



Kirera v Senate & 8 others (Petition 4 of 2024) [2024] KEHC 7490 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7490 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA**

PETITION 4 OF 2024

WA OKWANY, J

JUNE 13, 2024

BETWEEN

PURITY MORAA KIRERA PETITIONER

AND

THE SENATE 1ST RESPONDENT

THE SPEAKER OF THE SENATE 2ND RESPONDENT

GOVERNMENT PRINTERS 3RD RESPONDENT

HON. SIMBA PAUL ARATI 4TH RESPONDENT

KISII COUNTY ASSEMBLY 5TH RESPONDENT

SPEAKER KISII COUNTY ASSEMBLY 6TH RESPONDENT

CLERK KISII COUNTY ASSEMBLY 7TH RESPONDENT

WYCLIFFE SIOCHE 8TH RESPONDENT

WYCLIFFE SIOCHE 9TH RESPONDENT

RULING

1. The Petitioner herein, Purity Moraa Kirera, initially filed this Petition before Machakos High Court in HCCHRPET No. E007 of 2024 challenging the manner in which the impeachment proceedings against the 9th Respondent, the Deputy Governor of Kisii County, were conducted before both the Kisii County Assembly and the Senate (1st Respondent).
2. The Petitioner seeks the following reliefs in the Petition: -
 1. A declaration that the Notice issued on 13th February, 2024 of intention to remove the 1st Interested Party from office of the Deputy Governor, Kisii County by way of impeachment was defective and unlawful for want of compliance with Section 33(1) of the County



Government Act, 2012 as read with Orders 60(1), 60(5) and 60(6) of the standing Orders of the County Assembly of Kisii.

2. A declaration that within the intendment of Section 87 of the County Government Act, 2012 as read with Article 10 and 196(1) of *the Constitution* of Kenya, 2010, a County Assembly must conduct a meaningful and qualitative public participation in all the wards of the county on any decision that leads to a motion to impeach a County Governor.
 3. A declaration that the 2nd Respondent by admitting the motion of impeachment dated 21st February, 2024 and the 1st Respondent proceeding to hear the said motion against the 1st Interested Party despite the 7th Respondent having not conducted a meaningful and qualitative public participation, Section 87 of the County Government Act, 2012 was violated.
 4. A declaration that the 2nd Respondent by admitting the motion of impeachment dated 21st February, 2024 and the 1st Respondent proceeding to hear the said motion against the 1st Interested Party despite the 7th Respondent having been moved and canvassed out of time by the 7th Respondent, Section 33 of the County Government Act, 2012 was violated.
 5. A declaration that the decision of the 1st Respondent of the 14th March, 2024 to remove from office the 1st Interested Party as the Deputy Governor of Kisii County does not meet the threshold requirements in Article 181(1) of *the Constitution* of Kenya.
 6. An order of certiorari be issued to remove to this Honourable Court and quash the resolutions passed by the 1st Respondent on the 14th March, 2024 on the removal of the 1st Interested Party as the Deputy Governor, Kisii County and all consequential Kenya Gazette Notices issued pursuant to the said Resolution.
 7. An order of prohibition do issue prohibiting the 3rd Respondent from gazetting and or publishing a gazette notice appointing any person to office of the Deputy Governor, Kisii County.
 8. A declaration that the actions of the Respondents in this cause violated the constitutional provisions under Articles 27, 35(1) (b) and (2), 47, 50 (1) and (2) of *the Constitution* of Kenya.
 9. An ORDER compelling the Interested Party to refund the Salaries, remuneration and personal emoluments expended during the illegal tenure.
 10. This Honourable Court do order that the costs of this Petition be borne by the Respondents.
 11. Such other orders as this honorable court shall deem fit and just to grant in the circumstances.
3. Concurrently with the Petition, the Petitioner filed an Application dated 1st April 2024 (hereinafter “the 1st Application”) seeking the following orders: -
1. Spent
 2. That pending the hearing and determination of this Application, the Honourable court be pleased to issue conservatory orders staying and/or suspending the resolutions passed by the 1st Respondent on 14th March 2024 removing Robert Onsare Monda from the Office of Deputy Governor, Kisii County by way of impeachment.
 3. That pending the hearing and determination of this Application, the Honourable court be pleased to issue conservatory orders restraining the Respondents either by themselves or their



representatives from degazetting ROBERT ONSARE MONDA from Office of the Deputy Governor, Kisii County.

4. That pending the hearing and determination of this Application, the Honourable court be pleased to issue conservatory orders restraining the Respondents from gazetting Elijah Obebo to the office of the Deputy Governor, Kisii County pursuant to the resolutions passed by the 1st Respondent on 14th March 2024 removing Robert Onsare Monda from office of the Deputy Governor, Kisii County by way of impeachment.
 5. That pending the hearing and determination of this application, the Honourable court be pleased to protect, preserve and/or conserve the status of Robert Onsare Monda, in particular, barring the Respondents jointly and severally from appointing any other person as Deputy Governor, Kisii County.
 6. That pending the hearing and determination of this Petition, the Honourable court be pleased to issue conservatory orders staying and/or suspending the resolutions passed by the 1st Respondent on 14th March 2024 removing Robert Onsare Monda from office of Deputy Governor, Kisii County by way of impeachment.
 7. That pending the hearing and determination of this Petition, the Honourable Court be pleased to issue conservatory orders restraining the Respondents either by themselves or their representatives from degazetting Robert Onsare Monda from Office of the Deputy Governor, Kisii County.
 8. That pending the hearing and determination of this Petition, the Honourable court be pleased to issue conservatory orders restraining the Respondents from gazetting Elijah Obebo to the Office of the Deputy Governor, Kisii County pursuant to the resolutions passed by the 1st Respondent on 14th March 2024 removing Robert Onsare Monda from Office of the Deputy Governor, Kisii County by way of impeachment.
 9. That pending the hearing and determination of this Petition, the Honourable court be pleased to protect, preserve and/or conserve the status of Robert Onsare Monda, in particular, barring the Respondents jointly and severally from appointing any other person as Deputy Governor, Kisii County.
 10. That this Honourable Court be pleased to issue any other and/or further orders at the discretion of the court in the interest of justice-
 11. That costs be provided for.
4. The Application is supported by the Petitioner's Affidavit and is premised on the grounds that: -
1. On the 13th February, 2024 Kisii County Assembly received a notice of removal of Hon. Robert Onsare Monda from Office of the Deputy Governor, Kisii County by way of impeachment on the grounds of: Gross Violation of *the Constitution* or any other law, Abuse of Office, Gross Misconduct, and Crimes under National Law, which notice was not affirmed by the mover of the motion that the particulars of allegations as contained in the motion are true to his knowledge and the same was not verified by at least a third of all the members supporting the motion.
 2. The said notice of 13th February, 2024 further lacked details and particulars of charges leveled against Dr. Robert Onsare Monda.



