REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CONSTITUTIONAL PETITION NO. 17 OF 2018

IN THE MATTER OF CONSTITUTION OF KENYA 2010

IN THE MATTER OF ARTICLES 2, 3, 10, 20 22,38,47,50,165,174,179,196,258 & 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2012, SECTIONS 14, 31, 32(2) &40

AND

IN THE MATTER OF REMOVAL FROM OFFICE AS COUNTY EXECUTIVE COMMITTEE MEMBER OR ANY PERSON OFFICE, UNDER MACHAKOS COUNTY STANDING ORDERS NO 62,63& 64

AND

IN THE MATTER OF PRINCIPLES OF NATURAL JUSTICE

BETWEEN

HON.FRANCIS MALITI.....PETITONER

-VERSUS-

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

THE SPEAKER,

COUNTY ASSEMBLY OF MACHAKOS.....2ND RESPONDENT

HON. COSMAS MASESI.....3RD RESPONDENT

AND

THE GOVERNOR, MACHAKOS COUNTY...INTERESTED PARTY

JUDGEMENT

Parties

1. The Petitioner herein, **Hon. Francis Maliti**, is the Deputy Governor of Machakos duly declared elected under Article 179 of the Constitution of Kenya, 2010 and duly assigned the Finance portfolio as a member of the County Executive Committee under Section 32(3) of the ***County Governments Act, 2012***.

2. The 1st Respondent, **the County Assembly of Machakos** (hereinafter referred to as "the Assembly"), is the County Assembly duly established under Article 176, 177 of the Constitution of Kenya, 2010 and section 7 & 8 of the ***County Governments Act***, 2012 with powers

under section 40 thereof and Machakos County Standing Orders No. 62 &63.

3. The 2nd Respondent herein is the Speaker of the County Assembly of Machakos duly elected under Article 178 of the Constitution of Kenya 2010, and a member of the County Assembly under Section 7(1)(b) of the ***County Governments Act***, 2012.

4. The 3rd Respondent herein is a member of the County Assembly of Machakos duly elected to represent Matungulu East Ward, of the Machakos County and the mover of the motion to remove the petitioner from the position of the County Executive Committee Member Finance and Economic Planning under Section 40 of the ***County Governments Act***, 2012 dated 7th November, 2018

5. The interested party herein is the Governor, Machakos County duly elected under Article 180 and clothed with powers of appointment and removal of members of the County Executive Committee under Article 179 of the Constitution of Kenya, 2010 and Section 40 ***County Governments Act***, 2012.

Petitioner's Case

6. The Petitioner averred that being the Deputy Governor of Machakos County, he was duly elected along with the Governor in the general Elections held on 8th August, 2017. In that capacity, he is a member of the County Executive Committee hence the Governor has power and consultancy to assign to him such responsibilities and/or portfolio as a member of the County Executive Committee.

7. He averred that immediately after being sworn in as Deputy Governor and as the Governor established members of the County Executive Committee; he was assigned the responsibility and/or portfolio of the Finance and Economic Planning, a position which, in his view, does not require the approval and/or vetting by the County Assembly. He disclosed that he had served in the aforesaid portfolio for a period of one year without challenge by the 1st Respondent Assembly and had discharged his mandate as such with diligence, integrity and competence deserved of such a position since appointment.

8. This Petition was however triggered by the events that took place on or about the 6th November, 2018, when the 3rd Respondent herein presented a motion before the Clerk of the County Assembly of Machakos for onward transmission to the 2nd Respondent, a motion for the removal of the Petitioner from office under Section 40 of the ***County Governments Act, 2012*** and the Machakos County Standing Orders No. 62 on the grounds:

(a) That the petitioner was incompetent as he does not hold at least a first degree from a recognized University in Kenya that is relevant to the portfolio of Finance and Economic Planning in contravention of the relevant provisions of the Constitution and Section 35(3) (b) of the ***County Governments Act*** and Section 8 (c) and the second schedule of the ***Public Appointments (County Assemblies Approval) Act***.

(b) That the petitioner does not have knowledge, experience, a distinguished career, abilities and qualities of not less than five years relevant to and that meets the needs of the portfolio of the County department of Finance and Economic Planning for which he is currently serving as member of the County Executive Committee contrary to the provisions of Section 35 (3) (d) of the ***County Governments Act*** and Section 8 (c) and the second schedule of the ***Public Appointments (County Assemblies Approval) Act***.

(c) That the petition was in gross violation of the Constitution of Kenya, 2010 and particularly Article 183(3) the Constitution of Kenya, 2010 and Section 124 of the ***County Governments Act***, by refusing to submit documents lawfully requested for by the Assembly in the discharge of its oversight role over the Executive, namely, IFMIS account balances to the Budget and Appropriations Committee as requested for by the Committee to assist it in the preparations of the Supplementary Budget 2017/18.

(d) As head of the County Treasury, repeatedly failing to discharge within time the responsibilities vested in him under Chapter 12 of the Constitution and Part IV of the ***Public Finance Management Act***, 2012, with respect to the management and control of public finance in the County.

(e) Failing to comply with Section 104 (1) (r) of the ***Public Finance Management Act*** which provides for regular reporting to the Assembly on the implementation of the annual county budget.

(f) Failing to implement the County Bursary Fund established under Section 116 (1) of the ***Public Finance Management Act*** as provided in the ***Machakos County (Bursary Fund) Regulations, 2014*** I contravention of the provisions of Article 183 (a) of the Constitution which requires the relevant Executive Committee Member to implement County Legislation.

(g) Failing to implement the ***Machakos County Health Management Fund Regulations, 2015*** whose main objective is to ensure that all the funds collected in health facilities are ploughed back to the health facilities in violation of the provisions of Article 183 (a) of the Constitution which requires the relevant County Executive Committee Member to implement County Legislation.

(h) Failing to implement the Assembly Resolutions by refusing to co-ordinate the implementation of the ***Machakos County Supplementary Appropriation Act of 2018*** which outlined various projects to be undertaken at Ward level in total breach of Section 104 (1) (c) of the ***Public Finance Management Act*** and Articles 176 (1) and 183(3) of the Constitution of the establishment of the Assembly and the Assembly's oversight role over the County Executive.

(i) Failing to develop and submit to the Assembly and implement within time the various financial and economic planning policies in the County as stipulated in Sections 104 (1) (a), 117,118,125& 126, among others, of the ***Public Finance Management Act***.

9. It was pleaded that the motion was supported by more than 1/3 of the members of the County Assembly whose names were disclosed and the motion was tabled before the County Assembly of Machakos by the 3rd Respondent on the 7th November, 2018 at 10:00am.

10. According to the petitioner, the motion was debated even before a Select Committee was appointed and the members present at the assembly appointed an ad-hoc committee which ad hoc committee comprised of persons who were either amongst the one-third requirement category and who appended their signatures supporting the motion and/or signified their support of the same on the floor of the assembly prior to the appointment of the ad-hoc committee, where an initial debate was held.

11. It was the Petitioner's contention that he learned from social media that the County Assembly, 1st Respondent, had initiated a process of his removal from office on the 7th November, 2018 but was not served with the notice prior to the appointment of the select ad-hoc committee.

12. On the 9th Novemebr,2018 on the Petitioner's instructions the firm of Nyamu & Nyamu Company Advocates vide letter dated 8th November,2018, requested for documents as follows:-

1. Notice of Motion initiated for purposes of removal of the Deputy Governor as the County Executive Committee Member, Finance.

2. List of members in support of the Notice of Motion.

3. Hansard report on proceedings of Wednesday, 7th November, 2018.

4. Membership of the ad-hoc Committee selected to investigate any allegations levelled against the Deputy Governor of Machakos County.

5. Letters from political party caucuses nominating members of the County Assembly to the ad-hoc committee.

6. Letter inviting Deputy Governor before Ad-Hoc Committee.

7. Minutes of House Business Committee approving Order paper.

8. Order paper for Wednesday, 7th November, 2018.

13. On the same day which was on Friday at 7:30pm the 1st Respondent handed over some of the documents requested as aforesaid to a member of staff at a time when no Counsel was in the office and the said member of staff namely, **Edison Munuve**, to whom the documents were handed over, took them with him and being a weekend he presented the same to the aforesaid firm offices on Monday the 12th November, 2018 the same day the Petitioner was scheduled to appear before the Select Committee at 10:00am. According to the Petitioner, as his advocates are based in Nairobi City while he is based in Machakos the notice was inadequate and he did not have adequate time to prepare written response and to appear before the Select Committee investigating the allegations levelled against him by the 3rd Respondent, mover of the motion.

14. It was further contended that the 3rd Respondent who was the accuser and mover of the motion also happened to be part of the Select Committee appointed to investigate allegations levelled against the Petitioner and the letter of invitation to appear before the Select Committee served at 7:30pm Friday 9th November, 2018 requested the Petitioner to present a written response to the allegations on or before the 12th November, 2018.

15. The Petitioner therefore complained that in the given circumstances it was neither possible for the Petitioner to appear nor was it practical for him to present written response as the notice was too short.

16. However, on the appointed date and time the Select (ad-hoc) Committee proceeded in the Petitioner's absence made its findings and compiled a report.

17. On the 13th November, 2018 the Petitioner's Advocate by a letter addressed to the Clerk of the County Assembly of Machakos expressed dissatisfaction with the manner in which the removal proceedings were conducted and raised the following reservations: -

(a) Service of Notice to appear made on Friday 9th November, 2018 at 7:30pm is deemed as service Monday morning on 12th November, 2018and hence the notice was unreasonably inadequate.

(b) The petitioner was not afforded adequate time to prepare and present a written response hence the rights under Article 47 and 50 of the Constitution of Kenya, 201o were violated.

(c) The petitioner being Deputy Governor duly declared elected under Article 180 of the Constitution of Kenya, 2010 he is a member of the County Executive Committee vide Article 179(2) and that he holds the Finance & Economic Planning by virtue of assignment of responsibility by the Governor under Section 32(3) of the County Governments Act, 20102 hence the removal proceedings are misconceived.

