



**Mwangaza v County Assembly of Meru & another (Petition E024 of 2022) [2024] KEHC 9544 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9544 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
PETITION E024 OF 2022**

**EM MURIITHI, J**

**JULY 18, 2024**

**IN THE MATTER OF ARTICLES 1, 2,4(2), 10, 19, 20, 21, 22(1) AND 2(B) AND(C), 23(1), 24(1), 25(C), 27(1)(2)(3) AND (4), 32(1), 33(1), 35, 38(1), 47(1), 48, 50(1), 2(A)(C), (4), 52, 96, 165(3)(B) AND (D), 174, 175, 177, 181, 196(1), 200, 258, 259, 260 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF SECTIONS 8, 21, 27, 30, 33 AND 87 OF THE COUNTY GOVERNMENT ACT, 2012**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS, PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF THE INTERPRETATION OF THE CONSTITUTION UNDER ARTICLES 165(3)(D)(I) AND (2) AND 181 AS READ TOGETHER WITH SECTION 27 & 33 OF THE COUNTY GOVERNMENT ACT**

**AND**

**IN THE MATTER OF THE INTENDED REMOVAL FROM OFFICE OF THE GOVERNOR OF MERU COUNTY BY WAY OF IMPEACHMENT**

**BETWEEN**

**HON KAWIRA MWANGAZA ..... PETITIONER**

**AND**

**THE COUNTY ASSEMBLY OF MERU ..... 1<sup>ST</sup> RESPONDENT**

**THE SPEAKER, COUNTY ASSEMBLY OF MERU ..... 2<sup>ND</sup> RESPONDENT**



## JUDGMENT

1. The Petitioner, a female adult of sound mind and disposition, a Kenyan Citizen and the duly elected governor of County Government of Meru filed a petition dated 24/11/2022 praying for specific reliefs as follows:
  - a. Spent
  - b. Spent
  - c. Spent
  - d. Spent
  - e. A declaration that section 33 of the *County Governments Act* ought to be read with section 27(4) with the necessary modifications to provide the minimum period within which a motion for impeachment of the governor can be initiated.
  - f. A declaration that motion and or proceedings for impeachment of a governor cannot be initiated immediately after the elections and or before lapse of twenty four months after assumption of office.
  - g. In the alternative to prayer (f) above a certificate of recommendation be submitted to the Speaker of the Senate recommending enactment of a law stipulating the minimum period within which impeachment proceedings for removal of a governor can be initiated.
  - h. Any further and other orders as may be deemed necessary on the facts and in the circumstances of the case.
  - i. The Respondents be condemned to pay the costs of this Petition.

### Petitioner's case

2. The Petitioner, who contested in the August elections, 2022 as an independent candidate, was popularly elected by a vast majority of voters and sworn in as the governor of Meru County on 25/8/2022. Upon exercising the democratic right to elect the Petitioner as Governor, the people of Meru had a legitimate expectation that their democratically elected leader would serve a full term of 5 years. Disgruntled by her popularity as the general election date approached, many politicians vowed that Meru County Government will never be led by a woman governor and the mover of the impugned motion appeared in local TV station warning the electorate that if they made the mistake of electing the Petitioner as Governor, he would ensure that she is impeached soon after assuming office. Following the declaration by the office of the controller of budget that the ward development fund was an illegality, most of the members of County Assembly, and more specifically the mover of the impugned motion appeared on several media interview spewing all manner of vitriol against the governor and vowing to teach her a political lesson. On 21/11/2022, the Deputy Clerk, County Assembly of Meru notified the Petitioner of the invitation to respond and appear before the assembly for the motion of impeachment.
3. The Petitioner has, therefore, identified the following issues that require urgent interpretation:
  1. Whether in exercise of its powers under Article 181(1) of *the Constitution* and section 33 of the County Government Act the County Assembly can commence impeachment proceedings before the lapse/expiry of twenty four months after the election of the governor.



2. In light of the glaring loophole in respect of the timeframe within which impeachment proceedings ought to be initiated for removal of the County Governor; whether section 33 of the County Government Act should be read together with section 27(4) & (5) of the Act with the necessary modification in as far as the period within which to initiate impeachment proceedings and whether impeachment proceedings can be initiated more than once during the term of the Elected Governor.
3. Whether the impeachment motion for a duly elected governor can be initiated shortly after elections and or within three (3) months upon assumption of office.

