



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**PETITION NO. 2 OF 2020**

**HON. AMEJA ZELEMOI.....PETITIONER**

**=VERSUS=**

**THE COUNTY ASSEMBLY OF BARINGO**

**SPEAKER OF THE COUNTY ASSEMBLY OF BARINGO**

**HON. JACOB CHEBOIWO.....RESPONDENTS**

**JUDGMENT**

**Introduction**

1. By a petition dated 19<sup>th</sup> March 2020, the Petitioner who was the Deputy Speaker of the County Assembly of Baringo before his purported removal by the 1<sup>st</sup> Respondent County Assembly on 17<sup>th</sup> March 2020, which removal is subject of this petition, seeks relief of the court in the nature of several declarations and orders as follows:

*“1. A declaration that the procedure followed and the decision by the Respondents to remove the Petitioner herein from the position of a Deputy Speaker/Chairperson of Committees is in violation of Articles 10, 28, 29 (d), 47 and 50 of the Constitution of Kenya.*

*2. A declaration that the resolution of 17<sup>th</sup> March, 2020 by the 1<sup>st</sup> Respondent to remove the Petitioner herein from the position of a Deputy Speaker/Chairperson of Committees of the 1<sup>st</sup> Respondent is unconstitutional, null and void and thus of no consequence and the same be and is hereby quashed.*

*3. A declaration that the resolution of 17<sup>th</sup> March, 2020 by the 1<sup>st</sup> Respondent electing the 3<sup>rd</sup> interested party herein as a Deputy Speaker/Chairperson of Committees of the 1<sup>st</sup> Respondent is unconstitutional, null and void and thus of no consequence and the same be and is hereby quashed.*

*4. That the Petitioner herein be reinstated as the Deputy Speaker of the County Assembly Baringo unconditionally with full salary, benefits and allowances from the 17<sup>th</sup> March 2020.*

*5. That the Honourable Court be pleased to order for compensation of the Petitioner by way of general damages for violation of the Petitioner's rights.*

*6. An order for costs.”*

**The Petitioner's case**

2. The Petitioner's case is set out in the Petition in legal argument as follows:

*“36. THAT the process and mode of removing the Petitioner as a Deputy Speaker/Chairperson of Committees constitutes a gross violation by the Respondents of the National Values and Principles of Governance set out in article 10 of the Constitution specifically rule of law as the 1<sup>st</sup> Respondent did not follow the procedure for removing a Deputy Speaker from office.*

*37. THAT Articles 47 and 50 of the Constitution and Standing Order 67 affords the Petitioner a right to be heard and an opportunity to defend himself, and which right was denied by the Respondents.*

38. THAT further, the Respondent's decision, action and omissions offend the rule of law and natural justice.

39. THAT the actions of the Respondents have violated the Petitioner's human dignity and rights as enshrined by articles 27, 28, 47 and 50 of the Constitution.

40. THAT the removal of the Petitioner as a Deputy Speaker/Chairperson of Committees was actuated by apparent malice and ill-will on the part of the Respondents.

41. THAT the actions of the Respondents clearly indicate that they have no respect for the spirit of the Constitution and the rule of law.

42. THAT the actions of the Respondent herein, are absurd, unreasonable, barbaric, rustic, criminal, oppressive and vindictive.

43. THAT the decision of the Respondents is not only outrageous but also capricious and whimsical.

44. THAT it is the legitimate expectation of the Petitioner that, barring any calamity, he would serve his full term unless removed through known and established due process.

#### *d. VIOLATIONS OF THE CONSTITUTION AND FUNDAMENTAL RIGHTS AND FREEDOMS*

*I. To the extent that the Respondents blatantly, neglected and ignored to afford the Petitioner a chance to be heard or follow the provisions of the law in removing the Petitioner from the position of Deputy Speaker/Chairperson of Committees, the provisions and guiding principles of all aspects of good governance, fair administrative action, freedom from discrimination in the Republic as enshrined in the Constitution of Kenya 2010 have been violated.*

*II. The Respondent is also in violation of Article 10 of the Constitution that sets out the national values and principles of governance that binds all state officers, state organs, public officers and all persons whenever they apply or interpret the constitution, enact, apply or interpret any law, make or implement public policy decisions.*

*III. To the extent that the Respondents failed to follow the due process for removal of a Deputy Speaker as envisaged under section 11 of the County Governments Act and Standing Order No. 61 and 62 of the 1<sup>st</sup> Respondent's Standing Orders, the Respondents are in violation of Article 10 of the Constitution on principles of governance and national values specifically rule of law.*

*IV. That in ambushing the Petitioner on the floor of the house and preferring trumped charges with no evidence being tendered in support of the same, the Respondents subjected the Petitioner to psychological torture contrary to Article 29 (d) of the Constitution.*

*V. He was stabbed from the back literally as he could not confront his accusers when he was not given notice of the motion at all let alone in good time.*

*VI. Further, the removal of the Petitioner without following due process offends the provisions of Article 47 that lays the basis and accords the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*

*VII. Further, removal of the Petitioner without according him a chance to be heard offends the provisions of Article 50 that affords the Petitioner the right to fair hearing and have any dispute can be resolved by the application of law decided in a fair and public hearing before a court or in appropriate, another independent and impartial tribunal or body.*

*VIII Electing the 3<sup>rd</sup> respondent when the house had adjourned sine die”*

3. The Petitioner relied on facts set out in paragraphs 17-35 of the Petition to indicate that he was not afforded an opportunity to be heard, as follows:

#### **“C. THE FACTS**

*17. THAT the Petitioner herein was elected by Members of the 1<sup>st</sup> Respondent pursuant to Sections 21 (3) of the Election Act and 9 (4) & (5) of the County Governments Act to be the Deputy Speaker/Chairperson of Committees on the 6<sup>th</sup> September, 2017.*

*18. THAT the Petitioner has performed his duties diligently as the Deputy Speaker/Chairperson of Committees and has served the 1<sup>st</sup> Respondent in good faith without any interference.*

*19. THAT on the 17<sup>th</sup> March, 2020, the Leader of Majority of the 1<sup>st</sup> Respondent gave a notice of intention to move a motion dated 17<sup>th</sup> March, 2020 seeking to remove the Petitioner herein as a Deputy Speaker/Chairperson of Committees on various charges enumerated therein.*

*20. THAT on the same date of 17<sup>th</sup> March, 2020, the Leader of Majority of the 1<sup>st</sup> Respondent moved a motion to have the Petitioner herein removed as a Deputy Speaker/Chairperson of Committees and which motion was debated and approved by the 1<sup>st</sup> Respondent.*

