



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 209 OF 2020

CHARITY KALUKI NGILU.....APPLICANT

-VERSUS-

THE COUNTY ASSEMBLY OF KITUI.....1ST RESPONDENT

THE SPEAKER, COUNTY ASSEMBLY OF KITUI.....2ND RESPONDENT

THE CLERK, COUNTY ASSEMBLY OF KITUI.....3RD RESPONDENT

RULING NO. 2

1. The Applicant, Charity Kaluki Ngilu, who is the Governor of Kitui County is through the notice of motion dated 24th June, 2020 seeking orders as follows:-

“a) That for the reasons set out in the Certificate of the Urgency filed herewith, service of this application upon the Respondents be dispensed with and the Application be certified as urgent and the same be heard *ex-parte* in the first instance.

b)That pending the hearing and determination of this Application *inter-partes*, this Honourable Court be released to issue interim CONSERVATORY ORDERS suspending the tabling, debating and considering and/or acting upon the impeachment motion dated 16th June 2020 by members of the 1st Respondent and scheduled for debate on 29th June 2020 and moved against the Petitioner.

c) That pending the hearing and determination of this Application *inter-partes*, this Honourable Court be pleased to issue interim CONSERVATORY ORDERS prohibiting the 1st and the 2nd Respondents from discussing, debating or in any way whatsoever dealing with the impeachment motion against the Petitioner.

d) That pending the hearing and determination of PETITION herein, this Honourable Court be pleased to issue interim CONSERVATORY ORDERS suspending the tabling, debating and considering and/or acting upon the impeachment motion dated 16th June 2020 by members of the 1st Respondent and scheduled for debate on 29th June 2020 and moved against the Petitioner.

e) That costs of this application be borne by the Respondents.”

2. The application is supported by the grounds on its face and the Applicant’s affidavit sworn on the date of the application.

3. The 1st Respondent, the County Assembly of Kitui (“the Assembly”), the 2nd Respondent, the Speaker, County Assembly of Kitui (“the Speaker”) and the 3rd Respondent, the Clerk, County Assembly of Kitui (“the Clerk”) all opposed the application.

4. The Applicant’s case is premised on two grounds. Firstly, that the constitutional threshold on public participation as contemplated under Articles 10 and 196 of the Constitution and sections 87 and 91 of the County Governments Act, 2012 was not met. Secondly, that the 2nd Respondent contravened Standing Order 60 and 63 of the Standing Orders of the County Assembly of Kitui when processing the impeachment motion hence violating the Applicant’s rights under Articles 47 and 50 of the Constitution.

5. The respondents opposed the application through a replying affidavit sworn on 1st July, 2020 by the Speaker, George Mutua Ndotto, and the further replying affidavit sworn on the same date by Peter Mwikya Kilonzo, the Member of the County Assembly of Kitui representing Athi Ward and also the Leader of Majority.

6. It is the averment of the Speaker that the Assembly has already established mechanisms to ensure that it complies with the directives of the national government to avert the transmission of corona virus to the Assembly staff, members and the larger public. According to the Speaker, the Assembly has established a Covid-19 Ad Hoc Response Committee whose mandate is to ensure that the Assembly continues to be in session so as to ensure that the County's response to the Covid-19 pandemic is not hampered or the Assembly's oversight and legislative role is not unnecessarily interfered with.

7. The Speaker further avers that if the orders sought in the application are granted, it would amount to an attack on the doctrine of separation of powers and an encroachment on the Assembly's powers by this Court. Further, that the Applicant has not made out a case for the grant of the orders sought herein as she has not demonstrated any non-compliance with the law by the respondents.

8. It is the Speaker's averment that the application is made in bad faith and is aimed at forestalling and halting the exercise of powers and the discharge of constitutional duties of a constitutional body. He also avers that the application is an abuse of the court process as it seeks to invite the Court to encroach on the mandate and powers of the Assembly.

9. As for the procedure adopted upon the receipt of the motion, the Speaker deposes that the requisite notice was issued in compliance with Standing Orders 60 and 63. He additionally avers that given the strict timelines involved in matters of impeachment and considering that the motion would be ready for debate upon the expiry of the notice period, he caused the Applicant to be served with the motion for her removal together with all other evidentiary materials within the requisite timelines.

