



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CONSTITUTIONAL PETITION NUMBER 19 OF 2019**

**IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE S 22(1) OF THE CONSITUTION OF KENYA (2010)**

**AND**

**IN THE MATTER OF VIOLATION OF ARTICLE S 2,3,10, 24, 25, 27(1), 38, 47 AND 50 OF THE CONSITUTION OF KENYA**

**BETWEEN**

**HON. JOSEPH MBOHA..... PETITIONER**

**AND**

**THE SPEAKER, COUNTY ASSEMBLY OF SIAYA.....1<sup>ST</sup> RESPONDENT**

**COUNTY ASSEMBLY OF SIAYA.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT VIA SKYPE**

1. The Petitioner herein described himself as a member of the Siaya County Assembly elected to represent South East Alego Ward under the Orange Democratic Movement political party's ticket instituted this petition against the Speaker of the County Assembly of Siaya whom he described as the political head of the Assembly and who oversaw the general running of the Assembly and who ensured that the procedure adhered to the Constitution and the law (1<sup>st</sup> Respondents) and the County Assembly of Siaya which he described as being vested with the responsibility of being the legislative representative body of the people of Siaya County and in which the Petitioner represented the people of South East Alego ward.

2. The petition was filed on 27<sup>th</sup> May 2019 simultaneously with an application under certificate of urgency in which the Petitioner sought, amongst other orders, conservatory order stopping the implementation of the Resolution of the County Assembly of Siaya made on 2<sup>nd</sup> May 2019 adopting a motion discussing the conduct of the Petitioner pending the hearing and determination of the Application both at the interim and pending the hearing of the substantive petition.

3. By consent of counsel on record for the parties herein and which consent was recorded *vide* orders of 16.07.2019, the said Application (together with another application for contempt which had been filed by the Petitioner) were both compromised and parties took directions as to the hearing of the main Petition.

**THE PETITION**

4. The petition was brought under Articles 22(1) and 16(3) of the Constitution 2010, which provides for the jurisdiction of the Court to determine a question whether a right or fundamental freedom in the Bill of Rights had been denied, violated, infringed or threatened; to hear any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or of any law was inconsistent with or in contravention of the Constitution.

5. The Petitioner further pleaded that the petition was founded on Article 2(1), 2(5), 3, 20, 22(1), 25(1), 22(2), 25(2), 25, 27(1), 38, 47, 50 and 159 of the Constitution.

6. The factual background to the Petition are that the Petitioner was an elected member of South East Alego Ward in Siaya County serving under the Orange Democratic Movement political party and that the Respondents allowed a motion to be tabled before the Assembly and

debated on 2<sup>nd</sup> May 2019 whereupon the motion sought to discuss the conduct of the Petitioner in relation to alleged misconduct outside the precincts of the Assembly and which motion was debated and whereupon the members arrived at a determination that the Petitioner be suspended from the Assembly for two weeks and in which debating the Respondents failed to furnish the Petitioner with the allegations against him which would warrant a discussion of his conduct in the Assembly and further that the Petitioner was not accorded an opportunity to be heard or to respond to the allegations that were made against him in the said motion.

7. It was further asserted by the Petitioner that the Respondents moved to inflict further punishment on the Petitioner by seeking to unlawfully expel him from the Assembly and to remove him as a member of the County Assembly of Siaya and which actions were not supported by any statute or the Standing Orders of the County Assembly of Siaya and which were in violation of the Constitution and sought to undermine the political franchise of his constituents.

8. It was pleaded further that the said actions were in contravention of Article 25 of the Constitution which provides that the right to a fair trial could not be limited yet the Respondents proceeded to discuss the conduct of the Petitioner in the Assembly and penalize him without according him an opportunity to be heard or to present his case; in contravention of Article 27(1) of the Constitution which guaranteed equal protection of the law as the Respondents were seeking to deny the Petitioner and the people of South East Alego an opportunity to be represented in the County Assembly despite their political choice of their representative; in breach of Article 38 to the extent that the Petitioner and the people of the South East Alego were being denied an opportunity to participate in the County Assembly of Siaya through their democratically elected representative; and in breach of Article 47 to the extent that the impugned decision contravened the right to fair administrative action as it was arbitrary; and that the Respondents failed to give sufficient reasons for the decision made against the Petitioner and further sought to penalize him twice despite the protective clothe of the Constitution.

9. In the circumstances, the Petitioner prayed for orders that:-

*1. A declaratory order do hereby issue that the Resolution of the 2<sup>nd</sup> Respondents adopting the impugned motion of 2<sup>nd</sup> May 2019 discussing the conduct of the Petitioner violated the fundamental rights and freedoms of the Petitioner to a fair hearing.*

*2. A declaratory order do hereby issue that the Resolution of the 2<sup>nd</sup> Respondents adopting the impugned motion of 2<sup>nd</sup> May 2019 discussing the conduct of the Petitioner violated the fundamental rights and freedoms of the Petitioner to a fair administrative action.*

*3. An order of certiorari do issue quashing the resolutions of the 2<sup>nd</sup> Respondents adopting the said motion of 2<sup>nd</sup> May 2019.*

*4. An order of prohibition do issue prohibiting the implementation of the resolutions of the 2<sup>nd</sup> Respondents made on the 2<sup>nd</sup> May 2019 adopting the impugned motion filed to discuss the conduct of the Petitioner.*

*5. Costs of the petition; and*

*6. Any other relief the Honourable Court may deem just and fit to grant.*

10. The petition was supported by the supporting affidavit sworn by the Petitioner, wherein he reiterated the facts as pleaded in the petition as reproduced hereinabove with annexure exhibits.

#### **REPLY TO THE PETITION**

11. The petition was opposed by the Respondents who filed a Replying Affidavit sworn by **Eric Ogenga**, Deputy Clerk of the County Assembly (of Siaya) on behalf of the Respondents in which it was deposed that the section 9(1) of the County Governments Act of 2012 provides for the role of members of the County Assembly and further that section 14(1) of the said Act provides for the procedure of the committees of the County Assembly and it further allows the County Assembly to make Standing Orders regulating its procedures, to establish committees and to regulate the procedures of such committees so established.

12. It was further deposed that section 15(1) of the Act provides for a right to petition the County Assembly by any person to consider any matter within its authority.

13. It was deposed that the Petitioner being a member of the Siaya County Assembly had been elected and having taken the oath of office swearing to diligently discharge his duties in accordance with the Constitution and the law and further having put his hands to the County Assembly of Siaya Leadership and Integrity Code and further declared and committed himself to abide by its provisions.

14. Further deposition was that a notice of motion had been brought by a fellow member on the conduct of the Petitioner outside the precincts of the Assembly and which motion made several allegations (as were contained in paragraph 15 of the replying affidavit) and made the several prayers (as were contained in paragraph 16 of the replying affidavit) and which motion was brought pursuant to the powers of the County Assembly as donated by Article 119 of the Constitution as read together with section 15 of the County Government Act and buttressed by the County Assembly Standing Orders.

