REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CONSTITUTIONAL PETITION NO. 16 OF 2018

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010 ARTICLES 1, 2, 3, 10,20, 22, 35, 38, 47, 50,174,181,196,258 and 259 OF THE CONSTITUTION

AND

IN THE MATTER OF COUNTY GOVERNMENT ACT, 2012 SECTIONS 14a, 21, 22,23,24, 25,33, 87(a) and 87(b)

AND

IN THE MATTER OF MACHAKOS COUNTY STANDING ORDERS, STANDING ORDER NUMBER 128, 233,234(5) and 234(6), 235 AND 236

-BETWEEN-

WILFRED MANTHI MUSYOKA.....PETITIONER

-VERSUS-

THE COUNTY ASSEMBLY OF MACHAKOS.....RESPONDENT

AND

GOVERNOR, COUNTY

GOVERNMENT OF MACHAKOS.....1ST INTERESTED PARTY

COUNCIL OF COUNTY GOVERNORS.....2NDINTERESTED PARTY

KENYA LAW REFORM COMMISSION...3RD INTERESTED PARTY

JUDGEMENT

Parties

1. The Petitioner herein describes himself as a resident of Machakos County within the Republic of Kenya and a law abiding citizen and presents this petition on his own behalf and in the public interest.

2. The Respondent is the County Assembly of Machakos, the legislative arm of Machakos County Government established under article 176 of the Constitution, 2010.

3. The 1st interested party, the Governor County government of Machakos is the duly elected and sworn-in as the head of the County Government as established under Article 176 the Constitution.

4. The 2nd Interested Party is established under ***Inter-Governmental Relations Act*** with the mandate of facilitating the realization of the principles and objects of devolution under Article 174 and 175 of the Constitution of Kenya.

5. The 3rd Interested Party is the body established under ***Kenya Law Reform Commission Act 2013*** with the mandate, *inter alia,* of reviewing all law and recommending its reform.

Petitioner's Case

6. According to the Petitioner on the 24th October, 2018**,** the Procedure and House Rules Committee of the Respondent through its chair, **Hon. Paul Museku**, tabled a Report on the Proposed Amendments to its Standing orders which was adopted by the Respondents. According to the petitioner, the tabling of the Report was made under the provisions of Standing Order 228 that provides for periodic Reviews of the House standing orders.

7. It was averred that the Procedure and House Rules Committee proposed a raft of amendments to its standing orders including the following standing Orders:

a) **Standing Orders No. 2** on Interpretation for 'The Table" and "The Mace"

b) **Standing Orders No.23** on the Location of the First sitting of a new Assembly

c) **Standing Orders No. 26** on the Special Sitting of the House

d) **Standing Orders No. 27** on Hours of meeting and sitting day

e) **Standing Orders No. 42** on Committal to Committees (Approval of Public Appointments)

f) **Standing Order No. 59** on Procedure for Removal of the Governor on Grounds of Incapacity

g) **Standing Order No. 62** on Procedure for Removal of member of the County Executive Committee.

8. It was contended that although Standing Order No. 60 was not listed in the order paper as part of the amendments, the same was unprocedurally discussed and amended. The said Standing Order No. 60 makes provisions for impeachment of the County Governor and according to the Petitioner, the effect of the amendment of Standing Orders No. 59, 60 and 62 was to remove the requirement for a notice period of 7 days in the case of a governor and 3 days for a member of the CEC after the presentation of a competent notice of motion.

9. It was contended that upon the tabling of the Motion, the same was discussed but with strong reservations by a number of the members of the House and that on the floor of the house, the report was disowned by **Hon. Constance Nzioki**, who is a member of the Respondent's Procedure and Rules Committee, who argued that she did not propose any of the Standing Orders despite the contrary being alleged. It was further contended that **Hon. Ndawa** sought an adjournment of the said motion noting that the motion in itself was weighty and required time for members to familiarize themselves with the proposed amendments without being rushed but the application was denied.

10. According to the Petitioner, upon the adoption of the Report, the amendments to the Standing Orders took effect immediately.

11. The Petitioner was therefore aggrieved that in making the amendments to the said standing orders, the Respondents totally failed to facilitate public participation and involvement of the people of Machakos County in the process of their legislation leading to the amendments thereof which amendments, particularly Standing Orders 59, 60 and 62 made stringent timelines in the process of the removal of the Governor and the County Executive committee by doing away with the notice period of seven (7) and three (3) days respectively.

12. It was his case that in essence, the amendments did away with the small window of opportunity that was available to the members of the Public to participate in the process of the removal of the Governor and rendered the entire process a purely County Assembly affair. Further, the new Standing Order no. 59 did away with the requirement for investigation of mental and physical incapacity of the Governor to perform his or her functions thus infringing on the right to be heard and natural justice.

13. The Petitioner reiterated that the respondents did not carry out public participation before they could amend the Standing Orders which his advocates informed him are derivatives of the Constitution and in express violation of the Constitution. It was therefore his position that the respondents violated the Constitution by infringing on the rights of Machakos County people yet, the Respondent, being Constitutional and statutory offices are bound by the provisions of the constitution, the Bill of rights and leadership and integrity principles which they have violated.

14. The Petitioner therefore believed that the entire amendments made to the Machakos County Assembly on 24th October, 2014 are unconstitutional for want of Public Participation. In this regard the petitioner made reference to the decision of the Court of Appeal in the Embu case of **Martin Wambora vs. The County Assembly and Others** whereby the Court was of the opinion that such stringent timelines were unconstitutional if they did not afford the members of the Public an opportunity to participate.

15. In his submissions, the petitioner relied on the decision of **Mwita, J** in **Kenya Human Rights Commission vs. Attorney General & Another [2018] eKLR.** According to the petitioner, in the absence of any demonstration by the Respondent as to how it complied with the Constitutional requirement of Public Participation, this court ought to find, as found by **Justice Mwita** in the above cited case, that there was a violation of an important constitutional step in the form of public participation and that the Amendments fails this constitutional compliance step.

