



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT MACHAKOS
ELECTION PETITION NO.5 OF 2013
AND IN THE MATTER OF
THE ELECTION OF THE
MACHAKOS COUNTY ASSEMBLY SPEAKER

BETWEEN

FRANK MULISA MAKOLA.....
PETITIONER

AND

INTERIM CLERK OF MACHAKOS COUNTY ASSEMBLY

FELIX G. MBIUKI1ST
RESPONDENT

THE TRANSITION AUTHORITY2ND
RESPONDENT

COUNTY ASSEMBLY SPEAKER

B.N. MUNGATA.....3RD
RESPONDENT

COUNTY GOVERNOR

DR. ALFRED MUTUA4TH
RESPONDENT

MACHAKOS COUNTY ASSEMBLY5TH
RESPONDENT

JUDGMENT

Introduction

1. On Friday 22nd March 2013, the Machakos County Assembly (“the County Assembly”) held its first meeting and the first business transacted was the swearing in of county representatives and

- the election of the County Speaker (“the Speaker”).
2. The petitioner was amongst the 15 contestants interested in the Speaker’s seat. The elections were duly conducted and Mr Mungata, the 3rd respondent, was declared the duly elected Speaker after the third round of voting. At the material time, the 1st respondent was the Interim clerk (“the Clerk”) to the County Assembly and returning officer obligated to convene the first meeting of the Assembly and conduct the election.
 3. The Transition Authority (“the Authority”), is a body corporate established under **section 4** of the ***Transition to Devolved Government Act, 2012 (Act No. 1 of 2012)***. Its mandate extends to, *inter alia*, facilitating, developing a framework, coordinating, providing mechanisms and advice for the effective and successful transfer of functions, resources, assets and service from the National government to the County government.
 4. The petitioner being dissatisfied with the events leading up to the election and its conduct has presented the petition dated 2nd April 2013 to challenge the election of the Speaker. According to him, the conduct of election contravened constitutional principles and violated his fundamental rights; specifically his political rights. The petitioner avers that the county representatives were unduly influenced, bribed and intimidated to vote for the Speaker. He also avers that the representatives were induced by the Governor and his deputy to vote for the Mr Mungata and the whole electoral process was skewed in his favour.
 5. This matter was initially gazetted to be heard before the Magistrates’ Court at Mavoko sitting as an election court. When the matter came up for mention before Hon. Justice Mutende, she noted that the matter being a constitutional petition as opposed to an election petition, it ought to be referred to the Hon. Chief Justice for directions. On 2nd May 2013, the Hon. Chief Justice directed me to hear the matter.

Background Facts

6. To an extent the broad outlines of the facts leading up to the election of the Speaker are not contested and can be gathered from the depositions sworn by and on behalf of the petitioner and the respondents.
7. On Saturday 16th March 2013, the petitioner saw an advertisement for the vacancy of the position of Speaker for the County Assembly in the newspapers. On Monday, 18th March 2013, he visited the offices of the Clerk to collect the nomination papers. The Clerk reportedly informed him that he did not have the nomination forms and that he should leave his email address so that the documents could be forwarded to him. He subsequently learnt that he was required to collect the hard copy from the office and sign for it.
8. On 20th March 2013, the Machakos Town Independent Electoral and Boundaries Commission constituency office issued a clearance letter to the petitioner to enable him present his nomination papers. When he went to present his nomination papers, he was informed by the secretary to the Clerk that he needed to be personally present with two proposers who were the elected county representatives. He was only able to present his nomination papers at 2.45 pm on Wednesday 20th March 2013.
9. The petitioner was informed by his proposers that they had received invitation by telephone to come to the Machakos County Hall for orientation on the morning of 21st March 2013. He therefore prepared to meet all the county representatives, who constituted the voters and constituency, in order to lobby and campaign for his election. On the appointed day he proceeded to the County Hall but was prevented by the *askaris* from getting in on the ground that he was not part of the rehearsal. He then went to wait at an adjacent hotel hoping to meet them after the function.
10. At about 1.00 pm, two mini buses drove into the County Hall compound together with another

vehicle. His proposers informed him that the Governor, Dr Alfred Mutua, had invited all the County Representatives to a meeting at an unknown destination. Between 2.00 pm and 3.00 pm, the County Representatives left the County Hall and immediately boarded the two buses. The petitioner later learnt that they were taken to Ole Tukai Lodge at Amboseli which is around 200 Kilometres away from Machakos.

11. On the day of voting, the county representatives arrived at the County Hall just past midday and upon disembarking from the mini buses, were ushered straight into the hall. The petitioner avers that he tried to enter the hall but was turned away by the *askaris* who informed him that he was not allowed inside. He was thereafter ushered to a tent outside the Hall where he stayed throughout the election process.
12. According to the material before court, when the 1st round of voting was taken, the petitioner garnered 22 votes against Mr Mungata's 15. Three other candidates shared 3 votes. As none of the candidates received two thirds of the vote, a second vote was carried out. In the second round, the petitioner and Mr Mungata tied with 20 votes each. Following the vote tie, the Clerk adjourned the voting for about 30 minutes after which a third and final round of voting took place. Mr Mungata garnered 21 votes against the petitioner's 19 votes and was thereafter declared the duly elected Speaker.

