



**Kibwalei v Speaker County Assembly of Baringo & 2 others;
Governor County Government of Baringo (Interested Party) (Petition
E002 of 2023) [2024] KEHC 4707 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4707 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
PETITION E002 OF 2023
RB NGETICH, J
APRIL 18, 2024**

BETWEEN

ENG LEKONAYA K KIBWALEI PETITIONER

AND

THE SPEAKER COUNTY ASSEMBLY OF BARINGO 1ST RESPONDENT

THE CLERK COUNTY ASSEMBLY OF BARINGO 2ND RESPONDENT

THE COUNTY ASSEMBLY OF BARINGO 3RD RESPONDENT

AND

**THE GOVERNOR COUNTY GOVERNMENT OF BARINGO INTERESTED
PARTY**

Standing Order No. 66(6) of the Baringo County Assembly Standing Orders, 2014 is unconstitutional for conflicting with section 40(3)(a) of the County Governments Act (cap 265)

Reported by John Ribia

Statutes – interpretation of statutory provisions – interpretation of standing order 66(6) of the Baringo County Assembly Standing Orders vis-à-vis section 40(3)(a) of the County Governments Act - whether standing order 66(6) of the Baringo County Assembly Standing Orders, 2014 was unconstitutional for conflicting with the County Governments Act by prescribing a different composition for the select committee tasked with investigating the removal of a county executive committee member - County Governments Act, (cap 265), section 40(3)(a).

Brief facts

The petitioner was appointed as the County Executive Committee Member (CECM) for Public Works, Transport, and Infrastructure in Baringo County. A motion for his removal was introduced on October 17, 2023, citing incompetence, abuse of office, and gross violation of the Constitution.



On October 25, 2023, the County Assembly approved the motion with the support of one-third of its members, triggering the requirement to form a select committee to investigate the allegations. The petitioner challenged the constitutionality of standing order 66(6) of the Baringo County Assembly Standing Orders, which required the select committee to consist of one-third of the Assembly members (15 members) instead of the statutory requirement of five members under section 40(3) of the County Governments Act. Before the select committee was formed, the motion to establish it was withdrawn, effectively halting the removal process.

Issues

Whether standing order 66(6) of the Baringo County Assembly Standing Orders, 2014 was unconstitutional for conflicting with section 40(3)(a) of the County Governments Act (cap 265) by prescribing a different composition for the select committee tasked with investigating the removal of a county executive committee member.

Held

1. Article 200(c) of the Constitution mandated Parliament to make legislation to provide for processes of appointment or removal of officers of the county to facilitate operationalization of the county government. In compliance with the Constitution Parliament enacted the County Governments Act.
2. There was a presumption of constitutionality of statutes. Sovereign power belonged to the people and it was to be exercised in accordance with the Constitution. That sovereign power was delegated to Parliament and the legislative assemblies in the county governments; the National Executive and the executive structures in the county governments; and the Judiciary and independent tribunals. Those organs must perform their functions in accordance with the Constitution.
3. Article 2 of the Constitution provided that any law, including customary law, that was inconsistent with the Constitution was void to the extent of the inconsistency, and any act or omission in contravention of the Constitution was invalid. Where a court was convinced that legislation was inconsistent with the Constitution, there was no reason for it to shy away from declaring it invalid to the extent of its inconsistency. When any of the State organs stepped outside its mandate, the court would not hesitate to intervene.
4. The High Court was vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under article 165(3) of the Constitution, had the duty and obligation to intervene in actions of other State organs where it was alleged or demonstrated that the Constitution had either been violated or threatened with violation. The Constitution being the supreme law of the land, all State organs must function and operate within the limits prescribed by the Constitution.
5. In cases where they stepped beyond what the law and the Constitution permitted them to do, they could not seek refuge in independence and hide under that cloak or mask of inscrutability in order to escape judicial scrutiny.
6. Standing order 66(6) of the Baringo County Assembly Standing Orders contravened the provisions of section 40(3)(a) of the County Governments Act to the extent of the number of members of a select committee that considered the removal from office of members of the County Executive Committee. The County Governments Act provided that the select committee was to be comprised of five members of the assembly whereas the impugned Standing Order No.66(6) provided that the Select Committee was to be comprised of a third of the Members of the County Assembly making the 15 in respect to the Baringo County Assembly which was three times the number the Act provided.
7. There was a discrepancy on the composition of select committee under section 40(3) of the County Governments Act. Parliament in its wisdom while exercising a constitutional mandate under article 200 of the Constitution, stipulated the number of members to the committee as 5 members and county assemblies ought to comply on composition in the Standing Orders. Standing order 66(6) of the Baringo County Assembly was contrary to section 40(3)(a) of the County Governments Act and therefore inconsistent with the Act and the Constitution and was null and void.



