REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CONSTITUTIONAL PETITION NO. 1 OF 2021

PATRICK ATAMBO.....PETITIONER

VERSUS

HON. ATTORNEY GENERAL.....1ST RESPONDENT

H. E. HON. AMOS KIMWOMI NYARIBO.....2ND RESPONDENT

AND

THE SPEAKER, COUNTY ASSEMBLY OF NYAMIRA.....1ST INTERESTED PARTY

COUNTY ASSEMBLY OF NYAMIRA.....2ND INTERESTED PARTY

AND

CALEB GICHANA.....3RD INTERESTED PARTY

ZABLON MOTURI.....4TH INTERESTED PARTY

RULING

On 8th March 2021 the petitioner filed a petition before the Constitutional Division of the High Court in Nairobi seeking the following orders against the Respondents and the Interested Parties: -

> **"(i) A DECLARATION that the nomination of a person to the office of a Deputy Governor upon occurrence of a vacancy is a legal process that must be anchored in law.**
>
> **(ii) A DECLARATION that the law as is does not provide for a 2nd nomination of a Deputy Governor upon rejection under Section 32D of the County Governments (Amendment) Act, 2020.**
>
> **(iii) AN ORDER of mandamus compelling the 1st Respondent to advise Government and or the Parliament of Kenya to legislate and provide for circumstances where the nominated Deputy Governor under Section 32D of the County Government (Amendment) Act, 2020 is rejected by the County Assembly.**
>
> **(iv) In the alternative, an order that the failure by the 2nd Respondent to nominate a 2nd Nominee within fourteen (14) days of rejection of the first nominee to the office of Deputy Governor, Nyamira County Government was a violation of the spirit and letter of the applicable law.**
>
> **(v) an order that costs be borne by the 2nd Respondent.**
>
> **(vi) Any other relief or orders that this Honourable Court shall deem just, fit and appropriate to grant in favour of the Petitioner."**

Simultaneously with the petition the petitioner filed an application by way of Notice of Motion in which he seeks a **Conservatory Order** staying the process of nomination or processing a nominee to the office of Deputy Governor, County of Nyamira pending hearing and determination of the petition. The grounds for the application are that: -

"(a) The 2nd Respondent, invoking among others, the provisions of Section 32D of the County Governments (Amendment) Act 2020, did on 6th January, 2021, nominate a Deputy Governor in the name of Dr. James Ondicho Gesani.

(b) The nominated Deputy Governor was processed as expected in the said County Assembly and in particular through the Committee. Upon careful consideration, the Committee returned a negative verdict recommending for the rejection of the 2nd Respondent's aforesaid nominee.

(c) The County Assembly of Nyamira did upon consideration of the matter pass a resolution rejecting the nomination of Dr. James Ondicho Gesani as Deputy Governor. The resolution of the County Assembly was communicated to the 2nd Respondent vide the letter dated 19th January, 2021.

(d) Since then, the 2nd Respondent has not nominated a new person for consideration by the County Assembly in the vacant position of Deputy Governor, County Government of Nyamira.

(e) The 2nd Respondent has however been heard stating that he would nominate a person to fill the position of the Deputy Governor anytime yet;

> **i. The motion that processed the rejected nominee, Dr. James Ondicho Gesani, was a special motion. Under the Standing Orders of the County Assembly of Nyamira; Standing Order No. 46 (1) thereof, a Special motion once rejected can only be reintroduced after a lapse of six (6) months. The resolution of rejection of the 2nd Respondent's nominee for the position of Deputy Governor was passed by the County Assembly on 19th January 2021. No similar motion, if at all would be lawful, is tenable for presentation to the County Assembly of Nyamira until after lapse of six (6) months from 19th January 2021.**
>
> **ii. The office of the Deputy Governor is a Constitutional office. Replacement of a vacancy created thereat must be legally underpinned both in procedure and substance. The County Governments (Amendment) Act, 2020, did not provide for eventualities where the nominated person to the office of the Deputy Governor is rejected by a County Assembly. There is therefore a *lacuna* in law and any nomination by the 2nd Respondent of a Deputy Governor after rejection of the initial nominee would be anchored on no known law so as to render the same null and void.**

(f) The 2nd Respondent although aware that there is no law that would guide the 2nd nomination of a nominee to the position of a Deputy Governor after rejection of a first nomination, he, the 2nd Respondent, has maintained that he would still proceed to nominate. Such a nomination would be *vacuo* and any resultant product would be of no legal effect.

