



**Gachagua v Speaker of the National Assembly & 3 others (Petition E550 of 2024)  
[2024] KEHC 12876 (KLR) (Constitutional and Human Rights) (15 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12876 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E550 OF 2024  
EC MWITA, J  
OCTOBER 15, 2024**

**BETWEEN**

**RIGATHI GACHAGUA ..... PETITIONER**

**AND**

**THE SPEAKER OF THE NATIONAL ASSEMBLY ..... 1<sup>ST</sup> RESPONDENT**

**THE NATIONAL ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT**

**THE SPEAKER OF THE SENATE ..... 3<sup>RD</sup> RESPONDENT**

**THE SENATE ..... 4<sup>TH</sup> RESPONDENT**

**Parliament had to conclude the impeachment process relating to the Deputy President before the court could intervene in the matter.**

*The petitioner, the Deputy President, filed the instant application seeking conservatory orders that included orders to restrain the Senate from proceeding with his impeachment and to suspend the resolution passed by the National Assembly proposing his removal from office pending the determination of the petition. The court highlighted the procedure to be followed in the impeachment of the President and Deputy President. The court also held that the impeachment of the Deputy President having been committed to Parliament, meant that the parliamentary processes should be concluded before the court could intervene in the matter.*

Reported by Kakai Toili

**Constitutional Law** – Executive – Deputy President – removal of the Deputy President from office – impeachment - what was the procedure to be followed in the impeachment of the President and Deputy President – Constitution of Kenya, articles 145 and 150.

**Jurisdiction** – jurisdiction of the High Court – jurisdiction to issue conservatory orders - whether the High Court could issue conservatory orders over an impeachment process being undertaken by Parliament.



## **Brief facts**

The petitioner was the Deputy President of the Republic of Kenya and had brought the petition to challenge the decision by the National Assembly to pass a motion to impeach him. The petition was based on various grounds, including violation of his right to fair hearing and public participation. Simultaneous with the petition the petitioner had filed a motion application, seeking conservatory orders. One of the conservatory orders sought was to restrain the Senate from proceeding with the impeachment scheduled for October 16<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup>, 2024 so that the resolution passed by the National Assembly on October 8, 2024 founded on the motion dated September 26, 2024 proposing the petitioner's removal from office as Deputy President by impeachment was suspended until the determination of the petition.

The petitioner further sought a conservatory order restraining the Senate from admitting, processing, debating or in any manner whatsoever considering the motion for the proposed removal from office as Deputy President by impeachment founded on the notice of motion presented to and passed by the National Assembly until determination of the petition. The petitioner also sought a certification that the petition raised questions of great general public interest and thus, it should be placed before the Chief Justice for empanelment of a bench of uneven number of judges, not being less than three, to hear it.

## **Issues**

- i. What was the procedure to be followed in the impeachment of the President and Deputy President?
- ii. Whether the High Court could issue conservatory orders with respect to an impeachment process being undertaken by Parliament.

## **Relevant provisions of the Law**

### **Constitution of Kenya**

#### **Article 150 - Removal of Deputy President**

*(1) The Deputy President may be removed from office—*

*(a) on the ground of physical or mental incapacity to perform the functions of the office; or*

*(b) on impeachment—*

*(i) on the ground of a gross violation of a provision of this Constitution or any other law;*

*(ii) where there are serious reasons to believe that the Deputy President has committed a crime under national or international law; or*

*(iii) for gross misconduct.*

*(2) The provisions of Articles 144 and 145 relating to the removal of the President shall apply, with the necessary modifications, to the removal of the Deputy President.*

## **Held**

1. Jurisdiction was the authority given to a court to hear and determine disputes before it. Jurisdiction of a court may be granted by the Constitution, statute or both. Any time the jurisdiction of a court was challenged, it was a threshold question which the court had to determine. Should the court determine that it had no jurisdiction to hear the matter, that was the end. The court should not take any further step. It must down its tools.
2. The issues raised in the petition centred on whether the petitioner's right to a fair hearing guaranteed by the Constitution had been violated and whether anything said to be done under the authority of the Constitution and any law was inconsistent with, or in contravention of, the Constitution, thus falling within the jurisdiction of the court under article 165(3)(b) and (d) of the Constitution. Article 165(6) further granted the court supervisory powers over any person or body exercising judicial or quasi-judicial function, including the National Assembly and the Senate when performing quasi-judicial functions.
3. Article 165(3)(c) of the Constitution was in relation to the process of removing the President or Deputy President from office on grounds of incapacity. That process was initiated for purposes of



