REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

JUDICIAL REVIEW APPLICATION NO. 3 OF 2019

IN THE MATTER OF AN APPLICATION

FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012

AND

IN THE MATTER OF ELGEYO MARAKWET COUNTY STANDING ORDERS

REPUBLIC.....APPLICANT

VERSUS

COUNTY ASSEMBLY OF ELGEYO MARAKWET.....1ST RESPONDENT

THE SPEAKER, COUNTY ASSEMBLY

OF ELGEYO MARAKWET.....2ND RESPONDENT

THE CLERK, COUNTY ASSEMBLY

OF ELGEYO MARAKWET.....3RD RESPONDENT

AND

THE GOVERNOR,

ELGEYO MARAKWET COUNTY.....1ST INTERESTED PARTY

ELGEYO MARAKWET COUNTY.....2ND INTERESTED PARTY

AND

KEVIN BIWOTT.....*EX-PARTE* APPLICANT

JUDGMENT

[1] This Judicial Review application was filed by the *Ex-Parte* Applicant, **Kevin Biwott**, on the **6 May 2019**. He thereby prayed for the following orders:

[a] That an order of Certiorari be issued to bring to this Court for purposes of being quashed the decision of the 2nd Respondent admitting the motion on the removal of the *Ex-Parte* Applicant dated **26 March 2019**.

[b] That an order of Certiorari be issued to bring to this Court for purposes of being quashed the decision of the 1st Respondent dated **2 April 2019** whereby the Respondents resolved to constitute a 5 member Select Committee to investigate the *Ex-Parte* Applicant.

[c] That an order of Prohibition be issued against the Respondents prohibiting them, whether by themselves, their servants, agents, officers or whosoever otherwise from in any manner whatsoever unlawfully acting or continuing to act upon or enforcing or continuing to enforce or maintaining or continuing to maintain investigations leading to the removal of the *Ex-Parte* Applicant with respect to the resolution of **2 April 2019.**

[d] That an order of Prohibition be issued against the Respondents prohibiting them whether by whether by themselves, their servants, agents, officers or whosoever otherwise from unlawfully taking action or attempting to take any action with respect to the investigations leading to the removal of the *Ex-Parte* Applicant with respect to the resolution of **2 April 2019.**

[e] That the costs of and incidental to the application be borne by the Respondents.

[2] The application was premised on the grounds that the *Ex-Parte* Applicant is the County Executive Committee Member for Public Works, Roads and Transport at the Elgeyo Marakwet County Government; and that on or about **26 March 2019**, a motion was presented to the Speaker of the County Assembly of Elgeyo Marakwet by **Hon. Evans Limo**, the Member of the County Assembly for Kapyego Ward, seeking the removal of the *Ex-Parte* Applicant from office on grounds of violations of the Constitution. It was further the contention of the *Ex-Parte* Applicant that, although the motion was not supported by one third of all the members of the County Assembly, a special meeting was called by the County Assembly on **2 April 2019** in which the motion was discussed and a resolution made to commit it to a select 5-member committee for investigations.

[3] Thus, the *Ex-Parte* Applicant was apprehensive that the principles of natural justice and his right to a fair hearing would be compromised were the Respondents to continue in the course they had taken. Accordingly, the *Ex-Parte* Applicant moved the Court for relief to forestall what he considered his illegal removal from office. The *Ex-Parte* Applicant particularly averred that the Standing Orders of the County Assembly were flouted in the process leading up to the formation of the Select Committee. He also complained that his legitimate expectation of fair investigative process was violated; since all the members of the Select Committee had already demonstrated bias towards his removal. He was therefore categorical that unless the prayers sought are granted, the Respondents would continue to unlawfully maintain and solidify their illegal actions by carrying out investigations against him with the sole intention of having him impeached; hence the application.

[4] In response to the application, a Replying Affidavit was filed on behalf of the 1st and 2nd Respondents, sworn on **24 June 2019** by the Speaker of the 1st Respondent, **Hon. Philemon Kiplagat Sabulei**. His averment was that the decision of the County Assembly to form a Select Committee was informed by the requirements of **Section 40** of the **County Government Act;** and that, since the inquiry was still at a preliminary stage, this application was prematurely filed. It was further the averment of **Hon. Sabulei** that he personally perused the Motion and satisfied himself that the charges were grave in nature and warranted being placed before the relevant committee pursuant to **Standing Order No. 66**. It was therefore his contention that there was full compliance, by the Respondents, with **Section 40** of the **County Government Act**. He annexed the relevant extracts of the Hansard to demonstrate compliance; including the role he personally played in guiding the debate.