16. The petitioner submitted that it is no longer in dispute that public participation plays a central role in both legislative and policy functions

of the Government whether at the National or County level and it applies to the processes of legislative enactment, financial management and planning and performance management. In this respect reliance was placed on this Court's decision in **Robert N. Gakuru& Others vs. Governor Kiambu County & 3 others [2014] eKLR.** The Petitioner also relied on Article 196(1)(b) of the Constitution which obligates the County Assembly to facilitate public participation and involvement in the process of legislation and its business. Further, section 87 (b) of the ***County Government Act*** enjoins County Governments to carry out public Participation in the process of formulating and implementing policies, laws and regulations among others.

17. The Petitioner submitted that lack of public Participation is fatal and legislation made without conducting public participation are null and void. In this respect, he relied on **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)**.

18. The Court was therefore urged to hold that where the legislature does not conduct Public Participation in its legislative process in accordance with the dictates of the Constitution, the product of the legislative process is null and void. In this case as the Respondent failed to conduct public participation as required by the Constitution and the County Government Act, the Court was urged to find the entire amendments null and void on that ground alone.

19. As regards amendments to standing orders 59, 60 and 62 it was submitted that the same is unfair, unjust, unreasonable, undemocratic and contrary to the constitutional requirement of fair hearing and public participation. According to the petitioner, prior to the amendment of the Standing orders;

i. Standing order No 59 (2) made provisions for a seven (7) days' notice calling for investigation of the Governor's physical or mental capacity to perform the functions of the office. The amendment has now done away with the said provision making the removal a summary procedure,

ii. Standing order No 60 (4) made provisions for a seven (7) days' notice calling for impeachment of the Governor. Likewise, the amendment has now done away with the said provision.

iii. Standing order No 62 (2) made provisions for a three (3) days' notice calling for dismissal of a Member of County Executive Committee by the Governor. The amendment has now done away with the said provision and there is no longer a notice period.

20. It was submitted that in amending Standing Order 59, 60 and 62 of its Standing Orders by removing the notice period, the Respondent;

i. Deprived the members of the Public an opportunity to participate in the process of the removal from office of the Governor and the county Executive Committee members, despite the public having had a say in their election and appointment into office,

ii. Deprived the members of the Public of their sovereign power and democratic will to participate in their governance,

iii. Denied an accused Governor or CEC the right to be given fair notice of the allegations against them so as to prepare their defence contrary to Article 50 of the Constitution

iv. Denied an accused Governor a chance to be heard prior to a decision being made contrary to Article 47 and 50 and the ***Fair Administrative Actions Act***.

v. Denied members of the Respondent assembly a chance to interrogate, research and make an informed and independent decision on the allegations

21. According to the Petitioner, the importance of the Public Participation in the impeachment of the Governor was restated by the Court of Appeal in the case of **Martin Nyaga Wambora vs. County Assembly of Embu & 37 others [2015] eKLR**.

22. To the petitioner, as clearly stated by the learned judge, the only avenue available to the members of Public to participate in the impeachment of a Governor is from the time of communication of the motion to the Speaker of the County Assembly to the time the motion was debated in the County Assembly. However, the Respondent in this case has done the unthinkable, they have totally done away with the only window available for members of the Public to participate in the impeachment process.

23. According to the petitioner, one would have thought that the Respondent would have taken cue from that decision and amended its standing orders to enlarge the notice period but they rather went the absurd route of reducing the notice period to none at all. It was therefore submitted that without prejudice to our submissions that the entire amendments are invalid, the Amendments introduced to Standing order No. 59, 60 and 62 are inconsistent with the Constitution and the relevant highlighted provisions of the various statutes. It was further submitted that the amendments to Standing Order No. 59, 60 and 62 are unreasonable as no person acting reasonably would have made such amendments especially with clear decisions from this court and the Appellate Court.

24. The Court was therefore urged to find and hold that the amendments to Standing Order No. 59, 60 and 62 are invalid, null and void for their inconsistency with the Constitution and more so with the constitutional requirement of public participation.

25. It was further submitted that the Amendments to the standing orders were made in un-procedural manner. According to the petitioner, the procedure for amending standing order is as provided for under Standing Order 128 and is similar to procedure for consideration Bills. Under Standing Order 128, an amendment to the Standing Orders must be by way of a bill introduced by a Motion. However, the Respondent failed to publish such bill and take it through the various stages (readings) of consideration of a bill. It was thus submitted that the failure by the Respondent to comply with its own Procedure renders the Amendments invalid and the Court was urged to find and hold that the Respondent

failed to comply with the requirements of Standing Order 128 and the Amendments are therefore invalid, null and void.

26. In conclusion, the Court was urged to grant of the following reliefs:

(a) A declaration that the Respondents failed to facilitate public participation and involvement in the process of legislation leading to the amendment of the Machakos County Standing Orders on 24th October 2018 contrary to Article 196(1)(b) of the Constitution.

(b) A declaration that the amendments of Standing Orders numbers 2, 23, 26, 27, 42, 59, 60 and 62 made to the Machakos County Assembly Standing Orders on 24th October 2018 in their totality as approved are unconstitutional.

(c) An order of prohibition stopping the operations and/or implementation of the amendments made to the Machakos County Assembly Standing Orders on 24th October 2018

(d) A declaration that Standing Order 59, 60 and 62 of the Machakos County Assembly are inconsistent with the constitutional requirement of sovereignty of the people, the objects of devolution, public participation, fair hearing, fair administrative action, democratic governance and due process

(e) A declaration that the Respondent violated the Constitution by acting in the manner and way they did.

