 6 others - v- Malindi Municipal Council Civil Case Number 45 of 2005.*** He also cited the case of ***Kariuki & 2 Others –v- Minister for Gender, Sports, Culture & Social Services & 2 Others Misc. CA No. 389 of 2004 in (2004) 1 KLR.*** Where Lenaola J found that service must be personal and that the issue of knowledge of the existence of the order was not material. Mr. NJenga concluded that the law in Kenya provides that there must be personal service of an order. And in this case, no such service was effected on the 5th and 6th Respondents.

118. On his part, Mr. Ng'ang'a invited the court to interrogate the order issued on 23rd January, 2014. He argued that part (b) of the said order was clear that following an application made by the 1st Petitioner, both the Speaker and Clerk of the County Assembly of Embu and the County Assembly of Embu who were the 1st, 2nd and 3rd Respondents respectively, were restrained from holding any impeachment Proceedings before giving the 1st Petitioner an opportunity to be heard on the charges levelled against him. According to the Mr. Ng'ang'a there were no impeachment proceedings that the County Assembly of Embu was seized of under Section 33 of the County Government Act. That the only duty bestowed on the County Assembly was the framing of the charges for impeachment and the proposal for removal of the County Governor. Mr. Ng'ang'a consequently argued that the Court was invited to inJunct a process that the County Assembly was not seized of as the Senate is the only body mandated in both the Constitution and the County Government Act to carry out the process of impeaching or removing a County Governor. In any event, the 1st Petitioner was still in office after the Motion to remove him was passed by the County Assembly, which was proof that the County Assembly does not have the mandate to impeach the County Governor.

119. In light of the foregoing, it was the contention of the 5th and 6th Respondents that since the Senate is the only body mandated to carry out impeachment, the 1st Petitioner secured an order that was inefficacious and as a consequence there was no disobedience of the Court order as alleged. He further submitted that an order must be taken for what it says and not for what it ought to say. He relied on the case of ***Ochino & Another –v- Okombe Civil Appeal no. 36 of 1989 KLR (1989) 165*** in support of his argument where the Court of Appeal held that contempt can only arise if the order is clear and unambiguous.

120. In regard to the Court order issued by **MaJanJa J** on 3rd February, 2014, Mr. Ng'ang'a associated himself with the submission of Mr. Kibe; that by the time the Order was made and served on 4th February 2014, the Speaker of the Senate had already convened a meeting of the Senate vide Gazette Notice Number 627 dated 1st February 2014. Mr. Ng'ang'a was therefore of the persuasion that by the time the Order was made, the Speaker had already discharged his role of convening the Senate and that the Court order dated 3rd February, 2014 had been overtaken by events. He thus contended that the Court did not have the Jurisdiction to inJunct the Senate which had the Constitutional mandate to remove a County Governor.

121. Mr. Ng'ang'a added that the order dated 3rd February, 2014 was not directed at the Senate, but at the Speaker and the Attorney General. That accordingly, the same did not bar the Senate from instituting a Special Committee to investigate the conduct of the 1st Petitioner since the Senate was not a party to the proceedings. In view of this, the order had already been overtaken by events. As such it was his contention that the order of the learned Judge dated 4th February 2014 could not operate to annul a process that had already taken place as held in the case of ***Kileleshwa Service Station Limited –vs- Kenya Shell Limited Civil Application No. NAIROBI 84 of 2008 (UR)*** and ***Athi River Services Board –vs- Nairobi City Water & Sewerage Co. Ltd (2010) eKLR.*** He was of the view that the Speaker became functus officio upon convening the Senate and therefore any order directed at him after that was not capable of being disobeyed.

122. In regard to the Judicial Review Application No. 6 of 2014, Mr. Nganga submitted that the Prayers sought by the 4th Petitioner should be dismissed because this Court has no Jurisdiction to deal with the matter since the same raises questions of employment which, under Articles 162 (2) and 165(5) (b) of the Constitution are within the Jurisdiction of the Industrial Court as was held in the case of ***Prof Daniel N. Mugendi Vs. Kenyatta University & 3 Others Judicial Review (C.A. (Nrb) N. 6/12.***

123. Mr. Ng'ang'a however submitted that in the event the Court found it indeed had Jurisdiction over the matter, it would be important to note that the 4th Respondent was required to appear before the two committees of the County Assembly on 6th January 2014, at 11.00 a.m. and 2.30 p.m. respectively. Accordingly the applicant had the opportunity to attend the said sittings having been served with the summons on 3rd January 2014. Mr. Ng'ang'a and Mr. NJenga further submitted that the 4th Respondent's office was within the precincts of the offices of the County Assembly and she should have therefore appeared before the committees and formally sought for more time to avail any document or make any clarification that was within her knowledge with regard to the inquiries raised by the Committees. According to Mr. Ng'ang'a therefore, the fact that she chose to write a four page letter in response to the summonses to appear was a gesture of bad faith on her part as the Committees simply invited her for a dialogue. That after considering her response to the summonses, the Committees made a valid recommendation that investigations needed to be carried out by the Ethics and Anti-Corruption Commission.

124. It was also submitted that a recommendation to the Governor for the suspension of the 4th Respondent by the County Assembly did not take away or affect her rights. That in any case, the 1st Petitioner as the County Governor wrote a letter to the Speaker of the County Assembly informing him that the 4th Petitioner had stepped aside to allow for investigations and in her absence, another person would act as the County Secretary. That in the foregoing, the prayers sought had already been overtaken by events. Mr. Ng'ang'a and Mr. NJenga therefore urged the Court to dismiss the prayers sought by the 4th Respondent.

Response By The Petitioners

125. Mr. NJoroge together with Mr. Issa Mansur responded to the Respondents' submissions. Mr. NJoroge submitted that the 1st Petitioner through the amended Petition was urging the Court to look at the Constitutionality of his impeachment. That the Court was not sitting on an appeal on the Senate's and the County Assembly's resolution to impeach the 1st Petitioner as suggested by the Respondents. That the Court is only enJoined to look at whether the Senate and the County Assembly acted within the four corners of the law when deciding to remove the 1st Petitioner from office. Mr. NJoroge therefore asserted that the 1st Petitioner through the Amended Petition was able to illustrate how his rights had been violated and under what sections of the Constitution.

126. Mr NJoroge observed that the County Assembly of Embu did not follow the procedures laid out in their Standing Orders number 61 and 64 with regard to the removal of the 1st Petitioner as the Governor. That in the standing orders there are rules of procedure governing the proceedings of the house and have to be consistent with the Constitution. He further submitted that at the County Assembly, the Governor was never made aware of the charges against him by the County Assembly and only came to learn about the same when he was summoned to appear before the special committee of the Senate. He submitted that the impeachment process is akin to a trial process which starts at the County Assembly then goes to the Senate Committee and finally to the full Senate. Accordingly he submitted that the effect of non-compliance with the procedures laid out in the standing Orders in any of the three stages would render the process of removal of the County Governor a nullity.

127. Furthermore, he argued that time lines set for the removal of the Governor at the Senate under Section 33 of the County Government Act violated the canons of a fair hearing under Article 50 of the Constitution. It was Mr. NJoroge's contention that two hearings for the removal of the Governor and Deputy Governor took place within ten days at the Senate. That the net effect was that the 1st petitioner and the Deputy Governor were not given adequate time to prepare their defences. In addition, the 1st Petitioner was only given fifteen minutes at the plenary session of the Senate to give his defence which, in

Mr. NJoroge's opinion, did not amount to a right to be heard but can only be construed as a mitigation. He thus argued that there was lack of due process.

128. While responding to the issues raised by the 4th, 5th and 6th Respondents with regard to the 4th Petitioner's case, it was the submission of Mr. Issa Mansur that the court had supervisory Jurisdiction under Article 165(6) of the Constitution to grant the prayers sought. That the facts in the 4th Petitioner's case are interrelated with the removal of the 1st Petitioner as the Governor of Embu County. Mr. NJoroge asserted that the 4th Petitioner was not accorded due process as envisaged by the County Assembly of Embu Standing orders. Further, it was submitted that the 1st Petitioner was merely an interested party in the matter since he was the one who appointed her. That the fact that he swore an affidavit with regard to the issue should not be construed as shielding her from investigations. Mr. NJoroge therefore urged the Court to grant the prayers sought by the 4th Petitioner.

129. In response to the submissions made by the Respondents on the Court orders issued on 23rd January, 2014, it was Mr. NJoroge's response that the same were capable of execution since the impeachment process starts at the County Assembly level as per Standing Order number 61 of the Embu County Assembly Standing Orders. That the Speaker of the County Assembly of Embu had certain options when he received the order of the Court. First, under Standing Order number 45 (3) of the County Assembly of Embu, the Speaker had an option to declare the same inadmissible given that it would infringe Standing Order Number 86(2) which deals with a matter that is subJudice. And since the 1st Petitioner had instituted a case against the county assembly which was yet to be concluded, the rule of subJudice applied in this case. Secondly, the same case applied to the Speaker of the Senate when he received the Order dated 3rd February 2014 and extended on 4th February, 2014. Mr. NJoroge submitted that given the fact that neither the County Assembly nor the Senate obeyed the Court orders, the 1st Petitioner was preJudiced by the proceedings of the two institutions as the matters were subJudice. He referred the Court to the case of ***R-v- Gachoka (1999) 1EA 254*** in support of that submission.

130. Mr. Issa Mansur on his part pointed out to the Court that law on contempt has changed in this Country. That knowledge of a Court order supersedes personal service. He submitted that there had been a demonstration by the 1st Petitioner that the 5th and 6th Respondents knew about the orders issued by the Court on 24th January, 2014, while the Senate knew of the orders issued on 4th February, 2014. In addition, there was evidence of service of the orders through the Affidavits of Service filed herein.

131. On the issue of immunity of the County Assembly and its members as well as the Senate and its members, Mr. Issa Mansur contended that the National Assembly (Powers and Privileges) Act chapter 6 of the Laws of Kenya does not apply with regard to Court orders. That immunity granted under that Act, is subJect to the rule of law and in particular the Constitution. He submitted that the Senate, the Speaker of the Senate together with the Speaker of the County Assembly of Embu and the County Assembly of Embu must be held to account for disobedience of court orders. He referred the Court to the case of ***Smith -vs- Mutasa & Another (1990) LRC*** where it was held that the Court can interfere with Parliamentary immunity in instances where the Constitution has been violated.

132. He further asserted that state organs are bound by Article 10(2) of the Constitution with regard to the National values and principles of good governance which includes the observance of the rule of law. He cited the case of ***Commercial Bank of Africa –vs- Ndirangu (supra)***, and urged the court to find like **Kwach J** did, that disobedience of Court orders means a violation of the Constitution. He also urged the Court to find that any action done in disobedience of a Court order must be set aside. As such, Mr. Mansur urged the Court to find that the resolutions by the Senate and the County Assembly of the 1st Petitioner are null and void.

133. With regard to the issue of forum shopping, Mr. Issa Mansur asserted that the cases herein were instituted before the process of impeachment started. It was contended that the fact that the 1st Petitioner attended the Senate proceedings did not sanitize the proceedings therein. He therefore restated that the 1st Petitioner attended the same under protest and out of compliance with the law. It was his further submission that the resolution of the senate seeking to be quashed was the Gazette Notice Number 1052 of 17th March, 2014 which had been duly produced before the Court in the 1st Petitioner's

application dated 19th March, 2014.

134. On the issue of the lack for a prayer of reinstatement, Mr. NJoroge clarified that the effect of the prayers sought by the 1st petitioner meant that the 1st Petitioner would resume the position of Governor of Embu and as such, there was no need to specifically ask for reinstatement.

135. On the issue that the Speaker, and not the Senate, was a party Mr. NJoroge conceded and submitted that the Speaker of the Senate was under Articles 106 and 107 of the Constitution, the Principal of the Senate and that everything touching on the Senate goes through him. Therefore, the Senate was enJoined through its Speaker.

136. On the applicability of the ***Nixon Case (supra)*** in the Petitions before us and the proposition by the 3rd Respondent that the Court should act with restraint in matters of impeachment, it was Mr. Mansur's submission that the Court must apply Article 159 (2), on Judicial authority and uphold the rule of law regardless of status. That the matter of the removal of the 1st Petitioner was before the High Court before the Senate was seized of the same. That in this case, it was the Senate that should have restrained itself from interfering with matters that were before the Court. Consequently, he argued that it was wrong for the Senate to preJudge and determine the issues that were before the Court and ignore Court orders on the basis of separation of powers.

137. Mr. Issa Mansur therefore urged the Court to go the Nigerian way and not follow the ***Nixon Case (supra)*** with regard to whether the Court can interfere with the impeachment process. That further, the definition of what constitutes ***gross violation*** of the Constitution and any other written law should be subJect to the Court's interpretation and not left to the whims of the County Assembly and the Senate. The Petitioners therefore urged the Court to grant the prayers sought in the consolidated Petitions.

138. Having set out the parties submissions as above, we now proceed to make a determination of all the issued in the amended Petition. We propose to start with Judicial Review Application No. 6 of 2014.