3. The 1st Respondent herein upheld the Resolutions of Kisii County Assembly removing Dr. Robert Onsare Monda from the Office of the Deputy Governor, Kisii County by way of impeachment despite the Notice dated 13th February 2024 issued to the County Assembly of Kisii being invalid having been issued in violation of the Section 33 of the County Government Act, 2012 and the Kisii County Assembly Standing Order 60(1), 60(5) and 60(6) as it was not affirmed by the mover of the motion and the same was not verified by at least a third of all the members of supporting the motion.
4. The County Assembly of Kisii failed and/or neglected to provide to Dr. Robert Onsare Monda with all documentary evidence that it would rely on in prosecuting its case, which led to the introduction of fresh and new evidence at the hearing before the 1st Respondent, which action violated Dr. Robert Onsare Monda's rights as enshrined under Article 47 and 50(2)(c) of *the Constitution* thus prejudicing and denying him the ability to sufficiently respond to the allegations and mount a defense thereto.
5. Despite the foregoing violations of Dr. Robert Onsare Monda's rights as guaranteed by Article 47 and 50(2)(c) of *the Constitution*, the 1st Respondent herein upheld the resolutions of Kisii County Assembly removing Dr. Robert Onsare Monda from the Office of the Deputy Governor, Kisii County by way of impeachment.
6. The County Assembly of Kisii failed to facilitate and conduct any meaningful and effective public participation in respect of the motion of impeachment against Dr. Robert Onsare Monda which action violated Articles 10 and 196(1)(b) of *the Constitution* and Section 87 of the County Government Act thus the entire impeachment process being a nullity for failure to comply with *the constitution*.
7. The report on public participation allegedly conducted by the County Assembly of Kisii and used to make a decision to remove Dr. Robert Onsare Monda from office by way of impeachment was not served upon him.
8. The 1st Respondent further upheld the resolutions of the County Assembly of Kisii removing Dr. Robert Onsare Monda from office of the Deputy Governor by way of impeachment despite lack of effective public participation report and videos that were clearly not authentic, not signed and was incomplete.
9. The County Assembly of Kisii failed to create relevant committee as required by the law or convert itself into a "relevant committee" if it preferred to deem itself Relevant Committee to investigate the impeachment charges against Dr. Robert Onsare Monda prior to passing a resolution to remove him from office by way of impeachment.
10. Moreover, Dr. Robert Onsare Monda was not served with any report including report of relevant committee and a list of the alleged one-third signed by members of Kisii County Assembly supporting the Motion of impeachment by as required by the Kisii County Assembly Standing Orders.
11. On the 21st February, 2024 the Speaker of Kisii County Assembly notified Dr. Robert Onsare Monda of the Impeachment Motion against him that was tabled for debate on the 29th February, 2024 before the floor of the County Assembly and requested him to appear on the said date to defend himself against the allegations set out in the motion.
12. On the 29th February, 2024 Motion for the Removal of Dr. Robert Onsare Monda from Office by way of Impeachment was tabled for debate and a resolution reached to his impeachment.



13. The Speaker of Kisii County Assembly vide a letter dated 1st March 2024 forwarded to Dr. Robert Onsare Monda the resolutions of the County Assembly of Kisii from the Office of the Deputy Governor, Kisii County by way of impeachment.
14. The 1st Respondent's plenary conducted its hearing of the charges against Dr. Robert Onsare Monda on the 13th and 14th March 2024.
15. The 1st Respondent during the hearing of the charges against Dr. Robert Onsare Monda, allowed the County Assembly of Kisii to introduce new, fresh and additional evidence that was not before the County Assembly when it was considering the Impeachment Motion contrary to Rules 9, 14, 19, 20, 30 and 40 of its own Rules of Procedure for the Hearing and Determination of the Proposed Removal from Office by Impeachment of a Governor and thereby violating Article 47 and 50(2)(c) of *the Constitution*.
16. The 1st Respondent further allowed the County Assembly of Kisii to introduce fresh allegations and evidence for impeachment of Dr. Robert Onsare Monda which were not before the Assembly during the hearing of the charges against him and were not communicated by the Speaker of the County Assembly to the Speaker of the 1st Respondent which allegations formed the basis of Dr. Robert Onsare Monda's impeachment. The new and fresh evidence include: -
 - a. Bribery for bursaries;
 - b. Infanticide, death of the main complainant's child allegedly because of depression arising from the loss of bribe money without a job;
 - c. Alleged influence of tender awards at the ministry of health, under the Chief Executive Officer, Mrs. Gladys Aminga;
17. The 1st Respondent by entertaining fresh evidence and allegations of impeachment which initially did not form the basis of Dr. Robert Onsare Monda's impeachment by the County Assembly, the 1st Respondent violated his rights as enshrined under Article 47 and 50(2)(c) of *the Constitution*.
18. By resolving to impeach the Deputy Governor without the mandatory and requisite public participation as enshrined in *the Constitution* and the County Government Act, the 1st Respondent acted arbitrary and in clear violation of the law thereby making their resolutions and/or decisions illegal, null and void and of no effect whatsoever.
19. Despite the above illegalities and irregularities, the 1st Respondent still proceeded to conduct and conclude the impeachment of the Deputy Governor in total disregard of the express provisions of the law thereby making the entire process unlawful, unjust, and unfair and a nullity for all intent and purposes.
20. Further in conducting the illegal and impugned impeachment proceedings the Respondent unlawfully introduced and considered new and irrelevant issues and evidence that had not tabled before the 7th Respondent and/or presented to the Deputy Governor in utter disregard to the constitutional principle of the right to fair hearing contrary to Article 47 and 50 of *the Constitution*.
21. By allowing and considering new evidence and issues without prior notice and according the Deputy Governor opportunity to be heard, the 1st Respondent conducted the impeachment proceedings by trial via ambush and in a biased and subjective manner in violation of the



cardinal principles of natural justice thereby making the proceedings unfair, unreasonable, unjust and unlawful.

