



**Trusted Society of Human Rights Alliance v Oduol; County Governmet
of Siaya & 2 others (Interested Parties) (Constitutional Petition
E004 of 2023) [2025] KEHC 2411 (KLR) (7 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2411 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CONSTITUTIONAL PETITION E004 OF 2023**

**DK KEMEL, J
MARCH 7, 2025**

BETWEEN

TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE PETITIONER

AND

HON. WILLIAM ODUOL RESPONDENT

AND

COUNTY GOVERNMENT OF SIAYA INTERESTED PARTY

COUNTY ASSEMBLY OF SIAYA INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

RULING

1. The Petitioner herein filed a Notice of Motion brought under Rules 3,4,13,23 and 24 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 is dated 7th July, 2023 and filed on 26th July, 2023. The Petitioner is seeking the Petition filed on even date to be certified as raising issues on interpretation of *the Constitution* and Fundamental Rights and Freedoms. According to the Petitioner, there is a governance crisis in the 1st Interested Party, occasioned by the lawlessness and abuse of office by the Respondent, who was impeached by the 2nd Interested Party. The Petitioner states that there is material evidence that the Respondent is in gross violation of *the Constitution* and the law and that his continued stay in office will jeopardize service delivery by the 1st Interested Party thus the urgency for this Court to intervene to restore sanity and order.
2. In the Petition, the Petitioner states that the 2nd Interested Party impeached the Respondent, Deputy Governor of Siaya County on 8th June, 2023. Consequently, the Speaker of the Assembly formally



informed the Speaker of the Senate of their Resolution to remove the Respondent as required under Article 181 of *the Constitution* and Section 33 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. 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 had been substantiated and that the charge on abuse of office and gross misconduct of misleading the public by giving false information had been substantiated. However, the Senate resolved to give the Respondent a clean bill of health, the glaring evidence notwithstanding. The Petitioner states that from the report of the Senate and the proceedings at the County Assembly, a number of infractions and constitutional transgression by the Respondent can 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. 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.

3. The Petitioner prays for:

- 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(Rev 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. The Court bar the Respondent from continuing to hold and serve in the office of the Deputy Governor of Siaya County.
- e. Any other relief the court may deem fit to grant in redress to the clear violation of the Petitioner's right.
- f. Costs of the Petition.

4. The Petition is supported by the affidavit of the Petitioner's Chairman Elijah Sikona sworn on 7th July, 2023 wherein he averred inter alia; the Petitioner is a renowned and enthusiastic public defender committed to the protection of *the Constitution*, constitutionalism and rule of law; that it should be noted that the petitioner has been engaged in a number of high profile public interest litigation, some eliciting unprecedented and land mark decision while executing its mandate; that the Deputy Governor of Siaya County, Hon. William Oduol herein after only referred to as the Respondent was impeached by the County Assembly of Siaya on 8th June, 2023; that their attention was drawn to the process of impeachment due to extensive publicity it received from almost the major media houses within the Republic of Kenya and beyond; that a keen interest was taken in the proceedings as it touched on questions revolving around violations of provisions of *the Constitution*, threats to devolution and the public interest; that the consequent to the impeachment by the County Assembly, the Speaker of the Assembly formally informed the Speaker of the Senate of their resolution to remove the Respondent as required by Article 181 of *the Constitution* and Section 33 of the County Government Act; that the senate established an eleven member special committee to investigate the proposed removal of



