



**County Assembly of Siaya v Oduol; County Government of Siaya (Interested Party)
(Constitutional Petition E003 of 2023) [2025] KEHC 1997 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1997 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CONSTITUTIONAL PETITION E003 OF 2023**

DK KEMEL, J

FEBRUARY 21, 2025

BETWEEN

COUNTY ASSEMBLY OF SIAYA PETITIONER

AND

WILLIAM ODUOL RESPONDENT

AND

COUNTY GOVERNMENT OF SIAYA INTERESTED PARTY

RULING

1. The Petitioner herein lodged the present Petition dated 6th July, 2023 seeking the following reliefs:
 - a. A declaration that the actions of the Respondent have contravened Article 73 and 75 of the Constitution
 - b. A declaration that the Respondent is in breach of Section 47(1), 53(2) and (3) of the Public Procurement and Asset Disposal Act, 2015, Section 29 and 34 of the Leadership and Integrity Act, 2012 and Section 46 of the Anti-Corruption and Economic Crimes Act, 2003 (Revised 2016)
 - c. That consequently, and as a result of contravention and/or breach of the Constitution and the provisions of the statute as enumerated herein above, a declaration be and is hereby issued that the Respondent herein is unfit to hold state or public office.
 - d. Any other relief the court may deem fit to grant in redress to the clear violation of the Petitioner's right.
 - e. Costs of the Petition.



2. The Petition is supported by the affidavit of the Petitioner's Acting Clerk and the Chief Administrative Officer Erick Ogenza sworn on 6th July, 2023 wherein he averred inter alia; that grave breaches of constitutional provisions and the statute by the Respondent has warranted the filing of the Petition by the Petitioner on behalf of the residents of Siaya County; that under Article 185 (3) of the Constitution, the County Assembly may exercise oversight over the county executive committee and any other county executive organs; that Article 181 of the Constitution and Section 33 of the County Governments Act No. 17 of 2012 give the County Assembly powers to commence impeachment proceedings against a sitting Governor or Deputy Governor; that it was apparent from the impeachment proceedings both in the Senate and at the County Assembly that several astounding revelations on gross violations of the Constitution and other laws namely, -a) the highly publicized evidence of the purchase of an office desk, and office chair (seat) at over 1.1 million each; b) the alleged interference with a procurement process where the respondent sought to have certain specifications changed; and c) the incitement of the Alego-Usonga Sub-County against the government where the respondent serves; the charge against the Deputy Governor on Gross Violation of the Constitution and other laws, on allegation of Interference with the Procurement process through acts of bid rigging has been substantiated; and the charge against the Deputy Governor on Abuse of Office and Gross Misconduct of Misleading the Public by Giving False Information as substantiated were found by the Special Committee of the Senate in its report to have been substantiated; the acts of bullying public servants which is clearly a violation of the Constitution is well documented and demonstrated in the statements and documents submitted by Jack Odinga and Martin Okwatta; given the prevailing conditions, it is not feasible that the Respondent will be able to cohesively work with the people of Siaya and deliver the required services; the Respondent is an enemy of and a threat to devolution; with all the infractions and transgressions of the Constitution and laws of the land, the only logical thing the court can do is to declare him unfit to hold public and/or state office and bar him from continuing to serve as the Deputy Governor of Siaya.
3. In addition, the Petitioner has filed a Notice of Motion dated 6th July, 2023 seeking inter alia that this Court be pleased to certify that the Petition raises issues on interpretation of the Constitution and Fundamental Rights and Freedoms and the same ought to go for final disposal and determination immediately.
4. The application is premised on grounds inter alia; that the Respondent has by his unfortunate actions overthrown the Constitution of Kenya; that there is a governance crisis in the County Government of Siaya, occasioned by lawlessness and abuse of office by the Respondent herein; that there is material evidence that the Respondent is in gross violation of the Constitution and the law of the Republic and his continued stay in office will jeopardize service delivery by the County Government of Siaya; that there is a need for sanity and order to be restored in the County Government of Siaya and thus this Honourable Court has to intervene as a matter of urgency; that it is in the interest of justice that this matter is urgently heard and determined so that order and respect for the rule of law can be immediately restored in the County Government of Siaya.
5. In opposition to the Petition, the Respondent Hon. William Oduol who is the Deputy Governor of Siaya County lodged a Notice of Preliminary Objection dated 17th August, 2023 stating that:
 1. This Court lacks jurisdiction to hear and determine this matter by dint of Article 181 of the Constitution and Section 33(9A) of the County Government Act.
 2. The Petition is seeking to remove the Respondent from office in a manner that violates the express provisions of Article 181 of the Constitution and Section 33(9A) of the County Government Act, which provides the process for removal of the Respondent from office.