15. It was further deposed that the said notice of motion was given in the Order Paper on 2<sup>nd</sup> May 2019 and given to all members present in the Assembly (including the Petitioner) and debated in chambers on the same day and passed where **it was resolved that the Petitioner be suspended from membership of all Assembly Committees until his conduct was investigated but not suspended from plenary sittings (amongst other resolutions) and that the House had not considered the motion but only recommended that the same be tabled before the committee**, so that the Petitioner could be heard and a decision made on merit (in compliance with the procedure as was explained under paragraph 25 of the Replying Affidavit).

16. It was further deposed that the Petitioner was given an opportunity at the tabling stage to make representations on whether the motion had disclosed any prima facie case that warranted referral to the Committee of Powers and **Privileges where he actively participated and thus the Petitioner acquiesced to and participated in the proceedings and as such was estopped from questioning the decision arising therefrom.**

17. The Respondents further contended in the deposition that the suspension of the Petitioner was lawful pursuant to order 113 of the Standing Orders and section 42(7) of the Leadership and Integrity Act of 2012 which allowed suspension of a state officer pending investigation and determination of allegations made against a public officer.

18. Further, that the Petitioner misled the court by asserting that he was not accorded an opportunity to be heard or informed of the allegations he was facing and thus was guilty of non-disclosure and further, that he had misled this court when he claimed that he had been expelled from the Assembly without any proof of the purported expulsion.

19. The Respondents further deposed that the Committee of Powers and Privileges draws its powers from the Constitution, the Public Officers Act 2003, The Leadership and Integrity Act of 2012, the County Assemblies Powers and Privileges Act of 2017 and the County Assembly of Siaya Standing Orders and thus the inquiry into the conduct of the Petitioner was legal and lawful, as the Committee had the jurisdiction under sections 15, 16 and 17 of the County Assemblies Powers and Privileges Act of 2017

20. Further deposition was that the court ought to be slow in intervening where the Parliament had specifically and expressly prescribed the procedures for handling grievances and neither could the court supervise the workings of the Parliament as that would endanger the institutional comity between the three arms of the government.

21. It was further deposed that the Petitioner was invited to appear before the committee on Powers and Privileges so as to defend himself and give his side of the story and to have a legal representative at the said hearing and thus the rules of natural justice as to the requirement to be heard was followed.

22. Further, that the Petitioner was yet to appear before the said Committee and defend himself and neither had the report been tabled to the Assembly and thus the petition was premature and brought in bad faith and out of fear of appearing (by the Petitioner) before the committee.

23. It was Further deposed that the resolution of 2<sup>nd</sup> May 2019 by the 2<sup>nd</sup> Respondents was in the performance of its duties under the Constitution as read together with the County Government Act of 2012 and which duties, failure to perform, would amount to breach of the Constitution.

24. Further, the Respondents contended in deposition that the instant petition was not specific on the provisions of the law which had been violated, the extent of the violation and how it affected the Petitioner and how the violation affected him and that the Petitioner's rights could be violated and further that the prayers sought could not be granted.

25. The Respondents urged the court to dismiss the petition as it failed the threshold set in **Anarita Karimi –vs- Republic and Mumo Matemo –vs- Trusted Society of Human Rights Alliance & 5 others** and thus it is incompetent and *mala fides*.

## **SUBMISSIONS**

26. Pursuant to the orders made on 16.07.2019, respective parties' advocates filed their submissions in support of their respective positions.

27. The Petitioner submitted asserting that the petition had met the threshold of a Constitutional petition as it had set out the specific provisions of the Constitution which had been violated or threatened with violation and further the manner in which the said rights had been violated or threatened and ought to be upheld. Reliance was placed on **Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR.**

28. It was the Petitioner's further submission that the conduct of the Respondents violated his fundamental rights and freedoms as he was never accorded an opportunity to be heard before a sanction was imposed on him and which was in violation of Articles 25 and 50 of the Constitution as they did not serve the Petitioner with the allegations against him so as to enable him prepare his defense; that they failed to give the Petitioner opportunity to prepare himself; they proceeded to penalize the Petitioner through suspending him from the Assembly before the allegations against him could be investigated and verified; and failed to accord the Petitioner an opportunity to be heard and present his case before making the adverse finding. The case of Republic –vs- **Firearms Licensing Board ex-parte Jimi Wanjigi (Misc. Application No. 46 of 2018)** and **Muslim for Human Rights –vs- Attorney General & Others (2015) e KLR** was cited to buttress the argument that the right to a fair hearing includes the right to be given adequate opportunity to prepare for one's defense. It was argued that the Petitioner was never given an opportunity to defend himself and that the argument that he was in the Assembly at the time of the debate could not justify the issuance of adequate notice.

29. It was further submitted that the impugned act violated Article 38 on the rights of the people of South East Alego to be represented by a person of their choice by suspending and removing the Petitioner from the County Assembly and further denied them the right to participate in governance and participation in decision making. This court was referred to the case of **Opiyo Wandayi –vs- Speaker of the National Assembly (2016) eKLR** in that respect.

30. It was further submitted on behalf of the Petitioner that the impugned act was *ultra vires* the Respondents' mandate and powers as the Powers and Privileges Committee had no jurisdiction to conduct and enquiry on the member's attendance to the Assembly and that the same was not provided under the enabling law- the County Assemblies (Powers and Privileges) Act and that neither did the Constitution give the Assembly the powers to conduct an enquiry as to the attendance of a member under Article 194(1)(b) of the Constitution, as the said removal could only be invoked through a judicial process vide a petition in the High Court and thus the Assembly acted *ultra vires* by

usurping and arrogating unto itself powers not conferred by a statute. The court was referred to the case of **Commissioner on Administrative Justice –vs- Insurance Regulatory Authority & Another (2017)eKLR** where it was held that a decision made by a public body without the powers or in excess of the powers will be illegal. The Petitioner further submitted that the grounds adduced by the Respondents for disciplinary action did not meet the threshold for one to be subjected to a disciplinary action.

31. The Petitioner further submitted that the impugned act violated Article 47 of the Constitution and infringed the principles of natural justice in that if the conduct of the Respondents was to be considered as an administrative action, the same was not conducted in a proper manner as the Petitioner was never notified of the allegations against him, nor supplied with notice of those allegations to enable him adequately respond to the same, which was against the fair hearing principle. Reference was made to a decision by this court per Aburili J rendered in **Republic –vs- Chuka University Ex-parte Kennedy Omondi Waringa & 16 Others (2018) eKLR** and an argument made that neither was the Petitioner given an opportunity to be heard, (which was a cardinal Constitutional principle) as he was never given an opportunity to defend himself on the floor of the House before the decision was made for the admission of the Petitioner to the Committee stage and further, that the Respondents suspended the Petitioner without any evidence, which was against natural justice principle as codified by Article 47 of the Constitution.

32. The Petitioner thus prayed that the petition be allowed and the orders sought be granted as he had proved that there were Constitutional infractions and violations of his rights and those of the people of South East Alego through the impugned acts of the Respondents.

33. On the part of the Respondents, it was submitted that the petition did not meet the threshold of a Constitutional petition as stipulated in the **Anarita Karimi Njeru** [supra] case; that the Petitioner did not specify the manner in which the Respondents had violated the provisions despite him having recited the various Constitutional provisions which he alleged to have been violated and that neither was there any evidence provided as to the various issues of violation cited. The court was referred to the Mumo **Matemu** case, (supra).