(d) There is perceived bias based on the fact that the 3rd Respondent who moved the motion and all other members of the Committee were not qualified to form part of the Committee as they comprised part of the list of members of the County Assembly whose names were in the list of members supporting the motion while others supported the admission of the motion from the floor of the Assembly therefore the principles of natural justice under Article 47 and 50 of the Constitution of Kenya, 2010 were threatened with violation.

18. According to the petitioner, an advance copy was sent to the County Assembly Clerk via email on the same day and the original delivered by the Counsel to the Petitioner on the 14th November, 2018 at 10:36am. Though the 1st and 2nd Respondents scheduled the presentation of the Select Committee report before the Assembly on the 14th November, 2018, the Petitioner was neither notified of the same and nor was he invited to appear. However, the petitioner was informed by friendly members of the County Assembly that the same was to be tabled in the County Assembly on the 14th November, 2018 at 10:00am

19. the Petitioner's Counsel arrived at the 1st Respondent's premises at 10:00am or thereabouts and went straight to the Clerk's office and requested to appear for the Petitioner during the debate on the report on behalf of the Petitioner as provided under Standing Order No. 63 (b) but the Clerk denied him access to the Assembly and hence the debate proceeded without the Petitioner being given an opportunity to be heard.

20. The 1st Respondent proceeded to pass a resolution to remove the Petitioner from office and the 2nd Respondent forwarded the same to the Governor of Machakos County, the interested party herein for the dismissal of the Petitioner in accordance with the resolution passed on the 14th November, 2018.

21. The Petitioner further lamented that despite the immense public interest involved in the matter of removal of County Executive Committee Member and more specifically the Petitioner's role as Deputy Governor, the views of the members of the public were neither sought nor invited in the entire process.

22. It was therefore the Petitioner's case that by failing to involve the public in the process of the removal of the Petitioner from the position of the County Executive Committee Member Finance and Economic Planning the 1st and 2nd Respondents have violated Article 1 and 196 of the Constitution of Kenya, 2010. Further, by denying the Petitioner the right to appear before the County Assembly and to be heard therein, the 1st and 2nd Respondents have violated and infringed the Petitioner's rights under Article 2, 40, 47 and 50 of the Constitution of Kenya, 2010 and Standing Orders No. 62 and 63 of the Machakos County Standing Orders. It was further contended that by passing a resolution to remove the Petitioner from the position of the County Executive Committee Member Finance and Economic Planning, the 1st and 2nd Respondents have violated, the provisions of Article 179 of the Constitution of Kenya, 2010 and Section 32(3) of the ***County Governments Act, 2012***.

23. The Petitioner averred that by appointing the 3rd Respondent **Hon. Cosmas Masesi** the mover of the motion to sit in the Select Committee constituted to investigate the allegations he made against the Petitioner, the 1st and 2nd Respondents violated the principles of natural justice as espoused under Articles 47 and 50 of the Constitution of Kenya, 2010 as he was a judge in his own cause. In addition, by appointing **Hon. Mitaa** the seconder of the motion and **Hon. Stephen Nzue Mwanthi**, **Hon. George Kariuki King'ori** and **Hon. (Ms) Pauline Mene Munguti** who were supporters of the motion, the 1st and 2nd Respondents violated the principles of natural justice espoused under Article 47 and 50 of the Constitution of Kenya, 2010.

24. It was reiterated that the service of invitation to appear before the Select Committee effected on Friday 9th November, 2018 at 7:30 pm while the proceedings were on Monday, 12th November, 2018 at 10:00am was inadequate notice which did not give the Petitioner adequate notice opportunity to prepare and present written response and this was in violation of Articles 50 of the Constitution of Kenya, 2010, Section 40 (4) of the ***County Governments Act, 2012***. Further, the allegations/charges as framed, being in abstract and devoid of precision and proper particulars was in violation and infringement of the Petitioner's fundamental rights under Article47 and 50(2) of the Constitution of Kenya, 2010.

25. The Petitioner protested that by flouting their Standing Orders No.62 and 63 in the course of the proceedings for the removal of the Petitioner from the position of the County Executive Committee Member Finance and Economic Planning, the 1st and 2nd Respondents violated Section 14 of the ***County Governments Act, 2012***.

26. It was disclosed that the 1st Respondent had already passed a resolution to remove the Petitioner from the position of the County Executive Committee Member Finance and Economic Planning and 2nd Respondent has delivered the resolutions to the Governor, the interested party herein and therefore by virtue of Section 31(b) and 40 (6) (b) the Petitioner is threatened with removal from office a situation that would occasion violation of his fundamental rights under Article 47 and 50 and cause violation of the Constitutional and Statutory Provisions under Articles 1,2,10,38,196,258 and 259 of the Constitution of Kenya, 2010.

In response to the 1st and 2nd Respondents vide replying affidavit sworn on their behalf by **Felix G. Mbiuki** the Petitioner noted that as the affidavits lacked some annexures he could not sufficiently and conclusively respond to the issues raised therein. He further noted that both the affidavits of service sworn by one **Hilary Muthui** were not filed in court and were only marked as annexures and based on legal advice, the same cannot be produced in court as evidence and should be struck out. In any case the Petitioner averred that there is nobody in his office by the name Nyamu unless he was referring to his advocate on record. In support of this position the petitioner referred to **Wavinya Ndeti & Another vs. Independent Electoral and Boundaries Commission (IEBC) & 2 Others [2017] eKLR**.

27. It was the petitioner's averment that the shipment from the Courier Company G4S was blank and did not have an acknowledgement and thus it cannot be deemed that the County Assembly dispatched and/or the sent the same to the Petitioner.

28. He also noted that there was no annexure of any statement purportedly issued by Members of County assembly and reiterated that his advocate on record was denied access to the County Assembly of Machakos on 14th November 2018 and was also denied audience and told that he only had audience before the committee contrary to the principles of natural justice thereby denying the Petitioner the right to be heard. According to the Petitioner, access to public gallery in the County Assembly does not amount to proper Public participation and therefore, there was no active public participation with a process that was meant to strip the Deputy Governor off his assignment and portfolio occasioned vide statute and the Constitution of Kenya which is a matter of public importance and which affects residents of Machakos directly.

29. According to the Petitioner, although other County executive Committee members appointments are subject to approval of the County assembly, it is not the position in case of a Deputy Governor as by virtue of election he is a member of the County Executive Committee under section 32(3) of the ***County Government Act*** which provides that a Deputy Governor maybe assigned any portfolio by the governor and therefore he does not need to be qualified in relation to the field of assignment.

30. The Petitioner insisted that a matter touching on removal of a person from office touches on question whether fundamental rights of that person have been violated and such proceedings are quasi-judicial proceedings and not legislative proceedings and further that the principles of natural justice as espoused under Article 47 and 50 of the Constitution of Kenya 2010 ought to be adhered to and so is the question as to whether due process was followed in such a matter and hence this Court has supervisory jurisdiction and other powers provided under Article 165 of the Constitution of Kenya to deal with the matter.

31. In his submissions, the petitioner identified the following issues as falling for determination before this Court:-

> ***1. Whether the 3rd Respondent's motion and proceedings for the removal of the Petitioner from the Finance and Economic Planning Portfolio was conducted in accordance with the Constitution of Kenya, 2010, the County Governments Act, 2012 and the Machakos County Assembly Standing Orders.***
>
> ***2. Whether the Select Committee appointed for the purposes of investigating the allegations made against the Petitioner from the Finance and Economic Planning Portfolio was qualified and abided by the Constitutional principles under the Bill of Rights and the Machakos County Assembly Standing Orders.***
>
> ***3. Whether the Petitioner is entitled to the reliefs sought.***

32. In respect of the 1st issue, it was submitted that the proceedings for the removal of the Petitioner from the Finance and Economic Planning Portfolio was not conducted in accordance with the Constitution of Kenya, 2010, the ***County Governments Act, 2012*** and the ***Machakos County Assembly Standing Orders***. Based on Article 47 of the Constitution of Kenya, it was submitted that fair administrative action is now a constitutional right as was stated by the Constitutional Court of South Africa in the case of **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1 and** Reference was also made **Judicial Service Commission vs. Mbalu Mutava & Another [2014] KLR**.

33. According to the Petitioner, the 3rd Respondent's Motion and proceedings for the removal of the Petitioner from the Finance and Economic Planning Portfolio was conducted in violation of the Constitutional principles hereinabove espoused. The said action of tabling the Motion and appointment of a Select Committee was unlawful, unreasonable and procedurally unfair. The Petitioner was not adequately informed of the charges in due time to enable him prepare a response, he was not availed with all the documents he requested to enable him prepare a defence on time, the same having gotten to the attention of Counsel on record for the Petitioner on the 12th November, 2018, the same date upon which the Petitioner was required to appear before the Select Committee. In this regard the petitioner referred to section 32(3) of the ***County Governments Act***, No. 17 of 2012, an Act of Parliament enacted to give effect to Chapter Eleven of the Constitution; to provide for County Governments' powers, functions and responsibilities to deliver services and for connected purposes. Reference was also made to section 40(4) of the same Act dealing with the removal of a County Executive Member.

34. According to the Petitioner, the conduct of the 3rd Respondent in moving the Motion and proceedings before the County Assembly of Machakos on the 7th November, 2018 which Assembly debated the same resulting to the impeachment of the Petitioner whereupon after the debate the Assembly later resolving to form an ad-hoc committee to investigate the allegations and report back to the House was actuated by malice and aimed at having the Petitioner impeached from office without following the laid down rules and procedure provided for in the Constitution, the ***County Governments Act*** and the ***Machakos County Assembly Standing Orders*** as the motion was debated before the whole house before the formation of the Select Committee as required under law. According to the Petitioner, the Select Committee appointed for the purposes of investigating the allegations made against the Petitioner from the Finance and Economic Planning Portfolio was not qualified and did not abided by the Constitutional principles under the Bill of Rights and the Machakos County Assembly Standing Orders. It was submitted that the Select Committee comprised of five (5) members, three (3) of whom were part of the twenty eight (28) members that supported the Motion by the 3rd Respondent while the other two (2) supported the admission of the Motion from the floor of the Assembly.