3. Without prejudice to the foregoing grounds and in the alternative, the Petition is res judicata as the Senate of the Republic of Kenya substantively heard the matters raised in the Petition and made resolutions on them, which resolutions have not been challenged and/or appealed against.
6. The Respondent urged this Court to strike out in limine with costs the Notice of Motion and the Petition.
7. The genesis of this Petition is the impeachment of the Respondent on 8th June, 2023 by the Petitioner herein and thereafter the Senate's of the Republic of Kenya ("the Senate") resolution to give the Respondent a clean bill of health, the glaring evidence notwithstanding. The Petitioner's Speaker formally informed the Speaker of the Senate of their Resolution to remove the Respondent as the Deputy Governor of Siaya County pursuant to Article 181 of the Constitution, 2010 and Section 33(9A) of the County Government Act. The Senate through its eleven Member Special Committee whose mandate was to find whether or not the particulars of the allegations against the Respondent were substantiated, investigated the removal of the Respondent and prepared a report dated 22nd May, 2023. The Committee found that the charge against the Respondent on Gross violation of the Constitution and other laws, on allegation of interference with the Procurement process through acts of bid rigging and the charge on abuse of office and gross misconduct of misleading the public by giving false information had been substantiated. Notwithstanding the findings, the Senate resolved to give the Respondent a clean bill of health.
8. The Petitioner places heavy reliance on the report of the Senate and the proceedings at the County Assembly citing a number of infractions and constitutional transgressions by the Respondent to be noted; interference with the procurement process; use of office and authority to occasion procurement and services out of the procurement plan; bullying; misuse of public resources; giving false information; and incitement of segments of the population against the County Government.
9. According to the Petitioner, the Respondent is an enemy of devolution, thus this Court should declare him unfit to hold public and/or state office and bar him from continuing serving as the Deputy Governor of Siaya.
10. The Preliminary Objection was canvassed by way of written submissions.

Petitioner's submissions

11. In opposition to the Preliminary Objection, the Petitioner submits that the Petition is seeking an express interpretation as to whether the Respondent's actions violate express provisions of the Constitution or not. The Petitioner submits that there is no doubt that a Preliminary Objection raises pure point of law to be argued on the assumption that all facts pleaded by the other side are correct. Reliance is placed on *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696 and *Quick Enterprises Ltd vs Kenya Railway Corporation*, Kisumu HCCC No. 22 of 1999 that the objection cannot be raised if any fact had to be ascertained or what is sought is the exercise of judicial discretion. That a Preliminary Objection raised cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion. It is submitted that the objection must stem from the pleadings and should raise pure points of law with no facts to be ascertained as held in the case of *Avtar Singh Bhamra & Another vs Oriental Commercial Bank*, Kisumu HCCC No. 53 of 2004. In *Oraro vs Mbaja* (2005) 1KLR 141, the court held that a Preliminary Objection must not deal with disputed facts and must not derive its foundation from factual information which stands to be tested by rules of evidence.