Determination

Judicial Review Application No. 6 of 2014

139. We have stated the facts supporting the above application and the relief soughts in paragraph 3 of this Judgment. The issues for determination as can be discerned from the statutory statement of facts and the veryifying affidavit sworn by the applicant, Margaret Lorna Kariuki on 16th January 2014 are as follows;

> (a) Whether the court has Jurisdiction to hear and determine the application.
>
> (b) Whether the action of the Joint committees of infrastructure, Youth and Sports; the Joint committees on
>
> Agriculture, Fisheries and Livestock and the Public Accounts and Investments committees in recommending that the Applicant steps aside to pave way for investigations amounted to a violation of the rules of natural Justice or of her rights under Article 47 and Article 50 of the Constitution.
>
> (c) Whether the applicant is entitled to the orders sought.

140. We shall now proceed to consider the arguments made by the parties on each of the above issues and make our determinations thereon.

Whether the court has Jurisdiction to hear this application

141. It was the 2nd and 3rd Respondents contention that this court, in the exercise of its Judicial

Review Jurisdiction is not empowered to deal with the application before it since it allegedly relates to issues of employment concerning whether the applicant should be suspended from her employment. Relying on Article 162(2) and Article 165(5) of the Constitution, Mr Nganga, learned counsel for the 2nd and 3rd Respondents who appeared together with Mr NJenga submitted that the application ought to have been filed in the Industrial Court which is the court vested with Jurisdiction to hear and determine disputes related to employment.

142. Responding to this claim, Mr NJoroge in his submissions on behalf of the 4th Petitioner/Applicant denied that the application involved an employment dispute and maintained that this court was clothed with Jurisdiction by Article 165(6) to hear, determine and grant the orders sought in this application.

143. Having considered the basis upon which the Respondents challenge on this courts Jurisdiction is premised, we think that this is an issue which we can quickly resolve by Just looking at the provisions of Article 165(6) of the Constitution and the pleadings filed in this matter.

144. Article 165(6) donates to this court supervisory Jurisdiction over subordinate courts and over any person, body or authority exercising a Judicial or quasi Judicial function.

145. In this case, a cursory look at the verifying affidavit sworn by the Applicant on 16th January 2014 and the statutory statement of facts dated the same day shows clearly that the gist of the Applicant's complaint in this matter is that the Joint committees of infrastructure, Youth and Sports; the Committees of Agriculture, Fisheries and Livestock and the Committee on Public Investments and Accounts (herein after referred to as the Joint committees) made recommendations on 6th January, 2014 that she should step aside from the performance of her duties as County Secretary for the County Government of Embu pending investigations to be undertaken by the Ethics and Anti- Corruption Commission (EACC) without having given her an opportunity to be heard which in her view amounted to a violation of the rules of natural Justice and her right to fair administrative action guaranteed under Article 47 of the Constitution.

146. It is therefore clear from the pleadings that the Applicant's complaint relates to the process adopted by the Joint committees of the County Assembly of Embu in undertaking the inquiries before them leading to the impugned recommendations. The said complaint has nothing to do with a labour dispute. The Applicant was not for example seeking redress on grounds that she was unlawfully suspended from office in breach of her terms of employment or that any of her terms of employment had been breached by her employer. If the application had raised such complaints, we would have readily agreed with Counsel for the Respondents that it is the Industrial Court not this court that would have Jurisdiction to determine the issues raised therein but in so far as what is challenged is the process followed in arriving at the recommendations in question, we find that it is this court in the exercise of its Judicial review Jurisdiction that has the mandate to investigate whether that process complied with the law.

147. It is common ground, as this has not been disputed by any of the Respondents that the Joint committees being committees established by the County Assembly of Embu under Section 14 of the County Government Act while discharging their functions in the exercise of the Assembly's mandate to oversee the proper and efficient management of the County Governments' affairs including the use of financial resources at its disposal were acting as quasi Judicial bodies and their decisions are therefore amendable to Judicial Review.

148. For the reasons stated above, we have no doubt that this court has Jurisdiction to hear and determine the instant application and we so hold.

(2) Whether the Joint committees in making the subJect recommendations violated the rules of natural Justice or violated the applicant's right under Article47 and 50(1) of the constitution

149. **Article 47(1)** of the Constitution states as follows;

"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and proceduraly fair"

Article 47(2)

"If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action."

150. **Article 50(1)** provides that every person has a right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or an independent and impartial tribunal or body.

151. Looking at these two Articles of the constitution, it is clear that they have elevated the rules of natural Justice and the duty to act fairly when making administrative, Judicial or quasi Judicial decisions into constitutional rights capable of enforcement by an aggrieved party in appropriate cases.

152. The twin rules of natural Justice that no man shall be a Judge in his own cause (Nemo Judex in causa sua) and that no man shall be condemned unheard (audi alteram partem) are cardinal principles of law which are fundamental in our Justice system. They are basically an embodiment of the duty to act fairly. However, there is no legal definition or standard regarding what constitutes procedural fairness and each case must be decided on its own merits.

153. In this case, the Applicant's claim that summons requiring her to attend the two Joint committees on Monday 6th January, 2014 at 11.30 a.m. and at 2.30 p.m were delivered to her office on Friday 3rd January, 2014 is not disputed . The Applicant contends that both summons were delivered to her office at 5.30 p.m. but Mr NJenga claimed in his submissions on behalf of the Respondents that one of the summons was delivered at 1.30 p.m.

154. It is also not disputed that her request in letters dated 6th January 2014 for extension of time within which to gather the information required and to attend the committees was declined and that the committees proceeded with their deliberations without having heard her views on the matters under investigation which led to the recommendations sought to be quashed by orders of certiorari.

155. It is the Applicant's case that making the impugned recommendations in those circumstances violated the rules of natural Justice.

156. The Respondents on their part denied that the committees violated the rules of natural Justice as alleged by the Applicant. It is their case that the Applicant was afforded an opportunity to be heard through the service of summons to attend the deliberations of the committees but she failed or declined to utilize that opportunity; that having failed to take the opportunity provided to be heard on the matters under inquiry, the applicant cannot now turn around and claim that she had been condemned unheard.

157. In response to the applicants claim that the period of notice was too short to gather the information required to be presented before the committees, the Respondents' case was that the notice given to the applicant was sufficient in the circumstances of this case considering that the meetings were scheduled to be held at different times and the applicant's office was within walking distance to the venue of the meetings.

158. The question that the court must answer at this stage is whether the making of the recommendations in question without having formally heard the applicant amounted to a violation of the rules of natural Justice. In ***R VS Aga Khan Education Services ex parte Ali Sele & 20 Others High Court Misc. Application No.12 of 2002,*** this court while considering the applicability of the rules of natural Justice held *inter alia* as follows:-

"On the allegation that there was breach of the rules of natural Justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be

unnecessary and even in some cases obstructive. Each case must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance".

In ***Union Insurance Company of Kenya Ltd Vs Ramzan Abdul DhanJi Civil Application No. Nai. 179 of 1998, the Court of Appeal*** *held that;*

"Whereas the right to be heard is a basic natural- Justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it."

159. And lastly in **Russel Vs Duke of Norfork(1949) all ER at 118,** the court had the following to say on the same issue; ***"There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural Justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subJect matter that is being dealt with and so forth. Accordingly, I do not derive much assistance from the definition of natural Justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case".***

160. We find that the golden thread running through the above cited authorities is that the requirements of natural Justice are not applicable in all situations involving the making of administrative and quasi-Judicial decisions. Their application depends on the circumstances of each case, the nature of the inquiry, and whether the person concerned was given a reasonable opportunity of presenting his or her case.

161. Though the right to a hearing encompasses the right to be given sufficient notice of the allegations made and sufficient time to respond, there is no universal principle regarding what amounts to sufficient notice. Whether a notice given is sufficient or not depends on the circumstances of each case and the nature of the allegations to be answered.

162. In the instant case, it should be remembered that the Applicant had not been summoned to attend the Joint committees to defend herself against any alleged wrong doing. The summons only required her to attend for purposes of providing information on matters related to the procurement and use of funds allocated to the face-lifting of the Embu Stadium and purchase of maize seedlings.

163. Although the period of notice given to the applicant in this case would in any other case appear short and probably insufficient, in this case we are satisfied that the notice was not short as to be unreasonable for two main reasons ; Firstly, the applicant was not being summoned to defend herself against any allegations of wrong doing or to show cause why disciplinary action should not be taken against her for any number of reasons in which case she would have required time to prepare a response. Secondly, it is clear that the matters under investigation were not new as admitted by the Applicant in her letters dated 6th January 2014 requesting for extension of time. The said letters are referred to in her verifying affidavit and are exhibited as annextures marked '**MLK 3'**.

164. A reading of those letters confirms that the matters under investigations were not new to her as they had been discussed in several forums. That being the case and considering her official position as County Secretary whose duties included coordination of activities of the various departments of the entire county, it cannot be validly said that she was not seized of the information required by the Joint committees.

165. Since it is not disputed that the meetings of the Joint committees were to be held on a working day at different times; that the Applicants office was within walking distance from the venue of the meetings and there is no claim that the Applicant was away from the County on that day or was prevented by reason of distance or any other good reason from attending the committees' sessions, we hold the view that she should have honoured the summons, attended the committees and provided whatever information which was at her disposal and if it was found to be insufficient, she would have at that Juncture sought more time within which to provide additional information if necessary.

166. It is important to note that the Applicant had not Just been invited to attend the Joint committees but had been served with summons issued by the Joint committees under **Article 195** of the Constitution. Summons are the tools which the courts, Parliament, County Assemblies and their committees use to compel attendance of witnesses and when lawfully issued like they were in this case, unless there are good reasons preventing the person summoned from attending the summoning authority at the time and place required, they ought to be honoured.

167. Though the summons were principally meant to assist the committees get whatever information they required from the Applicant, we find that they also provided the Applicant with an opportunity to be heard in the event that there were issues she personally needed to respond to concerning the performance of her duties as County Secretary.

168. Having failed to utilize the said opportunity, we find that the applicant cannot validly complain that she was condemned unheard.

169. In any event, the Joint committees only made recommendations for her suspension/stepping aside pending investigations which did not amount to a decision with the effect of adversely affecting her rights or interests at that stage. We make this finding because the word "***recommendation"*** is defined in the ***Oxford English Dictionary 12th edition Oxford University Press at page 1201*** to mean; ***"A suggestion or proposal as to the best course of action''.***

170. The recommendations would only have amounted to a decision if they were ratified and adopted by the County Assembly in accordance with the Embu County Assembly's Standing Order No.180. In this case, no evidence was placed before this court to confirm that the said recommendations were ever tabled, debated and adopted as a decision of the Embu County Assembly through the passing of a resolution to that effect. And even if such a decision was made, it would still not amount to a final decision since for it to take effect, it had to be implemented by the County Governor and in any case, a suspension is different from a dismissal from employment.

171. Where a suspension from the performance of a person's duties is being considered pending further investigations, we find that the rules of natural Justice need not be strictly adhered to since no final decision is expected to be made at that point and such proceedings only amount to a preliminary inquiry. We are supported in this reasoning by the Learned authors of ***Halsbury's Laws of England Fourth Edition Reissue Volume 1,*** where when discussing the applicability of the rules of natural Justice stated as follows at Page 175 Paragraph 94;

> ***"The rule generally applies, at least with full force, only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded"***

172. We are therefore of the view that the deliberations of the Joint committees amounted to preliminary inquiries of the matters they were concerned with during their investigations and it was not necessary for them to formally hear the Applicant before making their recommendations.

173. In **Lewis V Heffer & Others (1978) 3 ALL EER 354** ,it was held inter alia that where a suspension was made as a holding operation pending inquiries, the rules of natural Justice did not apply because suspension was a matter of good administration. We agree with this finding because good administration

requires that where investigations are about to be launched regarding suspected irregularities in the execution of duties assigned to a certain office, the occupant of such office should step aside to pave way for the intended investigations in order to avoid the possibility of any interference with the investigations and to safeguard the integrity of its outcome.

174. We are further persuaded by the decision in Scotland in the Petition of the **Newtongrange Branch of Scottish National Party and others, Judicial review of a pretended decision of the National Executive Committee of the Scottish National Party dated 10th July 1999** in Judicial Review of a pretended decision of the National Executive committee of the Scottish National Party dated 10th July 1999 where Lord Osborne in referring to the concept of administrative suspension held as follows:

> ***"In this kind of situation, at an early stage when action of some sort requires to be taken and taken firmly, in order to set the wheels of investigation in motion, in my view, natural Justice would not demand the steps concerned.....indeed where an administrative suspension is decided upon, pending an investigation into some controversial circumstances, it would be inappropriate to hold a hearing into those circumstances, separate from the contemplated investigation itself".***

175. In view of the foregoing, we have come to a firm conclusion that the Joint committees in making their recommendations without having formally heard the applicant did not violate the rules of natural Justice or her right to fair administrative action.

Is the applicant entitled to the relief 's sought?

