REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 110 OF 2013

REPUBLIC .....APPLICANT

VERSUS

TRANSITIONAL AUTHORITY .....1ST RESPONDENT

INDEPENDENT ELECTORAL

BOUNDARIES COMMISSION.....2ND RESPONDENT

ALEX OLE MAGELO,

SPEAKER NAIROBI

COUNTY ASSEMBLY.....1st INTERESTED PARTY

NAIROBI COUNTY (THRO' THE

NAIROBI COUNTY GOVERNOR).....2nd INTERESTED PARTY

ATTORNEY GENERAL .....3rd INTERESTED PARTY

EX-PARTE

CRISPUS FWAMBA &

BENJAMIN HINGA NJERI

JUDGEMENT

On 22nd March, 2013 the 2nd Interested Party, the Assembly of Nairobi County (the Assembly) held its first sitting following the General Election held on 4th March, 2013. At that sitting, Alex Ole Magelo was elected the Speaker of the Assembly. He is the 1st Interested Party in these proceedings.

Crispus Fwamba and Benjamin Hinga Njeri, the 1st and 2nd ex-parte applicants (the applicants) have approached this court for certain orders amounting to a declaration that the election of the 1st Interested Party is null and void on the ground that at the time of the election the Assembly was not properly

constituted as envisaged by Article 177 of the Constitution.

The 1st Respondent is the Transitional Authority (the Authority) and the 2nd Respondent is the Independent Electoral Boundaries Commission (the Commission). The Attorney General is the 3rd Interested Party. The Attorney General though duly served did not participate in these proceedings.

The Authority is a body corporate established under Section 4 of the Transition to Devolved Government Act (Act No. 1 of 2012) and its core function is to facilitate and co-ordinate the transition to the devolved system of government in accordance with the Constitution.

The Commission is a body created by Article 88 of the Constitution and its general responsibility is conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament.

After the applicants obtained leave to commence these judicial review proceedings they proceeded to file a notice of motion application dated 4th April, 2013 in which they seek orders as follows:-

A. **AN ORDER OF CERTIORARI to remove to this Honourable Court and quash the decision of the Transitional Authority, the 1st Respondent herein in ordering the elections of the speaker of the County Assembly for Nairobi County by an improperly constituted County Assembly.**
B. **AN ORDER OF MANDAMUS compelling the 1st Respondent to order fresh elections of the speaker of the County speaker (sic) of the County Assembly for the Nairobi County Assembly to facilitate the proper election of a person to that office by a properly constituted and inclusive county Assembly.**
C. **AN ORDER OF MANDAMUS compelling the 1st Respondent to declare the seat for speaker of the County Assembly, (Nairobi County) vacant and to re-advertise the same to allow election of such speaker by a properly constituted county Assembly.**
D. **AN ORDER OF PROHIBITION directed at the 2nd Respondent prohibiting it from issuing and/or gazetting any person as the elected speaker of the county Assembly for Nairobi County.**
E. **Costs.**

The application is supported by grounds on its face and a supporting affidavit sworn by the 1st Applicant on the date of the application. It is also supported by a statutory statement and the 1st Applicant's verifying affidavit which were filed in court on 27th March, 2013 in support of the chamber summons application for leave.

The applicants' case is clearly brought out by the grounds, as contained in the statutory statement, upon which the application relies. The grounds are:-

1. **THAT the Applicants are aggrieved by the elections held for the office of the speaker of the County Assembly in Nairobi County as the said county assemblies are not properly constituted as provided by the Constitution.**
2. **That only a properly constituted county assembly can hold elections for the office of the speaker of the County Assembly which was not the case in the recently held elections for speaker of county Assembly in Nairobi County.**
3. **THAT in carrying out the elections for the office of the speaker of the county assembly, the clerks to the respective county assembly is in breach of the Constitutional provisions in regard to ensuring proper & inclusive membership of the county assembly is achieved.**
4. **That the Transitional Authority overlooked the constitutional provisions governing county assemblies and did not properly fulfill its constitutional mandate in regard to the same acted ultra vires the relevant law and the Constitution and thus the resultant decision being rendered null and void.**
5. **THAT the business being carried out by the county assemblies in Nairobi County is**

unconstitutional as only duly elected constitutional office holders are capable of carrying out such duties in compliance with the Constitution.