12. In response to the Respondent's assertion that the suit is res judicata as the issues raised in this Petition were the same issues which were raised and canvassed in the Senate, the Petitioner, submits that for the court to determine whether the issues were directly and substantially in issue before the Senate, the court will have to ascertain facts by having to call for the said proceedings and pleadings presented to the Senate and scrutinize the same. The Petitioner submits that the Preliminary Objection raised does stem from the pleadings, but requires the Court to call for ascertainment of facts. According to the Petitioner, the Respondent has not filed a Response to the Petition and thus the Preliminary Objection cannot be said to stem from his pleadings.
13. The Petitioner further asserts that the ground of res judicata cannot be raised in a Preliminary Objection but through a Notice of Motion as held in the case of *George Kamau Kimani & 4 Others vs County Government of Trans-Nzoia* (2014) eKLR where pleadings would be annexed to allow the court consider whether the issues in the previous suits are similar to the issues in the suit being in issue. The Petitioner submits that the Preliminary Objection does not raise pure points of law and cannot be determined without ascertainment of facts from elsewhere. The Petitioner submits that the suit herein is not res judicata since; there has been no previous determined suit between the parties over the same subject matter as no pleadings of such a suit or even proceedings before the Senate have been availed by the Respondent to enable this Court to examine them and determine whether the issue of res judicata exists; there is no former suit as between the same parties herein or parties under whom they or any of them claim; there is no suit or former suit in which parties in this suit are or were litigating under the same title; the issues raised in this suit have never been heard and determined on merit in any former suit. Reliance is placed on Section 7 of the *Civil Procedure Act*; *Bernard Mugo Ndegwa vs James Nderitu Githae & 2 Others* (2010) eKLR; *Cosmas Mrombo Moka vs Co-operative Bank of Kenya Limited & Another* [2018] eKLR; *Kenya Commercial Bank Limited vs Benjoh Amalgamated Ltd*[2017]eKLR ; *The Tee Gee Electricals & Plastics Co. Ltd vs Kenya Industrial Estates, Kisumu CACA No. 333 of 2001*(Unreported);*State of Maharashtra & Another vs National Construction Company, Bombay, SC Civil Appeal No. 1497 of 1996*. The Petitioner submits that there is no proper Preliminary Objection that has been filed by the Respondent.
14. The Petitioner submits that this Court has the requisite jurisdiction to hear and determine constitutional issues as and when they arise during the tenure of a Deputy Governor and even during his or her impeachment process, more so touching on gross violation of the *Constitution*. According to the Petitioner, the Court had the jurisdiction to hear this matter as it involves an alleged gross violation of the *Constitution* and express provisions of the Statute. The Petitioner asserts that this Court cannot hide under the justification of the doctrine of separation of powers. According to the Petitioner, the Respondent is in gross violation of the Article 73 and 75 of the *Constitution*. Reference is made to Article 22 which grants such an individual the power to move this Court where they claim their right of fundamental freedom has been infringed upon or is threatened. Reliance is placed on the decision of Mativo J. (as he then was) in *Apollo Mboya vs Attorney General & 2 Others* [2018] eKLR where the Court held that the judiciary has a Constitutional role to intervene and arrest unconstitutional and illegal action. The Petitioner submits that before the Court is a Petition not a Motion of Impeachment. That the Petition is seeking assessment of the actions of the Deputy Governor during his tenure in office, after which the Court is to pronounce itself as to whether those actions violate express provisions of the *Constitution* or not. The Petitioner urges this Court to dismiss the Respondent's Preliminary Objection with costs.