[5] Hon. Sabulei further averred that following the resolution that the matter be committed to a Select Committee, a Select Committee was duly formed to conduct independent and in-depth investigations; whereupon the *Ex-Parte* Applicant was invited to appear before the said Committee on **15 April 2019** but failed to show up. He asserted that the allegations against the *Ex-Parte* Applicant are serious in nature as they touch on violations of the Constitution; and therefore that the members of the County Assembly of Elgeyo Marakwet had an interest in establishing the truth by conducting an exhaustive inquiry through its Select Committee and making a report to the Assembly for debate.

[6] The deponent made assertions akin to submissions on points of law touching on the competence of the application; and in particular as to whether this Court has the jurisdiction to entertain the application. His contention was that the matter concerns labour relations and therefore ought to have been filed before the Employment and Labour Relations Court. He also averred that, since there are adequate safeguards in **Section 40** of the **Local Government Act** and the Assembly's Standing Orders, and in particular Standing Order No. 66, to ensure fair hearing to the *Ex-Parte* Applicant, the instant application is premature; and therefore untenable.

[7] The 3rd Respondent, **Jane Kiptum Mutai**, who serves as the Clerk of the 1st Respondent, also filed an affidavit sworn by her on **24 June 2019** adopting the same line taken by the 1st and 2nd Respondents; contending that the process followed by the Respondents was well in accord with the applicable law and Standing Orders of the 1st Respondent. As for the Interested Parties, Grounds of Opposition were filed on their behalf on **25 July 2019** setting out the following main grounds:

[a] That the 1st Interested Party has the power to appoint and dismiss members of his cabinet, including the *Ex-Parte* Applicant;

[b] That upon being served with the resolution by the *ad-hoc* committee, the 1st Interested Party may dismiss the *Ex-Parte* Applicant if an affirmative finding is made for such removal;

[c] That the motion for the removal of the *Ex-Parte* Applicant was not supported by 1/3 of the members as required in law; and therefore that the Respondents lacked the requisite jurisdiction to entertain any proceedings seeking the removal of the *Ex-Parte* Applicant;

[d] That the *Ex-Parte* Applicant had a legitimate expectation that the powers imposed upon the Respondents would be exercised with utmost good faith to subject him to a fair and lawful process;

[e] That the investigations of the 4th Respondent which are to follow the proceedings to be conducted into the removal of the *Ex-Parte* Applicant will be illegal if allowed to proceed.

[8] The application was canvassed by way of written submissions pursuant to the directions given herein on **26 June 2019**. Consequently, counsel for the *Ex-Parte* Applicant filed written submissions herein dated **26 August 2019**, proposing the following three issues for determination:

[a] Whether the Court has jurisdiction to hear and determine this matter;

[b] Whether due process leading to the formation of a 5-member Select Committee was followed;

[c] Whether the *Ex-Parte* Applicant has established any grounds for the Court to grant the Judicial Review Orders sought.

[9] In respect of the first proposed issue, **Ms. Nderitu** for the *Ex-Parte* Applicant relied on **County Government of Nyeri & Another vs. Cecilia Wangechi Ndungu** [2015] eKLR and **Republic vs. Evans Odhiambo Kidero & Another, Ex-Parte Evans Ondieki** [2016] eKLR to support the argument that the **Employment Act, 2007** does not apply to State Officers; and that the removal of a County Executive Committee Member is a political process which is not subject to the **Employment Act**. In the same vein, counsel submitted that the issuance of the remedies sought herein would not offend the doctrine of separation of powers; granted that the Court has supervisory powers bestowed on it under **Article 165** of the Constitution and the duty to uphold the supremacy of the Constitution. She relied on **Commission for the Implementation of the Constitution vs. National Assembly of Kenya & 2 Others** [2013] eKLR and **Mary Ndunge Ngulli vs. County Assembly of Kitui & 3 Others** [2019] eKLR to support her submissions.

