



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KITALE.**

**CONSTITUTIONAL PETITION NO. 8 OF 2014.**

**IN THE MATTER OF BREACH OF FUNDAMENTAL RIGHTS AND FREEDOMS  
ESPECIALLY ARTICLE 2, 3, 20, 21, 22 (1), 23, 28, 47, 48, 50, 177 & 178 OF THE  
CONSTITUTION OF KENYA, 2010.**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND  
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013, SECTION 4**

**BETWEEN**

**DAVID SIFUNA ::: PETITION.**

**AND**

**THE CLERK, COUNTY ASSEMBLY OF**

**TRANS NZOIA ::: 1ST RESPONDENT.**

**THE COUNTY ASSEMBLY OF**

**TRANS NZOIA ::: 2ND RESPONDENT.**

**R U L I N G.**

1. This Petition dated 2nd October, 2014 as amended on 6th October, 2014, is brought by **David Sifuna**, (herein petitioner) against the **Clerk, County Assembly of Trans Nzoia** (herein, first respondent) and **The County Assembly of Trans Nzoia** (herein, second respondent), pursuant to Articles 2 (1), 3 (1), 20 (1), 20 (2), 21 (1), 22 (1), 23 (1), 28, 47, 50 (1) and 178 (1) of the Constitution of Kenya, 2010.

2. **Article 2 (1)** is a declaration of the supremacy of the Constitution which bind all persons and all state organs at both levels of government.

Every person has a duty to respect, uphold and defend the Constitution (**Article 3 (1)**) whose Chapter four (4) is the **Bill of Rights** encompassing Articles 19 to 58 and which applies to all law and also binds all state organs and all persons.

Every person is entitled to the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom and every state organ has a fundamental duty to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights. Such duty extends to the state itself (**Articles 20, 21**).

3. Every person claiming that a right or fundamental freedom in the Bill of rights has been denied, violated, or infringed or is threatened has the right to institute court proceedings (**Article 22**) and the High Court has jurisdiction, in accordance with **Article 165**, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights (**Article 23**)

Under Article 165 (3) (b) and (d), the High Court has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and jurisdiction to hear any question respecting the interpretation of the Constitution including the question whether anything said to be done under the authority of the Constitution or any law is inconsistent with or in contravention of the constitution and any matter relating to Constitutional powers of state organs in respect of County Governments or any matter relating to the Constitutional relationship between the levels of government.

4. Under **Article 159 (1) and (2)**, judicial authority is derived from the people and vests in, and shall be exercised by the court and tribunals established by or under the Constitution.

In exercising such authority, the courts and tribunals shall be guided by the principles “*inter-alia*” that justice shall be done to all, irrespective of status and that the purpose and Principles of the Constitution shall be protected and promoted.

In the exercise of judicial authority, the judiciary shall be subject only to the Constitution and the law and shall not be subject to the control or direction of any person or authority (**Article 160 (1)**).

5. Thus, the judiciary must operate independent of all other branches of government which have their respective mandates carved out in the Constitution. Each of the three organs of government is required to undertake only what is provided by the Constitution and when this is not done many a constitutional disputes land in the courts creating what may be termed a “*miragical cold war*” between the organs and bringing into play the concept of separation of powers which presupposes that the primary functions of the state (i.e. Executive, legislative and judicial ) are exercised by distinct and independent organs. It is in that way that the liberty of the individual is secured. The concept rests on two main principles viz:- that the competencies of the three branches of governmental power must be clearly delimited and defined and that all branches of government are bound by the rule of law (see, **Martin N. Wambora & Others vs. Speaker of the Senate & Others**) [2014] e KLR.

6. However, the grim reality is reflected in the perception by a governance luminary in the eighteenth century, **Alexander Hamilton**, who on the relationship between the judiciary and the other power agencies stated that:-

*“The judiciary from its nature of its functions will*

*always be the least dangerous to the political rights*

*of the Constitution – the executive not only dispenses*

*the honours but holds the sword of the community.*

*The legislative, not only commands the purse but*

*prescribes the rules by which the duties and rights*

*of every citizen are to be regulated.*

*The judiciary, on the contrary, has no influence*

*over the sword or the purse, no direction either of*

*the strength or the wealth of the society and can  
take no active resolution whatever. It may truly  
be said to have neither FORCE nor WILL but mere  
judgment.”*

7. Nonetheless, the Kenya Constitution 2010, has come with progressive values and norms necessitating a re-evaluation of the judicial function of governance as guided by Article 10 on national values and principles of governance and and chapter six (6) on leadership and integrity.

In the Ugandan Case of **Paul K. Semogerere & Others vs. the Attorney General Constitution Appeal No. 1 of 2002**, the Supreme Court stated that:-

*“It is the Constitution, not parliament nor the  
executive nor judiciary which is supreme.”*

8. And , in the South African case between the **Speaker of the National Assembly and Patricia De Lille (M.P) & Another Case No. 29/98**, it was said that;-

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

9. The present dispute is undoubtedly founded, centred and determinable on the foregoing factors and commentaries. It is essentially anchored on Article 47 of the Constitution which provides for fair administrative action.

Thus:-

1. *“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”*
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.”*

10. On matters of Constitutional adjudication, this court cannot help but quote from a paper presented by Judge of the Supreme Court of Kenya, **J.B. Ojwang (Ph.d) (cantab)**, at the Kenya judges annual conference, 2014.

