



**Ungai v Speaker, County Assembly of Kakamega & 2 others; County
Assembly of Kakamega (Interested Party) (Constitutional Petition
E001 of 2024) [2024] KEHC 14322 (KLR) (1 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14322 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CONSTITUTIONAL PETITION E001 OF 2024
AC BETT, J
NOVEMBER 1, 2024**

BETWEEN

VICTORIA ZILLA UNGAI PETITIONER

AND

THE SPEAKER, COUNTY ASSEMBLY OF KAKAMEGA 1ST RESPONDENT

**THE ACTING CLERK, COUNTY ASSEMBLY OF KAKAMEGA 2ND
RESPONDENT**

**THE KAKAMEGA COUNTY ASSEMBLY COMMITTEE ON POWERS,
PRIVILEGES AND IMMUNITIES COMMITTEE 3RD RESPONDENT**

AND

THE COUNTY ASSEMBLY OF KAKAMEGA INTERESTED PARTY

JUDGMENT

1. The Petitioner, a duly elected Member of the County Assembly of Kakamega, through her petition dated 23rd January 2024 approached this Honourable Court seeking the following reliefs:-
 - a) A declaration do issue that the session and/or sitting of the County Assembly of Kakamega convened by the Speaker of the County Assembly of Kakamega on 27th September 2023 is illegal and unconstitutional.
 - b) A declaration do issue that the purported Report of the Kakamega County Assembly Powers and Privileges Committee on Inquiry into the conduct of Hon. Victoria Zilla Ungai is unlawful, illegal and unconstitutional.



- c) A declaration do issue that Hon. Victoria Zilla Ungai remains a member of the Speaker's Panel of the County Assembly of Kakamega unless otherwise discharged in accordance with principles of the Constitution specifically the right to a fair administrative action.
- d) A declaration do issue that Standing Order Number 196(2) of the Kakamega County Assembly Standing Orders is unconstitutional to the extent that:-
 - (i) It provides that the discharge of Member from the Speaker's Panel shall be at the sole discretion of the Speaker.
 - (ii) It does not require the Speaker of the County Assembly to give reasons for discharging a member from the Speaker's panel; and
 - (iii) It does not provide for according such a member the right to a fair administrative action before discharge.
- e. A declaration do issue that the suspension and or purported suspension of Hon. Victoria Zilla Ungai from the County Assembly of Kakamega through the impugned session/sitting of 27th September 2023 is unlawful, illegal, unconstitutional, null and void.
- f. A declaration issue that the Petitioner's labour and employment rights under Article 44 of the Constitution, fair administrative action under Article 47 of the Constitution and political rights under Article 38 of the Constitution have been violated and infringed.
- g. A declaration do issue that the Petitioner herein remains a member of the Finance, Economic Planning & ICT Committee and the Monitoring & Implementation Committee unless discharged by the County Assembly Party that sponsored her to the County Assembly of Kakamega.
- h. A declaration do issue that by convening a session of the County Assembly apart from the Standing Orders and the applicable laws with a notice of less than 12 hours, the 1st Respondent has misused and or abused a state office or and has contravened Chapter Six.
- i. A declaration do issue that the 1st Respondent, Hon. James Namatsi, is disqualified from being the Speaker of the County Assembly of Kakamega having been found, in accordance with any law, to have misused or and abused a state office or and public office or and to have contravened Chapter Six.
- j. An order of certiorari do issue quashing the proceedings and business of the session and or sitting of the County Assembly of Kakamega convened by the Speaker of the County Assembly of Kakamega on 27th September 2023.
- k. An order of certiorari do issue quashing the purported Report of the Kakamega County Assembly Powers and Privileges Committee on Inquiry into the conduct of Hon. Victoria Zilla Ungai.
- l. An order of mandamus do issue compelling the 2nd Respondent or anyone in the position of the Clerk of the County Assembly Kakamega, in acting or substantial capacity, to pay the Petitioner all withheld responsibility allowances of Kshs. 20,000 per month or as per the applicable circular of the Salaries and Remuneration Commission, from the month of June 2023 accruing to her by virtue of being a member of the Speaker's panel.
- m. An order of mandamus do issue compelling the 2nd Respondent or anyone in the position of the Clerk of the County Assembly of Kakamega, in acting or substantial capacity, to pay



the Petitioner responsibility allowance that accrue to her as a member of the Speaker's Panel in accordance with the applicable circular of the Salaries and Remuneration Commission unless and or until the Petitioner is removed in accordance with the Constitutional right to a fair hearing and fair administrative action.