Petition allowed.

Orders

- i. *Declaration that standing order 66(6) of the County Assembly of Baringo Standing Orders adopted on March 18, 2014 and as amended on the June 13, 2017 was unconstitutional, illegal and void for being contrary to the provisions of sections 40(3)(a) of the County Governments Act and article 200(c) of the Constitution.*
- ii. *Each party was to bear their own costs.*

Citations

Cases

Kenya

1. *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* Petition 628, 630 of 2014; [2015] KEHC 7074 (KLR) - (Explained)
2. *Council of Governors & 6 others v Senate* Petition 413 of 2014; [2015] KEHC 6967 (KLR) - (Applied)
3. *Kipng'eno, John Koech & 2 others v Nakuru County Assembly & 5 others* Election Petition 23 & 25 of 2013; [2013] KEHC 2130 (KLR) - (Mentioned)
4. *Manthi, Wilfred Musyoka v Machakos County Assembly & 4 others* Constitutional Petition 7 of 2018; [2018] KEHC 5229 (KLR) - (Explained)
5. *Muigai & another v Law Society of Kenya & another* Petition 286 of 2014; [2015] KEHC 6973 (KLR) - (Explained)
6. *Okello, Jared Odoyo & another v Independent Electoral & Boundaries Commission & 6 others* Civil Appeal Nos 16 & 19 of 2013; [2013] KECA 42 (KLR) - (Explained)
7. *Tunoi, Samuel v Speaker Nakuru County Assembly & 2 others* Petition 44 of 2015; [2019] KEHC 5982 (KLR) - (Explained)

Tanzania

Ndyanabo v Attorney General [2002] TZCA 14; [2001] EA 495 - (Explained)

United Kingdom

Pearlberg v Varty [1972] 1 WLR 534 - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 1(1); 2(4); 10; 22(1); 23(3); 25; 35; 41(1); 47; 50; 75(1); 179(1)(2)(b); 196; Chapter 11 - (Interpreted)
2. County Assembly of Baringo Standing Orders, 2014 order 66(6) - (Unconstitutional)
3. County Assembly of Baringo Standing Orders, 2014 order 37; 50(1)(2); 66 - (Interpreted)
4. County Governments Act (cap 265) sections 14(1)(8); 31; 34; 40(2)(3)(a); Schedule 2 - (Interpreted)
5. Fair Administrative Action Act (cap 7L) sections 4, 7 - (Interpreted)

Advocates

Mr Too h/b for Mwangi for the petitioner.

Ms Mabalalu h/b for Mr Kiprono for the 1st, 2nd and 3rd respondents.

JUDGMENT

1. The petitioner who is the County Executive Committee Member (CECM) in the County Government of Baringo responsible for Public Works, Transport and Infrastructure filed this petition against the respondents and the interested party seeking the following orders:-



- a. A declaration that the notice of motion for the removal of the petitioner from office dated October 17, 2023 and passed on October 25, 2023, was in contravention of articles 10, 35, 47, 50 and 196 of the Constitution.
- b. An order for *certiorari* do issue prohibiting the 3rd Respondent from constituting a special committee to hear charges against the petitioner, as called for by the motion tabled in the County Assembly on October 25, 2023;
- c. A declaration that the proceedings for the removal of the petitioner, the County Executive Committee Member (CECM) in charge of Roads, Transport & Public Works and Infrastructure, Baringo County was conducted in violation of articles 10, 25, 47 and 50 of the Constitution of Kenya, 2010 the provisions of the County Governments Act, 2012 and Standing Orders No 37 and 66 of the County Assembly of Baringo Standing Orders hence unconstitutional, illegal, null and void;
- d. An order of *certiorari* removing into this court and quashing the 1st respondent's proceedings for the removal of the petitioner from the position of the County Executive Committee Member (CECM) in charge of the Roads, Transport and Public Works, Baringo County and the resolutions passed by the 3rd respondent on the October 25, 2023;
- e. A declaration that Standing Order No 66(6) of the County Assembly of Baringo Standing Orders adopted on March 18, 2014 and as amended on June 13, 2017 is unconstitutional illegal and void for being contrary to the provisions of section 40(3)(a) of the County Governments Act and Chapter Eleven (11) of the Constitution.
- f. A declaration that the Composition of the Special Committee to investigate the removal of the petitioner from Office and any such resolutions, decisions, reports and/or recommendations made by the Special Committee so constituted are null and void,
- g. An order of injunction restraining the Interested Party, Governor, Baringo County, from dismissing the Petitioner as the County Executive Committee Member (CECM) in charge of Roads, Transport & Public Works and Infrastructure pursuant to any resolutions passed by the 3rd respondent.
- h. Costs of the petition be provided for.