22. The violation of the Applicant's fundamental rights to access information relating to and/or being accorded adequate opportunity to participate in the impeachment process of the Deputy Governor as a citizen and in particular a voter in and resident of Kisii County makes the entire impeachment process and the decisions made by the Respondent herein fly in the face of Articles 1, 10, 27, 47, 50 and 196 (1) (b) of *the Constitution* and Sections 33 and 87 of the County Government Act hence unconstitutional and a nullity.
 23. The entire impeachment process conducted by the 1st Respondent was therefore carried out in secrecy and lacked transparency and accountability contrary to the principles and national values of good governance and democracy as provided for in Articles 1, 2 and 10 of *the Constitution*.
 24. The 1st Respondent therefore acted in gross violation of *the Constitution* when it unlawfully upheld the decision of the Kisii County Assembly to impeach the Deputy Governor despite the charges not being substantiated by the evidence on record and did not meet the Constitutional threshold provided under Article 181 (l) (a) and (c) of *the Constitution* - The decision made was therefore unfounded in law and fact and lacks reasonableness.
 25. There is imminent danger that having passed the resolution removing the Deputy Governor from office, the 1st Respondent shall proceed to instigate the process of permanently removing and replacing Hon. Robert Onsare Monda as the Deputy Governor and rendering this Application nugatory, academic exercise and defeating the ends of justice.
 26. Unless the conservatory orders sought are granted, the Petitioner/Applicant and the general public shall suffer prejudice an occasioning irreparable loss and damage.
 27. The Application has been made without delay and it is in the interest of justice and fairness that the Orders sought are granted and no prejudice shall be occasioned to the Respondents herein.
5. On 4th April 2024, the High Court at Machakos (Muigai J.) issued the following ex-parte orders in respect to the 1st Application: -
1. That the Certificate of Urgency Application to be served to the Respondents.
 2. That the Respondents to file and serve Responses within the requisite period 14 days from date of service.
 3. That the status quo shall be maintained/stay/suspension of enforcement of the Senate Order and gazettment is stayed pending hearing interpartes of the instant petition/Application and preserve subject-matter.
 4. The matter shall be transferred placed before Principal Judge Nairobi to be mentioned with related matter 22/4/2024 for directions on hearing and determination of the matter as per the record the matter as it originates from Kisii County.
6. On 9th April 2024, the matter was, placed before the Principal Judge of the High Court Hon. Mr. Justice Eric Ogolla who, upon hearing submissions by Counsel, issued the following directions: -
- “I have considered the directions to give in this matter.
- There are related Petitions which have been consolidated and are to be heard by Judge Frida Okwany in Nyamira on 12th April 2024. I therefore make the following orders: -



1. This matter shall henceforth be heard by Hon. Lady Justice Frida Okwany in Nyamira High Court; alongside the other consolidated related matters.
 2. The matter will be mentioned before Judge Okwany on 12th April 2024 for directions.
 3. This court will not interfere with the conservatory orders issued herein, but the parties are at liberty to raise the issue of the existing interim conservatory orders with the court on 12th April 2024.”
7. In response to the 1st Application and the ex-parte orders of 4th April 2024, the 4th Respondent filed the Application dated 8th April 2024 (hereinafter “the 2nd Application”) seeking the following orders: -
1. Spent
 2. That pending the inter partes hearing and determination of the instant Application, the Honourable Court be pleased to stay and/or suspend the Orders issued herein on 4th April, 2024.
 3. That the Honourable Court be pleased to set aside, vacate, vary, and discharge the Orders granted ex parte on 4th April, 2024.
 4. That the costs of and incidental to this Application be in the cause.
8. The Application is supported by the Affidavit of the Kisii County Government County Secretary, Mr. Robert Ombasa, and is based on the grounds that: -
1. The Deputy Governor, County Government of Kisii, DR. Robert Monda underwent an impeachment process which commenced from the County Assembly of Kisii and subsequently to the Senate and as a result vide a Ruling rendered by the Speaker of the Senate, on 14th March; 2024, he was found guilty of breach of various laws including *the Constitution* and the Senate passed a resolution for his removal from Office.
 2. The Petitioner had previously filed Kisii High Court Petition No. E003 Of 2024, Dr. Robert Monda Vs The Speaker, Kisii County Assembly And Others, challenging the impeachment process by the County Assembly of Kisii, which Petition is currently alive and pending before this Court and is scheduled for further directions on 7TH MAY, 2024.
 3. Subsequently, on 18TH March, 2024, Dr. Robert Monda Filed Kisii High Court Petition No. E002 Of 2024; Dr. Robert Onsare Monda Vs The Senate And Others, accompanied by a Notice of Motion Application dated 18th March; 2024 seeking interim Conservatory Orders staying the Resolution by the Senate including orders preventing the gazettement of any such other nominee for the said position, among others Orders. No such interim orders were issued by the Kisii High Court and the is scheduled for Ruling on Applications for Joinder on 16TH APRIL, 2024.
 4. Subsequently, after failing to obtain any such interim Orders, a Petition being Machakos High Court Petition No. E006 Of 2024 (now Nairobi High Court Petition No. 003 Of 2024), was filed and an Order granted ex parte preventing the Government Printer from gazetting the Senate Order impeaching Dr. Robert Monda as the Deputy Governor of Kisii County.
 5. The Petitioner/Applicant herein thus filed the instant Petition, while being aware of the existence of the other Petitions over the same subject matter of the proceedings and obtained



ex parte and substantive orders, without affording the Respondents the right to be heard and without disclosing the existence of the other Petitions over the same subject matter.

6. The Honourable Court has issued substantive Orders pending the inter-partes hearing of the petition herein without affording the Respondents an opportunity to be heard.
7. It is on the basis of the foregoing that the Applicant has moved this Court on urgency as the Court has issued adverse substantive Orders against him without affording him an opportunity to be heard.
8. There is an eminent danger of different Courts issuing different Orders pertaining to the same subject matter, as evident herein, and hence the Applicant moves this Court on a priority basis seeking intervention.
9. Dr. Robert Monda is misusing the judicial process and using proxies and his agents, to file a multiplicity of suits gambling with the judicial process seeking for favourable Orders while forum shopping.
10. The filing of the instant suit is an abuse of the court process, coupled with forum shopping and the Petitioner has not come to this Court with clean hands.
11. The effect of the Orders is that the Court has halted a constitutional and statutory sanctioned process with constitutional and statutory timelines, without hearing the Respondents.
12. The effect of the above Orders further goes against the holding by the Supreme Court in the case of Justus Kariuki *Mate & Another Vs Martin Nyaga Wambora & Another, Supreme Court Petition NO. 32 OF 2014*, [2017] eKLR where the, the Supreme Court made the following observation thus:

[90] All the indications, from the stand of the superior Courts, are that expressly-prescribed constitutional time-frames are binding on the governance processes in place. Even though our specific examples are drawn only from *the Constitution*'s scheme "electoral justice, they nonetheless bear a wider signal, regarding time, as it must direct the various agencies of the State.