Petitioner's Case

13. The petitioner faults the election process for various reasons including the fact that the county representatives were given their curriculum vitae upon close of nominations hence denying them an opportunity to interrogate each candidate's qualifications. He states that the names of the candidates were never published immediately upon close of nominations thereby allowing the Mr Mungata to present his nomination papers at 5.30 pm which was beyond the nomination deadline.
14. The petitioner contends that his constitutional right to participate in a free, fair and transparent election was breached and that his political rights guaranteed under **Article 38** of the Constitution were violated in the manner in which the election was carried out. The petitioner asserts that the election was not free and fair because the petitioner was deliberately prevented from accessing the constituency or electorate to campaign as he was entitled to canvass for the seat with the county representatives as the electors. He complains that there was undue influence exerted upon the county representatives by the 4th respondent in breach of **Article 81(e)(ii)** of the Constitution which provides that free and fair elections must be, "*free from violence, intimidation, improper influence or corruption.*" In the circumstances, he urges the court to interfere with and set aside the election of the Speaker in order to vindicate his rights.
15. The petition is also supported by affidavits sworn by Josephat Mutunga Mutisya and Pascal Kiseli. Mr Mutisya states that Mr Mungata was placed at an advantage by having unlimited access to the county representatives to the exclusion of all the other candidates. He believes that the elections were flawed as the county representatives were induced, intimidated and influenced to vote for Mr Mungata by being entertained at Ol Tukai Lodge. He states that there were strangers in County Hall including the deputy governor and five other persons whose roles and duties were not known and the entire election process was thus manipulated. Pascal Kiseli, one of the candidates for Speaker's post points to an incident where he walked into the Clerk's office and allegedly found Mr Mungata reading an acceptance speech even before the vote for Speaker had been completed. This, according to the deponent, was a clear sign that the respondents were bent on rigging the election.

16. The petitioner seeks the following reliefs in the petition:

- a. *A declaration to issue declaring the nomination and election of the county speaker of Machakos County Assembly Mr B M Mungata to be illegal, unprocedural, null and void.*
- b. *An order of judicial review cancelling the nomination and election of 3rd respondent as Machakos*

County Assembly Speaker.

- c. *An order of mandamus compelling the 1st, 2nd and 5th respondents to conduct the election of the county assembly speaker in accordance with the constitution, statutes and rules.*
- d. *An order of injunction directed at the 4th respondent Dr Alfred Mutua the Governor of Machakos County his agents, servants, employees restraining them from participating, influencing or in any way taking part in the election of the County Assembly Speaker of Machakos*
- e. *An order of compensation and costs.*
- f. *Any other relief that the court deems fit and appropriate.*

17. Mr Wandago, learned counsel for the petitioner, relied on written submissions dated 20th May 2013 in support of the petition. Counsel supported the position that the court is clothed with jurisdiction to inquire into the propriety and substantial conformity of the speaker's election with the Constitution. Counsel cited the case of ***Peter O. Ngoge v Francis Ole Kaparo and Others*, HC Misc. Appl. 22 of 2004 [2007] eKLR**, ***Trusted Society of Human Rights Alliance v Attorney General* [2012] eKLR** and ***Centre for Rights Education & Awareness (CREAW) & 6 Others v Attorney General, Nairobi Petition 208 & 207 of 2012 [2012] eKLR*** for the proposition that this court has jurisdiction to determine the matter.

18. Mr Wandago submitted that the Speaker's office is established under the Constitution and that as such the election must be conducted in a free and fair manner consistent with the principles and values of the Constitution. He asserted that this was not the case as the county representatives were sequestered at Ol Tukai Lodge before the election and the petitioner was not allowed to join them and campaign. Counsel also averred that the County Hall where the election was held was on the election date surrounded by security officers and that his client was not allowed into the County Hall contrary to **Article 196** which requires open proceedings and public participation.

19. Counsel further submitted that the Governor unduly influenced the county representatives to vote in a specific way in breach of **Article 81(a)** and **(e)(ii)**. As evidence to support this contention, the petitioner avers that during the voting, the 4th respondent sent a short text message (SMS) to the representatives asking them to do their part and he would keep his word. The translated version of the text from Kamba language read in part: *"As we have agreed I ask you to vote wisely so that Machakos can progress. Please don't disappoint me."*

20. According to counsel, a county assembly is properly constituted if it has all the members elected by dint of **Article 177**, so that there was no hurry to elect a speaker in view of the fact that the County Assembly did not have nominated members present. It was further submitted that **Article 178(2)** contemplates that Assembly can sit before the election of the speaker. It was also his submission that **Order No. 4(1)** of the **National Assembly Standing Orders** (As adopted by the National Assembly on 9th January 2013 during the 4th Session of the 10th Parliament) ("**Standing Orders**") is unconstitutional and in breach of the **County Government Act, 2012** in so far as it requires a County assembly to elect the Speaker at its first sitting. The order states as follows, *"A speaker shall be elected when the House first meets after a General Election and before the House proceeds with the dispatch of any other business, except the administration of the Oath or affirmation of Office to Members present."*

21. Mr Wandago maintained that the petitioner was disadvantaged against the other opponents and participated in the elections faced with those difficulties. As opposed to other candidates, he was required to physically bring his proposers when there were no such requirements in the rules published by the Authority. The effect of this requirement on the petitioner, he says was to benefit the 3rd respondent who filed his papers much later so that that requirement was meant to accommodate him to present his papers.