10. On the claim that there was no public participation, the Speaker deposes that the Clerk had informed him that he had initiated public participation through various platforms espoused in the law and that members of the Assembly had been locally engaging with the people they represent.

11. The Speaker terms the application speculative stating that the Applicant is merely apprehensive as the Assembly is yet to debate, discuss or act on the motion for her removal. He avers that the Applicant is simply trying to guess the final outcome or the manner in which the process will proceed instead of participating in the process.

12. Turning back to the applicable procedure, the Speaker avers that the mover of the motion is supposed give a notice of seven days to the Speaker in line with Section 33 of the County Governments Act and Standing Order 60(3). He states that the Speaker is then required to serve the governor with the documents stipulated in Standing Order 63(2) at least three days before the debate on the motion.

13. Mr. Ndotto stresses that Article 50 of the Constitution and Standing Order 63 respectively guarantee the Applicant's right to a fair hearing and provides the mechanism for achieving that right in respect of a person facing impeachment at the Assembly. His case is that the Applicant has not led any evidence to show that her right to a fair hearing has been violated by the respondents. The Speaker urges the Court to note that the motion tabled before the Assembly is in compliance with the impeachment principle enshrined under Article 181 of the Constitution and Section 33 of the County Governments Act, 2012. The Court is therefore asked to find that the Applicant has not established a case for grant of conservatory orders and dismiss the application.

14. The Leader of Majority through the further affidavit avers that he always consults with the electorate before presenting their views in the Assembly. Further, that the consultations are done through organized forums and informally through direct interaction with the electorate. He confirms that he consulted the electorate on the proposed impeachment of the Applicant.

15. The Majority Leader avers that since the Assembly was operating within the constitutional scheme of devolution and running its legislative processes within the ordinary safeguards of separation of powers there is no scope for deployment of the Court's conservatory orders. He supports this averment by citing the decision of the Supreme Court in **Justus Kariuki Mate v Martin Nyaga Wambora & another [2017] eKLR**. It is further his deposition that the Applicant has not demonstrated any prejudice to be suffered considering that the Assembly is operating within its statutory timelines and procedures.

16. The Leader of Majority reiterates that there was public participation which was conducted in line with the Ministry of Health's directives on the Covid-19 pandemic. This, he avers, involved circulating questionnaires on the impeachment motion throughout Kitui County. He deposes that the motion of impeachment of a governor is not a referendum where the majority of the electorate carries the day but a quasi-judicial process where the weight of evidence carries the day irrespective of a governor's popularity.

17. The respondents also opposed the application through grounds of opposition dated 1st July, 2020 as follows:-

“a) That the Application is premature, misconceived and an invitation to this Court to usurp the constitutional mandate of the Speaker and the County Assembly of Kitui;

b) That the proceedings offend the doctrine of separation of powers and are an affront to the independence of the County Assembly of Kitui;

c) That the removal of the Governor is a political issue hence not suitable for resolution by courts of law;

d) That the issue of removal of the Governor is an internal matter for the County Assembly regulated and governed by applicable Standing Orders and not amenable to this court's jurisdiction;

e) That the Petitioner is non-suited as against the Respondents since no cause of action is disclosed against them;

f) That the application dated 24th day of June 2020 is therefore bad in law, an abuse of the court process and ought to be dismissed with costs to the Respondents.”

18. The Applicant filed skeletal submissions dated 29th June, 2020 in support of her application. The Applicant’s case is that under Article 165(3)(d)(i), (ii), (iii) of the Constitution, this Court is clothed with the requisite powers to determine matters involving the interpretation of the Constitution and the constitutional relationship between the levels of government. Further, that this Court is granted jurisdiction over matters involving the infringement or threatened breach of fundamental rights under the Bill of Rights.