(g) The absence of an enabling statutory framework under which the 2nd Respondent would nominate a second person as a Deputy Governor and the persistence of the 2nd Respondent on his intention to so proceed and nominate notwithstanding the absence of the enabling law has created a state of confusion, disorder and anarchy in the status and operations of the office of the Deputy Governor of Nyamira County Government. The said state of confusion, among others, has the potential of negatively and irreparably affecting the delivery of services on the party of the County Government of Nyamira and undermine the much cherished concept and intent of devolution under the Constitution of Kenya.

(h) Unless stopped by the order of this court, the 1st Respondent shall continue unabatedly to trample on the Petitioner's rights as guaranteed under the Constitution of Kenya, rendering this Petition an academic exercise, overtaken by events and moot.

(i) It is in the wider interest of justice and in protection of the fundamental rights as enshrined in the constitution that the conservatory orders herein be granted.

(j) This Court has the Constitutional mandate to protect and safeguard the Petitioner's Constitutional Rights.

(k) No prejudice whatsoever or at all shall be visited upon the Respondents if this application were to be allowed."

On 9th March 2021 Mrima J of the Constitutional Division of the High Court in Nairobi certified the Notice of Motion urgent and gave directions on the petition. However, on 26th April 2021 he transferred the petition to this court and directed Counsel for the parties to appear before me on 26th April 2021. The file did not however reach this court until 7th May 2021 when it was fixed for directions on 27th May 2021. On 24th May 2021 Counsel for the Petitioner/Applicant filed a certificate of urgency which brought the Notice of Motion to my attention and the application was then fixed for directions on 27th May 2021 whereupon Counsel for the parties consented to a virtual oral hearing of the application. At the hearing the Petitioner was represented by Mr. Millimo Advocate; Miss Robi held brief for Mr. Mutindi, Advocate for the 1st Respondent while the 2nd Respondent was represented by Mr. Omoti. The 1st and 2nd Interested Parties were represented by Mr. Ochoki and the 3rd Interested Party by Mr. Onsongo Advocate. Mr. Nyamwange Advocate claimed to act for the 3rd and 4th Interested Parties but it transpired that he was not in the matter at all.

The application for a conservatory order is vehemently opposed.

In summary, the Petitioner/Applicant's case is that the failure by the Governor of the County Government of Nyamira to name a nominee to the office of the Deputy Governor within 14 days of rejection of his first nominee was a violation of the spirit and letter of the applicable