- n. An order of mandamus do issue compelling the 2nd Respondent to pay the Petitioner all allowances, as per the applicable circulars by the Salaries and Remuneration Commission, for all official foreign and local trips.
 - o. The Petitioner be awarded general damages as against the Respondents for violation of the Petitioner's human rights.
 - p. The Court be pleased to issue any other appropriate relief.
2. The petition is founded on the provisions of Articles 2(1), 3(1), 10, 19, 20, 22, 23, 73(2)(a), 165 (3) (d), 176, 177, 178, 193(2)(g) of *the Constitution* of Kenya, 2010; Sections 3, 11, 14(1) and 14(7) of the *County Governments Act*.

A. Factual Matrix

i) Background

- 3. The facts giving rise to the Petition as far as I can distill from the face of the Pleadings before me are that on the 12th of September 2023, the 3rd Respondent conducted an inquiry in the absence of the Petitioner. Following this inquiry, the 3rd Respondent prepared a report containing findings that were adverse to the Petitioner.
- 4. As a result of these findings, the 3rd Respondent recommended certain punitive measures against the Petitioner. These included suspension from attending sessions in the County Assembly for the remainder of the second session of the Third County Assembly, restriction from accessing the County Assembly precincts, and a prohibition on the use or enjoyment of facilities typically available to Honourable Members for the duration of the suspension.
- 5. Subsequently, on the 27th of September 2023, the 1st Respondent convened a plenary session of the Interested Party, over which the 1st Respondent presided. During this session, the report in question was reportedly adopted by the Assembly.
- 6. Following this session, the 2nd Respondent formally communicated the assembly's decision to suspend the Petitioner.
- 7. Moreover, it is alleged that on various occasions, the 1st Respondent discharged the Petitioner from the Speaker's panel. Further, it is asserted that the Respondents, acting jointly, discharged the Petitioner from membership in the Finance, Economic Planning and ICT Committee as well as the Monitoring and Implementation Committee.

ii) Petitioner's case

- 8. The Petitioner case has four limbs and is presented as follows;

a Sessions of the County Assembly

- 9. It is the Petitioner's case that vide a text message to the members of Kakamega County Assembly, the 1st Respondent convened a session outside the Standing Orders, which provide a procedure under which a regular session or a special sitting is convened. Particularly, the Petitioner cites the provisions



of Standing order number 24 and 26, which sets out the procedure for convening sessions before the Assembly.

10. The Petitioner posits that the said session was held on 27th September 2023, where it emerged that the 1st Respondent being the Speaker of the House was the complainant, and still chaired the session that purported to approve the recommendations of the report, alluded to above.
11. The Petitioner however maintains that the Report was never seconded by any member of the House and as such, the motion to adopt the said report failed.
12. It is the Petitioner's case that the Speaker, being the Complainant, was conflicted and ought to have declared the conflict of interest as per article 73(2) of *the Constitution*.
13. The Petitioner also stated that she requested for a copy of the Hansard for the sitting of 27th September 2023 from the Respondents which was never made public, but her requests were not heeded to.
14. That consequent to the sitting of 27th September 2024, she was suspended and restricted from accessing the precincts of the County Assembly, pursuant to Section 17(3) of the County Assembly Powers and Privileges Act, whereas her conduct alleged to have breached privilege was never disclosed.
15. The Respondent also maintains that she is a member of the County Assembly by virtue of election by her constituents and as such the Respondents have no right to limit her representation to her electorate.
16. As a result of her suspension, the Petitioner contends that she has suffered mental anguish, financial loss and her political and labour rights were violated as she has lost on allowances and other benefits that accrue to her as a Member of the County Assembly, the Speaker's panel and the Committees.
17. Under this limb, the Petitioner contends that the actions of the 2nd Respondent of convening a session outside the provisions of the standing orders violated Article 10 of *the Constitution* on the values of and principles of good governance.
18. Further, that by failing to give reasons or accord the Petitioner a fair hearing, the Respondents violated the Petitioner's right to fair administrative action under Article 47 of *the Constitution*.
19. The Petitioner also contends that the actions of the 1st Respondent in so far as they demean the office of the Speaker of County Assembly violated Article 75 of *the Constitution*.

b) Responsibility allowance accruing from the Petitioner's membership of the Speaker's panel

20. It is the Petitioner's case that she was appointed to the Speaker's panel vide a letter dated 1st March 2023 where she earned a monthly responsibility allowance of Kshs. 20,000, which has been withheld by the 2nd Respondent since the month of June 2023.
21. That the 1st Respondent discharged her, pursuant to Standing Order 196 without any reason and without any communication to her.
22. The Respondent also contends that the said standing order provides that the discharge of a member shall be the sole discretion of the Speaker and shall take effect immediately upon issuance of a notice of the House Business Committee.
23. In this regard, she urges that to the extent that the provision does not require the Speaker to give reasons for such discharge and accord such a member a fair administrative action, Standing Order number 196(2) is unconstitutional.