[10] Counsel impugned the motion leading to the formation of the Select Committee for being undated and wrongly titled; and therefore in disregard of the provisions of **Standing Order 66(4)** of the 1st Respondent's Standing Orders. Thus, it was the submission of **Ms. Nderitu** that, since its target was not explicit, the motion worked against the legitimate expectation of the *Ex-Parte* Applicant. The case of **Communication Commission of Kenya & 5 Others vs. Royal Media Services & 5 Others** [2014] eKLR was cited in support of this argument. Counsel also submitted that the composition of the Select Committee was controversial and ought to have been thought through over a period of 7 days; which was not the case. In particular counsel took issue with the fact that the members who supported the motion were picked to sit in the Select Committee; and submitted that this was a clear violation of the rules of natural justice.

[11] As to whether the *Ex-Parte* Applicant had made a good case for the grant of the judicial review orders sought, counsel targeted the 1st Respondent's decisions of **2 April 2019** by which the subject motion was passed and the decision made on **9 April 2019** for the formation of the Select Committee to investigate the *Ex-Parte* Applicant; and urged that the decisions be quashed by an order of Certiorari for having been made in excess of jurisdiction and without adhering to the rules of natural justice. She relied on **Republic vs. National Employment Authority & 3 Others, *Ex-Parte* Middle East Consultancy Services Ltd** [2018] eKLR and **Kenya National Examinations Council vs. Republic, *Ex-Parte* Geoffrey Githenji Njoroge**, Civil Appeal No. 266 of 1996.

[12] On behalf of the Respondents, written submissions were filed herein on **15 October 2019** by the firm of **M/s Magare, Musundi & Company Advocates** wherein the following three issues were flagged up for determination:

[a] Whether this court has jurisdiction to hear and determine this matter;

[b] Whether the *Ex-Parte* Applicant had exhausted all the internal mechanisms before filing the instant application for judicial review; and,

[c] Whether the *Ex-Parte* Applicant disregarded the doctrine of Separation of Powers.

[13] With regard to jurisdiction, **Mr. Magare** made reference to **Owners of Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd** [1989] eKLR, **Phoenix of E.A. Assurance Co. Ltd vs. S.M. Thiga T/A Newspaper Services** [2019] eKLR and **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd & Others** [2012] eKLR to support the argument that the Court lacks the requisite jurisdiction to entertain this suit; and that since it has arisen out of a motion for the removal of the *Ex-Parte* Applicant, the dispute is an employment dispute and ought to have been filed before the Employment and Labour Relations Court, for purposes of **Articles 162(2)(a) and 165(5)** of the **Constitution**; and **Section 12(1)(a)** of the **Employment and Labour Relations Court Act, 2011.** Counsel also placed reliance on **Republic vs. Karisa Chengo & 2 Others** [2017] eKLR for the assertion that the High Court no longer has unlimited jurisdiction; and that it cannot deal with matters reserved for the Employment and Labour Relations Court.

[14] It was further the contention of **Mr. Magare** that the resolution to form the Select Committee was informed by the requirements of **Section 40(2) and (3)** of the **County Governments Act**; and therefore that any dispute arising from that process ought to have been resolved within the framework provided for under **Section 40** of the **County Government Act**. He relied on **Thompson Kerongo and 2 Others vs. James Omariba Nyaoga & 3 Others** [2017] eKLR to underscore his submission that the right to be heard is fully protected under the aforementioned provision of the law; and that, the *Ex-Parte* Applicant having declined to submit to the jurisdiction of the Select Committee, has no basis for complaint. Subsections **(2) and (3)** of **Section 9** of the **Fair Administrative Action Act, No. 4 of 2015**, as well as the cases of **Speaker of National Assembly vs. Karume** [1992] eKLR; **Geoffrey Muthinja Kabiru & 2 Others vs. Samuel Munga Henry & 1,756 Others** and **Republic vs. Kenya Revenue Authority, *Ex Parte* Keycorp Real Advisory Limited [2019] eKLR** were cited to buttress counsel's arguments around the doctrine of exhaustion.

[15] On separation of powers, counsel for the Respondents relied on **Wilfred Manthi Musyoka vs. Machakos County Assembly & 4 Others** [2018] eKLR; **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 2 Others** and **County Government of Kiambu & Another vs. Senate & Others** [2017] eKLR for the proposition that the principle applied to County Governments as it does the National Government; and that the courts are under obligation to show deference to the independence of the legislature as an important institution in the country's constitutional democracy. Thus, Counsel urged for the dismissal of this suit with costs.

