



Law Society of Kenya v Mwenda & 5 others; Independent Electoral and Boundaries Commission (Interested Party) (Petition E019, E005, E009, E011, E012, E13, E015 & E021 of 2021 & E433 of 2020 (Consolidated)) [2021] KEHC 449 (KLR) (Civ) (9 February 2021) (Ruling)

Law Society of Kenya v Anne Kananu Mwenda & 5 others; I.E.B.C. (Interested Party) [2021] eKLR

Neutral citation: [2021] KEHC 449 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

**PETITION E019, E005, E009, E011, E012, E13,
E015 & E021 OF 2021 & E433 OF 2020 (CONSOLIDATED)**

AC MRIMA, J

FEBRUARY 9, 2021

BETWEEN

LAW SOCIETY OF KENYA PETITIONER

AND

ANNE KANANU MWENDA 1ST RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY 2ND RESPONDENT

SPEAKER, NAIROBI CITY COUNTY ASSEMBLY 3RD RESPONDENT

DEPUTY GOVERNOR, NAIROBI CITY 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

GOVERNMENT PRINTER 6TH RESPONDENT

AND

IEBC INTERESTED PARTY

Effect of the failure to hold a gubernatorial by-election within the required 60 days where the County did not have a Deputy Governor.

Reported by John Ribia

***Electoral Law** – gubernatorial by-elections – gubernatorial elections as a result of the impeachment of a governor – conduct of the gubernatorial elections where the county government did not have a deputy governor – timelines*



for holding the gubernatorial by-elections - what was the effect of failure to hold the gubernatorial by-election within the required 60 days? – Constitution of Kenya, 2010, article 182.

Jurisdiction – jurisdiction of the High Court – jurisdiction of the High Court to stop the running and computation of constitutional timelines - whether the High Court had the power to stop the running and computation of constitutional timelines - what was the role of a court when faced with a lacuna in the law?

Devolution – county governments – deputy governor – nomination of a deputy governor – claim challenging the legal process for the nomination of a deputy governor which was *in situ* by the time a governor left office – whether the County Assembly could continue to process the appointment of the proposed deputy governor in the absence of a sitting governor where they had been impeached - Constitution of Kenya, 2010, article 182.

Constitutional Law – doctrine of legitimate expectation – nature and scope of legitimate expectation – circumstances giving rise to legitimate expectation - whether the nomination of a person to be appointed a deputy governor and the person availing him/herself for vetting created a legitimate expectation that if successful in the vetting the person would become a deputy governor.

Judicial Officer - judge – recusal of a judge of the High Court – grounds for recusal – complaint filed against a judge at the Judicial Service Commission in handling a particular matter -whether the complaint automatically precluded the officer from dealing with the matter.

Words and Phrases - legitimate – definition of legitimate – Complying with the law; lawful. Genuine; valid - Black's Law Dictionary 9th Edition, (Bryan A. Garner, Thomson Reuters Publishers).

Words and Phrases – expectation - definition of expectation - the act of looking forward; anticipation; a basis on which something was expected to happen; especially the prospect of receiving wealth, honors, or the like - Black's Law Dictionary 9th Edition, (Bryan A. Garner, Thomson Reuters Publishers) page 658.

Brief facts

The instant petition was filed challenging, *inter alia*, the 1st respondent's ascension to the office of the Governor of Nairobi City County. The Nairobi City County Governor was impeached by the Senate and by that time the Governor did not have a Deputy Governor. Therefore, the Speaker of the Nairobi City County Assembly assumed the position of Acting Governor by operation of law. Prior to the impeachment, the then Governor had nominated the 1st respondent for the position of Deputy Governor, and the process of vetting the nominee had been initiated. The County Assembly then took steps toward the vetting of the nominee. It was at that point that the consolidated petitions challenging the nomination of the 1st respondent as the Deputy Governor and her ascension into the office of Governor were filed.

Upon hearing the two applications in the consolidated petitions the court disallowed them. As a result, the 1st respondent was vetted, approved, and eventually sworn in as the Deputy Governor. The instant petition was filed challenging, *inter alia*, the 1st respondent's ascension to the office of the Governor of Nairobi City County. The petitioner sought, among other orders, the suspension of the decision of the County Assembly approving the nomination of the 1st respondent as the Deputy Governor.

Issues

- i. What was the effect of the failure to hold a gubernatorial by-election within the required 60 days where a county did not have a Deputy Governor?
- ii. Whether the High Court had the power to stop the running and computation of constitutional timelines.
- iii. What happened to a legal process for the nomination of a Deputy Governor which was *in situ* by the time a Governor left office or was impeached?
- iv. What was the role of a court when faced with a *lacuna* in law?
- v. What was the nature of the doctrine of legitimate expectation and under what circumstances could it arise?



- vi. Whether the nomination of a person to be a Deputy Governor and the person availing him/herself for vetting created a legitimate expectation that if successful in the vetting the person would become a Deputy Governor.
- vii. Whether a complaint against a judicial officer at the Judicial Service Commission in handling a particular matter automatically precluded the officer from dealing with the matter.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 182 - Vacancy in the office of county governor

1. *The office of the county governor shall become vacant if the holder of the office—*
 1. *dies;*
 2. *resigns, in writing, addressed to the speaker of the county assembly;*
 3. *ceases to be eligible to be elected county governor under Article 180(2);*
 4. *is convicted of an offence punishable by imprisonment for at least twelve months; or (e) is removed from office under this Constitution.*
2. *If a vacancy occurs in the office of county governor, the deputy county governor shall assume office as county governor for the remainder of the term of the county governor.*
3. *If a person assumes office as county governor under clause (2), the person shall be deemed for the purposes of Article 180(7)—*
 1. *to have served a full term as county governor if, at the date on which the person assumed office, more than two and a half years remain before the date of the next regularly scheduled election under Article 180(1); or*
 2. *not to have served a term of office as county governor, in any other case.*
4. *If a vacancy occurs in the office of county governor and that of deputy county governor, or if the deputy county governor is unable to act, the speaker of the county assembly shall act as county governor.*
5. *If a vacancy occurs in the circumstances contemplated by clause (4), an election to the office of county governor shall be held within sixty days after the speaker assumes the office of county governor.*
6. *A person who assumes the office of county governor under this Article shall, unless otherwise removed from office under this Constitution, hold office until the newly elected county governor assumes office following the next election held under Article 180(1).*