92. 'Standing Orders', all by themselves, by no means rest at the direct level of *the Constitution*, or indeed, the statute law. Even though Standing Orders certainly guide the constitutional functioning of the legislature, we still find it necessary to consider their constitutionality or otherwise. A relevant example is this Court's decision in the Senate matter, in which the following passage appears: "It is clear to us that it would be illogical to contend that [though] the Standing Orders are recognized by *the Constitution*, this Court, which has the mandate to authoritatively interpret *the Constitution* itself, is precluded from considering their constitutionality merely because the Standing Orders are an element in the 'internal procedures' of Parliament. We would state, as a legal and constitutional principle, that Courts have the competence to pronounce on the compliance of a legislative body, with the processes prescribed for the passing of legislation"

93. However, the Standing Orders, the individual merits of which were not contested, may be said to be properly coalesced in the constitutional scheme of legislative functions, and thus, to constitute an organic framework for the legislative agency's operations, on the basis of all available information.



94. The effect is that, a methodical and conscientious inquiry would show the County Assembly to have been operating quite properly, within the constitutional scheme of devolution, and running its legislative processes within the ordinary safeguards of the separation of powers — and consequently, quite legitimately outside the path of the ordinary motions of the judicial arm of State. On that basis, there would have been hardly any scope for the deployment of the Court's conservatory Orders —more particularly without first hearing the petitioners.
13. The Petitioner herein has come to Court way late in the day after the expiry of the statutory period under the [County Governments Act](#) which has since been implemented wherein the Governor nominated a new Deputy Governor within 14 days from the decision of the Senate and the County Assembly has since vetted and approved the same.
14. The Petitioner is clearly abusing the Court process and has lodged the instant Petition for ulterior motives and with the intention to disrupt statutory timelines and the discharge of functions by the County Government of Kisii and the Office of the Governor.
15. It is therefore in the interest of justice that the instant Application is heard and determined on a priority basis with the court allowing the same.

Responses to the Applications

a. 1ST Application (dated 1st April 2024).

9. Mr. Jacob Onkeo, the Clerk of the County Assembly, filed a Replying Affidavit dated 27th May 2024 on behalf of the 5th Respondent in which he avers that the Petition is an abuse of the court process, is scandalous, vexatious and merely meant to disrupt the affairs of the County Assembly of Kisii; that it offends the doctrine of sub judice, as the same issues raised in the Petition are currently pending before the High Court in other petitions such as Kisii High Court Petition No. E003 of 2024; that it offends the doctrine of separation of powers because the Court was being asked to usurp the role of the County Assembly of Kisii and the Senate thereby, undermining the constitutional and legislative processes duly vested in these bodies.
10. He also avers that the Applicant has engaged the County Assembly in multiple litigations over the same subject matter thereby subjecting them to unnecessary legal costs and undermining the efficient functioning of the judicial system and the principles of justice and fairness.
11. Hon. Dr. Robert Monda, the 9th Respondent herein, filed grounds in support of the Application wherein he states that the Applicant has made out a prima facie case for the granting of the Conservatory orders as the impeachment proceedings were gravely flawed and violated his constitutional rights and freedoms. He also avers that the Petition will be rendered nugatory unless the orders sought in the Application are granted.

b. 2nd Application dated 8th April 2024

12. The Applicant/Petitioner opposed the 2nd Application through a Replying Affidavit dated 2nd May 2024 wherein she avers; that the Application is premised on wrong facts that are aimed at defeating the ends of justice; that she exercised her right as a citizen under Article 258 of [the Constitution](#) with the intention of unearthing and exposing the unprocedural, unequitable, unfair and unconstitutional process that was undertaken by the Respondents when impeaching the Deputy Governor of Kisii County; that the Petition will be rendered nugatory if the Application is allowed and that it was



imperative for the Court to stall the process of actualizing the Senate's Orders and gazettelement process as it considers the constitutionality and procedural propriety of the impeachment process through the Petition. The Applicant/Petitioner also states that she was not aware of the existence of any other Petition(s) and argues that the sub-judice doctrine is not applicable in this case.

13. The 9th Respondent, Hon. Dr. Monda, filed Grounds of Opposition in response to the 2nd Application wherein he listed the following grounds: -
 1. The conservatory orders that were given were based on well informed and justified grounds hence should not be discharged.
 2. The Petition meets the standard proof, being prima facie standard, hence the conservatory orders are deserved.
 3. The orders were made ex-parte, pending inter-parties hearing. The inter-parties hearing has now occurred. The application to discharge the ex-parte orders has been overtaken by events, and the application is empty.
 4. The application herein dated 8th April 2024 ought not to have been made as all issues raised in the application are matters ordinarily raised for inter-parties hearing of the original application, in this case the original application dated 1st April 2024.
 5. The prayers in the application are negative in nature and should not be granted. Orders cannot be issued to stay a negative, status. The application seeks to stay ex-parte orders of stay.
14. Directions were issued for the hearing of the two applications together by way of written submissions.

The Applicant's/Petitioner's Submissions

15. The Petitioner reiterated the grounds on the body of her application and submitted that the interim orders issued on 4th April 2024 were meant to protect the substratum of the Petition so as to give the court room to adjudicate on the legality of the impeachment process. For this argument, the Applicant cited the decision in *Gatirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Others* (2014) eKLR where the court discussed the principles governing the granting of conservatory orders.
16. It was submitted that Article 23 of *the Constitution* grants this Court the mandate to issue conservatory orders pending the hearing of the petitions on merit. The Petitioner maintained that the conservatory orders will not occasion prejudice to any of the parties.

The 1st and 2nd Respondents' Submissions

17. The 1st and 2nd Respondents submitted that a party seeking conservatory orders must demonstrate that he has a prima facie case with a likelihood of success and that there is real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution* unless the conservatory order is granted, Reference was made to the decisions in *Bloggers Association of Kenya (Bake) vs. Attorney General & 5 others* [2018] eKLR and *Gatirau Peter Munya vs. Dickson Mwenda Githinji & 2 Others* (supra), where it was observed that courts must ensure that the conservatory orders fulfil the public interest.
18. It was submitted that the Applicant/Petitioner will not suffer any prejudice if the application for conservatory orders is not granted. It was also submitted that the instant petition will not be rendered nugatory if the orders sought are not granted as the Court still has powers to void all acts subsequent to the impeachment after hearing the main petition. For this argument, reference was made to the decision in *Mohamed & 6 others vs. County Assembly of Wajir & 9 others (Constitutional Petition E009*



§ E017 of 2021 (Consolidated)) [2022] KEHC 169 (KLR) where Court ordered that the impeached Wajir Governor be reinstated back to office.