(f) A declaration that the Respondent violated their own Standing Orders by failing to follow due process in amending the Standing Orders

(g) A declaration that the Respondent's acted unreasonably in the manner they amended the standing orders

(h) Any other order that this Honourable Court may deem fit and just to grant to ensure that rule of law is upheld by the Respondents in exercise of its legislative function

(i) **The cost of the Petition.**

Respondents' Case

27. The Petition was however opposed by the Respondent.

28. According to the Respondent, the Machakos County Assembly Select Committee on Procedure in its 6th and 7th meeting held on 11th September, 2018 at 8.30AM and 25th September,2018 at 8.30 AM discussed the proposed amendments to the Machakos County Assembly Standing Orders for consideration by the House. It was averred that the Assembly is a house of records and hence all members who are present during Committee sitting always append their signature that they have attended the meeting. The said list of attendance is what is used to pay them sitting allowances which they are legally entitled to as approved by the Salaries and Remuneration Commission. The members present during the 6th and 7th meeting of the procedure and Rules and who appended their signatures as were:

Members present during the 6th Meeting held on 11th September,2018	**Members present during the 7th meeting held on 25th September,2018**
Hon. Florence Mwangagi	Hon. Florence M. Mwangangi
Hon. Paul Nyanzi	Hon. Paul M. Nyanzi
Hon. Paul Museku	Hon. Paul N. Museku
Hon. Constance Nzioki	Hon. Constance M. Nzioki
Hon. Jane Nyawira	Hon. Jane W. Nyawira

29. According to the Respondent, on the 23rd October, 2018, a Member of the County Assembly of Machakos, **Hon. Paul Museku** moved a Motion pursuant to the provisions of Standing Orders 187(3) and (4) and 228 dated the same day that the House do discuss and approve the report of Procedure and House Rules Committee on Proposed amendments to the Standing Orders and the Assembly during its sitting held on 23rd October,2018 deliberated on the Report on proposed amendments for the procedure and Rules Committee. According to the Respondent, review of standing Order relates to activities undertaken by the Procedure and Rules Committee which takes into account the challenges and lessons learned by the current house and makes proposed changes for the incoming house.

30. It was the Respondent's position that standing orders are not Bills and hence any proposed amendments to the Standing Order is only subjected to the Committee of the whole House only and reported back to the house upon considering of the proposed amendments based on procedures and traditions of parliaments. From the foregoing therefor, any proposed changes to the Standing

Orders does not need to undergo the pre-publication scrutiny, publication, first reading, committal and subjection to Public participation and consultative forum and subsequently thereto third reading all of which these stages applies to consideration of Bills only.

31. According to the Respondent, the County Assembly always undertakes its mandate in adherence with the Constitution as it is exercise delegated authority of the people to whom the power is vested upon them. This is especially because the county assemblies are always open to the public. That is to mean that the county assembly has designated place referred to as speaker's gallery where any member of the public who would wish to know of the how the county assembly conducts its activities can is allowed to sit any day and time during the assembly proceedings subject to the speaker Rules in compliance with the provisions of Article 196 (1) (a) and (b) and (2) of the Constitution.

32. The Respondent's position was that members of the County Assembly can always maintain very close conduct with their electorates in the respective ward and hence through such interactive forum, they are able to discuss with them any subject matter and or views that they wish their elected and nominated representative presents for and on their behalf in the county assembly. Hence it would be improper to impute that the public does not participate in the county assembly proceedings and or affairs.

33. The Respondent's case was that contrary to the averments of the Petitioner the report was adopted by the majority of the members in compliance with the provisions of section 20 of the ***County Governments Act,*** and the Respondent did not violate and or breach any provisions of the law and mere specifically the Constitution. for the following reasons

a) All the amendments to the County Assembly of Machakos Standing Orders passed by the Assembly on 24th October 2018 were done in strict adherence to the Constitution and other laws. In fact, the main aim of the amendments was to align the Standing Orders with the ***County Governments Act*** No. 17 of 2012 and the ***Public Appointments (County Assemblies Approval) Act 2017***.

Standing Order No. 60 mirrors the provisions of section 33 of the ***County Governments Act, 2012*** while Standing Order No. 62 reflects Section 40 of the same Act. Section 40(1)(a),(b),(c),(d),(e), and (f), (2),(3)(a) and (b),(4),(5)(a) and (b),(6)(a) and (b) of the County Governments Act provides as follows—

(1) Subject to subsection (2), the Governor may remove a member of the county executive committee from office on any of the following grounds—

(a) incompetence;

(b) abuse of office;

(c) gross misconduct;

(d) failure, without reasonable excuse, or written authority of the governor, to attend three consecutive meetings of the county executive committee;

(e) physical or mental incapacity rendering the executive committee member incapable of performing the duties of that office; or

(f) gross violation of the Constitution or any other law.

(2) 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).

(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 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.

b) Standing Order No. 62 (8) (b) gives the committee investigating allegations against a County Executive Committee member ten days to investigate the matter.

c) Under Standing Order No. 62 (7) the County Executive Committee Member being recommended for removal from office has to be informed of the allegations, invited to appear before the committee in person or through a representative.

d) The seven day notice under Standing Order No. 60 (4) and the three days' notice under Standing Order No. 62 (2) of the Standing Orders before the amendments was to the House and not to person being impeached or removed from office as is alleged in the petition.

e) Standing Order No. 63 provides for the right to be heard for a person whose petition for removal from office has been received by the Assembly. They include right be given notice of the motion, right to appear in person or through a legal representative and the right to be given a report of the committee investigating allegations on their removal from office.

f) The Amendments were scrutinized by the committee, subjected to the committee of the whole House and debated in plenary. Any concerns could have been canvased through the members of the County Assembly.

g) Being internal rules of the Assembly, there was no requirement for conducting public participation although in any event and without prejudice to the foregoing the Assembly has an open gallery to members of the public and press to attend the proceedings and make presentations as necessary.

34. It was therefore contended that from the foregoing, the County Assembly of Machakos, the Respondent herein seeks for orders that the Petition be dismissed with costs as it seeks to interfere with the legislative authority of the County Assembly which is vested on it by the constitution. Further, based on the principles of separation of powers, the county assembly is an independent entity which should perform its obligations legally without any interference from any courts of law.