22. Counsel urged the court to allow the petitioner in order to uphold constitutional principles and values.

The Respondents' Case

23. The respondents opposed the petition. The 1st, 3rd, 4th and 5th respondents filed a Notice of Preliminary Objection dated 12th April 2013 and two replying affidavits sworn on 14th May 2013 by the 1st and 3rd respondents respectively.
24. One of the objections raised is that this court lacks jurisdiction to entertain these proceedings by virtue of the provisions of **Article 196(3)** read together with the provisions of **section 17** of the **County Governments Act, 2012** and the provisions of **sections 12 and 29** of the **National Assembly (Powers & Privileges) Act**. These provisions relate to parliamentary privileges and immunity which apply to County legislatures.
25. The second ground of objection was that the proceedings offend the doctrine of separation of powers encapsulated in **Article 175(a)** with respect to County government and that the issue of election of the Speaker of a County Assembly is an internal matter for the County Assembly and not amenable to the court's jurisdiction. It was further submitted that the only recognized statutory mechanism for the removal of a Speaker is through a resolution of the Assembly supported by not less than seventy five percent of all members of the Assembly as provided by **section 11** of the **County Governments Act, 2012** which is anchored in **Article 178 (3)**.
26. Mr Felix G. Mbiuki, the Clerk, by a replying affidavit sworn on 14th May 2013, opposed the petition. He confirms that the Authority invited members of the public who would qualify for the post of Speaker to collect nomination papers from the offices of the interim clerk of the county assemblies of all 47 counties. Mr Mbiuki depones that he acted in accordance with the **Standing Orders**. He states that he received the nomination forms from the 15 candidates including the petitioner on or about the 20th March 2013 and that he published a list showing all qualified candidates for the post of Speaker and that he made available the curriculum vitae of all the qualified candidates available to all county representatives.
27. Regarding the petitioner's allegation that the elections were not conducted in public, the Clerk contended that the process was conducted in open and that he invited several officials including the Deputy Governor to attend the swearing in ceremony of the members of the County Assembly. The Deputy Governor was therefore in attendance as an invitee and not as a representative of the Governor as alleged. Further, that the swearing in process was presided over by judicial officers. He noted that the local administration including the area Chief and other officers were invited and no one was given any preference for the post. The Clerk affirms that he acted impartially throughout the process.
28. The Authority denies any responsibility over the conduct of elections of the County Speaker of the County Assembly. Its position is set out in the replying affidavit sworn by its Chairman, Mr Kinuthia Wamwangi, on 13th May 2013. He asserts that the Authority bears no constitutional or statutory obligation to conduct and/or supervise the elections for the Speaker. Learned counsel for the Authority, Mr Makau, submitted that the Authority's powers and functions are spelt out in **sections 7 and 8** of the **Transition to Devolved Government Act, 2012 (No. 1 of 2012)** and that there exists no provision that mandates it to conduct, oversee and/or supervise the elections. Its only role in the election process was to publish the procedure and timelines to be applied from nomination of candidates to elections which was not the Authority's creation but was done on behalf of the Clerk.
29. Mr Makau, expressed the view that the court lacks jurisdiction to inquire into the proceedings of the County Assembly on account of the Assembly proceedings being privileged under the Constitution and the law and under the doctrine of separation of powers. It also contended that the petition lacked specificity on the particulars of the rights or freedoms that were infringed and/or violated by the Authority and that the facts pleaded do not disclose any contravention of rights as envisaged under **Article 38**.

30. Mr Mungata, the Speaker, swore an affidavit where he denied the allegation that the election process was skewed in his favour. He avers that his presence at Ol Tukai Lodge in Amboseli was not at the behest of the Governor but on his own volition and at his cost. He avers that he took the advantage of this opportunity to talk to the county representatives. He averred that his presence at the Lodge was not restricted to him alone and if the petitioner so wished, he would have made similar arrangements.
31. Mr Kilukumi, learned counsel for the 1st, 3rd, 4th and 5th respondents' submitted that the election of the Speaker is an election *sui generis*. It is not one where there were provisions for campaigning or appointment of the agents to oversee the exercise as is the case with the General elections for members of the county assembly. He submitted that the procedure governing the election of Speaker is to be found in the **Standing Orders** which are underpinned by **Article 196(3)** which reads, "*Parliament shall enact legislation providing for the powers, privileges and immunities of county assemblies, their committees and members.*"
32. Mr Kilukumi further submitted that according to the **Standing Orders**, the first business to be transacted at the first sitting of the assembly is the election of the speaker. In the circumstances, he stated that the Clerk was simply complying with the law. On the issue of campaigning, he submitted that the petitioner exercised his right to offer himself for election as provided for under **Article 38**. Counsel was emphatic that the election of the speaker is not founded on the principle of universal suffrage. He maintained that the electors are limited and confined by law to the elected county representatives and that the only campaign mechanism provided by the law was the provision of the candidates' curriculum vitae.
33. The respondents deny that there was no public participation as alleged by the petitioner. They assert that there was the public participation as members of the public were invited to attend the meeting. However, regarding the exclusion of all the candidates in the debating chamber it was their case that under the provisions of **Section 7 of the National Assembly (Powers and Privileges) Act, (Chapter 6 of the Laws of Kenya)** a stranger is not entitled to be present in the debating chamber.
34. The respondents relied on a number of cases for the proposition that this court lacks jurisdiction to enquire into the nomination process of Parliament and that separation of powers demands that the proceedings of the National Assembly and County assemblies enjoy immunity from the court. These cases include **Republic v the Judicial Commission of Inquiry into the Goldenberg Affair**[2007] 2 EA 392, **Republic v Registrar of Societies & 5 others ex parte Kenyatta & 6 others**, (2008) 3KLR(EP), **Bradlaugh v Gossett**[QBD] Vol. XII 271, **British Railways Board and another v Pickin**[1974]1 All ER and **Stockdale v Hansard** (9 Ad. & E. 1). Mr Kilukumi cited the well-known authoritative treatise of Parliamentary practice in the Commonwealth; **Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament**, 21st ed., London Butterworths 1989.