21. THAT the Petitioner was not served with the charges by the Respondents to enable him respond to the same.
22. THAT the Petitioner only learnt of the motion to remove him from office through the day's order paper.
23. THAT the Petitioner was ambushed on the floor of the house to respond to the allegations against him.
24. THAT a Notice of Motion was given and moved by the Leader of Majority, debated and voted on hurriedly by the Members of the 1<sup>st</sup> Respondent without according the Petitioner a right to be heard as envisaged under Articles 47 and 50 of the Constitution and Standing Order No. 67 of the 1<sup>st</sup> Respondent's Standing Orders.
25. THAT immediately thereafter, a motion to adjourn the Assembly was moved. The same having been seconded was opened for debate by the members.
26. THAT midway through the debate of the motion to adjourn, the Assembly was adjourned for a period of 30 minutes on account that there was a vacancy in the office of Deputy Speaker and thus members needed to consult.
27. THAT the Assembly was reconvened and a new order paper was sneaked in to the Assembly. A motion was then moved to elect a new Deputy Speaker.
28. THAT the 3<sup>rd</sup> Respondent herein was then elected to replace the Petitioner but he was not sworn in as a Deputy Speaker as required in law.
29. THAT after the election, the 1<sup>st</sup> Respondent reverted to the motion to adjourn which had been purportedly suspended. That there is no provision for suspension of a motion so that a new motion can be introduced and have it dispensed with first.
30. THAT the entire proceedings of the 1<sup>st</sup> Respondent of 17<sup>th</sup> March, 2020 were a sham, a charade, and a fraud engineered by the Respondents herein to humiliate the Petitioner and to have him removed from office.
31. THAT the charges preferred against the Petitioner are trumped up charges driven by malice and hatred towards the Petitioner as there was no iota of evidence presented by the mover of the motion.
32. THAT the Petitioner contends that the procedure for removal of a Deputy Speaker is similar, with necessary modifications, to that of the removal of a Speaker of County Assembly.
33. THAT the procedure for removal of a Speaker of a County Assembly is provided for under section 11 of the County Governments Act and the Standing Orders of the County Assembly.
34. THAT in the case of the 1<sup>st</sup> Respondent herein, the procedure in the Standing Orders is stipulated under Standing Order No. 62.
35. THAT the Petitioner contends that the resolution passed by the 1<sup>st</sup> Respondent was not supported by 75% of all the members of the 1<sup>st</sup> Respondent as there was no actual voting conducted.”

4. The Petitioner filed a Supporting Affidavit to verify the facts relied on as follows:

- “2. THAT I was elected by Members of the 1<sup>st</sup> Respondent pursuant to Sections 21 (3) of the Election Act and 9 (4) & (5) of the County Governments Act to be the Deputy Speaker/Chairperson of Committees on the 6<sup>th</sup> September, 2017. I believe; as advised by advocates on record, that I remain the Deputy Speaker of the County Assembly of Baringo unless lawfully removed from office. See a copy of oath and affirmation office I signed on 6/9/2017 annexed hereto and marked AZ 1 (a) and (b).
3. THAT I have performed my duties diligently as the Deputy Speaker/Chairperson of Committees and have served the 1<sup>st</sup> Respondent in good faith without any interference.
4. THAT on the 17<sup>th</sup> March, 2020, the Leader of Majority of the 1<sup>st</sup> Respondent gave a notice of intention to move a motion dated 17<sup>th</sup> March, 2020 seeking for my removal as a Deputy Speaker/Chairperson of Committees on various charges enumerated therein. See copy of the notice annexed hereto and marked AZ 2.
5. THAT on the same date of 17<sup>th</sup> March, 2020, the Leader of Majority of the 1<sup>st</sup> Respondent moved a motion to have me removed as a Deputy Speaker/Chairperson of Committees and which motion was debated and approved by the 1<sup>st</sup> Respondent. See a copy of order paper annexed hereto and marked AZ 3.
6. THAT I was not served with the charges by the Respondents to enable me respond to the same at all let alone in good time.
7. THAT I only learnt of the motion to remove me from office through the day's order paper.
8. THAT I was ambushed on the floor of the house to respond to the allegations against me and I was cornered completely as the

*trumped allegations were not only wild but also required documentary grounding that was never supplied to me.*

*9. THAT a Notice of Motion was given and moved by the Leader of Majority, debated and voted on hurriedly by the Members of the 1<sup>st</sup> Respondent without according me a right to heard as envisaged under Articles 47 and 50 of the Constitution and Standing Order 67 of the 1<sup>st</sup> Respondent's Standing Orders.*

*10. THAT immediately thereafter, a motion to adjourn the Assembly was moved. The same having been seconded was opened for debate by the members.*

*11. THAT midway through the debate of the motion to adjourn, the Assembly was adjourned for a period of 30 minutes on account that there was a vacancy in the office of Deputy Speaker and thus members needed to consult.*

*12. THAT the Assembly was reconvened and a new order paper was sneaked in to the Assembly. A motion was then moved to elect a new Deputy Speaker. See a copy of supplementary order paper annexed hereto and marked AZ 4.*

*13. THAT the 3<sup>rd</sup> Respondent herein was then elected to replace the Petitioner. However, he was not sworn in as required in law as a Deputy Speaker.*

*14. THAT after the election, the 1<sup>st</sup> Respondent reverted to the motion to adjourn which had purportedly suspended. That there is no provision for suspension of a motion so that new motion can be introduced and have it dispensed with first.*

*15. THAT the entire proceedings of the 1<sup>st</sup> Respondent of 17<sup>th</sup> March, 2020 were a sham, a charade, and a fraud engineered by the Respondents herein to humiliate and to have me removed from office.*

*16. THAT the charges preferred against me are trumped up charges driven by malice and hatred towards me as there was no iota of evidence presented by the mover of the motion.*

*17. THAT it is my contention, and I have been advised by my advocates, that the procedure removal of a Deputy Speaker is similar, with necessary modifications, to that of the removal of a Speaker of County Assembly.*

*18. THAT the procedure for removal of a Speaker of a County Assembly is provided for in section 11 of the County Governments Act and the Standing Orders of the County Assembly.*

*19. THAT in the case of the 1<sup>st</sup> Respondent herein, the procedure in the Standing Orders is stipulated under Standing Order No. 62.*

*20. THAT a notice of intention to move a motion for removal of a Speaker as per Standing Order No. 62 must be supported by at least one third of all the members.*

*21. THAT I am aware that the Respondents herein, through the office of the Clerk of the County Assembly, were advised by the Legal Office of the 1<sup>st</sup> Respondent that the procedure for removal of a Deputy Speaker from office is similar, with necessary modifications, to that of a Speaker but the Respondents herein ignored the advice of the Legal Counsel, "manufactured" their own procedures not known in law to orchestrate my removal from office for political reasons which cannot be countenanced by the law and court. See a copy of the legal opinion annexed hereto and marked AZ 5.*

*22. THAT it is my contention and position that the resolution passed by the 1<sup>st</sup> Respondent not supported by 75% of all the members of the 1<sup>st</sup> Respondent as there was no actual voting conducted."*

### **The Respondent's case**

5. The respondents have responded to the Petition challenging the petitioner's right to the relief and denying any violation of the petitioner's right and his entitlement to the reliefs sought as set out their case in the Affidavit of the 2<sup>nd</sup> Respondent Speaker of the County Assembly, almost in similar terms as that of the Clerk of the Assembly and the 3<sup>rd</sup> respondent asserting the validity of his election upon removal of the petitioner, as follows:

*"a) That the Petitioner was heard as can be seen in subsequent paragraphs herein and the Hansard annexed to the petition and further annexed hereto below.*

*b) That as a result of the foregoing, the 3<sup>rd</sup> Respondent was elected as the chair of committees, a position previously held by the Petitioner.*

*c) That by the time the 3<sup>rd</sup> Respondent was appointed, the seat was already vacant.*

*d) That by unanimous motion, the proceedings were adjourned indefinitely, not because of any intention but as a result of a presidential directive as a result of MERS- COV outbreak commonly known as Covid - 19 (Corona Virus disease) caused by corona virus outbreak which necessitated business to be adjourned and people to self-quarantine and work from home as seen from the Hansard, proceedings which ended at 1918 hours.*

e) That given that Covid-19 is a severe respiratory disease the business of the house could not be proceeded with.

f) That I invite the court to take Judicial Notice that even the court had to be suspended and people work from home initially as a directive by the commission on administration of justice and subsequently by the directive from the Judiciary through the letter by the Chief Registrar of the Judiciary. See annexed notice marked DKK 1.

g) The motion for removal of a person, from office, by dint of standing order no. 68(1) of the Baringo County Assembly Standing Orders to take precedence over all business on the order paper for the day.

h) That the 1<sup>st</sup> Respondent is actually a citadel of hope and epitome of Rule of Law and not an abyss of lawlessness.

i) That we are not in a state of impunity or transgressions of human rights that we are sticklers to the rule of law.

j) That we have followed the Constitution to the letter and enforced its spirit wholeheartedly.

k) That the procedures followed were correct and the Petitioner was heard.