c) Removal from Departmental Committees

24. It is the Petitioner's case that she was nominated and appointed to the Finance, Economic Planning and ICT Committee; and the Monitoring and Implementation Committee wherefrom she was illegally discharged and excluded in contravention of Standing Order 156.
25. That as a result of the said discharge, her rights and entitlements including committee allowances have been violated.

d) Allowances for Local and Foreign Trips

26. The Petitioner alleged that she was unilaterally, without any justifiable cause, declined allowances for her official, international and local trips which have equally violated her rights.

iii. Respondents' Case

27. The Respondents on their part filed Grounds of Opposition dated 20th February 2024 and a Replying Affidavit of even date sworn by the 1st Respondent.
28. The Respondents assert that, in recognition of devolution and the constitutional principle of separation in democracy such as ours:-
 - a. The court has no jurisdiction to entertain these proceedings by virtue of the provisions of Article 196(3) of *the Constitution* of Kenya, 2010 ("*the Constitution*") read together with the provisions of Section 17 of the County Government Act, 2012 and the provisions of Section 10 and 11 of the *County Assemblies Powers and Privileges Act*.
 - b. That the issue of discharge and or removal of the Petitioner from membership of various Committees is an internal matter for the County Assembly regulated and governed by the applicable Standing Orders and not amenable to the Court's jurisdiction.
 - c. The power to discharge a member from a Committee is vested in the Political Party that nominated such a member to a Select Committee by virtue of Standing Order No.158 of the Kakamega County Assembly, Standing Orders, through the Committee on Selection.
 - d. In nominating members to serve in select Committees, guided by Standing Order No. 155, the Committee on Selection only consult with the Assembly Parties. Where changes do not affect more than 20% of the membership of a Committee, the Chairperson of the Committee on Selection may give notice in writing, to the Speaker on the changes and such changes takes effect immediately.
 - e. The proceedings offend the doctrine of separation of powers encapsulated in Article 175 (a) of *the Constitution* and the object and principles of devolution as constitutional principle.
 - f. The Articles of *the Constitution* cited by the Petitioner does not confer upon her any constitutional right or fundamental freedom in the Bill of Rights to serve in the Speaker's Panel, and or any other Committee and or immunity from being subjected to inquiries and scrutiny, and to the consequences of liability as applicable, on being found culpable for breach of privileges, as a member of the County Assembly, capable of being violated and accordingly, no cause of action is disclosed by the Petition.
 - g. The Petition does not raise any constitutional issues whatsoever capable of being determined by the court.



29. It is the Respondents' case that the County Assembly Powers, Privileges and Immunities Committee, pursuant to Standing Order No 192(3) has powers to inquire allegations of breach of any member of the Code of Conduct or conduct of any member of the County Assembly which is intended to have or likely to adversely reflect on among other issues the dignity or integrity of the Assembly or the member thereof or to be contrary to the best interest of the Assembly or the members and in doing so is allowed to determine its own procedure and accordingly take disciplinary action against any member found culpable.
30. It is also the Respondents' assertion that the provisions of *the Constitution* and the Acts as cited and some but not all of Standing Orders cited in paragraphs 22 of the Petition makes provisions in respect to the issues as reproduced in the Petition but do not point out at all to any violation of *the Constitution*, breach of the statutes and threat to any fundamental rights and freedoms that has informed the filing of the present Petition.
31. The Respondents contend that in as much as the usage of short message service and other messaging applications are not illegal and lawful, since such communication is not prohibited any law or the Standing Orders.
32. That prior to the 31st August 2023, the Committee on Powers, Privileges and Immunity on its own Motion as provided for in Standing Order No. 192 took action and resolved to inquire into the Petitioner's conduct owing to the latter's social media posts which were allegedly defamatory to the County of Kakamega County Assembly leadership.
33. That following the social media posts by the Petitioner, which the Committee on Powers, Privileges and Immunities viewed as constituting breach and abuse of privilege by a member, and conduct worthy of inquiries by the Committee, as aforesaid, and pursuant to the provisions of Section 18(1) of the *County Assemblies Powers and Privileges Act*, 2017, the said Committee preferred charges against the Petitioner and by a letter dated 31st August 2023, and invited her to appear before it on 5th September 2023 to provide information about the stated posts and to respond to specific charges.
34. It is also the Respondents' case that the Petitioner has herself exhibited the said letter dated 31st August 2023, showing the charges against her. The allegation that she is not aware of the reasons that informed the basis of findings by the Committee against her is dishonest and disentitles her to equitable relief as she seeks before this court.
35. That despite being summoned, the Petitioner never attended before the Committee. Instead the Committee received a letter from the Petitioner's Advocate, which forced the Committee to adjourn its sitting of 5th September 2023 which was adjourned to 12th September 2023, when the Petitioner again failed to appear.
36. The Respondent states that in default of the Petitioner's appearance, the 3rd Respondent proceeded to go on with its inquiries and prepared its report dated September 2023.
37. That subsequently, a plenary sitting was convened and held on the 27th September 2023 and there was nothing unconstitutional, illegal, and unlawful as it was within the sitting days of the gazetted Calendar.
38. It is also the Respondents' case that the Report of the County Assembly Powers, Privileges and Immunities made adverse findings against the Petitioner and since it was tabled before the County Assembly of Kakamega on the 27th September 2023, its recommendations were communicated to the member and the same took effect immediately.