Issues for Determination

35. The parties broadly agreed that there were two issues for determination:
- a. Whether the court has jurisdiction to hear and determine the matter.
 - b. If the answer to the above question is the affirmative, whether the manner in which the election of the Speaker was conducted infringed on the petitioner's rights under **Article 38** of the Constitution.

Jurisdiction

36. The Supreme Court **In the Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011** made a clear statement on jurisdiction as follows, "[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by

statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in **Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1**, which bears the following passage (Nyarangi, JA at p.14): “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.” [30] **The Lillian ‘S’ case** establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

37. The jurisdiction of the High Court is set out in **Article 165(3)** which states;

(3). Subject to clause (5), the High Court shall have —

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(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

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.
[Emphasis added]

38. Hon. Justice Mwongo in **Clement Kung’u Waibara and Another v Francis Kigo Njenga and Others Nairobi EP No. 15 of 2013 (Unreported)** remarked that the question of jurisdiction, “inquires into whether the court is competent and has the legitimacy and authority to handle the petition and take a position thereon in any regard. For without jurisdiction, this court can take no further action in the matter and must instantly down its tools.” It is clear from the **Article 165(3)** that the High Court has jurisdiction to inquire into the legality of any act done or said to be done pursuant to the Constitution as has been emphasised in various cases; **Federation of Women Lawyers Kenya (FIDA-K) and Others v Attorney General and Another, Nairobi Petition No. 102 of 2011 [2011]eKLR**, **Albert Lukoru Loduna and Others v Judicial Service Commission Nairobi Petition No. 480 of 2012 [2012] eKLR**, **Kenya Youth Parliament & 2 others v Attorney General & another, Nairobi Petition No. 101 of 2011 (Unreported)**, **Trusted Society**

of Human Right Alliance v Attorney General Nairobi Petition No. 299 of 2012 (Unreported) and *Jeanne W. Gacheche and 6 Others v Judges and Magistrate’s Vetting Board and Others Nairobi Judicial Review No. 295 of 2011, 433, 434 and 438 of 2012 (Unreported)*.

39. In answer to the question as to whether this court has jurisdiction to inquire into the matters raised by the petition, I reiterate what I stated in the case of ***Commission For The Implementation of The Constitution v Parliament of Kenya and Others, Nairobi Petition No. 454 of 2012 (Unreported)***, “Therefore, as regards the question as to whether the court has jurisdiction to entertain the petition, the answer can only be in the affirmative; as to what lengths the Court can actually go in doing so is a second level inquiry based on the circumstances of each case.”

Violation of political rights

40. The second level inquiry, which is at the heart of this dispute, is whether the fundamental rights and freedoms of the petitioner have been violated. The petitioner has based his case squarely on the provisions of **Article 38** which secure and guarantee political rights in the following terms;

Political rights.

38. (1) *Every citizen is free to make political choices, which includes the right—*

(a) to form, or participate in forming, a political party;

(b) to participate in the activities of, or recruit members for, a political party; or

(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—

(a) any elective public body or office established under this Constitution; or

(b) any office of any political party of which the citizen is a member.

(3) Every adult citizen has the right, without unreasonable restrictions—

(a) to be registered as a voter;

(b) to vote by secret ballot in any election or referendum; and

(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

41. Before I proceed to consider the petitioner’s case, it is important to recall some of the principles that guide the Court in exercising jurisdiction. The Court is enjoined to be guided by the provisions of **Article 259(1)** which provides that the Constitution shall be interpreted in a manner that promotes its purpose, values and principles, advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights and permits development of the law and contributes to good governance. Apart from adopting the purposive approach demanded by **Article 259(1)**, the Court in considering constitutional provisions must give effect to the Constitution as a whole. The various provisions that deal with political rights must be read together in a manner that gives full effect to the purposes and provisions of the Constitution. In this respect I fully adopt the dictum stated in ***Centre for Rights Education and Awareness (CREAW) and Others v Attorney General Nairobi Petition No 16 of 2011 (Unreported)*** where the Court, quoting other decisions, stated that, “*In interpreting the Constitution, the letter and the spirit of the supreme law must be respected. Various provisions of the Constitution must be read*

together to get a proper interpretation.” (See also *Tinyefuza v Attorney General of Uganda Constitutional Appeal No. 1 of 1997 (Unreported)*, *Ndyanabo vs. Attorney General of Tanzania* [2001] 2 EA 485, and *Olum v Attorney General of Uganda* (2002) 2 EA 508).