19. The 1st and 2nd Respondents cited Orders 51, Rule 15 of the Civil Procedure Rules and the case of Richard Nchapi Leiyagu vs. IEBC & 2 others [2013] eKLR where the Court of Appeal stated that a court can exercise its discretion to set aside ex-parte orders to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.
20. Reference was also made to Rule 25 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which provides for the setting aside, varying or discharging Courts orders and the case of Bloggers Association of Kenya (Bake) vs. Attorney General & 5 others [supra] where it was held that the courts must, in varying, setting aside or discharging orders issued under Rule 23 of the said Rules, exercise their discretionary powers with great caution as the orders are meant to correct an error or oversight or to effect a review of the proposed order so that the orders may be able to deal more appropriately with the issues as litigated by the parties.
21. It was submitted that the Orders of 4th April 2024, staying the 1st Respondent's decision and the order transferring the matters to Nyamira were granted ex-parte thereby greatly prejudicing the Respondents, who did not get an opportunity to be heard on the application, contrary to public interest and the rules of natural justice. The 1st and 2nd Respondents urged the Court to vacate the exparte orders of 4th April 2024 and dismiss the Application dated 1st April 2024.
22. The 3rd Respondent did not file a response or submissions to the Applications.
23. The 4th Respondent filed submissions only in respect of the main suit/Petition. Similarly, the 5th Respondent's submission only relate to the Petition.
24. The 6th, 7th and 8th Respondents did not file any submissions.

The 9th Respondent's Submissions

25. The 9th Respondent submitted on three issues namely; whether the Petitioner met the prima facie standard of proof required in order to obtain conservatory orders; whether the Petitioner's case will be rendered nugatory if the conservatory orders are not granted; and whether the court has jurisdiction on matters of impeachment of a Governor on his deputy.
26. It was submitted that the Applicant had demonstrated that she has a prima facie case to warrant the granting of conservatory orders. Reference was made to the cases of Free Kenya Initiative & 6 others vs. IEBC & 4 Others eKLR 2022 and Wilson Kaberia Nkunja vs The Magistrate and Judges Vetting Board and others Nairobi High Court Constitutional Petition No. 154 of 2016 [2016] eKLR for the argument that the main suit will be rendered nugatory if the conservatory orders are not granted.
27. The 9th Respondent also cited the cases of Haki Na Sheria Initiative vs. Inspector General of Police & 2 others; Kenya National Human Rights and Equality Commission (Interested Party) (Petition 5 (E007) of 2021) [2021] KESC 22 (KLR) (Civ) (3 December 2021) (Ruling) where the Court explained instances where the term nugatory arises; and Law Society of Kenya vs. Office of the Attorney General & another; Judicial Service Commission (Interested Party) [2020] eKLR and Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 others [2015] eKLR, where the courts outlined the principles that must be satisfied before granting conservatory orders.
28. On jurisdiction, it was submitted that the impeachment process was quasi-judicial in nature and that courts can be called upon to confirm the legality of the procedures. Reference was made to the case of



Martin Nyaga Wambora vs. Speaker of Senate and 6 Others [2014] eKLR where the Court of Appeal held that the removal of a Governor was a constitutional and political process; a sui generis process that was quasi-judicial in nature and that the rules of natural justice and fair administrative action had to be observed.

Analysis And Determination

29. I have considered the pleadings and submissions filed in respect to the two Applications that are the subject of this ruling. I find that the main issue for determination is whether the Applicant/Petitioner herein and the 4th Respondent have made out a case for the granting of the orders sought in the 1st and 2nd Applications respectively.
30. I note that the 2nd Application may, under ordinary circumstances, be considered as a response to the 1st Application. However, owing to the nature of this case and the fact that it has attracted a lot of interest from the public going by the sheer number of Petitions that have so far been filed over the same subject matter of impeachment of the Kisii County Deputy Governor, I find that it will serve the interest of justice to consider and determine the merits of each of the applications separately.
31. I will determine the 2nd Application first as it was to be heard before the interpartes hearing since it seeks orders to set aside and/or vacate the conservatory orders issued in the 1st Application.

1st Application.

32. The 4th Respondent argued that the impugned conservatory orders should be set aside, vacated, varied, and discharged because the Petitioner had previously filed and/or was aware of the existence of similar petitions before the High Court at Kisii and Machakos. The 4th Respondent highlighted the particulars of the said similar petitions and noted that they all challenge the impeachment process undertaken by the County Assembly of Kisii and the Senate. The 4th Respondent contended that the said Petitions are still pending before the said Courts.
33. The 4th Respondent faulted the Applicant for obtaining substantive orders ex parte without affording him the right to be heard and without disclosing the existence of the other Petitions over the same subject matter.
34. It was the 4th Respondent's case that the Petitioner is abusing the Court process by lodging the instant Petition for ulterior motives with the intention of disrupting statutory timelines and the discharge of functions by the County Government of Kisii and the Office of the Governor.
35. The 4th Respondent further contended that the 9th Respondent was misusing the judicial process through forum shopping while using proxies/agents, to file multiple suits with the sole intention of gambling with the judicial process in order to obtain favourable orders. It was the 4th Respondent's case that the Applicant has not come to this court with clean hands.
36. The , on the Petitioner, other hand, denied knowledge of the existence of any other pending petition(s) as at the time she filed this Petition and argued that the 2nd Application was aimed at defeating the ends of justice. She further argued that she exercised her right under Article 258 of *the Constitution* of Kenya by filing the petition.
37. The main issues that arise from the 2nd Application are; whether the petition herein and by extension, the 1st Application offend the doctrine of res sub judice and whether the Applicant abused the court process through forum shopping.