35. Further your Lordship, the Select Committee was formed on the 7th November, 2018 after the motion had been tabled in the County Assembly, debated and a resolution passed to impeach the Petitioner. The purported Select Committee was therefore an afterthought, had pre-determined the outcome, had cast the dice long before its formation and formed for academic purposes for the Respondent's to be seen as having complied with the Machakos County Assembly Standing Orders. Worthy to note is that the 3rd Respondent herein who was the mover of the Motion to impeach the Petitioner was also a member of the Select Committee. Accordingly, the said Select Committee was not qualified as there was apparent and open bias from the members of the Committee some of them having voted at the floor of the House and the rest having supported the Motion by the 3rd Respondent to impeach the Petitioner. In this respect reference was made to the observations of **H L Viscount Haldane** in **Local Government Board vs. Arlidge [1915] AC 120 (138)**.

36. According to the Petitioner, the basic pillars of Principles of Natural Justice *Audi alteram partem,* (the duty to give persons affected by a

decision a reasonable opportunity to present their case) and *Nemo judex in cau sa sua debet esse,* (the duty to reach a decision untainted by bias)**.**

37. It was submitted that the Petitioner herein was served with the letter to appear before the Select Committee on Friday 9th November, 2018 at 7:30pm requiring him to present a written response to the allegations levelled against him on or before the 12th November, 2018. Counsel on record for the Petitioner only came to learn about the same on the 12th November, 2018 and was therefore unable to put in a response due to the short timelines within which the instructions were gotten. From the foregoing, it was neither possible for the Petitioner to appear before the Select Committee neither was it practical for him to prepare and present a written report as the notice was too short. Nonetheless, the Select Committee proceeded in his absence, made its findings and compiled a report to the effect that the allegations were substantiated. According to the Petitioner, Article 50 (2) of the Constitution under subsection (b) is to the effect that an accused person ought to be informed of a charge against his person with sufficient detail to answer to the same. Subsection (c) further provides that the accused person should be given adequate time and facilities within which he can prepare a defence. It was submitted that the Petitioner despite writing to the Respondent to avail documents to enable him prepare for his defence, the Respondent's nonetheless availed some of the information and not all of it, which information was availed at a time when the Petitioner could not have adequate time and facilities within which he could prepare his defence. Accordingly, the Court was urged to be persuaded by the Court's finding in **Ridge vs. Baldwin and others [1963] 2 All E.R 12.**

38. According to the petitioner, the whole process took only seven (7) consecutive working days thus effectively denying, not only the petitioner the ingredients of a fair trial but importantly also, the people of Machakos County in general a chance to participate in the impeachment process. Accordingly, the petitioner in support of his submissions relied on **Mativo, J's** decision in **Li Wen Jie & 2 Others vs. Cabinet Secretary, Interior and Coordination of the National Government & 3 Others [2017] eKLR.**

39. The petitioner based his case on Article 10 of the Constitution and the rule against bias (*nemo in propria causa judex, esse debet*) which presupposes that one should not be made a judge in his own case. The 3rd Respondent herein and the mover of the motion to have the Petitioner impeached also sat on the Select Committee purportedly appointed to investigate the allegations and report back to the House. Two other members of the Committee had also supported the motion presented by the 3rd Respondent and the rest supported the admission of the motion on the floor of the House prior to the establishment of the Select Committee. This, it was submitted, is against the rule against bias as the Select Committee showed apparent and open biasness in supporting the Motion at the Assembly thus leading to the conclusion that the Committee had an agenda which agenda was clearly demonstrated in supporting the motion and at the floor of the Assembly. In support of this submission the Petitioner relied on the decision of the Court of Appeal at Nairobi in **Martin Nyaga Wambora vs. County Assembly of Embu & 37 Others [2015] eKLR.**

40. According to the petitioner, the test to be applied is not whether there was actual bias or prejudice, but simply likelihood of bias and he relied on **Attorney-General vs. Anyang' Nyong'o & Others [2007] 1E.A. 12.**

41. It was therefore submitted that the Constitutional right of the Petitioner to a fair hearing was infringed upon and humbly calls upon this Honourable Court to protect the right of the Petitioner.

42. The Petitioner being dissatisfied with the findings of the Select Committee wrote to the Clerk of the County Assembly of Machakos through his Counsel on record vide a letter dated 13th November, 2018 expressing dissatisfaction with the manner in which the removal proceedings were conducted. The said report by the Select Committee was scheduled to be presented before the Assembly by the 1st and 2nd Respondent on the 14th November, 2018 but the Petitioner was neither notified of the same nor was he invited to appear before the Assembly. The Petitioner nonetheless instructed Counsel to appear before the Assembly during the debate of the report and the apparent bias consummated in the refusal to allow Counsel on record access to the Assembly by the Clerk to the Assembly thereby occasioning the debate to proceed in the absence of the Petitioner and his Counsel. In this regard the Petitioner relied on Order Nos. 62 (7) and 63 of the ***Machakos County Assembly Standing Orders***.

43. It was therefore submitted that a resolution was passed by the 1st Respondent removing the Petitioner from office which resolution was forwarded to the Interested Party herein by the 2nd Respondent for the dismissal of the Petitioner as County Executive Committee Member in charge of Finance and Economic Planning in blatant contravention of Article 179 of the Constitution of Kenya 2010 and section 32 (3) of the ***County Governments Act, 2012***. The said presentation of the Motion before the Assembly and allowing the debate by the 1st and 2nd Respondent was undertaken in an arbitrary, erratic, capricious, vindictive manner and therefore in total violation of the Constitution and the principles of natural justice. Accordingly, this Court was urged to find that the Select Committee appointed for the purposes of investigating the allegations made against the Petitioner from the Finance and Economic Planning Portfolio was not qualified and did not abided by the Constitutional principles under the Bill of Rights and the Machakos County Assembly Standing Orders. The Petitioner therefore urged this Court pursuant to Article 23 (3) as read with Article 165 (3) of the Constitution to grant the reliefs sought by the Petitioner herein.

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

> **(a) A declaration that the 3rd Respondent's motion and proceedings for the removal of the petitioner from the Finance and Economic Planning Portfolio was conducted in violation of Article 2, 3, 20, 38, 47, 50, 196 of the Constitution of Kenya, 2010, Section 14 and 40 of the County Governments Act, 2012and the Machakos County Assembly Standing Orders, and hence unconstitutional, illegal, null and void.**
>
> **(b) A declaration that the Select Committee appointed for purposes of investigating the allegations made against the Petitioner pursuant to the 3rd Respondent's motion for his removal from the position of the County Executive Committee Member Finance and Economic Planning was not qualified for the task and its appointment was in violation of principles of natural justice hence in violation of Articles 47 and 50 of the Constitution of Kenya, 2010.**

(c) An order of certiorari to quash by the 3rd Respondent's motion and 1st Respondent's proceedings for the removal of the Petitioner from the position of County Executive Committee Finance, Economic and Planning, Machakos County and the resolutions passed by the 1st Respondent on the 14th November, 2018

(d) An order of injunction restraining the Governor of Machakos, the interested party herein from dismissing the Petitioner from the position of County Executive Committee Member Finance, Economic Planning based on resolutions passed by the 1st Respondent and delivered to him vide letter by the 2nd Respondent dated 14th November, 2018.

(e) A declaration that the notices of motion and proceedings held by the 1st Respondent in relation to the Petitioner were undertaken in an arbitrary erratic, capricious, vindictive manner and therefore a violation of the principles of natural justice and fair hearing.

(f) Any other relief that this Honourable Court may deem appropriate to ensure law, order and constitutionalism.

(g) The cost of the petition.

The Interested Party's Case

45. The Interested Party herein, the Governor, Machakos County, supported the petition.

46. According to him, pursuant to the provisions of Article 180(5), he nominated the petitioner herein, duly academically qualified and experienced enough, to be his running mate during the general elections held on August 8th 2017 in which they emerged victorious and were duly sworn-in as Governor and Deputy Governor respectively.

47. According to him, pursuant to the provisions of Article 200 of the Constitution, Parliament of Kenya enacted the ***County Government Act, 2012***, to give effect to Chapter Eleven of the Constitution on Devolution.

48. The Interested Party averred that on the 9th October 2017, he assigned the Petitioner herein the responsibility of being the County Executive Committee Member in charge of Finance and Economic Planning pursuant to the provisions of Article 179(2) as read together with section 32(3) of the ***County Government Act***.

49. It was averred by the interested party that in the ordinary course of his duties the petitioner interacts with many members of the public, many members of staff, the office of the controller of budget, the office of the auditor general, the National Treasury, committees of the Senate, professional bodies, international donor agencies and development partners among many other stakeholders. Since his appointment**,** the Petitioner has been working professionally and diligently and no complaint has ever been raised with the interested party, as his boss, as to his conduct, until sometimes this month when the interested party learnt through social media that he was being impeached by the Respondents. From the media reports, the interested party learnt that the 3rd Respondent had presented a notice of motion to impeach the Petitioner on the 6th November 2018. Upon enquiry, the interested party found out that the said notice of motion, in fulfilment of Standing Order No 62, had been supported by twenty-eight (28) other Members of the County Assembly at the time of being presented, surpassing the required one third threshold and on 7th November, 2018, the motion was tabled in the County Assembly, debated and a resolution to impeach the petitioner arrived at. On the same day, after debating the motion, the Assembly later resolved to form an ad hoc committee of five members to investigate the allegations and report back to the house when fully aware that they had already arrived at a verdict to impeach the petitioner.

50. According to the interested party, the county assembly members affiliated to his political party, Maendeleo Chap Chap, which is the second largest party in the assembly and hence the minority party, were not included in the ad-hoc committee. He disclosed that he was aware that the petitioner instructed the firm of Nyamu & Nyamu Advocates to represent him on all issues pertaining to his removal from office and the same communicated to the Assembly vide a letter dated 9th November 2018. However, despite the petitioner appointing Nyamu & Nyamu Advocates to represent him, the petitioner was neither given an opportunity to know the allegations against him in good time to prepare his defense nor did he get an opportunity to respond to them. Despite the above clear breaches due process, the ad- hoc committee proceeded to write and table its report recommending the petitioner's impeachment and on the 14th November 2018, the report of the ad-hoc committee was tabled, and adopted to remove the Petitioner as the County Executive Committee Member for Finance and Economic Planning, a process that took only 7 consecutive working days thus effectively denying, not only the petitioner the ingredients of a fair trial but importantly also, the people of Machakos and Kenyans in general, a chance to participate in the impeachment process contrary to Article 196 of the Constitution under which County Assemblies are under duty to facilitate involvement and participation of the public in their affairs.