law. Mr. Millimo, Learned Counsel for the Petitioner/Applicant relying on the grounds on the face of the application and depositions in the supporting affidavit submitted that the office of the Deputy Governor is one of the offices provided for in Chapter Eleven of the Constitution. He submitted that the assumption of office of the Deputy Governor is a constitutional event under **Article 182 (2)** of the **Constitution** and that by the Deputy Governor assuming the office of the Governor as in the instant case, this creates a vacancy in the office of the Deputy Governor. Mr. Millimo submitted that on 18th December 2020 the 2nd Respondent assumed the Office of Governor of Nyamira County upon the death of the duly elected Governor and that upon assuming that office the 2nd Respondent invoked the provisions of **Section 32D (1) (a)** of the **County Government Act** as amended in the year 2020 and nominated the 3rd Interested Party as his candidate for the seat of Deputy Governor. Mr. Millimo submitted that the nomination of the 3rd Interested Party was however rejected by the County Assembly of Nyamira vide a communication dated 19th January 2021. Counsel contended that upon that the rejection of the candidate created a fresh vacancy in the office of Deputy Governor and the provisions of **Section 32D (1) (a)** of the **County Government Act** came into play once again and the 2nd Respondent was under statutory obligation to name a nominee within 14 days of the rejection of the previous nominee. Mr. Millimo submitted that there is no dispute that fourteen days lapsed without the 3rd Respondent naming a nominee. He submitted that it is therefore the Petitioner's case that any proposed or intended nomination outside of the stipulated fourteen days would be unconstitutional, ultravires, null and void. Mr. Millimo contended that the County Government Act does not of itself provide any nomination procedure after rejection of the candidate by the County Assembly (the 2nd Interested Party herein). Counsel pointed out that this petition was filed after the 2nd Respondent threatened to nominate a candidate for the office of the Governor notwithstanding the lapse of the statutory fourteen days. He contended that the threat in fact became real when the 2nd Respondent nominated the 3rd Interested Party in a letter dated 13th May 2021 and the 2nd Interested Party invited the nominee for vetting on 28th May 2021. Counsel pointed out that unlike in the first nomination the 2nd Respondent did not cite any substantive enabling provisions for this second nomination. Counsel opined that the reason for this is that there is no law that empowers the 2nd Respondent to name a nominee outside of the fourteen days' statutory period. He contended that the said statutory period expired on 1st February 2021 and the 2nd Respondent's purported nomination of the 3rd Interested Party is therefore illegal and unconstitutional. Counsel stated that as a State Officer the 2nd Respondent is enjoined to respect and uphold the constitutional values of governance yet the nomination threatens to violate several constitutional provisions. Counsel further submitted that moreover even were we to assume that the 2nd Respondent has power to nominate someone after the fourteen days' period he could not do so as **Standing Order No. 46 (1)** of the **Standing Orders** of the 2nd Interested Party (County Assembly of Nyamira) can only allow resubmission of the name after the expiry of six months. Counsel for the Petitioner/Applicant pointed out that the 3rd Respondent had in paragraph 16 of his replying affidavit sworn there would be no resubmission of a nominee until after the lapse of six months. Counsel stated that the 2nd Respondent reiterated this position when the parties appeared before Mrima J on 13th April 2021. Counsel contended that as such the 2nd Respondent apart from being bound by his own pleadings is estopped by his own conduct from purporting to nominate a Deputy Governor before the lapse of six months from the date of rejection of the previous nominee and the nomination of 16th May 2021 ought therefore not to be entertained. Counsel contended that this petition raises serious issues in the filling of a vacancy of a Deputy Governor. He contended that this is a ground breaking petition as there has been no other raising a similar issue and urged this court to issue a **Conservatory Order** so as to preserve the substratum of the petition as otherwise it shall be rendered nugatory and the Petitioner/Applicant shall suffer irreversible damage. Counsel contended that no prejudice will be suffered by any other party as indeed if the court were to find the process is lawful it will allow the process to continue upon the conclusion and determination of the petition. Counsel contended that **Article 23** as read with **THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013** empower this court to grant the orders sought.

Counsel for the 1st Respondent (The Attorney General) intimated to this court that they did not wish to take part in the application but would do so in the main petition.