6. **That the Applicants' rights in regard to proper representation in the county assembly as voters have been violated.**
7. **That this Honourable Court is bestowed with the power to check and control constitutional compliance by all persons and bodies.**
8. **That this Honourable Court ensures that everyone has the right to an effective remedy for all actions that are in violation of the constitutional safeguards in place and as guaranteed by the Constitution.**
9. **That this court has the powers to grant the orders sought.**

Looking at the papers filed in court by the applicants, it is clear that their case is that the election of the 1st Interested Party by the Assembly is null and void since at the time of the election the Assembly was not properly constituted as stipulated by Article 177 of the Constitution. Article 177 provides for the membership of a county assembly as follows:-

"177. (1) A county assembly consists of—

> **(*a*) members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;**
>
> **(*b*) the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender;**
>
> **(*c*) the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and**
>
> **(*d*) the Speaker, who is an *ex officio* member.**
>
> **(2) The members contemplated in clause (1) (*b*) and (*c*) shall, in each case, be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (*a*) in accordance with Article 90.**
>
> **(3) The filling of special seats under clause (1) (*b*) shall be determined after declaration of elected members from each ward.**
>
> **(4) A county assembly is elected for a term of five years."**

The applicants argue that the Authority acted illegally by calling for the election of the speaker of the Assembly before it was properly constituted in compliance with Article 177.

The applicants have roped in the Commission as the body **"mandated to gazette all duly elected persons in their respective capacities in any given election within the Republic of Kenya"**

The Authority and the Assembly were represented by Professor Tom Ojienda. The Authority opposed the application through a replying affidavit sworn by its CEO/Secretary, Mr. Stephen Makori on 15th May, 2013. The 2nd Interested Party opposed the application by way of a replying affidavit sworn on 15th May, 2013 by the Governor of Nairobi County, Dr. Evans Odhiambo Kidero.

Through the said affidavits the Authority and Nairobi County oppose the application on the ground that the applicants have not established that they acted illegally, unreasonably or unfairly so as to merit the grant of the orders sought. They also assert that this court lacks jurisdiction to hear this application since the same challenges the election of a member of a county assembly and the proper forum provided by the law for such a challenge is before a Resident Magistrate's Court designated by the Chief Justice to hear an election petition. It is the Authority's case that in exercise of powers conferred upon it under Section

138(3) of the County Governments Act (Act No. 17 of 2012) it appointed interim county clerks to preside over the election of speakers for the county assemblies and in compliance with Article 178(1) of the Constitution it advertised for the position of speaker of Nairobi County. It is the Authority's case that the 1st Interested Party's election was procedural, lawful and complied with the provisions of the First Schedule of the Elections Act, 2011. The Authority submitted that the first meeting of county assemblies after the first General Election under the Constitution promulgated on 27th August, 2010 was to be held within 14 days from the date of the gazettement of the results of the General Election by the Commission. The Authority contended that a county assembly is required to elect its speaker in its first meeting before conducting any other business and that was what was done in respect to the election of the 1st Interested Party. The Authority argued that on the other hand Section 36(4) of the Elections Act requires the Commission to designate within 30 days after the declaration of the election results, from each qualifying list, the party representatives on the basis of proportional representation. The Authority's case is that there was no illegality in proceeding with the election of the speaker in the absence of county assembly members to be nominated for the gender top up and special seats created by the Constitution.

It is the Authority's position that Section 14(2)(a) of the County Governments Act takes care of the absence of certain members by providing that **"a vacancy in the membership of county assembly does not invalidate county assembly proceedings."**

The Authority finally argued that the application before this court is defective since the applicants have not submitted to the court the decision they are asking this court to quash.

The Governor of Nairobi County adopted the Authority's position in regard to the application.

The Commission filed grounds of opposition dated 23rd April, 2013. Its grounds of opposition are:-

> **"1. This Honourable Court lacks jurisdiction to determine the Application.**
>
> **2. The Speaker of Nairobi County Assembly was lawfully elected and has therefore gained the right to be gazetted.**
>
> **3. The 2nd Respondent has wrongfully been joined to these proceedings.**
>
> **4. The Application is frivolous, misconceived and an abuse of the court process."**

The Commission submitted that under Article 177(1) of the Constitution, the speaker is an ex-officio member of a county assembly and in accordance with Section 75 (1A) of the Elections Act **"A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice."** It is Commission's case that this court is not a Resident Magistrate's Court designated by the Chief Justice and it is therefore not clothed with jurisdiction to hear this matter. The Commission further submits that where the Constitution or statute provides a procedure for seeking a remedy then that procedure should be followed and this court should restrain itself from interfering with that process.

