



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

PETITION CASE NO. 11 OF 2019

HON. HASSAN HALANE.....PETITIONER

VERSUS

HON. AHMED IBRAHIM ABASS, SPEAKER

COUNTY ASSEMBLY OF GARISSA.....RESPONDENT

RULING

1. INTRODUCTION

2. By a Notice of Motion dated **30/9/2019** brought under **Article 22 Rules 11, 10 (1), (2) and 11** Constitution of Kenya (Protection of Rights and fundamental freedom) Practise and Procedure Rules 2013), the Petitioner/Applicant seeks prayers for the purposes of this application interparte hearing NO. 4, 5 and 6.

3. The same is supported by the Affidavit of Hassan Halane sworn on **30/9/2019**.

4. The same was countered by the Notice of Preliminary objection dated **4/10/2019** raising 3 grounds namely:

(i) The Court lacks jurisdiction to hear and determine this matter, reason being that it flies in the face of the doctrine of separation of powers.

(ii) The matter lies within the ambit of the powers and privileges Committee of County Assembly.

(iii) The exhaustion principle:

5. The court gave directions on 8/10/2019 to the effect that the Notice of Motion and the Preliminary Objection be argued together. Further the parties were directed to file submissions and highlight same on 14/10/2019.

6. THE APPELLANTS SUBMISSIONS:

7. The respondent submitted that this dispute should have been remitted to the powers and privileges committee. The substratum of the petition is that the petition challenges, the ruling by the Respondent issued on 24th September, 2019 in which the Petitioner and four other members of the County Assembly of Garissa were expelled from the County Assembly for three months.

8. The ruling was as follows:

“The following Honourable members are hereby expelled for the remainder of the session and have been expelled from the assembly and its precincts for three (3) months and they are as follows:

(i) Hon. Mohamed Omar Abdullahi (Township)

(ii) Hon. Suleiman Mohamed (Jarajara)

(iii) Hon. Hussein Dakane (Nominated)

(iv) **Hon. Habiba Abdi (Nominated)**

(v) **Hon. Hassan Halane (Faji)**”.

9. The powers and privileges Committee of County Assemblies is a creature of the **County Assemblies Powers and Privileges Act No. 6 of 2017. Section 15 (1)** establishes the Committee while **Section 15 (4)** provides for the functions of the Committee.

10. The functions of the Committee of Powers and Privileges shall be to:

(a) **Inquire into the conduct of a member whose conduct is alleged to constitute a breach of privilege in terms of section 16: and**

(b) **Perform such other functions as may be specified in this Act.**

11. The main function of the committee is to ***inquire into the conduct of a member whose conduct is alleged to constitute a breach of privilege***. There is no provision in the Act for reference of a speakers ruling to the committee.

12. It is not Respondent’s impugned decision that ought to be reviewed by the committee but the blowing of whistles by the Petitioner and the four other members. His decision is thus ***void ab initio*** because it violates **Section 15(a)**.

13. What then would have been the right procedure for the Respondent to follow in the premises? **Section 16, 26 (1) and 28** provides conduct that constitutes breach of privilege.

14. Where there is an allegation of conduct consisting breach of privilege by a member, the committee may either ***suo moto*** as a result of a complaint made by any person, inquire into the conduct of a Member whose conduct is alleged to constitute breach of privilege.

15. The committee which consists of the Speaker, other members as appointed pursuant to the standing orders may inquire into the impugned conduct. The quorum of the committee must consist at least a third of the members, the speaker included.

16. The Committee must determine the impugned conduct within 14 days. The findings and recommendations are then forwarded to the County Assembly within 14 days.

17. The County Assembly shall then consider the report and recommendations and take such action against the member under enquiry.

18. The County assembly may then, as one of the various sentences permissible, suspend the Member of County Assembly for such a period as may be deemed appropriate.

19. The facts of the Petition which have not been challenged are that the Respondent on his own motion threw out the five members from the County Assembly.