Interested Party's submissions

15. In support of the Petition, the Interested Party submits that Article 165(3) (d) of the Constitution provides for jurisdiction of the High Court in permissive and broad terms. According to the Interested Party, the Petition seeks the enforcement of Chapter 6 of the Constitution and in particular, the interpretation of this Court as to whether the Respondent, a public officer has violated principles and values of the integrity and accountability enshrined under Chapter 6 as read with Article 10(2)(c) of the Constitution. Reference is made to the term “including” used in Article 165(3)(d) and defined in Article 259(4)(b) as meaning “includes, but is not limited to”, and is accordingly elastic and not exhaustive. That it clothes this Court with unlimited jurisdiction and power to interpret any question arising under the Constitution with finality. The Interested Party submits that Article 258 entitles every person acting in public interest to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
16. According to the Interested Party, the Preliminary Objection proceeds on the erroneous premise that Article 181 and Section 33(9A) of the County Government Act, limit/oust the jurisdiction of the court on any constitutional question under Chapter 6 touching on a Governor, yet a reading of those provisions does not disclose any express or implicit ouster of the High Court’s jurisdiction as suggested in the Preliminary Objection. Reliance is placed on *Tinyefuza vs Attorney General of Uganda Constitutional Petition No. 1 of 1997*[1997] 3 UGCC on the proposition that the entire Constitution must be read together as an integrated whole, not one particular provision destroying the other but each sustaining the other. Further reliance is on the Supreme Court decision in *Re the Matter of Kenya National Human Rights Commission (SC Advisory Opinion Ref. No.1 of 2012)* where the Court advocated for a holistic interpretation of the Constitution. According to the Interested Party, the Respondent’s Preliminary Objection is absurd and contra the rule of harmony. The Interested Party submits that if indeed the Respondent’s interpretation of Section 33(9A) of the Act that it divests this Court’s jurisdiction on leadership and integrity questions around Chapter 6 of the Constitution, then the Section is inconsistent with Article 165(3)(d)(ii) of the Constitution and is accordingly invalid under Article 2(4) of the Constitution. That such an interpretation flies in the face of Article 259 of the Constitution and dilutes the principles and values of accountability and integrity of leaders under Chapter 6. The Interested Party submits that the provisions of Chapter 6 embody normative values and principles upon which the system of checks and balances under the Constitution is anchored. It is submitted that the provisions apply to all public and state officers irrespective of their rank or profile and can accordingly be enforced independently of Article 181 of the Constitution. Reliance is placed on *Independent Electoral and Boundaries Commission (IEBC) vs National Super Alliance (NASA) Kenya & 6 Others* [2017] eKLR on the proposition that the values and principles under the Constitution and Article 10 of the Constitution are justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate. The Court held that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. According to the Interested Party, some of the values and principles that the instant Petition seek to enforce are good governance, integrity, transparency and accountability under Article 10(2)(c) of the Constitution as further extrapolated under Chapter 6.
17. The Interested Party submits that the decision in *Moses Kithinji vs Mohammed Abdi Kuti* [2020] eKLR was made per incuriam and is bad law and not to be followed since the Supreme Court in *Jasbir Singh Rai & 3 Others vs The Estate of Tarlochan Singh Rai and 4 Others*, Sup. Ct Petition No. 4 of 2012 affirmed that the principle of stare decisis does not apply to decisions made per incuriam and



the courts of coordinate jurisdiction are not bound by such decisions. The Interested Party urges this Court to dismiss the Preliminary Objection with costs.

Respondent's submissions

18. The Respondent submits that the Petition seeks to have this Court declare him unfit to hold state or public office, the consequences being his removal from the office of the Deputy Governor of Siaya. The Respondent submits that the only issue for determination is whether this Court lacks jurisdiction to hear and determine the instant Petition.
19. Reference is made to Article 181 of the Constitution which provides for the removal of a County Governor. That pursuant to Article 181(2), Parliament enacted Section 33 of the County Government Act which provides the procedure for removal of a County Governor and the Deputy Governor from office, in particular Subsection 9A where it is provided that Sub-Section (1) to (9) shall, with necessary modification, apply to removal from office of a Deputy Governor.
20. According to the Respondent, jurisdiction is not a procedural or legal technicality but rather a substantial issue that goes to the substratum of a matter before a court and without jurisdiction such court acts in vain. Reliance is placed on Owners of the Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Ltd [1989]eKLR and the Supreme Court case of Samuel Kamau Macharia & Another vs KCB Limited & 2 Others[2012]eKLR where the Court held that jurisdiction flows from either the Constitution or legislation of both thus a court cannot arrogate itself jurisdiction exceeding which is conferred upon by law. The Respondent asserts that granting the orders sought in the Petition shall have the effect of removing him from office contrary to the provisions of Article 181 of the Constitution and Section 33(9A) of the County Government Act which exclusively vests the removal of a Deputy Governor on the County Assembly in the first instance. Reliance is placed on Martin Nyaga Wambora vs Speaker of Senate & 6 Others[2014]eKLR where the Court of Appeal held that neither the Court nor the Senate have the constitutional mandate to move a motion for the removal of a County Governor. The Respondent asserts that the Petition is akin to an impeachment motion against the Respondent as it seeks to have the Respondent declared unfit to hold state or public office on the basis of allegations of gross violation of Articles 73 and 75 of the Constitution and consequently removed from office contrary to the provisions of Article 181 and Section 33 of the Act.
21. According to the Respondent, the Petition though disguised as a quest for interpretation of the Constitution, its real intention is to remove the Respondent from office in a manner that is contrary to the Constitution and the law, thus outside the jurisdiction of this Court. Reliance is placed on Moses Kithinji vs Mohammed Abdi Kuti [2020] eKLR where the court held that, courts have neither been vested with jurisdiction to initiate a motion, consider a resolution nor to hear the charges levied against the Governor based on the concept of separation of powers. The constitutional and statutory mandate to initiate and consider a motion to remove a County Governor is vested in the County Assembly and the Senate pursuant to Section 33 of the County Governments Act which is an implementing legislation for Article 181 of the Constitution and does not vest the courts with the jurisdiction to hear charges relating to the removal of a Governor from office. The Court was guided by the dicta in Marbury vs Madison, -5 US.137 where it was held that the province of the court is solely to decide on the rights of individuals and not to enquire how the County Assembly and Senate perform duties in which they have the discretion.
22. The Respondent submits that it is trite law that where the law provides for a procedure for a resolution of dispute, that procedure or process has to be strictly followed and if the same is not followed, the courts are divested of jurisdiction to entertain a dispute. Reliance is placed on Narok County Council vs Trans-Mara County Council & Another Civil Appeal No. 25 of 2000 cited with approval