51. It was the interested party's view that the impugned impeachment was done pursuant to the amended Machakos County Assembly Standing Order No. 62, whose procedural and substantive legality is under challenge vide Constitutional Petition No. 16 of 2018 currently before this Court.

52. Surprisingly, the interested averred that the 3rd Respondent presented the notice of motion to the Clerk, moved it before the 1st Respondent, sat in the ad-hoc committee which purportedly investigated the Petitioner and participated in the preparation of the report and eventually voted in its support. In effect, the 3rd Respondent was the complainant, the investigator, the prosecutor and the Judge thereof, in clear violation of the rules of natural justice and Articles 47 and 50 of the Constitution. According to him, besides the 3rd Respondents actions deposed above, that members who endorsed the notice of motion for it to get the one third threshold imposed by the standing orders, also sat in the ad-hoc committee despite having taken a clear position against the petitioner hence further diminishing opportunity for fairness.

53. According to the interested party, as the Governor of the County Government of Machakos and a resident, he neither saw nor heard of any single notice, either by print media or otherwise inviting Machakos residents to give their views on the alleged grounds of impeachment of the Petitioner. He therefore concurred with the Petitioner that the entire impeachment process was pre-determined hence invalid and unconstitutional. He insisted that his averment in Machakos Constitutional Petition No. 16 of 2018 that the amendments to Machakos assembly standing orders were made to justify a pre-determined agenda for settlement of political scores has now come to pass as evidenced by the purported impeachment of the Petitioner herein. He averred that the amended standing Orders completely removed the seven-day notice period contained in the amended standing order during which period residents of Machakos County and indeed members of public at large would have had a say in the decision of the Respondent to impeach the Petitioner.

1st and 2nd Respondents' Case

54. The Petition was however opposed by the 1st and 2nd Respondents.

55. According to the Respondent, the legislative authority of the County Government is vested and exercised by its County Assembly as provided for in article 185(1) of the Constitution. Further the role of the County Assembly is as provided for in section 8 of ***the County Governments Act.***

56. According to the 1st and 2nd Respondents, the chronology of the events herein are as follows:

i) Vide a motion dated the 5th day of November, 2018 and received in the Office of the Speaker of the County Assembly of Machakos on 6th day of November, 2018, the 2nd Respondent herein, and actioned by the Clerk of the County Assembly of Machakos on the 6th day of November,2018 **Hon. Cosmus Masesi** an elected member of the County Assembly of Machakos representing Matungulu North Ward Machakos County forwarded a Motion seeking to have the County Executive Committee Member responsible for finance removed from office by the Governor for consideration by the House Business Committee and subsequently thereto tabling before the county assembly.

ii) The said motion was supported by twenty-six members of the county assembly out of the total fifty-nine members of the Assembly excluding the Speaker.

iii) On the 6th November, 2018, the House business Committee held a meeting to discuss this matter and balloted the same as among other businesses of the day.

iv) On the 7th day of November,2018, the said Motion was tabled before the county assembly and approved based on the provisions of the Machakos County Assembly Standing Orders and other relevant laws.

v) Further on the same day and upon the Speaker ascertaining that the motion has conclusively been debated, the Speaker put the question which was adopted by the members present and subsequently thereto proceeded to form a select committee to investigate the matters raised by the elected member for Matungulu North Ward.

vi) On the 7th day of November, 2018 during the debate of the motion for the removal of the County Executive Committee for Finance, the presiding Chair informed all the political parties represented in the County Assembly to submit names of members of the Select Committee to investigate the allegations as stated in the Motion.

vii) Vide a letter dated 7th November,2018, the Clerk of the County Assembly of Machakos informed **Hon. Eng Francis Maliti**, the County Executive Member in Charge of Finance and the Petitioner herein that a resolution had been passed by the County Assembly seeking for his removal as the Machakos County Government Executive Committee Member in Charge of Finance. Further the letter stated that the said **Hon. Francis Maliti** can appear before the committee as he was entitled to the right to be heard.

viii) Vide a letter dated 8th November,2018, the Clerk of the County Assembly of Machakos invited **Hon. Eng Francis Maliti**, the County Executive Member in Charge of Finance and the Petitioner herein for a hearing on the 12th November, 2018 before the committee either in person or through a representative.

ix) Vide a letter NN/1725/2018 dated 8th November,2018 **Mr. Nyamu** Advocate of M/S Nyamu and Nyamu Advocates informed the County Assembly that he had been appointed as the legal representative for **Hon. Eng Francis Maliti** during the Select Committee proceedings and requested for documentation which were submitted to him on the 9th day of November, 2018.

x) On the 13th November, 2018, the Chairperson of the Ad-Hoc Committee on the Removal of the Petitioner as the County Executive Member in Charge of Finance, **Hon. Moses Mitaa** wrote a letter requesting to lay the paper on the table of the Assembly that day.

xi) On the 14th day of November, 2018, the Select Committee tabled its report recommending that the county assembly adopts its reports seeking to have the Governor dismiss **Hon.Eng Francis Maliti** as the County Executive Member in Charge of Finance. The said report was adopted by the majority of the members present in the house.

xii) Vide a letter dated 14th November,2018, Ref:MKSCA/ADM/IMP/CEC/Vol.1/10 the Speaker of the County Assembly of Machakos notified the Governor that the Assembly had voted in favour of a Motion to remove **Hon.Eng Francis Maliti** as the

County Executive Member in Charge of Finance.

xiii) Vide a letter dated 16th November,2018, Ref:MKSCA/ADM/IMP/CEC/Vol.1/11 the Speaker of the County Assembly of Machakos notified the Governor of the resolution of the house which whose implication was that the Governor should immediately dismiss **Hon.Eng Francis Maliti** as the County Executive Member in Charge of Finance.

57. It was therefore contended that from the foregoing, the county assembly rightfully and legally executed its mandate in removing **Hon.Eng Francis Maliti** as the County Executive Member in Charge of Finance. This is specifically because the county assembly cannot be influenced in making its decisions by being directed on how it should conduct its affair, otherwise it losses it independence and relevance based on the functions bestowed upon it by the Constitution and other relevant law.

58. According to the said respondents, the allegations by the Petitioner are untrue for the following reasons: -

(a) The notice of the motion to remove the petitioner from office was served in his office on 8th November 2018 as per affidavits of service by **Hilary Muthui**. It is therefore untrue that he learnt of the motion from social media.

(b) To confirm that the letters of notice and invitation to appear before the committee had been served upon the petitioner the Assembly sent by courier the said letters to the petitioner.

(c) As is evidenced by the affidavits of service the Petitioner made every effort to evade being served with the two letters. This is evidenced by the fact that the secretary at his office informed the officers of the Assembly that she had been instructed not to formally receive the letter even after reading. Besides, the letters were left at his office. There is no doubt that there was effective service of the letters on the Petitioner.

(d) Therefore, having been served with the invitation to appear before the *ad hoc* committee on 8th November 2018, the petitioner had adequate time; that is four (4) days, to prepare his response.

(e) Section 40(3) of the ***County Governments Act*** states that the select committee is to report within ten days to the County Assembly whether it finds the allegations against the County Executive Committee member substantiated.

(f) Therefore, the committee was time constrained to present the report within the time set by law.

(g) The Assembly sittings are up to Wednesdays. A sitting on any other day would have required gazettement and this would have presented a challenge to the Assembly since there was no adequate time to do the gazettement. Therefore, the report had to be presented to the Assembly on Wednesday 14th November 2018.

(h) Knowing that there was a matter of grave importance facing his client, the advocate chose to go on slumber for three days.

(i) Even after knowing the allegations facing him, the Petitioner has not presented to the Assembly a response thereto to date.

(j) The Petitioner appeared on several media outlets where disparaging remarks were made against the Assembly and the process of removing the petitioner from office. No lesser a person than the boss of the petitioner the governor appeared together with the petitioner himself on the media on 12th November 2018, on the day the petitioner was to appear at the select committee and urged the petitioner not to appear before the committee because it was biased.

(k) Several members of the County Assembly urged the petitioner not to appear before the select committee.

(l) The matter was debated at length in the Assembly plenary with a number of members supporting the petitioner. Further:-

(m) It was not refuted that the petitioner has no degree in the relevant area of study that is on finance and economic planning.

(n) The assertion that the petitioner is incompetent to hold office as County Executive Committee member for Finance and Economic Planning has not been refuted.

(o) The assertion that the petitioner has committed acts of gross violation of the Constitution and other laws has not been controverted.

(p) The mover of the motion was part of the *ad hoc* committee for purposes of substantiating his allegations against the petitioner. He was to provide the evidence and convince the committee on his allegations. The petitioner was to present his side of the story. The committee would then make an independent finding. This is the nature of legislatures worldwide, that when an allegation is made, it is the legislature itself to investigate the matter.

(q) Even though the Petitioner's advocate went to the Assembly on 14th November 2018, he did not present any written response to the allegations against the Petitioner.

(r) All the proceedings of the Assembly were open to the public. The sitting of 12th November 2018 was open to the public and therefore the Assembly fulfilled the constitutional requirement to conduct their business openly.

(s) That in the first place the appointment of the petitioner as County Executive Committee Member for Finance and Economic Planning was not subjected to approval by the Assembly as is required under section 35 of the ***County Governments Act, 2012***. This section does not exempt the appointment as a county executive committee member of a Deputy Governor from approval by the County Assembly.

(t) By a letter dated 15th November 2018 the Assembly responded to the petitioner's advocates letter of 13th November 2018 which alleged that the Petitioner had not been given a fair hearing in the matter of his removal. The letter demonstrated that the Petitioner had been given four (4) of the ten (10) days available to the committee to conclude on the matter.