Thus:-

*“The Constitution is today the constant basis of  
rights assertion, and of the exercise of the jurisdiction  
of the courts. On the non-criminal side, certainly,  
the constitution gives the most animated framework  
of litigation.”*

*“Firstly, this is because of the general spirit of the*

*Constitution, expressed in the empowering clause; All Sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution; Secondly, because of the Constitution's declaration as “national values and principles of governance” certain inherently rights – conferring themes such as rule of law, human dignity, equity, social justice, inclusiveness, equality, human rights, none-discrimination, protection of the marginalized, good governance, integrity, accountability. Thirdly, because of the entrenchment of an elaborate Bill of rights. Fourthly, because of the express subjection of executive authority, and the operations of public administration to 'the principle of service to the people of Kenya and their well being and benefit'. Fifthly, because of the establishment of a judiciary charged with independent decision making, on the basis of expressly stated canons of judicialism and principles of governance”.*

The courts are indeed required to adopt an expansive and broad approach in its interpretation of the Constitution and the law especially one that, **“inter-alia”** contributes to good governance.

11. Be that as it may, the case for the petitioner is that pursuant to Article 178 (1) of the Constitution, the petitioner was duly elected as the speaker of the second respondent but without any colour of right and in blatant disregard of the petitioner's rights and freedoms enshrined in the Constitution, the second respondent through its members conspired among themselves to lay malicious allegations against the petitioner thereby creating apprehension that they are about to impeach him. That, without regard to the petitioner's right to be heard, the second respondent accuses the petitioner of misusing county assembly fund, rampant corruption,. Clanism and nepotism in employment matters, use of unorthodox means to run the assembly among other accusations.
12. All accusations are vehemently denied by the petitioner with contentions that his duty as a member and chairperson of the County Assembly Service Board is limited to preparing annual estimates of expenditure of the county assembly and submitting them to the second respondent for approval. That, he is not a member of the County Public Service Board whose mandate is to vet and hire county employees and that he plays no role in the appointment and termination of county employees.

13. The petitioner also contends that he swore to protect and defend the Constitution, and as such has never violated its provisions, particularly articles 1, 2, 3, 6, 10, 13, 178, 232 and 258. That, he has not been involved in any form of corruption, conflict of interest and management of public resources contrary to chapter six (6) of the Constitution, the County Government Act, 2012 and the Public Finance Management Act, 2012. That, he has not abused his office in his capacity as both the speaker of the second respondent and chairman of the County Assembly Service Board under section 12 of the County Government Act, 2012.

14. With regard to right to fair administrative action, the petitioner contends that by virtue of section 11 of the county Government Act, 2012, the second respondent's have forwarded to the first respondent a notice of intention to move a resolution to remove him in a move engineered by the second respondent without notice to him and without seeking an audience with him to clarify whether or not the allegations against him are true or false. That, the said action is manifestly unfair and unreasonable and in contravention of Article 47 of the constitution. That, the right to fair administrative action in the case of a speaker is operationalized by the provisions of the second respondent's standing order No. 63 which was totally ignored by the second respondent in its overzealousness to remove the petitioner from office.

15. The petitioner further contends that he deserves lawful protection from unfair administrative action by the respondents and equal treatment without undue discrimination, bias or bad faith and thus deserves a fair hearing in all instances. Therefore, the petitioner "*inter-alia*" prays for an order for injunction restraining the respondents either jointly or severally from carrying out and/or proceeding with the impeachment proceedings pending the hearing and final determination of this petition or from illegally and/or maliciously threatening to remove the petitioner from his duly elected office using section 11 of the County Government Act, 2012 and for a declaratory order to the effect that the fundamental rights and freedoms guaranteed to the petitioner under Articles 2, 3, 20 (1), 20 (2), 21(1), 22 (1), 23 (1), 28, 47, 48 and 50 (1) of the Constitution have been contravened by the respondents.

A verifying affidavit deponed by the petitioner accompanied the petition which was filed on 29th September, 2014 and amended with the leave of the court on the 6th October, 2014.

16. The Respondents oppose the petition on the basis of the averments contained in a replying affidavit dated 7th October, 2014, deponed by the first respondent, **Aineah Indakwa**, on his own behalf and that of the second respondent wherein it is averred "*inter-alia*" that the petition is unconstitutional, incompetent, misconceived, fatally defective and an abuse of the court process which urges the court to disregard the law and contravene the doctrine of separation of powers. That, the petition itself together with the appropriate Notice of Motion and all supporting affidavits are so slovenly drawn as to be incorrigible. That, in entertaining the petition, the court shall be usurping the powers of other Constitutional institutions such as the Industrial court, the County Assembly of Trans Nzoia and thus be playing an investigative role rather than an adjudication and supervisory role. That, the determination on the guilt or otherwise of the petitioner which regard to the Accusations contained in the motion moved by the Hon. Angeline Too, is outside the Constitutional and supervisory powers of the High Court over inferior bodies.

17. That, the High Court lacks jurisdiction to deal with employment and labour matters as the matters raised by the petitioner are those arising from an employee/employer relationship between a speaker of a County Assembly and the County Assembly, hence, it is only the Industrial court that can enquire into it and no other court including this honourable court, can take away or attempt to share this jurisdiction.

18. The respondents further aver that the petition and the appropriate Notice of Motion dated 2nd October, 2014, have been overtaken by events and become otiose.