### **The Respondents' case**

4. The Respondents opposed the petition vide a replying affidavit sworn by Charles Murithi Launi, the Deputy Clerk of the 1<sup>st</sup> Respondent, on 25/11/2022. He avers that the Senate is the constitutionally ordained check/safeguard against bias on the part of the Respondents. The strict statutory timelines set out in section 33 of the *County Governments Act* and the prevailing case law on public participation necessitated the immediate publishing of the newspaper advert. It is trite that the doctrine of legitimate expectation cannot be invoked to frustrate or impede a process ordained by *the Constitution* or statute. *The Constitution* allows impeachment irrespective of whether a governor was elected by a small or a huge majority of votes. There is no single ground of impeachment which relates to the Ward Development Fund. The Petitioner has not established any justification for judicial interference in the inchoate impeachment process, and the petition ought to be dismissed.

### **Analysis and Determination**

5. Having considered the petition, the responses thereto and the well elaborated written submissions together with the authorities cited therein, the 3 issues that emerge for determination are (a) whether the ruling of 30/11/2022 determined the Preliminary Objection; (b) whether the petition is moot; and (c) if not, whether the reliefs sought will be granted.

### **Determination of the Preliminary Objection**

6. The Petitioner urges that the courts have the authority to avoid treating, as preliminary objections, those points that are only disguised as such, and instead, treat as preliminary objections, only those points that are pure law, like was noted in Attorney General of the Republic of Kenya v Independent Medical Legal Unit (2012) eKLR, Mukhisa Biscuit Manufacturers Limited v West End Distributors Ltd (1969) E.A 696 and Attorney General *of Tanzania v African Network for Animal for Animal Welfare (ANAW) EACJ Appeal No. 3 of 2011*. She urges that the court indeed considered the preliminary objection at the making of the ruling and rightly found that it had jurisdiction to hear the application and the petition.
7. The Respondents urge the court to determine their Notice of Preliminary Objection dated 25/11/2022 on its merit since the court's ruling of 30/11/2022 neither determined nor dismissed it.
8. The Respondents filed a Notice of Preliminary Objection dated 25/11/2022 on the grounds that:
  1. Binding precedent forbids this Honorable Court from granting the reliefs sought in the first application and the petition (c.f the judgment in Justus Kariuki *Mate & Another v Martin Nyaga & Another, Supreme Court Petition No. 32 of 2014*).
  2. The Application and the Petition effectively seek, under the guise of judicial review, the judicial emasculation of constitutionally ordained accountability mechanisms and processes.



3. This Honorable Court is not the constitutionally ordained forum for interrogating the merits, demerits, veracity or falsity of the allegations outlined in the impeachment motion.
  4. The Application and the Petition offend the doctrine of justiciability (specifically, the ripeness and separation of powers limbs of the doctrine).
  5. Given the matter set out in paragraphs 1 to 4 above, this Honorable Court has no jurisdiction, at the moment, to issue the prayers sought in the Application and the Petition.
  6. The Application and the Petition do not disclose any or any reasonable justification for judicial intervention in inchoate legislative/impeachment processes. Specifically, the Application and the Petition do not meet the legal threshold set in *Anarita Karimi Njeru v Republic, High Court Kenya (Nairobi) Miscellaneous Criminal Application No. 4 of 1979*.
  7. Such other, further or incidental objection(s) as may emerge or be canvassed at the hearing of the Application and the Petition.
9. In its impugned ruling of 30/11/2022, the court (Cherere J.) held that