4. THAT the prayers sought cannot be issued as there is a substantive holder of office who is in the chair of chairs colloquially referred as the Deputy Speaker and as such there is nothing to conserve.”

6. On the facts, the Speaker (2<sup>nd</sup> respondent herein) deponed that:

“5. THAT in response to the grounds, I wish to state as follows:

a) That the Petitioner was elected as an MCA, subsequently upon convening of the County Assembly the Petitioner was elected as chairperson of the Committees.

b) That as a member of the County Assembly and Chair of chairs, he was entitled to sit in the House Business Committee.

c) The House Business Committee received a notice dated 16/3/2020 enumerating 8 grounds for removal of the petitioner; See annexure marked DKK 2.

d) That the notice was submitted to the County Clerk who upon advice from legal placed it before the House Business Committee for listing.

e) The notice was signed by the Proponent that is, Reuben Chepsongol majority whip Jubilee party.

f) The list was accompanied with 36 signatures of persons supporting the notice of intention to remove the Deputy Speaker Hon. Ameja Zelemoi.

g) The number was over and above the 15 members required.

6. THAT upon receiving the notice and satisfying ourselves of compliance with the law, the same was placed before the House Business Committee for purposes of the order paper for the day.

7. THAT were satisfied that the Petitioner had received notice and he participated in prioritizing motions in the House Business Committee where many matters were deliberated among them the following:

a) Moving of the motion.

b) Moving of the notice.

c) Adjournment of the motion.

8. THAT they were all passed and the Petitioner as the Vice Chair of the House of Business Committee was present and participated fully full particular are within his knowledge.

9. THAT the motion was then tabled as per the procedure after notice was given and the Petitioner fully participated and defended himself as set out in the hansard herein above enclosed;

10. THAT using Standing Order number 62, which was applied with modifications, the deputy speaker was entitled to defend himself on the floor of the house.

11. THAT there is no other procedure for defending himself.

12. THAT the Petitioner answered each of the allegations some of which were satisfactory, some were not answered satisfactorily as can be gleaned from the Hansard.

13. THAT thereafter, the matter was put to vote and was voted in affirmative overwhelmingly.

14. THAT upon the vote being cast as can be seen from the Hansard, the Petitioner walked out of the Assembly which he is free to do and did not participate in the rest of the proceedings out of his own volition.

15. THAT from page 27, subsequently proceedings were suspended for 30 minutes to deliberate and as such the supplementary order was properly introduced and discussed as annexed to the petition.

16. THAT subsequently, there was a need to elect a replacement and the 3rd Respondent was unanimously elected and took office as per the Hansard annexed hereto before.

17. THAT the 1st Respondent, Assembly could not have anticipated debate so as to prepare an order for election of a new Deputy Speaker/ Chair of committee of chairs.

18. THAT consequently, that business can only be a consequential business and was done by a supplementary order as provided by the law.

19. THAT the entire proceedings were proper and the procedure was fully followed.

20. THAT the Standing Orders provide for the process of removal of the Speaker and the matters which the Speaker has discretion.

21. THAT instead of defending himself he:

a) Accused the seconder of the motion of corruption without bringing a substantive motion to discuss the seconder of the motion.

b) As a corollary, the guilt or otherwise of the seconder does not absolve the petitioner from misconduct.

c) The Petitioner laid no claim against the mover.

d) The Petitioner did not deny any of the specific accusations.

e) The Petitioner did not deny the specific case against the driver.

f) The Petitioner raised issues of tribe without substantiating them.

22. THAT prior to the moving of the motion, 36 members signed a motion for removal pursuant to Standing Order No. 62 which is above the 15 members required to sign signaling support for the motion; See annexed signatures marked annexure marked DKK 3.

23. THAT the accusations are serious in that:

a) He was assigned a government motor Vehicle to use in Churo/Amaya in Baringo County only for the motor vehicle to be seen carrying cabbages in Nakuru town.

b) The foregoing brought the County Assembly to disrepute.

c) Further, he physically fought an Honourable member of the County Assembly Hon. Lotela within the precincts of the county assembly and had no defence for such dishonourable conduct (See annexed excerpt from the power and privileges committee of the assembly marked as DKK4.

d) He misused government vehicle during Christmas and New Year eve to sale cabbage. The report was that the motor vehicle is now grounded as a result of misuse by the Petitioner.

e) The Petitioner abused his office in removal of HON. BETTY Birchogo from the County Assembly forum and HON Diana Siritis as KANU chief whip, un-procedurally.

24. THAT regarding the procedure for removal of the "Deputy Speaker", I wish to state as follows:

25. THAT under the Standing Orders, the only procedure provided is that of the Speaker and as a result, I invoked Standing Order Number 1(1) which provides that in all cases where matters are not expressly provided under standing orders of the assembly.

26. THAT I was guided by the constitution of Kenya, statute law, usages forms, precedent, customs, Standing Orders, procedures of the county assemblies and parliament of Kenya, and other jurisdictions to the extent that there are applicable to Kenya as required

under Standing Order Number 1(2).

27. THAT thus, the default clause of the Standing Orders is used, that is, majority decision is made.

28. THAT the Applicant wanted for us to use the rules required to be used against a Speaker but the house made directions that given that it is not specifically provided then the simple majority is to be used as the same is provided in Standing Order number 68(1) which provides that

**"Unless otherwise provided under the constitution, a question arising, in the county assembly shall be decided by a majority of the members in the house, present and voting."**

29. THAT I drew an analogue with the County Assembly Services Board, No. 24 of 2017, where the removal of the Clerk under is done by a simple majority.

30. THAT upon giving proper directions, the decision was properly made with an overwhelming majority as provided by the Standing Orders.

31. THAT regarding the decisions/ precedents annexed, I wish to state as:

a) That as regarding to **Petition No. 44 of 2015**, the same is not in all fours with this case as the Standing Orders of Nakuru County, in particular Standing Order No. 64 provided for 75% and Standing Order No.237 (6) was amended for immediate implementation.

b) Therefore, clearly the amends were targeted on Samuel Tunoi as opposed to the Baringo County Assembly where there was no express provision hence reliance on the default clause under the doctrine of *Expresso unius est exclusio alterius*.

c) Consequently the listing of the speaker, governor for incapacity, governor by impeachment, deputy governor, member of county executive committee; there is no express provision for the deputy speaker under Standing Orders no. 61-66 or any other standing orders.

d) Indeed the aforementioned case dealt with damages not as in the present case.

e) THAT the decision in **Nakuru Judicial Review No. 1 of 2015** by my predecessor deals with a Speaker whose protection is provided expressly.