20. It is submitted that, from the foregoing exposition, he cannot do that. This was a violation of the Act.

21. From the standing orders, the Respondent has a limited disciplinary scope. **Standing order 104 (2)** allows the Respondent or a chairperson of a committee to: order any member whose conduct is grossly disorderly to withdraw immediately from the precincts of the assembly.

22. On the first occasion, for the remainder of that days sitting and on the second or subsequent occasion, for the remainder of that days sitting and on the second or subsequent occasion during the same session, for a maximum of three sitting days including the day of suspension.

23. The question is then can the court hear this application and petition? Indeed it can and there is no shortage of supporting material. The constitution is the supreme law and it provides under **Article 2 (1)** that it binds all persons and all State organs at both levels of government.

24. **Article 165(3) (b)** provides that the High Court has jurisdiction to determine questions whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened.

25. **Article 165 (3) (d) (ii)** provides that the High Court shall have jurisdiction to hear any question respecting the interpretation of the constitution of whether anything said to be under the authority of the Constitution or of any law is inconsistent with or in contravention of the Constitution.

26. The Respondent holds a Constitutional office established under **Article 178(1)**.The office holder is bestowed with the authority to preside over a County Assembly pursuant to **Article 178 (2) (a)**.

27. In issuing the ruling/order which suspended the Petitioner and four others from the County Assembly on **24thSeptember, 2019**, he was exercising his constitutional role to preside over the County Assembly of Garissa as provided under **Article 178 (2) (a)**.

28. The High court has jurisdiction under **Article 165 (3) (b) and (d) (ii)** to interpret the constitution and determine whether the Respondents ruling/order made pursuant to his constitutional duty contravenes the Constitution.

29. The specific complaint against the ruling/order is that violates **Article 47(1)** of the Constitution, which provides, *that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*
30. It will suffice to say that the Respondents ruling/order is an administrative action and must be in line with the constitution. The decision has also been challenged on the basis that it violates **Article 10** of the constitution.
31. The impugned ruling is *ultra vires* the standing orders as the duration of suspension exceeds what is prescribed. In that regard, the ruling/order violates the Petitioners right to fair administrative action to the extent that it is not lawful and reasonable as required.
32. The ruling is inconsistent with **Article 10** of the Constitution for the reason that while the Respondent was exercising his constitutional duty of applying the standing orders, he disregarded his obligation to uphold national values as explicitly established under article 10.
33. Specifically, the Respondent failed to uphold the rule of law. The rule of law means restriction of arbitrary exercise of power by subjecting such power to well defined and established laws.
34. Whereas the standing orders give a specific period of suspension, the Respondent failed to abide by it and whereas the County Assemblies and privileges Act provide for a forum where conduct of a member can be referred to the Speaker usurped the functions and powers of the forum. This was arbitrary exercise of power.
35. The petitioner cited several authorities to support his submissions.
36. In *Justus Kariuki Mate & another vs Martin Nyaga Wambora & another (2017) eKLR* the judges of the supreme court cite with approval the case of *James Opiyo Wandayi v. Kenya National Assembly & 2 others, (2016) eKLR* and *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others (2015) eKLR* to give instances where the High Court rightly intervened to avert constitutional breaches by the legislature.

“Of contrasting profile is another High Court decision, James Opiyo Wandayi v. Kenya National Assembly & 2 others, (2016) eKLR , in which the issue was whether the actions of the Speaker, in disciplining the Member of Parliament for Ugunja Constituency, met the threshold of fairness and proportionality, as well as of the discharge of general administrative powers under Article 47 of the Constitution, Odunga J, stayed the decision of the Speaker of the National Assembly, which had suspended the parliamentarian for the remainder of the session. He held that the doctrine of separation of powers does not avail, where it is alleged that the Constitution has been violated. The applicant’s case was that the provisions of the relevant Standing Orders were unconstitutional to the extent that they did not meet the threshold of fairness and proportionality provided for under Article 47 of the Constitution.”