Legal Foundations of the Petition

2. Article 1(1), article 10, article 22(1) , article 23(3) , article 41(1), article 47, article 75(1), article 179 of the Constitution, section 14(1) of the County Governments Act, section 30(2) and 35 of the County Governments Act, article 179(2)(b) of the Constitution, section 31 of the County Governments Act, section 34 of the County Governments Act, section 40 of the County Governments Act, The Second Schedule to the County Governments Act mandates the County assembly to enact Standing Orders that provide for special motions and the Procedure for removal of member of County Executive Committee, Standing Order No 66 of the Baringo County Assembly Standing Orders, section 4 and section 7 of the Fair Administrative Action Act.

Petitioner's Case

3. The petitioner aver that he was shortlisted, interviewed, vetted and approved by the County Assembly and subsequently appointed as the County Executive Committee Member for the Department of Public Works, Transport and infrastructure following advertisement for the position on September 5,



2022. That he has been discharging the functions of his office dutifully in accordance with his mandate in uttermost observance of the Constitution and the law at all times.

4. That a Member of County Assembly for Kisanana Ward within Baringo County namely, Hon Jacob Kiprotich Cheboiwo, presented a motion dated October 17, 2023 which was received by the Clerk of Baringo County Assembly on October 17, 2023 for the removal of the petitioner from office on the following grounds: -
 - a. Incompetence
 - b) Abuse of office
 - c) Gross violation of the Constitution and written Law.
5. That in the morning of October 25, 2023, the 1st respondent published Order Paper No 1 of October, 2023 inviting members of Baringo County Assembly to debate the motion at 2: 30 PM the same day for purposes of initiating the impeachment process and the Constitution of a select committee to investigate the allegations raised therein and report its findings to the 3rd respondent.
6. The petitioner aver that under Standing Order No 66 of the Baringo County Assembly Standing Orders, for the motion to be approved by the House, it requires the support of at least a third of the members of the Assembly. Upon approval, the Assembly is required to constitute a Special Committee comprising a third of the members of the Assembly within 7 days to investigate the matter. The Special Committee is thereafter required to conclude the investigations within 10 days.
7. The petitioner is further aware that the motion for the removal of the petitioner was presented before the members of the county assembly on October 25, 2023 at 2:30 PM whereupon a vote on the motion was called. The motion for the removal of the petitioner from Office was support by eighteen (18) members while twenty-two (22) voted against the motion. Despite the lack of majority support, the motion was approved as it met the threshold of a third of the members of the Assembly.
8. Further that the speaker of the county assembly directed that a list of the members to constitute the special committee be tabled before the County Assembly on October 31, 2023 for approval by the members of the County Assembly.
9. The petitioner presents this petition challenging the decision of the County Assembly of Baringo County in adopting the motion for the removal of the petitioner presented on October 25, 2023 which was supported by one third of the members of the assembly pursuant to Standing Order No 66 of the Baringo County Assembly.
10. The petitioner's argument is that the procedure adopted by the members of the county assembly of Baringo is unfounded in law, is irrational, unreasonable and is founded upon erroneous provisions of the law in total violation of the Constitution of Kenya, 2010; and the decision of the members of the county assembly and the procedure adopted by the respondents herein is thus illegal, unconstitutional and is *ultra vires* the applicable statute to wit the County Governments Act.

Respondent's Case

11. In response, the respondents have filed a replying affidavit sworn by the Jepkemoi Chemase who is a Clerk to the County Assembly of Baringo the 3rd respondent herein.
12. She states that she is sued as the 2nd respondent herein and currently the Chief Administrative Officer, Accounting and Authorized Officer of the County Assembly of Baringo the 3rd Respondent herein.