“ 19. Flowing from the foregoing, a party such as the Petitioner who alleges that her constitutional rights are threatened with violations is within her right to seek the relief of conservatory orders and for that reason, I hold that this court has jurisdiction to interrogate any act said to be undertaken pursuant to the provisions of the constitution and if necessary, invoke the power under Article 23(3)(c) and issue appropriate conservatory orders. 20. Consequently, I will only consider the issue relating to threatened violation of Petitioner’s rights and issues relating to merits, demerits, veracity or falsity of the allegations outlined in the impeachment to the Assembly and the Senate which are the organs mandated to drive that process. 21. In the instant case, the Petitioner asserts that failure by the Respondents to follow Standing Orders 65 of the County Assembly of Meru has resulted in the violation of her rights under Articles 47 and 50 of the Constitution. Standing Orders regulate the County Assembly’s procedures, in particular, the proper conduct of its proceedings. 27. Where an inquiry showed that the county assembly had been operating within the constitutional scheme of devolution and running its legislative processes within the ordinary safeguards of the separation of powers, there would hardly be any scope for the deployment of the court’s conservatory orders (See *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* (supra)). 28. All state organs are bound by the Constitution and the law and courts retain the power to interpret, protect and promote the Constitution. A careful and thorough consideration of the process laying ground for impeachment of the Petitioner demonstrates that the Assembly was not operating properly, within its constitutional mandate in setting in motion the process of impeachment of the Petitioner. 30. The Petitioner is therefore correct that the Respondents have a duty to comply with the Constitution, statutory provisions and the Standing Orders of the Assembly. Although this Court is indeed mandated to intervene in the process where there is alleged denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights, the Court should only engage its powers where there is clear and imminent threat to the Constitution. 36. In considering the



appropriate orders that merit this application, I am guided by the principle that a party such as the Petitioner is not required to suffer illegality, breach of her rights, and resultant injustice on the solace that her grievance would be remedied either by the Assembly or the Senate. It is the singular authority of the court to deal with threatened violations before they happen and to give appropriate relief, including conservatory orders in terms of Article 23(3) of *the Constitution*. (See *Mohamed & 6 others v County Assembly of Wajir & 9 others (Constitutional Petition E009 & E017 of 2021 (Consolidated)* [2022] KEHC 169 (KLR) (16 February 2022) (Judgment). 37. On the other hand, this court is mandated to exercise restraint to guard against judicial emasculation of constitutionally ordained accountability mechanisms and processes that may have the effect of unnecessarily interfering or hampering the Assembly’s oversight role. 38. Upon considering the application and the preliminary objection, and after hearing the meritorious representations of counsel, this court finds that the procedure adopted by the Respondents to process the proposed motion of impeachment of the Petitioner is flawed and has the effect of violating Petitioner’s right to a fair administrative action under Article 47 and denying her adequate time to prepare her defence in contravention of article 50(2)(c) of *the Constitution* and standing order 65 (2) and (3).”

10. It is evident from the excerpt of the impugned ruling that the court did duly consider the Respondents’ Preliminary Objection dated 25/11/2022.

### **Mootness of the Petition**

11. The petitioner urges that in the circumstances that a matter is to be considered moot, the court in *Daniel Kaminja & 3 Others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi* (2019) eKLR stated that:

“A matter is moot if further legal proceedings with regard to it have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact.”

12. She urges that the court in *National Assembly of Kenya & another v Institute for Social Accountability & 6 others* (2017) eKLR characterized the doctrine of mootness as being complex, and cautioned that the doctrine should not be applied mechanistically in every factual situation, and that there is no sharp distinction between moot and live controversies. She urges that prayer (g) in the petition has not yet been granted and it was never bound to the first impeachment process or any impeachment motion thereon, but rather seeks a clarification on the minimum period within which impeachment proceedings for removal of a governor can be initiated. She urges that the petition raises further constitutional issues that require the interpretation and determination by this court in accordance with Article 165(3) (b) and (d) of *the Constitution*, and thus the petition has not been overtaken by events.
13. The Respondents urge that the issuance of the impugned order in interlocutory proceedings was tantamount to pre-empting the outcome of the petition without the benefit of full and proper consideration of the evidence and the merits and demerits of the parties’ respective cases. They urge that nothing remains for determination by this court after the issuance of the impugned order. They



urge that the petition is moot and there exists no live dispute or controversy worthy of this court's consideration and determination.