(55) In coalition for Reform and Democracy (CORD) & 2 Others v. Republic of Kenya and 10 others (2015) Eklr, the High Court examined the extent to which a court may inquire into the conduct of parliamentary proceedings. The court held that, as Article 165(3) (d) clothed it with powers to determine the constitutionality of a given act, the doctrine of separation of powers does not preclude it from examining acts of the Legislature or the Executive. The Court thus observed (paragraph 172):

“(1) In a jurisdiction such as ours in which the Constitution is Supreme the court has jurisdiction to intervene where there has been a failure to abide by Standing Orders which have been given Constitutional underpinning under the said Article. However, the court must exercise restraint and only intervene in appropriate instances, bearing in mind the specific circumstances of each case” (emphasis supplied).”

37. Having given these examples as befitting instances of where there is jurisdiction for the High Court to intervene, the apex court formulated the following principles at paragraph 63:

(i) “each arm of Government has an obligation to recognize the independence of other arms of Government:

(ii) each arm of Government is under duty to refrain from directing another organ on how to exercise its mandate:

(iii) the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment.

(iv) for the due functioning of constitutional governance, the courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case:

(v) in the performance of the respective functions, every arm of Government is subject to the law”.

38. There are other instances where the High Court has held that it has jurisdiction to intervene in matters challenging the legislatures actions. In *Nathaael Nganga Reuben v. Speaker, Machakos County(**ibid)*, it was held as follows:

“However, where a question arises as to whether an action is inconsistent with the Constitution or is passed in contravention of the constitution, as is the case in the instant petition, the High Court is the institution constitutionally empowered to determine such an issue. Subject to appellate jurisdiction given to the Court of Appeal and the Supreme Court. This court therefore not only has jurisdiction to hear and determine this Petition, but is also in the circumstances exercising its”

constitutional function within the doctrine of separation of powers”.

39. In *Amina Rashid Masoud v. Governor of Lamu County & 3 others*, the court held as follows:

“...there is nothing like supremacy of Parliament outside the Constitution. There is only supremacy of the Constitution. Given that the Constitution is supreme, every organ of State performing a Constitutional function must perform it in conformity with the constitution. Where the state fails to do so, the court as the ultimate guardian of the Constitution, will point out the transgression. As the cases cited above demonstrate, however, there is a legitimate question of how far the authority of the Court to review the decisions of other State Organs which exercise independent constitutional authority go. There are some areas where the Court can simply not go: some outer limits on its power to review the decisions and actions of other branches and State Organs.”

Therefore, as regards the question as to whether this court has jurisdiction to entertain the petition, the answer can only be in the affirmative: as to what lengths the Court can actually go in doing so is a second level inquiry based on the circumstances of each case. The jurisdiction of the High Court to adjudicate on constitutional matters is wide and is now settled. In short therefore, this court is endowed with the proper jurisdiction to scrutinize the County Assembly of Lamu in accordance with the Constitution. What the County Assembly was conducting was an administrative function which is subject to the court’s assessment in terms of compliance with the constitution.

40. In *Appollo Mboya v. AG & 2 others* (2018) eKLR, the court held as follows;

“According to the doctrine of the separation of powers, one of the important functions of the judiciary is to keep the other organs of the State in check by ensuring that their actions comply with the law, including, where applicable, the constitution. Ouster clauses prevent courts from carrying out this constitutional function.....The primary duty of the courts is to uphold the Constitution and the law “which they must apply impartially and without fear, favour or prejudice.” And if in the process of performing their constitutional duty, courts intrude into the domain of other branches of government, that is an intrusion mandated by the constitution. What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligation that parliament is required to fulfill in respect of the passage of laws, on the one hand and the respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand”.

41. Guided by the principles set out by the apex court in the **Justus Kariuki Mate & Another vs. Martin Nyaga Wambora & another** (ibid) and the numerous cited authorities, it is submitted that the High Court has jurisdiction, to hear this application and issue a conservatory order against the ruling/order of the Speaker/Respondent.

42. It is against public interest that Member of the County Assembly, elected and nominated continue to be barred from the County Assembly on the basis of a flawed ruling. The Respondent seems to have misconceived the petition by firstly raising unmerited preliminary points of law and arguing that there is another forum which the matter should have been remitted. He does not dispute the facts.