35. It was submitted on behalf of the Respondent that Respondent in carrying out the proposed Amendments to the Machakos County Assembly Standing Orders adhere to the Constitutional requirement of adequate Public Participation as required by Article 196(1) and that from the foregoing it is clear that:

a) The Petition as presented had no proof of infringement of any of the Petitioner's rights to public participation under Article 196(1)(a)(b)of the Constitution, 2010. Further, Sections 87, 91 and 115 of the County Government's Act, No. 17 of 2012 only required facilitation of reasonable public participation which the Respondent had complied with.

b) There was sufficient notice and adequate public participation before the Amendment of the Standing Orders by the Respondent to the members of the public who are always invited to sit in the Assembly gallery and also through their representatives who are Members of the County Assembly since the meetings to discuss the proposed amendments started on the 11th September, 2018 and the Report was tabled on the 24th October, 2018.

c) There had been extensive involvement of the residents of Machakos County and further that there was representation of the Petitioner and the said residents by their Members of County Assembly (MCAs) at the proceedings leading to amendments of the Standing Orders, the subject of the Petition herein.

36. According to the Respondents, the Applicant has not established a case to warrant grant of the reliefs sought herein for the reasons following:

a) All the amendments to the County Assembly of Machakos Standing Orders passed by the Assembly on 24th October 2018 were done in strict adherence to the Constitution and other laws. In fact, the main aim of the amendments was to align the Standing Orders with the County Governments Act No. 17 of 2012 and the Public Appointments (County Assemblies Approval) Act 2017.

b) Standing Order No. 60 mirrors the provisions of section 33 of the County Governments Act, 2012 while Standing Order No. 62 reflects Section 40 of the same Act and section 40(1)(a),(b),(c),(d),(e), and (f), (2),(3)(a) and (b),(4),(5)(a) and (b),(6)(a) and (b) of the County Governments Act provides as follows—

(1) Subject to subsection (2), the Governor may remove a member of the county executive committee from office on any of the following grounds—

(a) incompetence;

(b) abuse of office;

(c) gross misconduct;

(d) failure, without reasonable excuse, or written authority of the governor, to attend three consecutive meetings of the county executive committee;

(e) physical or mental incapacity rendering the executive committee member incapable of performing the duties of that office; or

(f) gross violation of the Constitution or any other law.

(2) 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).

(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 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 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.

c) Standing Order No. 62 (8) (b) gives the committee investigating allegations against a County Executive Committee member ten days to investigate the matter.

d) Under Standing Order No. 62 (7) the County Executive Committee Member being recommended for removal from office has to be informed of the allegations, invited to appear before the committee in person or through a representative.

e) The seven day notice under Standing Order No. 60 (4) and the three days' notice under Standing Order No. 62 (2) of the Standing Orders before the amendments was to the House and not to person being impeached or removed from office as is alleged in the petition.

f) Standing Order No. 63 provides for the right to be heard for a person whose petition for removal from office has been received by the Assembly. They include right be given notice of the motion, right to appear in person or through a legal representative and the right to be given a report of the committee investigating allegations on their removal from office.

g) The Amendments were scrutinized by the committee, subjected to the committee of the whole House and debated in plenary. Any concerns could have been canvased through the members of the County Assembly.

h) Being internal rules of the Assembly, there was no requirement for conducting public participation although in any event and without prejudice to the foregoing the Assembly has an open gallery to members of the public and press to attend the proceedings and make presentations as necessary.

37. In support of their case the Respondents relied on **Article 196 (1)** of the Constitution of Kenya, 2010 and sections 87, 91 and 115 of the ***County Government's Act,* No. 17 of 2012** only required facilitation of reasonable public participation which the 2nd Respondent had complied with.

38. They also relied **Pevans East Africa Limited vs. Chairman Betting Control and Licencing Board [2013] eKLR.** According to **The Institute Of Social Accountability & Anor vs. The National Assembly & 7 Others [2017] eKLR.**

39. The Court was urged to find that even if there was breach of any provisions of the law by the Respondent, the same would not warrant a draconian relief of declaration the amendments unconstitutional and or null and void. Further reliance was placed on **Diani Business Welfare Association and Others vs. The County Government of Kwale [2015] eKLR**, **Moses Munyendo & 908 Others vs. Attorney**

General &Anor [2013] eKLR, **Meru Bar, Wines & Spirits Owners Self Help Group vs. County Government of Meru [2014] eKLR** and **Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudheha) vs. Salaries and Remuneration Commission & Anor [2014] eKLR.**

40. It was therefore the Respondents' case that the Petitioner had not met the thresholds for grant of the orders herein. Accordingly they pray that the Court do hold their submissions and proceed to dismiss the Petitioner's Petition dated 7th November, 2018 herein with costs to Respondent.

Determinations

41. The first issue is whether this Court has the power to grant the orders sought herein in light of the doctrine of separation of powers.