Held

1. Although the parties agreed to stop the by-election from being held, they did not in any way stop the time set under article 182(5) of the Constitution of Kenya, 2010 (Constitution) from running. A court had no power to stop the running of constitutional timelines. As the parties had stopped the carrying out of the by-election by IEBC on one hand, and on the other hand, the constitutional time set under article 182(5) was running, all the matters before the court in the impeachment petition were to be concluded within the period of 60 days. Those circumstances also meant that if the impeachment petition was disallowed then the by-election would be conducted within the same 60 days window.
2. The impeachment petition was pending and was coming up for a ruling on, *inter alia*, the empanelment of a multi-judge bench on February 25, 2021. It was practically inconceivable to have the impeachment petition determined and then, if the petition was dismissed, to have a by-election conducted within the remainder of the 60 days if at all any days would be left by then.
3. The effect of not holding the by-election within the 60 days window in the unique circumstances of the instant matter meant that the tenure of the Speaker acting as a Governor under article 182(5) of the Constitution was constitutionally hinged to only 60 days. In other words, the Speaker could not continue acting as the Governor past the 60th day. In the event the Speaker left office after the 60 days and without an acting governor, a governor or a deputy governor in office, then what would follow would be a constitutional crisis. That was because after 60 days from the day the Speaker took over as



- the acting Governor and there being no by-election held (since the parties were not for the by-election), Nairobi County would not have had any person acting as a Governor, it would have no substantive Governor and no Deputy Governor, as well.
4. In the absence of an acting Governor, a Governor or a Deputy Governor in office, many questions calling for answers arose. They included;
 1. how the County Government of Nairobi and by extension, the County Assembly would run;
 2. how the thousands of workers, who had families and some who would be servicing loans, would be paid;
 3. how the health department would, in particular, endeavour to fight the dreaded *coronavirus* in the county;
 4. the length of time Nairobi County would be held in such limbo; and,
 5. how such a constitutional crisis would be undone given that constitutional timelines could not be extended among other questions.
 5. A court had to, as a primary duty and in the public interest, uphold the Constitution. A court should not in any manner whatsoever create a constitutional crisis. It remained the cardinal duty of a court to foresee such a crisis and take steps to avoid it. As the parties were not for the holding of the by-election and given that the 60 days period was running out, the court had only one option in upholding the public interest and to avoid a constitutional crisis: to allow the vetting process to proceed, at least to see whether the County could have a deputy governor if the nominee was approved. The court, therefore, in allowing the vetting process to continue acted in the best interest of Nairobi City County and of Kenya at large and in the public interest.
 6. Article 182 of the Constitution dealt with vacancy in the office of County Governor and mainly focused on the absence of a Governor and the Deputy Governor and that a by-election followed thereafter. The law was silent on what happened to a legal process for the nomination of a Deputy Governor which was *in situ* by the time the Governor left office. The Constitution did not contemplate such a situation and as a result, there was no provision on the way forward. That was a constitutional *lacuna*.
 7. In instances of constitutional *lacuna* or rather any *lacuna* in the law, courts acted in the public interest and asserted the court's inherent jurisdiction in dealing with the *lacuna*. A court should not stare at a *lacuna* in the law. It had to do something about it for the maintenance of the rule of law and in the wider interest of the public who could not just be held in abeyance.
 8. Whereas the law was silent on what happened to a legal process for the nomination of a Deputy Governor which was *in situ* by the time the Governor left office, and acting in the public interest, the court asserted its inherent jurisdiction in finding a way forward. The only way to deal with the *lacuna* and in the public interest was to allow the nomination process which had been legally initiated to proceed.
 9. The court remained alive to the fact that the process of vetting the Deputy Governor was undertaken by a constitutional entity; that was a county assembly. That was the only entity in law mandated to do so. The County Assembly of Nairobi City County was governed by the Constitution, the law, and its Standing Orders. Once a matter was received by the County Assembly, it could only be handled within the constitutional and legal confines. Unless the contrary was proved, such a matter became the property, so to say, of the County Assembly.
 10. In the course of dealing with the anti-corruption petition, the court confirmed that IEBC had already cleared the nominee for vetting. The court also confirmed that the County Assembly was indeed ready to undertake the vetting of the nominee. By the time the court issued the conservatory orders the County Assembly had undertaken all the preliminaries. The remaining issue was the actual vetting of the nominee. By then the nomination had been received by the County Assembly and had become



- subject to the processes and procedures of the House. The Standing Orders of the House were clear on the procedure for withdrawal of a matter before it.
11. The alleged withdrawal of the nomination of the 1st respondent was problematic in two ways.
 1. As the nomination process was firmly in the legal hands of the County Assembly, then any attempted withdrawal of the nomination could only be done in compliance with its Standing Orders. There was no such evidence on record.
 2. The letter on the purported withdrawal of the nomination of the 1st respondent was under police investigations on allegations of fraud. Even if the letter was able to recall the nomination of the 1st respondent, relying on such a hotly disputed document would be a tall order. It was only prudent that the investigations be carried out first.
 12. Legitimate expectation meant the act of looking forward or anticipating something that was lawful/genuine or valid. It was also a legal basis upon which someone expected something to happen. A legitimate expectation arose when there was the demonstration that;
 1. a decision maker led a party affected by the decision to believe that he would receive or retain a benefit or advantage including a benefit that he/she/it would be accorded a hearing before the decision was taken;
 2. a promise was made to a party by a public body that it would act or not act in a certain manner and which promise was made within the confines of the law;
 3. the public authority whether by practice or promise committed itself to the legitimate expectation; the representation was clear and unambiguous;
 4. the claimant fell within the class of person(s) who were entitled to rely upon the representation(s) made by the public authority;
 5. the representation was reasonable and the claimant relied upon it to its detriment;
 6. there was no overriding interest arising from the decision maker's action and representation;
 7. the representation was fair in the circumstances of the particular case and the same arose from the actual or ostensible authority of the affected public authority to make the same;
 8. the promise related either to a past or future benefit;
 9. its main purpose was to challenge the decision maker to demonstrate regularity, predictability, and certainty in their dealings with persons likely to be affected by their actions in the discharge of their public mandate.
 13. The then Governor nominated the 1st respondent to the position of Deputy Governor. The nomination was sanctioned by law. By then, the only impediment was the vetting of the nominee by the County Assembly. The vetting process was legally initiated. It was, however, stopped by the court in the anti-corruption petition which was later withdrawn. The result of the withdrawal was that the orders issued by the court against the vetting were, as well, discharged.
 14. As to the absence of a Governor to appoint the Deputy Governor under section 32D of the County Governments Act, No. 17 of 2012, article 182(4) of the Constitution was clear. The Constitution did not, expressly or by implication, preclude the Speaker who was the acting Governor from discharging the functions under section 32D of the County Governments Act.
 15. The action of nominating the 1st respondent to the position of Deputy Governor and the 1st respondent having availed herself to be vetted as such with a view of assuming the office, if approved, created a legitimate expectation upon her that if she was successful in the vetting process before the County Assembly then she would be the next Deputy Governor of Nairobi City County. The expectation was both legitimate and had crystallized in law. There being no other legal impediment, it was only fair and in the interest of upholding the law and in the public interest that the process of vetting the 1st respondent should proceed.
 16. Parties had to be accorded opportunities to ventilate their cases in an environment where the parties trusted that justice would prevail. The court was however alive to the truism that the position was akin



to walking on a tight legal rope. That was because whereas a court endeavoured to create a conducive environment for the parties, it had to also guard against forum shopping. A court ought not to waver as long as it correctly applied the law.