That, the petitioner is not about to be impeached as he was impeached and removed as speaker on 30th September, 2014, and is no longer the speaker of the Trans Nzoia County Assembly. That, the

procedure followed by the County Assembly in removing the petitioner from the office of Speaker of the Trans Nzoia County Assembly was proper and in accordance with not only section 11 of the County Government Act and the Trans Nzoia County Assembly Standing Orders but also consorted with rules of Natural Justice.

19. That, the process began with the notice of motion to move a motion filed by a member of the County Assembly dated 22nd September, 2014, which was given to the first respondent as required by the Act and the standing orders and which notice clearly set out the grounds and action sought and which was duly received by the Speaker and supported by twenty three (23) out of thirty eight (38) representing 60.5% of the number of members of the County Assembly and therefore surpassed the 1/3rd threshold prescribed under section 11 (2) of the County government Act and Order 58 of the Assembly's Standing Orders. That, the petitioner was required to respond to the accusations on the notice of motion and the prayers sought. That, after receiving the said notice of motion, the Assembly properly issued a written notice to the petitioner requiring him to appear before the Assembly on Tuesday 30th September, 2014 at 2.30 p.m. in the afternoon to respond to the accusations. That, the notice was more than the seven (7) days notice allowed in section 11 of the County Government Act and which notice was received and signed for on 24th September, 2014, and to which was attached the notice of motion to move a motion.

20. The respondents went on to aver that on the 30th September, 2014, the petitioner instead of honouring the notice and appearing before the Assembly; locked himself in his office and declined the opportunity of defending himself before the Assembly and instead rushed to court to frustrate the work of the Assembly. That in default of the petitioner's appearance, the Assembly presided over by Hon. Kapoloman, as a member elected under section 9 (4) of the County Government Act, proceeded to debate and vote on the motion of the petitioner's removal from office as provided for in the Act and in the standing orders and having heard the mover of the motion in the absence of the served petitioner found that the accusations had been established and put the issue to vote and at which vote thirty one (31) members of the County Assembly (MCAs) voted for the motion, five (5) voted against, two (2) were absent and only one (1) abstained which brought the vote for to 81.5% of all the MCAs which was overwhelmingly and exceedingly beyond the 75% ( $\frac{3}{4}$ ) threshold prescribed by the Act, hence the resolution to remove the petitioner as speaker of the County Assembly of Trans Nzoia. That, the petitioner physically assaulted the first respondent thus displaying criminal behaviour and violating the leadership and integrity chapter of the Constitution of Kenya, 2010. that, the petitioner is the author of his own misfortunes and has by his conduct shown that he is a person bereft of leadership and integrity who has no respect for the law including the standing orders of an Assembly he presided over as speaker and a person intent on perpetuating impunity and contempt for the authority of the Trans Nzoia County Assembly and one who abhors transparency and accountability in public office and therefore a contemptuous and arrogant petitioner who is undeserving of the orders sought by him in the petition.

21. The respondents avers that the impeachment and removal of the petitioner as Speaker of Trans Nzoia County Assembly was proper and due process was followed. That, the Assembly has already advertised the position of Speaker in public press for suitable applicants to apply without exclusion of the petitioner who is also free to apply. That, the conservatory orders issued by the court are not only likely to cause hardship but also likely to ground the operations of Trans Nzoia County Assembly to a halt, hence the balance of convenience is not in favour of the orders sought in the petition and the Notice of Motion dated 2nd October, 2014.

22. The respondents therefore pray for the dismissal or striking out of the petition together with the Notice of Motion dated 2nd October, 2014 arguing that it would be in the interest of justice upholding the Rule of Law as well as the Constitution and the Constitutional Principles for the court to do so.

The respondents also pray for costs and for the conservatory orders issued by the court on the 30th September, 2014, and 6th October, 2014 to be vacated, discharged or otherwise set-aside.

23. On 8th October, 2014 directions were given, that this petition do proceed by way of written

submissions which were highlighted in part.

However, in between, leave was sought and granted to the petitioner to institute contempt of court proceedings against the first respondent for allegedly disobeying orders of this court made firstly, on the 30th September, 2014 and secondly, on the 6th October, 2014. The necessary application was made vide a Notice of motion dated 29th October, 2014 which was scheduled for hearing on 13th November, 2014.

24. As for this petition, the pleadings raise two main issues for determination viz:-

[i] *Whether this court has the jurisdiction to deal with this dispute.*

[ii] *Whether the intended impeachment and/or impeachment of the petitioner by the second respondent violated the right to fair administrative action in terms of Article 47 of the Constitution of Kenya, 2010.*

A determination of these issues would invariably determine whether or not the petitioner is entitled to the orders sought in the petition.

25. With regard to the first issue on jurisdiction, the words of **Nyarangi, J.A.** In the case of **Motor Vessel Lillian “S” vs. Caltex Oil (K) Ltd (1989) KLR 1**, continue to ring a bell in our ears. Thus:-

*“Jurisdiction is everything, without it, a court has no power to make one more step.”*

26. These authoritative words are a clear affirmation that a court must be and endowed with necessary authority for it to decide matters that are litigated before it or to have cognizance of the matters presented in a formal way for its decision lest its decision amount to nothing, hence, null and void **“ab-initio”**.

Thus, jurisdiction must be acquired before any court renders its judgment.

27. This petition, as noted hereinabove, leans more towards the protection and promotion of fundamental rights and freedoms enshrined in our Constitution rather than an ordinary labour dispute involving an employer and employee in which case the right forum would be the **Employment and Labour Relations Court** also known as the **Industrial Court** created under Article 162 of the Constitution.