43. It is contended that, the ruling violates **Article 185(1) (2), (3) and (4)** of the Constitution which gives the county assembly legislative authority specifically to make laws that are necessary for the effective performance of the County government as provided under the forth schedule.

44. The **County Government Act 2012 Section 9** provides in mandatory terms, that a member county assembly must attend county assembly sessions and committee session for the purpose of legislating inter alia.

45. The ruling/ order by the Respondent bars the Petitioner and the 4 other elected and nominated members from executing their mandate under **Article 185** and is therefore a violation of the constitution.

46. It is submitted that same violates section **9(1) (c) (d) (e)** which is a normative derivative of **Article 185 (1) (2)(3) and (4)(a) (b)**. The Petitioner and the 4 members unlawfully barred from accessing the County assembly sit in various committees and cannot participate in the proceedings which violates their rights under **Article 185** and **Section 9**.

47. Prayer number 5 is not opposed on merit and if the preliminary objection fails then it succeeds. The prayer seeks access to information in the hands of a state organ.

48. Access to such information is a constitutional right guaranteed in the Constitution under **Article 35**. The basis for the demand for the Hansard for **25th September, 2019**, is that when the petitioner went to the assembly to collect personal items, he learnt that the respondent repeated his unlawful ruling and thus the need to produce it in court.

49. **RESPONDENTS SUBMISSIONS:**

50. The respondent submits that, the jurisdiction of a court flows from either the Constitution or an Act of parliament or both. A court of law cannot arrogate itself jurisdiction either by judicial craft or innovation. See the case of **Samuel Kamau Macharia & another v. Kenya commercial Bank Limited and 2 others** (2012) Eklr where the Supreme Court expressed that:

“A court’s jurisdiction flows from either the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that

which is conferred upon it by law.

51. See also See **Industrial & Commercial Development corporation vs. otachi (1977) KLR 101: (1976-80)1KLR 529.**

52. It is not in doubt that the jurisdiction of this court is not unlimited and that even where the court has jurisdiction, where there is an alternative effective remedy, and then this court's jurisdiction would be limited to the extent that a party **must** first exhaust that other remedy before resorting to approaching this court. See **Article 139 2(c) & Section 9 Fair Administrative Action Act, 2015).**

53. Thus court has no jurisdiction by dint of **section 9** of the Fair Administrative Action Act **which states that the high Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including inter mechanisms for appeal or review and all remedies available under any other written law are first exhausted.**

54. See **Speaker of the National Assembly vs. James Njenga Karume (1992) eKLR**, where the court of appeal held:

“In our view, there is considerable merit in the submissions that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an act of parliament, that procedure should be strictly followed”.

55. Section 9(2) of the Fair Administrative Action Act provides:

The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

The High Court or a subordinate court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings.

56. The jurisdiction of this court to hear and determine this matter is thus divested by dint of the exhaustion doctrine, the provisions of section **9(2)** of the Fair Administrative Act.

57. It is submitted that the County Assembly Powers, Privileges Committee has not been given a chance to do its statutory functions, therefore, Article 47 cannot be invoked at this time because the Petitioner has not requested to be heard before the relevant body.

58. It is the Respondent's submissions that to this extent these mandatory provisions of the County Assemblies Powers and Privileges Act 2017 as well as the Fair Administrative Act were never invoked with prior to the Petitioner filing the petition and the Notice of Motion dated 30th September, 2019. To this extent that, the Petitioner should not be given audience before this court until they comply with the mandatory provisions.

59. See **Misc Application No. 186 of 2006 John Harun Mwau vs. Dr. Andrew K. Mullei & 3 others:** the court held as follows:

“In Rep vs. The Judicial Commission of Inquiry to the Goldenberg Affair ex parte Saitoti Hmsc, Application 102/06 the court held that a court of law cannot question the decision covered by S. 4 & 12 of the National Assembly (powers and privileges) Act. That court relied on the case of **PREBBLE vs. TELEVISION NEW ZEALAND (1994) 3 ALL ER 407 where this court explained parliaments privileges and why the court cannot interfere”.**

60. It is submitted that this court at this point cannot interfere with the speakers decision as it will open a can of worms which will lead to a floodgate of numerous petitions as all 48 members of the County will render the Office of the Speaker toothless whenever it delivers rulings as pertains to business of the County Assembly and it undermines the doctrine of separation of powers and the principle of non-intervention of other government arms with another without which they could not county assembly will not be able to discharge their functions.