42. In applying these principles, it must also be borne in mind that political rights set out in **Article 38** do not exist in isolation. The rights underpin a whole ecosystem that is the electoral process and the manner in which the sovereign authority of the people is exercised through Parliament and legislative assemblies in county government. These provisions are part of the Constitution and cannot be read apart from it. In *Dr Calvin Kadongo and Others v Transition Authority and Others Nairobi Petition No. 174 of 2013 (Unreported)* I opined that, “[12] *Fundamental rights and freedoms do not exist in isolation, they are part of the Constitution and must be realised within the framework set by the Constitution. It is a cardinal principle of interpretation of the Constitution that it must be read as a whole and in this respect the provisions regarding the electoral and election process cannot be isolated and sacrificed at the altar of absolute individual rights and fundamental freedoms. The fundamental rights and freedoms guaranteed under the Bill of Rights are also given effect and realised within the framework of governance. [13] Chapter Seven and Eight of the Constitution titled “Representation of the People” and “The Legislature” respectively give effect to the principle of sovereignty of the people articulated in the Preamble and Article 1. These provisions are underpinned by various fundamental rights and freedoms, which include political rights guaranteed under Article 38, which are given effect by provisions dealing with elections.*” This reasoning applies with equal force when dealing with devolved government and in dealing with the petitioner’s grievance, it is therefore imperative to revisit the constitutional and statutory provisions relating to the election of the Speaker cited by the parties.

43. The Speaker is an *ex-officio* member of the county assembly by dint of **Article 177(1)(d)**. The office of the Speaker’s position is anchored in **Article 178** which provides;

Speaker of a county assembly.

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

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

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

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

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

44. Also relevant to this matter is **Article 196** which requires public participation and provides for powers, privileges and immunities for County assemblies and which states as follows;

Public participation and county assembly powers, privileges and immunities.

196. (1) *A county assembly shall—*

(a) *conduct its business in an open manner, and hold its sittings and those of its committees, in public; and*

(b) *facilitate public participation and involvement in the legislative and other business of the assembly and its committees.*

(2) *A county assembly may not exclude the public, or any media, from any sitting*

unless in exceptional circumstances the speaker has determined that there are justifiable reasons for doing so.

(3) Parliament shall enact legislation providing for the powers, privileges and immunities of county assemblies, their committees and members.

45. In order to give effect to **Articles 178 and 196**, Parliament enacted the **County Governments Act, 2012** ("**the Act**") which according to its long title is, "*An Act of Parliament to give effect to Chapter Eleven of the Constitution; to provide for county governments' powers, functions and responsibilities to deliver services and for connected purposes.*" **Part III** of **the Act** contains various provisions relating to the composition and operations of the County Assembly. **Section 14(7)** of **the Act** states that until a county assembly makes its Standing Orders, the **Standing Orders** of the National Assembly shall, with the necessary modifications, apply to that county assembly. **Section 17** of **the Act** further stipulates that the national law regulating the powers and privileges of Parliament shall, with the necessary modifications, apply to a county assembly. The powers, privileges and immunities of Parliament are regulated by the **National Assembly (Powers and Privileges) Act (Chapter 6 of the Laws of Kenya)**.

46. Although the parties did not draw my attention to the provisions of the **Elections Act, 2011**, the procedure for election of the speaker of the county assembly following a first election under the Constitution is governed by **Section 21** of the **Elections Act** as read with the **First Schedule** to the Act. The relevant part of **section 21** reads as follows;

Election of county assembly speaker.

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

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

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

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

47. The provisions I have cited set out the manner in which the County legislature is organised and the centrality of the office of the Speaker within that architecture as the head of the legislature. The petitioner seeks orders of the court to set aside the election of the Speaker and in dealing with this issue the Court must have regard to the legal provisions I have cited and the overarching principle of separation of powers. The Supreme Court had this to say about the doctrine of separation of powers **In the Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 (Unreported)**; "*The effect of the Constitution's detailed provision for the rule of law in processes of governance, is the legality of executive or administrative actions 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.*"

48. In **Trusted Society of Human Rights Alliance Case (Supra)** the court observed as follows, on the balancing act to be maintained by courts, '*The Constitution consciously delegates the sovereign*

power under it to the three branches of government and expects that each will carry out those functions assigned to it without interference from the other two...this must mean that the Courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the Executive sufficient latitude to implement legislative intent. Yet...the courts have an interpretive role-including the last word in determining the constitutionality of all governmental actions. That, too, is an incidence of the doctrine of separation of powers.” In **Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11**, in examining the extent of court’s intervention in the legislative process, the South African Constitutional Court had this to say “[70] What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligation that Parliament is required to fulfil in respect of the passage of laws, on the one hand, and the respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand.”