- investigating the President's (Deputy President's) physical or mental capacity to perform functions of that office. That was a distinct process from that of impeachment in article 145 as read with article 150 of the Constitution. Article 165(3)(c) excluded jurisdiction of the court over the process undertaken in accordance with article 144 and not article 145 of the Constitution as read with article 150 of the Constitution.
4. In the application in E522 of 2024, the issue of conservatory orders was not pursued. That was based on the fact that the process in the National Assembly had been concluded. In constitutional petitions, it was quite normal for parties to come to court and within a short while find that the circumstances of their cases had changed and it could be necessary to take other steps to bring life in the petitions. The court having not dealt with the issue of conservatory orders in that matter, meant that the instant court said no more on the issue.
  5. Parliament was an institution established under the Constitution. It comprised the National Assembly and the Senate. The National Assembly considered a motion to impeach the petitioner and passed a resolution. That was in exercise of its mandate under article 150 as read with article 145 of the Constitution. Article 150 was on the removal of the Deputy President. Article 145 provided for the procedure for removal of the President by impeachment.
  6. A member of the National Assembly, supported by a third of all members, may move a motion to impeach the President on grounds of, namely; gross violation of the Constitution or the law; where there were serious reasons to believe that the President or Deputy President had committed a crime under international law or national law or gross misconduct. If the motion was supported by two thirds of all members of the National Assembly, the Speaker was to inform the Speaker of the Senate about the motion within two days. The Speaker of the Senate was then to convene a meeting of the Senate within seven days after receiving the notice, to hear the charges.
  7. Article 145(5) of the Constitution stated that the President (the Deputy President) had the right to appear and be represented before the special committee during its investigations. Where the allegations were substantiated, the Senate had, after according the President an opportunity to be heard, to vote on the impeachment charges. If at least two-thirds of all the members of the Senate voted to uphold any impeachment charge, the President (Deputy President) would cease to hold office. Article 145 of the Constitution laid down the procedure to be followed in cases of impeachment and the timelines for doing so, including affording the person facing the charges an opportunity to be heard on the charges.
  8. The Supreme Court had made it clear that where the Constitution gave the mandate to undertake a process to another arm of Government, the court should allow that arm to complete its process before it could exercise its judicial review jurisdiction over the matter to determine whether what was said to be done under the authority of the Constitution was inconsistent with, or in contravention of, the Constitution.
  9. The petitioner had raised valid concerns. However, even though the Constitution granted the court jurisdiction to intervene where there was a threat to violate the Constitution or human rights and fundamental freedoms, precedents from the Supreme Court bound the court so that it had to exercise restraint in matters of impeachment. The process being challenged having been committed to Parliament meant that Parliament should be allowed to conclude its role in the process.
  10. In Kenya's constitutional scheme, the people delegated their authority to State organs, including Parliament and the Judiciary to exercise the delegated authority only in accordance with the Constitution. Article 2 of the Constitution reminded everyone that the Constitution was supreme and bound all persons and State organs at both levels, while article 3 of the Constitution placed an obligation on every person to respect, uphold and defend the Constitution.
  11. Article 10(1) of the Constitution was clear that national values and principles bound all State organs, public officers and all persons whenever they discharged their mandate under the Constitution. The national values and principles included, transparency, accountability, the rule of law, human rights



and public participation. If a State organ failed to abide by any of the values and principles in the Constitution, the court, exercising its jurisdiction under article 165(3) of the Constitution would come in and investigate whether anything said to be done under the authority of the Constitution was inconsistent with, or in contravention of, the Constitution.

12. Constitutional processes were not about dashing to the finish line. They had constitutional imperatives that must be complied with and if not, such infractions would not be out of reach of the Constitution. The timelines given by the Constitution were on the premise that constitutional processes would comply with constitutional requirements. Where there was an allegation that fundamental imperatives in the Constitution had not been complied with, the affected person had recourse to court and the court would have to determine whether the State organ complied with the Constitution or the law. It did not matter how far the process may have gone since no action was beyond the reach of the Constitution.
13. Article 2(4) of the Constitution was not only the hope but also the promise of the Constitution, that the court must abide by constitutional dictates because any act or omission in contravention of the Constitution was invalid.

*Application dismissed.*

### **Orders**

- i. *The prayer for grant of conservatory orders was declined.*
- ii. *In view of the issues raised in the petition which also appeared to relate to those in Petition No E522 of 2024, which had been certified for purposes of appointing a bench of uneven number of judges to hear it, the instant court certified the petition as raising substantial questions of law and of public interest, in terms of article 165(4) of the Constitution. The file was to be placed before the Chief justice to consider appointing an uneven number of judges to hear the petition.*
- iii. *Given the close proximity of the issues in the petition and those in Petition E 522 of 2024, the Chief Justice may consider whether that petition should be heard by the bench appointed to hear petition E 522 of 2024.*