[16] Counsel for the Interested Parties, **Mr. Tororei**, relied on his written submissions filed on **16 September 2019**. He took the view that, although no leave was granted beforehand for the institution of this suit as required by **Order 53 Rule 2** of the **Civil Procedure Rules**, the same is not fatal; granted that Judicial Review is now a constitutional remedy. He relied on **Republic vs. Kenya Revenue Authority & Another, Ex-Parte Centrica Investments** [2019] eKLR. As to whether the *Ex-Parte* Applicant deserves the orders sought, counsel relied on **Associated Provincial Picture Homes Ltd vs. Wednesbury Corporation** [1947] 2 AllER and **Peter Bogonko vs. National Environmental Management Authority** [2006] eKLR for the applicable principles in a suit of this nature.

[17] For purposes of **Section 40** of the **County Government Act**, counsel urged the Court to note that the specific steps set out in the 1st Respondent's **Standing Order 66** were not followed in the processing of the subject motion and the appointment of the Select Committee. He therefore took the view that the said violation of the procedure went to the root of the matter and rendered the entire motion illegal *ab initio;* and therefore that the appropriate remedy in the circumstances would be an order of Certiorari. In addition, counsel accused the Respondents of violating the principle of *nemo judex causa sua*; in that the same members who supported the motion got appointed as members of the Select Committee; while at the same time conceding that the entire process had to be handled by the Respondents as the function could not be outsourced.

[18] Mr. Tororei also addressed the issue of jurisdiction and whether this is a matter that ought to have been filed before the Employment and Labour Relations Court. He was of the same view as counsel for the *Ex-Parte* Applicant that this Court has jurisdiction to hear and determine this dispute and therefore that it is not a dispute falling within the purview of the Employment and Labour Relations Court. Counsel relied on County **Government of Nyeri & Another vs. Cecilia Wangechi Ndungu** (supra) and submitted that the hiring and firing of members of the County Executive Committee is not in any way governed by the **Employment Act**. He however proposed that, should the Court find otherwise, the suit be transferred to the appropriate forum in the interest of justice.

[19] On the doctrine of exhaustion, **Mr. Tororei** did not think that **Section 40** of the **County Government Act** is applicable as an internal mechanism for the dismissal of members of the County Executive Committee for purposes of **Section 9** of the **Fair Administrative Action Act.** He therefore urged the Court to reject the assertions by the Respondent in this regard and instead find that the Court has supervisory jurisdiction under **Article 165** of the **Constitution.** The case of **Martin Nyaga Wambora & 3 Others vs. Speaker of the Senate & 6 Others** [2014] eKLR was cited in this regard and to underscore the argument that, in its supervisory role, the jurisdiction of the High Court is circumscribed by the process and constitutionality of the action taken. In addition, **Mr. Tororei** supported the *Ex-Parte* Applicant's prayer for prohibition to prevent what would be a flawed removal from office.

[20] From the Statutory Statement and the affidavits filed herein, there is no dispute that the *Ex-Parte* Applicant was, at all material times, serving as the County Executive Committee Member in charge of Public Works, Roads and Transport in the County Government of Elgeyo Marakwet. It was also common ground that a motion was presented to the Speaker, the 2nd Respondent herein, seeking the removal of the *Ex-Parte* Applicant from office on grounds of alleged violation of the Constitution. The motion was duly tabled and moved by **Hon. Evans Limo,** the MCA for Kapyego Ward, and was supported by **John Yator, Jasline Rutto** and **Paul Kipyatich**, among others.

[21] The parties are also in agreement that, pursuant to a resolution passed at a special meeting of the 1st Respondent held on **2 April 2019**, a 5 member Select Committee was constituted to investigate the allegations against the *Ex-Parte* Applicant and file its report before the Assembly; and that upon being served with an invitation to attend the first meeting of the Select Committee, the *Ex-Parte* Applicant declined and opted to file the instant suit; seeking both Certiorari to quash the two decisions already made by the Respondents and a Prohibition to forestall his removal.