14. The Respondents urge that the only issue remaining for determination after quashing the first impeachment motion is the purely abstract and/or academic question of where a court of law can read the provisions of Section 27(4) and (5) of the *County Governments Act* into Section 33 thereof, which issue falls within the legislative mandate of Parliament under Article 94 of *the Constitution* or the advisory opinion of the Supreme Court under Article 163(6) of *the Constitution*. They urge that the Petitioner's disingenuous insistence that something is still to be determined after hearing this petition is an act of impunity and intellectual dishonesty. They urge that there is absolutely no factual matrix on which this petition is premised after final orders were issued at the interlocutory stage and also in view of the fact that the subject impeachment proceedings were finalized long ago. They urge the court to find and hold that the petition has been overtaken by events and nothing is left for determination.

15. Prayers e, f and g of the petition invite the court to invoke its interpretative jurisdiction under Article 165 (3) (b) and (d) of *the Constitution*. The Article provides that:

“3. Subject to clause (5), the High Court shall have — (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of— (i) the question whether any law is inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution; (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and (iv) a question relating to conflict of laws under Article 191.”

16. Article 181 of *the Constitution* provides for removal of a county governor as follows:

“(1) A county governor may be removed from office on any of the following grounds— (a) gross violation of this Constitution or any other law; (b) where there are serious reasons for believing that the county governor has committed a crime under national or international law; (c) abuse of office or gross misconduct; or (d) physical or mental incapacity to perform the functions of office of county governor. (2) Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds specified in clause (1).”

17. Section 27 of the *County Governments Act* provides for recall of a county assembly member as follows:

“(1) The electorate in a county ward may recall their member of the county assembly before the end of the term of the member on any of the grounds specified in subsection (2). (2) A member of a county assembly may be recalled on any of the following grounds— (a) gross violation of *the Constitution* or any other law; (b) incompetence; (c) gross misconduct; or (d) if convicted of an offence punishable by imprisonment for at least six months. (3) Deleted by *Act No. 11 of 2020*, s. 9. (4) A recall under subsection (1) shall only be initiated twenty-four months after the election of the member of the county



assembly and not later than twelve months immediately preceding the next general election. (5) A recall petition shall not be filed against a member of the county assembly more than once during the term of that member in the county assembly.”

18. Section 33 of the *County Governments Act* provides for removal of a governor as follows:

“(1) A member of the county assembly may by notice to the speaker, supported by at least a third of all the members, move a motion for the removal of the governor under Article 181 of *the Constitution*. (2) If a motion under subsection (1) is supported by at least two-thirds of all the members of the county assembly— (a) the speaker of the county assembly shall inform the Speaker of the Senate of that resolution within two days; and (b) the governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section. (3) Within seven days after receiving notice of a resolution from the speaker of the county assembly— (a) the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the governor; and (b) the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter. (4) A special committee appointed under subsection (3)(b) shall— (a) investigate the matter; and (b) report to the Senate within ten days on whether it finds the particulars of the allegations against the governor to have been substantiated. (5) The governor shall have the right to appear and be represented before the special committee during its investigations. (6) If the special committee reports that the particulars of any allegation against the governor — (a) have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or (b) have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the impeachment charges. (7) If a majority of all the county delegations of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.”

19. In the decision of the Supreme Court of Kenya *Institute for Social Accountability & another v National Assembly & 3 others & 5 others (Petition 1 of 2018)* [2022] KESC 39 (KLR) (8 August 2022) (Judgment), the Court after considering authorities held:

“47. The common thread from the above decisions is that a matter is moot when it has no practical significance or when the decision will not have the effect of resolving the controversy affecting the rights of the parties before it. If a decision of a court will have no such practical effect on the rights of the parties, a court will decline to decide on the case. Accordingly, there has to be a live controversy between the parties at all stages of the case when a court is rendering its decision. If after the commencement of the proceedings, events occur changing the facts or the law which deprive the parties of the pursued outcome or relief then, the matter becomes moot.”

20. In their discussion in *The Bill of Rights Handbook*, 5<sup>th</sup> ed. the authors Iain Currie & Alex De Waal note the following exception to non-justiciability by reason of mootness:

“Whereas ripeness prevents a court from deciding an issue too early, mootness prevents the court from deciding an issue when it is too late. A case is moot and therefore not justiciable,



according to the Constitutional Court [South Africa], ‘if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law’. For example issues that can no longer affect the interests of the parties are moot. An issue which no longer presents an existing or live controversy is moot.

