



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

PETITION NO 18 OF 2017

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLE 258(2)(C) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE CONTRAVENTION OF, AND THE THREAT OF CONTINUED CONTRAVENTION OF ARTICLES 10 (2 a & c), 183 (1a, b, d & (2), 185, 209, 210, 216(2) & 228 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE CONTRAVENTION AND THE THREAT OF CONTINUED CONTRAVENTIONS OF THE FOURTH SCHEDULE TO THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE PROVISIONS OF SECTION 5(2) (a) & (3), 8(1) (a), (b), (c), (e), (f) & (2), 21, 23, 25, 120 OF THE COUNTY GOVERNMENTS ACT

AND

IN THE MATTER OF SECTIONS 129, 130, 131, 132, 133 OF THE PUBLIC FINANCE MANAGEMENT ACT,

AND

IN THE MATTER OF SECTIONS 3, 4, 5 & 6 OF THE VALUATION FOR RATING ACT

AND

IN THE MATTER OF SECTION 5(1) OF THE RATING ACT

AND

IN THE MATTER OF THE PROVISIONS OF SECTION 10 & 19 OF THE PUBLIC OFFICER ETHICS ACT,

IN THE MATTER OF SECTION 9, 10, 12 (1) OF THE LEADERSHIP AND INTERGRITY ACT

BETWEEN

JAMES GACHERU KARIUKI & 69 OTHERS.....PETITIONERS

VERSUS

WILLIAM KABOGO GITAU & 104 OTHERS.....RESPONDENTS

R U L I N G

1. For determination are two Preliminary Objections to the Petition herein. The first was by the 18th, 20th and 21st Respondents, and was filed on 26th September 2017 and the second, by the 13th – 100th and 102nd Respondents, which was filed on 27th November 2017. The key grounds in the former preliminary objection are that:

- a) The petition is debarred or premature pursuant to the doctrine of exhaustion.
- b) There exists a clear procedure under Section 27(2) (a), (b) of the County Governments Act for the recalling of the Respondents.
- c) The Petition is misconceived, incompetent, bad in law and an abuse of the court process.

2. The key grounds in the second preliminary objection are that:

- a) Section 133(1) of the County Governments Act protects the Respondents against personal liability for any act, matter or thing done or omitted from being done if the act, matter or omission is in good faith in the course of the execution of duty
- b) Section 206 of the Public Finance Management Act protects the Respondents from personal liability in respect of any act, matter or thing done in good faith for the purpose of executing the powers, functions or duties of the National or County Treasury under the Constitution and the Public Finance Management Act.

3. Through oral and written submissions, the 18th, 20th and 21st Respondents made the following case in support of their preliminary objection. Firstly, the gist of the Petition is that the Respondents who are former members of the County Assembly (MCA's), the former Governor, former clerk of the County Assembly all of the County Government of Kiambu and named employees thereof failed to perform their duties satisfactorily and ought to refund the salaries and emoluments paid to them during their tenure of office.

4. Asserting that the Petitioners waited for the terms of the 18th, 20th, and 21st Respondents to lapse before lodging this Petition, the Respondents state that the Petitioners having failed to exhaust or avail of themselves of the recall procedure provided for under Section 27 of the County Governments Act, they cannot ask this court to usurp the power of the of the people of Kiambu County. These Respondents view the Petition as an afterthought and a fishing expedition. The Respondents also submit that they are immune from personal liability in respect of due exercise of their duties pursuant to Section 133(1) of the County Governments Act. They argue further that the petition is an abuse of the court process as the Respondents are no longer in office.

5. It is also contended that the Petition is misconceived and defective for violating the doctrine of separation of powers under Articles 174 and 175 of the Constitution, which by virtue of which the court does not interfere with the mandate of the county government. Moreover, that there is no legal basis to support the Petitioners' prayers for the refund of salaries and emoluments paid to the Respondents.