28. In any event, all sovereign power belongs to the people of Kenya and this must be exercised only in accordance with the Constitution either directly by the people or through their democratically elected representatives. It may therefore be stated that a speaker of a County Assembly is just but an employee of the people and his removal from office must be in accordance with the laid down procedure. This is the more reason why this petition has everything to do with the constitutional right to fair administrative action as provided under Article 47.

29. Today, the Constitution is the consistent basis of rights assertion and of the exercise of the jurisdiction of the courts. Indeed, judicial authority is derived from the people and is exercisable by the courts and tribunals established by the Constitution (See, Article 159).

Such courts include the High Court which is set up under Article 165 endowed with unlimited original jurisdiction in criminal and civil matters and jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

30. Under **Article 23 (1)**, the High court has jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

The High Court is thus vested with exclusive authority to uphold and enforce the Bill of Rights and with

regard to right to justice, Article 27 (1) provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.

Access to justice is guaranteed under Article 48 and under Article 50 (1), every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court.

31. From all the foregoing, it is apparent that the argument by the respondents that this court lacks the necessary jurisdiction to hear and determine this petition is misplaced and cannot stand. The decision in **Peter M. Kingoina vs. County Assembly of Nyamira (2014) e KLR**, relied upon by the respondents related to a judicial review application for orders of certiorari and to issues which the court concluded fell within the ambit of an employer/employee relationship and therefore declined to grant the order sought.

32. The scenerio herein is different in that the present dispute relates to alleged breach of the petitioner's constitutional rights by the respondents in purported exercise of their Constitutional and Statutory mandate.

The supremacy of the Constitution does not mean the supremacy of the legislative, the executive or the judiciary but the Constitution itself.

33. Therefore, any act done by any of these organs must be done in adherence to Constitutional values and principles.

In the **Martin Wambora Case (supra)**, the Court of Appeal stated that the values and principles embodied in the constitution provide the bedrock and foundation of Kenya's Constitutional system and under Article 10 (1) of the Constitution these values bind all state organs, state officers, public officers and all powers.

34. Thus, any matter relating to constitutional powers of state organs in respect of County Government would fall within the Constitutional mandate of the High Court.

Whereas the removal from office of a speaker of a county Assembly is a mandate of the Assembly exercised under the authority of the Constitution, it is the duty of the High court to determine if such removal is in-consistent with or in contravention to the Constitution or whether the process of removal violated both the Constitution and the relevant statutory law i.e. The County Government Act and the Standing Orders made under it.

35. Where the Constitution has been violated or is threatened with violation, the court cannot exercise restraint and therefore, any intended and blatant violation of any provision of the constitution by any state organ or person would definitely attract judicial scrutiny through the High Court.

In the upshot, it is this court and not the Employment and Labour Relations (Industrial) Court which is possessed of the actual jurisdiction to hear and determine this petition.

36. Indeed, the role of the High court for purposes of removal of a Governor or Speaker from office is supervisory in nature to ensure that the procedure and threshold provided for in the Constitution and the County government Act are followed so that if the process is unconstitutional , wrong, unprocedural or illegal, it cannot be said that the court has no jurisdiction to address the grievance arising therefrom (see, **Martin N. Wambora & Other vs. the Speaker of the Senate (supra)** and **(Mumo Matemu vs. Trusted Society of Human Rights Alliance & Others NBI Civil Appeal No. 290 of 2012.)**

37. This jurisdictional role is embedded in **Article 165 (6)** of the Constitution.

Thus, in the exercise of its supervisory role, the High Court does not attempt to replace the decision of the competent organ with its own decision, it only finds fault with it as it has to determine if the action taken was Constitutional, rational and examine if there had been any procedural impropriety. The court merely

examines the constitutionality of any action and does not sit in appeal over the opinion of the relevant organ. It examines whether relevant material and vital aspects having a nexus to the constitutional and legislative purposes were taken into account in the actual process.

38. Impeachment is defined in **Black's Law Dictionary 8th Edition**, as the act by a legislature of calling for the removal from office of a public official accompanied by presenting a written charge of the officials' alleged misconduct.

Therefore, proceedings of impeachment are quasi-judicial in nature and thus subject to the jurisdiction of the High Court under Article 165 (3) (a) and (6) of the Constitution of Kenya, 2010. The High Court being that which is set up under Article 165 of the Constitution and not Article 162 (2) of the Constitution.

39. With regard to the second issue for determination i.e. whether the intended impeachment and/or impeachment of the petitioner by the second respondent violated the right to fair administrative actions in terms of **Article 47** of the Constitution of Kenya, 2010, fair administrative action presupposes one which is governed by law and takes into consideration the rules of natural justice hence adhering to the rule of law and not “rule by law.”

Thus, every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and any person has the right to be given reasons for such action if a right or fundamental freedom of a person has been or is likely to be adversely affected by the administrative action (Article 47 (1) and (2)).

40. Under Article 47 (3), parliament was required to enact legislation to give effect to the rights in clause (1) of the Article and that legislation was to provide for the review of administration action by a court, or, if appropriate, an independent and impartial tribunal and promote efficient administration.

In the present, circumstances, the legislation envisaged under Article 47 (3) is the **County Government Act** and the subsidiary Legislations made thereunder.