34. It was further submitted that the Respondents did not act *ultra vires* as they acted in conformity with the provisions of Articles 10 and 115 of the Constitution and section 15 of the County Government Act 2012 and the County Standing Orders which mandated them to consider petitions brought before the Assembly and further Order 113 of the Standing Orders of the County Assembly of Siaya which bestowed the 1<sup>st</sup> Respondents with the powers to suspend members from service of the house and the duration of the said suspension.

35. Further, the Respondents contended that the suspension of the Petitioner was lawful pursuant to section 42(7) of the Leadership and Integrity Act of 2012 which allowed suspension of a state officer pending investigation and determination of allegations made against a public officer and that the Petitioner being a state officer by virtue of Article 260 of the Constitution, was subject to these provisions of the law and the Constitution. The suspension, it was submitted, was lawful as the Committee had the jurisdiction under section 15, 16 and 17 of the County Assemblies Powers and Privileges Act of 2017 which provisions give the Assembly powers to inquire into matters constituting breach of privilege in terms of section 16.

36. It was further submitted that the notice of motion was presented on the alleged conduct of the Petitioner and it was given in the Order Paper and the said Order Paper was given to all the members present in the Assembly (including the Petitioner) and was issued and moved in the presence of the Petitioner, debated and passed and the said debate was done as per the requisite procedure and thus the process was not *ultra vires*. The Respondents maintained that they therefore acted within the law and within their mandate.

37. The Respondents further submitted that the Petitioner was accorded an opportunity at the tabling stage to make representation on whether the motion had disclosed any prima facie case to warrant referral to the Committee of Powers and Privileges where he actively participated and thus the Petitioner acquiesced to and participated in the proceedings and as such was estopped from questioning the decision arising therefrom and as such the Petitioner misled the court by alleging that he was not accorded an opportunity to be heard or informed of the allegations he was facing and thus he was guilty of non-disclosure. The court was referred to the decision in **Joseph Mbalu Mutava –vs- Attorney General & Another (2014) eKLR** where it was held that fair trial obliged an adjudicator faced with the task of making a choice between two opposing stories to listen to both sides but not on one side.

38. Further it was submitted that the Petitioner misled the court that he had been expelled from the Assembly as he ought to have provided strict proof of the purported expulsion which he did not and further that he had not presented sufficient evidence to the effect that the procedure by the Respondents or the substance of their decision violated the law, rules and procedure and further that though the court had jurisdiction to question the substance of the decisions made by other organs of the government (such as the Respondents), but only to the extent of their Constitutionality or otherwise and that in the absence of any proof of impropriety by the Respondents in exercising their mandate, the court did not have the jurisdiction to overturn the decisions of the Respondents as doing so would amount to usurping the Constitutional mandate and statutory roles of the Respondents.

39. It was further submitted that in the circumstances of this Petition, this court ought not to interfere with the decision of the Respondents as the petition was based on rumours and allegations and interfering with the decision of the Respondents would be akin to opening the doors to a state of anarchy where the conduct of state officers would remain unchecked. That there was no procedural or substantial impropriety that had been proved concerning the conduct of the Respondents and as such the petition ought to fail. The court was referred to the case of **Simon Wachira Kagiri –vs- County Assembly of Nyeri & 2 Others (2013) e KLR** where it was held that the only possible scenario in which the court may be prepared to interfere with the proceedings and decisions of the County Assembly ought to be in extreme situations when the said bodies had acted or conducted its proceedings in a manner that amounts to abrogation of the Constitution.

40. The Respondents thus prayed that the petition be dismissed with costs.

## **DETERMINATION**

41. I have carefully considered the petition, the grounds thereof and the supporting affidavit as well as the Replying affidavits and the well written rival submissions filed by the parties' advocates and authorities cited. In my humble view, the following issues flow for determination:

1. *Whether the petition meets the requisite Constitutional petition threshold?*

2. *Whether the Petitioner's rights were violated?*

3. *Whether the petition ought to succeed?*

4. *What orders should this court make?*

42. ***On Whether the petition meets the requisite Constitutional Petition threshold***, in their replying affidavit, the Respondents deposed that the instant petition failed the threshold set out in ***Anarita Karimi –vs- Republic and Mumo Matemo –vs- Trusted Society of Human Rights Alliance & 5 others (supra)*** as it was not specific on the provisions of the law which had been violated, the extent of the violation and how it affected the Petitioner and how the violation affected him. This position was reiterated in their submissions. This argument was vehemently countered by the Petitioner in his submissions where he submitted that the petition had met the threshold of a Constitutional petition and ought to be upheld.

43. The question of the Petition not meeting the constitutional petition threshold is an important question that must be determined *in limine* before venturing into the merits or demerits of the petition herein. In ***Anarita Karimi (Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154)*** the court stated quite authoritatively and I concur:

***“if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”***

44. The principle in the above decision was reaffirmed by the Court of Appeal in ***Mumo Matemo v Trusted Society of Human Rights alliance [supra]***, where it was held that the petition which was the subject of the Appeal fell short of the threshold established in ***Anarita Njeru's case***. The million dollar question therefore as far as this petition is concerned is whether the petition indeed meets the set threshold, that is, whether the petition did ***set out with a reasonable degree of precision that of which he (the Petitioner) complained of, the provisions said to be infringed, and the manner in which they are alleged to be infringed.***

45. A careful reading of the petition reveals that the petition has its foundation as pleaded, in the constitutional provisions namely Articles 2(1), 2(5), 3, 20, 22(1), 25, 27(1), 38, 47, 50 and 159 thereof of the Constitution. The petitioner further sets out the ***acts which he was complaining of*** and which are contained in paragraphs 12-18 of the petition and which included failure to be furnished (by the Respondents) with the allegations against the Petitioner; failure to accord him an opportunity to be heard or to respond to the allegations made against him and the attempts to unlawfully expel the Petitioner from the Assembly and which was inflicting more punishment to the Petitioner and which acts were not supported by the law or standing orders.

46. The petition under paragraphs 19-22 further expounded on the ***manner of the infringement by the Respondents***. For instance, the petition clearly stated that the infringement of Article 25 was that though the Article provided that the right to a fair trial could not be limited, the Respondents proceeded to discuss the conduct of the Petitioner in the Assembly and penalize him without according him an opportunity to be heard or to present his case.

47. On infringement of Article 27(1) of the Constitution, it was pleaded that although the Article guarantees equal protection of the law, the Respondents were seeking to deny the Petitioner and the people of South East Alego an opportunity to be represented in the County Assembly despite their political choice of their representative.

48. On alleged infringement of Article 38 it was clearly pleaded that the same was infringed to the extent that the Petitioner and the people of the South East Alego were being denied an opportunity to participate in the County Assembly of Siaya through their democratically elected representative.

49. In relation to the alleged infringement of Article 47, it was pleaded that the impugned decision contravened the right to fair administrative action as it was arbitrary and the Respondents failed to give sufficient reasons for the decision made against the Petitioner and further sought to penalize him twice despite the protective clothe of the Constitution.

50. From the foregoing, it is clear that this petition was clear as to which provisions of the Constitution were allegedly violated by the Respondents; the alleged acts amounting to the alleged infringement and the manner in which the alleged acts led to infringement. That being the case, I find and hold that this petition passes the threshold set in ***Anarita Karimi's case (supra)***.