### **Citations**

#### **Cases**

#### **Kenya**

1. *Aura v Cabinet Secretary, Ministry of Health & 11 others; Kenya Medical Practitioners & Dentist Council & another* (Interested Parties) Constitutional Petition E473 of 2023; [2024] KEHC 8255 (KLR) — (Explained)
2. *British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another* (Interested Parties); *Mastermind Tabacco Kenya Limited* (Affected Party) Petition 5 of 2017; [2019] KESC 15 (KLR) — (Explained)
3. *In the Matter of the Interim Independent Electoral Commission* (Applicant) Constitutional Application 2 of 2011; [2011] KESC 1 (KLR) — (Explained)
4. *Kidero & 4 others v Waititu & 4 others* Petition 18 & 20 of 2014 (Consolidated); [2014] KESC 11 (KLR) — (Explained)
5. *Macharia & another v Kenya Commercial Bank Limited & 2 others* (Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 — (Followed)
6. *Mate & another v Wambora & another* Petition 32 of 2014; [2017] KESC 1 (KLR) — (Explained)
7. *Munya v Kithinji & 2 others* (Application 5 of 2014; [2014] KESC 30 (KLR); [2014] 3 KLR 36) — (Explained)
8. *Mwangaza v Speaker, County Assembly of Meru & another; Council of Governors* (Interested Party) Civil Application E093 of 2023; [2023] KECA 1599 (KLR) — (Explained)
9. *Mwangi Wa Iria & 2 others v Speaker of the Muranga County Assembly & another* Petition 458 of 2015; [2015] KEHC 7843 (KLR) — Explained



10. *Owners of the Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd* (Civil Appeal 50 of 1989; [1989] KECA 48 (KLR); [1989] KLR 1) — (Followed)
11. *Sonko v County Assembly of Nairobi City & 11 others* Petition 11 (E008) of 2022; [2022] KESC 76 (KLR)) — (Explained)

### **United Kingdom**

*Macfoy v United Africa Co Ltd* [1961] 3 All ER 1169 — (Explained)

### **Statutes**

#### **Kenya**

1. Civil Procedure Act (cap 21) section 6 — (Interpreted)
2. Constitution of Kenya articles 2; 3; 10(1); 21; 22; 23(1), (3)(c); 25(c); 47; 50(1); 75(3); 145(1)(2)(a); 150(2)(a); 165(3)(b)(d)(6); 258; 259 — (Interpreted)
3. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (Constitution of Kenya Sub Leg) rule 23 (1) — (Interpreted)
4. County Governments Act (cap 265) In general— (Cited)
5. High Court (Organization And Administration) Act (cap 8C) section 5 — (Interpreted)

### **Advocates**

*Mr Muite, SC, Mr Macharia, Mr Ongoya, Miss Waigwa* and *Mr Njomo* for the petitioner.

*Mr Nyamodi, Mr Kipkogei, Mr Wanyama, Wainaina, Mr Mulimo* and *Mwangi* for the 1st respondent.

*Mr Gumbo* for the 2nd respondent.

*Miss Thanji* for the 3<sup>rd</sup> and 4<sup>th</sup> respondents.

## **RULING**

### **Application**

1. The petitioner is the Deputy President of the Republic of Kenya. He has brought this petition to challenge the decision by the National Assembly to pass a motion to impeach him. The petition is based on various grounds, including violation of his right to fair hearing and public participation, among others.
2. Simultaneous with the petition the petitioner has filed a motion application, seeking conservatory orders. One of the conservatory order sought is to restrain the Senate from proceeding with the impeachment scheduled for 16<sup>th</sup>, 17<sup>th</sup> and October 18, 2024 so that the resolution passed by the National Assembly on October 8, 2024 founded on the motion dated September 26, 2024 proposing the petitioner's removal from office as Deputy President by impeachment is halted until the determination of this petition.
3. The petitioner further seeks a conservatory order restraining the Senate from admitting, processing, debating or in any manner whatsoever considering the motion for the proposed removal from office as Deputy President by impeachment founded on the notice of motion presented to and passed by the National Assembly until determination of the petition.
4. The petitioner also seeks a certification that the petition raises questions of great general public interest thus, should be placed before the Chief Justice for empanelment of a bench of uneven number of judges, not being less than three, to hear it.
5. The petition and motion application are brought under articles 21, 22, 23(1), (3)(c) read with article 165(3), 258 and 259 of the *Constitution*; section 5 of the *High Court Organisation and Administration*



Act and rule 23(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (the Mutunga Rules).

6. The petition and motion application are supported by the petitioner's affidavit, supplementary together with annexures thereto as well as written submissions. The motion application is predicated on the grounds that this court has jurisdiction under article 23 of the Constitution to consider and issue remedies, including a conservatory order in appropriate and deserving cases.
7. The petitioner states that a motion dated September 26, 2024 was tabled in the National Assembly on October 1, 2024 proposing his removal from office as Deputy President of the Republic by impeachment. The National Assembly allowed the motion on 8<sup>th</sup> October at 9pm. On the same night, the Clerk of the National Assembly transmitted the resolution to the Clerk of the Senate.
8. The petitioner further states that the resolution passed by the National Assembly is invalid on several grounds. These include; that the impeachment motion is replete with general unsupported allegations, hearsay and outright lies without particularization and specificity required by article 145(1) of the Constitution and Standing Order 64(1A) of the National Assembly Standing Orders.
9. The petitioner further states that the National Assembly did not conduct a constitutionally compliant public participation prior to passing the impeachment motion and the impeachment motion did not meet the threshold in article 145(1), among others.
10. The petitioner asserts that through Gazette Notice No 13170 dated October 9, 2024, the Speaker of the Senate convened the Senate to hear the charges on the proposed removal from office by impeachment. Subsequently, the Speaker of the Senate issued another communication on October 9, 2024, directing how the proceedings will be conducted in the Senate. It is the petitioner's case, that unlike the respondents who will not suffer prejudice if conservatory orders are granted, he risks losing his position and being disqualified from holding any state and public office by virtue of article 75(3) of the Constitution. The petitioner argues that the substratum of the petition will also be rendered moot, nugatory and an academic if conservatory orders are not granted.