17. One of the reactions after the delivery of the ruling in the consolidated petition was the filing of a complaint at the Judicial Service Commission on the grounds *inter alia* that the court was biased. The matter was pending. The filing of a complaint *per se* did not preclude a court from dealing with the matter. It all depended on the circumstances of the case.
18. There were instances where, depending on the nature of the matter and in order to enhance public confidence in the administration of justice, a court could consider recusing itself from that particular matter. That position only applied in the unique circumstances of the instant matter. It was not the court's general position on all the matters it handled. It could only be prudent that that position applied to all the matters on the leadership of Nairobi County which were well over 20 in number.
19. The matter comprised several consolidated petitions. The firm of *Messrs Kithi & Company Advocates* appeared in one or so of the petitions. As the court had previously done, the court had always recused itself in any matter where the firm of *Messrs Kithi & Company Advocates* appeared unless for reasons otherwise stated. Given the nature and the history of the petitions in the instant matter, it could only be fair that the court opts out of the matter.

Petition partly allowed.

Orders

- i. *The court recused itself from the instant matter as well as all the matters on the Governorship of Nairobi County.*
- ii. *The instant matter to be placed before the presiding judge of the division for further orders and directions on February 10, 2021 given the urgency in the matter.*
- iii. *Any party desirous of lodging an appeal against the ruling was granted leave to appeal. Copies of the proceedings and the ruling were to issue accordingly.*

Citations

Cases

Kenya

1. *Kenya Human Rights Commission v Attorney General & another* Constitutional Petition 87 of 2017; [2018] eKLR - (Explained)
2. *Kenya Revenue Authority v Universal Corporation Ltd* Civil Appeal 150 of 2018; [2020] KECA 395 (KLR) - (Explained)
3. *Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others* Civil Appeal 38 of 2013; [2014] KECA 884 (KLR) - (Explained)
4. *Muslims for Human Rights (MUHURI) & 2 others v Attorney General & 2 others* Petition 7 of 2011; [2011] KEHC 4291 (KLR); [2011] 1 KLR 322 - (Explained)
5. *Mweru & others v National Land Commission & 2 others* Miscellaneous Civil Application 443 of 2017; [2020] KEHC 9233 (KLR) - (Explained)
6. *Republic v Returning Officer Kamukunji Constituency, Nairobi & Electoral Commission of Kenya & another* Miscellaneous Civil Application 13 of 2008; [2008] KEHC 2251 (KLR) - (Explained)
7. *Wanjohi v Kariuki & 2 others* Petition 2A of 2014; [2014] KESC 26 (KLR) - (Explained)

Texts

Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West End Publishers 9th Edn pp 984, 658

Statutes

Kenya

1. Assumption of the Office of Governor Act, 2019 (Act No 4 of 2019) sections 11, 16 - (Interpreted)
2. Civil Procedure Act (cap 21) section 3A - (Interpreted)



3. Constitution of Kenya articles 1, 2, 3, 10, 25, 28(3); 47(1); 48; 50(2)(b)(c)(4); 75; 97(1)(a)(b); 98; 101; 118; 159; 174(a)(i)(9); 180; 182(5); 259(1) - (Interpreted)
4. Contempt of Court Act (cap 8F) sections 38, 39 - (Interpreted)
5. County Governments Act (cap 265) section 32D - (Interpreted)
6. Court of Appeal (Organization and Administration) Act (cap 9A) sections 35, 36, 40 - (Interpreted)
7. High Court (Organisation and Administration) Act (cap 8C) section 36 - (Interpreted)
8. Judicature Act (cap 8) sections 5, 39 - (Interpreted)

Advocates

None Mentioned

RULING

Introduction and Brief Background:

1. I have carefully considered this matter and I find it prudent to state my position on the way forward. That is, hence, the essence of this ruling.
2. By a petition dated January 18, 2021, the petitioner herein, the Law Society of Kenya, seeks to variously challenge the nomination of Anne Kananu Mwenda as the Deputy Governor of Nairobi City County and the ascension of the said Anne Kananu Mwenda into the office of the Governor of the Nairobi City County.
3. Together with the filing of the petition, the petitioner filed an evenly dated Notice of Motion. The application is filed under certificate of urgency and seeks the following orders: -
 - (1) This application be certified as urgent and service hereof be dispensed with in the first instance.
 - (2) Pending the hearing and determination of this application inter partes, a conservatory order be issued suspending the decision of the County Assembly made on January 15, 2021 approving the nomination of Anne Kananu Mwenda as the Deputy Governor of Nairobi City County.
 - (3) Pending the hearing and determination of this application inter partes, a conservatory order be issued suspending the decision of the respondents of January 15, 2021 to swear into office Anne Kananu Mwenda as the Deputy Governor of Nairobi City County Government.
 - (4) Pending the hearing and determination of this application inter partes, a temporary injunction be issued restraining the respondents, their agents and/or servants from swearing in Anne Kananu Mwenda as the Governor of Nairobi City County Government.

Inter-partes:

 - (5) Pending the hearing and determination of the petition, a conservatory order be issued suspending the decision of the County Assembly made on January 15, 2021 to swear into office Anne Kananu Mwenda as the Deputy Governor of Nairobi City County.
 - (6) Pending the hearing and determination of this petition, a conservatory order be issued suspending the decision of the respondents of January 15, 2021 to swear into office Anne Kananu Mwenda as the Deputy Governor of Nairobi City County Government.
 - (7) Pending the hearing and determination of this petition, a temporary injunction be issued restraining the respondents, their agents and/or servants the swearing in of Anne Kananu Mwenda as the Governor of Nairobi City County Government.



- (8) Costs for this application be provided for.
4. The application was, in the first instance, dealt with by the Duty Judge Korir, J on January 18, 2021. The Judge, however, referred the matter to this court for the reason that this court had previously dealt with a related matter being Nairobi High Court Petition No E005 of 2021 consolidated with Nairobi High Court Petition No E009 of 2021. I will hereinafter refer to the Notice of Motion dated January 18, 2021 as ‘the conservatory application’ and to the two petitions as ‘the consolidated petitions’.
 5. This court considered the matter and granted prayer 4 of the conservatory application. The court also, on its own motion, directed that the matters be forwarded to the Acting Chief Justice for empanelment of a Multi-Judge bench.
 6. By a notice of motion dated January 19, 2021, Anne Kananu Mwenda, the 1st respondent/cross-petitioner sought the setting aside of the orders of the court issued on January 18, 2021. The court on 20th January, 2021 considered the application and stayed the order it had issued *sue moto*; that is the order referring the matter for empanelment of a Multi-Judge Bench by the Acting Chief Justice.
 7. On January 22, 2021, the court issued directions on the way forward.