19. It is the Applicant’s case that she has raised weighty constitutional issues regarding the discharge of functions by the Assembly under Article 181 of the Constitution and Section 33 of the County Government Act. She also contends that she has raised the issue of non-compliance with the constitutional principle of public participation which is established under Articles 10, 174 and 176 of the Constitution and Section 87 of County Governments Act. It is her submission that she has demonstrated threatened and actual infringement of her fundamental rights under Articles 47 and 50 of the Constitution. Her case is that where a legislative authority acts in a manner that threatens the integrity of the Constitution, judicial interference is appropriate to ensure that the rule of law is upheld. In support of her arguments, the Applicant relies on the decisions in the cases of **Wilfred Manthi Musyoka v County Assembly of Machakos & 3 others [2019] eKLR** ; and **James Opiyo Wandayi v Kenya National Assembly & 2 others [2016] eKLR**.

20. The Applicant’s case is that any attempt to argue that the matter before this Court is to some extent a political question which is a reserve of the politicians at the Assembly should be rejected as that would amount to promoting legislative supremacy hence defeating the vision of the drafters of the Constitution who did not contemplate a scenario where the courts are foreclosed from upholding the rule of law. The Court is therefore urged to follow the decision of the US Supreme Court in the case of **Ins v Chadha - 462 U.S. 919, 103 S. Ct. 2764 (1983)** where it was held that the political question doctrine is not automatically invoked in constitutional issues with significant political overtones. Further, that the resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by the courts simply because the issues have political implications.

21. Turning to the question as to whether she has made out a case for grant of conservatory orders, the Applicant cites the decision in the case of **County Assembly of Machakos v Governor, Machakos County & 4 others [2018] eKLR** as highlighting the principles governing the grant of conservatory orders. It is the Applicant’s contention that her petition raises a *prima facie* case in that an advertisement in a daily newspaper calling for submissions on the impeachment motion within three days in a County that’s bigger than the Republic of Rwanda cannot amount to adequate public participation. Further, that most people are holed up in their houses due to the Covid-19 pandemic and the health and economic crisis in the country is inimical to achieving meaningful public participation.

22. The Applicant also attacks the questionnaire used to collect views from the public stating that the failure to disclose the identity of the participants shrouds the process in mystery and engenders lack of credibility. It is urged that public participation has to be qualitative and quantitative. The Applicant supports her submissions on the importance of public participation in public affairs by citing the decisions in the cases of **Robert N. Gakuru v Governor Kiambu County & 3 others [2014] eKLR**; **Wilfred Manthi Musyoka v County Assembly of Machakos & 3 others [2019] eKLR**; and **Martin Nyaga Wambora v County Assembly of Embu & 3 others [2015] eKLR**.

23. On her claim that the respondents violated her right to fair administrative action under Article 47 and the right to a hearing under Article 50 of the Constitution, the Applicant submits that the Speaker placed the motion on the Order Paper before the expiry of the seven days provided by Standing Order No. 60(3). She adds that she was not furnished with the evidence at least three days before the debate and neither was evidence attached to the motion. This failure, she submits, made it impossible for her to prepare her defence.

24. It is the Applicant’s case that she has demonstrated imminent and actual breach of her fundamental rights and the substratum of the petition will be rendered moot if the impeachment is allowed to proceed. She also submits it is in the public interest that the application be allowed.

25. The respondents filed written submissions dated 3rd July, 2020. The respondents’ case is that two issues arise for determination in respect of the application before this Court. On the first issue whether the Court has jurisdiction to interfere with parliamentary proceedings and the impact of such action on the doctrine of separation of powers, the respondents submit that it has not been demonstrated that they were operating outside the ambit of the law to warrant the Court’s intervention. They urge that the Court is called upon to exercise restraint especially where the Court is being called upon to delve into matters that fall within the administrative sphere and scope of other constitutional bodies.