51. ***On the second issue of whether the Petitioner's rights were violated?*** to determine this issue, I shall examine the various allegations levelled against the respondents. The Petitioner pleaded that the stated rights were infringed in the following manner: failing to furnish the Petitioner with the allegations against him in debating his conduct and to give him an opportunity to be heard or to present his case when discussing the conduct of the Petitioner in the Assembly; denial of the Petitioner (and the people of South East Alego) an opportunity to be represented in the County Assembly despite their political choice of their representative; denial of the Petitioner (and the people of the South East Alego) an opportunity to participate in the County Assembly of Siaya through their democratically elected representative; and infringing the Petitioner's rights to fair administrative action as it was arbitrary and the Respondents failed to give sufficient reasons for the decision made against the Petitioner and further sought to penalize him twice despite the protective clothe of the Constitution.

52. I now proceed to interrogate each of the above alleged violations herein below:

i. ***Failure to furnish the Petitioner with the allegations against him and to give him an opportunity to be heard or to present his***

*case when discussing his conduct*

53. The Right to a fair hearing is indeed one of the rights guaranteed in Article 50 of the Constitution and this Right cannot be limited. (see Article 25 of the Constitution) The right to a fair trial under this Article 50 includes the ***right to be informed of the charge, with sufficient detail to answer it*** and ***right to have adequate time and facilities to prepare a defence amongst other rights***. The Court in **Republic v Firearms Licensing Board & another; Ex parte Jimi Wanjigi [2019] eKLR**, while appreciating importance of the right to a fair hearing held:

***“58. The Constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person’s rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.....”***

***62. The right of a person to defend him/herself in the face of a decision potentially affecting his/ her rights or interests necessarily implies that the person must receive prior notice of the facts on which the decision will be based. Failure to give proper notice is itself a denial of natural justice and of fairness. I have carefully analyzed the facts of this case. I note that no notice was served upon the ex parte applicant. Details of the complaint (if any) were not availed to him nor have they been provided in this court. He was not accorded a hearing. The only communication was the impugned letter which reads:...”***

54. From the holding above, it can be deduced that any action (s) which lead to a person not having sufficient time to prepare for his defense or not knowing the charges leveled against him are unconstitutional.

55. The Petitioner’s case against the Respondents is that the Constitutional guaranteed right to a fair trial cannot be limited. The Respondents however dismisses the allegation of infringement of the Right in question as reproduced in the replying affidavit and submissions above. The Respondents go further to expound that the Petitioner was afforded an opportunity to be heard as the notice of motion was presented in the Assembly on 30<sup>th</sup> April 2019 and that on 2<sup>nd</sup> May 2019 the said motion was given in the Order Paper which Order Paper was given to all the members present including the Petitioner and further debated and passed (on the same day). Further, it was deposed that the Petitioner was given an opportunity at the tabling stage to make presentations on whether the motion had disclosed any prima facie case that warranted referral to the Powers and Privileges Committee and further that he participated in the said debate.

56. With the above response by the Respondents to the alleged violation, the question is, ***whether at the instance of debating the motion on the floor of the house, the Petitioner was accorded a fair trial?*** This is key because the decision which was made after the debate affected the Petitioner in a big way (as he was suspended from membership of the House committees) thus depriving him of his legitimate expectation of a benefit.

57. From the evidence on record, and based on the averments by the Respondents in their replying affidavit and further in the submissions, it is clear that the motion was presented on 30<sup>th</sup> April 2019 and that on 2<sup>nd</sup> May 2019 the said motion was given in the Order Paper. It is this Order Paper which the Respondents averred, was given to all the members present including the Petitioner. The Petitioner does not deny being in the Assembly and receiving motion and the Order Paper on the day of debating the motion. One of the prayers in the said motion was seeking suspension of the Petitioner from the Committee of the Assembly.

58. **Black’s Law dictionary, 2<sup>nd</sup> Edition** defines the term “adequate” to mean *sufficient, proportionate or equally efficient*. In my humble view, as the motion was touching on one of the members of the Assembly (Petitioner), adequate time was required between the giving of the Order Paper and debating the same. This would have given the Petitioner sufficient time to prepare on the same. It would not make any sense as far as fair hearing was concerned to have the Petitioner getting the Order Paper on the day the motion was coming for debate. Albeit there was no limited time between the notification of the motion and the debating, rules of natural justice dictate enough time. This was a motion which touched on the Petitioner’s suspension from the membership of the Committee of the House and therefore more time was required for him to prepare to defend himself in the House and which time could not be equated to, for instance, time needed to discuss motions on agriculture. It is my opinion that hours’ notice was not adequate in the circumstances of the case. In the end, I find and hold that the time that the Petitioner had was not adequate to enable him prepare for defense.

59. Further from the above, it is clear that the only thing that the Petitioner was supplied with was the Order Paper. A perusal of the said Order Paper clearly shows that the same only stated the alleged acts by the Petitioner in a way of recitals and which recitals did not explain in details what the Petitioner had done. This, in my view, denied the Petitioner his ***right to be informed of the charge, with sufficient detail to answer it*** and which indeed was a violation of his right to a fair trial.

60. In the **Hansard Report** which was attached to the replying affidavit, during debate of the motion, the Petitioner can be seen trying to beseech the House to refer the motion to the Powers and Privileges Committee for determination where the Committee would ***“make recommendations based on factual things that are going to be said on that time”*** (page 3 of the **Hansard Report**) and the Speaker was seen begging the members of the House to restrict the debate to that issue. In moving the motion, the mover was further seen trying to ***give a bit of meat on the motion*** (page 2). Towards the end of the debate on the motion (at page 11 of the Hansard), the Petitioner raised an objection to the debate. The Hansard reads:

***“Hon. Mboha: Thank you, Mr. temporary speaker, sir. I think when we started this debate, it was quite clear that whatever is in this particular motion they are based on hearsay and there were reasons that were said. I thought that even the motion itself is punishing me for things that the house has not given me an opportunity to say some of those things...”***

61. As the Session was nearing the end, the mover (Hon. Otiato) was heard asking the House to support the motion and that they move forward and submitted that: ***“let Hon. Mboha have his time, and any other member of the house to have their time and any other Kenyan***

*out there has their time and he would provide evidence as required....and I will be able to provide those evidences when required.”*

62. What can be seen from the above analysis of the Hansard is that at the time of debating the motion, the Petitioner was not aware of the content of the motion. The reason why he was not aware of the said content could only be due to the fact that the said notice of motion was communicated to him (through the Order Paper) on the day of the debate and further without sufficient details to enable him respond to the said allegations.

63. In my humble view, therefore, I find that the Petitioner’s right to a fair trial and or fair hearing was violated because the Respondents did not give the Petitioner adequate time to prepare for his defense and further the Respondents did not give him material allegations prior to the debate to enable him defend himself.