176. In her four prayers in the application, the applicant sought the Judicial Review remedies of certiorari and prohibition. The prayer for an order of certiorari was sought to quash the finding and/or recommendations by the Joint committees made on 6th January 2014 and to quash the decision of the County Assembly in adopting the said recommendations.

177. The remedy of prohibition was sought against the 4th Respondent (EACC) to forbid it from commencing investigations against the Applicant or any civil servants or officers in the Embu County Public Service on the basis of reports made by the Joint committees as adopted by the County Assembly of Embu on 7th January 2014.

178. The Court of Appeal in the case of ***Kenya National Examinations Council Vs Republic (1997) eKLR*** set out the principles upon which the three main Judicial Review remedies of Certiorari, Mandamus and Prohibition can issue. With regard to the order of certiorari, the court expressed itself thus;

> ***"Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of Jurisdiction or where the rules of natural Justice are not complied with or for such like reasons....."***

From this holding by the Court of Appeal, it is clear that an order of certiorari targets to quash an unlawful or illegal decision. As noted earlier, the Joint committees of the Embu County Assembly only made recommendations which as demonstrated in our paragraph 14 above did not amount to a decision. There is therefore no decision which is capable of being quashed by orders of certiorari as sought in prayers 1 and 2.

179. With regard to prayer 3, as noted earlier, no evidence in the form of a resolution was availed to this court to prove that the Embu County Assembly ever met and formally adopted the Joint committees recommendations thereby converting them into a decision of the Assembly. The letter marked as **'JK 2'** annexed to Jim G. Kauma's Replying affidavit sworn on 31st January, 2014 showing that the Embu County Assembly had made a decision on 7th January 2014 adopting the said recommendations cannot on its own amount to proof that such a resolution was ever made.

180. It is interesting to note that the said letter is dated 7 th January 2014 the same day the report containing the recommendations was made. Is it possible that the County Assembly met on the same day the report was made and adopted the recommendations without following the procedures laid out in its standing order no 180 detailing the steps to be taken before such a resolution is passed? Whatever the case, if such a resolution had been passed, why was it not annexed to the applicant's pleadings or availed to the court at a later date? Could the reason for this failure be that the resolution did not infact exist? These are the questions we had to contend with but unfortunately no answers were forthcoming from the Applicant either from the submissions made on her behalf or from her pleadings.

181. In view of the above, it is clear that the Applicant has contravened the provisions of **Order 53 Rule 7** of the **Civil Procedure Rules** which are expressed in mandatory terms as

follows;

> ***''In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.''***

182. This rule in our view was meant to ensure that before a court issues an order of certiorari, it is satisfied that there is a decision in existence which is capable of being removed to the High Court for the purpose of being quashed so that the court does not issue orders which are incapable of enforcement.

183. Having failed to avail the resolution containing the alleged decision by the Embu County Assembly and having failed to account for such failure, this court is unable to find that such a decision actually existed and consequently, it is our decision that the remedy of certiorari is not available to the Applicant.

184. Secondly and more importantly, there is evidence that the Applicant had already stepped aside on 15th January 2014 to pave way for investigations as recommended by the Joint committees. This can be seen from the deposition in **Jim G. Kauma's** replying affidavit at paragraph 17 and the letter annexed thereto marked '**JK3**'authored by the Governor of Embu County Martin Nyaga Wambora who was enJoined as an interested party in this case.

185. This position has not been disputed by the Applicant as she did not file a supplementary affidavit to controvert that averment. Infact, the Applicant in her pleadings did not make any mention of the fact that she had already stepped aside or disclosed the circumstances surrounding her alleged decision to step aside. Considering that this claim by the Respondents is not contested, this court is in the circumstances entitled to make a finding that the Applicant had indeed stepped aside on 15th January, 2014 a day before she filed her application seeking leave to commence these Judicial Review proceedings.

186. It is trite that Judicial Review remedies are discretionary in nature and the court in the exercise of its discretion may refuse to grant any one of them even where grounds for its issuance existed. The discretion of the court being a Judicial one is always exercised Judiciously on the basis of evidence and sound legal principles including a consideration of whether the remedy sought is efficacious in the circumstances of the case. In this case, The effect of granting the order of certiorari as sought in paragraph 3 would be to quash the decision requiring the Applicant to step aside from her office pending investigations which action the Applicant had already taken on her own volition. In the circumstances, granting such an order would not serve any useful purpose. It would be tantamount to this court granting orders in vain which is not permissible in law.

187. Turning now to the prayer for an order of prohibition, the law is that prohibition issues to prevent a tribunal or body from continuing with proceedings conducted in excess of Jurisdiction or contrary to the laws of the land or to prohibit the making of contemplated unlawful decisions – see Court of Appeal decision in **Kenya National Examination Council Vs Republic (supra).** Applying the above

Principles to this case, we are of the view that the remedy of prohibition is also not available to the Applicant. This court cannot issue an order of prohibition whose effect would be to shield the Applicant or any other member or official of the County Executive Board from investigations by Ethics and Anti-Corruption Commission, an independent commission created under the **Ethics and Anti- Corruption Commission Act No 22 of 2011** with the sole mandate of investigating allegations of corruption and matters related to economic crimes. We have no hesitation in finding that a court of law cannot prohibit a statutory body from executing its lawful mandate. In the circumstances, we have to decline the Applicant's invitation to issue an order of prohibition in terms of prayer 4. For all the foregoing reasons, we are satisfied that the application lacks merit and it is hereby dismissed with no orders as to costs.

188. Having disposed off the Judicial review application, we now turn to consider the other issues raised in the Amended Petition. In our view, the following are the issues that arise for determination;

(a) Whether this Court has Jurisdiction to grant the reliefs sought.

(b) Whether the Petition as drafted is competent.

(c) Whether the proceedings leading to the resolution and removal of the 1st Petitioner from office was done in accordance with the law.

(d) Whether the 1st, 2nd, 5th and 6th Respondents disobeyed Court orders issued on 23rd January 2014 and 3rd February 2014.

(e) Whether a Deputy Governor can assume office under Article 182(2) of the Constitution through a process of impeachment that was in violation of the Constitution.

(f) Whether the fundamental rights and freedoms of the 1st Petitioner were violated in the process of his removal from office.

(g) Whether accounting officer of a County government is answerable to the Senate or County Assembly in the financial management of county funds

(h) the meaning, extent and scope of power to call for evidence as provided for under Article 125 of the Constitution and whether that Article confers the Senate oversight role over the County Governments.

189. The last two issues will be addressed comprehensively in ***International Legal Concultancy v The Senate and the Clerk of the Senate Kerugoya Petition No. 8 of 2014*** which we retire to write separately.

190. The Jurisdiction of this Court was attacked on various fronts.

First, on the ground that the Petition is an afront to the doctrine of separation of powers as this Court cannot intervene in the constitutional mandate of impeachment of the 1st Petitioner as that was the exclusive preserve of the Senate and the County Assembly. Secondly, that the issue of impeachment was a political question thus not Justiciable. Thirdly, Section 12 of the National Assembly (Powers and Privileges) Act ousts the Jurisdiction of this Court to determine this Petition.

191. We are alive to the fact that Jurisdiction is indeed the first issue a court should deal with, because without it, the entire proceedings become a nullity. In the celebrated case of ***The Owners of Motor Vessel "Lillian S". v Caltex Oil Kenya Ltd [1989] KLR 1 14*** Nyarangi J stated:

> ***"Jurisdiction is everything. Without it, a court has no power to make one step, where a court has no Jurisdiction there would be no basis for a continuation of the proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without Jurisdiction."***

192. We are duly guided by that important finding and in determining whether this court has Jurisdiction, we shall answer the following questions;

(a) Whether the principle of separation of power limits this Court's Jurisidiction to determine this matter.

(b) Whether impeachment is a political question thus non-Justiciable.

(c) Whether parliamentary privilege ousts the Courts Jurisidction.

(a) <u>The doctrine of separation of powers</u>

193. It was the submissions of the learned counsels for the Respondents that this Court has no Jurisdiction to interefere with the mandate of the Senate in the impeachment process owing to the doctrine of separation of powers.

194. With regard to the doctrine of separatiuon of powers Article 1 of the Constitution reposes the sovereign power to the people of Kenya but provides for the delegation of that power to various state organs. These include; Parliament, The County Assemblies, the Executive at the national and County Levels of Government, the Judiciary, independent tribunals and Commissions. To facilitate the proper and effective exercise of that delegated power the Constitution allocates functions , powers and responsibilities to all these organs. While we agree that every state organ should be accorded the space to perform its constitutional mandate without undue intereference, Article 2 of the Constitution states that;

> ***"(I) This Consitution is the Supreme law of the Republic and binds all persons and all state organs at both levels of government.***
>
> ***(ii) No person may claim or exercise state authority except as authorised under this Constitution".***

195. This means that no person or state organ is above the law and above the Constitution. All organs created by the Constitution are subordinate to it. Further, Article 10(1) binds all state organs, state officers, public officers and all persons while applying and interpreting the Constitution. Therefore, when any of these organs steps outside its area of operation, this Court will not hesitate to intervene. The Supreme Court has ably captured this in ***<u>Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No. 2 of 2011</u>*** where it expressed itself as follows;

> ***"The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that the totality of governance- powers is shared out among different organs of government, and that these organs play mutually- countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation."***

196. Subsequently, the Supreme Court in ***<u>Speaker of National Assembly v Attorney General and 3 Others (2013) e KLR</u>*** where it stated as follows;

> ***"Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in th***e e***nactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach***

the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering his Opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act. "

The Court went on to state as follows;

"Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate Judge of "right" and "wrong" in such cases, short of a resolution in plebiscite, is only the Courts.."

197. The Court of Appeal also discussed this doctrine in ***Mumo Matemu v Trusted Society of Human Rights Alliance (supra)*** where it stated as follows;

*"**It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a per-commitment in our constitutional edifice. However, separation of power does not only proscribe organs of government from interfering with the other's functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be Judicial, legislative and executive deference to the repository of the function. We therefore agree with the High Court's dicta in the petition the subJect of this appeal 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 constitution democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet as the Respondents concede, the Courts have an interpretive role, including the last word in determining the constitutionality of all governmental actions."***

198. We are also persuaded by the South African Constitutional Court case of ***Doctors for Life International v. Speaker of the National Assembly and Others (CCT 12/05) [2006] ZACC 11***, where it stated as follows in regard to the duty of the court in defending the Constitution;

"...under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament 'must act in accordance with, and within the limits of, the Constitution', and the supremacy of the Constitution requires that 'the obligations imposed by it must be fulfilled.' Courts are required by the Constitution 'to ensure that all branches of government act within the law' and fulfill their constitutional obligations."

199. The Court being the only arm of government vested with the power to interpret the Constitution, and to safeguard, protect and promote its provisions has the duty and obligation to intervene in actions of other arms of government and state organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation.

The Amended Petition alleges violation of the Constitution and violation of the Petitioner's constitutional rights and freedoms with regard to his removal from office. In the circumstances, it is our finding that the doctrine of separation of power does not inhibit this Court's Jurisdiction to address the Petitioner's grievances.

(b) Justiciability

200. It was the Respondents' contention that the issues raised by these Petitions are not Justiciable as

impeachment is a political question and the Court cannot intervene.

201. The doctrine of Justiciability as we understand it has been elaborated by the High Court in several cases. For example, in **Trusted Society of Human Rights Alliance v Attorney General and Anor (2012) e KLR** the court distinguished between a Justiciable controversy; which is amenable to Judicial review and a policy decision by the political branches of government; which is a "political question" and hence inappropriate for Judicial review. The court stated;

> ***"The Justiciability doctrine expresses fundamental limits on Judicial power in order to ensure that courts do not intrude into areas committed to the other branches of government. The arguments on this issue are based on the foundational doctrine of separation of powers and its application to the case at hand."***

202. We are in agreement. And the issue before us now is whether the validity or otherwise of the 1st Petitioner's removal from office, by way of impeachment is a dispute amenable to Judicial review or whether it is a political question.

203. Mr. Mwangi NJoroge for the Attorney General submitted that a dispute on the process of impeachment is a political question that could not be resolved by the Courts. He referred us to the decision of the Supreme Court of United States in the case of ***Nixon v United States 506 US 224 (1993***) and he relied on the following passages of the decision at pages 224;

> ***"A controversy is non-Justiciable where there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department, or lack of Judicially discoverable and manageable standards for resolving it".***

204. The issue of what amounts to a political question has in our view been defined aptly by Justice Stevens in his concurring decision in the ***Nixon Case (supra)*** when he opined thus;

> ***"Of course the issue in the political question doctrine is not whether the constitutional text commits exclusive responsibility for a particular governmental function to one of the political branches. There are numerous instances of this sort of textual commitment, and it is not thought that disputes implicating these provisions are non Justiciable. Rather, the issue is whether the Constitution has given one of the political branches final responsibility for interpreting the scope and nature of such a power." (Emphasis ours).***

205. In the ***Nixon Case (supra)*** Walter Nixon had asked the Court to determine whether Senate Rule X1 which allows a committee of Senators to hear evidence against an individual who has been impeached and to report that evidence to the full Senate violates the impeachment trial clause. The Court held that the impeachment claim was not Justiciable and could not be resolved by the courts because the language and structure of that Rule reposed the sole authority of impeachment on the Senate.