39. The Respondents also contend that the Petitioner served the entire duration of the suspension and resumed her duties on the 13th February 2024 and thus the Petition therefore has been overtaken by events.
40. The Respondents also concede that the Petitioner was selected to serve in various Committees, including as a member of the Speaker's Panel.
41. The 1st Respondent however contends that it does not have powers to de-whip any member of the County Assembly from any Committee, save from the Speakers Panel from which he removed the Petitioner vide notice dated 15th June 2023, that was addressed to the House Business Committee as required by the Standing Orders.
42. That currently, the Petitioner herein is a member of the following Committees:- a) Members Services and Facilities, b) Justice and Legal Affairs Committee and c) ICT, e-Government, Library and Communication Committee.
43. On the suspension of the Petitioner, the Respondents aver that the reasons for the said action were communicated to the Petitioner, in compliance with the provisions of article 47 and the prescriptions of the Fair Administrative Actions Act.
44. The 3rd Respondent further contends that neither itself nor the 2nd Respondent, removed the Petitioner from any Committees in violation of the law, the Constitution or rules of natural justice.
45. That there is nothing unconstitutional in Standing Order No 196(2) of the Kakamega County Assembly Standing Orders to warrant the declaration now sought in prayer No 72 D of the Petition.
46. The Respondents further aver that rights of the Petitioner enshrined in Articles 44, 47 and 38 of the Constitution were never violated by any of the Respondents named in the Petition.
47. That the prayer No. 72 I, seeking to disqualify the 1st Respondent from being Speaker of County Assembly of Kakamega, and the allegation that he has been found, to have misused, abused a public office and to have contravened Chapter Six, are to say the least, baseless and wishful.
48. It is further the 1st Respondent's case that a County Assembly Speaker can only be disqualified from being the Speaker on the occurrence of the events as contemplated and provided for under Article 193(2) and where all the possibilities of an appeal specified under Article 193(3) of the Constitution have been exhausted.
49. The Respondents further contend that the Petitioner was discharged from the Speaker's Panel way back in June 2023 and having not served in that position since then, there is no basis for the order of mandamus sought in Prayer 72 L and M. In any event, allowances are paid for services rendered, and not due to some sense of entitlement.
50. In view of the above, the Respondents urge that the Petition be dismissed with costs.

B. Issues for Determination

51. Having carefully considered the pleadings and the respective submissions by the parties herein, I deduce the following issues for determination by this Honourable Court:-
 - i. Whether this Court has the Jurisdiction to hear and determine this Petition;
 - ii. Whether the Petitioners Constitutional rights were violated; and
 - iii. What reliefs (if any) is the Petitioner entitled to.



C. Determination

(i) Whether this Court has the Jurisdiction to hear and determine this Petition

52. The Respondents in their pleadings have challenged the jurisdiction of this Honourable Court on two accounts; first, that this Honourable Court has no Jurisdiction to hear and determine the Petition herein by virtue of the provisions of Sections 10 and 11 of the [County Assemblies Powers and Privileges Act](#).
53. Secondly, that these proceedings offend the Doctrine of Separation of Powers encapsulated in 175(a) of [the Constitution](#) of Kenya, 2010.
54. Section 10 and 11 of the [County Assemblies Powers and Privileges Act](#) provide as follows:-
- “10. Proceedings not to be questioned in courts
No proceedings or decision of a county assembly or the Committee of Powers and Privileges acting in accordance with this Act shall be questioned in any court.
 - 11. Immunity from legal proceedings
 - (1) No civil or criminal proceedings shall be instituted against any Member for words spoken before, or written in a report to a county assembly or a Committee, or by reason of any matter or thing brought by him or her therein by a report, petition, Bill, resolution, motion or other document written to a county assembly.
 - (2) No civil suit shall be commenced against the Speaker, the leader of the majority party, the leader of the minority party, a chairperson of a committees or any member for any act done or ordered by them in the discharge of the functions of their office.
 - (3) The Clerk or other members of staff shall not be liable to be sued in a civil court or joined in any civil proceedings for an act done or ordered to be done in the discharge of their functions relating to proceedings of a county assembly or its committees.”
55. Article 175(a) of [the Constitution](#) of Kenya, 2010 on the other hand provides:-
- “175. County governments established under this Constitution shall reflect the following principles—
 - (a) county governments shall be based on democratic principles and the separation of powers.”
56. As was held in the locus classicus case of *The Owners of Motor Vessel “Lilian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1, jurisdiction is everything and without it, the Court must down its tools.