Mr. Omoti for the 2nd Respondent opposed the application and submitted that it lacks merit and it should be dismissed with costs to the 2nd Respondent. He submitted that the 2nd Respondent concedes that he submitted the name of the 3rd Interested Party to the 2nd Interested Party for approval as provided in **Section 32 D** of the **County Government Act** but the name was rejected and a communication to that effect was made to him on 19th January 2021. Counsel contended that in the circumstances the 2nd Respondent was faced with two choices both provided in **Section 10** of the **Public Appointments County Assemblies Approval Act No. 5 of 2017.** Counsel submitted that the first option under **Section 10 (1)** of the aforestated **Act** was to submit the name of another candidate while the second option under **Section 10 (2)** was to resubmit the name of the 3rd Interested Party if the 3rd Interested Party fulfilled the conditions that led to his name being rejected in the first place or in other words if the circumstances that led to the nomination being rejected ceased to exist. Counsel for the 2nd Respondent submitted that the resubmission of the 3rd Interested Party's name on 3rd May 2021 was made pursuant to **Section 10 (2)** of the **Public Appointments (County Assemblies Approval) Act.** Counsel submitted that the nomination is valid and that had the petitioner read **Section 32D** of the **County Government Act** in conjunction with **Section 10** of the **Public Appointments (County Assemblies Approval) Act** he would have come to that conclusion that the nomination is valid and he would have realized that the 2nd Respondent has power to nominate the 3rd Interested Party outside of the fourteen days provided in **Section 32D (1) (a)** of the **County Governments Act.** In regard to Standing Order No. 46 (1) Mr. Omoti submitted that the same does not apply as what we have in this case is not the tabling of a motion. He contended that the resubmission of the name of the 3rd Interested Party for approval does not amount to tabling a motion for debate and hence it can be done before the lapse of six months. Counsel sought to distinguish the resubmission of the 3rd Interested Party's name from the tabling of a motion to vet and approve the name and submitted that the latter is what cannot be done before the lapse of six months. Counsel contended that estoppel and the submission that the 2nd Respondent must be bound by his pleadings cannot hold as the 2nd Respondent rightly undertook before Mrima J that no action would be taken before the lapse of six months. Counsel asserted that this application is premised on a misreading of the law, that it has no merit and is premature and the name of the 3rd Interested Party is properly before the 2nd Interested Party and upon the expiry of six months a motion shall be tabled. Counsel submitted that if it is then and only once it is established that the entire process has been undertaken outside the law can the supervisory jurisdiction of this court be invoked. Counsel contended that the 2nd Interested Party is a constitutional body with the primary jurisdiction to approve the Deputy Governor yet the petition is worded in such a manner that it is this court with power to approve the Deputy Governor. Relying on the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** Counsel submitted that constitutional bodies should be left to exercise their powers without interference. He urged this court to uphold the principle of separation of powers and resist the invitation to take over the power of the 2nd Interested Party to approve the appointment of the Deputy Governor. Counsel contended that as a

constitutional body the 2nd Interested Party cannot be directed on the manner it ought to exercise its power. Counsel asserted that mandamus cannot be used to compel a constitutional or administrative body to exercise its power in a particular manner. Counsel further submitted that the petitioner has not cited the constitutional provisions which will be violated should the prayers not be granted. He submitted that to the contrary there shall be no prejudice to the Petitioner/Applicant as the 2nd Respondent's powers are being exercised lawfully. Counsel submitted that it is in fact the public that stands to suffer as the County will be operating without a Deputy Governor when there is no basis for not filling the vacancy. Finally, Mr. Omoti submitted that the Petitioner/Applicant had not established a prima facie case to warrant grant of the orders.

Mr. Ochoki, Learned Counsel for the 1st and 2nd Interested Parties neither supported nor opposed the application. He informed the court that his clients would abide by whatever orders that shall be issued by this court.