6. For their part, the 13th to 100th and 102nd Respondents cited the decision in **Githu Muigai and Another v The Law Society of Kenya and Another [2015] e KLR** to support the submission that their immunity under Section 133(1) of the County Governments Act is similar to that accorded to the office of the Attorney General under Section 8 of the Office of the Attorney General Act (**OAG Act**). They also juxtaposed the provisions of Section 133(1) of the County Governments Act with Section 8 of the Judicature Act which immunizes Judicial Officers against personal liability arising from the discharge of their judicial duties and the upholding of such immunity by the court in **Maina Gitonga v Catherine Nyawira Maina and Another [2015] e KLR**. Also cited was the case of **John Rimui Waweru and 3 others v Githunguri Constituency Ranching Co. Ltd and 5 Others [2015] e KLR** where the court upheld the preliminary objection based on Section 133(1) of the County Governments Act, and dismissed the suit brought against the Governor, Kiambu County.

7. The Respondents further assert with respect to members of the county assembly that, pursuant to the provisions of Section 17 of the County Governments Act as read with Section 12 of the National Assembly (Powers and Privileges) Act, the county assembly enjoys parliamentary privilege and immunity in the execution of its functions. Reliance was placed on the cases of **County Government of Kiambu and Another v Senate and Others (2017) eKLR** and **Martin Nyaga Wambora v Speaker of the County Assembly of Embu and 3 Others [2014] e KLR**. Also cited is the Court of Appeal decision in **Mumo Matemu v Trusted Society of Human Rights Alliance and 5 Others [2013] e KLR** emphasizing the need for different state organs to defer to each other concerning their respective mandates. Thus, these Respondents assert that it is not open to this court to sit on appeal or interfere with decisions made by the county assembly and its officers, merely because the Petitioner believes an alternative course of action or decision would have been better.

8. The Respondents assert that matters relating to negligence, incompetence, poor performance of duty or dishonesty by public officers, in the first instance ought to be referred, by dint of Section 42 of the Leadership and Integrity Act and Section 35 of the Public Officers Ethics Act, to the Ethics and Anti-corruption Commission (EACC) to conduct investigations, rather than this court, which has no such mandate. For this proposition the Respondents rely on the decision in **Francis Curukia v Peter Gatirau Munya and 2 Others [2017] e KLR** in which the court cited the decision of **Mumbi J in Benjamin Ndolo Wambua and Another v The County Secretary Nairobi City County Government Petition No.25 of 2015**.

9. Further it is argued that while the Petition is an attempt to establish civil liability for alleged acts and omissions of the Respondents during their tenure in office, the Petitioners fail to specify what provision of the Constitution was violated and in what manner, or to demonstrate illegality on the part of the Respondents.

10. The 1st – 12th and 101st Respondents supported the two preliminary objections. In reference to the second preliminary objection, they reiterate the immunity prescribed under Section 133(1) of the County Governments Act and Section 206 of the Public Finance Management Act in respect of public officers such as the Respondents, in the execution of their functions. With regard to the 1st preliminary objection, reference is made to the allegations contained in the petition and orders sought, and submission made to the effect that, the Petitioners are thereby inviting the court to conduct investigations into the Respondents' conduct while in office, a function which properly belongs to the

EACC. That there is no evidence that the said commission has been approached by the Petitioners prior this action.

In their response, the Petitioners confirm that they were alive to the immunity of public officers under the County Governments Act and the Public Finance Management Act, but that the immunity only covers actions/omissions done in good faith. That whether the immunity applies to the present case was a matter to be tried through a full hearing. It was asserted that the Petition raised matters concerning neglect and refusal by the Respondents to carry out their duties under the Constitution and other statutes, and whether therefore, they were entitled to salaries emoluments earned during their tenure. Citing this court's jurisdiction under Article 165(3) of the Constitution, the Petitioners assert that the court can entertain the issues raised in the Petition.

11. In a rejoinder, counsel for the 18th, 20th and 21st Respondent stated that all sovereign power is exercised in accordance with the Constitution as provided in Article 1 of the Constitution. He reiterated that this court cannot purport to make a decision on the performance of the Respondents on behalf of the people who elected them.

12. The court has considered the arguments raised for and in opposition to the preliminary objections. As stated in the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696:**

“... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”. (emphasis added)

13. The key issues raised by the two preliminary objections are the question of the applicability of the various immunity provisions to the matters herein and the jurisdiction of this court to entertain this Petition and within which, the doctrines of separation of powers and exhaustion also arise.