26. It is further submitted that the 1st Respondent is established under Article 176 of the Constitution with its legislative authority donated under Article 185 of the Constitution as read with Section 8 of the County Governments Act and the office of the 2nd Respondent is established under Article 178 of the Constitution of Kenya. They urge that their constitutional foundation shield them from control of any other organ whenever they are performing their duties. Their argument is anchored on the decision of the Supreme Court in the case of **Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] eKLR** where it was noted that if a county assembly was operating within the constitutional scheme of devolution and running its legislative process within the ordinary safeguards of separation of powers then there would hardly be any scope for the deployment of the Court’s conservatory orders. The respondents urge the Court to be minded of the fact that the motion of impeachment commenced through a process enshrined under the Constitution by virtue of Article 181 and Section 33 of the County Governments Act.

27. On the second issue as to whether the Applicant has made out a case to warrant the grant of conservatory orders, counsel submitted that the principles for the grant of conservatory orders were well established and settled in the case of **Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General [2011] eKLR** where it was held that a party seeking a conservatory order needs to demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court grants conservatory orders there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.

28. The respondents proceed to submit that a *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** as a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from that party.

29. It is the respondents' submission that the Applicant's case is premised on two main grounds being that the Speaker of the County Assembly did not write to her to invoke Standing Order 63 upon expiry of the seven days' notice contemplated in Standing Order 60 of the Kitui County Assembly Standing Orders and that public participation fell short of the constitutional threshold. The respondents' view is that the procedure for removing the governor by impeachment is very clear as Order 60(3) of the Standing Orders clearly states that after the member moving the motion has obtained approval of the Speaker, the member shall give a seven days' notice calling for impeachment of the governor. Accordingly, they contend that the procedure was followed to the letter and that the Applicant is misleading the Court as there is no provision in law or in the Standing Orders that stipulates that the Speaker should only write to the governor invoking Standing Order 63 upon expiry of the seven days' notice.

30. It was further submitted that the Applicant has not provided this Court with any proof that the Order Paper was published after five days of the notice by Hon. Peter Mwikya Kilonzo contrary to Standing Order 60. The respondents further submit that the Applicant has not shown that she was not presented with the notice and the evidence in support of the allegations within the stipulated time. They therefore contend that the 2nd Respondent acted lawfully by invoking the provisions of Standing Order 63 which requires that a person being proposed for removal be notified of such proposal at least three days before the date of the motion. It is therefore the respondents' argument that the Applicant has failed to demonstrate that she indeed has a genuine and arguable against the 2nd Respondent as regards issues of alleged non-compliance with the timelines and failure to supply evidence in support of the motion. Additionally the Court is urged not to delve into the merits of the petition at this stage by determining the question of the sufficiency of the public participation they conducted.

31. The respondents submit that the Applicant has not demonstrated or shown that she will suffer any real danger which may be prejudicial to her as there has not been any violation of the Constitution or infringement of any other law in the process of her impeachment. They assert that even if the Applicant has established a *prima facie* case and shown the prejudice to be suffered, the Court is also required to take into account the public interest, constitutional values, the priority levels and the magnitude attributed to the cause in question. The respondents support their arguments by citing the decisions in the cases of **Kenya Association of Manufacturers & 2 others v Cabinet Secretary-Ministry of Environment and Natural Resources & 3 others [2017] eKLR** and **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR**.

32. According to the respondents, granting the orders sought will occasion unjustifiable injury to the residents of Kitui County and the Kenyan public at large. They therefore urge the Court to set aside the interim conservatory orders issued in favour of the Petitioner and dismiss the application dated 24th June, 2020 with costs to them.

33. The principles guiding the grant of conservatory orders in our jurisdiction are now well established. One of the cases in which the principles were outlined is that of **Board of Management of Uhuru Secondary School v City County Director of Education & 2 others [2015] eKLR** where it was stated that:-

“25. Foremost, the applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice....

26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis....

28. Once the applicant has established to the court's satisfaction a prima facie case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights....

29. Thirdly, flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice....

30. The fourth principle which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR is that the court must consider conservatory orders also in the face of the public interest dogma.

31. Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters. The court will consider the applicants credentials, the prima facie correctness of the availed information, whether the grievances are genuine legitimate and deserving and finally whether the grievances and allegations are grave and serious or merely vague and reckless.”