In support of this argument the Commission cited the decision of this court (Majanja, J) in **FRANCIS GITAU PARSIMEI & OTHERS v NATIONAL ALLIANCE PARTY AND OTHERS [2012] eKLR** where it was stated that:-

> **"It is against this background that the Court of Appeal established the principle that where the Constitution and or statute establish a dispute resolution procedure, then that procedure must be used. Within the rubric of electoral process, that principle has been emphasized time and again."**

Counsel for the Commission also referred this court to the decision of the Court of Appeal in **KIPKALYA KIPRONO KONES v REPUBLIC & ANOTHER EX-PARTE KIMANI**

WANYOIKE & 4 OTHERS [2008] 3 KLR [EP] 291 where it was held that :-

> **"The jurisprudence underlying these decisions is that the Constitution itself and the National Assembly and Presidential Election Act deal with and set out in detail the procedure of challenging elections and nominations to the National Assembly. Those procedures ought to be followed and the judicial review process which in Kenya is provided for in the Law Reform Act, Chapter 26 of the Laws of Kenya and Order 53 of the Civil Procedure Rules cannot oust the provisions of the Constitution in particular. The Law Reform Act and Order 53 of the Civil Procedure Rules are both inferior to and can only apply subject to the provisions of the Constitution."**

The second ground upon which the Commission opposed the application is that it has wrongfully been enjoined to these proceedings. The argument is that there is no claim, allegation or complaint made against it and neither have the applicants demonstrated that it has breached or threatened to breach the Constitution or any law. It is the Commission's case that its role in relation to the election of a county assembly speaker ends once it determines the place, the date and the time of the first sitting as required by Section 136 of the County Governments Act.

The Commission submits that Paragraph 3 of the First Schedule of the Elections Act provides that the clerk of the county assembly shall preside over the election of the speaker and if any gazettement is to be done then it should be done by the clerk of a county assembly and not the Commission. It is the Commission's case that there is no legal provision that mandates it to gazette an elected speaker and the claim that it was about to gazette the 1st Interested Party was not based on any fact or legal provision.

The Commission further submitted that the fact that it had been wrongfully joined in these proceedings confirms that this application is intended to be an election petition. The Commission referred to Rule 9 of the Elections (Parliamentary and County Elections) Petition Rules 2013 which provides that it shall be a respondent in an election petition filed under the Act. The Commission asserted that its enjoinment to these proceedings by the applicants demonstrates that this is an election petition which ought to have been filed in a Resident Magistrate's Court designated to hear election petitions.

On the issue of the election of the 1st Interested Party, the Commission submitted that he was lawfully elected in accordance with the Standing Orders of the Assembly. The Commission cited various statutory provisions to buttress this argument. These are the provisions already cited by the Authority in its submissions and I need not reproduce them.

As to why it thinks the application is frivolous, misconceived and an abuse of the court process, the Commission submitted that an order of prohibition is not available to the applicants because the election of the 1st Interested Party was lawful. The Commission also argues that since it has no mandate to gazette the election of the 1st Interested Party, the prayer for an order of prohibition by the applicants is frivolous and an abuse of the court process.

The 1st Interested Party, Alex Sanaika Ole Magelo opposed the application through a replying affidavit sworn on 23rd April, 2013. Through the said affidavit he contends that the right procedure for the election of a county assembly speaker as provided by the Constitution, the Elections Act and the County Governments Act was duly followed in his election as the speaker of the County Assembly of Nairobi. He argues that the remedy of judicial review is not available to the applicants since he is a member of a county assembly and any dispute relating to his election is an election dispute which ought to be dealt with through the procedure for redress of election disputes prescribed by Article 87 of the Constitution and the Elections Act. He therefore argues that this court has no jurisdiction to entertain this application.

The 1st Interested Party submitted that the application before court is premature in that the applicants are challenging the results of his election before gazettement of the results. Another objection to this cause is that the applicants have failed to prove that the respondents herein have made a decision detrimental to their interest which is capable of being investigated by way of judicial review or capable of being quashed

by orders of certiorari and they have therefore failed to properly invoke the jurisdiction of the court to issue the orders sought.

The 1st Interested Party submits that an order of mandamus is not available to the applicants in that they seek to compel the Authority to declare a seat of a county assembly vacant yet the procedure for declaring a seat of a county assembly vacant is only as provided by Section 11 of the County Governments Act. The 1st Interested Party strongly submitted on the validity of his election and referred the court to the provisions of the law cited by the respondents and the 2nd Interested Party.

The 1st Interested Party finally urged this court to consider the ramifications of allowing the application since the elections of the speakers of the other 46 counties were conducted under conditions similar to those of his election.

In reply to the submissions of the respondents and the interested parties, the applicants submitted that in accordance with Article 165(3) of the Constitution, this court has unlimited original jurisdiction in criminal and civil matters and this jurisdiction cannot be ousted, subverted, thwarted, undercut or limited by an Act of Parliament. It is the applicants' argument that electoral disputes are not categorized as among matters in which the High Court has no jurisdiction. The applicants argue that even though Article 87 of the Constitution mandates Parliament to enact legislation to establish mechanisms for timely settling of electoral disputes, the High Court is not denied the opportunity to hear and determine electoral disputes. The applicants sought to distinguish this matter from the decisions cited and argued that the election of speaker of a county assembly is not equivalent to the election of a member of a county assembly. The applicants argue that the election of a county assembly speaker is not an election within the meaning of the Elections Act. Citing sections 75(1) and 75(1A) the applicants argue that there is nothing in the said sections to show that a dispute involving the election of a speaker of a county assembly should be heard and determined by a Resident Magistrate's Court. The applicants assert that if Parliament intended that disputes involving the election of a speaker should be heard by a Resident Magistrate's Court then it would have expressly said so. This court was referred to the decision in the **High Court Petition No. 23 of 2013 LADY JUSTICE NANCY BARAZA V THE JUDICIAL SERVICE COMMISSION [2012] eKLR** where the court observed that:-