[22] Needless to say that judicial review is concerned, not with the merit of an impugned decision, but the process leading up to the decision. Thus, in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Limited [2002] eKLR** the Court of Appeal held that:

> **"The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review."**

[23] However, as pertinent jurisdictional issues were raised touching on the competence of this suit, it is imperative to give them consideration before coming back to the question of process. The foremost challenge was raised by counsel for the Respondents; namely, whether the Court has jurisdiction to entertain this suit. The Respondents also raised the doctrines of exhaustion and separation of powers as threshold issues; and contended that this suit was prematurely filed. And, while Mr. Tororei made reference to the question whether leave was applied for or obtained for purposes of Order 53 Rule 1 of the Civil Procedure Rules, the Notice of Motion dated 6 May 2019 shows that leave was obtained for it on 12 April 2019. As no serious objection was taken in this regard, I need not belabour the point.

[24] There is no gainsaying that jurisdiction is everything because without it a court of law can make no valid step in a matter placed before it. This point was aptly expressed in the **Owners of Motor Vessel "Lillian S" Case** (supra) thus:

> **"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there**

would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

[25] And in the work, **The Major Law Lexicon, Volume 4,** jurisdiction is defined thus:

> **"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by Statute or Chapter or Commission under which the Court is constituted and may be extended or restricted by similar means. If no restriction or limitation is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind or nature of the actions or the matters of which the particular court has cognizance or as to the area over which the jurisdiction extends, or it may partake of both these characteristics..."**

[26] Accordingly, in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR**, the Supreme Court underscored point as hereunder:

> **"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power on Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."**

[27] Hence, the **Constitution** provides, in **Article 165(5)(a),** that:

> **"The High Court shall not have jurisdiction in respect of matters:**
>
> **(a) …**
>
> **(b) Falling within the jurisdiction of the courts contemplated in Article 162(2)."**

[28] Since **Article 162(2)** provides for the establishment of courts with the status of the High Court to hear and determine disputes relating to employment and labour relations, the key issue to determine in this regard is whether the dispute falls within the ambit of **Section 12(1)(a)** of the **Employment and Labour Relations Court Act**. It provides that:

> **"The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including:-**
>
> **a) Disputes relating to or arising out of employment between an employer and an employee."**

[29] In the premises, the determining factor in delineating what should go to the Employment and Labour Relations Court is not so much applicability of the **Employment Act**, but rather the existence of employer/employee relationship. I say so because whereas the Court of Appeal made it abundantly clear **in County Government of Nyeri & Another vs. Cecilia Wangechi Ndungu** (supra) that the **Employment Act** does not apply to State Officers, it acknowledged that:

> **"…A State Officer's terms and conditions of service are regulated by the Constitution or the relevant Statute, principles of fair administrative action and rules of natural justice…"**

[30] Thus, it acknowledged the existence of employer/employee relationships that were regulated either by the Constitution itself or other statutes. And, in ascertaining the nature of the relationship in issue, the approach taken in **Nick Githinji Ndichu vs. Clerk, Kiambu County Assembly** [2014] eKLR by **Hon. Nduma Nderi, J**. and which I hereby endorse, is apposite. He held that:

> **"…the law is not concerned with the method of acquiring an employee. The law does not concern itself with whether the person was appointed or elected, rather, the person must:**
>
> **i) Be having an oral or written contract of service.**
>
> **ii) Be providing a service to a real or a legal person.**
>
> **iii) Be receiving wage/salary for the services rendered.**
>
> **If such a person has a dispute with the person with who he/she has a contract of service and to when he/she provides services for a wage or salary, the court (Employment and Labour Relations Court) has jurisdiction over such disputes and has**

available remedies for the purpose…"

[31] This approach found favour in **Eunice Jepkoech Siria vs. County Secretary Uasin Gishu County** [2017] eKLR, a persuasive authority cited by **Mr. Magare** for the Respondents in support of his argument on jurisdiction. It involved a dispute between the County Secretary, an appointee of the County Executive and the County Government of Uasin Gishu. It was held (**Hon. Onyango, J.)** that that relationship, though not governed by the **Employment Act,** was an employer/employee relationship and therefore falling within the jurisdiction of the Employment and Labour Relations Court. Similarly, in **Fredrick Odero vs. Governor, Homa Bay County & 3 Others** (supra), the dispute was between a member of the County Executive Committee and the Governor. The court **(Hon. Mrima, J.)** held that:

> **"A member of the County Executive hence enters into a contract with the County Government to serve in the County Executive. Such a member therefore provides services to the County Government at agreed terms including remuneration. Pursuant to the definitions in the Employment and Labour Relations Court Act, the member of the County Executive is an employee and there exists an employer-employee relationship between the two."**