the Respondent being mandated to find whether or not the particulars of the allegations against the Respondent were substantiated; that the proceedings of the special committee was largely streamed live and that they followed it keenly to completion; that among the issues that emerged on the gross violations of *the Constitution* were the highly publicized evidence of the purchase of an office desk and office chair (seat) at over 1.1 million each; the alleged interference with a procurement process here the Respondent sought to have certain specification changed and the incitement of the Alego Usonga Sub County against the County Government where the Respondent serves; that the special committee in its report presented to the Senate in plenary on 26/6/2023 found two of the allegations substantiated; that the Petition obtained a report of the special committee of Senate and upon scrutinizing the same, some of the allegations against the Respondent were established; that the special committee report was debated in the senate plenary but the proceedings degenerated into a political supremacy tussle between the majority and the minority leading to the majority carry the day; that the senate resolution therefore gave the Respondent a clean bill of health the glaring evidence notwithstanding; that the resolution of the Senate did not go down well with sizable population of the country; that the Petitioner herein decided to rise to the occasion namely protection of *the Constitution*, Rule of Law and protection of Public interest; that they wrote to the 2nd Interested Party to avail to them the requisite documents to enable them commence filing of a constitutional petition; that the 2nd Interested Party availed the documents as requested; that from the evidence presented by the 2nd Interested Party, there was sufficient evidence that the Respondent violated *the Constitution* in that he breached provisions of Article 73-75 thereof on Leadership and Integrity; that the Petitioner contends that due to the aforesaid violation of *the Constitution*, this court should proceed and allow the petition by finding that the Respondent is not suitable to hold a public or state office; that due to 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 since the Respondent is a divisive person whose only achievement is to divide and categorize the people of Siaya into clan and other groupings; that the Respondent is an enemy and a threat to devolution; that this court should declare him unfit to hold public office and to bar him from serving as a Deputy Governor of Siaya County.

5. In opposing the application, the Respondent has filed 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 thereon, which resolutions have not been challenged and/or appealed against.
6. The Respondent therefore urges this Court to strike out in limine with costs the Notice of Motion and the Petition.
7. The Preliminary Objection was canvassed by way of written submissions.
8. In opposition to the Preliminary Objection, the Petitioner submitted that there is no proper Preliminary Objection that has been filed by the Respondent. According to the Petitioner, there is doubt that the Preliminary Objection raises pure points 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. It is submitted that the objection must stem from the pleadings and should raise pure points of law as held in the case of Avtar Singh Bhamra & Another vs Oriental Commercial Bank, Kisumu HCCC No. 53 of 2004. According to the Petitioner, 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. Reliance is placed in the case of Oraro vs Mbaja(2005) 1KLR 141 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 the Rules of Evidence. 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 thus the Preliminary Objection cannot be said to stem from his pleadings. The Petitioner asserts that the issue 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 submitted 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 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. 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 was then) 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 the 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.

9. The Respondent submits that the Petition seeks to have this Court declare the Respondent 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 has jurisdiction to hear and determine the instant Petition. 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. That Subsection 9A provides that Sub-Section (1) to (9) shall, with necessary modification, apply to removal from office of a Deputy Governor. It is submitted that 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. According to the Respondent, 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 a state or public office on the basis of allegations of gross violation of Article 73 and 75 of *the Constitution* and consequently removed from office contrary to the provisions of Article 181 of *the constitution* and Section 33 of the County Government Act. Reliance is placed in the case of Moses Kithinji vs Mohammed Abdi Kuti[2020]eKLR where the court guided by the dicta in Marbury vs Madison, -5 US.137 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. 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. The Respondent submitted that it is not in dispute that the 2nd Interested Party attempted to remove the Respondent from office by way of impeachment but that 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. 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 as prescribed by *the Constitution*. Reliance is placed on Leonard Otieno vs Airtel Kenya Limited [2018]eKLR where it was held that there must a clear demonstration that the alternative remedy is not available, not effective, and not sufficient to address the grievances in question. The Respondent submitted that since this Court is bereft of jurisdiction, his Preliminary Objection should be allowed as prayed while the Petitioner’s application and the Petition should be struck off with costs to him.

10. The 1st Interested Party submitted that Article 165(3) (d) of *the Constitution* provides for jurisdiction of the High Court in permissive and broad terms. According to the 1st 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*. The 1st Interested Party makes reference 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. Reference is made to Article 258 that entitled every person acting in public interest to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention. According to the 1st 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 does not disclose any express or implicit ouster of the High Court's jurisdiction as suggested in the Preliminary Objection. Reliance is placed in the case of *Tinyefunza vs Attorney General of Uganda Constitutional Petition No. 1 of 1997*[1997] 3 UGCC where the Court held 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 case of *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 1st Interested Party, the Respondent's Preliminary Objection is absurd and contra the rule of harmony. The 1st Interested Party submitted 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 1st 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 *IEBC vs National Super Alliance (NASA) Kenya & 6 Others* [2017]eKLR that Article 10 of *the Constitution* is justiciable and enforceable immediately a transgression occurs. 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. The 1st Interested Party submits that the decision in the case of *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 that the courts of coordinate jurisdiction are not bound by such decisions. The 1st Interested Party urges this Court to dismiss the Preliminary Objection with costs.