32. THAT I wish to state further as follows:

a. The Petitioner still remains a Member of the County Assembly with all the privileges of an MCA and as such he has not lost office but lost trust of the people he was leading.

b. THAT I approved the Motion to elect a Chairperson of Committees to Standing Order No. 14 (3 & 4) as read with Standing Order 1 of the Standing Orders of the County Assembly of Baringo.

c. THAT under Standing 14(3), the election of the Chairperson of Committees should be elected as soon as it is practical and in this case it was practical.

d. THAT indeed under Standing Order No. 15, from time to time the speaker may approve 2 members capable of exercising powers of the Chairperson of Committees as the speaker's panel.

e. THAT it was thus necessary to have the office of Chairperson of Committees filled as there were presidential directives regarding working from home to avert corona virus epidemic.

f. THAT it was necessary to have the office filled and all committees be running during the pandemic for avoidance of affecting affairs of the county assembly in any case, during or immediately after the COVID19 Pandemic.

33. THAT regarding annexure AZ5, I received the advice and being a Speaker exercised my powers and wish to confirm that:

a) The Petitioner was not condemned unheard.

b) We observed rules of natural justice.

c) That the Petitioner was accorded a fair hearing. d) The petitioner was heard on the floor of the house.

e) The petitioner understood the procedure, the voting and never requested or merited for an adjournment and in any case he was not prejudiced.

f) THE petitioner defended himself on the floor of the house and produced all documents he required and raised no

objection on the procedure or otherwise.

g) *The issues raised herein are an afterthought.*

34. THAT regarding the application and Petition, I wish to state as follows:

a) *The same has no merit and it has been overtaken by events as the 3<sup>rd</sup> Respondent is firmly in office having assumed office as Chairperson of Committees on the day of election and the Petitioner is still carrying out his duties as a member of the county assembly representing Churo Amaya ward.*

b) *There is no constitutional breach shown which was occasioned and that the County Assembly of Baringo, followed the rule of law.*

c) *The Petitioner was heard as required under Articles 47 and 50 and the Fair Administrative Actions Act and as a fact the Petitioner did not seek to adjourn the motion or pray for more time if he needed the same.*

d) *That I am not aware of any malice or ill will as I only received a duly submitted notice and motion hence I cannot impute improper motive on members.*

e) *That the decision was based purely on facts available and the law application and as such contents of paragraphs 36 - 43 are denied as being baseless.*

f) *That none of the particulars of violations are true and they do not meet a Constitutional threshold.*

g) *That the election of the 3<sup>rd</sup> Respondent was during the time the house was in session.*

35. THAT consequently, the prayers sought are not in and available as:

a) *The default procedure was used, since the Applicant is not a Speaker.*

b) *The resolution of 17/3/2020 met the required threshold.*

c) *The 3<sup>rd</sup> Respondent was properly elected as a Deputy Speaker/ Chairperson of Committees.*

d) *There are no salaries, allowances which have been withheld as the Petition was fully removed.*

e) *The Petitioner is not entitled to damages.*

36. THAT the application and petition ought to be dismissed with costs.”

### **Submissions**

7. Counsel for the parties filed respective Written Submissions as judgment was reserved. In brief, the petitioner emphasized breach of right to fair administration action in the process leading to his removal and the lack necessary majority to effect the decision to remove a deputy speaker from office. On the other hand, the respondents asserted that they had granted the petitioner a full opportunity to be heard on the floor of the House on the 17<sup>th</sup> march 2020 having had notice of the charges in his capacity as vice chair of the Business Committee which set the process of hearing in motion after receiving notice therefor on 16<sup>th</sup> March 2020; that a deputy speaker unlike a Speaker of the County Assembly could be removed from office by a simple majority of members of the Assembly; and in any event urging that there is no property in public office and the petitioner could not therefore recover damages for any withheld allowances.

### **Case law authorities**

8. The Petitioner relied on the authorities of *Samuel Tonui V. The Speaker, Nakuru County Assembly & 2 Others*, Nakuru Petition No. 4 of 2015 (R. Lagat Korir); *Republic V. Clerk, County Assembly of Baringo ex-parte William Kassait Kamket* (2015) eKLR (Kimondo, J.) and *Republic V. Clerk, County Assembly of Baringo ex-parte William Kassait Kamket* (2015) eKLR (Radido, J); *Nick Githinji Ndichu v. Clerk, Kiambu County Assembly & 3 Ors* [2018] eKLR in support of the argument that the petitioner was not removed in accordance with the lawful procedure for the removal of Speaker that requires support by 75% majority, which it was contended applied similarly to case of Deputy Speaker. The removal of the petitioner was challenged on the principle of legitimate expectation created under section 9 of the County Governments Act that a deputy Speaker would hold the position for the entire term of Assembly, citing *Justice Kalapna H. Rawal v. Judicial Service Commission & 3 Ors* (2016) eKLR on the doctrine of legitimate expectation.

9. The Respondents distinguished the above decisions which were cited in the Petitioner’s supporting affidavit in that the *Tunoi* case related to Standing Orders at Nakuru County Assembly which provided for a 75% majority for removal of Deputy Speaker and the *ex p. Kamket* decisions related to the removal or suspension of a Speaker and not a deputy Speaker, urging that there was no provision for removal of a deputy Speaker and the applicable procedure was therefore one of simple majority vote. On the consequences of the removal of the petitioner, the respondents urged that there is no property in public office as held in the Court of Appeal decision in *Attorney General & another v Andrew Kiplimo Sang Muge & 2 others* [2017] eKLR that there is no legitimate expectation to hold public office in this case in

the nature of deputy Speaker. It was urged that there was no proof of violation of the petitioner's rights as he had fully participated in the in the house proceedings and answered to the allegations and produced evidence and the court could only interfere where there was proved breach of fundamental rights citing *Caroline Munanie Musee v. Makueni County Assembly* (2014) eKLR. Further, it was urged that the petition was moot following the election of the 3<sup>rd</sup> Respondent to the office of deputy Speaker of the assembly, citing Supreme Court Petition No. 17 of 2014 *Chris Munga N. Bichage v. Richard Nyagaka Tong'i*.

### **Issues for determination**

10. The following issues arise for determination:

- i. Whether petitioner's right to fair administration action under Article 47 as read with right to fair hearing under Article 50 of the Constitution was violated;
- ii. Whether the petitioner is entitled to a declaration that his removal, and subsequent election of the 3<sup>rd</sup> Respondent as **Deputy Speaker** of the County Assembly were unconstitutional;
- iii. What Remedies, if any, are available for the petitioners?

11. The principles for the grant of conservatory orders which fell for discussion in the interlocutory Notice of Motion filed herein, but by consent of the parties now subsumed in the full hearing of the Petition subject of the judgment herein, need not be considered.

### **Determination**

***Whether right to fair administrative action and fair hearing under Articles 47 & 50 of the Constitution violated.***

12. The Right under Article 47 of the Constitution belongs to every person whether speaker, deputy speaker or member of a committee of the Assembly, in terms of the Article as follows:

#### **"47. Fair administrative action**

(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 in clause (1) and that legislation shall—*

- a. *provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and*
- b. *promote efficient administration."*

13. In similar language, the right to a fair hearing under Article 50 (1) of the Constitution belongs to **every person** is prescribed as follows:

#### **"50. Fair hearing**

(1) ***Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."***

14. The exact content of the right to fair trial is set out in the Fair Administrative Action Act 2015 and in common law. Article 50 provides for a fair hearing by court or other tribunal or body in accordance with the law. *Fair hearing* has been interpreted by the Court of Appeal for Eastern Africa in *De Souza v. Tanga Town Council*, (1961) EA 377, 386-387, as having the following ingredients:

*"The general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity are well known. The authorities are reviewed in the recent case of **University of Ceylon v. Fernando** (1960) 1 ALL ER 631. I think that the principles, so far as they affect the present case, may be summarized as under:*