13. She states that the Baringo County Assembly adopted its Standing Orders in March 2014 and duly amended the same on the 12th Day of June 2017 to give effect to the provisions of section I4(1) of the County Governments At 2012 and as the Chief Executive Officer of the County Assembly of Baringo she is bound by the National Values and Principles of Government as espoused under article 10 of the [Constitution of Kenya](#) when applying and interpreting the [Constitution](#), making and or implementing the public policy decisions.
14. That the County Assembly of Baringo having been established under article 179(1) of the [Constitution of Kenya](#) is duty bound under the provisions of article 185(3) of the [Constitution of Kenya](#) to oversee County Executive Committee and other Organs within the Executive Arm of any County Government and the petitioner in his capacity as the County Executive Committee Member (CECM) in the County Government of Baringo in charge of Public Works, Transport, and Infrastructure is not immune from constitutional and legal processes.
15. That the members of the 3rd respondent have not at all constituted a Special Committee pursuant to the proviso in section 40(3)(a) of the County Governments Act charged with investigating the allegations raised in the impugned motion for the removal of the petitioner nor the said members have received, processed and approved the Report of the said Special Committee and have never acted in furtherance of the same in the proceedings of the 3rd respondent.
16. She states that section 40(2) of the [County Governments Act](#) on the removal from public office of a member of County executive Committee clothes the respondent with the power allowing any one of its membership supported by at least one third of all its membership to propose a motion requiring the Interested party herein to dismiss such a member on any of the following grounds namely; gross violation of the [Constitution](#) or any other law, incompetence; abuse of office gross misconduct; or convicted of an offence punishable by imprisonment for at least six months at any time even during the pendency of an employment contract.
17. That the notice of motion has since been substantially overtaken by events as the motion to appoint a Select Committee to investigate and submit a report to consider his removal from office as the County Executive Committee Member (CECM) in the County Government of Baringo in charge of Public Works, Transport, and Infrastructure initiated earlier on has since been withdrawn.
18. That the petitioner has not annexed any communication from, the impugned Select Committee in form of Letter inviting him to attend its hearing, at any appointed place and time and therefore cannot put his rights under section 4 of the [Fair Administrative Action Act](#) were curtailed and violated.
19. That given the abandonment of the motion that had already been passed at the County Assembly that the process that had already been commenced as claimed by the petitioner has now been brought to an end unless the process for his removal from office is undertaken afresh as the Respondent is still at liberty to do so to its logical conclusion.
20. That section 40 of the [County Governments Act](#) Number 17 of 2012 provides for the grounds for removal of the County Executive Committee Member of the County Assembly of Baringo in standing Order and in particular Standing Order 66 provides for the procedure for the removal of a member of the county Executive Committee Member.
21. That the county Assembly of Baringo complied with the provisions of standing Order 66(1) of the Baringo County Assembly when Hon Jacob Rotich Cheboiywo on the 17th October 2023 delivered the Proposed motion in writing to herself as contemplated by the law stating the Grounds and



- particulars upon which the proposal is made for requiring the Governor to dismiss a member of the County Executive committee on grounds of Gross Violation of the Constitution and or other law.
22. That upon receipt of the copy of the proposed motion by the Hon member of the 3rd respondent, the same was signed by herself and the Member of the County for onward transmission to the Hon Speaker the 1st respondent for consideration and his approval.
 23. That she transmitted the duly signed copy of the proposed motion dated the October 17, 2023 to the Hon Speaker for his approval when a copy of the Proposed Motion was approved on the October 17, 2023 by the Hon speaker the 1st respondent.
 24. That the Hon Member on having obtained the approval from the Hon Speaker to move a motion as contemplated under Standing Order 66 (1) of the Baringo County assembly was required by law to have a three (3) Day Notice calling for the dismissal of the Member of the County Executive Committee by the Governor which requirement was complied with by the Hon Member of the Respondent issuing a notice on the October 17, 2023.
 25. That time started running immediately a notice was issued to the Governor by the Hon Member of the 3rd respondent on the dismissal of the County Executive Committee Member issued on the October 17, 2023.
 26. That it is a requirement of the law that no motion shall be placed on the Order Paper unless three (3) Days has expired from the time the notice was given and that the motion in relation to removal of the petitioner from Office was placed on the Order Paper on the October 25, 2023 having been satisfied that the 3 days had already lapsed from the time a notice for dismissal was issued.
 27. That the requirement of preparing an Order Paper and circulating it as contemplated under the provisions of Standing Order 37 of the County Assembly of Baringo were strictly met as the same was circulated to the Hon Members both in hard copies and also being uploaded to the 3rd respondent's Website on the October 24, 2023 and not 25th October as alleged by the petitioner.
 28. That within the seven days from the Issuance of the Notice for dismissal she caused a list of signatures for removal of the Petitioner to be prepared and deposited in her office with an open space against each name of the members of the 3rd respondent for the purposes of appending the Signatures and some of the House Members of the respondent visited her office and appended their signatures in support of the motion on the open spaces against their names where a total of 17 members appended their signatures in support thereof.
 29. That the honorable speaker the 1st respondent in the petition having been satisfied that the Quorum was present and that the said motion had been supported by more than one third of the members of the county assembly the mover having favored him with the list signed by members in support of the motion, permitted the mover to move the motion and the motion was moved by the Hon member and seconded before the Honourable speaker advised the House to confirm if the quorum was present for the purposes of making a decision the same having been extensively debated, the 1st respondent was convinced quorum was present and directed that the decision be made by alphabetical roll call voting.
 30. That before the decision was made, the County Assembly of Baringo ensured that all the provisions that relate to taking of votes was complied with and at the end the honourable Speaker announced the results in relation to the motion at hand.
 31. That notwithstanding the outcome of the vote taken by the 3rd Respondent, members voted against the motion and 18 members voted in support of the motion ,the motion was considered to have been passed, by at least one third of the members of the county Assembly in this case 15 Honourable