....

Even though a matter may be moot as between the parties that does not necessarily constitute an absolute bar to its justiciability. The Court has a discretion whether or not to consider it. This was the gloss put on the Freedom of Expression Institute decision in the subsequent case of Independent Electoral Commission v. Langeberg Municipality [2001(3) SA 925 (CC)]. The Constitutional Court shed further light on the standard governing the exercise of this discretion. The discretion, it was held, must be exercised according to the interests of justice. A prerequisite for deciding an issue that is no longer live is that any order that the court may make must have some practical effect on the parties or someone else. Other relevant factors included the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument that has been advanced by the parties. Moreover, even if the court has determined one moot issue arising in an appeal it is not obliged to determine all other moot issues. It will follow that in class actions, or litigation in the public interest, the issues raised are much less likely to be considered moot since even if the applicants no longer require relief, the decision is likely to have a practical effect on many others. National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 1999 (3) BCLR 280 (C) 289. In other words, where there is compelling public interest that the constitutionality of a statutory provision be determined, the doctrine of mootness should be less strictly applied. [see S v. Manamela 2000 (3) SA 1 (CC) para 12.]”

21. As urged by the Respondents, the Court finds that the Petition does not disclose of any live controversy worth of this court’s consideration and determination. The question of validity of the impeachment proceedings against the Petitioner which was raised in the Petition is moot and no practical purpose will be served by its determination as the particular impeachment process the subject of the Petition is already concluded.
22. Whatever the merits of the Petitioner’s complaint, there is nothing left of the impeachment proceedings that the determination of this court, one way or the other, may act on for two reasons, namely, that the Court had made final orders as urged by the Respondents and also because the impeachment process had concluded. The dispute is not live. To the extent that the petition related to the first impeachment process set in motion against the governor and which has already concluded, the proceedings are now moot following the determination of the impeachment proceedings before the Senate.

### **On the merits**

23. However, on the exception to the principle of mootness and in discretion, as discussed above, the Court finds the question of suitability of timelines for impeachment of governor in prayers (f) and (g) of the petition to raise in public interest an issue suitable for determination by this court despite its finding on mootness of the Petition, on the qualification that “any order that the court may make must have some practical effect on the parties or someone else”. In addition, the declarations sought in paragraphs (f) and (g) appear to be pegged on a submission of unconstitutionality of the statutory provisions of section 33 of the [County Governments Act](#) with regard to the Article 38 right to hold office upon election.



## Prayers (f) and (g) of the Petition

24. It is the respectful view of this court that as regards the regulation of timelines for preferring a motion for impeachment of the governor, before expiry of 24 months after election as sought by the Petitioner herein, or any other time, *the Constitution* which establishes the right is silent on issue and it cannot be right to amend *the Constitution* by legislative enactment of a statute. What is generously given by *the Constitution* must not be restricted by statute. To be sure the Article 181(2) of *the Constitution* only grants authority to enact the procedure for giving effect to the substantive provision for removal of governor upon the grounds ordained by *the Constitution*, as follows:

“(2) Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds specified in clause (1).”

There is no authority to make additional provisions as to the earliest possible time-lines for the exercise of the power of removal of governor, which is a substantive rather than a procedural provision.