in *Republic vs Benjamin Jomo Washiali, Majority Chief Whip, National Assembly & 4 Others, Ex parte Alfred Kiptoo Keter & 3 Others* [2018]eKLR on the proposition where the law provides for procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a Court of law as the Court would have no jurisdiction to entertain the dispute. The Respondent submits that the instant Petition seeks the removal of the Respondent from office contrary to Article 181 of the Constitution and Section 33 of the County Government Act where the process of removal of the Respondent is exhaustively provided on similar grounds advanced by the Petitioner in its Petition.

23. The Respondent submits that it is not in dispute that the Petitioner attempted to remove the Respondent from office by way of impeachment but the Senate dismissed the impeachment charges against the Respondent after finding that the charges had not been substantiated. Reference is made to Section 33(8) of the County Government Act which allows the Petitioner to re-introduce a motion for the removal of the Respondent on the same charge to the Senate after three months. The Petitioner has not followed and exhausted the process provided under the Constitution and the County Government Act for removal of the Respondent from office on the alleged grounds of violation of the Constitution. It is submitted that the Petitioner has not demonstrated exceptional circumstances in the Petition to justify why the Respondent should be exempted from the process of removal of the Respondent from office prescribed by the Constitution. Reliance is placed on *Leonard Otieno vs Airtel Kenya Limited* [2018] eKLR that there must be a clear demonstration that the alternative remedy is not available, not effective, and not sufficient to address the grievances in question. The Respondent submits that since this Court is bereft of jurisdiction to hear and determine the Petition herein and thus it should not grant the orders sought by dint of the clear processes laid down in the Constitution and the County Government Act for the removal of the Respondent from office.
24. The Respondent prays that the Preliminary Objection should be allowed as prayed while the Petitioner's application and the Petition should be struck off with costs to him.

Determination

25. Having considered the arguments for and against the Preliminary Objection, the filed Petition and court decisions relied on, I am of the considered view that the sole issue that falls for determination is whether this Court has the jurisdiction to hear and determine the Petitioner's Petition.
26. Jurisdiction being so central to the judicial proceedings, Nyarangi, JA, in *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1 expressed himself as follows: -
- Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings..."
27. The Supreme Court in *Constitutional Application No. 2 of 2011 In the Matter of Interim Independent Electoral Commission* (2011) eKLR held that: -
- Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid down in judicial precedent
28. The jurisdiction of this Court is challenged vide the Respondent's Preliminary Objection. It is trite law that where a Preliminary Objection has been raised by a party, the objection should be dealt with by the Court at first instance before the Court renders itself on the merit of the case.
29. The Supreme Court in *Hassan Ali Joho & Another vs Suleiman Said Shahbal & 2 Others* Civil Application No.14 of 2014, [2014] eKLR cited the locus classicus on Preliminary Objections, *Mukisa*



Biscuit Manufacturing Co. Ltd v West End Distributors Ltd. (1969) EA 696, where the Court held as follows:

“..a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

30. The Court in Attorney General & another vs Andrew Maina Githinji & Another [2016] eKLR held that:-

The test to be applied in determining whether the appellants’ Preliminary Objection met the threshold or not is what Sir Charles Newbold set out above in the Mukisa Case (supra). That is first, that the Preliminary Objection raises a pure point of law, Second, that there is demonstration that all the facts pleaded by the other side are correct; and Third, that there is no fact that needs to be ascertained.