- Members, and that the process would not be complete unless a Special Committee is appointed by the County Assembly as contemplated under the provisions of section 40(3) a of the County Governments Act and Standing Orders 66(6) of the Baringo County Assembly within Seven days to investigate the matter and within 10 days report to the assembly whether it find the allegations against the member of the county Executive committee to be substantiated.
32. That the Hon Speaker made a communication and tasked both the majority leader and the Minority Leader in Consultation with their parties to constitute the special committee in his communication on 25th Day October 2023 after the passage of the motion.
 33. That both the Minority and the majority leaders in consultation with members of their party did propose the names of the members to serve in a special select committee subject to the consideration by the County Assembly and issued a notice of motion on October 31, 2023.
 34. That the House Business Committee was convened to consider allotting time for business of the assembly amongst them motion to consider the approval of the special-committee members to investigate the allegations raised against the Petitioner herein and in compliance with provisions of standing order 37 of the county assembly of Baringo, the order paper was Prepared and uploaded on the Baringo County Assembly website 12 hours before tabling in the County Assembly.
 35. That upon adoption of the names of members serving in the Special Select Committee to investigate against the member of the County Executive Committee, the member to be investigated has a right to appear and be represented before the committee during its investigations.
 36. That even after issuing the notice of motion for consideration of the proposed names to the Special Select Committee, the Hon Majority Leader Lawi Kipchumba Tallam issued a notice of withdrawal of the motion pursuant to the provisions of standing orders 50(1) and (2) of the Baringo County Assembly. The said withdrawal notice was pegged on the strength that the majority leader in consultation with members of the 3rd respondent needed time to allow further consultations to accommodate various interests and that he needed time to seek legal interpretation with a view to aligning the *Constitution*, the County Governments Act and the Baringo County Assembly Standing Orders which notice was upheld and immediately the notice of withdrawal was issued, the seven days as provided by law to ensure that such special select committee is established has since lapsed and to date none has been constituted and none is permitted by law to be constituted.
 37. That the members of the 3rd respondent have never commenced the process of vetting and/or approval of any other nominee in the docket currently being served by the Petitioner and the allegations contained in the petition are merely speculative, and that a select committee has not within 10 days of its establishment submitted a report to the 3rd respondent substantiating or unsubstantiating the grounds for removal to be considered the 3rd respondent as provided by the law.
 38. That it is only upon such complete investigations are completed by a select committee, its report being adopted by the County Assembly is when the removal would be activated and in any case the petitioner would have had an opportunity to be heard during investigations as of right and therefore the present petition as presented by the Petitioner is speculative in nature beside it being premature.
 39. That the notice of dismissal dated October 17, 2023 annexed to the affidavit in support of the instant petition was duly copied and made known to the petitioner in his personal capacity and any allegations to the contrary are misleading.
 40. The petition proceeded by way of written submissions in respect to issues pending herein.