> **"If the Parliament, in its wisdom intended the process for removal of Deputy Chief Justice to be the same as that of removing the Chief Justice, nothing would have prevented it from saying so."**

The applicants reiterated that this is a judicial review application and this court is properly seized of the matter.

Looking at the submissions made before this court I am of the view that the issues for determination are:-

1. Whether this court has jurisdiction to hear and determine this matter;
2. If the answer to the above is in the affirmative, whether there is a proper judicial review application before this court;
3. If the foregoing questions are answered in the affirmative then the other issue would be whether the election of the 1st Interested Party as the speaker of the County Assembly of Nairobi breached Article 177 of the Constitution or other provisions of the Constitution; and
4. Who should meet the costs of this application?

It is now established law that where a question of the court's jurisdiction has been raised, the court should first carry out an enquiry to establish its jurisdiction before doing anything else. If a court finds that it has no jurisdiction, it should abandon the matter without any further action. In the case of **SAMUEL KAMAU MACHARIA & ANOTHER v KENYA COMMERCIAL BANKS & 2 OTHERS [2012] eKLR** the Supreme Court addressed the issue of jurisdiction as follows:-

> **"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a**

court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings…….Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

I entirely agree with the decision of the Supreme Court. Article 165(3) of the Constitution donates to this court extensive jurisdiction but expressly bars the court from hearing and determining disputes relating to employment and labour relations; and the environment and the use and occupation of, and title to, land. The court is also denied jurisdiction in respect of matters reserved for the exclusive jurisdiction of the Supreme Court under the Constitution – see Article 165(5). In such circumstances this court's boundaries are clearly delineated by the Constitution and the court would be usurping the powers of other courts were it to delve into those exclusive areas. However, there are times when the issue of jurisdiction is not as clear as day and night and the court will have to carry out further enquiry in order to establish its boundaries. That is the situation in the case before me. There is therefore need to carry out further interrogation on the matter of jurisdiction.

I have already reproduced at length, the stand points of the parties herein in regard to the issue of jurisdiction. The respondents and interested parties are of the view that this is an election dispute and the correct forum is a Resident Magistrate's Court designated by the Chief Justice for hearing such disputes. The applicants think otherwise.

From the outset it should be noted that these judicial review proceedings are in essence aimed at removing the 1st Interested Party from the position of the speaker of the County Assembly of Nairobi. I agree with the sentiments of the Court of Appeal in the already cited case of **KIPKALYA KONES** that where the Constitution or legislation provides a procedure for settling a dispute, that procedure should be adhered to. The Court of Appeal re-emphasized this position in the recent case of **REPUBLIC v NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY, COURT OF APPEAL AT NAIROBI, CIVIL APPEAL NO. 84 OF 2010** when, it stated that:-

"Mr. Ngatia, for the appellant, did not contend before the trial Judge or before us that there was no right of appeal against the Respondent's order of 20th January, 2009; what Mr. Ngatia maintained before the trial Judge as well as before this Court is that in spite of the right of appeal provided under *section 129* of the Act the Appellant was entitled to approach the High Court by way of judicial review. The trial Judge, as we have stated, agreed with that contention but went on to consider whether the orders sought should be granted and why those orders were preferred over the appeal process. She also held that the Appellant had not explained why the process of judicial review was preferred over the appeal process……

We agree with Mr. Ngatia that the issue raised in the Appellant's notice of motion were in the domain of public law. But we do not accept that once a matter falls within the public law domain, judicial review is the only way to litigate upon it or it must be through the judicial review process. As we pointed out earlier, Mr. Ngatia did not contend that the matter fell outside the jurisdiction of the Tribunal specifically created to deal with disputes concerning the environment. The Tribunal itself is a public body created by statute to administer the appeal process under the Act; it cannot deal with matters concerning private law for instance. The learned Judge was merely weighing the

issue of whether the High Court was in a better position to deal with the matter than the Tribunal. She dealt with the speed or pace at which the Tribunal would be able to resolve the matter and compared that with the speed or pace which would be adopted by the busier courts. She dealt with the expertise available in the Tribunal as against the High Court and such like matters and having taken all those considerations into account, she concluded that the matter ought to have been dealt with by way of an appeal rather than by way of judicial review. The Judge backed up her decision with authorities…….