34. I normally find the determination of the question whether an applicant seeking conservatory orders has established a *prima facie* case a dicey one in that the Court is required to do a bit of analysis on the merits of the petition. This appears to contradict the caution issued in the **Centre for Rights Education Awareness (CREAW) & 7 others v Attorney General [2011] eKLR** that:-

“It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner's application and not the petition. I will not therefore delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only

requires to demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."

35. In the instant case, the Applicant asserts that failure by the respondents to follow Standing Orders 60 and 63 of the County Assembly of Kitui Standing Orders has resulted in the violation of her rights under Articles 47 and 50 of the Constitution. Standing Order 60 provides the impeachment procedure as follows:-

“Procedure for removal of Governor by impeachment

60. (1) Before giving notice of Motion under, section 33 of the County Governments Act, 2012 the member shall deliver to the Clerk a copy of the proposed Motion in writing stating the grounds and particulars upon which the proposal is made, for the impeachment of the Governor on the ground of a gross violation of a provision of the Constitution or of any other law; where there are serious reasons for believing that the Governor has committed a crime under national or international law; or for gross misconduct or abuse of office. The notice of Motion shall be signed by the Member who affirms that the particulars of allegations contained in the motion are true to his or her own knowledge and the same verified by each of the members constituting at least a third of all the members and that the allegations therein are true of their own knowledge and belief on the basis of their reading and appreciation of information pertinent thereto and each of them sign a verification form provided by the Clerk for that purpose.

(2) The Clerk shall submit the proposed Motion to the Speaker for approval.

(3) A member who has obtained the approval of the Speaker to move a Motion under paragraph (1) shall give a seven (7) days’ notice calling for impeachment of the Governor.

(4) Upon the expiry of seven (7) days, after notice given, the Motion shall be placed on the Order Paper and shall be disposed of within three days; Provided that if the County Assembly is not then sitting, the Speaker shall summon the Assembly to meet on and cause the Motion to be considered at that meeting after notice has been given.

(5) When the Order for the Motion is read, the Speaker shall refuse to allow the member to move the motion, unless the Speaker is satisfied that the member is supported by at least a third of all Members of the County Assembly to move the motion; Provided that within the seven days’ notice, the Clerk shall cause to be prepared and deposited in his office a list of all Members of the County Assembly with an open space against each name for purposes of appending signatures, which list shall be entitled “ SIGNATURES IN SUPPORT OF A MOTION FOR REMOVAL OF GOVERNOR BY IMPEACHMENT”

(6) Any signature appended to the list as provided under paragraph (5) shall not be withdrawn.

(7) When the Motion has been passed by two-thirds of all members of the County Assembly, the Speaker shall inform the Speaker of the Senate of that resolution within two days.”

36. Standing Order 63 protects the right to a hearing by stating that:-

“Right to be heard

63. (1) Whenever the Constitution, any written law or 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;

(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 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 note or papers presented to the Committee at least three days before the debate on the Motion.”

37. A perusal of the pleadings and documents placed before the Court will on a preliminary basis disclose that the respondents had not

violated the provisions of any of the cited Standing Orders. I will restrain myself from analysing the evidence placed before the Court by the parties in regard to the Applicant's claim that the said Standing Orders were not followed by the respondents.

38. The other question is whether the respondents have violated the principle of public participation. It is noted that the *ex-parte* interim orders were granted based on the Applicant's assertion that the respondents had not conducted qualitative and quantitative engagement of the public on the question of her impeachment. Whether or not sufficient public participation has been conducted is a matter of fact. I will not go into details on this issue save to point out that there was an advertisement in a daily newspaper with national circulation inviting views from the residents of Kitui County on the impeachment of the Applicant. Indeed, there was a questionnaire developed and issued to the residents of the County of Kitui. There was also an averment by the Leader of Majority that he had directly and indirectly engaged with the residents of his Ward on the impeachment motion and he was aware that the other members of the Assembly had also engaged with the residents of their wards.

39. The evidence placed before Court therefore shows that there was public participation on the motion. I will again avoid going into details or making further determinations on the issue of public participation for the reason that the impeachment of a governor is a process that passes many stages.