(1) *If a statute prescribes, or statutory rules or regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed. Lord Shaw of Dunfermline said in **Local Government Board v. Arlidge** (1915) AC 120, at p. 138 "If a statute prescribes the means it" (the Local Government Board) must employ them"; and in *University of Ceylon v. Fernando*, p. 638 Lord Jenkins, delivering the judgment of the Board and speaking of a clause in the "General Act" of the University of Ceylon, said:*

*"If the clause contained any special directions in regard to the steps to be taken by the vice-chancellor in the process of satisfying himself, he would, of course, be bound to follow those directions."*

**(2) If no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue: De Verteuil v. Knoggs (1918) AC 557, 560.**

*(3) In such a case the tribunal, which should be properly constituted, must do its best to act justly and to reach just ends by just means (per Lord Shaw in Arlidge's case). It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as if it were a trial: it need not examine witnesses; and it can obtain information in any way it thinks best: per Lord Loreburn, L.G., in Board of Education v. Rice and Others (1911) AC 179 at p. 182; and Arlidge's case. A member of the tribunal may, it seems, question witnesses in the absence of the other members of the tribunal and of the defendant and it is not necessarily fatal that the evidence of witnesses (including that of the complainant) may have been taken by the tribunal in the absence of the defendant: University of Ceylon, at p. 636 and p. 319. In this respect Fernando's case seem to go further than some previous eminent opinion (See e.g. the dictum of Lord Parker, C.J., in R v. Agricultural Land Tribunal ex parte Bracey (1960) 1 W.L.R at p. 913:*

*“It (certiorari) goes where there has been a breach of some principle of natural justice...like receiving evidence from in the absence of one and another”*

And see per Greer, L.J. in *Errington v. Minister of Health* (1935) 1 KB 249, p. 268-

*“he must do it in accordance with the rules of natural justice that is to say he must hear both sides and not to hear one side in the absent of the other.”*

And see the remarks of Cohen, L.J. (as he then was) in *Johnson v. Minister of Health* [1947] 2 ALL ER 395, at p. 405.

**(4) The person accused must know the nature of the accusation made: Byrne v. Kinematograph Renters Society Ltd. (1958) 2 ALL E.R. 579, 599 approved in University of Ceylon v. Fernando.**

**(5) A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view: Board of Education v. Rice and Others: and to make relevant statement they may desire to bring forward De Verteuil v. Knoggs; General Medical Council v. Speckman (1943) AC 627,641.**

*The tribunal should see that the matter which has come into existence for the purpose of the quasi-lis is made available to both sides and, once the quasi-lis has started, if the tribunal receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it: Johnson & Co. v. Minister of Health, at pp. 404, 405.”*

15. The removal of the petitioner from office was effected in great haste without affording him a reasonable opportunity to prepare his defence. There was no evidence that the particular of the charges levelled against him were ever presented to the petitioner. The Petitioner protested on the floor of the house that it was the first time he had seen the charges as follows:

*“Mr Speaker, this is the first time I have gotten a glimpse of the charges levelled against me. If I hadn't been around I wouldn't have known these charges brought by Hon. Lawi Kipchumba.”*

16. Even if there could be read a constructive notice by reason of his vice-chairmanship of the House Business Committee of the Assembly which, as deponed by the clerk of Assembly, had received a notice dated 16/3/20 for removal of petitioner the previous day and prioritized the motion, prior to the debate and resolution on the floor of the house, the period of notice is too short to allow reasonable preparation for defence to the charges, the seriousness of which the respondents' conceded in urging them as the reason for the removal of the Petitioner. It is immaterial that the petitioner had left the Assembly during the debate on his charges and had not prayed for any adjournment to permit him prepare for his defence. The procedure adopted by the respondents should have had inbuilt mechanisms for fair hearing without recourse to individual requests for extension of time.

17. I respectfully agree with R. Lagat Korir, J. in *Tunoi* case, supra, in her consideration on the issue of breach of fair hearing rights by reason of short period allowed for preparation of defence to charges therein as follows:

***“Whether the Petitioner's rights under Article 47 & 50 have been breached.***

39. *The Petitioner averred that he was served with a letter of the motion to impeach him at 1:00 pm being one and half hours before the motion to impeach him was to be heard and he was to defend himself.*

40. *On the right to be heard, Standing Order 68 of the County Assembly of Nakuru provides:-*

*(1) Whenever the Constitution, any written law or these Standing Orders:*

*requires the Assembly to consider a petition or a proposal for the removal of a person from office, the person shall be entitled to appear before the relevant Committee of the Assembly considering the matter and shall be entitled to legal representation;*

*(2) The person being removed from office shall be availed with the report of the select Committee, together with any other evidence adduced and such note or papers presented to the Committee at least three days before the debate of the Motion.*

41. Contrary to the Standing Order No. 68 aforesaid the amended Standing Orders No. 64(3) on the removal of the Deputy Registrar provides that:-

**"The Deputy Speaker shall be served with the Notice of Motion to remove him or her from office at least two hours before debate on the motion."**

42. Standing Order 68 enshrines the spirit of Article 47 of the Constitution which provides for a right to fair administrative action and states that:

**"Every person has the right to administrative action that is expeditious, lawful, reasonable and procedurally fair."**

The Fair Administration Action Act 2015 was enacted in order to give effect to Article 47 of the Constitution and section 4 provides for parameters to be followed when dealing with an administrative action. On sufficient time section 4 (3) provides:-

**"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."**

43. The right to be afforded sufficient time is a requisite for the right to fair administrative action to be achieved. In **County Assembly of Kisumu & 2 others vs. Kisumu County Assembly Public Service Board & 7 Others** the court held that:

**"The person charged is entitled to what, in legal parlance is referred to as the right to "notice and hearing." That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary.**

44. The question that is to be asked is whether the 2 hours envisaged under Standing Order 64(3) would be sufficient time for the Petitioner to adequately interrogate the allegations and prepare to defend himself. I do not think so. In this regard I find that the notice of an hour and a half does not constitute adequate notice for the Petitioner to prepare to defend himself. Similarly, there has been no evidence adduced by the respondents that the petitioner was furnished with the sufficient evidence that would allow him to defend himself.

45. Section 14 of the County Government Act has mandated County Assemblies to make Standing Orders consistent with the Constitution and the Act to regulate the Procedure of the County Assembly including orders for the proper conduct of its proceedings. I find that the amended standing order 64(3) shows a sharp contradiction to the Assembly's own Standing Order 68 (2). It directly contravenes the provisions of section 4(3) (a) of the Fair Administration Act and Article 47 of the Constitution and must therefore be impugned."

18. In addition, it would appear that the petitioner herein was entitled to committee hearing with legal representation under Standing Order 66 of the County Assembly of Baringo which provides as follows:

**"Right to be heard**

66. (1) Whenever **the Constitution**, any written law or **one of these Standing Orders** –

(a) requires the County Assembly to consider a Petition or **a proposal for the removal of a person from office, the person shall be entitled to appear before the relevant Committee of the County Assembly considering the matter and shall be entitled to legal representation;** and

(b) requires the County Assembly to hear a person on grounds of removal from office, or in such similar circumstances, the County Assembly shall hear the person –

(i) at the date and time to be determined by the Speaker;

(ii) for a duration of not more than two hours or such further time as the Speaker may, in each case determine; and

(iii) in such other manner and order as the Speaker shall in each case, determine.

(2) The person being removed from office shall be availed with the report of the select Committee, together with any other evidence adduced and such notes or papers presented to the Committee at least three days before the debate on the Motion."

This is notwithstanding the priority required to be given to removal motions under Standing Order 67 of the County Assembly.