[32] In the premises, the Court must look outside the **Employment Act** to ascertain the existence or otherwise of an employer/employee relationship between the *Ex-Parte* Applicant and the 1st Respondent. In this regard, **Article 179(2)** of the **Constitution** provides that:

"The county executive committee consists of—

> **(a) The county governor and the deputy county governor; and**
>
> **(b) Members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly."**

[33] While **Section 40(1)** of the **County Governments Act** imbues the governor with authority to remove a member of the CEC for incompetence, abuse of office, gross misconduct, failure to attend three consecutive meetings of the CEC, physical or mental incapacity rendering the member incapable of performing the duties of his office or gross violation of the Constitution, the process commenced herein against the *Ex Parte* Applicant was not initiated by the Governor, (the 1st Interested Party); but by a member of the County Assembly of Elgeyo Marakwet pursuant to **Section 40(2).** That provision states that:

> **"A member of the county assembly, supported by at least one-third of all the members of the county assembly, may propose a motion requiring the governor to dismiss a county executive committee member on any of the grounds set out in subsection (1)."**

[34] This is not a dispute between the *Ex-Parte* Applicant and the County Government of Elgeyo Marakwet (the 2nd Interested Party); and, unlike in **Nick Githinji Ndichu vs. Clerk, Kiambu County Assembly (supra)** where the dispute was between the Speaker of the County Assembly and the County Assembly itself, no nexus of the employer/employee kind, was shown to exist between the *Ex-Parte* Applicant and the 1st Respondent herein. In the absence of the employer/employee connection between the *Ex-Parte* Applicant and the 1st Respondent, the argument that this Court lacks jurisdiction to entertain the suit is misplaced. It is therefore my finding that the Court does have the jurisdiction to entertain and determine this dispute.

[35] Other than the question of jurisdiction, the Respondents took the stance that the *Ex-Parte* Applicant was hasty in rushing to Court before exhausting the internal mechanisms for redress provided for in **Section 40** of the **County Governments Act**. By this the Respondents contended that the *Ex-Parte* Applicant ought to have subjected himself to the process that had been put in motion and obtained the outcome thereof before seeking judicial review. **Section 9** of the **Fair Administrative Action Act** was relied on in this connection; for it provides that:

> **"(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.**
>
> **(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.**
>
> **(3) The High Court or a subordinate court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that the applicant shall first exhaust such remedy before instituting proceedings under subsection (1)."**

[36] Long before the **Fair Administrative Action Act** was enacted, the Court of Appeal held, in **Speaker of National Assembly vs. James Njenga Karume** (supra) that:

> **"…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…"**

[37] And therefore, the question to pose is whether the doctrine of exhaustion is applicable in the circumstances that present themselves herein. **Section 40** of the **County Governments Act** simply stipulates, in **Subsections (3), (4), (5) and (6)** thus:

"(3) If a motion under subsection (2) is supported by at least one-third of the members of the county assembly—

(a) The county assembly shall appoint a select committee comprising of five of its members to investigate the matter; and

(b) The select committee shall report, within ten days, to the county assembly whether it finds the allegations against the county executive committee member to be substantiated.

(4) The county executive committee member has the right to appear and be represented before the select committee during its investigations.

(5) If the select committee reports that it finds the allegations—

(a) unsubstantiated, no further proceedings shall be taken; or

(b) substantiated, the county assembly shall vote whether to approve the resolution requiring the county executive committee member to be dismissed.

(6) If a resolution under subsection (5)(b) is supported by a majority of the members of the county assembly—

(a) the speaker of the county assembly shall promptly deliver the resolution to the governor; and

(b) the governor shall dismiss the county executive committee member.