57. Further, in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2010] eKLR the Court stated: -

“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 the written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

58. The question for determination therefore, is whether the legal provisions reproduced above, oust the Jurisdiction of this Honourable Court.

59. Various courts have interrogated the scope of the High Court’s authority to adjudicate over proceedings or decisions of the County Assembly in light of the privileges and immunities conferred upon the County Assemblies, their Committees and Members.

60. In the case of Ruth Wambui Ndirangu & 2 others v Clerk County Assembly of Embu & 3 others [2019] eKLR, Muchemi J, while faced with a similar objection stated: -

“36. The petition before this court seeks for reliefs and orders based on the allegation that the constitutional rights of the applicants were violated by the 1st, 2nd and 3rd respondents. It also seeks for judicial review orders to quash the resolution of the respondents.

37. Article 165 (3) of *the Constitution* confers jurisdiction to this court to hear any question for the interpretation of *the constitution* including the determination of whether any law in question is inconsistent or in contravention with *the constitution*.

38. I am in agreement with the findings and observations made in the Protus Moindi case (supra) that the High Court has jurisdiction to deal with all matters of alleged constitutional violations by the respondents or any other state organs within its jurisdiction.

39. I find no merit in the preliminary objection and hereby find that this petition is within jurisdiction of this honourable court...”

61. Similarly, in the case of National Gender & Equality Commission v Majority Leader, County Assembly of Nakuru & 4 others; Jubilee Party & another (Interested Parties) [2019] eKLR, Joel Ngugi J, addressing a similar question concluded: -

“21. In the Mumo Matemu case, the Court of Appeal was explicit that the doctrine of separation of powers can never mean that decisions and processes of the other two arms of government are immunized from judicial interrogation. It is the standard utilized by the courts for such interrogation that determines whether the courts have sufficiently applied the doctrine of separation of powers. Hence the Court of Appeal prescribed a standard of review which it described as “rationality standard” distinct from “reasonableness standard” to be utilized in such cases...”

22. In the present case, the Petitioner claims that the intent purpose and effect of the impugned resolution by the County Assembly of Nakuru would be to perpetuate constitutionality, impermissible discrimination. This is a precisely stated complaint which, if true, would yield *the Constitution* that



the Respondents violated *the Constitution*. The only question, then would be whether such a conclusion can be reached by applying the “rationality standard” prescribed by the Court of Appeal, and not whether the courts have been rendered powerless to consider such controversy. I would therefore hold that the court has jurisdiction to consider the matter at hand.”

62. Additionally, in the case of Apollo Mboya v Attorney General & 2 others Petition No. 472 OF 2017 [2018] eKLR, the Court in declaring section 11 of the *Parliamentary Powers and Privileges Act* (No. 29 of 2017), which is similar in provision with section 10 of the County Assemblies Powers & Privileges Act held:-

“ 53. Section 11 of the act provides that ‘No proceedings or decision of Parliament or the Committee of Powers and Privileges acting in accordance with this Act shall be questioned in any court’....

75. The foregoing paragraphs summarize the nature and purpose of Parliamentary immunity. A reading of section 11 leaves no doubt that it covers more than the immunity discussed in the above paragraphs. It bars any person from challenging in Court decisions made by Parliament or its committees. The provision does not specify the nature of the decisions. It does not refer to immunity in the performance of their Parliamentary duties. It seeks to shield their decisions from court scrutiny. It is an ouster or finality clause which restricts or eliminates Judicial Review. In our constitutional dispensation, it is not Parliament, or the executive or the Judiciary that are Supreme, but *the Constitution*.”

63. The common thread in the foregoing authorities is that the court’s jurisdiction to interrogate the constitutionality of any act including that of the County Assembly cannot be ousted.

64. The court is mandated to safeguard the sanctity of *the Constitution* and where it is called upon to determine whether there has been a violation of *the Constitution* it must not shy away from its duty.

65. I am not therefore convinced that the Powers and Privileges of the County Assembly can be invoked to restrict or oust the Constitutional mandate of this Court to look into the constitutionality of the decisions of the County Assemblies.

66. Furthermore, County Assemblies Powers & Privileges Act 2017, is subordinate to *the Constitution* which is the supreme law and it cannot override it.

67. In so far as this Honourable Court is called upon to determine the constitutionality of the actions of the Respondents, the objection therefore, that this Honourable Court does not have the jurisdiction to hear and determine this matter accordingly fails.