**ii. On alleged Denial of the Petitioner (and the people of South East Alego) an opportunity to be represented in the County Assembly despite their political choice of their representative and denial of the Petitioner (and the people of the South East Alego) an opportunity to participate in the County Assembly of Siaya through their democratically elected representative**

64. The Petitioner pleaded that the Respondents had, since the passing of the motion and penalizing him, moved to inflict further punishment on him by seeking to unlawfully expel him from the Assembly and to remove him as a member of the County Assembly of Siaya. It was pleaded that this was tantamount to denial of the Petitioner (and the people of South East Alego) an opportunity to be represented in the County Assembly despite their political choice of their representative and further a denial of the Petitioner (and the people of the South East Alego) an opportunity to participate in the County Assembly of Siaya through their democratically elected representative. The Petitioner asserted that this was in breach of the Petitioner’s right to equal protection under the law under Article 27(1) and 38 of the Constitution. This issue was reiterated in the Petitioner’s submissions where it was submitted that by the illegal suspension and removal of the Petitioner from the County Assembly, the Respondents had infringed on the right of the people of South East Alego to representation and the Court was referred to **Opiyo Wandayi –vs- Speaker of the National Assembly (supra) .**

65. Responding to the above, the Respondents deposed that the gist of the resolution made by the County Assembly was that the Petitioner be suspended from the membership of the Assembly Committees until his conduct was investigated and that he was never suspended from the plenary sittings but further resolved that the motion be tabled before the Committee so that the Petitioner could be heard and a decision made on merit. This position was maintained in the written submissions by the Respondents.

66. A perusal of the petition herein clearly shows that the same was filed on 27<sup>th</sup> May 2019 and therein, the Petitioner sought generally orders in relation to the resolution made on 2<sup>nd</sup> May 2019.

67. A further a perusal of the Hansard Report, and whose contents the Petitioner did not dispute, shows that the notice of motion was passed as was drawn but only with an amendment as to the time within which the report ought to have been tabled before the County Assembly.

68. I am in agreement with the Respondents that the Resolution of the Assembly of 2<sup>nd</sup> May 2019 did not include a resolution that the Petitioner be suspended from the County Assembly. There was no evidence to the contrary which the Petitioner tendered before the court to rebut this overt evidence.

69. I therefore find that the Respondents were correct when they contended that the Petitioner had not been dismissed from the County Assembly as at the time of the filing of the petition and even as at the time of the filing of the replying affidavit in opposition to the petition, indeed the Petitioner had not been dismissed from the County Assembly.

70. Dismissal of the Petitioner from the County Assembly was made after this petition had been filed in court. Accordingly, based on the events of 2<sup>nd</sup> May 2019, there was no infringement of the Petitioner’s rights by **denial of the Petitioner (and the people of South East Alego) of an opportunity to be represented in the County Assembly despite their political choice of their representative and or denial of the Petitioner (and the people of the South East Alego) an opportunity to participate in the County Assembly of Siaya through their democratically elected representative.**

71. By the resolution of 2<sup>nd</sup> May 2019, the Petitioner was not removed from office or the County Assembly but from the membership of the House Committees and an act which I have already opined, was in breach of his right to a fair trial and fair hearing.

72. However, I note that when the Petitioner filed an application for contempt of court dated 10<sup>th</sup> June 2019, he pleaded that the Speaker of the County Assembly presided over a meeting of the Powers and Privileges Committee which allegedly sat and debated the conduct of the Petitioner and resolved to suspend him from the Assembly. As per the annexure JM 3 to the said Application, there was a petition by some registered voters and which petition was received by the Assembly on **7<sup>th</sup> May 2019** and which petition sought the removal of the Petitioner herein from office as a member of the County Assembly of Siaya.

73. In the replying affidavit to the said Application for contempt of court, the Committee sat and deliberated and tabled its report on 4<sup>th</sup> June 2019. That report was discussed in the Assembly and was adopted by the Assembly. Examining the minutes of the Powers and Privileges Committee which was attached to the Replying affidavit in response to the application for contempt (EO 2), the Committee meeting was held on 31<sup>st</sup> May 2019. It is however worth noting that despite this application having been compromised together with the Application of 27<sup>th</sup> May 2019, it still remains on record as the same was never expunged and the material disclosed in the application and replying affidavit are therefore material on record that clearly disclose what transpired during the Committee meeting.

74. It is trite law that a party is bound by his or her pleadings. The Court of Appeal in **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR,** deciding on the issue of matters not raised in the pleadings and making reference to the foreign judgments cited held:

*“As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the Petitioners and answered by the Respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score.”*

75. The same court differently constituted in Nairobi City Council v Thabiti Enterprises Limited (1997) eKLR1996 Court of Appeal-Akiwumi, Tunoi & Lakha, JJA Lakha JJA dissenting, held that *the court does not have jurisdiction on issues not found in the pleadings*. Further in Joseph Mbula Nziu v Kenya Orient Insurance Co. Ltd [2015] e KLR the Court held, relying on the Nigerian Supreme Court decision in Adetoun Oladeji (NIG) V Nigeria Breweries PLC S.C 91/2002 where Judge Pius Aderemi stated:

*“...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes goes to no issue and must be disregarded.”*

76. Similarly in Daniel Toroitich Arap Moi & Another v Mwangi Stephen Muriithi & Another [2014] e KLR the court of Appeal held:

*“submissions cannot take the place of evidence. The Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid...submissions are generally “marketing language...”*

77. I reiterate that at the time of filing the instant petition, the issue of removal of the Petitioner from the County Assembly of Siaya had not emerged. In fact, from the facts of the petition, it is clear that the same was based on the motion debated and passed by the Assembly on 2<sup>nd</sup> May 2019. The issue of the Petitioner being removed from the County Assembly came up later after the House Committee meeting of 4<sup>th</sup> June 2019 and subsequent adoption of the Committee’s report. The basis of the removal of the Petitioner as can be seen from the contempt of court application and the replying affidavit thereto, is a petition by some electorates alleging failure of the Petitioner to attend County Assembly Sessions.

78. It is therefore my view that the question of removal of the Petitioner from the County Assembly of Siaya constituted totally new set of facts and which could not be determined by this court based on the current petition. To do otherwise would amount to encouraging speculative suits since at the time of filing the petition, the Petitioner had not been removed from the membership of the Assembly. This specific issue therefore fails on the basis of the doctrine of ripeness which was defined and aptly applied by Mativo J in Republic v National Employment Authority & 3 others Ex-Parte Middle East Consultancy Services Limited [2018] eKLR where the learned Judge held:

*“44. In my view, these proceedings are unmerited, misconceived, and, pre-mature. First, the final decision had not been made. The application was still under consideration. The letter asking for a status report is not a decision. It is part of the vetting process. There is no decision capable of being quashed. The ex parte applicant ought to have subjected itself to the legally laid down vetting process and respond to the complaints against it instead of rushing to Court.*

*45. This brings into focus the principle of ripeness which prevents a party from approaching a Court prematurely at a time when he/she has not yet been subject to prejudice, or the real threat of prejudice, as a result of conduct alleged to be unlawful...The principle of ripeness was aptly captured by Krieglger J in the following words: “The essential flaw in the applicants’ cases is one of timing or, as the Americans and, occasionally the Canadians call it, “ripeness”... Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallized, and not with prospective or hypothetical ones. Although, as Professor Sharpe points out and our Constitution acknowledges, the criteria for hearing a Constitutional case are more generous than for ordinary suits, even cases for relief on Constitutional grounds are not decided in the air. ...The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered.”*

*46. Lord Bridge of Harwich put it more succinctly when he stated:- “It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.” It is perfectly true that usually the Court does not solve hypothetical problems and abstract questions and declaratory actions cannot be brought unless the rights in question in such action have actually been infringed. The requirement of a dispute between the parties is a general limitation to the jurisdiction of the Court. The existence of a dispute is the primary condition for the Court to exercise its judicial function. On the other hand, mootness involves the situation where a dispute no longer exists. Ripeness asks whether a dispute exists, that is, whether it has come into being.*

*47. Ripeness refers to the readiness of a case for litigation; “a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” The final decision was yet to be made, hence, there is no decision to be quashed. The goal of ripeness is to prevent premature adjudication; if a dispute is insufficiently developed, any potential injury or stake is too speculative to warrant judicial action.”[emphasis added].*

79. In other words, to make the issue suitable for determination after the resolution to remove the Petitioner from the membership of the County Assembly, the Petitioner ought to have amended the petition so as to include or plead or challenge the issue of his removal from the County Assembly and seek an order or Declaration regarding the same. This would have enabled him to tender evidence on the issue, specifically, and which would have enabled the court decide on the merits thereof.