[38] There is no inbuilt mechanism for relief in the above provision for procedural infractions by the duty bearer; namely the County Assembly. Moreover, even where the process is scrupulously employed to conclusion, there is no room for review or appeal. This was not the case, for instance in **Geoffrey Muthinja Kabiru & 2 Others vs. Samuel Munga Henry & 1,756 Others** (supra) in which the doctrine of exhaustion was invoked and which was cited by the Respondents in support of their submissions. In that case, a constitutional petition involving members of East Africa Pentecostal Church, it was noted by the court that Article 21 of the Church's constitution had expressly ousted the jurisdiction of the courts in disputes involving members of the church. It was in that context that the Court of Appeal held that:

"It is imperative that where a dispute resolution mechanism exists outside the courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the for a last resort and not the first port of call the moment a storm brews within the churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolutions outside the courts… This accords with Article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution…"

[39] Likewise, in **Republic vs. Kenya Revenue Authority, Commissioner, *Ex-Parte* Keycorp Real Advisory Limited** (supra) in which the *ex-parte* applicant was aggrieved by a tax decision, it was noted that the dispute was elaborately provided for in the **Tax Procedures Act, No. 29 of 2015**; and that it was imperative that the option be exhausted by the *ex-parte* applicant before seeking the intervention of the High Court. Thus the Court (**Hon. Mativo, J.)** noted that:

"51. Sub-section (1) thereof provides that a taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law. Sub-section (2) provides that a taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision. Additionally, sub-section (3) provides that a notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if—(a) the notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments; and in relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute.

52. Additionally, section 52(1) of the act provides that a person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the Tax Appeals Tribunal Act.[51] Further, section 53 of the act provides for appeal to the High Court in the following words, that is, a party to proceedings before the Tribunal who is dissatisfied with the decision of the Tribunal in relation to an appealable decision may, within thirty days of being notified of the decision or within such further period as the High Court may allow, appeal the decision to the High Court in accordance with the provisions of the Tax Appeals Tribunal Act…"

[40] There being no similar provisions embedded in **Section 40** of the **County Governments Act**, it cannot be said that the *Ex-Parte* Applicant was hasty in bringing this suit as the only available avenue for challenging the process employed by the 1st Respondent would be by way of judicial review. Needless to say that, it was precisely for the purpose of ensuring compliance with the constitutional imperatives that **Article 165(6) of the Constitution,** which grants the High Court the supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function**,** was crafted. Hence, in **Martin Nyaga Wambora & 3 Others vs. Speaker of the Senate & 6 Others** [2014], it was held that:

"…the role of the High Court for purposes of removal of a Governor from office is inter alia supervisory in nature to ensure that the procedure and threshold provided for in the Constitution and the County Governments Act are followed. If the process for removal of a Governor is unconstitutional, wrong, unprocedural, or illegal, it cannot be said that the court has no

jurisdiction to address the grievance arising therefrom…In its supervisory role, the jurisdiction of the High Court is dependent on the process and constitutionality of the action taken. In the instant case, in its supervisory role, the High Court is to examine whether any procedural law was violated by the County Assembly or Senate in arriving at their decision…"

[41] It is for the foregoing reasons that I find the twin doctrines of exhaustion and separation of powers inapplicable to the situation at hand. Indeed, in **Republic vs. Kombo & 3 Others Ex parte Waweru [2008] 3 KLR (EP) 478** that:

"The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong… or which infringes a man's liberty… must be able to justify its action as authorized by law – and nearly in every case this will mean authorized directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the Courts of law, and if the legal pedigree is not found to be perfectly in order the Court will invalidate the act, which he can safely disregard."

[42] Turning now to the merits of the application for judicial review, **Articles 47(1)** of the **Constitution** provides that:

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

[43] And where an infringement of the right is proved**, Article 23** is explicit that the High Court may then grant appropriate relief including an order of judicial review. In this instance, the *Ex-Parte* Applicant has attacked the process adopted by the Respondents from two fronts; firstly, that **Standing Order No. 66(4)** was flouted in the manner of presentation of the motion. Thus, his counsel pointed out that the motion was not only undated but also wrongly titled; and therefore was presented in disregard of the provisions of **Standing Order 66(4)** of the 1st Respondent's Standing Orders in so far as its target was not explicit. The Standing Order aforementioned provides that:

"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 one-quarter 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 Mr./Mrs./Ms…….MEMBER OF COUNTY EXECUTIVE COMMITTEE"

Provided further that the Mover shall provide to the Speaker, at least one hour before the sitting of the Assembly, a list signed by members in support of the motion." (emphasis supplied)

[44] The impugned Motion, which was annexed to the Supporting Affidavit and marked **Annexure KB 1**, was properly titled and the name and designation of the *Ex-Parte* Applicant properly set out therein. The argument therefore that the Motion was vague and that it worked against the *Ex-Parte* Applicant's right to legitimate expectation is baseless. Nevertheless, there is considerable merit in the assertion by the *Ex-Parte* Applicant that in terms of furnishing a list of all members for the specific purposes of **Standing Order 66(4),** there was non-compliance. To my mind, that Standing Order envisages the preparation of two Lists; one by the Clerk within 7 days of the Notice of Motion; and the other by the mover of the motion; at least one hour before the sitting of the Assembly.