(ii) Whether the Petitioner’s constitutional rights were violated

68. It is trite law that anyone who wishes the court to grant a relief for violation of a right or fundamental freedom, must plead in a precise manner the constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it. In Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154 the Court stated:-

“... if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case)



that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.” (see also *Meme v Republic & another* [2004] 1 KLR 637)

69. The Court of Appeal in *Mumo Matemo v Trusted Society of Human Rights alliance* [2014] eKLR, stated that:-

“...the principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”

70. The chronology of the events leading to the Petition, I construe, are; the alleged removal from the Speakers panel, alleged removal from the Assembly Committees, and finally, the inquiry into the Petitioner’s conduct and the subsequent tabling and adoption of the report which led to sanctions against the Petitioner.

Removal from the Speaker’s panel

71. It is not contested that the Petitioner was a member of the Speaker’s panel or that she was discharged from the said panel. The Petitioner however, contests the manner of the discharge, contending that it was done without notice or reason to her.

72. The Petitioner then proceeded to cite the provisions of Standing Order No. 196(2), which the Petitioner prays should be declared unconstitutional, and which she states in her Petition, provides as follows:-

“2. The Discharge of a member shall be at the sole Discretion of the Speaker and shall take effect immediately upon issuance of a notice to House Business Committee.”

73. I must however state at this juncture that a perusal of the Standing Orders presented before me, and which is annexed to the Petitioner’s Supporting Affidavit dated 23rd January 2024, at paragraph 5 thereof as “VZU 1”, at page 100 provides quite a different reading.

74. Standing Order No. 196 in the said annexure provides as follows:-

“1. Except as expressly provided for in these standing orders, no matter shall be referred to a selection committee except on a motion approved after notice given.

2. Notwithstanding paragraph (1), the Speaker may, in exceptional circumstances, on a request by a member, refer a matter to a committee.”

75. I however note that Standing Order No. 193 (b) of the said Standing Orders provide for discharge of a member from Speaker’s Panel as follows:-

i. The Speaker may, in writing, to the House Business Committee give notice that a member is to be discharged from the panel.



- ii. Within seven days of receipt of a notice under paragraph (i) the House Business shall consider the notice and give Notice of Motion to replace a member.
 - iii. The discharge of a member of the panel shall not take effect until the House has approved the motion for replacement under paragraph (i).
76. Given the conflict between the evidence provided and what is pleaded in the Petition, I am apprehensive that this court may not be in a position to delve into the constitutionality or merit of the discharge under the above Standing Order.
77. The Court cannot help but note however, that the wording and tenor of Standing Order No. 196 as cited under paragraph 56 of the Petition is in total variance with the actual provisions thereof set out under the County Assembly of Kakamega Standing Orders annexed to the Applicant's Supporting Affidavit dated 23rd January, 2024 and marked as annexure, "VZU-1.
78. I also appreciate that the Petitioner has also taken issue with the alleged withholding of responsibility allowance accruing to her as a member of the Speakers panel. In this regard, the Petitioner contends that as a member of the said panel, she is entitled to a monthly responsibility allowance of Kshs. 20,000/=.
79. It is however noteworthy that the Petitioner never tendered any evidence howsoever in support of this assertion (specifically that she was entitled to such allowance) to warrant a finding in this regard. In view of the above I find that prayer C & D of the Petition lacks merit.

Unlawful removal from Departmental Committees

80. The Petitioner also contended that she was a member of the Finance, Economic Planning and ICT Committee and the Monitoring, Implementation Committee.
81. The Respondents on their part contend that the Petitioner is a member of the Members Services and Facilities Committee, Justice and Legal Affairs Committee and ICT, e-Government, Library and Communication Committee but deny that she was a member of Finance, Economic Planning and ICT Committee and the Monitoring, Implementation Committee and further that she was removed from these Committees.
82. As a general principle, the rule of evidence is clear that he who alleges must prove as grounded in Section 107 of the Law of *Evidence Act* which state as follows:-
- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
83. No evidence was produced before this Court to show that the Petitioner was in fact a member of any of these Committees or that she was removed by the Respondents from these other Committees and therefore prayer G of her petition must fail.

Inquiry of the Powers, Privileges and Immunity Committee

84. Though the Petitioner does not specifically contest this process, she has made a plea for a declaration that the Report by the Committee be declared unlawful, illegal and unconstitutional on account of violation of her right to fair administrative action.