The Consolidated Petitions:

8. The consolidated petitions were among many other petitions filed contesting the vetting of Anne Kananu Mwenda by the County Assembly of Nairobi City County as the nominee for the position of the Deputy Governor of the Nairobi City County. Each of the Petitions had an application for conservatory orders seeking to stop the vetting process.
9. Directions were given and the two applications were heard together.
10. At this point in time and for ease of this discussion, it is imperative to venture, albeit briefly, into the background to the consolidated petitions.
11. By a letter dated January 6, 2020, the then Governor of the Nairobi City County, Hon Mike Mbuvi Sonko (hereinafter referred to as ‘Hon Sonko’) nominated Anne Kananu Mwenda for the position of the Deputy Governor of Nairobi City County. The communication was addressed to the Speaker of the County Assembly of Nairobi City County.
12. The communication was duly received and the process towards the vetting of the nominee was initiated.
13. On January 15, 2020 one Peter Odhiambo Agoro acting in public interest filed a petition in the Anti-Corruption Division of the High Court challenging the nomination of Anne Kananu Mwenda. It was Nairobi Anti-Corruption Petition No 1 of 2020. I will hereinafter refer it to as ‘the Anti-Corruption Petition’.
14. The Anti-Corruption Court rendered a ruling on February 17, 2020. In the said ruling the court, in paragraph 5 thereof, partly observed that: -
 - (i) The County Assembly is poised to vet the 1st respondent imminently as confirmed by Counsel;
 - (ii) The IEBC has given its clearance for that vetting;
15. The Anti-Corruption Court then issued a conservatory order restraining the County Assembly of Nairobi City County from proceeding on with the vetting of Anne Kananu Mwenda pending the hearing *inter partes* of the application dated January 13, 2020 or until further orders of the court.



16. On January 7, 2021 the Anti-Corruption Court *vide* its ruling allowed the withdrawal of the Anti-Corruption Petition. The effect of the withdrawal was that all orders then in force stood discharged.
17. The County Assembly of Nairobi City County then took steps towards the vetting of the nominee. It, among other things, gazetted the day and time of the vetting of the nominee.
18. It was at that point in time that the consolidated petitions were filed. Upon hearing the two applications in the consolidated petitions this court delivered a ruling on January 15, 2021. The applications were disallowed. As a result, Anne Kananu Mwenda, was vetted, approved and eventually sworn in as the Deputy Governor of the Nairobi City County.
19. This petition was then filed challenging, *inter alia*, the ascension of the Deputy Governor to the office of the Governor of Nairobi City County. As said, this court accordingly issued some conservatory orders.
20. To enable this court deal with the purpose of this ruling, it has become imperative that this Court looks at the reasons for dismissing the two applications in the consolidated Petitions.
21. I must admit that on the guidance of the law, this court was not able to venture into the realm of the main petition at the interlocutory stage. As Ibrahim, J (as he then was) stated in *Muslim for Human Rights (Milimani) & 2 others v Attorney General & 2 others* [2011] eKLR: -

The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely *vis-a-vis* the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.

22. Be that as it may, this court had the following 4 reasons for dismissing the two applications: -
 - (a) The stoppage of the by-election by the parties;
 - (b) The constitutional lacuna;
 - (c) The alleged withdrawal of the nomination;
 - (d) The doctrine of legitimate expectation.
23. I will briefly deal with each of the grounds.

(a) The stoppage of the by-election by the parties:

24. It is a fact that Hon Sonko was impeached by the Senate of the Republic of Kenya on December 17, 2020. By operation of the law, and there being no Deputy Governor for Nairobi City County as at that time, the Speaker of the County Assembly of Nairobi City County took over as the Acting Governor.
25. On December 21, 2020, the Independent Electoral and Boundaries Commission (hereinafter referred to as 'the IEBC') through the Government Printer caused a Special Issue of Gazette Notice No 10914 to be published and in preparation for a by-election for Nairobi County. The by-election was scheduled for February 18, 2021. The Gazette Notice also provided for several processes which were to be undertaken.



26. Resulting from foregoing, Hon Sonko filed Nairobi High Court Petition No E425 of 2020 against 10 respondents. The respondents are as follows: -
- (a) The Clerk, County Assembly of Nairobi County;
 - (b) The Speaker of Nairobi County Assembly;
 - (c) The Nairobi County Assembly;
 - (d) The Clerk of the Senate;
 - (e) The Speaker of the Senate of Kenya;
 - (f) The Senate of Kenya;
 - (g) Hon. Attorney General;
 - (h) The Independent Electoral and Boundaries Commission;
 - (i) The Assumption of Office of the County Governor Committee, Nairobi City County;
 - (j) The Acting Governor, Nairobi City County.
27. In the main, the Nairobi High Court Petition No E425 of 2020 (hereinafter referred to as ‘the impeachment petition’) variously challenged the entire impeachment process. In an Amended Petition evenly filed, Hon Sonko prayed for the following reliefs: -
- (a) A declaration that the rights and fundamental rights and freedoms under articles 259(1), 28(3), 47 and 50 of the *Constitution of Kenya 2010* of the petitioner have been denied, infringed, violated and/or threatened.
 - (b) A declaration that the resolutions passed by the 1st, 2nd and 3rd respondents on the 3rd of December, 2020 and the Resolution of December 17, 2020 on the removal of the petitioner from office as Governor of Nairobi County were in violation of the *Constitution* and legal process hence null void and invalid.
 - (c) A declaration that the impeachment process undertaken by the 1st, 2nd, 3rd and 4th respondents was invalid by the deliberated breaches of the preamble, articles 10, 25(c), 27, 47(1), (2), 48, 50(2)(b)(c), (4), 174(a)(i) of the *Constitution*.
 - (d) A permanent injunction be and is hereby issued restraining the IEBC the 8th respondent from publishing in the Kenya Gazette, electronic and print media of National circulation a Notice of holding elections of Gubernatorial seat for Nairobi City county as a consequence of the resolutions passed by the 4th respondent on December 17, 2020 and published in the Kenya Gazette on the December 17, 2020 and/or taking any steps towards the replacement of the petitioner as governor of Nairobi City County.
 - (e) The impeachment process undertaken by the 1st, 2nd, 3rd, 4th and 5th respondents was null, void and invalid for the failure to comply with the principles and values in the *Constitution* under article 174(9) and 75 of the *Constitution*.
 - (f) The impeachment process undertaken by 1st, 2nd, 3rd, 4th and 5th respondents violated the structure, values, principles and norms of the doctrine of legitimate expectation, separation of powers and the sub-judice rule.