Mr. Onsongo, Learned Counsel for the 3rd Interested Party vehemently opposed the application. Relying on the replying affidavit of the 3rd Interested Party Mr. Onsongo begun by urging this court not to extend the interim orders granted to the Petitioner/Applicant for reason that the people of Nyamira would be left without a Governor and Deputy Governor were something to happen to the Governor. Mr. Onsongo submitted that **Section 32D** of the **County Governments Act** kicks off the appointment of a Deputy Governor within fourteen days and thereafter the provisions of the **Public Appointments (County Assemblies Approval) Act** and the **Standing Orders** of the **County Assembly** kick in. Counsel submitted that if the County Assembly rejected a nomination then a motion can be re-tabled within the prescribed period and the procedure now in place cannot be faulted. Mr. Onsongo invited this court to peruse the prayers sought in the petition and find that none of them can be the basis for the prayers sought in this application. He submitted that there is no absence of law as alleged by Counsel for the Petitioner/Applicant and stated that the law provides for a second appointment. He described prayer 2 of the application as quick sand and asserted that the prayer cannot be granted. Counsel further submitted that this court cannot legislate; that the legislature has done that through the **Public Appointments (County Assemblies Approval) Act** and that this court cannot state that the failure to nominate within fourteen days is unlawful whereas the law has provided for a resubmission of a candidate. Counsel argued that the operation of **Section 32D** of the **County Governments Act** is triggered by **Section 32C** and the petitioner has not demonstrated that the timelines in **Section 32D** have not been met. He submitted that the appointment is not new as there was a Deputy Governor who ascended to the seat of Governor. He argued that this application is an attempt to drag governance issues to court in the guise of a constitutional petition and pointed out that the time to fill the office has been lost by this petition. He reiterated that the nomination falls squarely under **Section 10 (2)** of the **Public Appointments (County Assemblies Approval) Act** which stems from **Section 32D** of the **County Governments Act** which in turn stems from the constitution. He urged this court to dismiss the application saying that the orders sought would be injuries to the people of Nyamira.

In reply, Mr. Millimo submitted that the power by a Governor to nominate a Deputy Governor squarely lies in **Section 32D of the County Governments Act** but not the **Public Appointments (County Assemblies Approval) Act** and **Section 10** of the latter is therefore not of any relevance as the Act is concerned only with the approval of the candidate. Mr. Millimo reiterated that the law does not provide for nomination of a Deputy Governor outside the fourteen days provided in **Section 32D** of the **County Governments Act.** He described as splitting hairs the submission by Mr. Omoti that sought to make distinction between nomination of a candidate and tabling a motion. Mr. Millimo argued that the **Public Appointments (County Assemblies Approval) Act** is a procedural law and it cannot be imported to justify nomination outside the fourteen days provided in **Section 32D (1) (a)** of the **County Governments Act**. He contended that the process of vetting was scheduled for 28th May 2021 and so it had already commenced. Mr. Millimo submitted that under **Section 32D (3)** upon the submission of a name the County Assembly must within fourteen days' process the name and if not considered it will be deemed that the same has been approved. He described as misleading the submission by Mr. Omoti that the name can be tabled and the County Assembly can sit on it for an indeterminate period of time. He submitted that the Petitioner/Applicant is not asking this court to exercise the power of appointment but is asking this court to determine whether the 2nd Respondent exercised his power of nomination constitutionally and lawfully. Referring to **paragraphs 87 (1)** and **(2)** of the **Mumo Matemu case (supra)** Counsel argued that this court has power to make the interventions sought. He argued that the Mumo Matemu case cannot be used to defeat these proceedings and contended that this petition is not disputing the power of the 2nd Respondent to nominate a Deputy Governor but the constitutionality and legality of the intended vetting. Further, that this court is merely being asked to identify deficiency in existing legislation and provide a solution hence the reason the Attorney General is roped in as the Attorney General is the principal advisor of the government. Counsel also disputed that the petition is premature and reminded the court that what is being argued presently is the application not the petition. He pointed out that the petitioner is willing to have the petition fast-tracked. He submitted that the public would suffer more if the office were to be filled unconstitutionally and unlawfully. He argued that public interest tilts in favour of halting the process until the petition is heard and determined. Counsel once more reiterated his submission that it would be unconstitutional for the nomination to be done outside the fourteen days provided in **Section 32D** of the **County Governments Act.** In regard to the extension of the interim orders, Mr. Millimo submitted that the same were granted to subsist during the hearing and determination of this application and setting them aside without any formal application would be tantamount to amending them without a prayer to do so. Counsel drew this court to prayers 3 and 4 of the petition and disputed that the petition is based on quick sand. He contended that to the contrary the petition is sound and has high chances of success and urged this court to grant the application so as to preserve the substratum of the petition. He argued that no prejudice will be suffered by any of the parties and argued that it is also in the interest of justice to grant the application.