The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it – see for example R V. BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD. Case. The learned trial Judge, in our respectful view, considered these strictures and came to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect, we agree with the Judge."

I entirely agree with the position of the Court of Appeal. What I will embark on at this stage is to establish whether the election of a speaker of a county assembly is an election to be subjected to the election dispute resolution mechanism envisaged by the Elections Act. If at the end of the journey I find that a dispute concerning the election of the speaker of a county assembly should be determined by an election court, then I will have no alternative but to down my judicial review tools.

It must be noted from the outset that the speaker is an ex-officio member of the county assembly. The fact that he is an ex-officio member means that he is a member by virtue of his office. He is not like the other members who become members after undergoing certain electoral processes. Majanja, J correctly captured the unique position of a speaker of a county assembly in **ELECTION PETITION NO. 5 OF 2013 FRANKLINE v INTERIM CLERK OF MACHAKOS COUNTY ASSEMBLY AND 4 OTHERS** when he observed at paragraph 50 of his judgment that:-

"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 organization 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."

Since the election of a speaker of a county assembly is *sui generis*, the only way to understand whether the speaker is like the other members of a county assembly is to study the law relating to the removal of the speaker. The best starting point is the Constitution. Article 178 refers to the speaker of a county assembly and states that:-

"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."

Article 178(3) clearly mandates Parliament to enact legislation providing for the election and removal from office of speakers of county assemblies. The Constitution does not therefore provide for the election and removal of speakers of county assemblies.

When it comes to the "proper" members of the county assembly, the Constitution at Article 194 provides for the vacation of office as follows:-

"194. (1) The office of a member of a county assembly becomes vacant—

(*a*) if the member dies;

(*b*) if the member is absent from eight sittings of the assembly without permission, in writing, of the speaker of the assembly, and is unable to offer satisfactory explanation for the absence;

(*c*) if the member is removed from office under this Constitution or legislation enacted under Article 80;

(*d*) if the member resigns in writing addressed to the speaker of the assembly;

(*e*) if, having been elected to the assembly—

(i) as a member of a political party, the member resigns from the party, or is deemed to have resigned from the party as determined in accordance with the legislation contemplated in clause (2); or

(ii) as an independent candidate, the member joins a political party;

(*f*) at the end of the term of the assembly; or

(*g*) if the member becomes disqualified for election on grounds specified in Article 193 (2).

(2) Parliament shall enact legislation providing for the circumstances under which a member of a political party shall be deemed, for the purposes of clause (1) (*e*), to have resigned from the party."

Looking at the cited provisions of the Constitution, it is clear that the makers of the Constitution intended that the procedures and the grounds for the removal of a speaker and the other members of a county assembly should be different. The procedure for the election of a speaker of a county assembly is set out in the First Schedule of the Elections Act. The removal of a speaker from office is contained in Section 21 (5) of the Elections Act which provides that:-

"(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 by a resolution supported by the votes of at least two-thirds 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."

Comparing the grounds for the removal of the other members of a county assembly with those for removal of the speaker, it becomes clear that the grounds are not the same. Of importance to note, is that Article 194(1)(c) provides that the office of a member of a county assembly becomes vacant **"if the member is removed from office under the Constitution or legislation enacted under Article 80".** A removal under the Constitution would include a removal through an election petition. For a speaker, unlike the other members, he can only be removed, if he violates the Constitution. This in my view does not include a removal through an election petition since that would amount to a removal under the Constitution.

The procedure for removal of a speaker of a county assembly as captured by Section 21(5) of the Elections Act compares well with the laws of other Commonwealth jurisdictions. Writing on election laws in India, P.D.T. Achary at page 207 of **BHARAT'S LAW OF ELECTIONS, 1st Edition, Bharat Law House, 2004** observed that a speaker or deputy speaker could only vacate office as follows:-

"A member holding office as Speaker or Deputy Speaker of the House of the People-

a. **shall vacate his office if he ceases to be a member of the House of the People;**
b. **may at any time, by writing under his hand addressed, if such member is the Speaker, to the deputy Speaker, and if such member is the Deputy Speaker, to the Speaker resign his office; and**
c. **may be removed from his office by a resolution of the House of the People passed by a majority of all the then members of the House:**

Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution:

Provided further that, whenever the House of the People is dissolved, the Speaker shall not vacate his office until immediately before the first meeting of the House of the People after the dissolution."

Nowhere is the removal of a speaker by way of an election petition mentioned in the said book.

There are other reasons which make me think that the removal of a speaker through an election petition is not accommodated by the electoral laws that have been enacted. In an election petition, the Commission must be made a respondent - see paragraph 9 of the Elections (Parliamentary and County Elections)

Petition Rules, 2013. However, the Commission does not in any way participate in the election of a speaker. How then can it be made a party to proceedings for which it plays no role? This should point to the conclusion that the election of a speaker of a county assembly cannot be challenged through an election petition.