### **1<sup>st</sup> Respondent's Response**

11. The Speaker of the National Assembly, the 1<sup>st</sup> respondent, has opposed the application through grounds of opposition. The 1<sup>st</sup> respondent asserts that this court has no jurisdiction to hear this matter because the petition and application are *sub judice*, owing to there being petition E 522 of 2024; between the same parties which has been certified as raising substantial questions of law and referred to the Chief Justice for empanelment of a bench.
12. The 1<sup>st</sup> respondent states that the application and petition amount to forum shopping and are an abuse of the court process. The 1<sup>st</sup> respondent further states that under article 165 (3) (c) of the Constitution, this court lacks jurisdiction to determine the removal of the Deputy President by way of impeachment under article 150 of the Constitution.
13. According to the 1<sup>st</sup> respondent, this court cannot consider the legality or constitutionality of the impeachment motion against the petitioner and of public participation because the motion is yet to be fully considered by parliament and public participation is yet to be completed. This, the 1<sup>st</sup> respondent asserts, renders the petition non justiciable. The petition also offends the doctrine of comity, judicial restraint and separation of powers.
14. The 1<sup>st</sup> respondent again states that the impeachment of the Deputy President is conducted in time bound proceedings and, therefore, this court cannot issue conservatory orders during active



parliamentary proceeding, including the ongoing impeachment. The 1<sup>st</sup> respondent maintains that the petition violates the settled law by the Supreme Court in *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2017] eKLR.

## 2<sup>nd</sup> Respondent's Response

15. The 2<sup>nd</sup> respondent has filed a replying affidavit sworn by the Clerk of the National Assembly. The 2<sup>nd</sup> respondent states that the *Constitution* and National Assembly standing orders provide comprehensive and time specific legal framework for removal of the Deputy President by impeachment. The process was followed; public participation conducted and the petitioner was afforded a fair hearing. The resolution to approve the impeachment motion was thus, valid and in accordance with the *Constitution*.
16. According to the 2<sup>nd</sup> respondent, the timeline for processing impeachment both in the National Assembly and the Senate are provided for in the *Constitution*, namely articles 145 as read with article 150 and which were followed.
17. The 2<sup>nd</sup> respondent maintains that public participation was conducted after publishing a notice inviting members of the public to attend and give their views on October 3, 2024. The exercise was extended to 4<sup>th</sup> October following directions by the court that public participation be conducted at the constituencies.
18. The 2<sup>nd</sup> respondent asserts that the petitioner was given a hearing in compliance with articles 47 and 50 of the *Constitution*, and he attended the debate in the National Assembly on October 8, 2024. Thereafter, members of the National Assembly took a vote and the motion was passed. On October 9, 2024, the Speaker of the National Assembly notified the Speaker of the Senate as required by article 150(2)(a) as read with article 145(2)(a), thus the National Assembly followed the *Constitution* and the law on the impeachment of the petitioner.

## 3<sup>rd</sup> and 4<sup>th</sup> Respondents' Response

19. The 3<sup>rd</sup> and 4<sup>th</sup> respondents oppose the petition and application through a preliminary objection that this court has no jurisdiction to hear this petition. They maintain that article 165 of the *Constitution* is improperly invoked; that the petition is *sub judice* on account of petition No E 522 of 2024; the petition offends article 145 of the *Constitution* and that granting conservatory orders would be in violation of the *Constitution* because the removal of a Deputy President from office by impeachment is a process with constitutionally bound timelines.

## Arguments

20. During the hearing of the motion application for conservatory orders, counsel for the parties made oral arguments, highlighting their respective position over the matter.

## Petitioner's Submissions

21. Mr Muite, SC, teaming up with Mr Macharia, Mr Ongoya, Miss Waigwa and Mr Njomo, have urged the court to grant conservatory orders. Mr Muite, SC puts the record straight that the petitioner is not forum shopping as the respondent have argued in their responses. Senior Counsel maintains that a new cause of action arose after the National Assembly passed a resolution on the impeachment motion. This was a new development that necessitated the filing of this petition.