Petitioner's Submissions

41. The petitioner filed submissions dated March 5, 2024 restating grounds of the petition and that on October 31, 2023, the Majority Leader of the County Assembly withdrew the motion for the Constitution of the Select Committee that was intended to investigate the grounds for his removal for reasons captured above and following withdrawal of the motion, majority of the issues raised in this petition have been overtaken by events save for the question as to the Constitutionality and or Legality of Standing Order 66(6) of the County Assembly of Baringo Standing Orders which still outstanding.
42. The petitioner submits that the Constitution being the Supreme Law of the Land provides that any law that is inconsistent with it is void to the extent of inconsistency and it mandates every person to respect, uphold and defend it.
43. The petitioner submits that the People of Kenya delegated their Sovereign power to the Parliament and County Assemblies as law making bodies and expect them to adhere to the National values and Principles of Governance such as the Rule of Law, Democracy and Good Governance in discharge of their mandates and all legislations passed by the Parliament and County Assemblies must adhere to the Spirit and Letter of the Constitution and urge this court to determine whether the County Assembly of Baringo Standing Order 66(6) contravenes section 40(3) of the County Governments Act.
44. The petitioner submits that the process for the removal of a County Executive Member is set out under section 40 of the County Governments Act enacted by Parliament under Chapter 11 on devolved governments and pursuant to article 200 of the Constitution of Kenya.
45. That section 14 of the County Governments Act mandates the County Assemblies to do inter alia the following:-
 - (1) A county assembly -
 - (a) May make standing orders consistent with the Constitution and this Act regulating the procedure of the county assembly including, in particular, orders for the proper conduct of proceedings; and
 - (b) Subject to standing orders made under paragraph (a), may establish committees in such manner and for such general or special purposes as it considers fit, and regulate the procedure of any committee so established.
 - (8) Without limiting the generality of subsection (1), the Standing Orders made under this section shall provide for the matters specified in the Second Schedule.
46. And further submit that the Second Schedule to the Act sets out all matters that must be provided for and specifically addressed in the County Assembly Standing Orders which include Nomination of members of select committees, Criteria for and approval of nomination, Composition of select committees, Chairing of select committees and quorum, Procedure in select committees, Reports of select committees; and Limitation of mandate
47. That under section 40(2) of the County Governments Act provide procedure for the removal of a County Executive Committee Member being that at least one-third of all the members of the county assembly, may propose a motion requiring the Governor to dismiss a county executive committee member on grounds of gross violation of the Constitution or any other law, incompetence, abuse of office, gross misconduct, or if convicted of an offence punishable by imprisonment for at least six months and upon the motion being passed by one third, the following should follow under subsection 3



- a. the county assembly shall appoint a select committee comprising five of its members to investigate the matter; and
 - b. the select committee shall report, within ten days, to the county assembly whether it finds the allegations against the county executive committee member to be substantiated.
48. The petitioner submits that in light of section 14(1) & (8), 40(3)(a) and the Second Schedule to the County Governments Act, the County Assembly of Baringo enacted its Standing orders on March 18, 2014 and reviewed them on June 13, 2017 and of interest for the purposes of this trial is the Standing Order no 66 (6) which provides the Procedure for removal of a Member of County Executive Committee; this order provides thus;
- (6) When the motion has been passed by at least one third of all Members of the County Assemblies the Assembly shall, within seven (7) days, appoint a special Committee comprising a third of the Members to investigate the matter and shall, within ten days, report to the Assembly whether it finds the allegations against the member of County Executive Committee to be substantiated.
49. It is the Petitioners submission that this particular order contravenes the provisions of section 40(3) (a) to the extent that it says that the select committee shall be comprised of five (5) members of the assembly. The impugned Standing Order on the other hand provides that the Select Committee shall be comprised a third of the Members of the County Assembly which is Fifteen (15) for the Baringo County Assembly a number which is three times the number the Act provides.
50. That under section 40(3) of the county governments Act a select committee to consider a motion for the removal of a Member of a County Executive Committee shall be composed of 5 members and Standing Orders must be in line with the Constitution and the Act but County Assembly of Baringo decided to enact standing order 66(6) which is contrary to the provisions of the Act and placed reliance in Wilfred Manthi Musyoka v County Assembly of Machakos; Governor - County Government of Machakos & 2 others (Interested Parties) [2019] e KLR, where the court stated that Standing Orders are the legal instruments through which Assemblies perform their Constitutional Mandate.
51. It is the petitioner's submission that the County Assembly of Baringo is subject to the Constitution under article 200(c) which mandated Parliament to make a legislation to provide for processes of appointment or removal of Officers of the County to facilitate operationalization of the County Government; and the actions of the Assembly in legislating the Standing Order 66(6) which does not comply with section 40(3) of the County Governments Act, which is the principal law, is void and should be declared null and void to this extent of inconsistency.
52. The petitioner further submits that the withdrawal of the motion for the reason given by the Leader of Majority goes to demonstrate that even the county assembly itself was doubtful on the legality of its own standing orders when put before the mirror in the form of the Act and the Constitution; that the reflection of order 66(6) on the mirror of section 40(3)(a) of the Act was not a true reflection.
53. The petitioner further rely on the case of Samuel Tunoi v Speaker Nakuru County Assembly & 2 others [2019] eKLR where the court held as follows:-
- “ 45. Section 14 of the County Governments Act has mandated County Assemblies to make Standing Orders consistent with the Constitution and the Act to regulate the Procedure of the County Assemble including orders for the proper conduct of its proceedings. I find that the amended standing order 64(3) shows a sharp contradiction to the Assembly's own Standing Order