19. In this present petition, I find that in failure to give the petitioner a written notice and particulars of the charges levelled against him and reasonable period for the preparation of his defence to the charges, the respondents violated the petitioner's constitutional right to fair administrative action and fair hearing under Articles 47 and 50 (1) of the Constitution, the Assembly being the statutory "independent and

impartial tribunal or body” for the discipline of the petitioner within the meaning of latter Article.

**Whether removal of Deputy Speaker by simple or special majority of members of County Assembly.**

20. Article 178 of the Constitution provides for the office of the Speakers of the Assemblies and contemplates other persons acting in the office of the Speaker as follows:

**“178 Speaker of a county assembly**

**1. Each county assembly shall have a speaker elected by the county assembly from among persons who are not members of the assembly**

**2. A sitting of the county assembly shall be presided over by—**

**a. the speaker of the assembly; or**

**b. in the absence of the speaker, another member of the assembly elected by the assembly.**

**3. Parliament shall enact legislation providing for the election and removal from office of speakers of the county assemblies.**

21. Section 11 of the County Governments Act, the law contemplated in Article 178 (3) of the Constitution provides for removal of Speaker only as follows:

**“11. Removal of speaker from office**

**(1) A speaker of a county assembly may be removed from office by the county assembly through a resolution supported by not less than seventy five percent of all the members of the county assembly.**

**(2) A notice of the intention to move a motion for a resolution to remove the speaker shall be given in writing to the clerk of the county assembly, signed by at least one third of all the members of the county assembly stating the grounds for removal.**

**(3) A motion for a resolution to remove the speaker shall be presided over by a member of the county assembly elected under section 9(4).**

**(4) Before the debate and voting on a motion under subsection (3), the speaker shall be accorded an opportunity to respond to the allegations on the floor of the county assembly.”**

22. That the provisions of section 11 of the Act applies to the Speaker of the Assembly is emphasised by the need to have a member appointed to presided over the motion for removal of the speaker under subsection (3) above. Indeed, Speaker for purposes of the County Government Act, 2012 is defined as “*speaker*” means **the speaker of a county assembly** elected under Article 178 of the Constitution.” The central role of the Speaker as the soul of the Assembly may warrant the protection of the Speaker from removal not so the deputy Speaker who is really the chair of Committees of the Assembly, and when the role of Speaker may also be played by other members selected to the Speaker’s panel under Standing Order 15 of the Assembly. Conversely, there is no special procedure for the removal of a deputy Speaker from office as there is prescribed for the Speaker of the Assembly.

23. In addition, the maxim of statutory interpretation *Expressio unius est exclusio alterius* that **express mention of one thing excludes all others** reserves the protection to the office and person of Speaker only and not to persons who hold the position of deputy or temporary speaker. Entrenchment of a position by special procedure for removal must be express and specific to the person and office protected. I consider that a procedure for removal from an office being in the nature of an entrenchment of the office must relate to the particular office, and therefore a Speaker of the Assembly cannot for that purpose be equated with the deputy Speaker for purposes of the procedure of removal unless the particular provision expressly and specifically so provides.

24. Unlike in the case of **Tunoi** authority cited by the Petitioner, there is in the Standing orders of Baringo County Assembly no rule requiring a special majority for the removal of a Deputy Speaker. Instructively, the legal opinion of Counsel to the County Ms. Toroitich Betty (AZ5 at 34 of the record) did observe that “*there are no elaborate procedure for the removal of a deputy Speaker.*”

25. I find that the Deputy Speaker of the County Assembly of Baringo could be removed by a resolution supported by a **simple majority** of the Assembly in accordance with Standing Order NO. 68 (1) and section 11 of the County Governments Act and Standing order 61 of the County Assembly of Baringo have no application to this matter.

**Whether removal of the petitioner and subsequent election of the 3<sup>rd</sup> respondent valid.**

26. The Court of Appeal in **Nick Githinji Ndichu v Clerk, Kiambu County Assembly & 3 others** [2018] eKLR, a case involving the removal of Speaker lamented the lack of express stipulation of the grounds of impeachment as follows:

*“The upshot is that we are persuaded, just like the trial judge that the process of impeachment was carried out according to the rule*

book, and the appellant cannot be heard to complain.

*On the grounds of impeachment, it is correct as observed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents that there are no specific provisions as to the grounds for the removal of the a County Speaker either in the Constitution or the County Governments Act. The Constitution in Article 178(3) merely provides that parliament shall enact legislation providing for the election and removal from office of Speakers of the County Assemblies. We would want to assume that the contemplated legislation is the current County Governments Act which, as already stated, is silent on the grounds for the removal of County Speakers. The matter purely rests with the discretion or resolution of the County Assembly, a very sad state of affairs indeed. That leaves the Speaker sought to be removed at the mercy, whim or caprice of the members of the County Assembly. He/she is a lame duck really, which impacts negatively on the effective discharge of speaker's office. We would recommend that the national assembly moves with alacrity and speed to close this gaping hole or loopholes so that the grounds of removal are well known before hand. As it is, a speaker could be removed for any reason under the sun."*

27. The case before this court however, relates to a deputy Speaker the removal from office of which is not required to be by a special majority as in the case of Speaker, ad while the court supports the call in **Nick Githinji Ndichu** for pre-stipulated grounds of removal of Speaker, I am not able to take benefit from the authority. On perusal of the Hansard, this court is not able to hold as urged by the Petitioner that the respondents did not produce evidence to prove the charges levelled against him. Bearing in mind that the County Assembly is not a court of law and the standard of proof in proceedings before it cannot be held to be to a standard of beyond reasonable doubt, and bearing in mind that his court is not sitting on appeal from the decision of the County Assembly, I would consider that there was evidence adduced before the assembly to prove the charges of abuse of office by use of County motor vehicle for non county purposes and gross violations of leadership and integrity laws in assault incident against another member of the County Assembly within its precincts.

28. With respect, the test for removal from the office of deputy Speaker (or indeed Speaker) is not in the proof beyond reasonable doubt, or to any standard of probability, of the charges levelled against him, which is a judicial function, but in the support of the motion by the applicable simple or special majority, as the case may be, of the members of the Assembly which has the constitutional and legal mandate over the Speaker and deputy Speaker. The object of fair administrative action and fair hearing rights in these circumstances is, therefore, to give the affected person an opportunity to respond to the charges and thereby hopefully sway the vote as it were, by persuading the members to return a verdict of not guilty on the charges and, consequently, vote against the motion for removal.