31. The jurisdiction of this Court is found under Article 165 (3) of Constitution, 2010 which provides 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.

32. Article 165(6) confers on the High Court supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court, the Superior Courts being in terms of Article 162 (1) of the Constitution, the Supreme Court,



- the Court of Appeal, the High Court and courts of equal status namely; the Employment and Labour Relations Court and the Environment and Land Court.
33. Halsbury's Laws of England (4th Ed) Vol 9 has defined jurisdiction as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."
 34. Under the Black's Law Dictionary, 9th Edition, jurisdiction is defined as the Court's power to entertain, hear and determine a dispute before it.
 35. The Petitioner contends that the Respondent has breached the provisions of the Constitution and the Statutes. The Interested Party asserts that the Petition seeks the enforcement of Chapter 6 of the Constitution and in particular, the interpretation of this Court as to whether the Respondent, a public officer has violated principles and values of the integrity and accountability enshrined under Chapter 6 as read with Article 10(2)(c) of the Constitution. In a nutshell, the Interested Party supports the Petitioner's argument that this Court has the requisite jurisdiction to hear and determine the Petition.
 36. In the converse, the Respondent has challenged the jurisdiction of this Court on the premise that Article 181 of the Constitution and Section 33(9A) of the County Governments Act provides the procedure for removal of the Respondent. According to Respondent, the Petitioner's Petition as lodged seeks to remove him from office as the Deputy Governor of Siaya County Government contrary to the Constitution and Statute.
 37. By dint of Article 181 of the Constitution and Section 33(9A) of the County Government Act, the Respondent asserts that this court is bereft of jurisdiction to hear and determine the Petition. According to the Respondent, the constitutional mandate to remove the Respondent from office is well and expressly provided under Article 181 of the Constitution and Section 33(9A) of the County Government Act, thus this Court cannot arrogate itself such jurisdiction. The process to remove the Respondent from office was undertaken by the Petitioner herein and the Senate and therefore this Court cannot surpass the prescribed procedures under the Constitution and the Statute.
 38. Article 181 provides for the removal of a County Governor and not a Deputy County Governor as follows:
 - (1) A county governor may be removed from office on any of the following grounds—
 - (a) gross violation of this Constitution or any other law;
 - (b) where there are serious reasons for believing that the county governor has committed a crime under national or international law;
 - (c) abuse of office or gross misconduct; or (d) physical or mental incapacity to perform the functions of office of county governor.
 - (2) Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds specified in clause (1).
 39. The court notes that the Respondent has placed reliance on the County Government Act, No. 17 of 2012 instead of the County Governments (Amendment) Act, 2020 wherein under Section 33(9), Subsection (9A) was added stating that Subsections (1) to (9) shall, with necessary modifications, apply to the removal from office of a deputy governor. The Respondent has placed reliance on Section 33(8) of the County Government Act which allows the Petitioner to re-introduce a motion for the removal of the Respondent on the same charge to the Senate after three months. Clearly, the Petitioner has not followed and exhausted the process provided under the Constitution and the County Government Act



for removal of the Respondent from office on the alleged grounds of violation of the Constitution. It follows therefore that the procedure and the grounds for removal of a County Governor shall apply to the Deputy Governor.

40. In *Narok County Council vs. Trans Mara County Council & Another* Civil Appeal No. 25 of 2000, the Court of Appeal expressed itself as follows:

“Where the law provides for procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a Court of law as the Court would have no jurisdiction to entertain the dispute”.

41. It follows therefore that the jurisdiction of this court can be limited by a statute in absence of clear and unambiguous language in the statute. In *East African Railways Corp. vs Anthony Sefu* [1973] EA 327 it was held that

“..It is, a well-established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect.”