42. That the doctrine of separation of powers applies to the national government as well as devolved governments was appreciated in **Simon Wachira Kagiri vs. County Assembly of Nyeri & 2 Others (2013) eKLR** at page 13 thereof where it was held as follows:

> **"County governments are miniature national governments structures and ordered in line with traditions and principles that govern the national Government. To this extent the doctrine of separation of powers apply with equal measure."**

43. **Montesquieu** had sought to address this doctrine in his work, ***De L'esprit Des Lois*** [***The Spirit of the Laws*** (1948)]in the following words:

> ***When the legislative and Executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, there is no liberty if the power of judging is not separated from the legislative and Executive, there would be an end to everything, if the same man or the same body were to exercise those three powers.***

44. That this principle is reflected in our own Constitution appears in Article 1(3) thereof which provides that sovereign power which pursuant to Article 1(1) of the Constitution ***"belongs to the people of Kenya and shall be exercised only in accordance with this Constitution***":

> ***"…is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—***
>
> ***(a) Parliament and the legislative assemblies in the county governments;***
>
> ***(b) the national executive and the executive structures in the county governments; and***
>
> ***(c) the Judiciary and independent tribunals.***

45. This was appreciated by the High Court in **Trusted Society of Human Rights v. The Attorney-General and Others, High Court Petition No. 229 of 2012; [2012] eKLR**, at paragraphs 63-64 where it held as follows:

> **"Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuian influence is palpable throughout the foundational document, the Constitution, regarding the necessity of separating the Governmental functions. The Constitution consciously delegates the sovereign power under it to the three branches of Government and expects that each will carry out those functions assigned to it without interference from the other two."**

46. Thus, while the Constitution provides for several State organs, including commissions and independent offices, the people's sovereign power is vested in the *Executive, Legislature* and *Judiciary.*

47. The broad principle of "separation of powers", certainly, incorporates the scheme of "checks and balances"; but the principle is not to be applied in theoretical purity for its ultimate object is good governance, which involves phases of co-operation and collaboration, in a proper case. This perception emerges from **Commission for the Implementation of The Constitution vs. National Assembly of Kenya, Senate & 2 Others [2013] eKLR where Njoki, SCJ** opined that:

> "**The system of checks and balances that prevents autocracy, restrains institutional excesses and prevents abuse of power apply equally to the Executive, the Legislature and the Judiciary. No one arm of Government is infallible, and all are equally vulnerable to the dangers of acting** ultra vires **the Constitution. Whereas, the Executive and the Legislature are regularly tempered and safeguarded through the process of regular direct elections by the people, the discipline of an appointed and unelected Judicial arm of Government is largely self-regulatory. The parameters of encroachment on the powers of other arms of Government must be therefore clearly delineated, [their] limits acknowledged, and restraint fully exercised. It is only through the practice of such cautionary measures, that the remotest possibility of judicial tyranny can be avoided."**

48. The spirit and vision behind separation of powers is that there be checks and balances, and that no single person or institution should have a monopoly of all powers. This was restated by **Twinomujuni, JA** in **Masaluand Others vs. Attorney General [2005] 2 EA 165 (CCU)** as follows:

> **"The Constitution, the supreme law, vests all judicial power of the people in the Judiciary and whether the dispute involves the interests of the Judiciary or individual judicial officers or not, it is only the judiciary which is vested with judicial power**

to resolve it. However the judiciary must resolve the dispute "in the name of the people and in conformity with law and with the values, norms and aspirations of the people"……The Constitution was framed on the fundamental theory that a larger measure of liberty and justice would be assured by vesting the three great powers, the legislative, the executive and the judicial in separate department, each relatively independent of the others; and it was recognised that without this independence if it was not made both real and Enduring, the separation would fail of its purpose. All agreed that restraints and checks must be imposed to secure the requisite measure of independence; for otherwise the legislative department, inherently the strongest, might encroach on or even come to dominate the others, and the judicial, naturally the weakest, might be dwarfed or swayed by the other two, especially the legislature…….The executive not only dispenses honour but holds the sword of the community. The Legislature not only commands the purse, but also prescribes the rules by which the duties and rights of every citizen are to be regulated. The Judiciary on the contrary has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgement. This simple view of the matter suggests several important consequences. It proves incontestably that the Judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the two; and that all possible care is requisite to enable it defend itself against their attacks. The complete independence of the Courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, it is one, which contains certain specified exceptions to the legislative authority; such as for instance that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without all this, all the reservations of particular rights or privileges would amount to nothing…A Judge has to pass between the Government and the man whom the Government is prosecuting; between the most powerful individual in the community and the poorest and the most unpopular. It is of the last importance, that in the exercise of these duties he should observe the utmost fairness. The judicial department comes home in its effects to every man's side; it passes on his property, his reputation, his life, his all. It is to the last degree important that he should be rendered perfectly and completely independent with nothing to influence or control him but God and his conscience. The greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent Judiciary."

49. The Supreme Court has ably captured this fact in **Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011** where it expressed itself as follows:

"The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation."

50. However, Article 2(4) of our Constitution which provides as follows:

Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

51. Under Article 165(3)(d)(i) and (ii) the High Court is clothed with the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether any law is inconsistent with or in contravention of the Constitution and the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. Therefore whereas the legislative authority vests in Parliament and the County legislative assemblies where a question arises as to whether an enactment is inconsistent with the Constitution or is passed in contravention of the Constitution the High Court is the institution constitutionally empowered to determine such an issue subject to the appellate jurisdiction given to the Court of Appeal and the Supreme Court. This is in recognition of the fact that there is nothing like supremacy of the legislative assembly outside the Constitution since, under Article 2(1) and (2), the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government and no person may claim or exercise State authority except as authorised under the Constitution. Therefore there is only supremacy of the Constitution and given that the Constitution is supreme, every organ of State performing a constitutional function must perform it in conformity with the Constitution. So, where any State organ fails to do so, the High Court, as the ultimate guardian of the Constitution, will point out the transgression. The contrary argument, in our view, runs counter to the constitutional provisions with respect to the jurisdiction of this Court. The jurisdiction of the Court to invalidate laws that are unconstitutional is in harmony with its duty to be the custodian of the Constitution, which pronounces its supremacy at Article 2. Similarly, the general provisions of the Constitution, which are set out in Article 258 contain the express right to every person to **"…** *institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention*."