68(2). It directly contravenes the provisions of section 4(3)(a) of the Fair Administration Act and article 47 of the Constitution and must therefore be impugned."

54. And further in the case of Jared Odoyo Okello & another v Independent Electoral & Boundaries Commission & 6 others [2014] eKLR, the Court of Appeal (Nambuye, GBM Kariuki, Gatembu, M'inoti & Murgor, JJA) held that:-

"We need not belabour the first principle that subsidiary legislation cannot in our jurisdiction, be inconsistent with the principal legislation under which it is made, let alone the Constitution (See section 31(b) of the Interpretations and General provisions Act, cap 2 Laws of Kenya). It cannot possibly be that jurisdiction which is not expressly limited by the Constitution in art 164(3) is left to be limited by subsidiary legislation. We do not buy the argument at all."

55. The petitioner submits that in their replying affidavit, the respondents stated that the petitioner's claim of the unconstitutionality is unfounded as the provisions of order 66(6) were not activated and the petitioner did not therefore suffer any injustice as a result of the application of the law but the petitioner argue that this argument is neither here nor there as it is not a requirement in article 2(4) of the Constitution for one to prove harm for an act or legislation to be declared inconsistent with the Constitution or any other law and relied on the case of John Kipng'eno Koeh & 2 others v Nakuru County Assembly & 5 others [2013] eKLR.
56. The petitioner urges this court to find that the County Assembly of Baringo is bound by the County Governments Act in legislating the Standing Order 66(6) and should exercise this power to the full extent with requirements under section 40(3) of the Act; and failure to do so, renders its processes and in this case, the Investigation of the conduct of a County Executive Committee Member who is a subject of Removal proceedings *ultra vires* under the Act and thus unconstitutional illegal, null and void.

Determination

57. I have perused and considered the grounds of petition, averments by the parties herein together with submissions filed. The motion for removal of the petitioner as the County Executive Committee Member having been withdrawn, the only remaining issue for determination by this court is whether standing order No 66(6) of the Baringo County Assembly Standing Orders is in contravention of section 40(3) of the County Governments Act which is the principal statute and by extension the Constitution.
58. Article 200(c) of the Constitution mandates Parliament to make a legislation to provide for processes of appointment or removal of Officers of the County to facilitate operationalization of the County Government. In compliance with the Constitution parliament enacted the County Governments Act.
59. Section 40(3) of the County Governments Act provides as follows:-
- "(3) If a motion under subsection (2) is supported by at least one-third of the members of the county assembly
- (a) the county assembly shall appoint a select committee comprising five of its members to investigate the matter; and



- (b) the select committee shall report, within ten days, to the county assembly whether it finds the allegations against the county executive committee member to be substantiated.”

60. Standing Order No 66 (6) of the Baringo County Government provide as follows: -

- (6) When the motion has been passed by at least one third of all Members of the County Assembly, the Assembly shall, within seven (7) days, appoint a special Committee comprising a third of the Members to investigate the matter and shall, within ten days, report to the Assembly whether it finds the allegations against the member of County Executive Committee to be substantiated.”

61. The general rule or principle in respect to legislation is that there is a presumption of constitutionality of statutes. This position was reaffirmed by the Court of Appeal of Tanzania in *Ndyanabo vs. Attorney General* [2001] EA 495 which was a restatement of the law in the English case of *Pearlberg v Varty* [1972] 1 WLR 534. Where Tanzania court of appeal stated as follows: -

“Until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative”

62. Under article 1 of the *Constitution*, sovereign power belongs to the people and it is to be exercised in accordance with the *Constitution*. That sovereign power is delegated to Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals. There is however a rider that the said organs must perform their functions in accordance with the *Constitution*. Our Constitution having been enacted by way of a referendum, is the direct expression of the people’s will and therefore all State organs in exercising their delegated powers must bow to the will of the people as expressed in the *Constitution*.