61. It is practically impossible for the Petitioners at this juncture to seek conservatory orders as it will be an affront to the doctrine of separation of powers. Secondly, the orders sought by the Petitioners though fashioned as conservatory orders, they are mandatory orders sought at the interlocutory stage. This is because it has not allowed the internal dispute resolution mechanisms of the county assembly powers and privileges committee and the clerk to perform its statutory mandated functions.

62. See **Tom Onyango v Mimosa investments Limited (2017) eklr**, The court of appeal held:

“11.....a mandatory injunction may be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not be normally granted. It may be granted in clear cases where, *inter alia*, the court is satisfied that the matter ought to be decided at once or where the circumstances are such that the court is satisfied that the case is unusually strong and clear. In exceptional cases, the court has discretion to grant interim relief although it amounts to granting the final relief itself prayed in the suit”.

63. **ISSUES, ANALYSIS AND DETERMINATION**

After going through the pleadings, annexures and parties submissions, I find the issues are:

(i) Whether High court has jurisdiction to entertain this matter?

(ii) Whether Petitioners have exhausted internal mechanisms for appeal review and all available remedies available under any other written law as required by S9 (2) of Fair Administrative Action Act?

(iii) Whether this court can directly deal with the speakers ruling delivered on 24.9.2019?

(iv) Whether Respondent has violated Article 47 of the Constitution?

(v) Whether the instant Notice of Motion is meritorious?

(vi) What is the order as to costs?

64. On the issue of jurisdiction, the Respondent submit that the court has no jurisdiction to entertain the instant dispute and relies on – **OTACHI SUPRA, S.K. MCHARIA SUPRA inter alia**. On the other hand the petitioner is of a contrary view and relies on various authorities including **KARIUKI MATE SUPRA, OPIYO WANDAYI SUPRA, NATHANIEL NGANGA SUPRA, AMINA MASOUD SUPRA**.

65. The facts of this case are not disputed as the Respondent never filed an affidavit to oppose the motion in issue and as we stand there is no reply to the Petition. It is then taken that the form and content of the speaker/Respondent ruling impugned is as it is presented herein.

66. The Respondent expelled the named persons including the Petitioner for the remainder of the sessions and were expelled from the Assembly and its precincts for 3 months on **24.9.2019**.

67. The respondent contend that if that act by the respondent aggrieved petitioner, his first port of call in complaint against respondent was the Committee of Powers and Privileges.

68. The powers and privileges Committee of County Assemblies is a creature of the **County Assemblies Powers and Privileges Act No. 6 of 2017. Section 15 (1)** establishes the Committee while Section 15 (4) provides for the functions of the Committee.

69. The functions of the Committee of Powers and Privileges shall be to:

Inquire into the conduct of a member whose conduct is alleged to constitute a breach of privilege in terms of section 16: and Perform such other functions as may be specified in this Act.

70. The main function of the committee is to inquire into the conduct of a member whose conduct is alleged to constitute a breach of privilege. There is no provision in the Act for reference of a speakers ruling to the committee.

71. It is not Respondent's impugned decision that ought to be reviewed by the committee but the blowing of whistles by the Petitioner and the four other members. The respondent decision on the face of it, is thus void ab initio because it violates **Section 15(a)**.

72. What then would have been the right procedure for the Respondent to follow in the circumstances? **Section 16, 26 (1) and 28** provides conduct that constitutes breach of privilege.

73. The parties seem not to contest that the act of the blowing of whistles in the assembly by the Petitioner and the four other members amounted to conduct consisting breach of privilege by a member under the Act.

74. Where there is an allegation of conduct consisting breach of privilege by a member, the committee may either suo moto or as a result of a complaint made by any person, inquire into the conduct of a Member whose conduct is alleged to constitute breach of privilege.