It is also noted that legislation does not provide for gazettement of the election of a county speaker. Yet Section 76(1)(a) provides that **"A petition - to question the validity of an election shall be filed within twenty eight days after the date of the publication of the results of the election in the Gazette ....."** Since the election of a speaker is not subject to gazettement how and when will the 28 days start running? When can a person aggrieved by the election of a speaker lodge an 'election petition'?

I also managed to get one decision from the Supreme Court of Zimbabwe which shows that the judiciary in a constitutional democracy like ours can overturn the election of the speaker of parliament. I am persuaded by the said decision and I hold that the removal of the speaker of parliament through the judicial process applies to the removal of the speaker of a county assembly. In the cause of **MOYO AND OTHERS v ZVOMA AND ANOTHER, (SC 28/10) [2011] ZWSC (10 March 2011)**, the Supreme Court of Zimbabwe held that the election of the speaker of Parliament could be challenged through the judicial process. The genesis of this case is that after the general election of 2008 the election of the Speaker of the House of Assembly/Parliament was challenged on the ground that the Speaker had not been elected through a secret ballot as dictated by the Constitution and the parliamentary standing orders. It was not disputed that six members had openly displayed their marked ballot papers before depositing them in the ballot box. The High Court dismissed the matter but on appeal, the Supreme Court in a majority judgement quashed the decision and held that the election of the speaker was illegal since it had not been conducted through a secret ballot as required by the Constitution and legislation.

The decision of the Supreme Court of Zimbabwe clearly shows that when the election of a speaker does not comply with the Constitution and or legislation, the court can overturn such an election. The decision from Zimbabwe also confirms that the removal of the speaker can be done by use of other procedures apart from an election petition. In the said case the proceedings were commenced in the High Court through an application for judicial review and not an election petition although the complaint was that the laws relating to the election of a speaker had been overlooked by the parliamentary clerk who had conducted the elections.

The finding by the Supreme Court of Zimbabwe that courts can entertain a challenge to the election of a speaker was affirmed in passing by J. G. Nyamu, J (as he then was), R. Wendoh and G. A. Dulu, JJ in **PETER O NGOGE v FRANCIS OLE KAPARO & OTHERS [2007] eKLR** when they stated 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 <u>it is not the function of this court to interfere with the internal arrangements of Parliament unless they violate the Constitution</u>. The doctrine of separation of powers as regards the internal arrangements of Parliament demands that we do not interfere with and such internal arrangement. The internal arrangements are those normally regulated by the Standing Orders of the House. There cannot therefore 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 declarations and orders sought in this regard would be plainly in contravention of the Constitution. Moreover, it would result in the court interfering with the immunity granted to Parliament on such internal matters which have nothing to do with any violation of the Constitution. The powers, privileges and immunities of Parliament are provided for by the National assembly (Powers and Privileges and Immunities Act Cap 6 Laws of Kenya). <u>Our view is that the court would only be entitled to intervene to uphold the provisions of the Constitution.</u> An application which in substance invites the court to violate a constitutional provision or doctrine of separation of powers is itself an abuse of the court process, and is also incompetent and ought to be dealt with summarily." (The underlining is mine for emphasis).**

In my view, where a county assembly fails to remove a speaker and the speaker has clearly violated the Constitution and or legislation, the court, if properly moved, should not hesitate to affirm and establish the rule of law by removing the speaker. This court is mandated to interpret, protect and enforce the Constitution and the laws made thereunder and it should not shy away from fulfilling its mandate. However, this is a power that should be exercised with extreme caution lest the courts are inundated with spurious and vexatious applications aimed at destabilizing the operations of county governments. It must always be borne in mind that the intention of Parliament is that a speaker should be removed by the county assembly.

One may then ask why the election of a speaker of a county assembly has been included in the Elections Act. In my humble view, such inclusion was just a matter of convenience. It can be compared to the inclusion of Order 53 in the Civil Procedure Rules. This Order which deals with judicial review applications has no nexus with the other Civil Procedure Rules.

In summary, I express a guarded view that a dispute concerning the election of a speaker of a county assembly need not be addressed through an election petition. The best means for addressing such a dispute is through a judicial review application or constitutional petition. On the issue as to whether this application is properly before this court, I therefore find and hold that the applicants have knocked on the right door. This court has jurisdiction to entertain their application and I will proceed to consider the same.