11. The 2nd interested party submits that the Preliminary Objection seems to proceed on the erroneous premise that Article 181 of *the Constitution* and Section 33 (9A) of the County Government's Act limit or oust the jurisdiction of the court on any constitutional question under Chapter 6 touching on a Governor. It was submitted that 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. It was the view of learned counsel that it is trite law and settled principle of constitutional interpretation that "The entire Constitution must be read together as an integrated whole, not one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness. And exhaustiveness" – See *Tinyefunza vs. Attorney General of Uganda Constitutional Petition No. 1 of 1997* [1997] 3 UGCC



Again, reliance was placed in Supreme Court of Kenya case of Re The Matter of Kenya National Human Rights Commission, (Supreme Court Advisory Opinion Ref. No.1 of 2012), which has similarly advocated a holistic interpretation of *the Constitution* stating;

“ But what is meant by a holistic interpretation of *the Constitution*? It must mean interpreting *the Constitution* in context. It is contextual analysis of a Constitutional proviso, reading it alongside and against other provisions, so as to maintain a rational explication of what *the Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions in each other, so as to arrive at desired result.”

12. It was further submitted that the Respondent’s claim that the jurisdiction of the High Court is ousted by the provisions of the County Government Act is a fallacy in that the same is inconsistent with *the Constitution* and should be declared as invalid. It was further submitted that the provisions of Chapter Six of *the Constitution* embody normative values and principles on which the system of checks and balance under *the Constitution* is anchored. Those provisions apply to all public and state officers irrespective of rank or profile and can be enforced independently of Article 181 of *the Constitution*. Reliance was placed in the case of “Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR held that values and principles under *the Constitution* of Kenya and Article 10 (2) of *the Constitution* is 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. It held

“ 80. In view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of *the Constitution* is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforceable gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1) (a) which enjoins all persons to interpret *the Constitution* in a manner that promotes its values and principles.

81. Consequently, in this appeal, we make a firm determination that Article 10 (2) of *the Constitution* is 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.”

12. It was further submitted that the decision of the court in Moses Kithinji v. Mohammed Abdi Kuti [2020] eKLR was made per incuriam and is otherwise bad law and should not be followed. It was finally submitted that the Preliminary Objection be dismissed with costs.



Determination

13. I have given due consideration to the Petition as well as the Preliminary Objection and the rival submissions by the Petitioner, Respondent and 1st and 2nd Interested Parties regarding 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 arises for determination is whether this Court has the jurisdiction to hear and determine the Petitioner's Petition.
14. Jurisdiction being so central to the judicial proceedings, Nyarangi, J A, 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..."
15. The Supreme Court of Kenya 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
16. The jurisdiction of this Court has been 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.
17. 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".
18. 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.
19. 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.
20. 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.
21. 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.”
22. 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.
23. The Petitioner contends that the Respondent has breached the provisions of *the Constitution* and the Statutes. The 1st and 2nd Interested Parties assert 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 1st and 2nd Interested Parties support the Petitioner’s argument that this Court has the requisite jurisdiction to hear and determine the Petition.
24. 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.
25. 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 2nd Interested Party herein and the Senate and therefore this Court cannot surpass the prescribed procedures under *the Constitution* and the Statute. It is instructive that *the Constitution* is self-contained in that it provides the process for the removal of Governors and by extension Deputy Governors under Article 181 thereof. On the other hand, *the Constitution* provides for the National values and Principles of Governance under Article 10 which binds all state organs and state officers. Again, Article 73-75 deals with matters to do with leadership and integrity which must be observed by all state officers. The gist of the petition is that the Respondent herein violated the provisions of Article 73-75 of *the Constitution* and hence the need for his removal from office. Since *the Constitution* has provided the process for removal of Governor or Deputy Governor under Article 181 thereof, the 2nd Interested Party herein did comply with the same and commenced impeachment proceedings against the Respondent. Upon successful impeachment, the matter ended up in the Senate. The Senate did not uphold the impeachment. The 2nd Interested Party still has the option to commence fresh impeachment proceedings against the Respondent if need be. If that happens, then the Petitioner's concerns will be taken care of as the Respondent would be removed from office. Even though the Petitioner has come up with an independent action against the Respondent pursuant to violations of Article 10, 73 – 75 of *the Constitution*, the same would have succeeded were it not for the fact that the Respondent has already been dealt with under Article 181 of *the Constitution*. It seems to me that the failure of the impeachment proceedings at the Senate has led to the filing of this petition yet the 2nd Interested Party still has the option of commencing fresh impeachment proceedings. It would appear therefore that there is a two-pronged move against the Respondent through impeachment and now through this petition. It is my considered view that the Petitioner herein should team up with the 2nd Interested Party and commence fresh impeachment proceedings as provided for under Article 181 of *the Constitution*. That option is still available and that the same should be exhausted.