52. My position is supported by the decision in **Coalition for Reform and Democracy (CORD) & Another versus the Republic of Kenya & Another (2015) eKLR** where the court stated *inter alia* at paragraph 125 that:

"Under Article 1 of the Constitution sovereign power belongs to the people and it is to be exercised in accordance with the Constitution. That sovereign power is delegated to Parliament and the legislative assemblies in the county governments; the national executive and the executive structures in the county governments; and the Judiciary and independent tribunals. There is however a rider that the said organs must perform their functions in accordance with the Constitution. Our Constitution having been enacted by way of a referendum, is the direct expression of the people's will and therefore all State organs in exercising their delegated powers must bow to the will of the people as expressed in the Constitution… Article 2 of the Constitution provides for the binding effect of the Constitution on State Organs and proceeds to decree that any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid…"

53. Therefore when an issue arises as to the constitutionality of any act done or threatened by either the Legislature or the Executive, it falls

upon the laps of the Judiciary to determine the same. As was held in **Jayne *Mati & Another vs. Attorney General and Another* - Nairobi Petition No. 108 of 2011** at paragraph 31:

> **"…separation of powers between the judiciary, executive and legislature is one of the hallmarks of our Constitution. Each body or organ of state is bound by the Constitution and should at all times acquaint itself of its provisions as it works within its sphere of competence. Constitutional interpretation is not the sole preserve of the judiciary but the judiciary has the last word in the event of a dispute on the interpretation and application of the Constitution."**

54. On that note, the Supreme Court in **Speaker of National Assembly -vs-Attorney General and 3 Others (2013) eKLR** stated 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. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering its opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act. "**

55. The Court went on to state as follows:

> **"Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of "right" and "wrong" in such cases, short of a resolution in plebiscite, is only the Courts."**

56. As was held the case of **De Lille & Another vs. The Speaker of the National Assembly (1998)(3) SA 430(c)** in which the Court stated as follows:

> **"The National Assembly is subject to the Supremacy of the Constitution. It is an organ of state and therefore it is bound by the Bill of Rights. All its decisions and acts are subject to the Constitution and the Bill of Rights. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution. It is subject in all respects to the provisions of our Constitution. It has only those powers vested in it by the Constitution expressly or by necessary implication or by other statutes which are not in conflict with the Constitution. It follows therefore that Parliament may not confer on itself or on any of its constituent parts, including the National Assembly, any powers not conferred on them by the Constitution expressly or by necessary implication."**

57. On appeal the Appellate Court in **Speaker of National Assembly vs. De Lille MP & Another 297/98 (1999)(ZASCA 50)** rendered itself as follows:

> **"This enquiry must crucially rest on the Constitution of the Republic of South Africa. It is Supreme- not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No parliament, no official and no institution is immune from Judicial scrutiny in such circumstances."**

58. The South African Constitutional Court in ***Minister of Health and Others vs. Treatment Action Campaign and Others* (2002) 5 LRC 216, 248 at** paragraph 99 **underscored** the Court's role to protect the integrity of the Constitution thus:

> ***"The primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the State to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive that is an intrusion mandated by the Constitution itself."***

59. I am are duly guided and this Court, vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the invitation to do so is most welcome as that is one of the core mandates of this Court.

60. This however does not mean that the Judiciary should superintend the other two arms of government in all their undertakings in order to determine whether their decisions are "right" or "wrong". As was appreciated by the Court of Appeal in **Mumo Matemu vs. Trusted**

Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012; eKLR [2012]:

> **"It is not in doubt that the doctrine of separation of powers is a feature of our Constitutional design and a per-commitment in our Constitutional edifice. However, separation of power does not only proscribe organs of Government from interfering with the other's functions. It also entails empowering each organ of Government with countervailing powers which provide checks and balances on actions taken by other organs of Government. Such powers are, however, not a licence to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore cannot agree with the High Court's dicta in the Petition, subject of this Petition that -**
>
> **'Separation of powers must mean that the courts must show deference to the Independence of the legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet as the Respondents concede, the courts have an interpretive role including the last word in determining the constitutionality of all government actions.'"**

61. It was therefore appreciated by **Ngcobo, J** in **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)** that:

> **"The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court. It seems to me therefore that a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes, on the one hand, and those provisions which impose the primary obligation on Parliament to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority. The criteria set out are clear, and a failure to comply with them would lead to invalidity. When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation… By contrast, where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that obligation has been fulfilled, trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers. This is precisely what the obligation comprehended in section 72(1)(a) does."**

62. In the words of **Ackermann, J** in the South African case of **National Coalition for Gay and Lesbian Equality & Others 13 Others, Case CCT No.10/99**:

> **"the other consideration a court must keep in mind, is the principle of the separation of powers and, flowing therefrom, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature."**

63. The rational for exercise of restraint was explained in **Okiya Omtatah Okoiti & 3 Others vs. Attorney General & 5 Others [2014] eKLR** in which a 3 judge bench of the Court stated that:

> **"In our view, Members of Parliament should not look over their shoulders when conducting debates in Parliament. They must express their opinions without any fear. The Court should be hesitant to interfere, except in very clear circumstances, in matters that are before the two Houses of Parliament and even those before the county assemblies."**

64. In **Patrick Ouma Onyango & 12 others vs. Attorney General and 2 Others [2005] eKLR** the court, on the issue of whether it should interfere with a political or legislative process stated:

> **"The answer the court gives to this question is that whatever the technicalities or the legal theory, sound constitutional law must be founded on the bedrock of common sense and the courts must now and in the future appreciate the limitations on formulation of policy, legislative process and practical politics because the courts are ill equipped to handle such matters".**

65. In my view the issue for determination before this Court is the manner in which the County Assembly is supposed to carry out is process of amendment of its standing orders and whether that process met the constitutional threshold.

66. There is no doubt at all that the amendments of standing orders is an act that requires the application of the Constitution and the law. Clearly therefore there can be no doubt that before the said amendments are made the process of the amendment must comply with the constitutional principles. This was the spirit of the decision in **Trusted Society of Human Rights Alliance vs. Attorney-General & 2 Others [2012] eKLR** where the Court said:

> **"The constitution consciously delegates the sovereign power under it to the three branches of government and expects each will carry out those functions assigned to it without interference from the other two…this must mean that the courts must**

show deference to the independence of the legislature as an important institution in the maintenance of our constitutional democracy as well as accord the Executive sufficient latitude to implement legislation intent. Yet...the courts have an interpretive role, including the last word in determining the constitutionality of all governmental action. That too is an incidence of the doctrine of separation of powers."