29. In deference to the petitioner's contention that the process of removing a deputy Speaker is the same as that prescribed for the Speaker, whether by simple or special majority, the mandate to determine whether the grounds for removal of a Speaker or deputy Speaker lies with the Assembly and not the court. In accordance with the principle of Separation of Powers, the court may not determine a matter which falls to be determined by **voting** in the Assembly, such as the impeachment or removal of a speaker or deputy speaker from office. Indeed, by the authority of **Speaker of the National Assembly v James Njenga Karume** [1992] eKLR "**where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.**" It is the County Assembly which is mandated to exercise power of removal over the deputy Speaker and the court cannot properly, in my view, determine whether or not, as contended by the petitioner, the charges against the petitioner were proved by cogent evidence before the vote to remove was taken, the Petitioner's submissions dated 28<sup>th</sup> May 2020 urging that –

*"14. The Respondent therefore, ought and should provide cogent [proof] to show that the Petitioner violated the law and thus warranted his removal. The respondents did not discharge this burden during the proceedings in the Assembly. No evidence was tendered to substantiate the allegations against the Petitioner."*

30. Having established a power in the Assembly to remove the deputy Speaker, the court cannot go behind their decision to see whether their decision was justified on the evidence presented before them. With respect, that would amount to an **appeal** on the merits from the determination of the Assembly, while this court as a constitutional and judicial review court is only concerned with the constitutionality and legality of the process rather than the merit of the decision. See **Commissioner of Lands v Kunste Hotel Limited** [1997] eKLR –

*"that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. (See; **R v. Secretary of State for Education and Science ex parte Avon County Council** [1991] 1 ALL ER.282, at p. 285.). The Point was more succinctly made in the English case of **Chief Constable of the North Wales Police v. Evans**. [1982] 1 WLR 1155, by Lord Hailsham of St. Marylebone, thus:*

*"The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court."*

31. Of course, the court has jurisdiction to enforce rights and fundamental freedoms in the Bill of Rights under Article 22 and supervisory jurisdiction under Article 165 (6) and (7) of the Constitution "**over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court**" to satisfy itself of the constitutional validity and legality of the proceedings and "**may call for the record of any proceedings before any subordinate court or person, body or authority**" and "**may make any order or give any direction it considers appropriate to ensure the fair administration of justice.**" In this regard, I respectfully agree with the court (Mutende, J.) in **Caroline Munanie Musee v. Makueni County Assembly**, supra, that –

26. "**Right at the outset, I should point out that this court as mandated by the law is not to enter by stealth into the mandate and role of the County Assembly. Its duty would be merely to observe that the procedure of doing business is followed and does not contravene the constitution in any manner. This Court must only focus on the procedure adopted. Where the court finds that the assembly breaches the constitution the court must intervene to ensure the constitution is upheld. In the case of the Speaker of the Senate and Another and the Attorney General and Others (Advisory Opinion No. 2 of 2013 the Supreme Court observed thus:-**

***“We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under the constitution which is the Supreme Law of the land. The English tradition of Parliamentary Supremacy does not commend itself to nascent democracies such as ours. Where the constitution decrees a specific procedure to be followed in the enactment of Legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the Supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the constitution. It would be different if the procedure in question were not constitutionally mandated. This court would be averse to questioning parliamentary procedures that are formulated by the houses to regulate their internal workings as long as the same do not breach the constitution.”***

27. One of the functions of the County Assembly is to remove the Deputy Speaker. The court would not interfere in such business unless there is a clear breach of fundamental rights. Where such breach is proved the court must involve its statutory duty by intervening.”

32. There will be circumstances where the court’s interference is taken away by the doctrine of constitutional avoidance where the matter in dispute may be resolved by resort to other legal regime without resort to constitutional principles, or where the decision sought to be interfered with by judicial review has already been taken and acted upon or implemented, or where, as contended by the respondents herein, the dispute is academic and moot.

33. The resolution to remove the Petitioner from office of deputy Speaker was, as conceded by the petitioner in paragraphs 5 and 13 of his supporting affidavit, approved by the members of the County Assembly and, subsequently, the Assembly upon a vote elected the 3<sup>rd</sup> respondent as the Deputy Speaker of the Assembly. It matters not that some of the members present ought to have been away of per diem paid official visit out of the County. The simple majority rule only requires a vote by “a majority of the Members in the House, **present and voting**” as follows:

**“Voting in the County Assembly**

**68. (1) Unless otherwise provided under the Constitution, a question arising in the County Assembly shall be decided by a majority of the Members in the House, present and voting.**

(2) In ascertaining the results on a question under paragraph (1), the Speaker shall, in the first instance, collect the voices of the “Ayes” and the “Noes” and shall declare the results accordingly.

(3) On a question proposed for a decision in the County Assembly, the Speaker has no vote.

(4) In determining the number of Members of the County Assembly for the purpose of voting, the Speaker shall not be counted as a Member.”

34. The petitioner’s contention that no voting was done is with respect, misconceived. The Petitioner was by the **voting** procedure of the Assembly established under the standing orders (Standing Order 68 (1)) requiring only a simple majority removed from office of deputy speaker, and the 3<sup>rd</sup> respondent thereafter elected to the position which had been declared vacant upon removal of the petitioner as shown at pp. 27-31 of the Hansard. There was no occasion calling for Division voting in accordance with Standing Orders.

35. The court accepts that the exigencies of the Presidential Directive made on 15<sup>th</sup> March 2020 on closure of Government organs, agencies and departments following the discovery of the Corona Virus Disease (Covid-19) in Kenya provided an urgent and compelling reason, in public interest to push in accordance with Standing Orders the filling of the then vacant position of the deputy Speaker. It appears that with the election of the 3<sup>rd</sup> Respondent to the office of deputy Speaker, even without the formal swearing-in the matter is now past contest in the sense of the decision of the Supreme Court in **Chris Munga N. Bichage v. Richard Nyagaka Tongi** Pet. No 17 of 2014.

**Conclusion**

36. As observed above, the petitioner could not properly rely on the specific procedure for removal of Speaker of the County Assembly to impugn his removal by a simple majority of the members. The correct legal philosophical postulation of the matter before the court appears to me to be that the respondents’ conduct against the petitioner was wrongful as it denied him, and the petitioner consequently lost, an opportunity to which he was entitled under Articles 47 and 50 of the Constitution, to defend and clear himself of the charges levelled against him and for which the process of removal was invoked; and the legal wrong is, therefore, in the denial of reasonable opportunity to be heard on the charges and, consequently, the means to forestall his removal from office on the basis of the charges, and not in the resolution to remove him from office, which the County Assembly had power to pass by a simple majority of the members of the County Assembly in accordance with Standing Order No. 68 (1), the matter not being governed by the special procedure for the removal of a Speaker under Standing Order No. 61 of the County Assembly of Baringo.

37. The removal from office depends on the outcome of the vote in the Assembly, which in this case was in support of the removal of the petitioner from office of deputy Speaker.

38. The violation of the petitioner’s constitutional rights to hearing and fair administration action before the vote on resolution to remove him from office was taken must be recompensed.

**Relief, if any.**

39. The process for the removal of the petitioner from office did not accord to the right to fair administrative action and the right to fair hearing as the petitioner was not given reasonable opportunity to prepare for his defence to the serious charges levelled against him, and for breach of the petitioner's right to fair administrative action and right to fair hearing the petitioner is entitled to damages. In assessing those damages, the court takes note of the ameliorating factor that the petitioner was removed from, as urged by the respondents, "a non-substantive office, ... as he continues as a member of the County Assembly."

40. Having been removed from office, the court cannot order reinstatement as prayed because as guided by the Court of Appeal in **Attorney General & another v Andrew Kiplimo Sang Muge & 2 others** [2017] eKLR, hereinafter **Andrew Kiplimo Sang Muge** case, there is no property in a public office, and for the same reason there can be no damages or compensation for monies in form of allowances lost by the petitioner from the time of the removal as prayed. The Petitioner urged legitimate expectation to hold office of the deputy Speaker based on section 9 of the County Governments Act, 2012, but in not too dissimilar context, the Court of Appeal in **Andrew Kiplimo Sang Muge** put paid any notion of compensation for termination of the term of a public officer before a statutory term as follows:

"It follows that the award of damages for the unexpired term of MCAs was based on misapplication of the law. According to the learned Judge the affected MCAs were entitled to compensation for the loss of legitimate expectation of remuneration or income. Citing **Articles 38 (3) (c) and 39** of the Constitution, he posed:

**"Do the Members of the County Assembly suffer loss of reduction of tenure?"**.

In answer he explained that;

**[40] The right to hold office is a right to property in the widest sense of the property including the salary and emoluments earned by virtue of holding such office and an aggrieved party would be entitled to claim damages for loss of property, or in proper case an injunction to stop the deprivation of property. See A-G for The Gambia v. Jobe (1985) LRC (Const) 556 where it was held that the term 'property' in the Constitution was to be construed widely"**

No doubt the office of an MCA is a public office, which under section 9 of the County Governments Act is vested with enormous public service roles.