75. The committee which consists of the Speaker, other members as appointed pursuant to the standing orders may inquire into the impugned conduct. The quorum of the committee must consist at least a third of the members, the speaker included.

76. The Committee must determine the impugned conduct within 14 days. The findings and recommendations are then forwarded to the County Assembly within 14 days.

77. The County Assembly shall then consider the report and recommendations and take such action against the member under enquiry.

78. The County assembly may then, as one of the various sentences permissible, suspend the Member of County Assembly for such a period as may be deemed appropriate.

79. There is no provision in the Act for reference of a speakers ruling to the committee and none was pointed by the respondent. The petitioner submits that, the proposition that this matter should have been remitted to the committee in the first instance is untenable as it is misconception of the facts of the petition.

80. From the standing orders, the Respondent has a limited disciplinary scope. **Standing order 104 (2)** allows the Respondent or a chairperson of a committee to: order any member whose conduct is grossly disorderly to withdraw immediately from the precincts of the assembly. On the first occasion, for the remainder of that days sitting and on the second or subsequent occasion, for the remainder of that days sitting and on the second or subsequent occasion during the same session, for a maximum of three sitting days including the day of

suspension.

81. By dint of **Standing order 104 (2)** the Respondent is mandated to suspend MCA for conduct which is grossly disorderly for a maximum of 3 sitting days including day of suspension. The expulsion power is not provided for.

82. The instant dispute is where the Respondent expelled the named members for 3 months.

83. Prima-facie- the Respondent ruling is ultra vires the standing orders.

84. Thus can the High Court question the aforesaid decision? In **KARIUKI MATE SUPRA**; the Supreme Court held that:

“In a jurisdiction like ours in which the Constitution is supreme, the court has jurisdiction to intervene where there is a failure to abide by standing orders which have been given constitutional underpinning under the said Article. However the court must exercise restraint and only intervene in appropriate instances, bearing in mind the specific circumstances of each case.

85. This was an extract in the case of **OPIYO WANDAYI SUPRA** Where Odunga J stayed the speaker of National Assembly decision which had suspended the parliamentarians for the remainder of the session. In the aforesaid **KARIUKI MATE** case Supreme Court of Kenya (SCOKE) laid down principles to apply in instances of case like the instant one. Namely;

I. “each arm of Government has an obligation to recognize the independence of other arms of Government:

II. each arm of Government is under duty to refrain from directing another organ on how to exercise its mandate:

III. the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment.

IV. for the due functioning of constitutional governance, the courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case:

V. in the performance of the respective functions, every arm of Government is subject to the law”.

86. The question is then can the court hear this application and petition? Indeed it can and there is no shortage of supporting material. The constitution is the supreme law and it provides under **Article 2 (1)** that it binds all persons and all State organs at both levels of government.

87. **Article 165(3) (b)** provides that the High Court has jurisdiction to determine questions whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened.

88. **Article 165 (3) (d) (ii)** provides that the High Court shall have jurisdiction to hear any question respecting the interpretation of the constitution of 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.

89. The Respondent holds a Constitutional office established under **Article 178(1)**. The office holder is bestowed with the authority to preside over a County Assembly pursuant to **Article 178 (2) (a)**.

90. In issuing the ruling/order which suspended the Petitioner and four others from the County Assembly on **24th September, 2019**, he was exercising his constitutional role to preside over the County Assembly of Garissa as provided under **Article 178 (2) (a)**.

91. The High court has jurisdiction under **Article 165 (3) (b)** and **(d) (ii)** to interpret the constitution and determine whether the Respondents ruling/order made pursuant to his constitutional duty contravenes the Constitution. The specific complaint against the ruling/order is that it violated **Article 47(1)** and **10 (2)** of the Constitution. **Article 47** codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

92. Fair administrative action broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations.

The national values set out in **Article 10(2) of the constitution** bind every state organ, state officer, public officer and all persons whenever any of them

(a) Applies or interprets the Constitution;

(b) Enacts, applies or interprets any law; or

(c) Makes or implements public policy decisions.

2. The national values and principles of governance include –

a)..... THE RULE OF LAW.....