67. It is not in doubt that this Court has the power and the jurisdiction to strike down the actions of County Assemblies where such orders are warranted. I therefore associate myself with the decision in **John Kipng'eno Koech & 2 Others vs. Nakuru County Assembly & 5 Others [2013] eKLR,** where it was held that:

" It is thus clear to this Court that a County Assembly exercising its administrative function of approval of nominees, has a statutory duty to exercise that function to the fullest extent with the requirements of the enabling law, and failure to do so, may render its findings, determinations and decisions and recommendations ultra vires the Act…"

68. As to whether this Court should interfere with the actions of the Respondents herein must however depend on the facts of this petition.

69. In my view the determination of this petition revolves around three issues which are:

1. **Whether the amendments in question required that public participation be adhered to.**

2. **Whether there was in fact public participation.**

3. **Whether the amendments themselves were constitutional.**

70. It is not in doubt that the amendments in issue related to the procedure of the removal or impeachment of the Governor. It is true that Article 93(2) enjoins the National Assembly and the Senate to perform their respective functions in accordance with this Constitution and in so doing they are enjoined by Article 124(1) to make Standing Orders for the orderly conduct of their proceedings. Standing orders are therefore the legal instruments through which the Assemblies perform their constitutional mandate. It was therefore held by the Supreme Court of Zimbabwe with respect to the importance of Standing Orders in the case of **Tendai Laxton Biti and Another vs. The Minister of Justice, Legal and Parliamentary Affairs and Another, Civil Application No 46 of 2002** that:

"There is therefore merit in the submission that, having made such a law, Parliament cannot ignore that law. Parliament is bound by the law as much as any other person or institution in Zimbabwe. Because Standing Orders arise out of the Constitution, and because the Constitution mandates Parliament to act in accordance with Standing Orders, they cannot be regarded merely as "rules of a club". Standing Orders constitute legislation which must be obeyed and followed… Commonsense dictates that Parliament is required to comply with its own laws regarding the enactment of legislation. This principle stems from as far back as the decision in Minister of the Interior & Anor v Harris & Ors 1952 (4) SA 769 (A), in which the Appellate Division struck down legislation passed by the Nationalist Government in South Africa to create a High Court of Parliament to override the Appellate Division's earlier decision in respect of voting rights of non-white persons, see Harris & Ors vs. Minister of the Interior & Anor 1952 (2) SA 428 (A). In other jurisdictions, the courts have applied the principle that legislation which is enacted by a legislative body without compliance with the existing law in respect to the enactment of legislation will be declared void by the courts, even where the Constitution provides for a parliamentary democracy form of government."

71. In the case of **Mzwinila vs The Attorney General of Botswana, Case No Misc No 128 of 2003, 2003 (1) BLR 554 (HC)** the High Court of Botswana held that:

"The standing orders reflect the custom and usage of parliament as confirmed by resolution."

72. In my view Standing Orders reflect parliamentary policy of undertaking the Assembly's constitutional and legislative mandate. However as stated in ***Biti Case*** (Supra) because Standing Orders arise out of the Constitution, and because the Constitution mandates Parliament to act in accordance with Standing Orders, they cannot be regarded merely as "rules of a club". Standing Orders constitute legislation which must be obeyed and followed. Since they are both legislation and public policy instruments, it is my view and I find that they are subject to Article 10 of the Constitution which was dealt with in **Republic vs. The Attorney General & Another ex parte Hon. Francis Chachu Ganya, Nairobi High Court (Judicial Review Division) Miscellaneous Application No. 374 of 2012**, as follows:

"One of the issues raised in these proceedings is that the ex parte applicants were not consulted before the decision affecting them was made. It is not in dispute that under Article 10 of the Constitution the national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution, *enacts, applies or interprets any law or makes or implements public policy decisions*. It is also true that under Article 10(2) of the Constitution, national values include *participation of the people*, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised and good governance, integrity, transparency and accountability. Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate their views."

73. It was therefore held in In Nairobi Civil Appeal No. 224 of 2017 – **Independent Electoral and Boundaries Commission & Others vs. The National Super Alliance & Others**, the Court of Appeal was emphatic in paragraphs 80 and 81 that:

"80. In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforceable gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1)(a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.

81. Consequently, in this appeal, we make a firm determination that Article 10(2) of the Constitution is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate."

74. I agree with the position in **The Institute of Social Accountability & Anor vs. The National Assembly & 7 Others [2017] eKLR** that:

"Further, unless the alleged breach of procedure during enactment is demonstrated to be so fundamental that it is a mockery of the constitutional and procedural requirements, I hold that it would not meet the threshold for a court to nullify an otherwise constitutional legislation. Thus it is upon the person alleging to demonstrate to the court that he process was fundamentally flawed such that the ensuing legislation should not be allowed to stand."