14. There is no dispute that in the material period the 13th to 100th Respondents were members of the County assembly of the County Government of Kiambu while the 3rd to the 12th Respondents were members of the county executive committee [CEC] of the County Government of Kiambu. Also, in the material period, the 1st and 2nd Respondents were the Governor and Deputy Governor, respectively, of the County Government of Kiambu and therefore, members of the CEC by virtue of the provisions of Article 179(1) and (2) of the Constitution. Thus, the 1st to 100th, the 104th and 105th Respondents are all state officers while the 101st and 102nd Respondents are county public officers .

15. Section 133(1) of the County Governments Act provides that:

“No act, matter or thing done or omitted to be done by –

a) any members of the county government or its administration board or committee;

b) any member of the county assembly;

c) any member of staff or other person in the service of the county government; or

d) any person acting under the direction of the county government--

shall, if that act, matter or thing was done or omitted in good faith in the execution of a duty or under direction, render that member or person liable to any civil liability.”

16. Paragraphs 34(a) to (n) of the Petition contains allegations levelled against the 1st to 100th Respondents including neglecting, ignoring and/or refusing, *inter alia* , to make laws necessary for the effective performance of the functions and exercise of powers of the County Government of Kiambu under the Fourth Schedule of the Constitution as required under Article 185(2); to implement county legislation as required by Article 183(1) (a) of the Constitution; to finance the county government through means other than the equitable share of revenue raised by the national government, a requirement under Article 209(3) a) and (b) of the Constitution; to prepare county money bills, including county appropriation and finance acts and to appropriate county allocation of revenue from national government for the financial years 2013/2014, 2014/2015, 2015/2016 and 2016/2017.

17. It is further alleged that despite these omissions, the 101st and 102nd Respondents paid out salaries and emoluments to the said Respondents above, while the 103rd Respondent neglected, ignored and/or refused to recover these monies thus allegedly misappropriated. That the 104th Respondent allegedly neglected his duties with regard to withdrawals made in connection with the payment of the said salaries and emoluments. In the alternative, it is pleaded that the 1st to 100th Respondents are ignorant of the law and therefore incompetent to perform any duties as public officers. Paragraphs 41 avers the particulars thereof.

18. In the Replying affidavit filed on 19th January, 2018 (by the 1st to 12th and 101st Respondent) and submissions made before the court, the Respondents attempt to controvert the allegations contained in the Petition and invoke immunity under Section 133(1) of the County Governments Act. Looking at these averments, it is true as stated in submissions by the Respondents, that the Petition does not explicitly refer to absence of good faith on the part of the Respondents. However, invoking Article 226(5) of the Constitution and Section 9 of the Leadership and Integrity Act, the Petitioners assert that public officers must take personal responsibility for their actions and/or omissions and the foreseeable consequences of said actions or omissions, and further that, the national values and principles of governance cannot be realized through shielding the Respondents from answering the Petition.

The court having perused the Petition is of the view that, even a cursory reading of the rather expansive averments in the Petition reveals a reference, albeit indirect, to alleged *mala fides* against the Respondents. In other words, accusations of bad faith against the Respondents can be implied from the pleadings. Whether the allegations can withstand due factual and legal scrutiny is a different matter altogether. And whether this court is the proper forum to investigate the veracity of the said allegations is a different matter. It is important to point out that the decision in **Githu Muigai and Another v The Law Society of Kenya**, which to my mind is more applicable to this case than the decision in **Maina Gitonga** (which dealt with judicial immunity) was rendered upon a full hearing of the Petition rather than at preliminary stage.

19. It is also pertinent to note that decision in **Githu Muigai** though reiterating the immunity of the office of the Attorney General from personal liability arising from the exercise of his functions or things done in good faith, did not turn primarily on that issue. But rather on the finding by the court that the Law Society of Kenya had arrogated themselves power to censure the Attorney General which was not vested in them by statute.

20. The court observed *inter alia* that:-

“If indeed the Attorney General did act incompetently and dishonorably in the exercise of the functions of his office, it is not the statutory duty of the Respondents to censure him ... to purport to haul the Attorney General before the (LSK) council and censure him, on the basis that he happens to be a member of the LSK is, in our view, in itself an arrogation of power and abuse of those powers, by the Respondents. Nothing in the provisions of the LSK Act; whether expressly or by necessary implication, vests on the Respondents the kind of powers they allege to have.”