- (g) A declaration that the swearing in for the 2nd respondent on the 21st December, 2020 as acting Governor for Nairobi City County was conducted in violation of article 1, 2, 3, 10, 159 and 259 of the [Constitution of Kenya, 2010](#) and sections 11 and 16 of the [Assumption of the office of Governor Act, 2019](#) hence unconstitutional, illegal, null and void.
 - (h) An order of *certiorari* be and is hereby issued to quash the Nairobi City County Appropriation Act, 2020 signed by the 2nd respondent on December 21, 2020.
 - (i) An order of *certiorari* be issued to bring into court and be quashed Gazette Notice No Vol CXXII-No 227 dated December 18, 2020 signed by Kenneth Lusaka the Speaker of the Senate.
 - (j) Any other relief that court may deem just and expedient in the circumstances.
 - (k) That the costs of this petition be borne by the respondents.
28. Hon. Sonko also filed a notice of motion dated December 18, 2020. The application, which was later amended, sought the following 13 orders: -
- 1. That this application herein be certified as extremely urgent and service hereof be dispensed with and interim orders in terms of prayer 2, 4, 6 and 8 in the first instance as the subject of this application will be defeated unless this application is heard expediently before the swearing in ceremony scheduled for 10 am on December 21, 2020.
 - 1B: That the honourable court be pleased to every the orders issued on December 21, 2020 and directed that the matter herein be mentioned at the earliest opportunity.
 - 1C: That the honourable court be pleased to issue orders suspending the special Gazette Notice No 10914 of 2020 and its consequential effects until the hearing and determination of the application herein.
 - 2. That the honourable court be pleased to issue Conservatory Orders restraining the implementation of the resolution passed by the 6th respondent on the December 17, 2020 to remove the applicant/petitioner from office of Governor of Nairobi City County and/or announcing a by-election for the Gubernatorial seat of Nairobi City County until the Notice of Motion herein is heard *inter-parties*.
 - 2A: That the honourable court be pleased to issue an order suspending the 2nd respondent herein from discharging any functions or duties as acting governor for Nairobi City County and/or exercising the powers and authority exclusively vested in the Governor pending the hearing and determination of this application.
 - 2B: That the honourable court be pleased to issue an order suspending the 2nd respondent herein from discharging any functions or duties as acting Governor for Nairobi City County and/or exercising the powers and authority exclusively vested in the governor pending the hearing and determination of this petition.
 - 2C: This honourable court be pleased to suspend the implementation of the Nairobi City County Appropriation Act, 2020 pending the hearing and determination of this application.
 - 2D: This honourable court be pleased to suspend the implementation of the Nairobi City County Appropriation Act, 2020 pending the hearing and determination of this petition.
 - 3. That the honourable court be pleased to issue conservatory order restraining the implementation of the resolution passed by the 6th respondent on the December 18, 2020



to remove the applicant/petitioner from office of governor of Nairobi City County and/or announcing a by-election for the Gubernatorial Seat of Nairobi City County until the petition herein is heard and determined.

4. That a conservatory order be and is hereby issued restraining the installation and/or swearing in of the 2nd respondent as the acting Governor for Nairobi City County pending the hearing and determination of the application herein *inter-parties*.
 5. That a conservatory order be and is hereby issued restraining the installation and/or swearing in of the 2nd respondent as the acting Governor for Nairobi City County pending the hearing and determination of the petition herein.
 6. A temporary injunction be and is hereby issued restraining the IEBC the 8th respondent from publishing in the Kenya Gazette, electronic and the print media of National circulation a Notice of holding elections of Gubernatorial seat for Nairobi City County as a consequence of the resolution passed by the 7th respondent on December 17, 2020 and published in the Kenya Gazette on the December 17, 2020 and/or taking any steps towards the replacement of the petitioner as Governor of Nairobi City County pending the *inter-parte* hearing of this application.
 7. A temporary injunction be and is hereby issued restraining the IEBC the 8th respondent from publishing in the Kenya Gazette, electronic and the Print media of National circulation a Notice of holding elections of Gubernatorial seat of Nairobi City County as a consequence of the resolution passed by the 6th respondent on December 17, 2020 and published in the Kenya Gazette on the December 17, 2020 and/or taking any steps towards the replacement of the petitioner as Governor of Nairobi City County until the hearing and determination of the petition herein.
 8. That a conservatory order be and is hereby issued suspending the Gazette Notice No 10904 published by the 5th respondent on the December 17, 2020 pending the hearing and determination of the application herein.
 9. That a conservatory order be and is hereby issued suspending the Gazette Notice No 10904 published by the 5th respondent on the December 17, 2020 pending the hearing and determination of the petition herein.
 10. That a conservatory order be and is hereby issued suspending any Gazette Notice on the Assumption of the Office of Governor of Nairobi City County dated December 18, 2020 pending the hearing and determination of the application herein.
 11.
 12. That the honourable court be pleased to issue any such or further orders or dictions as it may deem fit and convenient in the exceptional circumstances of this case taking into account that the process has been highly politicized and the process has overturned the popular will of the people as contained in article 1(1) of the *Constitution*.
 13. That costs of the application be provided for.
29. The impeachment petition was initially handled by Makau, J until when the judge formally referred the matter to this court.
30. The parties in the impeachment petition appeared before me on January 4, 2021. With an exception of the 4th, 5th and 6th respondents who did not take part in the matter, all the other parties were represented



by Counsel. Hon Sonko was jointly represented by Mr Wilfred Nyamu, Mr Harrison Kinyanjui and Mr Evans Ondieki. Mr Osundwa appeared for the 1st respondent. Mr Kokebe appeared for the 2nd respondent. The 3rd Respondent was represented by Mr Ashioya and Mr Ngira. Mr Nyamondi and Mr Kuria Thande appeared for the 7th respondent. Mr Jabane appeared for the 8th respondent. Mr Ndegwa Njiru and Mr Ndegwa Mwangi jointly appeared for the 9th respondent. Mr Okatch appeared for the 10th respondent.