206. In our understanding, the US Supreme Court decision in the Nixon Case only expounded the doctrine of separation of powers; to the extent that when the law mandated an organ of the government, in our case the Senate to make decisions regarding impeachment of public officers, the Court could not intervene with that decision, unless it is demonstrated that the Senate in making that decision to impeach violated the law. The maJority decision in the ***Nixon Case*** supports us in this finding. It held as follows;

> ***"We agree with Nixon that Courts possess power to review either legislative or executive action that transgresses identifiable textual limits. As we have made it clear, 'whether the action of either the Legislative or Executive Branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."***

This was also the gist of Justice Stevens concurring opinion in the same case when he observed that;

"One can, nevertheless envision different and unusual circumstances that might Justify a more searching review of impeachment proceedings. If the Senate were to act in a manner seriously threatening the integrity of its results, convicting say, upon a coin toss, or upon a summary determination that an officer of the United States was simply 'a bad guy' Judicial interference might well be appropriate. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a Judicial response despite the prudential concerns that would ordinarily cause silence. The Political question doctrine, a tool for maintenance of governmental order, will not be so applied as to promote only disorder'.

207. In Kenya, the Constitutional power to impeach a Governor has been donated to the County Assembly and the Senate. The 1st Petitioner is challenging the validity of his removal from office claiming that it was not done in accordance with the law. The question that this Court must determine is whether it has any role in the impeachment process. Even if Mr. Mwangi NJoroge for the Attorney General urged us to exercise restraint, we are of the view that the Court is the guardian of the Constitution and it must determine whether any act or power has been exercised in accordance with the Constitution and the law, if it finds that either the County Assembly or the Senate contravened the Constitution and the law in the process of removing the 1st Petitioner from office it must intervene by granting appropriate reliefs. The Court cannot exercise restraint in instances where it has been demonstarted that the constitution has been violated or has been threatened with a violation. We agree with the reasoning in ***Marbury v Madison 5 U.S 137 (1803)*** where the Court stated as follows;

"It is emphatically the province and duty of the Judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.... This is of the very essence of Judicial duty."

208. We are alive to the fact that the Petitioner is not asking this Court to conduct his impeachment trial, which would make the dispute before us a political question. Rather, he has asked the Court to determine whether his impeachment was tried by the County Assembly and the Senate by following the Constitution and the County Government Act which stipulates the procedure for impeaching a Governor. This Court cannot refrain from making that determination. In addition, we are aware that the 1st Petitioner has alleged a violation of his fundamental rights and freedoms as provided in the Bill of Rights in the process of his removal from office. In our view this removes any doubt that the Petition before us is Justiciable.

(c) Parliamentary Privilege and Immunities

209. It was Mr. Kibe's submission that the Jurisdiction of this Court has also been limited by virtue of Section 12 of the National Assembly (Powers and Privileges) Act (Cap 6 Laws of Kenya), which is to the effect that Parliament proceedings are not to be questioned in any court.

210. To answer that submission, we shall revert to the provisions of Article 117 of the Constitution, which provides that;

"117 (1) There shall be freedom of speech and debate in Parliament.

(2) Parliament may, for the purpose of the orderly and effective discharge of the business of parliament provide for the powers, privileges and immunities of parliament, its committees, the leader of the maJority party, the leader of the minority party, the chairpersons of committees and members. "

Section 12 of the National Assembly (Powers and Privileges) Act provides;

"No proceedings or decision of the Assembly or the Committee of Privileges acting in accordance with this Act shall be questioned in any court".

Even though this provision in the National Assembly (Powers and Privileges) Act was enacted under the

Repealed Constitution, Section 7 of the Sixth Schedule to the Constitution provides that the same shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. We thus find that the provisions of Section 12 of National Assembly (Powers and Privileges) Act are applicable to the Senate and the County Assembly.

211. We have no doubt in our minds that the Senate and the National Assembly hold, exercise and enJoy privileges, immunities and powers bestowed on them, their members and officers in terms of the provisions of the National Assembly (Powers and Privileges) Act . Indeed in so holding we are in agreement with the reasoning of Dumbutshena Chief Justice of Zimbabwe Supreme Court in ***Smith v Mutasa and Another (1990) LRC 87*** where he cited with approval the holding of Evans CJHC Iin ***Re Clarke et all and AG of Canada (1978 81DLR (3d) 33 at 51*** where he stated as follows;

> ***"In dealing with the issue of parliamentary privileges, counsel for the respondent submitted that the Courts have no Jurisdiction to determine the nature and extent of such privileges. He argued that Parliament is the source and the sole Judge of the privileges of its Members. This would create an interesting obstacle for the applicants in the present case. I would point out, however, that I am asked to interpret Standing Order (SOR) /76-644. In doing so, I am asked to determine whether SOR/76-644 overrides or abridges existing parliamentary privileges. In this respect, I do not consider that I am infringing on the Jurisdiction of Parliament.***

He went on to express himself as follows;

> ***Historically, there has always been some question whether the Courts have Jurisdiction to determine the nature and extent of parliamentary privilege. As the supreme law –giving body, it would seem only natural that Parliament should be the source of authoritative guidelines on the subJect. On the other hand, there is something inherently inimical about Members of Parliament determining the nature and extent of their own rights and privileges. The Courts have seized on this to consistently review the nature and extent of parliamentary privilege.'***

He continues at page 52:

> ***'.....the Courts apparently have an implicit Jurisdiction to deal with questions of parliamentary privilege. Notwithstanding the submission of counsel for the respondent, I have no hesitation in proceeding to evaluate the effect of SOR/76-644 on the privileges of Members of Parliament. Roman Corp. Ltd et al v Hudson's Bay Oil & Gas Co Ltd et al(1971) 2 OR 418, 18DLR (3d) 134(Houlden J. (Ont H.C.); affirmed (1972) 1 OR 444, 23 DLR (3d) 292(C.A.); affirmed (1973)SCR 820, 36 DLR(3d) 413 (discussed, infra), is sufficient authority for the proposition that the Courts of law in Canada have Jurisdiction to adJudicate on matters involving the privileges of members of parliament.'***

212. We appreciate that privileges, immunities and powers are such as those provided for by the National Assembly (Powers and Privileges) Act are essential for the proper governance and protection of Parliament because parliament needs them for the control of its internal procedures and for complete freedom of expression in their deliberations inside the National Assembly.

213. It is undisputed that the resolution to impeach the 1st Petitioner was made within the proceedings of the Senate. We are clear in our minds that should the Senate violate the Constitution and the law in the course of its proceedings it falls upon the Judiciary to say so and to pronounce such violation. The Court cannot ignore any breaches of the Constitution in favour of parlimentary privilege. The Constitution is the Supreme law of the land and it binds all persons and all state organs at both levels of government.

214. We are also alive to the provisions of Section 29 of the National Assembly (Powers and Privileges) Act which ousts Jurisdiction of this court in regard to acts of the Speaker and officers of the National Assembly. The question therefore is whether this Court has the power to inquire into the constitutionality of the actions of the Members of Senate and Speaker and other officers of the National

Assembly. Section 29 states that;

> ***'Courts not to exercise Jurisidction in respect of acts of Speaker and officers of the Assembly. Neither the Speaker nor any officer of the Assembly shall be subJect to the Jurisidction of any court in respect of the exercise of any power conferred on or vested in the Speaker of such officer or by or under this Act or the Standing Orders."***

215. This question was answered in the affirmative by Lenaola J in ***NJenga Mwangi & Another v The Truth Justice and Reconciliation Commission and 4 Others Petition No. 286 of 2013*** where he that;

> ***"I am also in agreement that under Section 29 of the National Assembly (Powers and Privileges) Act, courts cannot exercise Jurisidction in respect of acts of the Speaker and other officers of the National ASsembly, but I am certain that under Article 165(3)(d) of the Constitution, this court can enquire into any unconstitutional actions on their part."***

We agree with the Learned Judge

216. It is therefore important to remember that even though the Senate has powers to impeach a Governor, it must function within the limits prescribed by the Constitution. In this regard the Supreme Court of Zimbabwe while considering the extent to which Courts can interefere with parliamentary privilege stated in ***the Smith v Mutasa and Another (supra)*** that;

> ***"In this case the House of Assembly has stepped beyond what its own statutes and the Constitution permit it to do. It cannot therefore seek refuge in illegality. The Courts must in cases such as this one step in to resolve the dispute...."***

217. We are persuaded to make a similar finding in the instant case. If the Senate violates the Constitution, the Courts being the guardian of the Constitution must step in and lift the veil on the doctrine of parliamentary privilege if necessary. We have pondered deeply on the issue and we agree with the Zimbabwean Supreme Court that, if Members of Parliament, the Speaker and officers in his office, can only enJoy immunity from court action if their decisions or actions are made in accordance with the letter and spirit of the Constitution. We therefore find that Section 12 and 29 of National Assembly (Powers and Privileges) Act on parliamentary privilege do not oust the Jurisdiction of this Court to inquire into the legality of the 1st, 2nd, 5th and 6th Respondents actions.

218. In concluding this aspect of Jurisidction, we find that the Court has Jurisdiction to determine whether the impeachment of the 1st Petitioner was done in accordance with the Constitution and the law for the simple reason that the Constitution requires the Courts to ensure that all organs of government act within the law. It is the duty of the Court under Article 159(2)(e) of the Constitution to ensure that the purpose and principles of the Constitution are protected and promoted.

(ii) Whether the Amended Petition as drafted is incompetent.

219. Mr. Kibe's first line of argument in support of the above preliminary point was that the Petitioners had failed to plead their case with reasonable precision to enable the court grant the reliefs sought and that they had also failed to state the alleged violations of the Constitution

220. The rule that a constitutional petition ought to state clearly the alleged violation and relief sought was stated in the case of ***Anarita Karimi NJeru v Republic (1976-1980) KLR 154*** where the court stated at Page 156 of the Judgment that:

> ***'We would however again stress that if a person is seeking redress from the High Court or an order which invokes a reference to the Constitution, it is important (if only to ensure that Justice is done in his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed."***

221. We are duly guided by the recent pronuncement of the Court of Appeal when emphasising on the importance of this rule in the ***Mumo Matemu Case(supra)*** when the Court observed as follows;

> ***We cannot but emphasize the importance of precise claims in due process, substantive Justice, and the exercise of Jurisdiction by a court. In essence, due process, substantive Justice and the exercise of Jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the Judicial decision is to define issues in litigation and adJudication, and to demand exactitude ex ante is to miss the point.***

The Court went on to state that;

> "***However, our analysis cannot end at that level of generality. It was High Court's observation that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting." Yet the principle in Anarita Karimi NJeru(supra) underscores the importance of defining the dispute to be decided by the court. in our view, it is a misconception to claim as it has been in***
>
> ***recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the constitution and the overriding obJective principle under section 1A and 1B of the Civil Procedure Act(Cap 21) and***
>
> ***section 3A and 3B of the appellate Jurisdiction act (cap 9). Procedure is also a handmaiden of Just determination of cases. Cases cannot be dealt with Justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive Justice, as they give fair notice to the other party. The principle in Anarita Karimi NJeru(supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.***

222. For a Petition to be competent, the manner in which it is presented must comply with the provisions of Rule 10 of the Mutunga Rules. This rule provides that;

> ***10(1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.***
>
> ***(2) The petition shall disclose the following— (a) the petitioner's name and address; (b) the facts relied upon;***
>
> ***(c) the constitutional provision violated;***
>
> ***(d) the nature of inJury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted***
>
> ***the suit; or in a public interest case to the public, of persons or community;***
>
> ***(e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;***
>
> ***(f) the petition shall be signed by the petitioner or the advocate of the petitioner; and***
>
> ***(g) the relief sought by the petitioner.***

223. The Amended Petition before us refers to Articles 1, 2, 3, 6, 10, 19, 20, 22, 23, 47, 50, 73, 125, 159, 160, 165, 174, 181, 226, 227 and 259 of the Constitution in its title and the same are also reproduced in its

legal foundations. At paragraph 39 to 73 the Petitioners state the facts in support of the Petition and also provided the particulars for alleged violations and the manner in which the Constitution was violated. They have also stated the reliefs sought. In our view therefore, the Amended Petition has provided sufficient particulars to support the alleged violations of the constitution that would enable the court make a determination of whether or not to grant the reliefs sought.We thus find that the Amended Petition has met the threshold required under Rule 10 of the Mutunga Rules.

224. The other ground urged by Mr.Kibe is that the Petition was defective as it was not supported by an affidavit together with all the annextures necessary showing the alleged infringements .

225. Rule 11 (1) of the Mutunga Rules states that;

> ***11(1) The petition filed under these rules may be supported by an affidavit.***
>
> ***(2) If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.***

226. A literal interpretation of this rule reveals that the requirement that a Petition be supported by an affidavit and annextures thereto is not mandatory. The rules of procedure envisaged a situation where there would be possibilities of the Petition not being supported by an affidavit. Accordingly, we do not see how the Petition before us can be said to be incompetent for lack of an affidavit in support.