21. In **John Rimoi Waweru’s case**, the Plaintiffs admitted that they were not seeking personal liability against the Governor of Kiambu County but his office. The facts of that case are therefore distinguishable from those herein. The language employed in the immunity provision in the Public Finance Management Act is not dissimilar to that contained in Section 133(1) of the County Governments Act. For our purposes, the operative words are “good faith”. Section 206 of the Public Finance Management Act provides:-

“Nothing done by any authorized person or public officer working under the instructions of the National Treasury or County Treasury, if done in good faith, for the purposes of exciting the powers, functions or duties of the National Treasury or County Treasury under the Constitution or this Act, renders that person or public officer personally liable for any action, claim or demand.” (emphasis added)

22. It is my view that, notwithstanding the omnibus nature of the averments in the Petition, the question whether or not the Respondents acted *mala fides* is one of fact and requires ascertainment as it is disputed by the Respondents. Therefore, the limb of the preliminary objection based on immunity derived from Sections 206 of the Public Finance Management Act and the Section 133(1) of the County Governments Act is in this instance not a pure point of law. The court will consider the special immunity accorded to county assemblies under Section 17 of the County Governments Act as read with Section 12 of the National Assembly (Powers and Privileges) Act within the next question.

23. As earlier stated, the question of this court’s jurisdiction to entertain this Petition also encompasses in some respects the twin doctrines of separation of powers and exhaustion. The Petitioners have maintained that this court’s jurisdiction under Article 165(3) d) of the Constitution is wide enough to admit this rather novel petition. The jurisdiction of this court is derived from the Constitution and the law. Article 165 3 (d) provides that:

“Subject to clause (5) the High Court shall have –

“jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of:

i) the question whether any law is inconsistent with or in contravention of this Constitution

ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.”

24. Article 258 clothes every person with *locus standi* to institute proceedings, claiming that the Constitution has been contravened or is threatened with contravention. In setting out the grounds upon which the Petition was founded, the Petitioners averred at paragraphs 32 and 33 that the Respondents **“knew or ought to have known”** that due discharge of their duties was the basis for their drawing salaries and emoluments, and that as public officers they were required under Section 10(1) of the Public Officers Ethics Act to carry out their individual and collective duties in accordance with the law.

25. Having particularized the respective constitutional and statutory duties and alleged misdeeds of the Respondents in that regard, the Petitioners appear to anticipate a jurisdictional challenge, in stating at paragraph 43 that the 1st to 100th Respondents **“have no responsible commission for the purposes of the Public Officers Ethics Act ... hence the Petitioners believe that they squarely fall under surveillance by the ordinary Kiambu/Kenya residents/citizens through the court”**. (sic) The length and breadth of issues raised in the Petition is crystalized in the issues stated for determination at paragraph 44, which include the determination of the question whether the Respondents performed their various statutory and constitutional duties or neglected, ignored or refused to carry out such duties; whether the Respondents were ignorant of the Constitution and the law and incompetent; and ultimately, whether they were entitled to draw salaries and emoluments during their tenure in office.

26. The prayers *inter alia* seek orders to compel the County Secretary to file into court a comprehensive report in respect of all salaries and emoluments paid to the said Respondents. Several declarations are sought, including a declaration that the state officers sued did not perform

their respective constitutional and statutory duties and are therefore not entitled to draw salaries and emoluments from the County Government. Also sought is a mandatory injunction to compel the County Secretary and Assembly Clerk to the County Government of Kiambu to **“forthwith recover”** all the monies paid to the 1st to 100th Respondents in the form of salaries and emoluments. Prayer (h) seeks a declaration to the effect that the state officers sued herein are collectively and individually unfit to hold public office due to their ignorance in respect of stated provisions of the Constitution and statutes etc.