Res Sub Judice

38. The Res Sub Judice doctrine is a Latin phrase which means ‘the thing is under judgment’. Black’s Law Dictionary 9th Edition, defines it as, “before a court for determination.....”
39. Section 6 of the [Civil Procedure Act](#) encapsulates the Sub Judice rule, as follows: -
6. No court ought to proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previous instituted suit or proceeding; and or the previously instituted suit or proceedings is between the same parties; and or the suit or proceeding is pending in the same or any other court having jurisdiction to grant the reliefs claimed.
40. In Kenya National Commission on [Human Rights vs. Attorney General; Independent Electoral & Boundaries Commission & 16 others \(Interested Parties\) \(Advisory Opinion Reference 1 of 2017\)](#) [2020] KESC 54 (KLR) the Supreme Court stated: -

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

(See also David Ndi & others vs. Attorney General & Others 2021 eKLR)

41. The 4th Respondent highlighted two similar petitions namely; Kisii High Court Petition No. E002 of 2024 Dr. Robert Monda vs. The Speaker, Kisii County Assembly and Others and Kisii High Court Petition No. E003 of 2024, Dr. Robert Onsare Monda vs. The Senate and Others, (hereinafter “Similar Petitions”) that were pending determination as at the time the instant Petition was filed. According to the 4th Respondent, the Applicant herein was aware of the similar petitions and therefore contravened the sub judice doctrine by filing this petition.
42. As I have already noted in this ruling, the Applicant maintained that she did not know of the existence of the other petitions as at the time she filed her petition. According to the 4th Respondent, however, the real face behind all the petitions is the 9th Respondent who is the also the Petitioner in the earlier petitions that are pending before Kisii High Court. The 4th Respondent argued that the petitioner herein is the 9th Respondent’s proxy.
43. My finding is that the instant petition meets all the parameters set by the Supreme Court in Kenya National Commission on Human Rights vs. Attorney General; Independent Electoral & Boundaries Commission & 16 others (Supra) for determining if a matter is sub judice. I say so because it was not disputed that: there is more than one petition over the same subject matter; that at least 2 similar petitions were instituted before this petition; that the similar petitions are pending before courts of competent jurisdiction and; that the suits are between the same parties or their representatives.



44. The questions that arise from my above finding are; firstly, whether the Petitioner herein was aware of the existence of the similar petitions and; secondly, whether the Petitioner is the 9th Respondent's representative or proxy.
45. It is instructive to note that the 9th Respondent herein is the Petitioner in the Similar Petitions. It is also noteworthy that attempts, by the 9th Respondent, to obtain conservatory orders to stop his impeachment in the Similar Petitions were unsuccessful.
46. I have taken the liberty to peruse the prayers sought in the instant Petition and compared them with the prayers sought in the Petition filed by the 9th Respondent herein (Dr. Robert Monda), in Kisii HCCPET. No. E004 of 2024. I note that there is a striking and unmistakable similarity in the said prayers. Indeed, the similarity in the prayers is so striking that one can say that they are a replica of each other, word for word. This similarity leads me to the irresistible conclusion that both Petitions were either generated/conceived from the same source or were filed by the same party. The similarity in the pleadings lends credence to the 4th Respondent's position that the Petitioner herein was either fully aware of the existence of the earlier petition, and thus copy pasted the prayers thereto, or is the 9th Respondent's proxy.
47. Having noted that this petition was initially filed before Machakos High Court, I find it hard to believe that it was by sheer chance/coincidence that petitions filed by different parties, who have no connection with each other, in courts that are miles apart can end up having the same prayers word for word. It is my finding that Applicant herein cannot feign ignorance of the existence of the earlier petitions in the face of the glaring similarity in the pleadings.
48. Furthermore, a perusal of the instant petition paints the Petitioner as a party who keenly followed the impeachment proceedings right from their inception at the Kisii County Assembly all the way to the Senate where a resolution was passed to remove the 9th Respondent from the position of the Deputy Governor. The Applicant gave a detailed account of the entire impeachment process including the timelines for the tabling of the impeachment motion before the County Assembly to the final resolution by the Senate that informed her decision to file the instant Petition. My finding is that having presented herself as a party who had all the information on the facts surrounding the impeachment proceedings, then it is most likely that she was also aware of the existence of the similar petitions and applications filed before Kisii High Court seeking to stop the impeachment.
49. My above finding is bolstered by the Petitioner's choice of Machakos High Court as the venue for filing her petition. The choice of Machakos is quite suspect and fortifies the 4th Respondent's claim that this was a glaring case of forum shopping. In this regard it is clear that the Petitioner must have been aware that the 9th Respondent unsuccessful attempts to secure conservatory orders before Kisii High Court thus explaining the choice a far flung court in Machakos.
50. My finding is that the choice of Machakos High Court as the place of filing this petition is a red flag that this court cannot ignore in determining the merits of the 4th Respondent's Application. I note that no sooner was this matter placed before Muigai J. at Machakos High Court, than the learned Judge observed that there was a related matter before the same court and that the case originated from Kisii County.
51. This court takes judicial notice that there are High Courts in almost every county in the Republic of Kenya and Kisii County is not an exception. I find that with the introduction and launching of the e-filing system in all our courts, which has made it possible for litigants to file cases in any court within the country from the comfort of their homes or offices, there can be no excuse for a party to file a case outside the territorial jurisdiction of the court where the cause of action arose.



52. I find that in the circumstances of this case, the decision, by the Applicant to obtain the impugned orders outside Kisii County leaves a lot to be desired, offends the sub judice doctrine and confirms the forum shopping allegation.
53. Forum shopping was described in *Stanley Muia Makau vs. Republic* [2020] eKLR as follows: -
- “On the other hand "Forum shopping" typically refers to the act of handpicking a venue in which to try a case for purposes of gaining some unfair advantage or opportunity to throw the dice in one's favour. Such an action would be a subversion of justice with a resultant undermine in the principle of equal protection of the law....”
- (see also Prof. Ngugi J. [as he then was] in *Fortis Tower Management Ltd & another vs. Trendmark Computers Limited* [2018] eKLR.)
54. Forum shopping is an undesirable practice because it undermines the efficient functioning of the judiciary and may be seen as an exploitation of the legal systems. Forum shopping can also lead to inconsistent legal outcomes. Courts have therefore developed legal mechanisms to counteract forum shopping, such as doctrines of forum non conveniens (allowing a court to dismiss a case if another forum is more appropriate) and rules to prevent abuse of jurisdictional choices.
55. Having regard to the findings and observations that I have made over the subject of sub judice and forum shopping, I find that the Applicant did not approach this court of equity with clean hands when seeking the impugned orders. As a constitutional court, this court cannot countenance or turn a blind eye to the apparent abuse of its processes.
56. The multiplicity of the petitions filed over the same impeachment clearly put the integrity and sanctity of the court in great jeopardy as the likelihood of different courts issuing conflicting orders became real when the High Court in Kisii declined to issue conservatory orders only for the same orders to be quickly secured, *ex parte*, before Machakos High Court.
57. For the above reasons, I find that the 4th Respondent has made out a case for the granting of the orders sought in the application dated 8th April 2024.
58. My above finding on the 2nd Application notwithstanding, I am still minded to consider the merits of the 2nd Application.