227. But even if we were wrong, we agree with the submissions made by Mr. Issa Mansur that there is an affidavit on record sworn by the Petitioner on 22nd January 2014 filed in support of the Petition dated 22nd January 2014. This Petition was subsequently amended with the leave of the court on 24th February 2014, hence the Amended Petition before us.

228. Lastly, Mr. Kibe attacked the validity of the Petition on grounds that the Peittioners were seeking for orders of certiorari to quash the resolution passed by the County Assembly and the Senate, yet those resolutions had not been availed to the Court as provided for under Order 53 Rule 7 of the Civil Procedure Rules 2010.

229. Having perused the court record, we are unable to agree with Mr. Kibe on this point. We find that the two resolutions to remove the 1st Petitioner from office forming the subJect of this proceedings, are before the court because they are contained in Gazette Notice Number 1052 which reads as follows;

> ***GAZETTE NOTICE NO.1052***
>
> ***THE CONSTITUTION OF KENYA***
>
> ***THE COUNTY GOVERNMENT ACT (No. 17 of 2012)***
>
> ***STANDING ORDER NO.65 OF THE SENATE STANDING ORDERS***
>
> ***REMOVAL FROM OFFICE OF THE GOVERNOR EMBU COUNTY***
>
> ***IT IS notified for the information of the general public THAT pursuant to Article 181 of the Constitution and section 33 of the County Government Act, 2012, on 28th January, 2014 the County Assembly of Embu approved Motions "to remove from office, by impeachment," the County Governor and the Deputy Governor of Embu County:***
>
> ***And that by letters dated 29th January, 2014 (Ref: CAE/SCA/1/28 and 29) and received in the Office of the Speaker of the Senate on 30th January, 2014, the Speaker of the County Assembly of Embu informed the Speaker of the Senate of the approval of the Motion by the County Assembly and further forwarded to the Speaker of the Senate documents in evidence of the proceedings of the Assembly;***

And further that, pursuant to section 33 (3) (b) of the County Government Act, 2012 and Senate Standing Order No.65(1)(b), the Senate by resolution on Tuesday

4th February, 2014 appointed a special committee comprising eleven of its members to investigate the matter of the proposed removal from office of the Governor and Deputy Governor of Embu County and to report to the Senate within ten(10) days of its appointment on whether it finds the particulars of the allegations to have been substantiated ;

And that, pursuant to section 33(4) of the County Government Act, 2012 and Senate Standing Order No.65(2), the Special Committee investigated the matter and tabled its report in the Senate on Friday 14th February 2014;

And that, pursuant to section 33(4) and 96)(b) of the county government act 2012 and Senate standing Order 65 (4) (b), the Special Committee found that the particulars of the following allegations against the Governor of Embu County had been substantiated; namely-

(a) Violation of the Public Procurement and Disposal Act, 2005 and Regulations 2013;

(b) Violation of the Public Finance Management Act, 2012; and

(c) Violation of the Constitution of Kenya

And that, pursuant to section 33 (6) (b) of the County

Government Act, 2012 and Senate Standing Order

65(4)(b), the Senate After according the Governor of

Embu County an opportunity to be heard, did on Friday,

14th February, 2014 resolve to impeach the Governor of

Embu County on the following grounds; namely –

(a) Violation of the Public Procurement and Disposal Act, 2005 and Regulations 2013;

(b) Violation of the Public Finance Management Act, 2012; and

(c) Violation of the Constitution of Kenya

Dated the 14th February, 2014.

EKWEE ETHURO

Speaker of the senate

230. The County Assembly and the Senate make decisions through resolutions, which are then communicated to the public through publication in the Kenya Gazette in the form of Gazette Notices. Therefore, we are satisfied that the Petitioner in annexing the aforesaid Gazette Notice No. 1052 availed the Resolutions sought to be quashed hence complied with the requirements of Order 53 Rule 7.

(iii) <u>Whether the proceedings leading to the resolution</u> <u>and removal of the 1st Petitioner from office</u> <u>was done in accordance with the law.</u>

231. It is not contested that the County Assembly and the Senate are the bodies constitutionally mandated to undertake the process leading to the removal of the 1st Petitioner from office. However, this

process must be carried out in accordance with the law.

232. The law regarding the removal of a Governor from office is contained in Article 181 of the Constitution. Article 181(1) establishes the grounds upon which a Governor can be removed from office. Article 181(2) mandates Parliament to enact legislation providing for the procedure for the removal of a Governor from office. Pursuant to this mandate, Parliament enacted the County Government Act (hereinafter referred to as the Act). At Section 33 of the Act, Parliament provided the procedure to be used by both the County Assembly and the Senate in the removal of a Governor from office.

233. Looking at the provisions of Article 181(1), it is clear that, it contains the constitutional basis for the removal of a Governor and it is hence the substantive law on the subJect. On the other hand, Section 33 of the Act provides for the procedural law in the removal of a Governor and operationalises Article 181. It is therefore our finding that for the removal of a Governor from office to be valid, the process used must strictly adhere to both the substantive and the procedural law contained in both Article 181 of the Constitution and Section 33 of the Act respectively.

234. At this Juncture the question we must answer is whether the process used in the removal of the 1st Petitioner from office complied with both substantive and procedural law.

235. In regard to the procedural law, the procedure is at outlined by Section 33 of the Act, and it is as follows; " ***33. Removal of a governor***

> ***(1) A member of the county assembly may by notice to the speaker, supported by at least a third of all the members, move a motion for the removal of the governor under Article 181 of the Constitution.***
>
> ***(2) If a motion under subsection (1) is supported by at least two-thirds of all the members of the county assembly—***
>
> > ***(a) the speaker of the county assembly shall inform the Speaker of the Senate of that resolution within two days; and***
> >
> > ***(b) the governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section.***
>
> ***(3) Within seven days after receiving notice of a resolution from the speaker of the county assembly***
>
> ***—the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the governor; and the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.***
>
> ***(4) A special committee appointed under subsection***
>
> ***(3)(b) shall—***
>
> > ***(a) investigate the matter; and***
> >
> > ***(b) report to the Senate within ten days on whether it finds the particulars of the allegations against the governor to have been substantiated.***
>
> ***(5) The governor shall have the right to appear and be represented before the special committee during its investigations.***
>
> ***(6) If the special committee reports that the particulars of any allegation against the governor***

—

(a) have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or

(b) have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the impeachment charges.

(7) If a maJority of all the members of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.

(8) If a vote in the Senate fails to result in the removal of the governor, the Speaker of the Senate shall notify the speaker of the concerned county assembly accordingly and the motion by the assembly for the removal of the governor on the same charges may only be re-introduced to the Senate on the expiry of three months from the date of such vote.

(9) The procedure for the removal of the President on grounds of incapacity under Article 144 of the Constitution shall apply, with necessary modifications, to the removal of a governor.

(10) A vacancy in the office of the governor or deputy governor arising under this section shall be filled in the manner provided for by Article 182 of the Constitution."

236. Our understanding of Section 33(4) of the Act, is that the Special Committee must investigate the matter. Investigate is defined in the Blacks Law Dictionary 9th Edition as a '***systematic inquire into something***'. Investigating here shall include the Committee satisfying itself that the Resolution presented to it was arrived at after due process was followed at the County Assembly. We agree with the Attorney General submission that the design of Section 33 is meant to ensure that the process regarding impeachment is self correcting. So that any errors that may have occurred at the County Assembly level may be detected by the Special Committee of the Senate while performing its investigative role. For instance, in our present case, had the Senate investigated the manner in which the resolution forwarded to the Speaker of the County Assembly had been arrived at, it would have discovered that it was passed in disobedience of court orders. It was therefore not correct for the Special Committee to say that it would not look into what had transpired at the County Assembly.

237. Where the Senate finds that the resolution is not properly before it then it is not obliged to admit it. We also need to add that, the timelines stipulated by Section 33(2) starts running from the date the resolution is admitted for further action.

238. We find that in the present case, the procedure followed at the Senate was not faulted. However, the 1st Petitioner claimed that the procedure used at the County Assembly denied him his rights to a hearing therefore violated his right to fair admnistrative action. We shall revert to this issue later in this Judgment.

239. Turning now to the substantive law, Article 181(1) states that;

181 (1) A county governor may be removed from office on any of the following grounds-

(a) gross violation of this Constitution or any other written law;

(b) where there are serious reasons for believing that the county governor has committed a crime under national or international law

(c) abuse of office

(d) physical or mental capacity to perform the functions of the office of county governor.

240. With regards to the grounds for removal of a Governor as reproduced above, Mr. Muite SC submitted that the use of the word gross is deliberate and appropriate; that it demonstrates the intention of the framers of the Constitution, that the threshold for the removal of a Governor must be very high. He further submitted that not every conduct should led to the removal of a Governor. He thus contended that the accusations made of the 1st Petitioner did not meet the threshold established under Article 181 as they were not described as gross.

241. In rebuttal, Mr. Nganga submitted that by being asked to interrogate the threshold for the removal of a Governor the same is tantamount to sitting on an appeal against the Senate's decision and this Court did not have such Jurisdiction including powers to interrogate the merits of a decision made by the Senate. He thus contended that the threshold applicable in the removal of a Governor was set out under Article 181 of the Constitution and the Court cannot set its own threshold.

242. From the material placed before us, we note that the 1st Petitioner at both the County Assembly of Embu and at the Senate was charged with the following;

(a) Violation of the Constitution

(b) Violations of the Public Procurement and Disposal Act 2005 and Regulations 2013

(c) Violation of the Public Finance Management Act 2012 (d) Violation of the County Government Act 2012

(e) Abuse of office

Subsequently,pursuant to section 33(6)(b) of the County Government Act, 2012 and The Senate Standing Order 65(4)(b), the Senate, after according the 1st Petitioner an opportunity to be heard, did on Friday 14th February, 2014 resolve to impeach the Governor of Embu County on the following three grounds that it found had been substantiated; namely;

(a) Violation of the Public Procurement and Disposal Act, 2005 and Regulations 2013;

(b) Violation of the Public Finance Management Act,2012;

(c) Violation of the Constitution of Kenya.

243. The question before us now is whether the charges preferred against the Governor which the Senate found to have been substantiated leading to his removal met the constitutional threshold set by Article 181(1). Mr. Muite invited the Court to note that the charges as framed did not allege gross violation of the Constitution and the law in the statutes mentioned therein. He therefore urged the Court to find that they did not meet the constitutional threshold required to remove a Governor from office.

244. Mr. Nganga on the other hand, submitted on behalf of the 5th and 6th Respondents that the fact that the word gross was omitted from the charges does not mean that the violations attributed to the 1st Petitioner were not gross; that, what amounted to gross violation was determined by the content of the allegations and that the Senate was better placed to determine whether the allegations met the threshold of gross violation going by the evidence presented before it. Mr. Nganga Joined issue with Mr. Mwangi NJoroge who submitted that this does not have Jurisdiction to determine what amounts to gross violations since this would amount to reviewing the merit of the Senate's decision to remove the Governor from office.

245. We must to some extent agree with Mr. Nganga that the County Assembly and the Senate are the best Judge to determine whether the charges presented against the 1st Petitioner were in accordance with Article 181 of the Constitution. The Constitution has set out that power of Judging the merit of the charges to those two houses. It would thus be wrong in our view for this court to question the merits of the decision made by the County Assembly and the Senate. Indeed we wholly agree with the

High Court decision in ***Nancy Baraza v Judicial Service Commission & 9 others (2012) e KLR 2013*** it was held that;

> ***"It is not for this Court or the Commission to find that the allegations made against the Petitioner did not amount to gross misconduct. In fact according to Prof Yash Pal Ghai's 'Kenya Constitution: An instrument for change" cited by the Petitioner 'whether a conduct is gross or not will depend on the matter as exposed by the facts' which facts it is the duty of the tribunal to establish'.***

246. In support of this submission on this point, Mr, Nganga relied on the cases of ***Kenya Pipeline Limited –vs- Housing Ebara Company Limited & 2 others (supra) Mumo Matemu Case (supra)*** and ***The Supreme Court Advisory Opinion No. 2 of 2013*** **(supra).** However, we are aware that Mr. Muite did not move this Court to make a determination on the merit or otherwise of the charges framed against the 1st Petitioner. We understood him to be invoking the Jurisdiction of this Court to interpret the extent, scope and applicability of Article 181(1) of the Constitution.