85. The Petitioner also asserted that the Respondents violated her right to fair administrative action under article 47 of *the Constitution*, and thus it is necessary, for completion of the record that the same be addressed as it was a facet of this process.
86. It is established that the Committee on Powers, Privileges resolved to inquire into the Petitioner's conduct owing to the latter's social media posts which were allegedly defamatory to the County of Kakamega County Assembly leadership.
87. The said Committee preferred charges against the Petitioner and by a letter dated 31st August 2023, invited her to appear before it on 5th September 2023 to provide information about the stated posts and to respond to specific charges. The said letter lays out the charges and the particulars of the charges that the Petitioner was facing before the Committee.
88. The Respondents contend that despite being summoned, the Petitioner never appeared before the Committee. Instead, the Committee received a letter from the Petitioner's Advocate, and its sitting was adjourned to 12th September 2023, when the Petitioner was notified and again failed to appear.
89. The Respondent stated that in default of the Petitioner's appearance, the 3rd Respondent proceeded to go on with its inquiries and prepared its report dated September 2023.
90. In the case of *Republic v Nairobi City County ex parte Registered Trustees of Sir Ali Muslim Club* [2017] eKLR, Odunga J. stated as follows:

“ 56. In a nutshell, the rule of law also allows for predictability of actions by public bodies and the fact that law would be uniformly and objectively applied. Part of our Constitution (article 10) asserts that transparency and accountability are some of the hallmarks that define the rules that bind a state organ. Since the rule of law enforces minimum standards of fairness, both substantive and procedural it follows that before a decision adverse to the interest of a person is made, that person must be accorded a hearing as stipulated in article 47 of *the Constitution* as read with sections 4 and 7 of the Fair Administrative Actions Act.”

91. Based on the evidence before this Honourable Court, I am satisfied that the Petitioner was granted a fair chance to be heard, but chose not to appear before the Committee as directed. In this regard, her right to fair administrative action was not in any way violated.

Sittings of the County Assembly on 27th September, 2023

92. The Petitioner contends that by convening a session of the County Assembly outside the Standing Orders (by text) and the applicable law, with a notice of less than 12 hours, the 1st Respondent violated Article 2(2) and to a larger extent, Chapter six of *the Constitution*.
93. The Standing Orders of the County Assembly of Kakamega, which are the subject of these proceedings, is enabled by the provisions of Articles 174, 175, 176(2) and 200 of *the Constitution* and; Section 3 and 14 of the County Government Act.
94. It is not in dispute that a plenary sitting was convened and was held on the 27th September 2023. The Respondents also concede that the said session was convened via text message to Honourable Members of the Assembly.



95. The Petitioner argues that this Plenary Session was illegal and unconstitutional as it did not conform with the procedure laid out in the Standing Orders. Further, that the Speaker who was the complainant, presided over the plenary session.
96. A decision suffers from procedural impropriety if in the process of its making, the procedures prescribed by statute are not being followed or if the ‘rules of natural justice’ are not adhered to.
97. In the case of *Republic v Firearms Licensing Board & another Ex parte Boniface Mwaura* [2019] eKLR, Mativo J held as follows:-
- “There are three broad bases on which a decision maker may owe a duty to exercise its functions in accordance with fair procedures. First, legislation or another legal instrument which gives a decision making power may impose a duty to follow specific procedures. The requirements relating to procedure contained in the statute or other instrument must be complied with. However, failure to comply with required procedures does not automatically mean that the decision which follows is invalid. The courts take a range of factors into account in deciding whether or not to nullify a decision.
66. Second, no-one may be the judge in his or her own cause. This strikes at decision making where the decision maker is connected with the party to the dispute or the subject matter. In this context, justice should not only be done, but should be seen to be done. Consequently, appearance of bias may be as relevant as actual bias.
67. Third, no person against whom an adverse decision might be taken should be denied a fair hearing to allow them to put their side of the case. What constitutes a fair hearing depends on the particular circumstances of the case. These include the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it has to work. A telephone call asking a citizen to report to a particular office and hand over a licensed gun without offering a hearing or reasons is arbitrary, dictatorial, harsh and cannot pass constitutional test.
68. Fourth, statutes often require that decisions made under them to be supported by reasons.
69. Article 47 of *the constitution* codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. [66]Further there is a right to be given reasons for any person who has been or is likely to be adversely affected by administrative action.[67]Each of these prescriptions fit the recognized grounds for judicial review of administrative actions.”
98. The question therefore that inevitably follows is whether or not the plenary session was properly convened and whether the 1st Respondent presided over the plenary session, when he in fact was the complainant without declaring his conflict of interest.
99. In response to the Petition, the 1st respondent deposed that the use of short message service and other messaging applications are not illegal as they are not prohibited by the Standing Orders. Standing



Order No. 26 sets out the procedure to be adopted in convening a special sitting of the County Assembly and states as follows:-

“26.

- (1) Whenever during a Session the County Assembly stands adjourned, whether or not a day has been appointed for the next meeting, the Speaker may, on the request of the Leader of the Majority Party or the Leader of the Minority Party, appoint a day for a special sitting of the County Assembly.
- (2) The Speaker may allow a request under paragraph (1) if the Speaker is satisfied that the business proposed to be transacted relates to any urgent and exceptional business as the Speaker may allow.
- (3) The Speaker shall, by notice in the Gazette, notify the Members of the place, date and time appointed for the special sitting of the County Assembly.
- (4) Whenever the County Assembly meets for a special sitting under paragraph (1), the Speaker shall specify the business to be transacted on the day or days appointed and the business so specified shall be the only business before the County Assembly during the special sitting, following which the County Assembly shall stand adjourned until the day appointed in the County Assembly calendar.”