31. Counsel addressed the court in extenso on the way forward in the matter. With an exception of Mr Jabane who left the matter to the discretion of the court, all the other counsel were unanimous that prayer 1C of the Amended Notice of Motion ought to be granted otherwise the substratum of the petition will be destroyed and the petition will only be good for academic purpose.
32. Given the unanimity of counsel on the way forward, prayer 1C of the amended notice of motion was granted as agreed by the parties. In essence, the parties did not wish the by-election to be conducted.
33. The effect of prayer 1C of the amended notice of motion was, therefore, that IEBC would not proceed on with any of the preparations towards the holding of the by-election.
34. It is imperative to note that although the parties agreed to stop the by-election from being held, they did not in any way stop the time set under article 182(5) of the Constitution from running. A court of law has no powers to stop the running of constitutional timelines.
35. The obtaining legal position was affirmed by the Supreme Court in Civil Application No 6 of 2014 George Mike Wanjohi v Steven Kariuki & 2 others [2014] eKLR. In the case, the court was confronted with the question as to whether it could stop the constitutionally triggered timeline under article 101(4) of the Constitution which made it a requirement that a by-election shall be held within 90 days of the occurrence of a vacancy in the office of a member of National Assembly elected under article 97(1)(a) or (b) or of the Senate elected under article 98(a). In making the finding that constitutional timelines must be kept sacred, the learned judges made the following finding: -
 - (45) Consequently, any statutory process or act done *ultra vires* the provisions of the Constitution, this court will not hesitate to declare them void. Hence, a stay order will not be tantamount to stopping a constitutional process. We hasten to add that what the court cannot do is to extend the 90 days period within which the election should be held. That period is sacred as it is provided for in the Constitution and even this court, a creature of the Constitution, cannot extend it.
36. As the parties had stopped the carrying out of the by-election by IEBC on one hand, and on the other hand, the constitutional time set under article 182(5) of the Constitution was running, it therefore meant that all the matters before court in the impeachment Petition were to be concluded within the period of 60 days. It further meant that in the event the impeachment petition would be disallowed then the by-election was, as well, to be conducted within the same 60 days' window.
37. As at now, the impeachment petition is still pending. I am reliably informed that the matter is coming up for a ruling on, *inter alia*, empanelment of a Multi-Judge bench on February 25, 2021. The truth, therefore, is that it's practically inconceivable to have both the impeachment Petition determined and if the petition is dismissed then a by-election to be conducted within the remainder of the 60 days if at all any would be left by then.



38. What would then be the effect of not holding the by-election within the 60 days' window in the unique circumstances of this matter? Article 182(5) state as follows -

If a vacancy occurs in the circumstances contemplated by clause (4), an election to the office of county governor shall be held within sixty days after the speaker assumes the office of county governor.

39. It, hence, means that the tenure of the Speaker acting as a Governor under article 182(5) of the *Constitution* is constitutionally hinged to only 60 days. In other words, the Speaker cannot continue acting as the Governor past the 60th day. In the event the Speaker leaves office after the 60 days and without an acting Governor, a Governor or a Deputy Governor in office, then what would follow would be a constitutional crisis. I say so because after 60 days from the day the Speaker took over as the acting Governor and there being no by-election held (since the parties were not for the by-election), Nairobi County would not have had any person acting as a Governor, it would have no substantive Governor and no Deputy Governor, as well.

40. In the absence of an acting Governor, a Governor or a Deputy Governor in office, many questions calling for answers arise. They include how would the County Government of Nairobi and by extension the County Assembly of Nairobi County run? How will the thousands of workers, who have families and some may be servicing loans, be catered paid? How will the Health Department, in particular, endeavour to fight the dreaded corona virus in the County? For how long would the Nairobi County be held in such a limbo? How would such a constitutional crisis be undone given that constitutional timelines cannot be extended? And, the questions are unending.

41. A court of law must, as a primary duty and in public interest, uphold the *Constitution*. A court must not in any manner whatsoever create a constitutional crisis. It remains the cardinal duty of a court to foresee such a crisis and take steps to avoid it.

42. In this matter, as the parties were not for the holding of the by-election and given that the 60 days' period was running out, the court had only one option in upholding public interest and to avoid a constitutional crisis: to allow the vetting process to proceed, at least to see whether the County may have a Deputy Governor, if the nominee is approved. This court, therefore, in allowing the vetting process to continue acted in the best interest of the Nairobi City County and of this Country at large and in public interest. As said, this court had no option but to avoid a looming constitutional crisis.

(b) The Constitutional Lacuna:

43. Article 182 of the *Constitution* deals with vacancy in the office of County Governor. I hereunder reproduce the said provision: -

- (1) The office of the county governor shall become vacant if the holder of the office
 -
 - (a) dies;
 - (b) resigns, in writing, addressed to the speaker of the county assembly;
 - (c) ceases to be eligible to be elected county governor under article 180(2);



- (d) is convicted of an offence punishable by imprisonment for at least twelve months; or (e) is removed from office under this *Constitution*.
 - (2) If a vacancy occurs in the office of county governor, the deputy county governor shall assume office as county governor for the remainder of the term of the county governor.
 - (3) If a person assumes office as county governor under clause (2), the person shall be deemed for the purposes of article 180(7)—
 - (a) to have served a full term as county governor if, at the date on which the person assumed office, more than two and a half years remain before the date of the next regularly scheduled election under article 180(1); or
 - (b) not to have served a term of office as county governor, in any other case.
 - (4) If a vacancy occurs in the office of county governor and that of deputy county governor, or if the deputy county governor is unable to act, the speaker of the county assembly shall act as county governor.
 - (5) If a vacancy occurs in the circumstances contemplated by clause (4), an election to the office of county governor shall be held within sixty days after the speaker assumes the office of county governor.
 - (6) A person who assumes the office of county governor under this article shall, unless otherwise removed from office under this *Constitution*, hold office until the newly elected county governor assumes office following the next election held under article 180(1).
44. Article 182 of the *Constitution* mainly focuses on the absence of a Governor and the Deputy Governor and that a by-election follows thereafter. This matter, however, introduces another novel scenario. The issue is what happens to a legal process for the nomination of a Deputy Governor which is in situ by the time the Governor leaves office.
45. The Constitution and the law is silent. The Constitution did not contemplate such a situation and as a result there is no provision on the way forward. That is a constitutional lacuna.
46. How is a court of law supposed to deal with a constitutional lacuna or rather any lacuna in law? In such instances, courts have acted in public interest and asserted the court's inherent jurisdiction in dealing with the lacuna. A classic example is what happened upon the declaration of unconstitutionality of the *Contempt of Court Act* No 46 of 2016 on November 9, 2018 in *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR. The said Act was declared unconstitutional for lack of public participation as required by articles 10 and 118(b) of the *Constitution*, and for encroaching on the independence of the Judiciary.
47. Section 38 of the nullified *Contempt of Court Act* had repealed section 5 of the *Judicature Act*, section 39 of the same Act repealed section 36 of the *High Court (Organization and Administration) Act* while section 40 repealed section 35 of The *Court of Appeal (Organization and Administration) Act*. The question which arose was whether after the *Contempt of Court Act* was declared unconstitutional,



the sections of the law it had repealed still stood repealed. The declaration of unconstitutionality had created a lacuna in the law.

48. The High Court in *Samuel Mweru & others v National Land Commission & 2 others* [2020] eKLR addressed itself to the manner in which to deal with the lacuna. The court referred to several decisions including those of the Court of Appeal. This is what the court stated in part: -

17. Courts derive their power from the *Constitution* and the statutes that regulate them. Historically, the High Court, in addition to the powers it enjoyed in terms of statute, has always had additional powers to regulate its own process in the interests of justice. This was described as an exercise of its inherent jurisdiction. Citing IH Jacob *Current Legal Problems*, Freedman CJM adopted the following definition of ‘inherent jurisdiction’^[13]
18.
19.
20. I am aware of a recent High Court ruling rendered in *Republic v Kajiado County & 2 others ex parte Kilimanjaro Safari Club Limited*^[16] in which the court held as follows:-

Section 39(2)(g) of the Act enjoins the Chief Justice to make rules to provide for, among other things, the procedure relating to contempt of court. However, the rules to regulate the commencing and prosecuting of contempt of court applications under the Act are yet to be made. The law that previously applied in this regard was the *Contempt of Court Act* of 2016, until the decision of the High Court (Chacha Mwita, J) made on November 9, 2018 in *Kenya Human Rights Commission v Attorney General & another*, [2018] eKLR. The said decision declared the *Contempt of Court Act* of 2016 invalid for lack of public participation as required by articles 10 and 118(b) of the Constitution, and for encroaching on the independence of the Judiciary.