26. 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).

27. 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 2nd Interested Party to re-introduce a motion for the removal of the Respondent on the same charge to the Senate after three months. Clearly, the Petitioner should take note that the 2nd Interested Party 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. The Petitioner should nudge the 2nd Interested Party to commence fresh impeachment proceedings against the Respondent.

28. 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”.

29. 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.”

30. *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.”

31. 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 2nd Interested Party 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. The Petitioner herein is expected to work together with the 2nd Interested Party towards the removal of the Respondent since it is allowed under Article 181 of *the Constitution* and Section 33 (9A) of the County Government Act. No reason has been given by the 2nd Interested Party 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. Further, the Respondent has already been taken through the process of impeachment all the way from the County Assembly to the Senate. I find that the Respondent will suffer great prejudice if he is subjected to fresh proceedings as herein yet the process of his removal from office is clear under Article 181 of *the Constitution* and Section 33 (9A) of the County Government Act. It seems that upon the impeachment of the Respondent failing to succeed at the Senate, the Petitioner herein came up with this petition with a view to having him removed for violating Article 10, 73-75 of *the Constitution*. Whereas the Petitioner is entitled to bring such a petition, the circumstances obtaining herein is that the Respondent had already been dealt with through impeachment mounted by the 2nd Interested Party. It is believed that the grievances of the 2nd Interested Party are shared by the Petitioner and therefore, if a fresh impeachment process is commenced, those grievances would be addressed substantially. In that regard, this court lacks jurisdiction to entertain this matter.

32. 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.
33. 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 third ground of the Preliminary Objection therefore cannot succeed as brought before the Court.



34. The court notes that the Senate absolved the Respondent and that the Petitioner appears to be aggrieved by its decision and thus the 2nd Interested Party 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 herein has filed this petition after the Senate had quashed the impeachment of the Respondent by the 2nd Interested Party. Since it has been observed above that the 2nd Interested Party could as well commence fresh impeachment proceedings, the Petitioner's concerns will be taken care of through that process. In any case, the Petitioner herein had worked closely with the 2nd Interested Party during the impeachment process and that they could as well work together in a fresh impeachment against the Respondent. It is instructive that the option to impeach the Respondent is still available to the 2nd Interested Party and therefore the doctrine of exhaustion is applicable in the circumstances.
35. For the foregoing observations, the Court finds the Respondent's Notice of Preliminary Objection dated 17th August, 2023 is merited in terms of grounds 1 and 2 thereof on the ground that this Court lacks jurisdiction to hear and determine the Petition. Accordingly, the Respondent's Preliminary Objection in that regard is upheld with the result that the Petitioner's Petition and Notice of Motion dated 7th July 2023 be and are hereby struck out. Each party to bear their own costs.

DATED AND DELIVERED AT SIAYA THIS 7TH DAY OF MARCH, 2025.

D. KEMEI

JUDGE

In the presence of:

N/A Ouma.....for Petitioner

N/A Nyamidi.....for Respondent

N/A Awele.....for 1st Interested Party

Kiage for Ogolla.....for 2nd Interested Party

N/A.....for 3rd Interested Party

Ogendo.....Court Assistant