63. Article 2 of the *Constitution* provides for the binding effect of the *Constitution* on state organs and proceeds to decree that any law, including customary law, that is inconsistent with the *Constitution* is void to the extent of the inconsistency, and any act or omission in contravention of the *Constitution* is invalid.

64. Where court is convinced that legislation is inconsistent with the *Constitution*, there is no reason why it should shy away from declaration it invalid to the extent of its inconsistency. In the case of *Council of Governors and Others v The Senate* Petition No 413 of 2014, the court stated as follows: -

“This court [is] vested with the power to interpret the *Constitution* and to safeguard, protect and promote its provisions as provided for under article 165(3) of the *Constitution*... has the duty and obligation to intervene in actions of other arms of government and state organs where it is alleged or demonstrated that the *Constitution* has either been violated or threatened with violation. In that regard, the Petition before us alleges a violation of the *Constitution* by the respondent and in the circumstances, it is our finding that the doctrine of separation of power does not inhibit this court’s jurisdiction to address the petitioner’s grievances so long as they stem out of alleged violations of the *Constitution*. In fact, the invitation to do so is most welcome as that is one of the core mandates of this court”.

65. In view of the above, when any of the state organs step outside its mandate, this court will not hesitate to intervene.



66. It is therefore my view that this court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other state organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. The Constitution being the Supreme Law of the land, all state organs must function and operate within the limits prescribed by the Constitution. In cases where they step beyond what the law and the Constitution permit them to do, they cannot seek refuge in independence and hide under that cloak or mask of inscrutability in order to escape judicial scrutiny.
67. This position was adopted by this court in Githu Muigai & another v Law Society of Kenya & another [2015] eKLR where the court stated as follows:-
- “In our view, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In *Republic v Kenya Revenue Authority ex parte Aberdare Freight Services Ltd & 2 others* [2004] 2 KLR 530, it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others, and based on *East African Railways Corp v Anthony Sefu Dar-es-Salaam* HCCA No 19 of 1971; [1973] EA, courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. Consequently, where the law exhaustively provides for the jurisdiction of a body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. Further, courts will not be rubber stamps of the decisions of administrative bodies. However, if Parliament gives great powers to statutory bodies, the courts must allow them to exercise it. The courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law.”
68. Similarly in Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others [2015] eKLR, the Supreme Court held that:
- “In our view, the principle that emerges from the above decisions read together with article 124(1) of the Constitution is that in a jurisdiction such as ours in which the Constitution is supreme, the court has jurisdiction to intervene where there has been a failure to abide by Standing Orders which have been given constitutional underpinning under the said article. However, the court must exercise restraint and only intervene in appropriate instances, bearing in mind the specific circumstances of each case.”
69. Having perused section 40(3) of the county Governments Act and Standing order No 66(6) of the Baringo County Assembly, I agree with the petitioner that standing orders No 66(6) contravenes the provisions of section 40(3)(a) to the extent of the number of a member of a select committee that considers the removal from Office of Members of the County Executive Committee. The County Governments Act says that the select committee shall be comprised of five (5) members of the assembly whereas the impugned Standing Order No 66(6) says the Select Committee shall be comprised a third of the Members of the County Assembly making the fifteen (15) in respect to the Baringo County Assembly which is three times the number the Act provides.
70. There is a discrepancy on the composition of select committee under section 40(3) of the county governments Act. Parliament in its wisdom while exercising a constitutional mandate under article 200,



stipulated the number of members to the committee as 5 members and county Assemblies ought to comply on composition in the Standing Orders. In view of the above, standing order 66(6) of the Baringo County Assembly is contrary to section 40(30)(a) of the County Governments Act and therefore inconsistent with the Act and the Constitution and is therefore null and void. From the forgoing, prayer(e) of the petition dated October 26, 2023 is allowed.

71. Final orders: -

1. I hereby declare that standing order 66(6) of the County Assembly of Baringo Standing Orders adopted on March 18, 2014 and as amended on the June 13, 2017 is unconstitutional, illegal and void for being contrary to the Provisions of sections 40(3)(a) of the County Governments Act and article 200(c) of the Constitution.
2. Each party to bear own costs.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 18TH DAY OF APRIL 2024.

.....

RACHEL NGETICH

JUDGE

In the presence of

CA Karanja.

Mr. Too h/b for Mwangi for the petitioner.

Ms. Mabalalu h/b for Mr. Kiprono for 1st, 2nd and 3rd Respondents.