(u) The allegations against the Petitioner are clear and straight forward, that he does not possess a degree relevant to matters relating to finance and economic planning and further that he does not have the relevant experience in those fields. Further, the report of the Controller of Budget details the malpractices on the management of the county budget that is overseen by the Petitioner.

59. According to the said Respondents, the actions of the 1st and 2nd Respondents were within and complied with the confines of the provisions of the law particulars whereas were set out including section 14(1) of the ***County Government's Act, 2017,*** Articles 73(1)(a),(b),(i),(ii),(iii),(iv) and (b), 174(a) and (i), 185(3) of the Constitution. Others are sections 20, 31(b), 39(2)(a) and (b), 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;*** Standing Order Nos.2, 62 63, 64 and 151(1)(a),(b),(c) and (d) of the ***Machakos County Assembly Standing Orders;*** sections 8, 11(1),(2) and (3) 14(a),(b) and (c) 18(1),(2)(a) and (b),(3),(4)(a) and (b),(5)(a),(b)(i),(ii), (iii) and (iv),(6),(7),(8),(9) and (10) of ***County Assemblies Powers and Privileges Act, 2013.***

60. It was therefore the 1st and 2nd Respondents' position that this 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.

61. In their submissions, the said Respondents reiterated the foregoing and relied on **Owen Yaa Baya vs. The County Assembly of Kilifi [2015] eKLR**.

62. This Court was therefore urged to find the County Assembly of Machakos, the 1st and 2nd Respondents herein were within the confines of the law in impeaching the Petitioner herein and to grant the orders sought by the Petitioner would be tantamount to interfering 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.

63. Further reference was made to **Nick Githinji Nddichu vs. The Clerk, Kiambu County & Anor [2015] eKLR** where the Court found that the Petition lacked merit in that the Petitioner was removed as a Speaker of the Kiambu County Assembly for a valid reason and in terms of a fair procedure. It was submitted that in that case, the Court had found that the Petitioner had been accorded opportunity to respond to the allegations against him on the floor of the house and that he did not request for more time to further his defense as per section 11(4) of the ***County Government Act*** and Standing Order 58(4). The court further found that the motion for the impeachment was supported by more than two thirds majority as per Section 11(1) of the ***County Government Act*** and Standing Order 58(1).

64. It was therefore submitted that the Petitioner herein has not proved that he objected to the motion before the 1st Respondent. He has also not proved that he requested for more time to respond to the allegations against him. He instead chose not to attend the hearing. This Court was therefore urged to dismiss the petition based on **Gilbert Tuwei vs. The County Assembly of Kericho & 2 Others [2016] eKLR** in which the court found that the County Assembly may have had just cause to initiate the process against the Petitioner as provided under Section 40 of the ***County Government Act*** as was the case herein. The court further found that the Petitioner was accorded due process and there was no violation of the provisions of Articles 47 and 50 of the Constitution. In that particular case, the Petitioner had been summoned to appear on the 20th April, 2015 and a report was tabled in the House on the 25th April, 2015. The Petitioner had raised similar allegations as the Petitioner herein that he had not been accorded time to cross-examine witnesses and also that he had not been availed the documents in support of the charges against him. The court found that there was no violation of Articles 47 and 50 of the Constitution. Accordingly, this Court was urged to so find as in this particular case the Petitioner was duly served and he chose not to attend the hearing.

65. In conclusion the said Respondents' case was that the Petitioner has not met the thresholds for grant of the orders herein. Accordingly, they prayed that the Court do hold their submissions above and proceed to dismiss the Petitioner's Petition dated 20th November, 2018 herein with costs to them.

Determinations

66. 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. In this respect the Respondents relied on the provisions of ***County Assemblies Powers and Privileges Act, 2013*** which in their view seeks to give effect to Article 196(3) of the Constitution; to provide for the powers, privileges and immunities of county assemblies, their committees and members; to make provision regulating admittance to and conduct within the precincts of county assemblies; and for connected purposes. Section 8 thereof provides that no civil or criminal proceedings may be instituted in any court or tribunal against a member of a county assembly by reason of any matter said in any debate, petition, motion or other proceedings of a county assembly. Section 11(1),(2) and (3) on the other hand provides that:

(1) No civil or criminal proceedings shall be instituted against any Member for words spoken before, or written in a report to a county assembly or a Committee, or by reason of any matter or thing brought by him or her therein by a report, petition, Bill, resolution, motion or other document written to a county assembly.

(2) No civil suit shall be commenced against the Speaker, the leader of the majority party, the leader of the minority party, a chairperson of a committees or any member for any act done or ordered by them in the discharge of the functions of their office.

(3) The Clerk or other members of staff shall not be liable to be sued in a civil court or joined in any civil proceedings for an act done or ordered to be done in the discharge of their functions relating to proceedings of a county assembly or its committees.

67. It was therefore the 1st and 2nd Respondents' position that this 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.

68. 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."

69. **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.

70. 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.

71. 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."

72. 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.*

73. 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."**

74. 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."

75. 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."

76. 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.

77. 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*."

78. 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…"

79. 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."**

80. 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."

81. 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."

82. 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."

83. 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."

84. 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."

85. I am 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.

86. 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.'"

87. 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."

88. 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."

89. 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."

90. 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".

91. 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 removal of the petitioner. It is the petitioner's case that in conducting its proceedings, the 1st and 2nd Respondents violated the provisions of the law and the Constitution. Various constitutional provisions were relied upon by the petitioner in this regard. There is no doubt at all that in undertaking its mandate the 1st Respondent is under a constitutional obligation to comply with the law and the Constitution since in so doing, the 1st and 2nd Respondents are required to apply the Constitution and the law. Clearly therefore there can be no doubt that before the said process of removal of the petitioner herein had to 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."

92. 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…"**

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

94. It was the petitioner's case that the motion was debated even before a Select Committee was appointed. According to the petitioner, the Select Committee was formed on the 7th November, 2018 after the motion had been tabled in the County Assembly, debated and a resolution passed to impeach the Petitioner. The purported Select Committee was therefore an afterthought, had pre-determined the outcome, had cast the dice long before its formation and formed for academic purposes for the Respondent's to be seen as having complied with the Machakos County Assembly Standing Orders.

95. Section 40 of the ***County Government's Act, 2017***, which deals with the removal of member of executive committee, 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.***

96. It is therefore clear that the first step in the proceedings for the removal of County Executive Committee Member is for a member of the county assembly, to table a motion requiring the governor to dismiss a County Executive Committee Member on any of the prescribed

grounds. That motion must garner support of at least one-third of all the members of the county assembly. However, the mode of determining whether such a motion has garnered the requisite numbers is not provided in the Act. It is in fact provided for in Order No. 62 of the ***Machakos County Assembly Standing Orders*** as follows:–

> ***62.(1) A Member may give Notice of Motion in writing to the Clerk under Section 40 of the County Governments Act, 2012, requiring the Governor to remove from office a member of County Executive Committee 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) The notice of Motion shall be signed by the Member and shall be accompanied by a statutory declaration by the member affirming that the particulars contained in the motion are true to his or her knowledge and the declaration shall contain full names, National Identification Number and Postal Address of the member.***
>
> ***(3) The motion shall be supported by at least one third of all the members, who shall append their full names, National Identification numbers, signatures and date in support of the motion as endorsed on the motion.***
>
> ***(4) The Clerk shall submit the proposed Motion to the Speaker for approval.***
>
> ***(5) The Motion shall be tabled in the immediate next committee meeting of House Business committee for balloting.***
>
> ***(6) The House Business committee, shall ballot Notice of the Motion which shall be given in the next sitting of the Assembly.***
>
> ***(7) After the Notice of Motion is given, the Motion shall be placed in the Assembly Order Paper for the next assembly sitting; provided that if the Assembly is not then sitting, the Speaker shall call a special sitting for the motion to be considered***
>
> ***(8) If the motion is supported by at least one third of all the members, the Assembly shall in the same sitting;***
>
> > ***a) Appoint a Select committee comprising of five (5) members appointed on the basis of relative majorities of the seats held by each of the Assembly parties, to investigate on the matter.***
> >
> > ***b) The Select committee shall within ten (10) days report to the Assembly whether the allegations against the member of County Executive Committee are substantiated.***
>
> ***(9) The Clerk shall immediately in writing inform the affected member of County Executive Committee the resolutions of the Assembly.***
>
> ***(10) The county executive committee member has the right to appear and be represented before the select committee during its investigations.***
>
> ***(11) 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.***
>
> ***(12) If a resolution under subsection (11) (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.***

97. Accordingly, a sitting of the Assembly to determine whether or not such numbers have been attained cannot be termed as amounting to a decision already made to remove the County Executive Committee Member. In this case, that was the step that was taken and it is not

contested that the said motion garnered the requisite number. The next stage in such proceedings is for the county assembly to appoint a select committee comprising five of its members to investigate the matter. The said select committee is required to report, within ten days, to the county assembly whether it finds the allegations against the county executive committee member to be substantiated. During the proceedings of the said select committee the County Executive Committee Member whose conduct is being investigated has the right to appear and be represented before the select committee.

98. In this case, it was the 3rd Respondent who proposed the motion seeking the removal of the petitioner herein as County Executive Committee Member. It is however contended by the petitioner that the said committee comprised of persons who were either amongst the one-third requirement category and who appended their signatures supporting the motion and/or signified their support of the same on the floor of the assembly prior to the appointment of the ad-hoc committee, where an initial debate was held. In this case it was stated that those who comprised the one third supporters of the motion were Hon. Mark Muendo, Hon. Paul Museku, Hon. Antony K. Mulu, Hon. Justus M. Kiteng`U, Hon. Betty Nzioki, Hon. Justus Katumo, Hon. Kioko Kalumu, Hon. Josephat M. Kasyoki, Hon. Robert Kisini, Hon. Thomas Mutinda, Hon. Tariq Mulatya Muema, Hon. Dominic Ndambuki, Hon. Christine Koki, Hon. Margaret Mwikali, Hon. Agatha Mutunga, Hon. Cosmas Kieti, Hon. Moses Mitaa, Hon. Joseph W. Musau, Hon. Jacinta N. Luka, Hon. Daniel Kiilu, Hon. Rozina Kanini, Hon. Cosmas Ngula Masesi, Hon. Mutiso Peter, Hon Fredrick Muthoka, Hon. George King'ori, Hon. Irene Mbivya, Hon. Geoffrey Kamulu and Hon. Benedette Musyoka.