The petition herein is expressed to be made pursuant to the enforcement of fundamental rights and freedoms, the principles of natural justice, transparency and fair hearing and the Notice of Motion is brought under Rule 19 of **THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013** otherwise known as the **Mutunga Rules. Rule 23** of the said **Rules** states: -

> **"Conservatory or interim orders.**
>
> **23 (1) Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.**
>
> **(2) ……**

(3) ……

The power to grant a **Conservatory Order** is also provided in **Article 23 (3) (c)** of the **Constitution** which states: -

> **"(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—**
>
> **……**
>
> **(c) a conservatory order……"**

This court's jurisdiction to grant the orders sought is therefore not in doubt and has not in any event been contested.

I have carefully considered the application, the grounds thereof, the affidavits of the parties, the rival submissions of Learned Counsel for the parties, the cases cited and the law. The issue that calls for determination at this stage is **whether or not the Petitioner/Applicant is entitled to a Conservatory Order "staying the process of nomination and/or processing a nominee to the office of a Deputy Governor, County Government of Nyamira"** as prayed.

The principles under which a conservatory order may be granted are now well settled and there is a long line of cases dealing with the issue. In the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, SC Application No. 5 of 2014 [2014] eKLR** the Supreme Court stated: -

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

In the case of **Centre for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others [2017] eKLR** the court held: -

> **"A party who moves the court seeking conservatory orders must show to the satisfaction of the court that his or her rights are under threat of violation; are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedoms and preserve the subject matter pending the hearing and determination of a pending case or determination."**

In the case of **Law Society of Kenya v Office of the Attorney General & another; Judicial Service Commission (Interested Party) [2020] eKLR** the court summarized those principles as follows: -

> **"24. From various authorities of the Courts the principles required to be satisfied before granting conservatory orders or interim conservatory orders compromises of the following: -**
>
> ***a) First, an Applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.***
>
> ***b) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.***
>
> ***c) Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.***
>
> ***d) The final principle for consideration is whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order."***

I have applied all of the aforestated principles to this case in order to determine the issue before me and sadly my finding is that the Petitioner/Applicant is not deserving of the orders sought. It is to be noted that the issue of filling of the office of a County Deputy Governor upon a vacancy arising in the office of the Governor and the timelines for so doing first came to the fore in the case **of In Re Speaker, County Assembly of Embu, Supreme Court Reference No. 1 of 2015 [2018] eKLR** when the Supreme Court was approached to give an advisory opinion regarding the process of filing the position of a Deputy Governor after the Deputy Governor ascended to the office of the Governor when a vacancy arose in that office as a result of the removal of the County Governor through impeachment proceedings. The Supreme Court observed: -

"[47] It is beyond dispute that there exists a lacuna in law, with regard to the filling of a vacancy in the office of Deputy Governor. The Constitution is silent on what happens to that office, should a vacancy occur in terms of Article 182(2)."

The court after considering the submissions of the parties and drawing a parallel from the appointment of a Deputy President in **Article 149** of the **Constitution** went ahead to give an advisory opinion as follows: -

"[61] ……From the signal embodied in Article 149 of the Constitution, and in the absence of any applicable legislative provision, we hold that, *where a vacancy occurs in the Office of the Deputy County Governor, the Governor shall within fourteen days, nominate a person to fill such vacancy.* **The County Assembly shall vote on the nomination within *sixty days* after receiving it. Where a vacancy occurs in** *both* **the offices of County Governor and Deputy County Governor at the same time,** *the office of the Deputy County Governor shall remain vacant until the election of a new Governor*. The new Governor *shall nominate a person to fill the vacancy within fourteen days after assuming office. The County Assembly shall vote on the nomination within sixty days after receiving it.* **For the avoidance of doubt, we hereby state that this holding shall obtain in all circumstances pursuant to which the Office of the Deputy Governor may become vacant as contemplated by the Constitution, i.e. death, resignation or impeachment."**

The above advisory has since been given effect by Parliament's introduction of **Sections 32A, 32B, 33C** and **33D** into the **County Governments Act. Section 32D** of the **County Governments Act** which provides for filling of a vacancy in the office of Deputy Governor states: -

"32D. Filling of a vacancy in the office of deputy governor.