93. There is nothing like supremacy of parliament outside the Constitution only supremacy of the constitution. Thus every organ of state performing constitutional functions must perform it in conformity with constitution where the state fails to do so, the court as the ultimate guardian of the constitution will point out the transgression see **Amina Masoud Supra**.

94. This court thus holds that it has jurisdiction in the instant matter as the speaker's ruling appears prima-facie exceeded mandate under standing orders **104(2)**, thus breaching **Article 47** and **10** of the Constitution of Kenya.

95. On whether **Section 9 (2)** of Fair Administrative Action Act was violated for failure to exhaust other available mechanisms of dispute resolution prior to moving to court, the respondent cited the provisions of County Assemblies powers and privileges **Act NO. 6 of 2017 S. 15**, the Respondent has not pointed any provisions which is provided by statute or law on where the speaker's ruling like the instant one can be impugned.

96. **Section 9(2) Fair Administrative Action act** does not render any instances where there are readily available alternatives to courts Forum which can entertain the instant dispute.

97. In **SPEAKER NATIONAL ASSEMBLY VS. KARUME (1992) EKLK** the court held that:

“Where there is clear procedure for redress of any particular grievance presented by the Constitution or Act of Parliament, that procedure should be strictly followed”.

98. Where was Applicant and his CO-MCAs expelled supposed to go? Which procedure is provided to challenge speaker's order /ruling? None has been demonstrated. Thus this court steps in to enforce the law on merit of the Notice of Motion. Thus the P O fails and is dismissed.

99. On merit of the motion, the principles on grant of conservatory orders, have set threshold to be used. In the case of **Board of Management Uhuru secondary School vs. City Director of Education and 2 others (2015) Eklr** the court held:

“In summary the principles are that applicant ought to demonstrate an arguable prima-facie case with likelihood of success and that the absence of the Conservatory orders he is likely to suffer prejudice. Further the court should decide whether a grant or denial of the conservatory relief will enhance constitutional values and object of specific rights or freedom in the bill of rights and if an interim conservatory order is not granted, the petition or substratum will be rendered nugatory. Lastly the court will consider public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order”.

100. The ruling violates Article 185(1) (2), (3) and (4) of the Constitution which gives the county assembly legislative authority specifically to make laws that are necessary for the effective performance of the County government as provided under the forth schedule.

101. The County assembly is also mandated to oversight the county executive committee and to receive and approve plans and policies for management and exploitation of the county's resources and development of its infrastructure.

102. It is the members of the county assembly who collectively carry out this mandate as representatives of the electorate. To enable the members carry out this functions, the county Government Act 2012 section 9 provides in mandatory terms, that a member county assembly must attend county assembly sessions and committee session for the purpose of legislating, being a linkage between the electorate and the County Assembly on matters of public service delivery and to share expertise and knowledge on any issue for discussion in the assembly.

103. Members of county assembly being grassroot leaders are best placed to bring fore the electorates needs and preferences. The unlawful order by the Respondent bars the Petitioner and the 4 other elected and nominated members from executing their mandate under Article 185 and is therefore a violation of the constitution. It violates section **9(1) (c) (d) (e) which is a normative derivative of Article 185 (1) (2)(3) and (4)(a) (b)**.

104. The Petitioner and the 4 members unlawfully barred from accessing the County assembly sit in various committees and cannot participate in the proceedings thus impugned ruling violates their rights under article 185 and section 9.

105. Prayer number 5 is not opposed on merit and thus as the preliminary objection has failed the same succeeds. The prayer seeks access to information in the hands of a state organ.

106. Access to such information is a constitutional right guaranteed in the Constitution under Article 35. The basis for the demand for the Hansard for 25th September, 2019 according to the petitioner is that, when he went to the assembly to collect personal items, he learnt that the respondent repeated his unlawful ruling and thus the need to produce it in court.

107. Thus the court finds that the Application has merit and thus makes the following orders ;

I. Prayers 4 and 5 of the instant motion are granted.

II. Costs in the main cause.

Dated, Signed and delivered at Garissa this 18TH day of October 2019

C. KARIUKI

JUDGE