99. It was contended that the members present at the assembly appointed an ad-hoc committee comprised of Hon. Moses Mitaa, Hon. Stephen Nzue Mwanthi, Hon.Cosmas Ngula Masesi, Hon. George Kariuki King'ori and Hon. (Ms) Pauline Mene Munguti.

100. According to the Petitioner, the Select Committee appointed for the purposes of investigating the allegations made against the Petitioner from the Finance and Economic Planning Portfolio was not qualified and did not abide by the Constitutional principles under the Bill of Rights and the Machakos County Assembly Standing Orders. It was submitted that the Select Committee comprised of five (5) members, three (3) of whom were part of the twenty eight (28) members that supported the Motion by the 3rd Respondent while the other two (2) supported the admission of the Motion from the floor of the Assembly. Worthy to note is that the 3rd Respondent herein who was the mover of the Motion to impeach the Petitioner was also a member of the Select Committee.

101. It is clear from the foregoing that apart from the 3rd Respondent who himself was the mover of the motion, from amongst those who supported the motion, two of them were appointed as members of the select committee. The Respondents have disclosed that the membership of the 1st Respondent comprises of fifty nine members excluding the Speaker. Clearly there were 33 members who either did not support the motion or were not present during the proceedings. It is however contended that all political parties were informed to submit the names of the members of the Select Committee to investigate the allegations made against the Petitioner. That may be so. However, in selecting the persons to investigate the allegations made against the petitioner, the 1st Respondent was under an obligation to adhere to the dictates of Article 47 of the Constitution which provides that:

> ***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

102. Fair administrative action is therefore now a constitutional right as was stated by the Constitutional Court of South Africa in the case of **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1**, thus;

> **"Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades…"**

103. In our case, it was held by the Court of Appeal in **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR,** that:

> **"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."**

104. For a hearing to be said to be fair, not only should the case that the respondent is called upon to meet be sufficiently brought home to him and adequate or reasonable notice given to enable him deal with it, but the authority concerned also ought to approach the issue with an unbiased disposition. In this respect the holding in **Porter and Weeks vs. Magill (House of Lords) [2001] UKHL 67** is to the effect that:

> **"In assessing whether there had been bias, the court should take all relevant circumstances into account: The ultimate question is whether the proceedings in question were and were seen to be fair."**

105. This test was elucidated further in the case of **Glencot Development and Design Co. Ltd vs. Ben Barrett & Son (Contractors) Ltd Reference: HT 00/401** where the High Court of Justice, Queen's Bench Division held that in considering the circumstances of the case the test is whether a fair-minded and informed observer conclude that there was a real possibility or danger that the Adjudicator was biased.

106. In **Kenya Commercial Bank Ltd vs. Kenya National Commission on Human Rights Nairobi HCMA No. 688 of 2006 [2008] KLR 362** a three judge bench of this Court while citing **Hannan vs. Bradford City Council [1970] 2 ALL ER 69** and **R vs. Sussex Justices ex parte Cay (HLC 1924)**, expressed itself as follows:

> **"Section 17 (b) and (d) of the Act requires the Commission to observe the principle of impartiality and rules of natural justice. One of the tenets of natural justice is that no man can be judge in his own cause. S 25 of the Act allows the respondent, after completing an enquiry, to commence proceedings in the High Court under s 84(1) of the Constitution. Having made up their mind that the applicant had contravened the 1st interested Party's rights, the respondents should have proceeded under s 25 (b) and not taken part in the adjudication. It is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done. We find that in the circumstances of this case, a right thinking man would have formed the impression that there was likelihood of bias and justice would not have been done. The proceedings attract the order of *certiorari* for purposes of their being quashed...The applicant complaints that their legitimate expectation of a fair trial has been thwarted because of all the reasons raised by them that there is a real likelihood of bias by the Commissioner sitting as a judge in his own cause; because the Panel as constituted is unlawful, and because the regulations are uncertain, defective and unenforceable. As we pointed out earlier, s 17 of the Act provides that Rules of Natural Justice will be observed by the respondent in the performance of its functions which include investigation of human Rights Violations. The applicant expected to be given a fair hearing and all tenets of natural justice to be observed but from our observations above, we find that the same have been flouted by the respondent by their own conduct of prejudging the applicant, being a judge in its own cause; by regulation 14 breaching Rules of Natural Justice; by the Commissioner committing errors of precedent fact. We also find that the applicant's Legitimate Expectation that they would get a fair hearing from the respondent was breached."**

107. Therefore, the issue is not whether the composition of the select committee was in actual fact bias but whether a right thinking man [or woman] would have formed the impression that there was likelihood of bias and justice would not have been done. This was the position taken by the Court of Appeal in its majority judgement in **Beatrice Wanjiru Kimani vs. Evanson Kimani Njoroge Civil Appeal No. 79 of 1998 [1995-1998] 1 EA 134** in which **Lakha, JA** it expressed himself as hereunder:

> **"In considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the chairman of the Tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could possibly be, nevertheless if right minded persons would think that, in the circumstances there was a real likelihood of bias on his part he should not sit… There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The Court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking; "The judge was biased."**

108. In **Omolo, JA**'s view, once it is accepted that a judge was in fact biased against a party then the question of any notional fairness in the eventual outcome of the dispute becomes merely academic.

109. My view is informed by the sentiments expressed in **Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587** in which the Court expressed itself as follows:

> **"The petitioner also challenges the inclusion of the Vice Chancellor in the committee to sit on appeal of the petitioner's case having been a judge of first instance. As earlier noted s 14 provides for the composition of the Senate and the chairman of the said Senate is the Vice Chancellor. The letter of 11th September 2006 allowed an appeal to be made to the Vice Chancellor but the appeal was dismissed. A second appeal was made on 5th April 2007 but the same was rejected on 19th July 2007. The petitioner has faulted the decision of the Vice Chancellor who is supposed to chair the Students Disciplinary Committee for sitting on appeal. I do agree that the Vice Chancellor cannot be a judge at first instance and also on appeal. However, in the instant case the Vice Chancellor did not take part in the Disciplinary Committee proceedings and his sitting on appeal in the matter cannot be said to be prejudicial to the petitioners' case in any way. Had the Vice Chancellor sat on the 1st Committee then he would have lacked capacity to sit on appeal. Ordinarily I would agree that the provision that the Vice Chancellor sits both at 1st instance on the case and on appeal would be contrary to rules of natural justice and unconstitutional. The regulation authorizing the Vice Chancellor to sit as a judge in the 1st instance and on appeal should be relooked at."**

110. In **Republic vs. Judicial Commission of Inquiry Into The Goldenberg Affair, Honourable Mr. Justice of Appeal Bosire and Another *Ex parte* Honourable Professor Saitoti [2007] 2 EA 392; [2006] 2 KLR 400,** it was held that in considering the merits of the test to be applied in a case where there is allegation of bias, it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done. Of the various tests used to determine an allegation of bias the reasonable apprehension test of bias is by far the most appropriate for protecting the appearance of impartiality and it was the one adopted by the Court of Appeal at Nairobi in **Martin Nyaga Wambora vs. County Assembly of Embu & 37 Others [2015] eKLR** in which it was held that:-

> **"With respect, while the learned Judges made a clear finding that there was likelihood of bias in the appointment of the same members of the committee that had earlier investigated similar allegations against the appellant, as members of the**

Special Committee in the second removal process, the Judges erred in overlooking that likelihood because in their opinion there was no prejudice caused to the appellant. The test that the Judges were obliged to apply was not whether there was actual bias or prejudice, but simply likelihood of bias. I reiterate what this Court stated in Attorney-General v. Anyang' Nyong'o & Others [2007] 1E.A. 12;

"The objective test of 'reasonable apprehension of bias' is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the view of a reasonable, fair-minded and informed member of the public that a Judge did not (will not) apply his mind to the case impartially [?]….. The Court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case..."

The test that the High Court was obliged to apply was the impression of a reasonable and fair- minded member of the public, in regard to the impartiality of the Special Committee of the Senate in the circumstances obtaining before them. In that regard having found that a reasonable member of the public would form the impression that there was likelihood of bias, the issue of actual prejudice was irrelevant. In any case, the deliberations and the motion by the Senate on the removal of the appellant were guided by the report of the Special Committee of the Senate, and if the Committee that produced that report was made up of members whose impartiality was in issue, then it cannot be truly said that there was no actual prejudice caused to the appellant."

111. In this case, it is clear from the Hansard report that the 3rd Respondent, the mover of the motion in question was proposed to sit in the select committee. There is no evidence that he never sat in the deliberations of the Committee. Section 20 of the ***County Governments Act*** provides as follows:–

(1) Except as otherwise provided in the Constitution, in this Act or in other legislation, any question proposed for decision by the county assembly shall be determined by a majority of the members of the county assembly present and voting.

(2) On a question proposed for decision by a county assembly—

(a) the speaker of the county assembly has no vote; and

(b) in the case of a tie, the question is lost.

(3) A member of a county assembly shall—

(a) at all times observe the principles of integrity including those set out in Chapter Six of the Constitution; and

(b) promptly declare to the speaker any interest that the member has in any matter being discussed in the county assembly.

(4) A member of a county assembly shall not vote on any question in which the member has a pecuniary interest.

112. In my view the least the 3rd Respondent was expected to do was to disclose that as the mover of the motion, he had an interest in its outcome. He did not do so.