41. County Governments are set up under Article 176 (1) of the constitution and a County Assembly under Article 177 (1) consists of “*inter-alia*” members elected by the registered voters of the ward, each ward constituting a single member constituency.

The speaker of the Assembly is an “*ex-officio*” member of and is elected by the Assembly from among persons who are not members of the Assembly. His responsibility is to preside over the sitting of the Assembly and in his absence, another member of the Assembly elected by the Assembly. Thus, the Speaker is in charge of the management and control of the proceedings of the Assembly but under the watchful eyes of the members of the Assembly whose goodwill is vital to his tenure in office. His removal from office would however be in accordance with Constitutional principles and the applicable statute law which herein is the County Government Act.

42. Section 11 of the Act provides for the removal of Speaker from office in that:-

1. ***A speaker of a county assembly may be removed from office by the county assembly through a resolution supported by not less than seventy five percent of all the members of the county assembly.***
2. ***A notice of the intention to move a motion for a resolution to remove the speaker shall be given***

*in writing to the clerk of the county assembly, signed by at least one third of all the members of the county assembly stating the grounds for removal.*

3. *A motion for a resolution to remove the speaker shall be presided over by a member of the county assembly elected under section 9 (4).*

4. *Before , the debate and voting on a motion under sub-section (3), the speaker shall be accorded an opportunity to respond to the allegations on the floor of the county assembly.*

43. The provision is in essence, the impeachment clause, so to speak, and must operate, in tandem with the county assembly standing orders which would in this case be the **Interim Standing Orders of the County Assembly of Trans Nzoia**, to give effect to the right to fair administrative action encompassing the right to a fair hearing in terms of **Article 50** of the constitution given that impeachment involves the presentation of a written charge of the speaker's alleged misconduct.

According to Black's Law Dictionary, the term **charge** means to accuse a person of an offence "***inter-alia***". Any accused person is entitled to fair hearing which connotes proceedings which are conducted in a just, equitable and impartial manner.

Impeachment proceedings being quasi-judicial in nature, a speaker of a county assembly is placed in a position which is a kin to an accused person in a criminal case, as he is likely to suffer drastic consequences. Therefore, his constitutional rights to a fair administrative action and a fair hearing cannot be compromised under any circumstances. This must have been what the county assembly of Trans Nzoia had in mind when it enacted standing orders No. 58 and No. 63 which essentially provide for removal procedures.

44. Indeed, the procedural aspect of the statutory action undertaken, by the respondent against the petitioner is really what this court was called upon to examine and satisfy itself whether or not it accorded with not only Articles 47 and 50 of the constitution but also the rules of natural justice. Even in the exercise of their constitutional and statutory mandates, public bodies are required to act reasonably and rationally guided by principles of fairness, equity and justice with a view to promoting and safeguarding the rights of an individual as set out in the Constitution.

45. The County Assembly of Trans Nzoia is a public body. Its members and officials are classified as public officers by dint of Article 260 of the Constitution.

In **Geoffrey Muguna Mburugu vs. Attorney General NBI HCCC No. 3477 of 1994**, the High Court held that:-

*“Employment in the public service both provides*

*the machinery of serving the public interest, and*

*benefits the employee who is compensated by approved*

*methods of work done. The employee thus acquires an*

*interest that evolves into a legal right, within the*

***terms of employment. It is in the interest both of the public, to whom services are rendered , and the employee, who has a personal relationship with the working arrangements, that the governing law affecting continued productivity in public office, be given fulfillment.”***

46. Herein, the governing law with regard to the removal of a public officer in a county Government is the County Governments Act and in particular section 11 of the Act read together with Standing Orders No. 58 and No. 63 of the Interim County Assembly Standing Orders of the County of Trans Nzoia.

The Constitution (**Article 236**) affords public officers protection in that they shall not be victimized, or discriminated against for having performed the functions of office in accordance with the constitution or any other law or dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.

47. Standing Order No. 58, is a replica of section 11 of the County Governments Act while “Standing Order No. 63 provides for the right to be heard thereby bringing into play the concepts of fair hearing and principles of natural justice.

Thus, under Standing Order 63 (1), whenever the Constitution, any written law or the standing orders:-

***(a) requires the Count 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 than 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.*

48. Under Standing Order 63 (2), the person being removed from office shall be availed with the report of the select committee, together with any other evidence adduced and such note or papers presented to the committee at least three days before the debate on the motion.

It is therefore without doubt that Standing Orders No. 58 and 63 along with section 11 of the County Governments Act were applicable **“hook, line and sinker”** in the present circumstances for the obvious reason that impeachment of a county assembly speaker is a process of removal of a person from office.

49. It is the petitioner's contention that, the members of the county assembly blatantly disregarded his constitutional rights and freedoms and conspired among themselves to lay malicious allegations against him with a view to impeaching him without regard to his right to be heard in relation to the allegations made against him i.e. misuse of county assembly fund, rampant corruption, clanism and nepotism in employment of staff which allegations were contained in the Notice of motion dated 1st October, 2014 but not particularized and which allegations are vehemently denied in total. That, the county assembly forwarded to the clerk of the assembly vide section 11 of the County Government Act, a notice of intention to move a resolution to remove him without any notice to himself and/or seeking an audience with him to clarify whether or not the allegations made against him were true or false thereby contravening Article 47 of the Constitution by treating him to an unfair and unreasonable administrative action likely to adversely affect him. That, no written reasons for the action were given to him and that, Standing Order No. 63 was ignored by the respondents, in their overzealousness to remove him from office in violation of his constitutional rights to a fair hearing and to be informed of the charges against him with sufficient detail for him to respond. The petitioner heavily relied on the Court of Appeal decision in the **Martin Wambora's Case (supra)** and urged this court to apply **“mutatis-mutandis”** the principles enunciated therein with regard to the removal of a County Governor.