40. It is important to note that the impeachment of a governor is a process that is well insulated by the law. During the debate at the Assembly, the Applicant can raise the issue of public participation as one of the grounds necessitating the termination of the impeachment motion. If the motion against her is successful at the Assembly, she can still raise the issue of lack of public participation at the Senate. If the Senate agrees with the Assembly, the Applicant can still approach the High Court on the same issue.

41. Indeed Article 94(4) of the Constitution commands Parliament, which is made up of the National Assembly and the Senate, to protect the Constitution and promote democratic governance. In dealing with the question of the impeachment of a governor, the Senate should ensure that the impeachment has complied with the provisions of the Constitution and statute which includes the requirement for public participation. The Supreme Court in its advisory opinion in the case of **In the Matter of the Speaker of the Senate & another [2013] eKLR** was categorical that:-

“[62] However, where a question arises as to the interpretation of the Constitution, this Court, being the apex judicial organ in the land, cannot invoke institutional comity to avoid its constitutional duty. 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.”

[Emphasis supplied]

42. The Applicant is therefore correct that the respondents have a duty to comply with the Constitution, statutory provisions and the Standing Orders of the Assembly. Nevertheless, it is important to appreciate that the issue of impeachment of a governor is anchored in the Constitution. The organs mandated to drive that process are the county assemblies and the Senate. Although this Court is indeed mandated to intervene in the process where there is alleged denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights, the Court should only engage its powers where there is clear and imminent threat to the Constitution. It is important to note that impeachment is a tool used to oversight the county executive and a county assembly is carrying out its constitutional mandate in debating an impeachment motion.

43. Indeed in **Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] eKLR**, the Supreme Court established the principles to guide the Court in such a situation as follows:-

“[63] From the course of reasoning emerging from such cases, it is possible to formulate certain principles, as follows:

- (a) each arm of Government has an obligation to recognize the independence of other arms of Government;**
- (b) each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate;**
- (c) the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment;**
- (d) for the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case;**
- (e) in the performance of the respective functions, every arm of Government is subject to the law.”**

44. In that case the Supreme Court affirmed that:-

“[94] The effect is that, a methodical and conscientious inquiry would show the County Assembly to have been operating quite properly, within the constitutional scheme of devolution, and running its legislative processes within the ordinary

safeguards of the separation of powers – and consequently, quite legitimately *outside the path of the ordinary motions of the judicial arm of State*. On that basis, there would have been hardly any scope for the deployment of the Court’s *conservatory Orders* – more particularly without *first hearing the petitioners*.”

45. In its earlier decision in the already cited advisory opinion in the case of **In the Matter of the Speaker of the Senate & another** [2013] eKLR the Supreme Court highlighted the considerations to be taken into account before interfering with parliamentary processes as follows:-

“[60] It makes practical sense that the scope for the Court’s intervention in the course of a running legislative process, should be left to the discretion of the Court, exercised on the basis of *the exigency of each case*. The relevant considerations may be factors such as: the likelihood of the resulting statute being valid or invalid; the harm that may be occasioned by an invalid statute; the prospects of securing remedy, where invalidity is the outcome; the risk that may attend a possible violation of the Constitution.”

46. Other factors to be considered in an application for conservatory orders were once again stated by the Supreme Court in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others** [2014] eKLR as follows:-

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

47. In a similar application in the case of **Anne Mumbi Waiguru v County Assembly of Kirinyaga** [2020] eKLR I made the following observations:-

“38....the deployment of conservatory orders in the exercise of supervisory jurisdiction by the High Court over the other arms of government should be done with utmost restraint and only where overt violation of the Constitution and the law has been shown. Otherwise, constitutional organs that are carrying out their lawful functions should be left alone.

39. The question therefore is whether the Applicant has placed before the court sufficient grounds to warrant the halting of the impeachment process which is time-bound. I do not need much persuasion in order to agree with the respondents that the question as to whether the allegations against the Applicant meet the constitutional threshold goes to the merits of the motion before the Assembly. In my view, I will be contradicting the binding decision of the Supreme Court in the **Justus Kariuki Mate** case if I venture into determining whether the allegations placed before the Assembly meet the threshold for commencing an impeachment process. The issue of threshold forms the substance of the impeachment motion and the Assembly is best placed to determine it. While I agree with the decision of the Court of Appeal in **Martin Nyaga Wambora** (supra), I nevertheless hold the view that the supervisory jurisdiction of the High Court on the issue of threshold is best exercised after the fact.