113. In my view, the authority ought not to be seen to be seeking representations from the respondent simply for the purposes of meeting the legal criteria. The fair hearing must be meaningful for it to meet the constitutional threshold. This is so because it is a tenet of the rule of law that power ought to be properly exercised and ought not to be misused or abused. According to **Prof Sir William Wade** in his book ***Administrative Law*** as cited in **R vs. Somerset County Council, ex parte Fewings and Others [1995] 1 All ER 513 at 524:**

"The powers of public authorities are…essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land…regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them…"

114. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240** while citing **Reg vs. Secretary of State for the Environment Ex Parte NottinghamShire Country Council [1986] AC**:

"A power which is abused should be treated as a power which has not been lawfully exercised…Thus the courts role cannot

be put in a straight jacket. The courts task is not to interfere or impede executive activity or interfere with policy concerns, but to reconcile and keep in balance, in the interest of fairness, the public authorities need to initiate or respond to change with the legitimate interests or expectation of citizens or strangers who have relied, and have been justified in relying on a current policy or an extant promise. As held in *ex parte Unilever Plc* (*supra*) the Court is there to ensure that the power to make and alter policy is not abused by unfairly frustrating legitimate individual expectations...A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers. In this connection Lord Scarman put the need for the courts intervention beyond doubt in the *ex-parte Preston* where he stated the principle of intervention in these terms: "I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case, it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law." The same principle was affirmed by the same Judge in the House of Lords in *Reg vs. Inland Revenue Commissioners, ex-parte National Federation of Self Employed and Small Business Ltd [1982] AC 617* that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or have abused their powers or acted outside them and also that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. In other words, it is unimportant whether the unfairness is analytically within or beyond the power conferred by law: on either view, judicial review must reach it. Lord Templeman reached the same decision in the same case in those helpful words: "Judicial review is available where a decision making authority exceeds its powers, commits an error of law commits a breach of natural justice reaches a decision which no reasonable tribunal could have reached or abuses its powers." Abuse of power includes the use of power for a collateral purpose, as set out in *ex-parte Preston,* reneging without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals. I further find as in the case of *R (Bibi) vs. Newham London Borough Council [2001] EWCA 607, [2002] WLR 237*, that failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief."

115. Therefore, the 1st Respondent, in exercising its oversight power must do so in conformity with the law and in good faith. As was held in **Minister for Aboriginal Affairs vs. Peko-Wallsend Ltd (1986) 162 CLR 24 at 39-40 and 55:**

"A decision-maker will err by failing to take into account a relevant consideration or taking an irrelevant consideration into account. These grounds will only be made out if a decision-maker fails to take into account a consideration which the decision-maker is bound to take into account in making the decision or takes into account a consideration which the decision-maker is bound to ignore. The considerations that a decision-maker is bound to consider or bound to ignore in making the decision are determined by construction of the statute conferring the discretion. Statutes might expressly state the considerations that need to be taken into account or ignored. Otherwise, they must be determined by implication from the subject matter, scope and purpose of the statute."

116. Since the 1st Respondent in exercising its oversight role is exercising quasi-judicial role, it is imperative that it must not act in bad faith, must not act on extraneous considerations which ought not to influence it, and it must not plainly misdirect itself in fact or in law. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**

117. It follows that if the manner in which the 1st Respondent conducted the proceedings for the removal of the petitioner was informed by extraneous considerations, that would obviously be wrongful exercise of constitutional power and that would call for intervention by this Court notwithstanding the principle of separation of power between the judiciary and the legislature.

118. In **Local Government Board vs. Arlidge [1915] AC 120 (138) H L Viscount Haldane** observed,

"...those whose duty it is to decide must act Judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to meet out justice."

119. It was the Petitioner's contention that he learned from social media that the County Assembly, 1st Respondent, had initiated a process of his removal from office on the 7th November, 2018 but was not served with the notice prior to the appointment of the select ad-hoc committee. Upon request, on 9th November, 2018 which was on Friday at 7:30pm the 1st Respondent handed over some of the documents to a member of staff, one **Edison Munuve** and the petitioner was requested to present a written response to the allegations on or before the 12th November, 2018. However, the person to whom the documents were handed over, took them with him and being a weekend, presented the same to the petitioner's advocate's firm offices on Monday the 12th November, 2018 the same day the Petitioner was scheduled to appear before the Select Committee at 10:00am. According to the Petitioner, as his advocates are based in Nairobi City while he is based in Machakos the notice was inadequate and he did not have adequate time to prepare written response and to appear before the Select Committee investigating the allegations levelled against him by the 3rd Respondent.

120. On this aspect, ***Halsbury's Laws of England***, 5th Edn. Vol. 61 page 545 at para 640 states:

"The *audi alteram partem* rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. Similar notice ought to be given of a change in the original date and time, or of an adjourned hearing…The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases. This duty is not always imposed rigorously on domestic tribunals which conduct their proceedings informally, and a want of detailed specification may exceptionally be held immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him, or if the deficiency in the notice did not cause him any substantial prejudice…Notification of the proceedings or the proposed decision must also be given early enough to afford the person concerned a reasonable opportunity to prepare

representations or put their own case. Otherwise the only proper course will be to postpone or adjourn the matter."

121. The Uganda Supreme Court in **The Management Committee of Makondo Primary School and Another vs. Uganda National Examination Board, HC Civil Misc Application No.18 of 2010**, a decision followed with approval by **Lenaola, J** (as he then was) in **Mandeep Chauhan vs. Kenyatta National Hospital & 2 Others [2013] eKLR** held that:

> **"It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase *'audi alteram partem'* literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing."**

122. In **Breen vs. Amalgamated Engineering Union [1971] All E.R. 1148**, **Lord Denning** held as follows:

> **"It is now settled that a statutory body which is entrusted by Statute with discretion must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand or as administrative on the other or what you will, still it must act fairly. It must in a proper case give chance to be heard."**

123. In **Judicial Service Commission vs. Gladys Boss Shollei & Another [2014] eKLR**:

> **"Apart from the need for independence and impartiality, the right to a fair hearing under Article 50(1) of the Constitution encompasses several aspects. These include, the individual being informed of the case against her/him; the individual being given an opportunity to present her/his side of the story or challenge the case against her/him; and the individual having the benefit of a public hearing before a court or other independent and impartial body."**

124. That the proceedings for removal of County Executive Committee Member must adhere to the rules of natural justice is clear from Section 40(4) of the ***County Government's Act, 2017***, which provides that:

> ***The county executive committee member has the right to appear and be represented before the select committee during its investigations.***

125. This position is emphasised by Standing Order No. 63 of the ***Machakos County Assembly Standing Orders*** which provides that:

> ***(1) Whenever the Constitution, any written law or these Standing Orders—***
>
> ***(a) requires the Assembly to consider a petition or a proposal for the removal of a person from office, the person shall be entitled to appear before the relevant Committee of the Assembly considering the matter and shall be entitled to legal representation;***
>
> ***(b) requires the Assembly to hear a person on grounds of removal from office, or in such similar circumstances, the Assembly shall hear the person—***
>
> ***(i) at the date and time to be determined by the Speaker;***
>
> ***(ii) for a duration of not more two hours or such further time as the Speaker may, in each case determine; and***
>
> ***(iii) In such other manner and order as the Speaker shall, in each case, determine.***
>
> ***(2) The person being removed from office shall be availed with the report of the select Committee, together with any other evidence adduced and such note or papers presented to the Committee at least three days before the debate on the Motion."***

126. In this case the ***County Government's Act, 2017***, provides the county executive committee member has the right to appear and be represented before the select committee during its investigations. There is no provision that he is to be heard by the Assembly itself. The question is therefore whether the petitioner was afforded a hearing before the select Committee.

127. According to the 1st and 2nd Respondents, the motion was received in the Office of the Speaker of the County Assembly of Machakos on 6th day of November, 2018, and actioned by the Clerk of the County Assembly who actioned the same for consideration by the House Business Committee and subsequently thereto tabling before the county assembly. On the 6th November, 2018, the House business Committee held a meeting to discuss this matter and balloted the same as among other businesses of the day. On the 7th day of November,2018, the said Motion was tabled before the county assembly and approved based on the provisions of the Machakos County Assembly Standing Orders and other relevant laws. On the same day and upon the Speaker ascertaining that the motion has conclusively been debated, the Speaker put the question which was adopted by the members present and subsequently thereto proceeded to form a select committee to investigate the matters raised. Vide a letter dated 7th November, 2018, the Clerk of the County Assembly of Machakos informed the petitioner that a resolution had been passed by the County Assembly seeking for his removal as the Machakos County Government Executive Committee Member in Charge of Finance. Further the letter stated that the petitioner could appear before the

committee as he was entitled to the right to be heard. Vide a letter dated 8th November,2018, the Clerk of the County Assembly of Machakos invited the petitioner for a hearing on the 12th November, 2018 before the committee either in person or through a representative. Vide a letter NN/1725/2018 dated 8th November, 2018 **Mr. Nyamu** Advocate of M/S Nyamu and Nyamu Advocates informed the County Assembly that he had been appointed as the legal representative for **Hon. Eng Francis Maliti** during the Select Committee proceedings and requested for documentation which were submitted to him on the 9th day of November, 2018.