80. I observe that the Petitioner attempted to litigate on the issue of his removal from the County Assembly through his submissions where he lamented that he was removed from the Assembly but as stated above, as at the time of filing the submissions, the petitioner had been

removed from the Assembly through a different motion from the motion that he was challenging before this court through this petition. Submissions, it has been held time and again, are not a substitute of pleadings or evidence. As was held in Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, cited with approval in Efil Enterprises Limited v Dickson Mathambyo Kilonzo [2018] eKLR at paragraph 35 :

***“.....A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallize the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.”***

81. My finding therefore is that the petitioner has not proved any infringement of rights by ***denial of the Petitioner (and the people of South East Alego) of an opportunity to be represented in the County Assembly despite their political choice of their representative and denial of the Petitioner (and the people of the South East Alego) an opportunity to participate in the County Assembly of Siaya through their democratically elected representative by the resolution of the 2<sup>nd</sup> May 2019.*** This is because, as stated above, by the resolution of that day, the Petitioner was not removed from Assembly but from the membership of the House Committees and an act which I have already opined was done in breach of his right to a fair trial.

82. However, in my humble view, this does not mean that there could be no infringement of this right by subsequent actions of the Respondents. There could be infringement but the evidence availed before this court did not prove the infringement. I note that indeed the removal of the Petitioner from the office as a County Assembly member is a matter which raises legal questions and which indeed ought to be decided on, as was appreciated by the court in Opiyo Wandayi –vs- Speaker of the National Assembly (2016) eKLR. However, with no material and evidence brought before this court by the Petitioner and by virtue of the fact the issue was not pleaded and framed in the petition; and since the actions which led to him allegedly losing his membership in the County Assembly were based on different facts not akin to the facts pleaded in support of the Petition, the petitioner ought to move the court appropriately (if he so wishes) and have the court determine that particular question on pleaded facts.

83. As matters stand, the claim by the petitioner was speculative as far as the present petition is concerned and therefore the same cannot be sustained on that ground.

***iii. On alleged Infringement of the Petitioner's rights to fair administrative action (under Article 47 of the Constitution).***

84. Article 47 of the Constitution provide:

***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

85. The Petitioner pleaded that the Respondents failed to afford him the right to a fair administrative action as their decision was arbitrary as the Respondents failed to give sufficient reasons for the decision made against the Petitioner and further sought to penalize him twice despite the protective clothe of the Constitution and that this was in breach of Article 47 of the Constitution. The Petitioner prayed for ***a declaratory order to issue that the Resolution of the 2<sup>nd</sup> Respondents adopting the impugned motion of 2<sup>nd</sup> May 2019 discussing the conduct of the Petitioner violated the fundamental rights and freedoms of the Petitioner to a fair administrative action.***

86. In his submissions, the Petitioner repeatedly submitted (in relation to this issue) that the impugned act violated Article 47 of the Constitution and infringed the principles of natural justice in that if the conduct of the Respondents was to be considered as an administrative action, the same was not conducted in a proper manner as the Petitioner was never notified of the allegations against him or supplied with notice of those allegations to enable him adequately respond to the same and which was against the fair hearing principle. Further, that neither was he given an opportunity to be heard (and which was a cardinal Constitutional principle) as ***he was never given an opportunity to defend himself on the floor of the House before the decision was made for the admission of the Petitioner to the committee stage and further suspended the Petitioner without any evidence and all this was against natural justice principle as codified by Article 47 of the Constitution.***

87. In response to the petition, the Respondents on this issue deposed that the motion had been brought by a fellow member and pursuant to the powers of the County Assembly as donated by Article 119 of the Constitution as read together with section 15 of the County Government Act of 2012 and buttressed by the County Assembly Standing Orders, which motion was debated in chambers and passed where it was resolved that the Petitioner be suspended from membership of all Assembly Committees until his conduct was investigated and that in any event, the Petitioner participated in the debate. Further, it was deposed in contention that the suspension of the Petitioner was lawful pursuant to Order 113 of the Standing Orders and section 42(7) of the Leadership and Integrity Act of 2012 which allowed suspension of a state officer pending investigations and determination of allegations made against a public officer.

88. In their submission on the issue, it was contended that the Respondents did not act *ultra vires* as they acted in conformity with the provisions of Article 10 of the Constitution and further Article 115 and section 15 of the County Government Act 2012 and the County Standing Orders which mandated them to consider petitions brought before the Assembly and further order 113 of the Standing Orders of the County Assembly of Siaya which bestowed the 1<sup>st</sup> Respondent with the powers to suspend members from service of the House and the duration of the said suspension. Further that the suspension was lawful pursuant to section 42(7) of the Leadership and Integrity Act of 2012 which allowed suspension of a state officer pending investigations and determination of allegations made against a public officer. It was submitted that the Petitioner was a state officer by virtue of Article 260 of the Constitution. The suspension, it was submitted, was lawful and that the Committee had the jurisdiction under sections 15, 16 and 17 of the County Assemblies Powers and Privileges Act of 2017 which

provisions gave the Assembly powers to inquire into the matters constituting breach of privilege in terms of section 16.

89. It was further submitted that the process was not *ultra vires* as the notice of motion was presented on the alleged conduct of the Petitioner and it was given in the Order Paper and the Order Paper given to all the members present in the Assembly (including the Petitioner) and was issued and moved in the presence of the Petitioner, debated and passed and that the said debate was done according to procedure thus the process was not *ultra vires* but the Respondents acted within the law and within their mandate, with the Petitioner being accorded an opportunity at the tabling stage to make representation on whether the motion had disclosed any prima facie case to warrant referral to the Committee of Powers and Privileges where he actively participated. The Respondents contended that the Petitioner acquiesced to and participated in the proceedings and as such, was estopped from questioning the decision arising therefrom.

90. My examination of the above lengthy extract from the pleadings and submissions in my opinion discloses the question as to whether the Assembly in debating whether to submit the motion to the Powers and Privileges committee was a quasi-judicial body such that its actions were subject to the dictates of Article 47 of the Constitution.