49. What is not in doubt is that unconstitutional exercise of executive or legislative power cannot be shielded from judicial scrutiny by reason of respect of the doctrine of separation of power or in the name of parliamentary immunity or privilege. **Article 1** provides that all sovereign power belongs to the people to be exercised only in accordance with the Constitution and further delegates the sovereign power to various state organs among them Parliament and the legislative assemblies in the county governments. **Article 1(3)** is clear that the state organs upon which such power is to be delegated “shall perform their functions in accordance with [the] Constitution.” The Constitution is Supreme and is binding upon all persons and all State organs at both levels of government. Accordingly, no person or state organ is above the Constitution and their actions are amenable to the Constitution. **Article 3** places an obligation on every person to respect, uphold and defend the Constitution while **Article 10** enjoins all state organs, state officers, public officers and all persons to abide by the national values and principles. The ultimate arbiter of the core principles is the judicial branch. In **Republic v Independent Electoral & Boundaries Commission and others ex parte Cllr Elliot Lidubwi Kihusa and others Nairobi HC JR Misc. App. No. 94 of 2012**, where it was stated that, “The primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the State to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.” (See also **Minister of Health and Others v Treatment Action Campaign and Others (2002) 5 LRC 216, 248, Doctors for Life International v Speaker of the National Assembly and Others (Supra)**)

50. The petitioner’s rights under **Article 38** must be adjudicated in the context of the doctrine of separation of powers and the constitutional and legislative provisions that govern the organisation of the county assembly which I have set out above. In this respect I agree with Mr Kilukumi that the election of a Speaker is an election *sui generis*. A plain reading of **Article 38** as read with **Articles 178 and 196**, the **County Government Act**, the **Elections Act, 2011** and the **Standing Orders** do not envisage the election of the Speaker as one based on universal suffrage; it is an internal election for Speaker governed by special rules contained in the **First Schedule** to the **Elections Act, 2011** and the **Standing Orders** which are all underpinned by statutory and constitutional provisions I have cited. The County Assembly, as a legislative assembly, is entitled to regulate its own proceedings including the election of the Speaker.

51. What is clear from the facts of this case is that the petitioner was given an opportunity, like any other interested Kenyan, to be a candidate for an office established under the Constitution within the meaning of **Article 38(3)(c)**. The petitioner’s complaint is based on how the election of Speaker was conducted and that procedure is to be found in the **First Schedule** of the **Elections Act, 2011** which reads as follows;

ELECTION OF SPEAKER OF COUNTY ASSEMBLY

1. A speaker of a county assembly shall be elected when the county assembly first meets after a general election and before the county assembly proceeds with the dispatch of any other business.
 2. If the office of speaker falls vacant at any time before the dissolution of the county assembly, another member of the assembly shall be elected to preside over the transaction of business until after the election of a new speaker.
 3. The clerk of the county assembly shall preside over the election under paragraph (2).
 4. The names of candidates for election to the office of speaker shall be entered upon nomination papers obtained from and handed to the clerk, at least forty-eight hours before the time appointed at which the county assembly is to meet to elect a speaker, and shall be accompanied in each case, by signatures of two members who support the candidate and a declaration by them that the candidate is willing to serve and that the candidate is qualified to be elected as a member of the county assembly under this Act.
 5. The clerk shall maintain a register in which shall be shown the date and time when each candidate's nomination papers were received and shall ascertain that every such candidate for election to the office of speaker is qualified to be elected as such under this Act.
 6. The election of the speaker shall be by secret ballot.
 7. The clerk shall prepare, at least one hour before the meeting of the county assembly, ballot papers upon which shall be shown the names of all candidates validly nominated under paragraph (5) and shall issue not more than one such paper to each member who comes to the table to obtain it.
 8. The clerk shall, at the commencement of each ballot, cause the ballot box, empty and unlocked, to be displayed to the county assembly and shall, in the presence of the county assembly, lock the box, which shall thereafter be kept in the full view of the county assembly until the conclusion of the ballot.
 9. Each member of the county assembly who wishes to vote shall proceed to a booth or designated area provided by the clerk for that purpose and located next to and within reasonable distance of the ballot box and shall, whilst therein, mark the ballot paper by placing a mark in the space opposite the name of the candidate for whom the member wishes to vote, fold the marked ballot paper before leaving the booth or area and place the folded ballot paper in the ballot box. Provided that a member who, before the conclusion of a ballot has marked a paper in error may, by returning it to the clerk, obtain another in its place and the clerk shall immediately cancel and destroy the paper so returned.
 10. The clerk shall make such arrangements as may be necessary to enable any member with disability to vote.
 11. When it appears to the clerk that all members who are present and who wish to vote have placed their ballot papers in the ballot box, the clerk shall unlock the box, examine the ballot papers and, having rejected those unmarked or spoilt, report the result of the ballot; and no member who has not already recorded his or her vote shall be entitled to do so after the clerk has unlocked the ballot box.
 12. A person shall not be elected as speaker of a county assembly, unless supported by votes of two-thirds of all the members of the county assembly and if no candidate is supported by the votes of two-thirds of all the members, the candidate who in that ballot receives the highest number of votes and the candidate who in the ballot receives the next highest number shall alone stand for election in a further ballot and the candidate who receives the highest number of votes on the further ballot shall be elected speaker.
 13. A candidate may, by written notice to the clerk, withdraw his or her name before a ballot is started, and in the event of such withdrawal, the clerk shall cross the name of that candidate off any ballot papers issued for that or any subsequent ballot.
 14. Notwithstanding anything to the contrary in this schedule, if there is only one candidate who has been duly nominated, that candidate shall be declared forthwith to have been elected speaker, without any ballot or minimum vote being required.
52. Even if one were to resort to the **Standing Orders** that parties relied on, the relevant provisions provide as follows;

Vacancy in the Office of the Speaker

4(1) A Speaker shall be elected when the House first meets after a General Election and before the House proceeds with dispatch of any other business, except the administration of the Oath or Affirmation of Office to Members present.