22. Regarding the impeachment of the President or Deputy President, Mr Muite, SC argues that it is a two-phase process. The first phase takes place in before the National Assembly and the second phase in the Senate. The resolution in the National Assembly, gave the court jurisdiction to do justice on the matter of impeachment of the Deputy President. According to Senior Counsel, when the people of Kenay enacted the Constitution, they gave this court jurisdiction to hear and determine anything said to be done in accordance with the Constitution.
23. Mr Muite, SC asserts that article 23 requires the court to uphold the Bill of Rights, an authority conferred on this court, while article 23(3) gives the court power to grant conservatory orders. According to Senior counsel, article 25(c) is clear that the right to a fair hearing/trial cannot be limited. He maintains that the petitioner’s right to a fair hearing has been violated; that public participation was not properly conducted as the Supreme Court directed in the British America Tobacco Kenya Plc (Formerly British American Tobacco Kenya Limited) v Cabinet Secretary for Health & others (Petition No 5 of 2017) thus, this court has jurisdiction to investigate the matter since the National Assembly acted as a quasi-judicial body.
24. In counsel’s view, the 12 days provided for in standing order No 64 of the National Assembly Standing Orders, violates article 50(1) of the Constitution. Further, public participation was to take place at county headquarters until the High Court at Kerugoya directed that public participation be conducted at constituency level. The notice to that effect was issued late, and according to senior counsel, that explains why the turnout was a paltry 224, 907 people who took part during public participation. Public participation was not, therefore, meaningful and did not comply with article 118 of the Constitution.
25. Mr. Muite, SC cited the decision of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR that public interest and constitutional values is the basis for granting conservatory orders. The resolution was transmitted to the National Assembly and immediately, the Senate set the process of trial in motion posing the question “Why the haste?”
26. Senior Counsel again cites the decision in Aura v Cabinet Secretary, Ministry of Health & 11 others; Kenya Medical Practitioners & Dentist Council & another (Interested Parties) [2024] KEHC 8255 (KLR) on the minimum requirements for effective and meaningful public participation and urges the court to grant conservatory orders to maintain the substratum of the petition.
27. Mr Macharia also argues that this court has jurisdiction; that the matter is not *sub judice* and that the decision in Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] KESC 1 (KLR) is distinguishable from the present petition since in the Wambora case, conservatory orders were issued in the middle of proceedings in the County Assembly. In this case, however, the process concluded in the National Assembly, a fact that was also confirmed by the respondents during the hearing of petition E522 of 2024, before Mugambi, J.
28. On *sub judice*, counsel argues that under the Mutungu Rules, a party can approach the court in any manner and the court will have to hear him. On ripeness, counsel urges that there are exceptions in that where something is to happen, one does not have to wait for ripeness.

## 2<sup>nd</sup> Respondent’s Arguments

29. Mr Nyamodi, teaming up with Mr.Kipkogei, Mr Wanyama, Wainaina and Mwangi, have argued that the petitioner is guilty of forum shopping. Mr Nyamodi makes reference to petition E522 of 2024 in that prayers in that application are identical to those in the present motion. He also refers to paragraph



- 6 of the ruling in that matter, maintaining that the same arguments made before Mugambi J have been made before this court.
30. Mr Nyamodi further argues that the National Assembly passed the resolution on October 8, 2024, parties appeared before Mugambi J on October 9, 2024 and the ruling was delivered on October 11, 2024. “It was the petitioner’s duty to press that court to grant prayers on conservatory orders in that matter.” Counsel argues. The filing of this petition amounted to forum shopping.
  31. Regarding the matter before the Senate, Mr. Nyamodi maintains that the process is based on constitutional timelines thus, the court should allow the process to go on.
  32. On public participation, counsel argues that it is not a must that every person takes part. If the level of attendance was to be taken into account, elections would be challenged on grounds of poor attendance during elections. According to counsel, article 145 has thresholds with regard to numbers both in the National Assembly and the Senate.
  33. Mr Gumbo adds that once the process concluded in the National Assembly, article 145(c) kicked in and the Seante took over and has scheduled a hearing. The court should, therefore, exercise difference and restraint. Once concluded, the court can then interrogate whether anything said to have been done is constitutional. Counsel cites the decision in *Sonko v County Assembly of Nairobi & 11 others*, [2022] KESC 76 (KLR) and *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2017] KESC 1 (KLR) to support his position. He argues that the petitioner will not suffer any prejudice if conservatory orders are not granted as article 145(5) gives a safety valve for him to appear before the Senate.
  34. Mr Wanyama on his part, adds that the petitioner is precluded from raising issues raised in petition E522 of 2024. He argues that the petitioner’s counsel informed Mugambi, J that they were not pursuing the order for conservatory orders. At that time, the proceedings before the National Assembly had concluded and counsel for the petitioner did not want the respondents to respond on the order on conservatory orders. That was why the court (Mugambi J) only dealt with the issue of certification.
  35. Mr Wanyama cited the decision in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR as the test for granting conservatory orders. Counsel further cites the decision in the *Wambora Case* to support their case. In counsel’s view, the *Constitution* provided for timelines which should be respected.
  36. On public participation, counsel posits that being a constitutional imperative, it should be done within certain timelines. The court should not therefore issue conservatory orders which may distablise the process.

### **3<sup>rd</sup> and 4<sup>th</sup> Respondent’s Arguments**

37. Miss Thanji representing the 3<sup>rd</sup> and 4<sup>th</sup> respondents reiterates the other respondents’ position that the court has no jurisdiction to hear the matter at this stage. Reliance is placed on the decision in *Mwangaza v County Assembly of Meru & another; Council of Governors (Interested Party)* [2023] KECA 1599 (KLR). According to counsel the Senate is the trial Chamber and the petitioner has a chance to appear before it.
38. Counsel again relies on the decision of *Justus Kariuki Mate & another v Hon Martin Nyaga Wambora & another (supra)* to argue that the petition will not be rendered nugatory as the petitioner has an opportunity to come to court after the process. Further reliance is placed on *Sonko v County Assembly of Nairobi & 11 others, (supra)* on impeachment process.