247. The Jurisdiction of the High Court to interpret the Constitution as provided for under Article 165 (3) (d) of the Constitution is not disputed by any of the parties herein. This Article provides thus;

> ***"(3) SubJect to clause (5), the High Court shall have— (a).....***
>
> ***(b).... (c)....***
>
> ***(d) Jurisdiction to hear any question respecting the interpretation of this constitution including the determination of-***
>
> > ***(i) the question whether any law is inconsistent with or in contravention of this 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....."**

248. There is now a chain of authorities from High Court and the Court of Appeal confirming the position that this Court has Jurisdiction to interpret the Constitution. See for example; ***John Harun Mwau & 3 Others v Attorney General and Others (2012) e KLR, Center for Rights Education and Awareness & Others v Attorney General Petition No. 36 of 2011, International Center for Policy and Conflict & 5 Others v Attorney General Petition No. 552 of 2012, Jeanne W Gacheche & 6 Others v Judges and Magistrates Vetting Board and others, Nairobi Judicial Review No. 295 of 2011.***

249. We are therefore satisfied that we have the Jurisdiction to interpret at this stage the meaning of the word *"gross"* as used in Article 181(1) of the Constitution. In this interpretation, we will not be questioning the merit of the decision of the Senate, but we will be formulating a guideline on what constitutes gross violations of the Constitution and the law bearing in mind the office of the Governor in devolved governmnet structure.

250. We begin by looking at the plain meaning of the word gross.

The Concise Oxford English Dictionary defines the word gross as;

'***Blatantly wrong or unacceptable***'. That is the natural and ordinary meaning of the word 'gross'.

In his article Duru Onyekachi in *"Impeachment under Nigerian Law: A Journey through the cases"*

available at http://ssrn.com/author states as follows while defining gross in relation to impeachment proceedings;

> ***" 'gross' here means glaringly noticeable because of obvious inexcusable badness, or obJectionableness or a conduct in breach of the Constitution. Accordingly, it is not every misconduct that will attract impeachment".***

251. With regard to the meaning of 'gross' violation and what it constitutes, we cannot do better than the Supreme Court of Nigeria did in ***Hon. Muyiwa InakoJu & Others v Hon Abraham Adeolu Adeleke (supra)*** when it defined it as follows;

> ***"The word 'gross' in the subsection does not bear its meaning of aggregate income. It rather means generally in the context atrocious, colossal, deplorable, disgusting, dreadful, enormous, gigantic, grave, heinous, outrageous, odious, and shocking. All these words express some extreme negative conduct. Therefore a misconduct which is the opposite of the above cannot constitute gross misconduct."***

As to what constitutes gross violation, the Supreme Court stated as follows;

"The following in my view, constitute grave violation or breach of the Constitution (a) intereference with the constitutional functions of the legislature and the Judiciary by an exhibition of overt unconstitutional executive power, (b)Abuse of the fiscal provisions of the Constitution , (c) abuse of the Code of Conduct for Public Officers, (d) disregard and breach of Chapter IV of the Constitution on fundamental rights, (e) interference with local government funds and stealing from the funds, pilfering of the funds including

monthly subventions for personal gains or for the comfort and advantage of the State Government, (f) instigation of military rule and military government, (g) Any other subversive conduct which is directly or indirectly inimical to the implementation of some other maJor sectors of the Constitution".

252. We wholly agree with the Nigerian Supreme Court's definition of what constitutes gross violation. To our mind therefore, whether a conduct is gross or not will depend on the the facts of each case having regard to the Article of the constitution or any written law alleged to have been violated. We find that it is not every violation of the Constitution or written law can lead to the removal of a Governor, it has to be a gross violation.

253. The question therefore is how to measure what constitutes gross violation. We are of the view, that the standard to be used, does not require a mathematical formula, but it must take into account the intendment of Article 181(1) of the Constitution. In our view therefore whatever is alleged against a Governor must;

(a) Be serious, substantial and weighty.

(b) There must be a nexus between the Governor and the alleged gross violations of the Constitution or any other written law.

(c) The charges framed against the Governor and the particulars thereof must disclose a gross violation of the Constitution or any other written law.

(d) The charges as framed must state with degree of precision the Article (s) or even sub-Article(s) of the Constitution or the provisions of any other written law that have been alleged to be grossly violated.

254. We agree with the sentiments of the Supreme Court of Nigeria in ***Hon. Muyiwa InakoJu & Others v Hon Abraham Adeolu Adeleke (supra)*** where the court observed as follows;

"It is not a lawful or legitimate exercise of the constitutional function in section 188 for a House of Assembly to remove a Governor or a Deputy Governor to achieve a political purpose or one of organised vendetta clearly outside gross misconduct under the section. Section 188 cannot be invoked merely because the House does not like the face ot look of the Governor or Deputy Governor in a particular moment or the Governor or Deputy Governor refused to respond with a generous smile to the legislature house on a parliamentary or courtesy visit to the holder of the office. The point I am trying struggling to make out of this light statement on a playful side is that section 188 is a very strong political weapon at the disposal of the House which must be used only in appropriate cases of serious wrong doing on the part of the Governor, which is tantamount to gross misconduct within the meaning of subsection (11). Section 188 is not a weapon available to the legislature to police a Governor or Deputy Governor in every wrong doing. A Governor or Deputy Governor, as human being, cannot always be right and he cannot claim to be right always. That explains why section 188 talks about gross violations. Accordingly, where a misconduct is not gross, then section 188, weapon of removal is not available to the House of Assembly."

255. We agree with the sentiments of the Supreme Court of Nigeria in the case of ***Hon. Muyiwa InakoJu (supra)*** which illustrates that the removal of a Governor through impeachment should not be taken lightly and that it should not be used for ulterior motives. In our view, that is why our Constitution at Article 181 sets very high standards for removal of a Governor.

256. Again, the words of the Supreme Court of Nigeria, in ***Hon. Michael Dapianlong & 5 Others v Chief Joshua Chibi Dariye Supreme Court of Nigeria S.C 39 of 2009*** hold so true today and best describe the situation the 1st Petitioner finds himself in. The Court stated as follows;

"The office of the Governor or the Deputy Governor is an all important one. Any of them is in the office by the grace of the maJority of the totality of that state. In getting him out of office for one reason or the other, the voice of the maJority of the totality of the populance of the State must be reflected through the maJority of the total members they voted into the house. The impeachment or removal of a Governor or Deputy Governor is a very serious business. Certainly, it cannot be the intendment of the framers of the Constitution that the decision to impeach or remove anyone holding High office should be left in the hands of very negligible few as 8(eight) members as it has been argued. The provisions of the Constitution must be interpreted in a Just and holistic manner."

257. We recall that Mr. Kibe dissuaded us from following the Nigerian cases for the reason that those cases were filed to challenge the lack of two third maJority rule required for impeachment of a Governor. Granted, that in those case, the issue for determination revolved around failure to attain the number threshold required to support a motion for impeachment, we find the authorities instructive regarding the importance of the office of a Governor and the need to maintain a high threshold for his removal.

258. As we have stated above, the removal of a Governor from office is a very grave issue. We wholly agree with Mr. Nani Mungai that the right of a Governor to hold office is a political right recognised under Article 38(3)(c). Article 38 also bestows on the people of Kenya the right to elect any person of their choice to a political office in including the office of a Governor. The decision to remove a Governor from office is essentially a limitation of those two rights which in this case is allowed by Article 181(1) of the Constitution. And this limitation Justifies the need to ensure that the law is strictly followed in the removal of a Governor especially on the issue of threshold.

Whether the 1st, 2nd, 5th and 6th Respondents disobeyed Court orders issued on 23rd January 2014 and 3rd February 2014.

259. It was Mr. Muite's SC submission that there must be due process in the removal of a Governor. He asserted that the 5th and 6th Respondents disobeyed the court order issued on the 23rd January 2014 which required that the 1st Petitioner be served with specific charges on which the County Assembly proposed to remove him from office and that he be given an oportunity to defend himself before a

resolution for his removal was passed. Mr. NJenga for the 5th and 6th Respondents disputed this claim and stated that by the time the orders of the Court were issued on 23rd January 2014, a private members motion by the County Assembly member known as Ibrahim Swaleh had already been introduced seeking to remove the 1st Petitioner from office. He thus contended that the order of the Court issued on 23rd January 2014 was incapable of compliance by the 5th and 6th Respondents.

260. Counsels for the 5th and 6th Respondents contended that the orders issued on 23rd January 2014 were not directed at the mover of the motion (Ibrahim Swaleh) who is not a party in this case but at the 5th and 6th Respondents who had nothing to do with the introduction of the motion. And that the orders were directed at the impeachment proceedings that were not before the County Assembly therefore incapable of compliance.

261. In view, of the above rival submisisons can it therefore be said that the court orders were disobeyed?

262. Before making that important finding, we need to consider the argument raised by Mr. NJenga that the application for contempt before this Court is incompetent, given that notice was not served on the Attorney General a day before the application seeking leave to institute contempt proceedings against the 5th and 6th Respondents was filed.

263. We are of the view that this obJection is not merited. Since service of a notice to the Attorney General is a procedural technicality which has nothing to do with the substance of the application for contempt. This Court is enJoined by Article 159(2) (d) of the Constitution to administer substantive Justice without undue regard to technicalities, and in the circumstances this obJection cannot be sustained.

264. It is not in dispute that a Member of the County Assembly may move a motion under Section 33(1) of the County Government Act to remove a County Governor. It is not also in dispute that a motion for the removal of the County Governor was moved on16th January 2014 by Ibrahim Swaleh, and the same was placed before the Speaker of the County Assembly who scheduled it to be moved on 23rd January 2014. On the 23rd January 2014, the 1st Petitioner filed Embu Petition No. 1 of 2014 (supra) that was transferred to Kerugoya High Court and Githua J issued a conservatory order restraining the Speaker and the Clerk of the County Assembly of Embu and the County Assembly of Embu from holding such impeachments proceedings without having first served the applicant with a notice containing the specific grounds/charges upon which his impeachment was being proposed and without giving him an opportunity to be heard. It is also not in dispute that the Motion proposing the removal of the 1st Petitioner from office was finally tabled in the County Assembly on 28th January 2014 and passed on the same day.

265. Mr. NJenga asked us not to make any findings of disobedience of Court orders against the 5th and 6th Respondents as he claimed that the Petitioners had failed to demonstrate that personal service of the court orders was effected on the 5th and 6th Respondents. He referred us to the case of ***Kariuki & 2 Others v Minister for Gender, Sports, Culture and Social Services & 2 Others (Supra)*** and Court of Appeal case of ***Ochino & Another v Okombo & 4 Others (1989) KLR 165*** where it was held that personal service of court orders must be effected endorsed with a penal notice for a person to be held in contempt. He thus urged us to find that the law in Kenya provides that there must be personal service of an order.

266. We have seen a copy of the order issued by Githua J on 23rd January 2014. We have noted that it bears a stamp of the Speaker of the County Assembly of Embu on the face of the copy of orders which indicate that it was received by one Boniface Muthomi at 1904 hours on 23rd January 2014. Further, we have also read the affidavit of service sworn on 29th January 2014 by Mr. NJuguna NJoroge, an Advocate of the High Court. In his affidavit, Mr. NJoroge explained that he served the pleadings and orders of Githua J on the County Assembly of Embu on 23rd January 2014. At paragraph 1 and 2 of his affidavit he states;

"1. THAT on 24th January 2014, I received a court order dated 23rd January 2014, Certificate

of Urgency and Notice of Motion dated 22nd January

2014 and its supporting affidavit and annextures from Nyamu & Nyamu Advocates Nairobi with instructions to serve the same upon the Clerk, County Assembly of Embu,

2. THAT on the same day at 8.30am, I proceeded to the offices located at the County Assembly of Embu premises, alongthe Embu Meru Highway opposite Faith House in Embu and after explaining the purpose of my visit, I served the said documents upon the secretary who acknowledged receipt by stamping their official stamp on the face of my copies that I return herewith".

267. We believe the above averments with regard to service as the same have not been controverted by any evidence to the contrary. To our mind, nothing would have stopped Boniface Muthomi and the Secretary to the County Assembly from filing affidavits denying service as alleged or by calling Mr. NJuguna for cross-examination in respect to his averments on service. The 1st Petitioner's claim that indeed the 5th and 6th Respondents were served with the Court orders is further supported by the stamps endorsed by the Office of the Speaker upon receipt of the same. Statements from the bar cannot therefore be taken as conclusive proof of lack of service.

268. We have seen the replying affidavit sworn by Justus K. Mate, who is the Speaker of the County Assembly and Jim G. Kauma, the Clerk of the County Assembly both sworn on 24th February 2014 denying service claiming that they were not personally served with a Copy of court orders. They also averred that they did not know about the court orders. We however note that the said Justus Mate has not denied that the office of the Speaker of the County Assembly of Embu was actually served with a copy of the court order of 23rd January 2014.