The second issue is whether these judicial review proceedings are defective. Judicial review proceedings are normally brought under strict rules found in Order 53 of the Civil Procedure Rules, 2010. Much as Article 159(2)(d) of the Constitution now directs the focus of the court on the substantive justice, the rules of procedure cannot be ignored. The Court of Appeal had an opportunity to address this issue in the recent case of **MUMO MATEMU v TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE AND 5 OTHERS, NAIROBI CIVIL APPEAL NO. 290 OF 2012** where it observed that:-

> **(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude *ex ante* is to miss the point.**
>
> **(42) However, our analysis cannot end at that level of generality. It was the High Court? s observation that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting." Yet the principle in *Anarita Karimi Njeru (supra)* underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to *Article 159* of the Constitution and the overriding objective principle under *section 1A* and *1B* of the Civil Procedure Act (Cap 21) and *section 3A* and *3B* of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru (supra)* that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle."**

I agree with Court of Appeal that the rules of procedure should be adhered to. Not every rule of procedure has now become a technicality to be dispensed with by quoting Article 159(2)(d) of the

Constitution. The court should consider the import of non-compliance with a rule of procedure before deciding whether non-compliance is a mere technicality.

In opposition to this application, the respondents and interested parties submitted that the application is bad in law since the applicants did not comply with the provisions of Rule 7(1) of Order 53 of the Civil Procedure Rules, 2010 (CPR). The rule provides that:-

> **"7. (1) In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court."**

The decision being challenged in these proceedings is the election of the 1st Interested Party. That decision was not gazette and is not in the public domain. The respondents and the interested parties have not denied the existence of the decision. The rule, however, gives an applicant the option of accounting for the failure to lodge a copy of the decision with the court. The applicants did not utilize this alternative. It is clear that the applicants were careless in the manner in which they presented their application to court. However, I think it would be paying too much respect to the rules of procedure were this court to dismiss this matter on the ground that the challenged decision has not been availed to the court. I will therefore invoke Article 159 (2)(d) of the Constitution in order to save their application. In doing so, I am persuaded by the decision of J. G. Nyamu, J (as he then was) and R. Wendoh, J in the case of **REPUBLIC v RETURNING OFFICER, KAMUNKUNJI CONSTITUENCY AND ANOTHER EX-PARTE SIMON NGANGA MBUGUAH [2008] eKLR** in which they observed that :-

> **"In our view, Order 53 rule 7 of the Civil Procedure Rules is only confined to the production of the formal orders specified therein either at the stage of leave or at the hearing stage and it does not apply to all other situations where it is clear that a decision has been made that on the ground that some decision has been acted on, yet it has no formal existence…….**
>
> **Judicial review is perhaps the most powerful invention for the enforcement of the rule of law. It need not succumb to such technicalities especially taking into account that, parties to a judicial review are partners of the court and have, a duty of disclosure to the Court of all material facts. In this case the respondents have clearly admitted that they did make the challenged decision and for this reason we find and hold that the absence of a final exhibited formal decision is not fatal to this application. In any event if an applicant as in this case has not exhibited a decision, the Respondents owe a duty to the court to attach it or fully explain what happened in order to meet the challenge.....**
>
> **In the case before us the decision is fairly identifiable and it has not been denied that the challenged decision was made. The respondents have a duty to the Court to clearly state what decision was made and for what reason. The moment a judicial review application is filed the respondents have a responsibility of placing all their cards on the table**
>
> **We therefore find that the absence of a formal decision is not fatal to this application."**

A court of law should not allow the substance of a matter to be clouded by technicalities. The rules of procedure are meant to aid the court in reaching a just decision. If failure to comply with a certain procedural requirement is not prejudicial to the other party, there is no reason for not overlooking such a provision. There is no dispute that a decision was indeed made to conduct the election of the speaker of the Assembly and that decision was actually carried out as a result of which the 1st Interested Party was elected. All the parties were aware of this decision and the respondents and the interested parties cannot claim that they have been taken by surprise by this application. I therefore find that the failure by the applicants to exhibit the impugned decision is not, in the circumstances of this case, fatal to their application.

This application, however, meets its Waterloo for a different reason. The public body whose decision is being challenged through these proceedings is not before this court. The proper respondent should have been the Clerk of Nairobi County Assembly being the person mandated to preside over the election of the speaker. The Assembly was only roped in as an interested party since its affairs would have affected by the outcome of this case. The Authority and the Commission had nothing to do with the decision that is being challenged by the applicants.

In the already cited case of **PETER O. NGOGE** the court found that the naming of the electoral body in a case challenging the election of the speaker of Parliament was improper. The court observed that:

> **"We find no basis for having joined the Electoral Commission of Kenya in these proceedings, there is no clear logical linkage between the applicant's alleged rights and the Electoral Commission of Kenya's constitutional mandate on elections and the applicant has in the circumstances no standing to join the electoral body."**

In the case of **FRANKLINE MUSILA MAKOLA** (supra) Majanja, J noted that:

> "**I 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."**

I agree with the decisions in the above cited cases. I add that a public body whose decision is being questioned by an applicant must always be made a respondent to a judicial review application. The applicants have named the wrong respondents. Their application therefore fails.