I am in the circumstances obliged to revert to the provisions of the law that operated before the enactment of the contempt of court of Act, to avoid a lacuna in the enforcement of court’s orders. It was in this respect observed in *Republic v Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya*, HCMCA No 13 of 2008, that the High Court has the responsibility for the maintenance of the rule of law, hence there cannot be a gap in the application of the rule of law. In addition, where there is a lacuna with respect to enforcement of remedies provided under the *Constitution* or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the court, the court is perfectly within its rights to adopt such a procedure as would effectually give meaningful relief to the party aggrieved, in exercise of the inherent jurisdiction granted to the court by section 3A of the *Civil Procedure Act* to grant such orders that meet the ends of justice and avoid abuse of the process of court.



49. The courts variously emphasized that a court should not stare at a lacuna in the law. It has to do something about it for the maintenance of the rule of law and in the wider interest of the public who cannot just be held in abeyance.
50. I am in total agreement with the position taken by the courts on how to deal with a lacuna in the law. Faced with such a situation, a court cannot fold its legal hands and cite inability to act. If that happens then it amounts to abdication of duty on the part of the court.
51. In this case, whereas the *Constitution* and the law is silent on the what happens to a legal process for the nomination of a Deputy Governor which is in situ by the time the Governor leaves office, and acting in public interest, the court asserted its inherent jurisdiction in finding a way forward.
52. By applying the foregoing and in the circumstances of this matter, the only way out deal with the lacuna and in public interest was to allow the nomination process which had been legally initiated to proceed. That is what this court did.

(c) The Alleged Withdrawal of the Nomination:

53. I have hereinabove dealt with how the Anti-Corruption Petition was filed until its withdrawal.
54. Upon the withdrawal of the Anti-Corruption Petition the only other issue which stood on the way of the vetting of the Deputy Governor nominee was the contention that Hon. Sonko had revoked the nomination of Anne Kananu Mwenda as the Deputy Governor.
55. I gave a careful consideration to this issue. I remain alive to the fact that the process of vetting the Deputy Governor is undertaken by a constitutional entity; that is a County Assembly. That is the only entity in law mandated to do so.
56. The County Assembly of Nairobi City County is governed by the Constitution, the law and its Standing Orders. Once a matter is received by the County Assembly, it can only be dealt within the said constitutional and legal confines. Unless the contrary is proved, such a matter becomes a property, so to say, of the County Assembly.
57. In the course of dealing with the Anti-Corruption Petition, the court confirmed that IEBC had already cleared the nominee for vetting. The court also confirmed that the County Assembly was indeed ready to undertake the vetting of the nominee. It is, therefore, clear that by the time the court issued the conservatory orders the County Assembly of Nairobi City County had undertaken all the preliminaries thereto. The remaining issue was the actual vetting of the nominee.
58. By then the nomination had been received by the County Assembly and had become subject to the processes and procedures of the House. The Standing Orders of the House are clear on the procedure for withdrawal of a matter before the House.
59. For instance, Standing Order 43 of the Nairobi City County Assembly provides that: -
 - (1) The Speaker shall read to the County Assembly any message from the Governor or the Senator of the County delivered to the Speaker for communication to the County Assembly.
 - (2)
 - (3) When a message from the Governor or the Senator of the County is read, the message shall be deemed to have been laid before the County Assembly and the Speaker may either –



- (a) direct that the message be dealt with forthwith; or
- (b) appoint a day for the consideration of the message; or
- (c) refer the message to the relevant Committee of the County Assembly for consideration.

60. Standing Order 46 of the Nairobi City County Assembly further provides that: -

- (1) Upon receipt of a notification of nomination for appointment to an office as is under the *Constitution* or under any other legislation required to be approved by the County Assembly, the nomination shall stand committed to the relevant Sectoral Committee of the County Assembly for consideration.
- (2) Despite paragraph (1), appointments under article 179(2)(b) of the *Constitution* shall stand committed to the Committee on Appointments.

61. Standing Order 55 of the Nairobi City County Assembly is also of essence. It provides that: -

- (1) A notice of Motion may be withdrawn by the Member who gave the notice, but notice of the same Motion may be given again either by the same or by any other Member.
- (2) Despite paragraph (1), notice of a Special Motion may not be withdrawn, except with leave of the County Assembly.

62. I found the alleged withdrawal of the nomination of the Deputy Governor nominee problematic in two ways. First, as the nomination process was firmly in the legal hands of the County Assembly of Nairobi City County, then any attempted withdrawal of the nomination could only be done in compliance with Standing Orders of the House. There was no such evidence on record. Second, the letter on the purported withdrawal of the nomination of the Deputy-Governor nominee is under police investigations on allegation of fraud. That is under the Directorate of Criminal Investigations Reference No CID/IB/SCU/SEC/2/3 VOL III/143. The investigators have so far formally written to the High Court over the matter.

63. The County Assembly of Nairobi City County contends that the alleged letter on withdrawal of the nomination of the Deputy Governor is a fraud and was never served upon itself. The County Assembly is out to unravel the fraud. With such an unveiling situation, even if the letter was able to recall the nomination of the Deputy Governor, relying on such a hotly disputed document will be a tall order. It can only be prudent that the investigations be carried out first.

64. Again, the public interest principle militated that the constitutional organ be accorded an opportunity to discharge its mandate. That is what this court arrived at.