50. In that Wambora case, it was stated that a Governor was entitled to notice and particulars of the charges facing him and notice as to whether the allegations were merely allegations of violation of the Constitution or other law or gross-violation of the Constitution and other law. That, gross violation of the Constitution included violation of the values and principles embodied in it that provided the bedrock and foundation of Kenya's Constitutional system. That, the facts that proved gross violation had to be proved before the relevant constitutional organ and thus, the High Court was duly bound to determine if the facts in support of the charges against a Governor met and proved the threshold in Article 181 of the Constitution. That, the office of Governor was different from the office of member of County Assembly although both were subject to competitive electoral process, the rule of differentiation was inherent in the doctrine of equality, different treatment of different offices was equality of treatment.

51. In relation to members of the County Assembly, the Court of Appeal clearly stated that the High Court had to confirm the grounds for removal. The Court of Appeal further stated that there was need to maintain a high threshold for removal of the Governor and to ensure that the law was strictly followed. That, the standard of proof was neither beyond reasonable doubt nor on a balance of probability but for the removal of a Governor the standard of proof was above a balance of probability and below reasonable doubt. That, whatever was alleged had to be serious, substantial and weighty and there had to be a nexus between the Governor and the alleged gross violation of the Constitution or any other written law. That, the charges framed against the Governor and the particulars thereof had to disclose a gross-violation of the Constitution or any other written law and the charges as framed had to state with degree of precision the articles or even sub-articles of the Constitution or the provisions of any other written law that had allegedly been grossly violated. That, the motion to remove a Governor from office and particulars of the charge had to expressly state that the alleged violation was gross and give particulars of the alleged gross-

violation.

52. The contention by the respondents with regard to the manner in which they carried out their mandated function in the removal of the petitioner as the speaker is aptly demonstrated in their joint response to the petition. First and foremost, they contend that the petition was overtaken by events as the petitioner was impeached on the 30th September, 2014 and was no longer the speaker of the County Assembly of Trans Nzoia.

53. With regard to that point, this court must state that prior to the impeachment proceedings slated at 2.30 p.m. on the same 30th September, 2014, the petitioner moved this court ex-parte and obtained interim injunctive orders restraining the respondents from carrying out and/or proceeding with the impeachment proceedings pending inter-parties hearing of the appropriate application dated 29th September, 2014 which was in effect the current petition as amended on the 6th October, 2014. Vide a Notice of motion dated 2nd October, 2014, the petitioner obtained further interim orders from this court restraining, halting and/or recalling for purposes of quashing the advertisement for the post of the Speaker of the County Assembly of Trans Nzoia that was placed in the Standard and Nation newspapers on the 2nd October, 2014 and staying the resolution passed and/or made by the County Assembly (2nd respondent) regarding the motion dated 22nd September, 2014 and passed on 30th September, 2014, resolving to remove the petitioner from office by impeachment.

54. Both the orders made by the court on 30th September, 2014 and the 6th October, 2014 had to be served and obeyed by the respondents thereby implying that the impeachment proceedings of the 30th September, 2014, were effectively stopped pending the hearing and final determination of the petition and if the proceedings went ahead in disregard of the court order, then the resolution passed and/or made by the County Assembly on that 30th September, 2014, to remove the petitioner from office by impeachment was effectively stayed and could not be implemented pending hearing and determination of this petition.

55. A separate application vide a chamber summons dated 17th October, 2014, was made by the petitioner for leave to institute contempt of court proceedings against specified members of the County Assembly and the Clerk of the Assembly (1st Respondent). Leave was accordingly granted on the 22nd October, 2014, against the first respondent only.

It is clear from all the foregoing that this petition is very much alive and has not been overtaken by events as alleged by the respondents.

56. Be that as it may, the respondents also contended that the procedure followed in removing the petitioner was proper and in accordance with section 11 of the County Governments Act and the rules of natural justice. That, to that effect, a notice to move a motion was filed by a member of the Assembly on the 22nd September, 2014 and forwarded to the clerk of the assembly in compliance with the Act and the Standing Orders. That, the notice which was supported by 60% of the members of the assembly clearly set out the grounds and action sought. That, the notice was received by the petitioner for him to respond. That, the clerk on receipt of the notice issued a written notice requiring the petitioner to appear before the assembly on 30th September, 2014, at 2.30 p.m. to respond to accusations made against him. That, the written notice was received and acknowledged by the petitioner on the 24th September, 2014. That, the petitioner did not appear before the assembly on the appointed date but instead rushed to the court to frustrate the work of the assembly. The respondents acknowledged that the business of the assembly is governed by the standing orders of the assembly read with the County Governments Act and the Constitution of Kenya, 2010 but contended that with regard to the removal of a speaker the applicable provisions are section 11 of the County Governments Act and Standing Order No. 58 of the Interim

County Assembly Standing Orders and therefore, Standing Order No. 63 would not apply to a Speaker but other office holders. That, in any event, the power to make Standing Orders is exercised by virtue of the County Governments Act, hence Standing Order No. 63 cannot override the express provisions of the Act and whenever there is a conflict between the provisions of the standing orders and those of the Act, the later would prevail in accordance with the rules of statutory interpretation. That, the notice of intention to move, a motion dated 22nd September, 2014, was received by the petitioner who declined the opportunity to defend himself.