## 1<sup>st</sup> Respondent's Arguments

39. Mr Milimo, counsel for the 1<sup>st</sup> respondent has elected to submit last. Counsel reiterates more or less the arguments by counsel for the other respondents. Mr Milimo emphasises that this application seeks similar orders that were sought in petition E522 of 2024; that the petitioner has not disclose the existence of petition E522 and that this matter is thus, *sub judice*. He relies on section 6 of the [Civil Procedure Act](#) on this argument.
40. Regarding the right to a fair hearing, Mr Milimo argues that the petitioner will be given an opportunity to appear before the Senate. He relies on [Mwangi Wa Iria & 2 others v Speaker of the Muranga County Assembly & another](#) [2015] eKLR, that a person facing impeachment should not shy away from a constitutional process.

## Rejoinder

41. In a short rejoinder, Mr Macharia argues that the petition is not a forum shopping; that the petitioner only seeks order No 4 in the application; that statics like the one from Keiyo constituency was not in Petition E522 and that this petition raises new issues.

## Determination

42. I have considered the application, responses and arguments on behalf of the parties. From their arguments, counsel for the parties addressed a number of issues. However, there are only two main issues the court is required to respond to. These are; whether this court has jurisdiction to hear this matter and whether a conservatory order should be granted.

## Jurisdiction

43. The respondents argue that this court has no jurisdiction as this matter is on a constitutional process under articles 145 as read with article 150 of the [Constitution](#). Some of the respondents have gone as far as arguing that article 165(3)(c) ousts the court's jurisdiction from hearing disputes arising from impeachment of the President and Deputy President. They also argue that this matter is *sub judice* since the orders sought in the application were also in petition E522 of 2024.
44. There is no doubt on what jurisdiction is. It is the authority given to a court to hear and determine disputes before it. Jurisdiction of a court may be granted by the [Constitution](#), statute or both. Any time the jurisdiction of a court is challenged, it is a threshold question which the court has to determine. Should the court determine that it has no jurisdiction to hear the matter, that is the end. The court should not take any further step. It must down its tools. (See [Owners of Motor Vessel "Lillian S" v Caltex Oil \(Kenya\) Limited](#) (*supra*)).
45. Addressing the issue of jurisdiction in [Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 others](#) [2012] eKLR, the Supreme Court stated:
- (68) A court's jurisdiction flows from either the [Constitution](#) or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the [Constitution](#) or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...without jurisdiction, the court cannot entertain any proceedings...Where the [Constitution](#) exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.



46. *In re the Matter of the Interim Independent Electoral Commission* (Applicant), Constitutional Application Number 2 of 2011 [2011] eKLR, after referring to *Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited* (*supra*), the Supreme Court again stated:
- [30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the *Constitution*.
47. Jurisdiction of this court is provided for in article 165(3) of the *Constitution*. This court has jurisdiction to, among others, (b) determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; (d) hear any question respecting the interpretation of the *Constitution*, including the determination of—(ii) the question whether anything said to be done under the authority of the *Constitution* or of any law is inconsistent with, or in contravention of, the *Constitution*.
48. Further, article 23(1) provides that the High Court has jurisdiction, in accordance with article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
49. Article 165(3) as read article 23(1) authorises the High Court to decide all matters other than those reserved for other courts, the Supreme Court, Employment and Labour Relations Court and Environment and Land Court. Article 165(6) grants the High Court supervisory jurisdiction over subordinate courts and “over any person or body exercising judicial or quasi-judicial function.”
50. The constitutional authorisation given to the High Court is expansive. Whether this court has jurisdiction to hear and determine this petition, must be viewed through the prism of article 165(3) (b) and (d) and (6) as read with article 23(1).
51. This petition alleges what the petitioner views as violation of his right to a fair hearing, a right in the Bill of Rights. Whether the right to a fair hearing has been violated is a matter within the jurisdiction of this court. I must add, that the right to a fair hearing guaranteed by article 50(1) is one of the non-derogable rights in article 25(c).
52. In *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others*, (SC Petition No 18 of 2014 consolidated with Petition No 20 of 2014); [2014] eKLR, the Supreme Court stated that reference in article 50(1) to the right to a fair hearing for all persons and article 50(2) which accords all accused persons the right to a fair trial are used interchangeably, sometimes to define the same concept, and other times to connote a minor difference, thus fall under the list in article 25(c) which lists the right to a fair trial as a non-derogable fundamental right and freedom that may not be limited.
53. The petitioner also argues that constitutional imperatives in conducting public participation were not met. This claim again falls within the scheme of article 165(3), so that this court has jurisdiction to interrogate whether any of constitutional processes said to have been conducted under its authority met the constitutional threshold.
54. In that respect, the issues raised in the petition centre on whether the petitioner’s right to a fair hearing guaranteed by the *Constitution* has been violated and whether anything said to be done under the authority of the *Constitution* and any law is inconsistent with, or in contravention of, the *Constitution*, thus falling within the jurisdiction of this court under article 165(3)(b) and (d). Article 165(6) further



grants this court supervisory powers over any person or body exercising judicial or quasi-judicial function, including the National Assembly and the Senate when performing quasi-judicial functions.