100. Despite the 1st Respondent stating that the use of short message service is not prohibited by the Standing Order, it is not the mode of communication provided and Gazette Notice is the only mode of communication stipulated by the Standing Orders in case of special sitting.

101. The 1st Respondent avers that the impugned sitting fell within the County Assembly’s sitting calendar and was therefore not unlawful.

102. However, the Respondents never submitted before this Court the Hansard, Calendar or Gazette Notice of the Special Sitting to dislodge the Petitioner’s claims that all these processes were followed as provided for in the Standing Orders.

103. Section 103 of the *Evidence Act* provides as follows:-

“When the language used in a document applies partly to one set of existing facts, and partly to another, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.”

It was therefore necessary for the Respondents to produce the Hansard and County Calendar if they wanted to disprove the Petitioner’s claim which specifically claimed that the Respondents were in contravention of the County Assembly’s Standing Orders in convening the plenary sitting as and when it did.

104. The Respondents were said to have failed to gazette or publish a calendar of the County Assembly. The failure to produce the same or a Hansard can only lead to an inference that they were not available



or if available, were likely to be adverse to the Respondents case. In the case of Nesco Services Limited -vs- CM Construction (EA) Limited [2021] eKLR, the Court stated as follows:-

“Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:

“Section 112 of the Evidence Act Chapter 80 of the laws of Kenya provides:

‘In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.’

Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession.”

105. In the case of John Major Mukenya v Clerk County Assembly of Bungoma & 2 others; Florence Fulano Wekesa & 5 others (Interested Parties) [2021] eKLR, the Honourable Court while faced with an identical question held as follows:-

“The question then that must be answered in the circumstances is whether the issue of notice by the respondent to the Government Printer suffices even without a formal gazette notice. It is clear that at the time the respondents conducted its business on the 14th May, 2020, there was no Gazette in place for the special sitting.

Section 2 of the County Governments Act defines County Gazette to mean a gazette published by the authority of the County Government or a supplement of such gazette.

The operative word in standing order 26 is; shall which denotes mandatory. It is therefore mandatory for the speaker to ensure the special sitting is gazetted in line with the provision of the law.

It is therefore the finding of this court that failure by the 2nd respondent to cause gazetting of the special sitting held on 14th May, 2020 is contrary to the law particularly the third respondent’s Standing Order No. 26 and any resolution passed in the sitting is of no effect.....

In the circumstances and for the reasons stated above, I allow the petition and issue the following orders:

1. A declaration is hereby given that the 3rd respondents sitting of the 14th May, 2020 was unconstitutional and contrary to the Bungoma county assembly standing orders for failure by the 2nd respondent to gazette the special sittings.
2. The purported changes of leadership of the county assembly is hereby quashed and the status-quo obtaining before the 14th May, 2020 regarding the 1st to the 3rd parties be maintained.”

106. Accordingly, I find that the Session convened on the 27th September, 2024 was unprocedural and unlawful in so far as it was convened in contravention of the Assembly’s Standing Orders.



What reliefs (if any) is the Petitioner entitled to?

107. Based on the replying affidavit and the length of time that has lapsed since the petition was filed, much of the relief sought has been overtaken by events and is now water under the bridge. Moreover, the Petitioner did not controvert the averments by the Respondents that by the time the Respondents were filing their response, she had fully served the suspension.
108. Having made the above findings, the Petition herein partially succeeds and I make the following orders:-
- a. That a declaration be and is hereby issued that the Session and/or Sitting of the County Assembly of Kakamega convened by the Speaker of the County Assembly of Kakamega on 27th September 2023 was unlawful, illegal and unconstitutional for having been convened contrary to the provisions of the County Government of Kakamega Standing Orders.
 - b. A declaration be and is hereby issued that the suspension of Hon. Victoria Zilla Ungai for the remainder of the Second Session of the Third County Assembly of Kakamega vide the sitting of 27th September 2023 was unlawful, illegal, unconstitutional, null and void.
 - c. An order of certiorari be and is hereby issued quashing the proceedings and business of the Session and/or Sitting of the County Assembly of Kakamega convened by the Speaker of the County Assembly of Kakamega on 27th September 2023.
 - d. The Petitioner shall have the costs of the petition.
109. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 1ST DAY OF NOVEMBER 2024.

A. C. BETT

JUDGE

In the presence of:

No appearance for the Petitioner

Ms. Achieng holding brief for Mr. Okong'o for 1st, 2nd and 3rd Respondents and the Interested Party

Court Assistant: Polycap