25. It would be absurd to require an electorate to condone, tolerate or endure bad governance for any period because it would be too soon after the election of the office holder. Once conduct within the prescription of Article 181 (1) is established or alleged, the process of removal governor crystallizes without need to wait for the expiry of any specified period. To hold otherwise would to condone for the time-being violation of *the Constitution* in terms of Article 181 by reason of gross violation of this Constitution or any other law; serious reasons for believing that the county governor has committed a crime under national or international law; abuse of office or gross misconduct; or physical or mental incapacity to perform the functions of office of county governor, without authority of *the Constitution*. Such action would infringe on the principles and values of including accountability, integrity and the rule of law among other principles and values set out in Article 10 of *the Constitution*. It would also be improperly to hamper the operation of *the Constitution*'s integrity and accountability provisions in a manner not contemplated in *the Constitution*, which would, in my respectful view, be a subversion of *the Constitution*.
26. The right to hold elective office under Article 38 of *the Constitution* must be construed purposively and in harmony with the provisions for removal from office for unconstitutional conduct, that is conduct proscribed under *the Constitution* such as the provisions of Article 181 (1) of *the Constitution*. The enforcement of the Article 38 right to hold office cannot be construed as to hamper the implementation of the removal provisions of Article 181 (1) of *the Constitution*. The two constitutional provisions must be construed as directed under Article 259 of *the Constitution* in a manner that “(a) promotes its purposes, values and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance.” The purposes, value and principles of accountability, integrity and rule of law are central to *the Constitution*.
27. There is no moratorium or earliest time limit in the removal provisions of Article 181 of *the Constitution* before which action contemplated thereunder may be initiated. Any attempt to legislate time-lines without express or implied authority of *the Constitution* would be unconstitutional. The Court cannot direct the performance of an unconstitutional act consistent with the principle of the supremacy of Constitution under Article 2(4) of *the Constitution* that “(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”



28. This court has not been asked to determine the constitutionality of section 27(4) and (5) of the *County Governments Act*, and they may in appropriate proceedings in that behalf be found to contravene the provision of Article of *the Constitution*. Indeed, the Right to Recall of Members of Parliament under Article 104 of *the Constitution* on which the *County Governments Act* recall clause is modelled does not have similar earliest timelines for recall. Suffice it to state that the provisions of section 27 (4) and (5) of the *County Governments Act* apply to the Members of the County Assembly only.
29. The Court would find that the provisions of section 33 of the *County Governments Act* have not been shown to be inconsistent with or in contravention of *the Constitution*, to require this court's intervention.

### Alternative prayer

30. The alternative prayer (h) for “a certificate of recommendation be submitted to the Speaker of the Senate recommending enactment of a law stipulating the minimum period within which impeachment proceedings for removal of a governor can be initiated” is a direction to the Senate to exercise its lawmaking power in a certain way on the question of removal of governor, which would amount to a violation of the principle of separation of powers as to powers of the Parliament to make laws without direction by the other arms of the government. In counselling a healthy relationship between the three arms of Government, COMMONWEALTH (LATIMER HOUSE) PRINCIPLES ON THE THREE BRANCHES OF GOVERNMENT, November 2003 provides as follows as regards the Court and the Parliament:

“ II Parliament and the Judiciary

- (a) Relations between Parliament and the judiciary should be governed by respect for Parliament's primary responsibility for law making on the one hand and for the judiciary's responsibility for the interpretation and application of the law on the other hand.
- (b) Judiciaries and Parliaments should fulfill their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner.”
31. Indeed, the province of enacting legislation is vested on parliament in accordance with the provisions of Article 94 of *the Constitution*, that:

“(1) The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament. (2) Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty. (3) Parliament may consider and pass amendments to this Constitution, and alter county boundaries as provided for in this Constitution. (4) Parliament shall protect this Constitution and promote the democratic governance of the Republic. (5) No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation. (6) An Act of Parliament, or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause (5), shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the



nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.”

32. In its impugned ruling of 30/11/2022, the court (Cherere J.) was categorical that:

“ 34. The jurisdiction of the court under Article 159 (3) is limited to interpreting the law. There are numerous rules of interpreting a statute, but, without demeaning the others, the most important rule is the rule dealing with the statute’s plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive. (See *Apollo Mboya v Attorney General & 2 others* [2018] eKLR). 34. It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the Courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot legislate.”

In the circumstances of this case, I respectfully agree.

33. The Court will respect the Senate’s primary responsibility for law making in the context of this Petition and refrain from directing it as to how to execute this mandate. Needless to say that exercise only need to comply with the relevant constitutional provisions.

#### **Orders**

34. Accordingly, for the reasons set out above, this court finds that the Petition is without merit and it is dismissed.

35. In view of the public nature of the Petition, there shall be no order as to costs.

Order accordingly.

**DATED AND DELIVERED ON THIS 18<sup>TH</sup> DAY OF JULY 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Mr. Ashaba for the Petitioner.

Ms. Musyimi for Mr. Mwereru for the 1<sup>st</sup> Respondent.