Nomination of candidates

(5) Immediately upon the close of the nomination period ... The Clerk shall-

(a) publicize and make available to all Members, a list showing all qualified candidates; and

(b) make available to all Members, copies of the curriculum vitae of the qualified candidates.

(6) The Clerk, at least two hours before the meeting of the Assembly prepare ballot papers upon which shall be shown the names of all candidates validly nominated under paragraph (5) of this Standing Order.

Secret ballot

6(1) The election of the Speaker shall be by secret ballot.

53. These provisions clearly show that the election of Speaker does not admit open campaigns in the manner the election of members of the County assembly at the General election entails. Under the ***Standing Orders***, any campaign is limited to the distribution of the curriculum vitae of the nominated candidates to members of the electoral college which the petitioner admits was done. In my view, all that is required for the candidates, at least for purposes of the elections of Speaker immediately following the first General elections under the Constitution is for the prospective candidate to meet the criteria for qualification as a member of the county assembly provided under **section 25** of the ***Elections Act***. Any canvassing is on the candidates own initiative.

54. Furthermore, the entry into the precincts of the Assembly is a matter governed by the ***National Assembly (Powers and Privileges) Act*** which states, at **section 7**, that, “*No stranger shall be entitled, as of right, to enter and remain within the precincts of the Assembly.*” **Section 2** of the Act defines the term ‘stranger’ in relation to the Assembly to mean, “*any person other than the Speaker, a member of the Assembly or an officer of the Assembly.*”

The County Assembly has the right to regulate who goes in and out of its premises and this power is an incident of the privilege necessary for it to function freely without undue interference from any person or authority. The fact that the Assembly has the right to regulate person who enter into its premises does not negate the principle of public participation provided in **Articles 10** and **196**. The principle public participation depends on the facts and circumstances of the case (See ***Commission For The Implementation of The Constitution v Parliament of Kenya and Others (Supra)***, ***Consumer Federation of Kenya v Attorney General and Others Nairobi HC Petition No. 11 of 2012 (Unreported)*** and ***Law Society of Kenya v Attorney General Nairobi Petition No. 318 of 2013 [2013]eKLR***). The extent of public participation in this case is provided by inviting members of the public to vie for the position of Speaker. As the election is limited to county representatives electing the Speaker as the head of the County Assembly, it is not expected that the election will be carried out in the manner of an election based on universal suffrage. There is also no allegation that the election of the Speaker was not conducted in the open or in public as required by **Article 196**.

55. The petitioner’s allegations of inducement, undue influence and denial of the opportunity to campaign were founded on a misapprehension in the manner in which the election for Speaker is conducted as I have demonstrated in the provisions of the law. A consideration of the evidence

presented does not support a case that the elections were a sham, illegal or in any way lacking in probity.

56. The petitioner admits that the retreat for the county representatives was organised at least as early as 15th March 2013 and its agenda was, *inter alia*, “*Bonding of the Members of the County Assembly with the Governor-Elect and briefing on the Governor’s swearing in ceremony.*” It was not intended to be a campaign event for the Speaker’s position and any arrangement for any campaign was entirely within the discretion of the organisers and the county representatives. There is no requirement under the rules governing the election of Speaker that the county representatives must be made available to the petitioner.

57. Allegations of undue influence, bribery, intimidation and inducement are grave allegations to make. Although this case is not an election petition in the strict sense, it is matter that challenges the election of a speaker of a county assembly. In this respect I adopt what has been stated about the standard of proof in election petitions. In *Joho v Nyange and Another* [2008] 3 KLR (EP) 500 and *Onalo v Ludeki and Others* [2008] 3 KLR (EP) 507, the learned judges held the view that the burden of proving any allegation made in a petition lies with the petitioner and that any allegations made in an election petition have to be proved to the “satisfaction of the court.” I am certain that the standard of proof, save in matters where specific offences are alleged, cannot be generally beyond reasonable doubt, but because of the quasi– criminal nature of the allegations, it is almost certainly on a higher degree than merely on a balance of probabilities, the latter being the standard in civil cases.

58. The matters alleged to prove inducement, intimidation, undue influence and bribery are vague and lack particularity. Furthermore, the evidence proffered is threadbare and lacks any probative value. For example, if there was bribery, who gave whom money and how much. Did the county representative vote for the Speaker as a result of anything said or done by the 4th respondent? The evidence presented does not rise to the standard of proof required. My conclusion is particularly influenced by the fact that none of the county representatives deponed an affidavit in favour of the petitioner to prove or support the matters alleged.