(d) – The Doctrine of Legitimate Expectation:

65. The term ‘legitimate expectation’ is a conglomerate of two words; that is ‘legitimate’ and ‘expectation’. According to *Black’s Law Dictionary* 9th Edition, (Bryan A Garner, Thomson Reuters Publishers) the word ‘legitimate’ is defined at page 984 to mean: - Complying with the law; lawful. Genuine; valid



66. The same dictionary defines ‘expectation’ at page 658 in the following terms: -
the act of looking forward; anticipation. A basis on which something is expected to happen; esp., the prospect of receiving wealth, honors, or the like.
67. As can be discerned from the foregoing separate definitions, legitimate expectation therefore means: -
The act of looking forward or anticipating something that is lawful/genuine or valid.
A legal basis upon which someone expects that something is to happen.
68. Very recently, the Court of Appeal in Nairobi Civil Appeal No 150 of 2018, *Kenya Revenue Authority v Universal Corporation Ltd* [2020] eKLR had occasion to shed light on the principles that guide the Court while applying the doctrine of legitimate expectation. In agreeing with various High Court decisions, the Learned Judges of Appeal made the following summary of when legitimate expectation arises: -
a legitimate expectation arises where there is demonstration that: a decision maker led a party affected by the decision to believe that he would receive or retain a benefit or advantage including a benefit that he/she/it would be accorded a hearing before the decision was taken; a promise was made to a party by a public body that it would act or not act in a certain manner and which promise was made within the confines of the law; the public authority whether by practice or promise committed itself to the legitimate expectation; the representation was clear and unambiguous; the claimant fell within the class of person(s) who were entitled to rely upon the representation(s) made by the public authority; the representation was reasonable and that the claimant relied upon it to its detriment; there was no overriding interest arising from the decision maker’s action and representation; the representation was fair in the circumstances of the particular case and that the same arose from actual or ostensible authority of the affected public authority to make the same; the promise related either to a past or future benefit; its main purpose is to challenge the decision maker to demonstrate regularity, predictability and certainty in their dealings with persons likely to be affected by their action in the discharge of their public mandate.
69. It is a fact that Hon Sonko, then the Governor of Nairobi County, nominated Anne Kananu Mwenda to the position of the Deputy Governor of Nairobi City County. The nomination was sanctioned by law. By then, the only impediment was the vetting of the nominee by the County Assembly of Nairobi City County. The vetting process was legally initiated. It was, however, stopped by the court in the Anti-Corruption Petition.
70. As discussed above, the Anti-Corruption Court Petition was later withdrawn. The result of the withdrawal was that the orders issued by the court against the vetting were, as well, discharged.
71. As to the absence of a Governor to appoint the Deputy Governor under section 32D of the *County Government Act*, No 17 of 2012, article 182(4) of the *Constitution* is clear. The Constitution does not, expressly or by implication, preclude the Speaker who is the acting Governor from discharging the functions under section 32D of the *County Government Act*.
72. Going by the guidance of the Court of Appeal in *Kenya Revenue Authority v Universal Corporation Ltd* (*supra*) and in the circumstances of this case, I had no hesitation in finding that the action of nominating Anne Kananu Mwenda to the position of a Deputy Governor and the said Anne Kananu Mwenda having availed herself to be vetted as such with a view of assuming the office if approved created a legitimate expectation upon the said Anne Kananu Mwenda that if she is successful in the



vetting process before the County Assembly then she would be the next Deputy Governor of Nairobi City County. The expectation was both legitimate and had crystallized in law.

73. There being no other legal impediment, it was only fair and in the interest of upholding the law and in public interest that the process of vetting of Anne Kananu Mwenda proceeded.

74. The above four considerations were the main pillars as to why this court in its ruling in the consolidated Petitions stated that: -

59. there is wisdom in allowing the constitutional organs and institutions to discharge their constitutional mandates even as parties are battling it out in court. In this case, stopping the constitutional process which was initiated by the nomination of the nominee based on an uneven legal platform militates against public interest.

75. Having fully addressed my mind on the matters before me and being legally convinced that public interest commanded this court to allow the nomination process of the Deputy Governor nominee to proceed, this court disallowed the said two applications.

The Current Petition:

76. The current petition is an offshoot from the consolidated Petitions. It mainly seeks to challenge the nomination of Anne Kananu Mwenda as the Deputy Governor and the ascension of the said Anne Kananu Mwenda, the now Deputy Governor of Nairobi City County, into the office of the Governor of Nairobi City County.

77. There is no doubt the petition raises fundamental issues of law. When I considered the application for conservatory orders several legal issues and questions ran through my mind. They include whether a Deputy Governor who comes into office during a time when the Governor, who is impeached and who is actively challenging the impeachment proceedings, can ascend to the position of the Governor, what will happen if the Deputy Governor ascends into the office of the Governor and the impeached Governor succeeds in challenging the impeachment proceedings?, whether the obtaining position in this matter is provided for by the *Constitution* and the law, and if not, then what is the best way forward? among many others.

74. It is on the foregoing consideration that I found it prudent to, first, maintain the status quo and accord the parties an opportunity to be heard on the application for conservatory orders. I also issued a further order that the matter be referred for empanelment of a multi-judge bench. The order on empanelment is, however, stayed at the moment.

75. I must emphasize that the legal position laid by the Supreme Court in Civil Application No 5 of 2014 *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others* [2014] eKLR on the principles for consideration on whether to grant conservatory orders will have to be adhered to in dealing with the main application at the *inter partes* stage.

The Way Forward:

76. When I rendered the ruling in the consolidated Petitions, there were mixed reactions thereto. It is a fact that the whole matter on the leadership of the Nairobi City County has elicited enormous public interest. There are, as well, various theories and perceptions created by each day. That is a normal expectation in a matter of such magnitude.



77. I am firmly and deeply persuaded that, in any matter, the law and nothing else but the law, must prevail accordingly. I, hence, endeavour to make decisions with such clarity in my mind.
78. I am also convinced that parties must be accorded opportunities to ventilate their cases in an environment where the parties trust that justice shall prevail. I, however, say so being alive to the truism that the position is akin to walking on a tight legal rope. That is because whereas a court endeavours to create a conducive environment for the parties, it must also guard against forum shopping. A court ought not to waver as long as it correctly applies the law.
79. One of the reactions after the delivery of the ruling in the consolidated petition was the filing of a complaint at the Judicial Service Commission on the grounds inter alia that the court is biased. The matter is pending. The filing of complaint *per se* does not preclude a court from dealing with the matter. It all depends on the circumstances of the case. There are instances where, depending on the nature of the matter and in order to enhance public confidence in the administration of justice, a court may consider recusing itself from that particular matter. That is the position I opt for in this matter.
80. I must, however, make it clear that the said position only applies in the unique circumstances of this matter. It is not the court's general position on all the matters it handles. Of further importance is that it can only be prudent that this position applies to all the matters on the leadership of Nairobi County which by now are well over 20 in number.
81. There is another reason for my recusal. This matter now comprises of several consolidated Petitions. The firm of Messrs Kithi & Company Advocates appear in one or so of the Petitions. As I have previously done, I have always recused myself in any matter where the firm of Messrs. Kithi & Company Advocates appear unless for reasons otherwise stated. Given the nature and the history of the Petitions in this matter it can only be fair that I opt out of this matter.
82. Having said so, the following orders do hereby issue: -
- (a) I hereby recuse myself from this matter as well as all the matters on the Governorship of Nairobi County.
 - (b) This matter shall be placed before the presiding judge of the Division for further orders and directions on February 10, 2021 given the urgency in the matter.
 - (c) Any party desirous of lodging an appeal against this ruling is hereby granted leave to appeal. Copies of the proceedings and the ruling to issue accordingly.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF FEBRUARY 2021.

A. C. MRIMA

JUDGE