There are many questions that arise from the learned Judge's determination that MCAs who were in office before the elections of 8<sup>th</sup> August, 2017 were entitled to be compensated for loss of office for the unserved period. For example, how were the MCAs expected to serve for the period of 8 months if elections were held, as required by the Constitution, on the 8<sup>th</sup> August 2017? Would the monthly remuneration of both the MCA who was voted out and the incumbent for the same job not result in a nugatory public financial expenditure? It was estimated by the appellants that the Exchequer would require approximately Kshs. 8 billion to finance the award. The respondents' own estimate was Kshs. 4 billion. Both figures are by any assessment astronomical.

It is for these reasons and construction of **Articles 177(1)(a)** impracticable result, that it did. Concerns that we said that the learned Judge's and **177(4)** was bound to produce an absurd and

In awarding damages for the unserved term, the learned Judge was persuaded that the affected MCAs would suffer loss of income for the unexpired term of office; that the right to hold office including the right to a salary and other related emoluments in the office is a right to property; that the interruption of that term amounted to deprivation of property contrary to **Articles 38 (2) and 40** of the Constitution, which would entitle those affected to a claim in damages for loss of property.

There is rich jurisprudence on the question at hand from other jurisdictions from which we can develop ours. However in relying on such foreign decisions, as Dr. Mutunga, CJ cautioned in the **Judges & Magistrates Vetting Board & 2 Others V. Centre for Human Rights & Democracy & 11 Others**, SC Petitions Nos. 13A, 14 & 15 of 2013 (consolidated), we must always appreciate Kenya's unique Constitutional – making historical context, not to mention that our laws may not necessarily be the same as those of the foreign jurisdictions on which we wish to rely.

To begin with there is no such a thing as legitimate expectation to hold, to the end of its term, a public or elective office since a public office is not the property of the office-holder. See **South African Veterinary Council V Szymanski** 2003 ZASCA 11. See also **Justice Kalpana H. Rawal V. Judicial Service Commission & 3 others** (supra).

In **Eckerson V City of Des Moines**, 137 Iowa 452, the Iowa Supreme Court emphasized that:

**"Public offices are created in the interests of the general public, and not for the benefit of any individual. And no one in possession of an office has a constitutional right to remain therein for the full period of the term for which he was elected..... In the case of statutory office, the Legislature may even abolish the office, and with the taking effect of the law providing thereof, the right of the incumbent to further act ceases eo instante, notwithstanding the term for which he was elected has not expired."**

Specifically the "employment" of an elected leader differs qualitatively from other forms of employment. The Supreme Court of Pennsylvania in **Sweeney v Tuckers** 473 Pa 493, 375 A2d 698 (1977) held that:

**"It is questionable whether [an elected official's] interest in his office is a property interest. An elected office is a public trust, not the private domain of the officeholder. A member of the Legislature. . . holds office for the benefit of his constituents and cannot justifiably rely on a private need or expectation in holding office ....[T]he public interest in the office far outweighs any private interest of the office-holder."**

In our case, under Article 194 of the Constitution, an MCA may vacate office, inter alia, at the end of the term of the county assembly; or if he dies; or removed from office; or if he resigns; or becomes disqualified for election on grounds specified in Article 193(2). If they can leave office before the expiration of the term of the office, it cannot be said to be entitled to be compensated should his term be interfered with in accordance with the law.

As this Court did, with approval in Justice Philip K. Tunoi & Another V Judicial Service Commission & Another, Civil Appeal No. 6 of 2016, we cite the following passage from the decision of the Philippines Supreme Court in The Provincial Government of Camarines Norte V Beatriz O. Gonzales, G.R. No. 185740 to stress the point that a public office holder or an elected political official has no property right in his office.

**“Security of tenure in public office simply means that a public officer shall not be suspended or removed or dismissed except for cause as provided by law and after due process. It cannot be expanded to grant a right to public office. Security of tenure is only violated if an individual is removed from position without sufficient cause and due process as provided by law.”**

In Butler V Pennsylvania, 10 How. 402: 13 L. ed. 472, the US Supreme Court rejected the argument that an official is entitled to pay for a period he expected to work, but had not in fact worked. The court said:

**“... promised compensation for services actually performed and accepted during the continuance of the particular agency may undoubtedly be claimed, both upon principles of compact and equity, but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense. The establishment of such a principle would arrest necessarily everything like progress or improvement in government, or if changes should be ventured upon, the government would have to become one great pension establishment on which to quarter a host of sinecures.”**

In our own Justice Kalpana H. Rawal V Judicial Service Commission & 3 Others, Civil Appeal No. 1 of 2016, the Court reiterated these principles saying:

**“...Accordingly we are satisfied that the right to pension for the period in which service has been rendered is a proprietary right and accrued pension is vested property right. There is no evidence on record that such right of the appellant has been violated or is even threatened. We are however not persuaded that there is a right to pension in respect of an anticipated period in which no service has been actually rendered. In such period there are no contingents or accrued rights. Our conclusion in this respect therefore also settles the appellant’s contention that her right to property was violated by retrospective application to her of Article 167(1) of the constitution.”**

**[Emphases added]**

The decision of the Court of Appeal, which was on an appeal from this court, is binding.

#### **Costs**

41. The litigation was occasioned by the Respondents’ action in removal without due process of the petitioner from the office of deputy Speaker, and the successful petitioner is, on the principle that **costs follow the event**, entitled to costs of the Petition.

#### **Orders:**

42. The court makes a **Declaration** of violation of the Petitioner’s right to fair administrative action and fair hearing under Articles 47 & 50 of the Constitution for denial of reasonable opportunity to heard in the failure to afford him a reasonable time to prepare for his defence to the serious charges levelled against him.

43. The Court makes an award of Kenya Shillings Five Hundred Thousand (Ksh.500,000/-) to be paid by the 1<sup>st</sup> respondent County Assembly to the Petitioner as damages for the breach of the petitioner’s right to fair administrative action and fair hearing under Articles 47 & 50 of the Constitution.

44. The Court, however, considers that it cannot, consistently with the doctrine of separation of powers, determine what falls to be determined by voting in the County Assembly and, therefore, the County Assembly having already voted to remove the Petitioner and elect the 3<sup>rd</sup> Respondent as Deputy Speaker of the County Assembly, **the court cannot order reinstatement of the petitioner to the position of Deputy Speaker**, and the Declarations therefor prayed by the Petitioner are declined.

45. For avoidance of doubt, the court does not make any award for damages for any loss of property occasioned by the petitioner’s removal from the office of the Deputy Speaker because as guided by the Court of Appeal in Andrew Kiplimo Sang Muge case, supra, there is no property in public office and, consequently, no damages shall issue for removal therefrom.

46. The 1<sup>st</sup> Respondent County Assembly shall pay the costs of the Petition to the Petitioner.

Order accordingly.

**DATED AND DELIVERED THIS 5<sup>TH</sup> DAY OF JUNE 2020.**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES**

M/S Gordon Ogolla, Kipngetich & Co. Advocates for the Petitioner.

M/S Magare Musundi & Co. Advocates for the Respondents.