269. We therefore find that there was service of the court orders of 23rd January 2014 on the 5th and 6th Respondents.

270. We are alive to the 5th and 6th Respondents submissions that a finding on disobedience of court orders cannot be made unless there is evidence of personal service. For this proposition Mr. NJenga relied on the holding by Lenaola J in the case of ***Kariuki & 2 Others v Minister for Gender, Sports, Culture and Social Services & 2 Others (Supra)*** where he expressed himself in the following terms;

> ***"....But in our law, service is higher than knowledge and since the service here was frustrated....I shall hold in accordance with the existing law that there was no service"***

271. In our view, that was the law then which has since changed.

The law as it stands today is that knowledge supersedes personal service. In support of our position, we cite the case of ***Kenya Tea Growers Association v Francis Atwoli & 5 Others Petition No. 64 of 2010*** where Lenaola J opined as follows;

> ***"In the case before me, I am more than satisfied that even at the higher level beyond reasonable doubt, when an individual has been served with and/or has knowledge of a court order but not only ignores it but in fact incites others to do the same, the threshold for contempt has been met. Francis Atwoli in fact went further to arrogate himself the decision to determine when the strike should end despite the fact that the court order had stopped it. He went further to interpret it as made without Jurisidiction and that only the workers court (Industrial Court) had Jurisidction to determine the matter. He did not do so once but on a number of occasion as he flew by helicopter from place to place on 18th October 2012. His contempt was obvious and his conduct and words can attract no other finding"***

272. Further in ***Basil Criticos v Attorney General & 8 Others (2012) e KLR*** while referring to the above quote in ***Kenya Tea Growers Association Case (Supra)***, the Lenaola J stated as follows in regard to service of court orders;

"The point above is that where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary. That should be the correct legal position and I subscribe to it".

273. We are in agreement with the Learned Judge. If a party can prove that there was knoweldge of court orders then in our view that would be sufficient to form a basis for the finding of contempt of court orders. That being the case, we now pause to answer the question whether the 5th and 6th Respondents had knowledge of Court orders as at 28th January 2014 when the motion for removal of the 1st Petitioner was deliberated upon.

274. We are clear in our mind that the Petitioners have demonstrated that the 5th and 6th Respondents had knowledge of Court orders. We have seen the letter dated 28th January 2014 and referenced CON/PET.1/2014 from the Deputy Registrar of Embu addressed ***"To Whom it May Concern"*** writing in response to the County of Embu Commander who had sought clarification of the seal of the Deputy Registrar at the High Court at Kerugoya affixed on the Court Order made on 23rd January 2014. The Deputy Registrar on that letter stated as follows;

> ***"This is to confirm that the orders granted by the Honourable Lady Justice Cecilia Githua on 23rd January 2014 and issued on the same day are genuine and the Court seal is also genuine"***

There is evidence to show that this letter was received by the County Assembly on the same day, 28th January 2014. We have also noted the averment by the 5th Respondent in his Replying Affdiavit to the effect that the court order was incompetent as it did not have a court seal. We take the view that the 5th Respondent could not have questioned the competence of the Court order in the manner described above, if he had not seen or had knowledge of the court order.

275. We have also seen the newspaper advertisements in the Sunday Nation of 26th January 2014 and Daily Nation of 27th January 2014 reproducing verbatim the orders issued on 23rd January 2014 by Githua J. In The Standard Newspaper of 28th January 2014 the Petitioners caused to be published a penal notice to the effect that there were court orders issued on 23rd January 2014 at the High Court in Kerugoya and anyone who was in violation of those orders would be liable for contempt of court and would face penal consequences and detention in prison for a term not exceeding six months. It was the submission of Mr. NJenga that the Court should disregard these newspaper advertisements as the same amounted to substituted service made without leave of the court. However, we find no merit in this contention since in our view the newspaper advertisements amounted to a notice to members of the Public and indeed to the whole world, including Members of the County Assembly of Embu of the existence of court orders.

276. We therefore find that the 5th and 6th Respondents had knowledge of those Court Orders issued on 23rd January 2014 and they cannot contest otherwise. Accordingy, the argument by Mr. NJenga that the advertsements constituted substituted service cannot be true and we so find.

(a) <u>Are the 5th and 6th Respondents in Contempt of Court</u>

277. The motion for the removal of the 1st Petitioner was not moved on 23rd January 2014 as scheduled, but was moved on 28th January 2014. By then, we have already found as seen above that the Speaker and the County Assembly of Embu had been served with the orders of the Court and were aware of the Court orders. Despite having knowledge of the Court orders, it is not disputed that the 5th and 6th Respondents proceeded with the motion proposing removal of the 1st Petititoner without having served him and without giving him an opportunity to be heard on the same. It is contended by the 1st Petitioner and this is not disputed by the Respondents that he saw the charges preferred against him by the 6th Respondent for the first time at the Senate.

278. As to the submission made by Mr. NJenga that the 5th Respondent cannot be held in contempt of Court because the Speaker of the County Assembly of Embu was not the mover of the motion, and he

does not sit in the County Assembly as a member to deliberate on the resolution to remove the Governor from office. We find that argument misleading as will be seen shortly from the provisions of Standing Order No. 24 and 36 of the Standing Orders of the County Assembly of Embu.

279. Standing Order No 24 provides;

> ***"The Speaker shall preside at any sitting of the County Assembly but in absence of the Speaker, the deputy speaker shall preside and in the absence of both the Speaker and the deputy speaker, a member elected by the County Assembly for that purpose pursuant to Article 178(2) of the Constitution shall preside"***

Then Standing Order No. 36 provides that;

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

From the provisions of the Standing Orders cited above, it is clear that it is the responsibility of the Speaker of the County Assembly to preside over the business of the County Assembly. In addition, it is his duty to direct the Clerk of the County Assembly in the preparation of the Order Paper showing the business for each sitting day of the County Assembly. We therefore find that the Speaker of the County Assembly of Embu, Mr. Justus Kariuki Mate was the person who was in a position to ensure that the court order was obeyed given his role in the County Assembly. We have found that he allowed the motion, proposing the removal of the Governor from office to be debated and passed on 28th January 2014, without complying with the Court order. Accordingly, we find that the 5th Respondent, Mr. Julius Kariuki Mate and the Clerk of the County Assembly of Embu Mr. Jim Kauma acted in disobedience of court orders and are therefore guilty of contempt of court. We hereby cite them for contempt of court and they will consequently, appear in this Court on a date to be decided by the Court when the appropriate sentence and or sanction shall be meted out against them.

Effect of disobedience of Court Orders

280. On the effect of disobedience of court orders, we cannot put it better than the Court did in ***Hadkinson v Hadkinson (1952) 2 ALL ER 211*** where it was stated as follows;

> ***"It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent Jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it...it would be most dangerous to hold that the suitors or their solicitors could themselves Judge whether an order was null and void, whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question, that the course of a party knowing of an order which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed it must be obeyed. Such being the nature of this obligation, two consequences will in general follow from its breach. The first is that anyone who disobeys an order of the Court is in contempt of Court and may be punished by committal or attachment or otherwise. The second is that no application to the court by such a person will be entertained until he has purged himself of his contempt."***

281. We however find the reasoning in ***Clarke and Others v Chadburn & Others (1985) 1 ALL ER (P.C) 211*** most attractive in regard to our instant case. In this case it was held as follows;

"An act done in wilful disobedience of an inJunction or court order was not only a contempt of Court but also an illegal and invalid act which could not, therefore, effect any change in the rights and liabilities of others. I need not cite authority for the proposition that it is of high importance that orders of the courts should be obeyed. Wilful disobedience may properly be described as being illegal. If by such disobedience the persons enJoined claim that they have validly effected some change in the rights and liabilities of others, I cannot see why it should be said that although they are liable to penalties for contempt of court for doing what they did, nevertheless those acts were validly done....but the legal consequences of what has been done in breach of the law may plainly be very much affected by illegality. It seems to me on principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted with illegality that produced them, even if the Defendants thought that the inJunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it".

282. We are in agreement with the above authorities, to the effect that anything done in disobedience of court orders is null and void *ab intio* and is a nullity in law. Therefore the 6th Respondent having proceeded to pass a resolution for the removal of the 1st Petitioner from office in defiance of court order means that the resolution was a nullity. It is like that the resolution was never passed in the first place. In the circumstances, there was no valid resolution which could have been forwarded to the Speaker of the Senate for action under Section 33(2) of the Act. The subsequent actions of the Senate are a nullity including the decision to remove the first Petitioner from office.

283. The above finding in our view would have been sufficient to dispose of the matter regarding the invalidity of the 1st Petitioner's removal from office. However, the Petitioners case is also that the 1st and 2nd Respondent acted in disobedience of court orders issued by MaJanJa J on 3rd of February 2014. We now turn to consider this issue.

Did the 1st and 2nd Respondent Act in disobedience of Court Orders

284. Following the resolution of the County Assembly to remove from office the 1st Petitioner despite the disodience of court orders, the 1st Petitioner on 27th January 2014, served the Speaker of the Senate with the pleadings with regard to Embu Petition No. 1 of 2014 (supra) together with the order of the Court issued on 23rd January 2014. The Speaker of the Senate proceeded to convene the Senate pursuant to the provisions of Section 33(2)(a) of the County Government Act vide Gazette Notice No. 627 dated 31st January 2014.

285. Consequently, the 1st Petitioner filed Nairobi Petition No. 51 of 2014 (supra) on 3rd February 2014 where MaJanJa J issued orders restraining the Speaker of the Senate from introducing, discussing, sitting or deliberating the impeachment of the 1st Petitioner based on the resolution forwaded by the Speaker of the Embu County Assembly. As it can be seen from the return of service of the affidavit of Wilfred Nyamu Mati sworn on 4th February 2014, the 1st and 2nd Respondents were served with the Court order and ruling of MaJanJa J. The ruling, Court order dated 3rd February 2014 and pleadings in Kerugoya Petition No. 4 of 2014 (Formerly Nairobi Petition No. 51 of 2014) were received by a Mr.oJohhn Ngari who describes himself as the Legal Clerk on behalf of the Speaker of the Senate on 4th February 2014 at 7.30am.

286. The 1st Respondent, the Speaker of the Senate and the 2nd Respondent, the Clerk of the Senate did not appear in Nairobi Petition No. 51 of 2014 on 4th February 2014. As a result of which MaJanJa J confirmed the exparte orders issued on 3rd February 2014. Similarly, the 1st and 2nd Respondents did not file any responses or send a representative at the hearing.

287. Mr. Nganga urged us not to find that the Petition was unopposed despite lack of responses from the 1st and 2nd Respondents. But we are unable to yield to Mr. Nganga's request and for good reason. It is now trite law that although a party alleging a fact has the onus of proof of that fact, the opposing party is at the very least expected to file a response to those allegations of facts. Where such a party does not respond to those facts, then the court can only but take it that those facts are actually uncontested. In so

holding, we must associate ourselves with the sentiments of Wendoh J in ***Rumba Kinuthia vs Attorney General Nairobi HCCC 1408 of 2004*** where she held as follows;

> **'Despite the fact that the applicant made very serious allegations against the defendant, government agents, servants and police officers, no affidavit was filed in reply, so that all the facts deponed to by the applicant in his affidavit are what the court will take as representing the correct factual position'.**

288. The question therefore is whether the facts as stated elsewhere above disclose that the 1st and 2nd Respondents are in contempt of court as alleged by the Petitioners.

289. A perusal of the court record of 4th February 2014 demonstrates that the court convened at 10.30am, there was no appearance for the Senate, Mr. Nyamu appeared for the 1st Petitioner and The Attorney General was present. MaJanJa J then extended the exparte orders of 3rd February 2014. As stated above, the service upon the Senate had been effected by Mr. Nyamu on the morning of 4th February 2014 at 7.30 am.

290. Be as it may, had the Speaker of the Senate adhered to the Court orders of 3rd February 2014, the impeachment proceedings would not have been held. We must agree with Mr. Issa Mansur that at the time the Speaker of the Senate received the court orders on the morning of 4th February 2014, he had three options. First, either appear in Court before MaJanJa J as ordered and seek to vary, set aside or discharge the Court orders already in place stopping any deliberations on the impeachment of the 1st Petitioner, secondly, choose to comply with the Court orders by not convening the Senate or lastly revoke his Gazette Notice No. 627 convening the Senate and dated 31st January 2014.

291. However, the Speaker of the Senate allowed the Special sitting of the Senate to proceed on 4th February 2014. Following the deliberations on the motion the Senate resolved to establish a Special Committee comprising 11 members to investigate the proposed removal from office of the Governor and Deputy Governor of Embu County and report to the Senate within 10 days. The Committee before starting its work observed that there were orders issued by the High Court on 4th February 2014 and addressed itself as follows in its report;

> ***"The Committee observed that the High Court had issued conservatory orders restraining.....The question before the Committee therefore was, What is the effect of that court order on the Senate and the Special Committee? The Committee resolved that it would defer its thoughts on the matter and hear the parties on the matter, if it would arise and therefore reserved its findings on the matter to the conclusion of the hearing of the evidence by the Parties".***

292. It is thus clear to our minds that the Senate was aware of the Court orders and indeed deliberated on those orders and choose not to obey the orders and instead commenced its proceedings. It is clear that the Senate acted in violation of court orders and we so find. However, we cannot cite the Speaker and the Clerk of the Senate being the representatives of the Senate for contempt of court since no application for contempt is before the court.