Conservatory Orders (the 1st Application).

59. The Petitioner and the 9th Respondent argued that a prima facie case has been made for the granting of the conservatory orders so as to preserve the substratum of the Petition and enable the court determine the legality of the impeachment process. They cited Article 23 of *the Constitution* which grants the Court the mandate to issue conservatory orders. They maintained that the Petition will be rendered nugatory unless the conservatory orders are granted and that no party will be prejudiced by the conservatory orders.
60. The 1st, 2nd and 4th Respondents, on the other hand, submitted that a party seeking conservatory orders must not only demonstrate that he has a prima facie case with a likelihood of success but that there is real danger that he will suffer prejudice unless the court grants the conservatory orders. They argued that the 1st Application does not meet the threshold for the granting of conservatory orders.



61. The Supreme Court outlined the principles governing the granting of conservatory orders in *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others* (supra) as follows:-

“(86) “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

(87) The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

(i) the appeal or intended appeal is arguable and not frivolous; and that

(ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

(88) These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of *the Constitution* of Kenya, 2010, a third condition may be added, namely:

(iii) that it is in the public interest that the order of stay be granted.

(89) This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through *the Constitution*.”

62. Similarly, in *Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others* Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR the same principles were summarized as follows: -

“(a) An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.

(b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and

(c) The public interest must be considered before grant of a conservatory order.”



63. My attention is drawn to the use of the term ‘and’ in the above cited decision which connotes that the parameters set for the granting of conservatory orders are to be considered conjunctively and not disjunctively. This means that the failure to satisfy one parameter leads to the collapse of the entire Application for failure to meet the threshold set for the granting of conservatory orders.
64. The question which arises is whether the 1st Application meets the threshold set for the granting of conservatory orders. The first parameter entails the establishment of a prima facie case. What constitutes a prima facie case was discussed in *Mrao vs. First American Bank of Kenya Limited & 2 Others* (2003) KLR 125 as follows: -
- “... In a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”
65. The import of the above decision is that the Court is required to satisfy itself that the suit, whose subject matter an Applicant seeks to preserve through a conservatory order, raises arguable/triable issues that are not frivolous. In this regard, it matters not whether the suit in question will at the end be successful. In *David Ndiu & others vs. Attorney General & others* [2021] eKLR, the Court weighed in on this issue as follows: -
- “45. The first issue for determination in matters of this nature, is whether a prima facie case has been established and a prima facie case, it has been held, is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, it has to be shown that a case which discloses arguable issues has been raised and in this case, arguable constitutional issues.” (emphasis added)
66. A perusal of the Petition reveals that the Petitioner challenges the manner in which the impeachment process was conducted both at the County Assembly and the Senate. The Petitioner highlighted several procedural and constitutional improprieties in the impeachment process, which in my considered view, raise triable/arguable questions of law. I find that the Applicant/Petitioner has established that she has a prima facie case against the Respondents thus satisfying the first condition for the granting of a conservatory order.
67. Turning to the second parameter, on whether the Petition will be rendered nugatory if a conservatory order is not granted, I have considered the parties’ rival arguments over this issue. The Applicant’s case was that the substratum of the Petition will be rendered nugatory if the 1st Respondent’s decision is allowed to take effect. The 1st, 2nd and 4th Respondents were however of the view that no irreparable loss will be occasioned to the Applicant if the conservatory orders are not granted.
68. This court is alive of the fact that as a Constitutional Court, it is bound by constitutional edicts. One of the principles that underpin our democracy is the principle of separation of powers. In *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 2 Others*, Civil Appeal No 290 of 2012, [2013] eKLR the Court of Appeal held thus:-
- “[Separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the Executive sufficient latitude to implement legislative intent.



Yet, as the respondents also concede, the Courts have an interpretive role – including the last word in determining the constitutionality of all governmental actions...” [emphasis added].

69. While this Court appreciates that one of its functions is to ensure that the other arms of the government adhere to *the Constitution*, it is also alive to the fact that it must at all times be careful not to exercise its discretion whimsically or intervene in the matters involving other arms of the government, to wit, the legislature, in a manner that may go against constitutional principles such as the doctrine of separation of powers. The extent of the court’s intervention in legislative process was discussed in *Speaker of the Senate & Another vs. Attorney General & 4 Others*, Reference No. 2 of 2013; [2013] eKLR where the Supreme Court held:-

“60. It makes practical sense that the scope for the Court’s intervention in the course of a running legislative process, should be left to the discretion of the Court, exercised on the basis of the exigency of each case. The relevant considerations may be factors such as: the likelihood of the resulting statute being valid or invalid; the harm that may be occasioned by an invalid statute; the prospects of securing remedy, where invalidity is the outcome; the risk that may attend a possible violation of *the Constitution*.

62. This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another” [emphases added].

70. In *Mate & another vs. Wambora & another (Petition 32 of 2014)* [2017] KESC 1 (KLR) (Civ) (15 December 2017), the Supreme Court formulated principles to guide courts in determining whether or not to interfere with the processes undertaken by other arms of the government and held thus: -

“63. From the course of reasoning emerging from such cases, it is possible to formulate certain principles, as follows:

- (a) each arm of Government has an obligation to recognize the independence of other arms of Government;
- (b) each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate;
- (c) the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment;
- (d) for the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case;
- (e) in the performance of the respective functions, every arm of Government is subject to the law.” [emphases added].