27. First of all, I have to state that there is a self-evident dissonance between the grievances raised in the Petition and the prayers sought. For instance, where a public officer has failed to perform a statutory or constitutional duty, the more appropriate and efficacious remedy would be an order to compel the said performance, but not the recovery salaries or emoluments paid to such officer as a public or state officer. And while it may be argued generally that a public or state officer owes a duty to the appointing authority or to the electorate who put him in office to discharge his statutory and other legal obligations, the corresponding remedy for the breach of such duty or contract, is nowhere prescribed to be the recovery of salaries or emoluments received by such officer on account of the office held by him.

28. The Petitioners by their oral submissions all but confirmed the statement made by the 18th, 20th and 21st Respondents to the effect that the gist of their Petition was that the named Respondents **“did not perform their duties well and should therefore refund all the money paid to them during their tenure”** in office. While addressing the court on behalf of his co-Petitioners, the 1st Petitioner stated that;

“The Respondents herein have refused to discharge their legal duty. In layman terms we want to understand if the Respondents can be paid when they have not carried out their duties. Under Article 165(3) this court can determine legality of actions of any person under the law (or) Constitution.”

29. The multiple allegations levelled against the Respondents appear to range from dereliction of duty, ignorance of the Constitution and the law, incompetence, mis-management of public funds, dishonest gain and financial impropriety. The looming question is whether this court is the proper forum or state organ and the present proceedings the proper avenue for conducting an inquiry into these allegations. While the wide powers of this court under Article 165(3) (d) (ii) cannot be gainsaid, it would be tantamount to legal heresy to read the said Article in isolation from other provisions of the Constitution and related statutes.

30. For instance, with regard to the alleged failure by the county assembly of which majority of the Respondents were members, to make certain laws as obligated under various articles of the Constitution, Article 196(3) as read with Section 17 of the County Government Act and Section 12 of the National Assembly (powers and Privileges) Act insulate proceedings and decisions of the county assembly from being questioned in any court. The courts have severally pronounced that these immunities exist to facilitate the effective carrying out of the duties and functions by members and officers of the county assembly and that courts will be slow to intrude into the workings of county assemblies.

31. Not even the Senate can interfere with the law-making function of the county assemblies. See **County Government of Kiambu and Another v Senate and Others [2017] e KLR**. However Article 96(3) provides that:

“The senate determines the allocation of national revenue among counties, as provided in Article 217, and excises oversight over national revenue allocation to the county government.”

32. So that complaints of the nature found at the Petition paragraphs 34 (k), (l), (m), (n) in relation to failure to appropriate county allocation of revenue in the financial years 2013 to 2017 are matters that fall under the oversight of Senate. Ditto for the allegations of unjustified payments of salaries and emoluments pleaded in the Petition. Paragraph 37 of the Petition indeed confirms that pursuant to Article 228 the Controller of Budget sued as the 103rd Respondent oversees the implementation of county budgets by authorizing lawful withdrawals, and files reports to both Houses of parliament. There is no evidence that prior to this case being filed, representations had been made by the Petitioners to that office or to the Senate Public Accounts Committee concerning the matters complained of.

33. What is more, the duty of auditing the accounts of county governments is the function of the Auditor General pursuant to the provisions of Article 229 of the Constitution and under Sub Article (5) an audit report shall confirm **“whether or not public money has been applied lawfully and in an effective way”**. Audit reports by the Auditor General are submitted to Parliament and the relevant county. Sub article 8 provides that;

“Within three months after receiving an audit report, Parliament or the county assembly shall debate and consider the report and take appropriate action.”

34. What legal mandate and what expertise does this court have to take on the tasks assigned by the Constitution to the Controller of Budget, Auditor General and ultimately Parliament? If indeed the Respondents violated the requirements of the Public Finance Management Act, and the County Governments Act by failing to prepare money bills, is this court the proper body to inquire into these breaches? I do not think so. And if the Respondents were so incompetent, ignorant of the law and in dereliction of duty that they were unable to perform the basic functions of making the necessary laws, approving plans and policies for the management and exploitation of county resources, undertaking development and management of infrastructure and institutions, collecting taxes or raising local revenue during their tenure as pleaded at paragraphs 34, 39 – 43, is this court responsible for bringing the Respondents to account? And to subsequently compel the recovery of salaries and emoluments earned by the Respondents during their tenure in office? I am not so persuaded.