55. The 1<sup>st</sup> respondent has pushed an argument that this court has no jurisdiction to hear a matter arising from impeachment of the President or Deputy President on the basis of article 165(3)(c). The article provides that the High court has:

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under article 144.

56. Article 165(3)(c) is in relation to the process of removing the President or deputy President from office on grounds of incapacity. This process is initiated for purposes of investigating the President's (Deputy President's) physical or mental capacity to perform functions of that office. This is a distinct process from that of impeachment in article 145 read with 150. Article 165(3)(c) excludes jurisdiction of this court over the process undertaken in accordance with article 144 and not article 145 as read with article 150 of the Constitution.

### ***Sub judice***

57. The respondents again argue that the application is *sub judice* in view of the application that was in E522 of 2024. All sides agree that in that application, the issue of conservatory orders was not pursued. This was based on the fact that the process in the National Assembly had been concluded. Indeed, counsel for the petitioner read to court an excerpt of the ruling by Mugambi, J. where counsel for the 1<sup>st</sup> respondent herein informed that court that the process in the National Assembly had been concluded.

58. In constitutional petitions, it is quite normal for parties to come to court and within a short while find the circumstances of their cases having changed and may have to take other steps to bring life in the petitions. The court having not dealt with the issue of conservatory orders in that matter, I say no more on the issue.

### **Conservatory Orders**

59. The next issue is whether this court should grant conservatory orders. The petitioner has urged the court to grant conservatory orders and halt the process that is pending before the Senate. The petitioner's case is that the process is violative of his right to a fair hearing and that constitutional imperatives on public participation were not met.

60. The respondents urge the court not to injunct the Senate since it is undertaking a constitutional process authorised by the Constitution itself. Parties have relied on several decision to support their respective positions.

61. Parliament is an institution established under the Constitution. It comprises the National Assembly and the Senate. The National Assembly considered a motion to impeach the petitioner and passed a resolution. This was in exercise of its mandate under article 150 as read with article 145 of the Constitution.

62. Article 150 on the removal of the Deputy President, provides that:

1. The Deputy President may be removed from office—

(a) on the ground of physical or mental incapacity to perform the functions of the office; or (b) on impeachment— (i) on the ground of a gross violation of a provision of this



Constitution or any other law; (ii) where there are serious reasons to believe that the Deputy President has committed a crime under national or international law; or

(iii) for gross misconduct.

- (2) The provisions of articles 144 and 145 relating to the removal of the President shall apply, with the necessary modifications, to the removal of the Deputy President.
63. Article 145 provides for the procedure for removal of the President by impeachment. A member of the National Assembly, supported by a third of all members, may move a motion to impeach the President on grounds of, namely; gross violation of the Constitution or the law; where there are serious reasons to believe that the President or Deputy President has committed a crime under international law or national law or gross misconduct.
64. If the motion is supported by two thirds of all members of the National Assembly, the Speaker is to inform the Speaker of the Senate within two days. The Speaker of the Senate is then to convene a meeting of the Senate within 7 days after receiving the notice, to hear the charges.
65. Article 145(5) states that the President (the Deputy President) has the right to appear and be represented before the special committee during its investigations. Where the allegations are substantiated, the Senate has, after according the President an opportunity to be heard, to vote on the impeachment charges. If at least two-thirds of all the members of the Senate vote to uphold any impeachment charge, the President (Deputy President) will cease to hold office.
66. Article 145 lays down the procedure to be followed in cases of impeachment and the timelines for doing so, including affording the person an opportunity to be heard on the charges.
67. I have considered the constitutional provisions on impeachment and read decisions from the Supreme Court and the Court of Appeal which are binding on this court. These decisions have laid down the position that it is important to let an impeachment process run its course after which the court would have a look at any complaints on violation of the either the Constitution, the law or fundamental rights, including processes.
68. For instance, in Justus Kariuki MateŃ & another v Hon. Martin Nyaga Wambora & another (*supra*), the Supreme court stated that interpretation of the Constitution calls for a delicate balance in the respective mandates of the different arms of government.
69. In Sonko v County Assembly of Nairobi & 11 others (*supra*), the Supreme Court observed that removal proceedings for a county Governor are textually committed by the Constitution to the legislative branch of government. The constitutional mandate and the process to impeach a Governor commences in the County Assembly and terminates in the Senate.
70. The Supreme Court emphasised that the Constitution commits to both institutions the exclusive power to remove the Governor subject only to procedural requirements set out in the County Governments Act and the respective Standing Orders of the County Assemblies and the Senate: and proof of the charges.