128. The petitioner contends that he never received the said letters. I agree with the position adopted in **Wavinya Ndeti & Another vs. Independent Electoral and Boundaries Commission (IEBC) & 2 Others [2017] eKLR** that:

> **"The court found that there was no service. The purpose and essence of service is to bring the proceedings to the attention of the affected party. It is an integral part in the resolution of election disputes. This is because, without service the other side is denied the opportunity to know that there is a petition against him so that he can have the opportunity to defend himself. Therefore, failure to serve the petition upon the respondents goes to the root of the petition. The petition will be struck out if there is no service. It matters not that the respondents became aware of the petition and filed their response. A waiver or acquiescence cannot cure the situation."**

129. It is however clear that at least by 12th November, 2018, the date of the hearing before the Select Committee, the petitioner was aware that proceedings were to be undertaken by the Select Committee at 10.00am. he does not indicate when the person who received the communication informed him of the same. It is true that the period for his attendance may not have been adequate to enable the petitioner prepare for the hearing. I therefore agree with **Mativo, J's** decision in **Li Wen Jie & 2 Others vs. Cabinet Secretary, Interior and Coordination of the National Government & 3 Others [2017] eKLR** that:-

> **"…the speedy trial provided for in our constitution is not "a rushed and unconsidered justice." No. It cannot be nor can it be so construed under any circumstances. In my considered view, our constitution provides for a speedy trial process but it anticipates a trial with two sides, which must as of necessity exhibit the best antidote to both sides. It must demonstrate a justice system that is not too fast, and not too slow, but just right.[47] To me that is the proper meaning of the phrase "to have the trial begin and conclude without unreasonable delay." The drafters of the constitution never anticipated a process that is too speedy to the detriment of an accused person. I reiterate that the flip side of the maxim "justice delayed is justice denied… "is a rushed, unconsidered, un-procedural and unconstitutional process that undermines sound justice system." The effect is that such a process is a sham and has absolutely no place in our constitutionalism. I find that the speedy manner in which the deportation process was undertaken is a mockery to justice and cannot taking all into account qualify to be called a fair process and as observed above, the principles of natural justice were flouted."**

130. However, in my view, a party to whom insufficient or inadequate notice is given ought to raise the issue with the judicial or administrative body concerned and seek for time to adequately prepare. Section 4(4)(d) of the ***Fair Administrative Action Act*** provides that an opportunity be afforded for a person to request for an adjournment of the proceedings, where necessary to ensure a fair hearing. It is therefore upon the person seeking time to request for adjournment of the proceedings. In these proceedings, there is no indication that the petitioner sought for adjournment of the proceedings before the Committee. In **Oluoch Dan Owino & 3 Others vs. Kenyatta University [2014] eKLR,** the court held the view that:

> **"The petitioners have argued that they were not accorded a fair hearing as they did not receive the letters inviting them for the disciplinary hearing, and that they were invited by way of short text messages (SMS). I have considered the letters inviting the petitioners for the hearings. The letters are addressed to the petitioners at addresses to which other letters from the respondent to the petitioners contained in the replying affidavit are addressed. It would perhaps have been prudent for the respondent to obtain a certificate of posting or some other evidence of delivery of the letters, but in the end, I am not satisfied that the petitioners' claim in this regard has merit, for two reasons. First, I note that the respondent took the further step of inviting the petitioners to the hearings by way of short text messages and telephones. More importantly, I note that all the petitioners attended the disciplinary proceedings on the scheduled dates and did not raise the issue of the non-delivery of the letters at the hearing before the Committee, nor did they seek an adjournment of the hearing."**

131. In **Peris Wambogo Nyaga vs. Kenyatta University [2014] eKLR** this Court expressed itself on the same issue as follows:

> **"That the applicant was heard is not in doubt. The applicant however contends that the notice she was given to appear before the Committee was short. Whereas under Article 47 the applicant was entitled to a fair administrative action which in my view would connote inter alia that the applicant be given adequate time to prepare for the case, in this case there is no evidence from the record that the applicant sought for time to do so."**

132. It may be argued that since the decision of the select committee is subject to approval of the Assembly, defect in proceedings before the committee ought not to necessarily be fatal to the ultimate decision. Order No. 62(11)(a) of the ***Machakos County Assembly Standing Orders*** provides that if the select committee reports that it finds the allegations unsubstantiated, no further proceedings shall be taken. It is therefore clear that the defence mounted by the County Executive Committee Member under investigation may have the effect of "killing" the complaint at that stage without the same being referred to the Assembly, hence the need to adhere to the tenets of the rule of law.

133. As regards public participation, I agree that the public ought to have been afforded an opportunity of giving their views before the select committee. There is no evidence that this was done.

134. There is no doubt at all that the Governor, the interested party herein, had the power to assign the petitioner, his Deputy duties since section 32(3) of the ***County Governments Act***, provides that:

> ***"The governor may assign the deputy governor any other responsibility or portfolio as a member of the county executive committee."***

135. It is however my view that where the Governor decides to assign his Deputy such responsibilities, though the Deputy Governor is elected with the Governor, his competence as an County Executive Committee Member must be subjected to vetting just as any other County Executive Committee Member and his removal as such members must also be subjected to the procedure prescribed for the other County Executive Committee Members.

136. Although the petitioner seems to believe that as a Deputy Governor he is not amenable to the process of appointment and removal prescribed for other members of the executive committee, it is my view and I hold that such an opinion is erroneous. The mere fact that one is elected together with the Governor as the Governor's deputy does not necessarily make that person suitable to hold any position in the executive committee. The competency to serve as County Executive Committee Member is not determined by the competency to be a county Deputy Governor. As this Court held in **Faith Syokau Wathome Kithu (MBS) & Others vs. Machakos County Assembly & 3 Others [2018] eKLR**:

> **"102. The Petitioners also took issue with the fact that the Committee imposed an unlawful pass mark of 70% which is not provided in law and went further to set a criteria of awarding marks that was skewed and deliberately designed to reflect the Petitioners as unsuitable i.e. by setting up a criteria by which the first degree and the 5 year experience constituted in total 50 marks. Whereas that decision may well be frowned upon in some quarters, that was clearly a threshold issue. This Court cannot clearly prescribe to the County Assembly what it considers as the appropriate threshold in order to determine whether a nomine ought to be approved for appointment. Similarly, the Court cannot prescribe what marks to award in respect of particular head of evaluation. This is so because the decision as to whether a nominee merits the appointment is a matter purely within the powers of the County Assembly and this Court cannot direct the Assembly on what constitutes merit or otherwise. In the same vein this Court cannot interrogate the decision of the Assembly whether the material presented before it was sufficient to prove mismanagement by some of the nominees so as to arrive at a decision whether the said decision was correct or not.**
>
> **103. Apart from the constitutional principles, section 8(c) of the *Public Appointments (County Assemblies Approval) Act, 2017* provides that the issues for consideration by the relevant County Assembly in relation to any nomination shall be the suitability of the nominee for the appointment proposed having regard to whether the nominee's credentials, abilities, experience and qualities meet the needs of the body to which the nomination is being made. It is therefore clear that the County Assembly was obliged to consider whether the Petitioners' credentials including their degrees meet the needs of the departments to which they were being nominated. This is my understanding of the decision of Mumbi Ngugi, J in Benson Riitho Mureithi vs. J. W. Wakhungu & 2 Others [2014] eKLR where the learned Judge held that pursuant to section 22 of the *Public Officers Ethics Act*, the 1st respondent had a duty, imposed on her by the people of Kenya, to consider the Interested Party's suitability under the Constitution, and to make the appointment to the Board in accordance with the dictates of the Constitution. The Learned Judge then held that though the Constitution has imposed an irksome and onerous burden on those responsible for making public appointments by requiring that they make the appointments on the basis of clear constitutional criteria, that burden, however, is justified by our history and experience, which led the people of Kenya to include an entire chapter on leadership and integrity in the Constitution hence those to be appointed must meet certain integrity and competence standards.**
>
> **104. In the premises I cannot fault the Respondents for making a decision based on the relevancy of the degrees held by the Petitioners to the positions to which they were nominated by the interested party."**

137. It therefore follows that the relevancy of a Deputy Governor's Degree qualification to the portfolio to which he has been assigned is a factor which may be taken into to consideration by the Assembly in determining the Deputy Governor's suitability to the position he has been nominated by the Governor. It is however for the County Assembly to determine such suitability. For this court to embark on a determination regarding the competence and suitability of a County Executive Committee Member would clearly amount to usurpation of the powers of the County Assembly and a clear violation of the doctrine of separation of powers.

138. My view is supported by Article 185(1) of the Constitution as read with section 8(a) of the ***County Governments Act*** which provides that the county assembly shall vet and approve nominees for appointment to county public offices as may be provided for in this Act or any other law. I therefore agree with the holding in **Owen Yaa Baya vs. The County Assembly of Kilifi [2015] eKLR** that:

> **"Article 174 of the Constitution is quite clear on the objects of devolution. One of the objectives is to promote democratic and accountable exercise of power. It is also to enhance checks and balances and the separation of powers. The County Assembly has the power to summon any officer including ministers for purposes of explaining the affairs of the County. This is their role under Article 1 of the Constitution. The members of the County Assemblies exercise the people's sovereign power as they are their representatives. There is nothing wrong in summoning the applicant to appear before the county assembly either for purposes of being censured or for any other purpose. The applicant performs executive duties and cannot allege that he is not a member of the executive committee. Article 185 permits the County Assembly to exercise oversight over other executive organs of the County. The applicant falls within both the category of executive committee as well as other executive organs."**

139. In my view this petition must succeed on two grounds. Firstly, the proceedings did not meet the threshold of fairness expected in such proceedings since the persons who were selected to sit in the select committee did not meet the threshold of impartiality. In fact, one of them was the mover of the motion, the complainant, as it were against the petitioner, while at least two other person had already indicated their viewpoint. While the latter may not necessarily be fatal, the composition of the select committee must as far as possible reflect impartiality and lack of bias as much as possible. Secondly, there was no evidence that the process was subjected to public participation.

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

i. A declaration that the proceedings for the removal of the petitioner from the Finance and Economic Planning Portfolio was conducted in violation of Articles 10 and 47 of the Constitution of Kenya, 2010, the provisions of the County Governments Act, 2012 and the Machakos County Assembly Standing Orders, and hence unconstitutional, illegal, null and void.

ii. A declaration that the Select Committee appointed for purposes of investigating the allegations made against the Petitioner pursuant to the 3rd Respondent's motion for his removal from the position of the County Executive Committee Member Finance and Economic Planning was not qualified for the task and its appointment was in violation of principles of natural justice hence in violation of Article 47 of the Constitution of Kenya, 2010.

iii. An order of certiorari removing into this court and quashing the 1st Respondent's proceedings for the removal of the Petitioner from the position of County Executive Committee Finance, Economic and Planning, Machakos County and the resolutions passed by the 1st Respondent on the 14th November, 2018

iv. An order of injunction restraining the Governor of Machakos, the interested party herein from dismissing the Petitioner from the position of County Executive Committee Member Finance, Economic Planning based on resolutions passed by the 1st Respondent and delivered to him vide letter by the 2nd Respondent dated 14th November, 2018.

v. As the petition was largely a public interest matter, there will be no order as to costs.

141. It is so ordered.

Read, signed and delivered in open Court at Machakos this 4th April, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kioko for Mr Nyamu for the Petitioner

Miss Nzilani for Miss Kamende for 1st and 2nd Respondents

Mr Nthiwa for the interested party

CA Geoffrey