42. *Nyamu, J. (as he then was) in Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728* held that;

“The Courts guard their jurisdiction jealously, but recognize that it may be precluded or restricted by either legislative mandate or certain special contexts. Legislative provisions which suggest a curtailment of the Courts’ power of review give rise to a tension between the principle of legislative mandate and the judicial fundamental of access to courts. Judges must search for critical balance and deploy various techniques in trying to find it. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the Court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal...It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly. It is a well-established principle that a provision ousting the ordinary jurisdiction of the Court must be construed strictly meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the Court.”

43. The Court finds no ambiguity on the law that guides the County Assembly and the Senate in embarking on a process to remove a Governor or Deputy Governor. The Court finds it lacks the requisite jurisdiction to hear and determine the Petition by dint of Article 181 of the Constitution and Section 33(9A) of the County Government Act. In the case of *Martin Nyaga Wambora Vs Speaker of Senate & 6 Others* [2014] the Court of Appeal held as follows:

31. Our reading and interpretation of Article 181 of the Constitution as read with section 33 of the County Government Act shows that removal of a Governor is a constitutional and political process; it is a sui generis process that is quasi-judicial in nature and the rule of natural justice and fair administrative action must be observed. The impeachment architecture in Article 181 of



the Constitution reveals that removal of a Governor is not about criminality or culpability but is about accountability, political governance as well as policy and political responsibility. Section 33 of the County Government Act provides for the procedure of removal of an erring Governor. The organ vested with the mandate at first instance to move a motion for the removal of a County Governor is the County Assembly. Neither the courts nor the Senate have the constitutional mandate to move a motion for the removal of a County Governor. The Senate's constitutional mandate to hear charges against a Governor is activated upon receipt of a resolution of the County Assembly to remove a Governor.”

Being guided by the foregoing authority, I am satisfied that the Petitioner herein did have the opportunity to impeach the Respondent and upon the conclusion of the process in the Senate, it still has the opportunity to bring up a fresh motion of impeachment against the Respondent if need be. No reason has been given by the Petitioner as to why it has not used that forum to remove the Respondent from office. I find that as long as that forum is still available, this court lacks jurisdiction to entertain the petition.

44. The Petitioner asserts that the Preliminary Objection raised by the Respondent is not a true objection since the Court will be required to ascertain facts by having to call for the proceedings and pleadings presented to the Senate and scrutinize the same. However, I find the assertion to be untrue in that the Petitioner has already pleaded those facts namely that the Respondent had already been taken through impeachment all the way before the County Assembly to the Senate. Hence, those facts are already there and that none of the parties have disputed them. That being the position, the preliminary objection was properly raised by the Respondent and merits consideration by this court.
45. On the ground that *res judicata* cannot be raised in a Preliminary Objection, but through a Notice of Motion, the Court finds merit in the Petitioner's argument that the same is not available to the Respondent at this stage unless an application to that effect is lodged. *Obaga J. in George Kamau Kimani & 4 Others vs County Government of Trans-Nzoia (2014) eKLR* held that the best way to raise a ground of *res judicata* is by way of notice of motion where pleadings are annexed to enable the court to determine whether the current suit is *res judicata*. In this instant Petition, the court will have to consider whether the issues raised before the Petitioner and Senate are similar to the issues in the instant Petition. The second ground of the Preliminary Objection therefore cannot succeed as brought before the Court.
46. The court notes that the Senate absolved the Respondent and that the Petitioners appear to be aggrieved by its decision and thus it had the option of lodging an appeal against the decision of the Senate or initiate fresh impeachment proceedings if need be as provided by law. The Petitioner should exhaust all the available options provided pursuant to the exhaustion doctrine. The Petitioner has not given any reason why it has not resorted to the available impeachment to remove the Respondent from office.
47. For the foregoing observations, the Court finds the Respondent's Notice of Preliminary Objection dated 17th August, 2023 is merited on the ground that this Court lacks jurisdiction to hear and determine the Petition.
48. Accordingly, the Respondent's preliminary objection is upheld with the result that the Petitioner's Petition and Notice of Motion dated 6th July 2023 be and are hereby struck out. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 21ST DAY OF FEBRUARY, 2025



D. KEMEI

JUDGE

In the presence of:

N/A Ogola.....for Petitioner

N/A Nyamodi..... for Respondent

Oseko for Awele.....for Interested Party

Ogendo..... Court Assistant