The Supreme Court then added:

- (111) It has been emphasized in accordance with the principle of separation of powers that in considering applications to review decisions of the other branches of Government, “courts should strive to achieve a balance between their role as guardians of the Constitution and of the rule of law, including an obligation to respect what Parliament is constitutionally required to fulfill”. In other words, where the Constitution requires Parliament to determine a matter



in the first place as part of its constitutional mandate, Parliament will have the discretion and power to regulate its own affairs and the courts will be slow to interfere with the exercise of that discretion.

Reference to count assembly in these decisions applies to the National Assembly where necessary.

71. Flowing from these decisions, The Supreme court has made it clear that where the Constitution commits a process to another arm of Government, the court should allow that arm to complete its process before the court exercises its judicial review jurisdiction over the matter to determine whether what was said to be done under the authority of the Constitution is inconsistent with, or in contravention of, the Constitution.
72. Granted, this is the first time this country is experiencing impeachment proceedings against a Deputy President. The petitioner has raised substantial questions including, violation of his right to a fair hearing guaranteed by article 50(1) and ringfenced by article 25(c) as a non-derogable right. The petitioner has also stated that the National Assembly, in passing the impeachment motion, considered extraneous matters other than the grounds raised in the impeachment motion.
73. There is the further argument, that constitutional imperatives on public participation were not complied with. The petitioner has given an example of Keiyo South constituency, (S/No 95) to demonstrate this fact. According to the public participation results for that constituency, the total number of people who participated is given as 43. Those who were in support are given as 70. Those who did not support were 3. The percentage of those in support was 162.79% while 6.98% did not support. It is implausible that an attendance of 43 people would produce 70 people in support (162.79%) and 3 in opposition (6.98%).
74. The petitioner has again argued that the National Assembly considered extraneous matters that had nothing to do with the issues raised in the motion.
75. The petitioner has raised valid concerns. However, even though the Constitution grants this court jurisdiction to intervene where there is a threat to violate the Constitution or human rights and fundamental freedoms, precedents from the Supreme court bind this court so that it has to exercise restraint in matters of impeachment. The process being challenged having been committed to Parliament, it should be allowed to conclude its part.
76. In our constitutional scheme, the people delegated their authority to state organs, including Parliament and the Judiciary to exercise the delegated authority only in accordance with the Constitution. Article 2 reminds everyone that the Constitution is supreme and binds all persons and state organs at both levels, while article 3 places an obligation on every person to respect, uphold and defend the Constitution.
77. Article 10(1) is also clear that national values and principles bind all state organs, public officers and all persons whenever they discharge their mandate under the Constitution. The national values and principles include, transparency, accountability, the rule of law, human rights and public participation. If a state organ fails to abide by any of the values and principles in the Constitution, the court, exercising its jurisdiction under article 165(3) will come in and investigate whether anything said to be done under the authority of the Constitution is inconsistent with, or in contravention of, the Constitution.
78. It was in this respect that the Supreme Court stated in *Justus Kariuki Mate & another v Martin Nyaga Wambora & another*, (*supra*), that it would be reluctant to question parliamentary procedures as long as they did not breach the Constitution; and that the mandate of the courts is restricted by the doctrine of separation of powers to deciding on matters of individual rights and fundamental freedoms. The Supreme Court then made it plain that in the exercise of their “wide political powers, both the County



Assembly and the Senate cannot act outside the confines of the Constitution and the law. For to do so would invariably invite the court's intervention."

79. In other words, constitutional processes are not about dashing to the finish line. They have constitutional imperatives that must be complied with and if not, such infractions will not be out of reach of our constitution. The timelines given by the Constitution are on the premise that constitutional processes will comply with constitutional requirements. Where there is an allegation that fundamental imperatives in the Constitution have not been complied with, the affected person has recourse to court and the court will have to determine whether the state organ complied with the Constitution or the law.
80. In that respect, our constitution offers both hope and promise: Hope, that institutions it has established will comply with its fundamental principles; And promise, that the Constitution is supreme and any act or omission in contravention of the Constitution is invalid. In other words, it does not matter how far the process may have gone since no action is beyond the reach of our constitution.
81. This is what Lord Denning had in mind when he stated in Macfoy v United Africa Co Ltd [1961] 3 All ER 1169, that:
- “if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order to set it aside. It is automatically null and void without more a do, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
82. Article 2(4) of our constitution is not only the hope but also the promise of our constitution, that we must abide by constitutional dictates for “any act or omission in contravention of this Constitution is invalid.”

### **Conclusion**

83. In conclusion, having considered the application and arguments by parties, the Constitution and precedent, the prayer for grant of conservatory orders is declined.
84. However, in view of the issues raised in this petition which also appear to relate to those in petition, No E522 of 2024, which has been certified for purposes of appointing a bench of uneven number of judges to hear it, I certify this petition as raising substantial questions of law and of public interest, in terms of article 165(4) of the Constitution. This file is to be placed before the Hon. Chief Justice to consider appointing an uneven number of judges to hear this petition.
85. Given the close proximity of the issues in this petition and those in petition E 522 of 2024, The Hon. Chief Justice may consider whether this petition should be heard by the bench appointed to hear petition E 522 of 2024.
86. I make no order on costs.

**DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF OCTOBER 2024.**

**E C MWITA**

**JUDGE**