40. Impeachment proceedings are in the nature of a trial by peers. If at the end of the trial the Assembly removes the Applicant, that decision will have to be confirmed by the Senate. In my opinion, the work of the Senate is like that of an appellate court. It will hear the Applicant and review the impeachment proceedings and materials in order to ensure that the constitutional and legal parameters have been met. The issue as to whether the constitutional threshold has been met will be considered by the Senate. The allegation by the Applicant that the impeachment motion has been brought in bad faith will also be addressed by the Senate which is duty-bound to consider the merits of the impeachment. I therefore do not find merit in the Applicant’s argument that the impeachment motion should be stopped because the threshold for impeachment has not been met or that the proceedings have been commenced in bad faith.”

48. Where an applicant seeks to stop an impeachment process before a County Assembly or the Senate, the Court should heed the caution by the Supreme Court in **Justus Kariuki Mate & another v Martin Nyaga Wambora & another** [2017] eKLR that:-

“[84] From the facts of this case, it is clear to us that the integrity of Court Orders stands to be evaluated in terms of their inner restraint, where the express terms of the Constitution allocate specific mandates and functions to designated agencies of the State. Such restraint, in the context of express mandate-allocation under the Constitution, is essential, as a scheme for circumventing conflict and crisis, in the discharge of governmental responsibility. No governmental agency should encumber another to stall the constitutional motions of the other. The best practices from the comparative lesson, signal that the judicial organ must practice the greatest care, in determining the merits of each case.”

49. Indeed there is good reason why this Court should be very slow in interfering with an impeachment process. This is because once the Senate has had its say, parties are at liberty to approach the Court on the question of the constitutionality of the impeachment. At this stage the Court is required to consider both the procedural and substantive aspects of the impeachment. The question whether the impeachment met the constitutional threshold is one of the issues to be addressed in such proceedings. It would therefore be proper to approach the Court after the conclusion of the impeachment process by the County Assembly and the Senate. This is not to say that a party cannot approach the Court under Article 23 of the Constitution at any stage of the process. The doors of the Court are always open to all those who believe that their constitutional rights have been violated or are threatened with violation. However, it is the duty of the person who alleges violation of the Constitution to demonstrate such violation. In this case, the Applicant has not discharged that onus. She will also not suffer any prejudice if the process is allowed to proceed to conclusion since she will have another opportunity at the end of the day to approach the Court for the appropriate remedy.

50. There is a complaint by the Applicant that the constitutional threshold of public participation was not attained because of Covid-19 pandemic. Nobody knows when the pandemic will be contained and new ways must be designed for achieving constitutional requirements. Legislative business cannot stall because of a disease that is at the moment beyond human control. Ultimately, it is the responsibility of the respondents to ensure that the impeachment meets the constitutional threshold both procedurally and substantively. Failure by the respondents to discharge this duty and failure by the Senate to correct the anomaly by rejecting the impeachment, will render the impeachment an exercise in futility since any legal challenge will lead to the quashing of the impeachment by the Court for failure to adhere to the Constitution and statute.

51. Before I issue the final orders, I wish to observe that impeachment of a governor is akin to an election petition. It would therefore be advisable that any person desirous of filing a court case in respect of an impeachment process should approach the High Court within the County in which the impeachment is taking place. Where there is no High Court in the county, then the nearest High Court should be approached. I say so because it is important for the residents of the affected county to have access to the Court where such proceedings are taking place.

52. In conclusion, I find that the Applicant has not met the threshold for grant of conservatory orders. As such her application dated 24th June, 2020 is dismissed. Costs for the application shall abide the outcome of the petition.

Dated, signed and delivered at Nairobi through video conferencing/email this 9th day of July, 2020.

W.Korir,

Judge of the High Court