In case I am wrong in my finding that there is no proper application before this court, I will proceed to consider whether the election of the 1st Interested Party contravened the provisions of Article 177 of the Constitution. The applicants have argued that at the time of the election of the 1st Interested Party the Assembly was not properly constituted as required by Article 177 of the Constitution. The court was confronted with a similar question in the case of **PETER O. NGOGE** (supra) and the court found that the election of a speaker in the absence of nominated members of Parliament was lawful. In saying so, the court relied on the provisions of the repealed Constitution and observed that:-

> **"The argument that at the time of the election of the Speaker, the National Assembly was not properly constituted fails on these very clear provisions of the Constitution.**
>
> **Section 56(2) of the Constitution reads:**
>
> **"Subject to this Constitution, the National Assembly may act notwithstanding a vacancy in its membership (including a vacancy not filled when the Assembly first meets after a general election)…."**
>
> **The fact that the nominated members were gazetted after the election of Speaker does not invalidate the election of Speaker, on the very clear wording of the above section. The vacancy occasioned by the absence of the nominated members cannot and does not invalidate any business conducted at the first sitting after the dissolution of Parliament or at all."**

It must be noted that the repealed Constitution had clearly provided that the absence of a member would not affect the business of Parliament. No such provision has been pointed to me in the current Constitution in regard to the constitution of county assemblies.

Did the election of the speaker of Nairobi County breach the provisions of Article 177 of the Constitution? Article 177 of the Constitution shows that a county assembly has four components namely:

a. One elected member for each ward in the county;

b. The number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender:
c. Members of the marginalized groups as prescribed by an Act of Parliament; and
d. The Speaker, who is an *ex officio* member.

That is what constitutes a county assembly. The applicants assert that a county assembly cannot be said to be legally constituted in the absence of the members of any of the four categories. The Constitution is quite clear that a county assembly cannot transact any business in the absence of the Speaker. In order to ensure that there is always a person to preside over the proceedings of a county assembly, the Constitution provides through Article 178(2) that:-

> **"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."**

The Constitution has thus clearly provided for the absence of the speaker. As regards the other members of the assembly, there is no provision in the Constitution as to what should happen when a member is absent. The Constitution, however, foresees a situation where some members will be absent during the sittings of a county assembly. That is why in Article 200 it provides that:-

> **"200. (1) Parliament shall enact legislation providing for all matters necessary or convenient to give effect to this Chapter.**
>
> **(2) In particular, provision may be made with respect to–**
>
> **(*a*) the governance of the capital city, other cities and urban areas;**
>
> **(*b*) the transfer of functions and powers by one level of government to another, including the transfer of legislative powers from the national government to county governments;**
>
> **(*c*) the manner of election or appointment of persons to, and their removal from, offices in county governments, including the qualifications of voters and candidates;**
>
> **(*d*) <u>the procedure of assemblies and executive committees including the chairing and frequency of meetings, quorums and voting</u>; and**
>
> **(*e*) the suspension of assemblies and executive committees." (The underlining is mine for emphasis).**

Parliament is thus mandated to pass laws to take care of procedure of assemblies and quorums of the assemblies. The legislation passed in this regard is the County Governments Act which provides at Section 14(2)(a) that:-

> **"(2) The county assembly proceedings are valid despite—**
>
> ***(a)* there being a vacancy in its membership at the particular time; or**
>
> ***(b)*……."**

Section 19 of the same Act provides that the quorum of a county assembly is one third of all the members of the county assembly. It must be noted that the law talks about the membership of the assembly as a whole and does not refer to elected or nominated members. Once one third of all the members of a county assembly are present, the assembly can transact business.

There is no dispute that Section 19 was complied with at the time of the election of the 1st Interested Party. It is also agreed that some seats had not been filled at the time of the election of the speaker. There is nothing in the Constitution indicating that the absence of a certain category of members of the county assembly will paralyze the operations of the assembly. This court would be putting its own words into the Constitution were it to find that the absence of some members had invalidated the proceedings of the Assembly. I therefore agree with the respondents and the interested parties that the absence of certain categories of the members of the county assembly did not in any way make the election of the 1st Interested Party illegal or unconstitutional.

However, I must state that our Constitution promotes inclusiveness. In future the Commission should ensure that the nominated members are gazetted at the same time with the elected members so that they can equally participate in the business of the county assembly starting with the election of the speaker.

The summary of it all is that the applicants' case cannot succeed. The same is therefore dismissed. As regards the issue of costs, I note that this cause had a public interest element to it and I therefore make no orders as to costs.

Dated, signed and delivered at Nairobi this 28th day of August, 2013

W. K. KORIR,

JUDGE