75. In this case the amendments in question provided, inter alia, for the procedure for the removal of the Governor. A Governor is the Chief Executive of a County and is elected directly by the people. Whereas, the Constitution and the legislation provide for its removal, any such process must take into account the fact that that the election of the Governor is directly by the people. His or her removal must therefore reflect the will of the people. It has however been said that since the Members of the County Assembly represent the people, their decision reflects the will of the people. The reality is however does not support this view. By parity of reason, in passing legislation it has been argued that there is no need for public participation as the people are represented by their representatives in the Assembly. However in **Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC),** where **Ngcobo, J** held *inter alia* as follows:

"Our constitutional democracy has essential elements which constitute its foundation; it is partly representative and partly participative. These two elements reflect the basic and fundamental objective of our constitutional democracy. The provisions of the Constitution must be construed in a manner that is compatible with these principles of our democracy. Our system of government requires that the people elect representatives who make laws on their behalf and contemplates that people will be given the opportunity to participate in the law-making process in certain circumstances. The law-making process will then produce a dialogue between the elected representatives of the people and the people themselves. The representative and participative elements of our democracy should not be seen as being in tension with each other…What our constitutional scheme requires is "the achievement of a balanced relationship between representative and participatory elements in our democracy." The public involvement provisions of the Constitution address this symbolic relationship, and they lie at the heart of the legislative function. The Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process…To uphold the government's submission would therefore be contrary to the conception of our democracy, which contemplates an additional and more direct role for the people of the provinces in the functioning of their provincial legislatures than simply through the electoral process. The government's argument that the provisions of section 118(1)(a) are met by having a proposed constitutional amendment considered only by elected representatives must therefore be rejected…Before leaving this topic, it is necessary to stress two points. First, the preamble of the Constitution sets as a goal the establishment of "a society based on democratic values [and] social justice" and declares that the Constitution lays down "the foundations for a democratic and open society in which government is based on the will of the people." The founding values of our constitutional democracy include human dignity and "a multi-party system of democratic government to ensure accountability, responsiveness and openness." And it is apparent from the provisions of the Constitution that the democratic government that is contemplated is partly representative and partly participatory, accountable, transparent and makes provision for public participation in the making of laws by legislative bodies. Consistent with our constitutional commitment to human dignity and self respect, section 118(1)(a) contemplates that members of the public will often be given an opportunity to participate in the making of laws that affect them. As has been observed, a "commitment to a right to… public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self respect."

76. This was the position in **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)**, where the court held as follows:

"The right to political participation is a fundamental human right, which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements: a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected…..Significantly, the ICCPR guarantees not only the "right" but also the "opportunity" to take part in the conduct of public affairs. This imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation.

77. I therefore associate myself with the position adopted by **Okwengu, JA** in **Martin Nyaga Wambora vs. County Assembly of Embu & 37 others [2015] eKLR** that:

"…the removal of the Governor was not just any other business of the County Assembly, but a matter in which the electorate in the County Assembly were deeply interested, the Governor having been directly elected by the electorate. The matter was weighty and of great interest to the people of Embu whose only opportunity to participate effectively in the removal process, was from the time of communication of the motion to the Speaker of the County Assembly to the time the motion was debated in the County Assembly."

78. Therefore being a matter was weighty and of great interest to the people of the Assembly concerned, any procedure that leads to removal or impeachment of the Governor from the office is in my view so fundamental that it would a mockery of the constitutional and procedural requirements for the Members of the County Assembly to make it solely their business in deciding whether or not to remove a Governor. It is not lost to this Court that while voters of a County may elect a Governor notwithstanding his or her political affiliation, where such a Governor does not enjoy the support of the party with the majority in the County Assembly, unless public participation is inoculated in the process of removal of a Governor, the provision for election of Governs by popular mandate may well become a mirage.

79. It is therefore my view and I hereby find that it was necessary before amending the Standing Orders the subject of this petition that the public ought to have been involved in that process.

80. Was this done? Apart from merely averring that this was done, there is completely no evidence that the public participation was taken into account in the said process. I agree with **Mwita, J** in **Kenya Human Rights Commission vs. Attorney General & Another [2018] eKLR** where he held that:

"Once a petitioner attacks the legislative process on grounds that the law making process did not meet the constitutional standard of public participation, the respondent is under a legal obligation to demonstrate that the legislative process did meet the constitutional standards of public participation...there was no attempt on the part of the respondent to show that there was any semblance of public participation in the legislative process leading to the enactment of the impugned Contempt of Court Act. That being the state of affairs, the court has no option but to agree with the petitioner that there was violation of an important constitutional step in the form of public participation and the Act fails this constitutional compliance step."

81. In this case I am not satisfied that there an opportunity was afforded to the public to air their views on the proposed amendments before they were passed.

82. Can the County Assembly amend Standing Orders with a view to reducing the period for public participation? It is clear that it can do so as long as in doing so it does not render public participation a formality. As this Court held in ***Robert N. Gakuru & Others vs. The Governor Kiambu County & 3 Others Petition No. 532 of 2013***:

"In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply "tweet" messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may fora as possible such as churches, mosques, temples, public *barazas* national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action. Article 196(1)(b) just like the South African position requires just that."

83. To afford the public unrealistic period to air their views, in view would defeat the spirit of Article 10 and render it a dead letter of the law. The Court of Appeal in ***Martin Nyaga Wambora*** **(supra)** has already alluded to the fact that even the 7 days given to the public was too stringent and thus inconsistent with the requirement of public participation when it held that:

"section 33 of the County Government Act is not inconsistent with Article 1, 2(1), 10, 118 (1)(b), 174, 196 (1)(b) of the Constitution in regard to public participation in the removal of a County Governor rather it is the Embu Standing Orders that are inconsistent with the constitutional requirement of public participation because of the stringent timelines."

84. In the premises I find merit in this petition and I hereby issue the following orders:

(a) A declaration that the Respondents failed to facilitate public participation and involvement in the process of legislation leading to the amendment of the Machakos County Standing Orders on 24th October 2018 contrary to Article 196(1)(b) of the Constitution.

(b) A declaration that the amendments of Standing Orders numbers 2, 23, 26, 27, 42, 59, 60 and 62 made to the Machakos County Assembly Standing Orders on 24th October 2018 in their totality as approved are unconstitutional.

(c) An order of prohibition stopping the operations and/or implementation of the amendments made to the Machakos County Assembly Standing Orders on 24th October 2018.

(d) As the petition was a public interest matter, there will be no order as to costs.

85. It is so ordered

Read, signed and delivered in open Court at Machakos this 21st day of January, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Mutuku for Mrs Kamende for the 1st and 2nd Respondents

CA Geoffrey