293. We must state at this point that disobedience of court order is a grave issue as it undermines the rule of law. Article 10 of the Constitution identifies the rule of law as one of the national values and principles of governnace. Article 3 of the Constitution is very clear that every person has an obligation to respect and defend the Constitution. So that any person who disobeys a court order also violates the Constitution. We agree with the sentiments of Odunga J in ***Judicial Service Commission v The Speaker of the National Assembly&Another Petition No. 518 of 2013*** where the Learned Judge expressed himself a follows;

> ***"Respect of Court orders however disagreable one may find them is a cardinal tenet of the rule of law and where a person feels that a particular order is irregular the option is not to disobey it with impunity but to apply to have the same set aside. When decision to disobey particular***

court orders are left to the whims of the parties public

disoder and chaos are likely to reign supreme yet under the preamble of our constitution we do recognise the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social Justice and the rule of law".

294. Article 159(1) states that Judicial authority in Kenya is derived from the people and vests in and is exercised by, the courts and tribunals established under the Constitution. Courts of law speak through their Court orders, and it follows that those orders must be obeyed.The Court of Appeal in ***Commercial Bank of Africa Ltd v Ndirangu (1990-1994) EA 70(CAK)*** recognised the importance of obeying Court orders and held that;

"A flagrant disobedience of a court order, if allowed to go unchecked, will result in the onset of an erosion of Judicial authority".

295. We cannot over emphasis the fact that court orders once issued must be obeyed by those against whom they are directed unless or until they are either discharged or set aside. More so because once a court order is issued, it binds all and sundry, the mighty and the lowly equally, and the County Assembly and the Senate are no exception. The developing trend in our country where parties to litigation appear to be choosing which court orders to obey or disobey must be stopped in order to build the public confidence in the rule of law.

Whether A Deputy Governor can assume office under Article 182(2) of the Constitution through a process of impeachment that was in violation of the Constitution.

296. We have already found that the proceedings in regard to the removal of the 1st Petitioner were carried out in violation of Court orders and found the proceedings to have been a nullity ab intio. Accordingly the Deputy Governor cannot assume office under Article 182(2) and benefit from an illegal process, and the reasons are stated elsewhere in this Judgment. However, for avoidance of doubt, an act done in disobedience of a court order is illegal and invalid act which cannot affect any change in the rights and liabilities of others. See ***Clarke and Others v Chadburn & Others (supra).***

297. It must be remembered that Article 182(2) is premised on assumption that a Governor has been removed from office legally. It therefore follows that if such removal is through an illegal process, then the Deputy Governor cannot assume office under Article 182(2).

Whether the fundamental rights and freedoms of the Petitioner were violated

Right to Fair administrative Action

298. It was the 1st Petitioner contention that before the resolution to remove him from office by the County Assembly was passed, he was not accorded a hearing which amounted to a violation of Article 47 of the Constitution. Article 47 provides that:

(I) Every Person has the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(ii) If a right or fundamental freedom of a person has been or is likely to be adversely affected by admnistrative action, the person has the right to be given written reasons for the action"

299. In our view, Article 47 anchors the rules of natural Justice into our constitution. One of the rules of natural Justice demands that no one should be condemned unheard. Looking at section 33(1) of the County Government Act, it is clear that it does not contain a provision for the participation of a Governor leading to the resolution to recommend his removal.

300. Section 14 of the County Government Act has mandated County Assemblies to make Standing Orders consistent with the Constitution and the Act, to regulate the Procedure of the County Assembly including orders for the proper conduct of its proceedings. Pursuant to this provision, The Embu County Assembly has enacted the Embu County Assembly Standing Orders. The procedure for the removal of the Governor is found under Standing Order No. 61 which has a detailed procedure for the removal of a Governor from office. It states;

> ***"61(1) Before giving notice of motion under, section 33 of the county government act no.17 of 2012 the member shall deliver to the clerk a copy of the proposed motion in writing stating the grounds particulars upon which the proposal is made, for the impeachment of the governor on a ground of violation of a provision of the constitution or of any other law; where there are serious reasons for believing that the governor has committed a crime under national or international law; or for gross misconduct or abuse of office. The notice of motion shall be signed by the member who affirms that the particulars of allegations contained in the motion are true to his or her own knowledge and the same verified by each of the members constituting at least a third of all the members and that the allegations therein are true of their own knowledge and belief on the basis of their reading and appreciation of information pertinent thereto and each of them sign a verification form provided by the clerk for that purpose.***
>
> ***(2) The clerk shall submit the proposed motion to the speaker for approval.***
>
> ***(3) A member who had obtained the approval of the speaker to move a motion under paragraph (1) shall give a seven (7) days notice calling for impeachment of the governor.***
>
> ***(4) Upon the expiry of seven(7) days, after notice given, the motion shall be placed on the order paper and shall be disposed of within three days; provided that if the county assembly is not then sitting, the speaker shall summon the assembly to meet on and cause the motion to be considered at that meeting after notice has been given.***
>
> ***(5) When the order for the motion is read, the speaker shall refuse to allow the member to move the motion, unless the speaker is satisfied that the member is supported by at least a third of all members of the county assembly to move the motion; provided that within the seven days' notice, the clerk shall cause to be prepared and deposited in his office a list of all members of the county assembly with an open space against each name for purposes of appending signatures, which list shall be entitled "SIGNATURES IN SUPPORT OF A MOTION FOR REMOVAL OF GOVERNOR BY IMPEACHMENT".***
>
> ***(6) Any signature appended to the list as provided under paragraph (5) shall not be withdrawn.***
>
> ***(7) When the motion has been passed by two- thirds of all members of the county assembly, the speaker shall inform the speaker of the senate of that resolution within two days."***

301. As can be seen, the Standing Orders while providing for the procedure for removal of the Governor have failed to provide for the right of the Governor to be heard before the decision to remove him can be made.

302. As to what constitutes fair admnistrative action, The Constitutional Court of South Africa in ***President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT16/98) 2000***, while interpreting a provision similar to our Article 47 of the Constitution stated at paragraphs 135-136 as follows;

> ***"Although the right to Just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing***
>
> ***administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to Just administrative action is now entrenched as a constitutional control***

over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative Justice. These standards will, of course, be informed by the common law principles developed over decades..."

303. In ***Halsburys Laws of England, 5th Edition 2010 vol. 61*** it is stated as follows in regard to the right to be heard;

> ***"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of Justice. This rule has been refined and adapted to govern the proceedings of bodies other than Judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court."***

304. A literal reading of that section 33 (1) and Standing Order No. 61 reveals that the procedure provided therein does not provide for the right of hearing for the Governor at the County Assembly. Mr. NJoroge urged us to find that Standing Order No. 64 provides for the right to be heard. This standing order reads;

Right to be heard

64 (1) Whenever the constitution, any written law or these standing order –

(a) Requires the county assembly to consider a petition or a proposal for the removal of a person from office, the person shall be entitled to appear before the relevant committee of the county assembly considering the matter and shall be entitled to legal representation.

(b) Requires the county assembly to hear a person on grounds of removal from office, or in such similar circumstances, the county assembly shall hear the person-

(I) At the date and time to be determined by the speaker.

(ii) For a duration of not more two hours or such further time as the speaker may, in each case determine; and

(iii) In such other manner and order as the speaker shall, in each case determine.

(2) The person being removed from office shall be availed with the report of the select committee, together with any other evidenceadduced and such note or papers presented to the committee at least three days before the debate on the motion.

305. Our reading of this Standing Order confirms that the Standing Order No. 64(1)(b) applies to the removal of the Governor as it "***Requires the county assembly to hear a person on grounds of removal from office, or in such similar circumstances, the county assembly shall hear the person-***."It therefore means that the Governor has a right to be heard at the County Assembly.

306. With due respect we do not agree with the submissions made by the Learned Counsel for the 5th and 6th Respondent that the proposal by a County Assembly to have a Governor removed from office was akin to the drafting of charges by the Director of Public Prosecutions when commencing a criminal prosecution against an accused person and that therefore serving a Governor with charges and according him a hearing at the County Assembly was not necessary; that Section 33 should be read as a whole

and that the right to a hearing provided for by Section 33(2) to a Governor facing removal proceedings at the Senate was sufficient to satisfy the legal requirement for a fair hearing.

307. We take the view that the resolution proposing the removal of a Governor from office involves a process in which a motion is tabled in the County Assembly which is debated before it is either approved or reJected. This is the process that triggers the removal proceedings at the Senate in the event that the motion is approved. Since it is at the County Assembly that adverse findings against the conduct of a Governor while in office are first made, and it is those findings in the form of a resolution that lead to the removal proceedings at the Senate whose outcome may affect his political right to hold an elective office, we are persuaded to find, which we hereby do, that even at the County Assembly the right to a hearing must be accorded to a Governor at any time that the motion proposing removal from office is being debated before it is approved or reJected.

308. Failure of Section 33(1) to make provision for a Governor facing a proposal of his removal from office is the Lacuna in law which Githua J sought to fill when she made the orders of 23rd January 2014 which we have found elsewhere in this Judgment that the 5th and 6th Respondents chose to disobey.

309. As we have noted earlier, the County Assembly of Embu had already made provisions to as to the right to a hearing in its Standing Orders but for unknown reasons they chose to violate their own Standing Orders by not giving the 1st Petitioner an opportunity to be heard. It is therefore our finding that in so doing they also violated the 1st Petitioner's right to fair adminstrative action enshrined under Article 47 of the Constitution. We make this finding bearing in mind that it is not disputed in this case, that in passing the resolution proposing the removal of 1st Petitioner from office, the County Assembly was acting as a quasi Judicial body.

310. Even though Section 33(1) of the Act does not provide expressly for the right to be heard, we are alive to the rule that there is a presumption in the interpretation of statutes that rules of natural Justice will apply whenever admnistrative decisions with a potential to adversely affect an individual are made. In ***Onyango Oloo v Attorney General (1986-1989) EA 456***

Court of Appeal stated as follows

> ***"The principle of natural Justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural Justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural Justice...To "consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, t regard as, to think, hold the opinion... "Consider" implies looking at the whole matter before reaching a conclusion...A decision in breach of the rules of natural Justice is not cured by holding that the decision would otherwise have been right since if the principle of natural Justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided."***

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

Right to Fair Hearing

312. The 1st Petitioner also alleged that his right to fair hearing was violated as provided for under Article 50(1) of the Constitution. This Aricle provides as follows;

> ***50(1) Every person has the right to have any dispute that can be resolve dby the application of***

law decided in a fair and public hearing before a court of law or, if appropriate another independent and impartial tribunal or body.

313. In our view, the rights provided for under Article 50(1) are available to a person charged in a criminal trial or to a party to a civil dipute in a court of law or other independent tribunals. The 1st Petitioner was not undergoing a criminal trial or civil proceedings and he cannot contend that his right to fair hearing had been violated.

Conclusion

314. We have found that the 1st, 2nd, 5th and 6th Respondents acted in violation of the Court orders of 3rd February 2014 and 23rd January 2014 respectively. In the circumstances, the removal of the 1st Petitioner as the Governor of Embu County by the Senate was null and void *ab initio* and therefore amounted to a nullity in law. We have also found that the 1st Petitioner's right to fair admnistrative action was violated by the 6th Respondent.

Reliefs

315. Having made the foregoing findings, we must determine the appropriate reliefs in the circumstances of this Case. In so doing we are alive to the provisions of Article 23(3) of the Constitution which provides that "in any proceedings brought under Article 22, a Court may grant appropriate relief, which includes but is not limited to declaration of rights, inJunction, conservatory order, a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not Justified under Article 24, an order for compensation; and an order of Judicial review.

316. The orders that commend themselves to us are as follows;

(a) We declare that the proceedings for impeachment of a Governor under Article 181 of the Constititution are quasi Judicial in nature and are therefore subJect to the Jurisdiction of the High Court under Article 165(3)(d) and 6 of the Constitution.

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

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

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

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

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

317. For the avoidance of doubt, we are aware that some of the reliefs we have granted in this Petition, have the effect of reinstating the 1st Petitioner to the office of Governor of Embu County. However, this should not be construed as a bar to any future removal from office should the need arise as long as the

same is conducted in accordance with the law.

318. Finally, we must take this opportunity to thank all the counsel in this Petition. Mr. Muite SC, Mr. Ahmednasir SC, Mr. Nyamu, Mr. Issa Mansur, Mr. NJoroge NJuguna, Mr. Wanyama, Mr. Nganga, Mr. NJenga, Mr. Kibe, Mr. Mwangi NJoroge and Mr. Thande for their invaluable submissions to the development of this important area of our law on devolution. We must appreciate them for their well reasoned arguments especially given that this is the first prouncement on this area of the law on the removal of a Governor. They have materially assisted this Court for which we thank them. If we have not referred to all the authorities that were cited, it is not for lack of appreciation for their industry.

319We must also appreciate our Research Assistants, Ms. Carolene Kituku and Ms. Ruth Kihuria, their efforts, commitment, diligence and support in the preparation of this Judgment.

DATED, **DELIVERED** AND **SIGNED** AT THE HIGH COURT AT KERUGOYA THIS 16TH DAY OF APRIL 2014.

H.I ONG'UDI **C. W GITHUA** **B. N.OLAO**

JUDGE **JUDGE** **JUDGE**