(1) Where a vacancy arises in the office of a deputy governor as provided for under section 32C, the governor shall—

(a) within fourteen days, nominate the deputy governor; and

(b) with the approval of the county assembly, appoint a deputy governor.

(2) A person nominated for appointment as deputy governor under subsection (1) shall be a person eligible for election as governor.

(3) The county assembly shall—

(a) consider a motion for approval for the appointment of the deputy governor, within fourteen days, and resolve whether to approve the motion; and

(b) be deemed to have approved the motion for the appointment of the deputy governor upon the lapse of fourteen days and having failed to make a resolution."

The manner of considering the motion for approval of the nomination by the County Assembly is of course provided for in the **Public Appointments (County Assemblies Approval) Act** whose preamble states: -

"An ACT of Parliament to provide for the procedure for the approval of public appointments by County Assemblies and for connected purposes."

If I understood the Petitioner/Applicant's case, it is that once the County Assembly has considered the motion for approval of the Governor's nominee and for whatever reason it rejects or refuses to approve the nomination then the Governor can only nominate another candidate within fourteen days of that rejection and a nomination done beyond the fourteen days would be outside the period prescribed by the law and hence unlawful and unconstitutional. With due respect I beg to disagree with this submission. This is because whereas **Section 32D** of the **County Governments Act** and indeed the **Supreme Court Advisory** do not state what happens in the event the appointment of the candidate is rejected there are other provisions in the law to guide this. **Section 10** of the **Public Appointments (County Assemblies Approval) Act** for instance provides that the appointing authority can submit another candidate (for approval) (**Subsection (1)) and Subsection (2)** alludes to the resubmission of the name of the candidate whose nomination was rejected. Note however that whether or not the candidate in this petition meets the criteria set out in **Section 10 (2)** of the **Act** is not an issue in this application and I am not making a determination on that issue for now. Further, even were this court to agree with the Petitioner/Applicant that **Section 10** of the **Public Appointments (County Assemblies Approval) Act** is a procedural Act which is of no relevance to **Section 32D** of the **County Governments Act** it is my finding that there is no absence of law as **The Interpretation and General Provisions Act** has a provision for time at **Section 58** which states: -

"Where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises."

The **Constitution** itself has a similar provision at **Article 259 (8) of the Constitution** and the same states: -

"If a particular time is not prescribed by this constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises."

I do not therefore agree that there is no law to guide the nomination of a candidate to fill a vacancy in the office of the Deputy Governor once the initial nomination is rejected by the County Assembly. In my view the time for nomination of another candidate outside of the fourteen days upon the rejection of the initial candidate by the County Assembly is properly addressed by **Section 58** of **The Interpretation and General Provisions Act** if not by the **Public Appointments (County Assemblies Approval) Act** and as such there is no lacuna in the law. It would also not be unconstitutional as it would be within the ambit of **Article 259 (8)** of the **Constitution**. To hold otherwise would be to say that the office of the Deputy Governor could remain vacant indefinitely a notion which the Supreme Court held "**would be inconsistent with the vital objects of the constitution…."** ***(See In re Speaker, County Assembly of Embu (supra)).*** It is my finding therefore that the Petitioner/Applicant has not demonstrated a prima facie case with a likelihood of success as would warrant this court to grant a Conservatory Order. I am also not persuaded that the grant of the conservatory order would serve the public interest as in my view that interest would be served by a purposive interpretation of the law as opposed to a narrow and restrictive interpretation. Further, the petition has many other prayers and its substratum will definitely not be rendered nugatory by refusal to grant the Conservatory Order. In the premises the application is dismissed with costs to the respondents.

Ruling signed, dated and delivered (Electronically via Microsoft Teams) at Nyamira on this 22nd day of July 2021.

E. N. MAINA

JUDGE