91. In **Joseph Mbalu Mutava v Attorney General & another [2014] eKLR**, the learned judge held as follows (paragraphs 86 and 87):

***“Article 47 of the Constitution provides for the right to fair administrative action in the following words;***

***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

***(3) Parliament shall enact legislation to give effect to the rights***

92. In the academic text by S.A De Smith on ***Judicial Review of Administrative Action, Third Edition (1973) Stevens and Sons Limited, at page 60 it is stated that the term administrative refers to broad areas of governmental activity in which the repositories of power may exercise every class of statutory function, and that an administrative act cannot be exactly defined but includes the adoption of a policy, the making and issue of a specific direction and the application of a general rule to a particular case in accordance with the requirements of policy, expediency or administrative practice.***

93. In **Republic v Speaker of the National Assembly & 4 others Ex-Parte Edward R.O.Ouko [2017] eKLR**, the court was faced with a question as to whether Parliament in debating removal of the auditor general and subsequent referral of the motion to the parliamentary committee was in exercise of jurisdiction as a quasi-judicial body. The learned judge upon making reference to a number of authorities held:

***“108. Assuming that the procedure that was before Parliament was a mere inquiry as alleged by the Respondents, is such an inquiry outside the purview of judicial review? According to Lord Denning in Selvarajan vs. Race Relations Board [1976] 1 ALL ER 12:***

***“...it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on the persons affected by it. The fundamental rule is that, if a person may be subjected to pains and penalties, or be exposed to prosecution or proceedings or be deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case against him and be afforded a fair opportunity of answering it...”***

***111. According to the applicants, and this contention was not denied, upon the Constitution of the tribunal, the applicant stands to be immediately suspended to pave way for investigations. Clearly the proceedings leading to the Constitution of the Tribunal by the President, a process that is merely formal, may definitely expose the applicant to a legal hazard or other substantial prejudice. It is not just a mere formality since as a result of the Report of the Parliament and the consequential formation of the Tribunal, certain privileges, rights and interests of the applicant stand automatically suspended. It is therefore my view that in conducting its proceedings, pursuant to Article 251 of the Constitution, Parliament is undertaking an “administrative action” which is define in section 2 of the Fair Administrative Action Act as including:***

***(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or***

***(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;***

***112. So that even if, and I entertain my doubts about such a position, Parliament was not exercising quasi-judicial function pursuant to section 2(1) aforesaid, it was definitely undertaking an act that affects the legal rights or interests of the applicant to whom such action related. Accordingly it was undertaking an administrative action. It is now clear that it does not matter whether an action is described as quasi-judicial or administrative. (emphasis added)***

94. From the above decision, it is clear that the County Assembly, in debating the motion (as per the powers bestowed on it by section 15 of the County Government Act) which had the power to consequently refer the issue to the Powers and Privileges Committee, it was an administrative body and thus was subject to the provisions of Article 47 of the Constitution.

95. ***The only question is whether the provisions of Article 47 of the Constitution which guarantees every person the right to fair***

**administrative action breached or violated as alleged by the Petitioner.** The Petitioner pleaded that the Respondents failed to afford him the right to a fair administrative action as their decision was arbitrary as the Respondents failed to give sufficient reasons for the decision made against the Petitioner and further sought to penalize him twice despite the protective clothe of the Constitution and that this was in breach of Article 47 of the Constitution.

96. In his submissions, the Petitioner submitted (in relation to this issue) that the impugned act violated Article 47 of the Constitution and infringed the principles of natural justice in that if the conduct of the Respondents was to be considered as an administrative action, the same was not conducted in a proper manner as the Petitioner was never notified of the allegations against him or supplied with notice of those allegations to enable him adequately respond to the same and which was against the fair hearing principle and neither was he given an opportunity to be heard (and which was a cardinal Constitutional principle).

97. In response, it was contended by the Respondents that the Respondents acted as per the provisions of the law (on powers to debate on a motion presented in the House) and that the suspension of the Petitioner was lawful pursuant to Order 113 of the Standing Orders and section 42(7) of the Leadership and Integrity Act of 2012 which allowed suspension of a state officer pending investigation and determination of allegations made against a public officer. This position was maintained even in the submissions.

98. **Section 4(1) of the Fair Administrative Action Act, 2015** which was enacted pursuant to Article 47(3) of the Constitution provides that:

***“(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.***

***(2) Every person has the right to be given written reasons for any administrative action that is taken against him.***

***(3) “Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-***

***a. prior and adequate notice of the nature and reasons for the proposed administrative action;***

***b. an opportunity to be heard and to make representations in that regard;***

***c. notice of a right to a review or internal appeal against an administrative decision, where applicable;***

***d. a statement of reasons pursuant to section 6;***

***e. notice of the right to legal representation, where applicable;***

***f. notice of the right to cross-examine or where applicable; or***

***g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.***

***(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-***

***a. attend proceedings, in person or in the company of an expert of his choice;***

***b. be heard;***

***c. cross-examine persons who give adverse evidence against him; and***

***d. request for an adjournment of the proceedings, where necessary to ensure a fair hearing.***

***(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.”***

99. It can be seen from the above provisions of the implementing legislation to Article 47 of the Constitution that the rights protected pursuant to Article 47 are akin to those provided under Article 50 (fair hearing). The court in **J N N, (a Minor) M N M, suing as next friend v Naisula Holdings Limited t/a N School [2018] eKLR**, (Mativo J) held persuasively:

***“17. On the alleged violation of fair trial rights, I am clear in my mind that the argument propounded by the Respondents counsel represents the correct legal position. I find comfort in the Court of Appeal decision in J.S.C. vs Mbalu Mutava which succinctly elucidated the law in cases of this nature. It held that the right to a fair administrative action under Article 47 is a distinct right from the right to a fair hearing under Article 50 (1) of the Constitution.***

***18. Fair administrative action broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of Constitutional duties and statutory duties guided by Constitutional principles and policy considerations and that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law. Fair hearing under Article 50 (1) applies in proceedings before a court of law or independent and impartial tribunals or bodies.***

19. A similar finding was arrived at by Majanja J in Dry Associates Limited vs CMA & Another cited by the Respondents counsel where the leaned judge held that Article 50 applies to a court, impartial tribunal or a body established to resolve a dispute while Article 47 applies to administrative action generally.

100. Thus the two rights are distinct. Applying the above legal provisions to the facts herein, it is clear that the Petitioner's right to fair administrative action were infringed at the time of debating the motion which led to his removal from the house committee. This is because it is clear as discussed earlier in this judgment that when the Order Paper was given to the members (including the Petitioner) on the day of the debate, clearly, he was not afforded prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations in that regard and neither was he given information, materials and evidence to be relied upon in making the decision or taking the administrative action.

101. As was held in Republic v Speaker of the National Assembly & 4 others Ex-Parte Edward R.O.Ouko (supra), at paragraph 79, even though Parliament is empowered to regulate its own procedures, however whatever procedure Parliament adopts, it must be Constitutional and lawful. This is my understanding of section 4(6) of the *Fair Administrative Action Act* which provides that:

***“Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.***

102. **It is my humble view, therefore that the County Assembly, in debating the motion which led to the suspension of the Petitioner from the House Committees, they violated the Petitioner's right to fair administrative action.**

103. On the process of debating the Petitioner and which led to his removal from the Assembly, as I have opined elsewhere above in this judgment, in the contempt of court application dated 10<sup>th</sup> June 2019 filed by the Petitioner (and which application was compromised and not heard on merit) it was disclosed that the Speaker of the County Assembly presided over a meeting of the Powers and Privileges Committee which allegedly sat and debated on the conduct of the Petitioner and resolved to suspend him from the Assembly and which action was pursuant to a petition by some registered voters and which petition was received by the Assembly on 7<sup>th</sup> May 2019 seeking for the removal of the Petitioner from office as a Member of the County Assembly. The Committee as per the replying affidavit to the said Application sat and deliberated and tabled its report on 4<sup>th</sup> June 2019, which report was discussed in the Assembly and was adopted by the Assembly.