35. It is also claimed that the County Assembly did not carry out its oversight mandate. In a word the entire erstwhile administration was a failure as no part of it executed its respective constitutional and statutory obligations. It is my view that what the Petitioners are seeking by this petition is in part a wide-ranging exit audit or merit review of the overall performance of the entire erstwhile County Government of Kiambu.

36. In **County Assembly of Kisumu and 2 Others V Kisumu County Assembly Service Board and Others**, the Court of Appeal had

occasion to consider the provisions of Section 12 of the National Assembly (Powers and Privileges) Act as read with Section 17 of the County Governments Act. The court stated inter alia that:

“37. Understanding of, and respect for, the principle of separation of powers is the *sine qua non* of a democratic State. The essence of the doctrine of separation of powers is that the Executive, the Legislature and the Judiciary constitute three separate and independent arms of government with different and exclusive responsibilities. The legislative function, that is the enactment of laws, belongs to the legislature; the implementation of law and government policies is the role of the Executive; and the interpretation and enforcement of the rule of law is the mandate of the Judiciary. By virtue of this separation, it is not permissible for any branch to interfere with the others’ spheres.”

38. With regard to the issue before us, under the doctrine of separation of powers, the court should not interfere with the freedom of speech and debate of legislative bodies. The court must resist unwarranted intrusion into internal procedures of Parliament and the County Assemblies unless they act unconstitutionally. As this Court stated in *Martin Nyaga Wambora & Others v. Speaker of the Senate & Others*, where it is shown that in conducting its proceedings, a legislative authority has acted within the confines of the Constitution, courts have no jurisdiction and ought not to interfere simply because anybody is aggrieved by a decision passed by the legislative authority. However, where they have not, the court can interfere. This is because the legislative assemblies, like all other organs of state and indeed every person, must act in accordance with the Constitution.”

39. Article 2(1) of the Constitution declares that the Constitution is “the supreme law of the Republic” which “binds all persons and all state organs at both levels of government.” Every person, organ or institution is therefore enjoined to respect, uphold and defend the Constitution. It follows that Parliament or any County Assembly cannot seek refuge under the National Assembly (Powers and Privileges) Act, if it violates any provision of the Constitution. The Supreme Court reiterated this point in the case of *Speaker of the Senate & Another v. Attorney General & 4 Others* in the following terms:

“...Kenya’s legislative bodies bear an obligation to discharge their mandate in accordance with the terms of the Constitution, and they cannot plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation... If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law... 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.”

40. In this regard I have to agree with the Respondents’ submission that looking at the entire Petition as drafted, it does not positively disclose how the numerous constitutional provisions cited have been violated or the illegalities perpetrated, beyond asserting a mere failure by the Respondents to carry out their respective obligations thereunder. The established principle of law is that that anyone who wishes the court to grant relief for the violation of the Constitution, or any right or fundamental freedom under the Constitution, is obligated to plead in a precise manner the constitutional provisions which have been violated or infringed, the manner of infringement. In the quintessential case of *Anarita Karimi Njeru v Republic (No.1) [1979] KLR 154* the Court stated:

“ ...if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important(if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

41. The Court of Appeal reiterated the above principle in *Mumo Matemo v Trusted Society of Human Rights alliance [2014] eKLR*, where it stated that:

“...the principle in *Anarita Karimi Njeru (supra)* underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru (supra)* that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”

42. I have previously alluded to the omnibus nature of the Petition herein and appreciate sentiments by Counsel for the 13th to 100th and 101st Respondents that as framed, the Petition appears impossible to answer. The Petition raises a variety of issues that also appear to be steeped in deep political overtones. Concerning any political questions as to the general competence and performance of the erstwhile county government during its term in office, the electorate of the County of Kiambu was best placed to make a judgement. It appears that with respect to the Respondents who were members of the county assembly, the Petitioners did not petition in the stipulated period, for the recall of the alleged offending MCAs during the pendency of their tenure as provided under Section 27(1) and (2) of the County Governments Act for their alleged misdeeds. Nor, with regard to matters complained of did they petition the county assembly under Section 15 of the County Governments Act.