57. After carefully considering all the submissions on that point made on behalf of the petitioner and the respondent by their respective Learned Counsels, **Mr. Ongoya and Mr. Sifuna**, it became apparent to this court that the test on whether the removal process was lawfully and properly conducted by the respondents against the petitioner was founded or anchored on the supremacy of the constitution over all other laws including the County Governments Act and the Standing Orders made under it. Therefore, any action undertaken in the name of the constitution but in contravention of the same constitution would be null and void "**ab-initio**". Such action would be treated as having been done contrary to the constitutional principles of good governance, integrity, rule of law, transparency and accountability in terms of Article 10 of the Constitution. Indeed, in the case of **Mumo Matemu vs. Trusted Society of Human Rights (2013) e KLR (Supra)**, it was held that:-

***“When a court examines the Constitutionality of any action, the courts will not be sitting in appeal over the opinion of the relevant organ but only examining whether relevant material and vital aspects having a nexus to the Constitutional and legislative purposes were taken into account in the actual process. The issue for consideration is whether the process had a clear nexus with the determination to meet the objective criteria established by law.”***

58. Herein, section 11 of the County Governments Act was applicable for it stipulates the procedure of the removal of a County Assembly Speaker. However, the provision does not stand on its own. It is fortified by standing order No. 58 and made compliant with the principles of natural justice by Standing Order No. 63 which would also apply to a Speaker who for all intents and purposes is a public officer and thus protected against victimization for performing the functions of his office and against removal from office without due process of law by dint of Article 236 of the Constitution.

59. In effect, section 11 of the County Governments Act and Standing Orders No. 58 and 63 of the Interim Standing Orders of the County Assembly of Trans Nzoia are the implementing and protective statutory provisions for the constitutional rights to fair administrative action and fair hearing.

60. Accordingly, the Notice of Motion for the removal of the petitioner as Speaker dated 22nd September, 2014 was properly presented to the clerk of the Assembly by **Hon. Angeline Too**, with the support and Concurrence of 60.5% of the Assembly members. The besieged speaker (petitioner) was served with a copy of the notice which he received on the 23rd September, 2014 together with the allegations/accusations/charges made against him to wit:-

1. *That, the petitioner has grossly violated several articles of the Constitutional of Kenya, 2010, which he swore to protect and defend being Articles 1, 2, 3, 6, 10, 178, 232 and 258.*
2. *That, the petitioner has been involved in corruption, conflict of interest and management of public resources contrary to the provisions of chapter 6 of the Constitution, The County Governments Act 2012 and the Public finance Management Act, 2012.*
3. *That, the petitioner has abused office in his capacity as both the speaker of the County Assembly and chairperson of the County Assembly Public Service Board under section 12 of the County Governments Act, 2012.*
4. *That, the petitioner has often acted with impunity and displayed gross misconduct in his behaviour, including unilaterally appointing himself as the sole signatory of the County Assembly accounts, withdrawing money from these accounts and depositing it directly in his personal accounts and authorising imprest of huge amounts drawn by his secretary without approval of the County Assembly service Board and the Finance and Budgeting Committee of the County Assembly.*
5. *That, the petitioner has been incompetent in the way he has presided over matters of the County Assembly and the County Assembly Service Board.*
6. *That, the petitioner has taken over the role of the clerk in matters of appointing public servants, through signing of appointment letters contrary to the County Governments Act, 2012, offended the principle of separation of power and values and principles of the Public service in article 232 of the Constitution.*
7. *That, the petitioner has throughout his term as Speaker of the County Assembly acted unconstitutionally, illegally, maliciously, selfishly and in conflict of interest contrary to his Oath of Affirmation of office sworn under schedule four (4) of th County governments Act, 2012.*
8. *That, the character and conduct of the petitioner is inconsistent with the leadership and integrity chapter 6 of the Constitution and the Public Officer's Ethics Act 2003.*

61. Notwithstanding those almost scanty nature of the accusations made against the petitioner, the respondents issued a notice to the petitioner to appear before the County Assembly. The notice dated 23rd September, 2014 was received by the petitioner on 24th September. It read as follows:-

**“RE:- NOTICE TO APPEAR BEFORE THE COUNTY  
ASSEMBLY.**

*The above matter refers.*

*By a resolution of the County Assembly made on the 23rd September, 2014, you are hereby required to appear before the County Assembly on Tuesday 30th September, 2014 at 2.30 p.m. in the afternoon at the County Assembly to answer to the allegations combined in the Notice of Motion hereof and grounds attached thereto and to further criminal charges of assault in which you physically fought the clerk, one Ainea Indakwa.*

*In the meantime, you are advised not to undertake any duties appertaining to your office and to hand over any properties belonging to the County Assembly until the house clears you of the allegations.”*

62. The notice was signed by A.O. Indakwa, as the Clerk of the County Assembly of Trans Nzoia.

In effect, the notice was also an attempt by the Respondents to prevent the petitioner from discharging his lawful duties as the Speaker pending the determination of his fate by the Assembly contrary to Article 236 of the Constitution.