71. In the instant case, I note that the impugned impeachment process has already gone full circle, has been concluded and a final resolution made, by the Senate, to impeach the 9th Respondent as at the time the instant Petition was filed. It is instructive to note that the impeachment proceeded despite spirited attempts, by the 9th Respondent, to stop the process through applications made in the similar petitions that are still pending before the various courts.
72. The question which arises is if this court can issue orders whose effect will be to stay the decision, by the Senate, to impeach the 9th Respondent pending the hearing and determination of the Petition. My finding is that, since the Senate has already made a resolution, the court must exercise restraint and limit its intervention in the impeachment to hearing the merits of the petition. I further find that issuing conservatory orders to stay the Senate's decision will be akin to directing or interfering with another organ/arm of government in the exercise of its mandate.
73. The other pertinent question is whether the instant petition will be rendered nugatory or worthless if the orders sought in the 1st Application are not granted?
74. The answer to the above question is to the negative. I find the Applicant's claim that the Petition will be nugatory to be misconceived and unfounded. My finding is informed by three main reasons; firstly, the Applicant's Petition is still pending hearing and it is therefore possible that the court may after hearing the Petition arrive at the finding that the impeachment process was flawed. In such an eventuality, the court may grant the Petitioner, and indeed the 9th Respondent, various remedies including compensation for wrongful removal and/or reinstatement. I find guidance in the decision in [*Mohamed & 6 others vs. County Assembly of Wajir & 9 others \(Constitutional Petition E009 & E017 of 2021*](#) (Consolidated)) [2022] KEHC 169 (KLR) (hereinafter "the Wajir Case") where the court ordered for the reinstatement of the Governor who had gone through the entire impeachment process up to the Senate. The court rendered itself thus: -
- “As appropriate consequential relief, an order of mandatory injunction is granted against the 8th respondent Ahmed Ali Mukhkar, compelling him to handover and restore the office of the Governor of the County of Wajir to the 7th petitioner, Amb. Mohammed Abdi Mohammud.”
75. Taking a cue from the decision in the above cited case, I find that the instant application does not meet the threshold set for the granting of conservatory orders. I say so because the Petitioner has not demonstrated that there is danger that she will suffer prejudice if the orders sought are not granted.
76. Secondly, it is trite impeachment of a Governor or his Deputy, is a legal process that is governed by [*the Constitution*](#) and the statute. It is to be noted that a decision on impeachment is made by a majority of the Members of the County Assembly and the Senate in their capacity and representatives of the electorate or the public.
77. This court takes the view that an impeachment process can be likened to an election process where, for example, a Governor and his Deputy are elected by majority vote. Following such an election, the will of the majority voters prevails and is acted upon within the timelines set under law. This is done through the gazettment and swearing in of the duly elected Governor and his Deputy, within the set timelines, irrespective of the existence of a petition challenging. In other words, the outcome of an election cannot be stayed through a conservatory order. Suffice is to say that if, at the conclusion of the election petition challenging such an election, the election court finds that the electoral process was marred with irregularities, then the election will be nullified and the aggrieved party granted suitable remedies.



78. In similar fashion, and as I have already stated in this ruling, if upon hearing the merits of the instant petition this court finds in favour of the Petitioner, then the 9th Respondent will get appropriate remedies which may include reinstatement to his position of Deputy Governor as was held in the Wajir Case. I am therefore not persuaded that the instant petition will be rendered nugatory unless the conservatory orders sought in the 1st Application are granted.
79. Turning to the third parameter for the granting of conservatory orders which requires the court to consider public interest before granting a conservatory order, I find that the public interest in this matter tilts against the granting of the conservatory orders. I say so because it is the electorate or the people of Kisii County, through their elected duly elected representatives both at the County Assembly and the Senate, that considered the impeachment motion in accordance with the law and arrived at the majority decision to impeach the 9th Respondent. As I have already stated in this ruling, the decision by the Senate can only be challenged during the substantive hearing of the Petition and not through the granting of conservatory orders. I further find that since the office of a Deputy Governor is a public office that does not belong to a specific individual, it follows that once the office holder is impeached, he has to give room to the next office holder unless and until such impeachment is overturned or nullified by an order of the court.
80. I find that in the circumstances of this case, the rights/interest of the people of Kisii County, to be represented and served by a duly appointed Deputy Governor following the 9th Respondent's impeachment, far outweighs the prejudice, if any, that the Applicant herein will suffer if the orders sought in her application are not granted.
81. In *Re Speaker of the County Assembly of Embu* [2018] eKLR the Supreme Court, issued an advisory opinion on the timelines for filling the vacancy in the office of a Deputy Governor and equated the procedure to that of the filling of the vacancy in the office of the Deputy President and held as follows: -

“(59) *The Constitution* is explicit on the mode of filling the position of Deputy President. Article 149 thus provides:

“(1) Within fourteen days after a vacancy in the office of Deputy President arises, the President shall nominate a person to fill the vacancy, and the National Assembly shall vote on the nomination within sixty days after receiving it.”

[60] We would adopt the observations of this Court in earlier advisory opinions, regarding the requisite approach to constitutional interpretation, in view of the provisions of Article 259 of *the Constitution*. Article 259 (3) provides that:

“Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking...”

(61) The foregoing principle calls for a reading of Article 182 of *the Constitution* alongside Article 149, which makes provision for the procedure and timelines for filling a vacancy in the Office of the Deputy President. From the signal embodied in Article 149 of *the Constitution*, and in the absence of any applicable legislative provision, we hold that, where a vacancy occurs in the Office of the Deputy County Governor, the Governor shall within fourteen days, nominate a person to fill such vacancy. The County Assembly shall vote on the nomination within sixty days after receiving it. Where a vacancy occurs in both the offices of County Governor and Deputy County Governor at the



same time, the office of the Deputy County Governor shall remain vacant until the election of a new Governor. The new Governor shall nominate a person to fill the vacancy within fourteen days after assuming office. The County Assembly shall vote on the nomination within sixty days after receiving it. For the avoidance of doubt, we hereby state that this holding shall obtain in all circumstances pursuant to which the Office of the Deputy Governor may become vacant as contemplated by *the Constitution*, i.e death, resignation or impeachment.” [Emphasis added].

82. Flowing from the above advisory opinion, I find that the moment the Senate made the resolution to impeach the 9th Respondent, the office of the Deputy Governor immediately became vacant thus setting the stage for the filling of the vacancy within the stipulated timelines. My finding is that the public interest in this case supports compliance with the constitutional and statutory timelines set for the filling of the vacancy in the office of the Deputy Governor of Kisii County.

Conclusion/Determination

83. Having found that the 4th Respondent has made out a case for the granting of the orders to vacate the ex parte conservatory orders and having found that the 1st Application does not meet all the parameters set for the granting of conservatory orders I make the following final orders: -
- i. The Application dated 1st April 2024 is not merited and is hereby dismissed.
 - ii. The Application dated 4th April 2024 is hereby allowed.
 - iii. The ex-parte Orders issued on 4th April 2024 are hereby vacated.
 - iv. The costs of the applications shall abide the outcome of the Petition.
84. I urge the parties herein to comply with the directions issued for the filing of submissions on the main petition so as to expedite its hearing and determination.
85. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 13TH DAY OF JUNE 2024.

W. A. OKWANY
JUDGE