104. The above issue in my humble view, was unripe as far as this Petition is concerned. Furthermore, the Petitioner did not amend the Petition after the issue was “ripe” and neither was there any evidence tendered on how the act by the Respondents in that regard was in breach of the right to fair administrative action.

105. **As I have stated above, the proceedings leading to the removal of the Petitioner from the Assembly were separate from the ones which were subject of this petition. Since the Petitioner did not amend his pleadings, or even tender evidence to prove the said infringement, a declaratory order cannot issue over the same.**

106. **On whether the petition ought to succeed,** Article 22(1) of the Constitution bestows a right upon every person to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.” Further, Article 23(1) of the Constitution confers on this court the jurisdiction (in accordance with Article 165) to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom **in the Bill of Rights.** Sub-Article 3 provides that “in any proceedings brought under Article 22, a court may grant **appropriate relief, including:-**

***a. a declaration of rights;***

***b. an injunction;***

***c. a conservatory order;***

***d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;***

***e. an order for compensation; and***

***f. an order of judicial review.***

107. The powers of this court to remedy an infringement of a right or freedom under the Bill of Rights was appreciated in the case of Kenya Hotel Properties Limited v Attorney General & 5 others [2018] eKLR where E. C Mwita J citing with approval the Supreme Court's decision (Mutunga C.J as he then was) in Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estates & 4 others [2013] eKLR held:

***“42. I entirely agree with His Lordship, the retired Chief Justice, that there is no remedy the High Court is unable to grant under the Constitution. This fact emerges clearly from Article 23 (3) of the Constitution on the remedies the court can grant. The court is empowered to grant appropriate relief, including declaration of rights, injunctions and conservatory orders among others, leaving no doubt that the reliefs grantable by the court are inexhaustible. They are at the discretion of the court depending on the facts and circumstances of each case.***

43. ***As to what an “appropriate remedy” is I can do no better than refer to the definition adopted by the Constitutional court of South Africa in the case of Fose v Minister of Safety and Security 1997(3) SA786 (CC) (7) BCLR 851 CC that:***

**“[A]ppropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights...In our context an appropriate remedy must mean an effective remedy”**(emphasis added)

**44. And in *Minister of Health & others v Treatment Action Campaign & others* [2002] ZACC 15; 2002(5) SA 721 BCLR (CC), the same court observed that where a breach of any right has taken place, a court is under a duty to ensure that effective relief is granted, the nature of the right infringed and the nature of the infringement providing guidance as to the appropriate relief in the particular case.**

**45. In that regard, therefore, it is clear from both Article s 22 and 23 as read with Article 165(3) of the Constitution that the court is to redress denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights. That implies a Petitioner would have to move the court for purposes of determining violation of rights and fundamental freedoms and thereafter, the court on being satisfied as to the violations, would prescribe appropriate redress on the basis of the facts and circumstances of the case...”**

108. It follows that this court in enforcing the Bill of Rights can grant any relief that is required to protect and enforce the Constitution and depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.

109. Turning to the remedies sought by the Petitioner, the Petitioner prayed for a ***declaratory order to issue that the Resolution of the 2<sup>nd</sup> Respondents adopting the impugned motion of 2<sup>nd</sup> May 2019 discussing the conduct of the Petitioner violated the fundamental rights and freedoms of the Petitioner to a fair hearing.***

110. **As I have found in this judgment, indeed the Resolution of 2<sup>nd</sup> May 2019 adopting the impugned motion on the same day that it was passed was in violation of the Petitioner’s rights to a fair trial and fair hearing as he was not informed of the charge, with sufficient detail to answer it.** Further, the petitioner was given the Order Paper on the same day as the House was debating his alleged conduct and thus his right to have adequate time and facilities to prepare a defence was infringed.

111. ***In the premises, a declaration is hereby issued declaring that the Resolution of the 2<sup>nd</sup> Respondent adopting the impugned motion of 2<sup>nd</sup> May 2019 discussing the conduct of the Petitioner violated the fundamental rights and freedoms of the Petitioner to a fair trial and fair hearing.***

112. The Petitioner further prayed for a declaratory order to issue that the Resolution of the 2<sup>nd</sup> Respondents adopting the impugned motion of 2<sup>nd</sup> May 2019 discussing the conduct of the Petitioner violated the fundamental rights and freedoms of the Petitioner to a fair administrative action. As I have opined when considering this limb, it is clear that the Petitioner’s right to fair administrative action was infringed at the time of debating the motion which led to his removal from the House Committee. This is so because the Order Paper was given to the members (including the Petitioner) on the day of the debate, which clearly shows that he was not afforded prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations in that regard and neither was he given information, materials and evidence to be relied upon in making the decision or taking the administrative action.

113. **For the above reasons, I find and hold that a declaration ought to issue and I hereby issue a declaratory order declaring that that the Resolution of the 2<sup>nd</sup> Respondents adopting the impugned motion of 2<sup>nd</sup> May 2019 discussing the conduct of the Petitioner violated the fundamental rights and freedoms of the Petitioner to a fair administrative action.**

114. The Petitioner further prayed for an order of certiorari to issue quashing the resolutions of the 2<sup>nd</sup> Respondents adopting the said motion of 2<sup>nd</sup> May 2019 and further prayed for an order of prohibition to issue prohibiting the implementation of the resolutions of the 2<sup>nd</sup> Respondents made on the 2<sup>nd</sup> May 2019 adopting the impugned motion filed to discuss the conduct of the Petitioner.

115. For the reasons that the decision by the Respondents was in violation of the Petitioner’s right to a fair trial and fair hearing and further violated his right to a fair administrative action as he was not afforded adequate time to prepare for his defense and further as the Respondents did not give him sufficient time and materials to enable the petitioner defend himself, it follows that such a decision ought not to stand. The same ought to be quashed.

116. **For the above reasons, I hereby call into this court for purposes of quashing and I hereby quash the Resolution of the 2<sup>nd</sup> Respondents adopting the said motion of 2<sup>nd</sup> May 2019.**

117. **Having quashed the said impugned Resolution, there is nothing that remains for purposes of implementation and therefore the prayer for prohibition cannot issue as it would be superfluous to prohibit that which does not exist after it is quashed.**

118. **On the whole, the petition herein filed on 12<sup>th</sup> May 2019 is found to be substantially meritorious and the orders sought in the petition as per prayers 1,2,3 and 5 are granted as prayed. Prayer 4 is declined for the reasons given in the body of this judgment**

119. **The Respondents shall pay to the Petitioner Costs of this petition to be agreed or be assessed by the court.**

120. Orders accordingly.

**Dated, signed and Delivered at Siaya this 7<sup>th</sup> Day of May 2020 via skype due to covid 19 situation**

**R.E. ABURILI**

**JUDGE**