Another notice followed on 1st October, 2014 headed “*Notice of resolution removing you from office and a vacancy in the office of the Speaker*”. It read as follows:-

*“Pursuant to the powers conferred upon the County Assembly by virtue of Article 178 (3) of the Constitution of Kenya, 2010, section 11 (1) County Governments Act and Standing Order 58 (1) of the County Assembly Standing Orders, by a resolution of more than 75% of the members of the County Assembly at its sitting on 29th September, 2014 (sic) in the afternoon, you Hon. David Kinisu Simiyu were removed from office as speaker of the County Assembly of Trans Nzoia.*

*Accordingly, a vacancy has arisen in the office of the*

*Speaker, County Assembly of Trans Nzoia.”*

The notice was again signed by the clerk of the County Assembly and was effectively informing the petitioner that he was dismissed from office and no longer the Speaker of the County Assembly of Trans Nzoia.

All the aforementioned notices were issued in the absence of proper due process and in total disregard to the petitioner's Constitutional rights to fair administrative action and/or fair hearing.

63. Suffice to hold that the accusations or charges made against the petitioner were not coated with specific details and particulars such as would provide “*prima-facie*” evidence to warrant an answer from him. The accusations did not establish an apparent nexus between the petitioner and the accusations contained in the appropriate notice of motion. As it were, the petitioner was asked to respond to unsubstantiated or unparticularized accusations in a process which was not only inchoate but also devoid of fairness. The petitioner was thus denied adequate time and facilities to prepare his defence. He was simply condemned unheard as the Assembly conveniently and deliberately ignored the provisions of Standing Order No. 63 in the rush to remove or impeach him. It was unreasonable to expect him to utilize an opportunity to be heard in such circumstances and on matters whose details and particulars were not within his knowledge and had not been provided to him. It is not far fetched for this court to opine that the power given to the Assembly by dint of section 11 of the County Governments Act as fortified by Order 58 of the Assembly's Standing Orders was abused by the deliberate failure of the County Assembly to apply the prescribed and/or complimentary procedure provided by the Assembly's Standing Order No. 63 thereby disregarding the petitioner's constitutional rights and indeed the principles of natural justice.

64. The Constitutional principles enunciated by the Court of Appeal in the Martin Wambora case (supra) respecting the removal of a County Governor would equally apply to the removal of a County Assembly Speaker. Those principles were herein not met by the County Assembly in the exercise of its constitutional mandate.

Any institution which deals with matters touching on the rights of any subject in any capacity whatsoever, must conform to the time honoured and hallowed principles of fundamental rights and natural justice. Therefore, any established breach of any of those principles in relation to any person must be met with quashing order irrespective of the calibre of the institution in respect of which the breach has been established.

65. A County Assembly must and is required to operate under the Constitution which is the Supreme Law of the land and if the Assembly violates the procedural requirements of the Supreme Law as demonstrated herein, it becomes the obligation of this court to assert the authority and supremacy of the Constitution (see, **The Speaker of the Senate & Another vs. Attorney General & Others Supreme Court Advisory Opinion No. 2 of 2013.**)

66. The scenario accruing in this matter was two fold, **firstly**, the removal or impeachment proceedings were conducted by the county Assembly while a valid court order stopping the process was hanging in the horizon. Whether, or not the order was brought to the attention of the Assembly prior to the proceedings would be an issue in the contempt of court proceedings pending against the clerk to the Assembly. In any event, this petition has brought out facts which show that there was a lot of drama between the Assembly members and the petitioner prior to the impeachment proceedings thereby demonstrating that the Assembly must have had wind that there was a court order stopping the process but attempted to avoid it by all means necessary.

**Secondly**, after the impeachment proceedings, the Assembly passed a resolution removing the petitioner from office and announcing a vacancy in the office of Speaker, County Assembly of Trans Nzoia.

67. All these proceedings involved the removal of a public officer and were conducted in violation and

total disregard of a valid court order. The net effect thereof was that the proceedings were null and void “*ab-initio*”.

Indeed, by purporting to pass a resolution to impeach a public officer, in disobedience of a valid court order, the respondents herein violated the Constitution. Their decision clearly undermined the authority of the court as provided under Article 159 and 160 of the Constitution.

68. In sum, this court must hold and hereby holds that the entire process leading to the removal or impeachment or purported removal or impeachment of the petitioner as the Speaker of the County Assembly of Trans Nzoia was flawed and not free from procedural impropriety such that the petitioner's constitutional rights and fundamental freedoms under Articles 25, 27, 28, 47 and 50 “*inter-alia*” were violated with impunity by the respondents. This petition is therefore well merited and is allowed in terms of prayers “bb” and “cc” of the amended petition dated 6th October, 2014 in that ***it is hereby declared and ordered*** that the process leading to the adoption of the resolution of the county Assembly (2nd Respondent) of the 30th September, 2014 impeaching and removing the petitioner from office as Speaker of the County Assembly was illegal in Violation of Article 47 of the Constitution read with Standing Order No. 63 of the Assembly's Standing Orders and was thus, null and void and of no effect and that, ***it is hereby declared*** that the decision of the respondent made on 30th September, 2014, conveyed vide a notice dated 1st October, 2014, impeaching and removing from office the petitioner as Speaker of the Assembly was reached in violation of Article 47 of the Constitution read with Standing Order No. 63 of the Assembly's Standing Orders and is hereby quashed for being null and void.

69. The petitioner shall be entitled to the costs of the petition against both respondents.

Ordered accordingly.

**[Delivered this 11<sup>th</sup> day of December, 2014.]**

**J.R. KARANJA.**

**JUDGE.**