If indeed the Petitioners believed the Respondents had violated the Public Officers Ethics Act or Chapter six of the Constitution as they seem to assert through their averments in the Petition, nothing stopped them from availing themselves of the procedure in Section 42 of the Leadership and integrity Act so that investigations could be carried out and if appropriate, recommendations made to prosecute in accordance with section 43 of the Act.

43. In *Mumo Matemu’s* case the Court of Appeal had this to say:

“It was the contention of the appellant that the standard of review must be deferential given that appointments are

committed to the other organs of government. In view of our constitutional design and the institutional competences attendant to it, it seems to us that this view cannot and has not been seriously contended in principle by any of the respondents. Deference is multi-directional, and we are prepared to hold that in the same way the other branches are to defer to the jurisdiction of the courts, the courts must also defer to the other branches where the constitutional design so ordains. We hold that the standard of judicial review of appointments to State or Public Office should therefore be generally deferential, although courts will not hesitate to be searching where the circumstances of the case demand a heightened scrutiny provided that the courts do not purport to sit in appeal over the opinion of the other branches....

44. The Court of Appeal in emphasizing the centrality of the doctrine of separation of powers in our constitutional design observed that:

We further reiterate that whereas the centrality of the Ethics and Anti-Corruption Commission as a vessel for enforcement of provisions on leadership and integrity under Chapter 6 of the Constitution warrants the heightened scrutiny of the legality of appointments thereto, that is neither a license for a court to constitute itself into a vetting body nor an ordination to substitute the Legislature’s decision for its own choice. To do so would undermine the principle of separation of powers. It would also strain judicial competence and authority. Similarly, although the courts are expositors of what the law is, they cannot prescribe for the other branches of the government the manner of enforcement of Chapter 6 of the Constitution, where the function is vested elsewhere under our constitutional design.”

45. Suffice to state that, there is an established democratic system and structure of government with in-built checks and balances, not only at the county government level, but also at the national government level. This court cannot to purport to take over what are clearly tasks designated to different organs of state, as sought by the Petitioners in this case, without doing violence to the national values and principles of governance espoused under Article 10(2) (a) and (c) of the Constitution. Worse, unwarranted interference with the functions of county governments would run counter to the objects of devolution and principles of devolved governments in Articles 174 and 175 of the Constitution, and in extreme cases be tantamount to the supplanting of the sovereign power of the people espoused in Article 1 of the Constitution.

46. It is evident that the Petitioners herein made a beeline for this court instead of approaching the relevant mandated organs and before exhausting other avenues and procedures provided for dealing with their complaints. The alleged complaint to the EACC (**annexure JGK1**) to the Petitioner’s Further affidavit filed irregularly alongside submissions is a vague statement devoid of specifics and refers to county governments, generally. It was written only 3 months to the filing of the petition, and as for annexure **JGK2**, the authors are strangers to this suit but in any event, the complaint albeit more specific is directed to the Independent Electoral and Boundaries Commission and the Public Service Commission.

47. This court must therefore defer to the constitutional and statutory organs responsible for dealing with the complaints placed before it through this Petition. The court rejects the Petitioners’ invitation to assume jurisdiction over these matters. Put plainly, the Petition is before the wrong forum and the preliminary objection must be upheld. The Petition is accordingly struck out.

48. Considering that this Petition was filed only months to the end of the tenure of the 1st – 100th, 101st and 102nd Respondents and the General Election in 2017, the fact that the Respondents who lost their positions in the said election have been forced to shoulder the cost burden of a Petition which for purposes of this Court is wrongheaded in so far as it was presented in this Court in clear disregard of the existence of relevant organs and procedures available to deal with the questions it raises, I would award to the 1st to 102nd Respondents half the costs of the Petition.

DELIVERED AND SIGNED AT KIAMBU THIS 17th DAY OF OCTOBER 2019

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C. MEOLI

JUDGE

In the presence of:

James Gacheru- 1st Petitioner representing his co-Petitioners

Miss Gathua h/b for Mr Mwangi Waithaka for the 13th - 100th and 102nd Respondents and for Mr Ngaiywa for the 1st to 12th and 101st Respondents

Mr Gatitu for the 18th, 20th and 21st Respondents absent

C/A Nancy/Kevin