59. The County Assembly members have now made their choice. **Section 11** of the *County Government Act* is clear on how a Speaker is removed from office. **Section 21(5)** of the *Elections Act, 2011* also provides the circumstances under which the seat of the speaker may become vacant. It provides;

(5) *The office of speaker of a county assembly shall become vacant—*

(a) when a new county assembly first meets after an election;

(b) if the office holder vacates office;

(c) if the county assembly resolves to remove the office holder of its members;

(d) if the office holder resigns from office in a letter addressed to the county assembly;

(e) where the office holder violates the Constitution;

(f) in the case of gross misconduct on the part of the office holder;

(g) where the office holder is incapable, owing to physical or mental infirmity, to perform the functions of the office;

(h) where the office holder is bankrupt;

(i) where the office holder is sentenced to a term of imprisonment of six months or more; or

(j) if the officer holder dies.

60. In the circumstances, I decline the entreaty to set aside the Speaker's election in the absence of a clear violation of the Constitution as this would not only be contrary to the statute but also breach of the doctrine of separation of powers particularly on a matter where the electoral college comprises county representatives who have exercised their will to choose their Speaker.

61. The petitioner has also alluded to several irregularities such as lack of clarity as to the time of collecting the nomination forms, whether the proposers should have attended personally to sign the forms, how the names of prospective candidates were recorded and failure to publicise the names. These irregularities are in my view not substantial as to affect the will of the country representatives who voted in three rounds to elect their Speaker.

62. I also find that there is no cause of action against the Transition Authority as it does not exercise any power or jurisdiction over the election of the County Speaker as evidenced by the provisions of the **County Government Act**.

63. Finally I reiterate what was stated in **Peter O. Ngoge v Francis Ole Kaparo and 4 Others (Supra)**, Justices Nyamu, Wendo and Dulu declared that, "*The invitation to the Court to intervene in the matter of the election of a Speaker which is clearly regulated by the Standing orders and which is required to be the first item of the agenda of a new session would in itself be a clear breach of the Constitution in that it is not the function of this court to interfere with the internal arrangements of Parliament unless they violate the Constitution. The doctrine of separation of powers as regards the internal arrangements of Parliament demands that we do not interfere with any such internal arrangements. The internal arrangements are those normally regulated by the Standing Orders of the House. There cannot be a valid cause of action based on what would clearly be a violation of the Constitution by the court if it was to intervene.*" The court further noted that, "*We must however not miss the chance to state that all organs of state namely the Legislative, Executive and the Judiciary are all subject to the Constitution. The High Court has the power to strike out a law or legislation passed by Parliament which is in conflict with the Constitution. The same applies to any privileges, immunities or powers claimed by Parliament which are in conflict with the Constitution. Nothing is immune from the courts scrutiny, if in conflict with the Constitution.*"

64. Mr Wandago argued that the County Assembly was not properly constituted in so far as did not have nominated members present and that the **Standing Orders** were unconstitutional and in breach of the **County Government Act, 2012** in so far as it requires the county assembly to elect the Speaker at its first sitting. This issue was not pleaded and was raised only during the submissions and I therefore decline to deal with it.

65. For the reasons I have set out above the petitioner's case must fail and is hereby dismissed.

Conclusion and Disposition

66. A summary of my conclusions and findings are as follows;

- a. The High Court has jurisdiction to interrogate the issues raised in the petition in so far as they allege violation of fundamental rights and freedoms guaranteed under the Bill of Rights.
- b. There has been no violation of the petitioner's fundamental rights and freedoms under **Article 38** of the Constitution as the election of the County Assembly Speaker is uniquely governed by the Constitution particularly **Articles 178** and **196**, the **Elections Act, 2011**, the **County Government Act** and the applicable **Standing Orders**.
- c. On the issue of costs I find that the petitioner brought this cause in order to enforce his

fundamental rights and freedoms. In the case of *John Harun Mwau and Others v Attorney General and Others, Nairobi Petition No. 65 of 2011(consolidated) [2012]eKLR* the court held that even though a case is one of enforcement of fundamental rights and freedoms, costs remained in the court's discretion. Although the petition is grounded on enforcement of **Article 38**, it is a petition filed to assert the right of the petitioner to contest the Speaker's election. It is in the nature of an election petition and in election petitions costs follow the event. I do not find any special circumstances that would warrant departure from the general principle. I therefore award costs of the petition to the respondents.

- d. Taking into account the nature of the matter, the fact that it was heard by way of submissions, I cap the total costs due to all respondents at Ksh. 500,000.00 only.

67.I hereby make the following orders;

- i. The petition dated 2nd April 2013 be and is hereby dismissed.
- ii. The petitioner shall pay the respondents' costs which are capped at a total of Kshs. 500,000.00.

DATED and DELIVERED at MACHAKOS this 24th day of June 2013

D. MAJANJA

JUDGE

Mr Wandago instructed by Okong'o, Wandago & Co. Advocates for the Petitioner.

Mr Makau instructed by J.A Makau & Co. Advocates for the 2nd respondent.

Mr Kilukumi instructed by Kilukumi and Company Advocates for the 1st, 3rd, 4th& 5th respondents.