[45] While it is manifest that the mover complied and availed a "LIST OF HONOURABLE MEMBERS IN SUPPORT OF THE MOTION", as can be ascertained from **Annexure PKS 2** to the 2nd Respondent's Replying Affidavit, there is no indication that, within the seven days' notice of the Motion, the Clerk caused to be prepared and deposited in the Speaker's Office, a list of all Members of the County Assembly with an open space against each name for purposes of appending signatures, entitled "SIGNATURES IN SUPPORT OF A MOTION FOR REMOVAL OF Mr./Mrs./Ms…….MEMBER OF COUNTY EXECUTIVE COMMITTEE".

[46] From the wording of the Standing Order, this was a peremptory requirement; given the high threshold envisaged under **Section 40** of the **County Government Act** and **Standing Order 66(5) and 66(6).** More importantly, it underscores the need for the County Assemblies to take their oversight role, and in particular, impeachment motions, with the seriousness required. Failure to comply was therefore a serious procedural defect in the proceedings that would warrant the intervention of this Court; and having so found, the ensuing steps, including the formation of the Select Committee cannot stand as the entire process was void *ab initio*. Indeed, it is plain that had the Respondents paid heed to the requirements of **Standing Order 66(4)** they would not have caused those who had taken a stand in support of the motion to be appointed as members of the Select Committee.

[47] I am therefore satisfied that the *Ex-Parte* Applicant is entitled to relief for the infringement aforementioned. As to what would be the appropriate remedy, I note that the Court has been asked to grant two types of reliefs, namely Certiorari and Prohibition. In **Kenya National Examinations Council vs. Republic, Ex-Parte Geoffrey Gathenji Njoroge & Others** [1977] eKLR the Court of Appeal held that:

"The remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment. The nature and scope of certiorari was discussed in the case of Captain Geoffrey Kujoga Murungi Vs Attorney General Misc Civil Application No. 293 of 1993 where it was stated; "Certiorari deals with decisions already made …. Such an order can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice..."

[48] *The Court then proceeded to state thus:*

"What does an ORDER OF PROHIBITION do and when will it issue" It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY'S LAW OF ENGLAND, 4th Edition, Vol.1 at pg.37 paragraph 128…The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition…"

[49] In the light of my findings herein above, I am satisfied that the *Ex-Parte* Applicant is entitled to an order of Certiorari to quash the decisions taken by the Respondents in the process leading up to the formation of the Select Committee. The *Ex-Parte* Applicant is also entitled to an Order of Prohibition to restrain the Respondents from pursuing the flawed process that they had initiated. Accordingly, I would allow the Notice of Motion dated **6 May 2019** and grant orders in favour of the *Ex-Parte* Applicant as hereunder:

[a] That an order of **Certiorari** be and is hereby issued to bring to this Court for purposes of being quashed the decision of the 2nd Respondent admitting the motion on the removal of the *Ex-Parte* Applicant dated **26 March 2019**.

[b] That an order of **Certiorari** be and is hereby issued to bring to this Court for purposes of being quashed the decision of the 1st Respondent dated **2 April 2019** whereby the Respondents resolved to constitute a 5 member Select Committee to investigate the *Ex-Parte* Applicant.

[c] That an order of **Prohibition** be issued against the Respondents prohibiting them, whether by themselves, their servants, agents, officers or whosoever otherwise from in any manner whatsoever unlawfully acting or continuing to act upon or enforcing or continuing to enforce or maintaining or continuing to maintain investigations leading to the removal of the *Ex-Parte* Applicant with respect to the resolution of **2 April 2019.**

[d] That an order of **Prohibition** be issued against the Respondents prohibiting them whether by whether by themselves, their servants, agents, officers or whosoever otherwise from unlawfully taking action or attempting to take any action with respect to the investigations leading to the removal of the *Ex-Parte* Applicant with respect to the resolution of **2 April 2019.**

[e] That the costs of and incidental to the application be borne by the Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH NOVEMBER 2020

OLGA SEWE

JUDGE