REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CONSTITUTIONAL PETITION NO. 13 OF 2019

IN THE MATTER OF ARTICLES 6, 10, 22, 50, 73, 75, 174, 175, 176, 179, 183 AND 185 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 7, 8, 9, 32, 35, 36, 40, 45 AND 59 THE COUNTY GOVERNMENTS ACT, 2012

AND

IN THE MATTER OF SECTIONS 4, 7, 9 AND 11 OF THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015

AND

IN THE MATTER OF UASIN GISHU COUNTY PETITION TO COUNTY ASSEMBLY (PROCEDURE) ACT, 2015

AND

IN THE MATTER OF STANDING ORDER NO. 194 OF THE UASIN GISHU COUNTY ASSEMBLY STANDING ORDERS

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

EVELYNE ROTICH.....PETITIONER

AND

COUNTY ASSEMBLY OF UASIN GISHU.....1ST RESPONDENT

COUNTY ASSEMBLY OF UASIN GISHU

COMMITTEE ON HEALTH SERVICES.....2ND RESPONDENT

THE SPEAKER, COUNTY

ASSEMBLY OF UASIN GISHU.....3RD RESPONDENT

RULING

[1] This Ruling is in respect of the two applications filed herein, dated **24 June 2019 (the 1st application)** and **8 July 2019 (the 2nd application)**, respectively. The 1st application was filed contemporaneously with the Petition, on **25 June 2019**. It was filed under **Articles**

10 and 22 of the **Constitution**: **Rules 4 and 23** of the **Constitution of Kenya (Protection of Fundamental Rights) Practice and Procedure, 2013;** as well as **Sections 3A and 63(e)** of the **Civil Procedure Act** and all other enabling provisions of the law, for orders that:

[a] Spent

[b] Spent

[c] A conservatory order do issue restraining the Respondents from receiving, considering, debating or adjudicating over a motion or petition seeking the removal of the Petitioner as the County Executive Member to the Uasin Gishu County Executive or in any manner acting or implementing their decision to adopt the report of its Committee on Health dated **12 June, 2019** pending the hearing and determination of the Petition;

[d] A temporary injunction do issue restraining the 1st Respondent from proceeding with the intended impeachment motion against the Petitioner pending the hearing and determination of the Petition;

[e] The costs of the application be provided for.

[2] The application was premised on the grounds that, on the **11 March 2019**, the Clerk of the County Assembly received a Petition dated **5 March 2019** purportedly from the Union Representatives of nurses, clinicians, dentists and medical practitioners in Uasin Gishu County, seeking that the Petitioner be declared unfit to hold public office. That the Petition was presented before the 2nd Respondent for deliberations, upon which the 2nd Respondent came to the conclusion that the Petitioner was indeed unfit to hold office. The Petitioner was accordingly apprehensive that the 1st Respondent would proceed with an impeachment motion pursuant to the provisions of **Section 40** of the **County Governments Act, No. 17 of 2012**, based on the report of the Committee on Health dated **12 June 2019**; which was adopted on **17 June 2019.**

[3] It was further the contention of the Petitioner that the decision of the County Assembly is not only unfounded in law, but is also is irrational, and therefore unconstitutional; and that unless the orders sought are granted, the Petitioner stands to suffer irreparably, should the impeachment motion be proceeded with by the Respondents. The grounds were amplified in the Supporting Affidavit sworn by the Petitioner on **24 June 2019**, including its annexures.

[4] Since the application was brought under a Certificate of Urgency, the Court was accordingly moved for the grant of interim orders, with a view of preserving the subject matter pending *inter partes* hearing; and thus, Prayer 2 of the 1st application was granted on **27 June 2019**. The matter was then fixed for *inter partes* hearing on **24 July 2019**; and before that could happen, the 2nd application was filed herein on **8 July 2019**, again under a Certificate of Urgency, for orders that:

[a] the application be certified as of utmost urgency and that service thereof be dispensed with in the first instance;

[b] A conservatory order do issue restraining the Respondents from debating, adjudicating, discussing or in any way processing the Notice of Impeachment laid on the floor of the 1st Respondent on **2 July 2019** by **Hon. Patrick Bundotich,** MCA for Tarakwa Ward, seeking the removal from office of the Petitioner on the grounds of alleged gross misconduct, incompetence and mismanagement of her docket pending the hearing and determination of the application.

[c] A conservatory order do issue restraining the Respondents from debating, adjudicating, discussing or in any way processing the Notice of Impeachment laid on the floor of the 1st Respondent on **2 July 2019** by **Hon. Patrick Bundotich,** MCA for Tarakwa Ward, seeking the removal from office of the Petitioner on the grounds of alleged gross misconduct, incompetence and mismanagement of her docket pending the hearing and determination of the Petitioner's application dated **24 June 2019**; as well as the Petition herein.

[d] That leave be granted and the Petitioner/Applicant be at liberty to apply for the committal of **Hon. David Kiplagat, Hon. Hosea Korir,** and **Hon. Patrick Bundotich** to civil jail for contempt of court for jointly and severally disobeying the Court **Order issued** on **27 June 2019.**

[e] That this Court do issue such other and further orders as the Court shall deem necessary to meet the ends of justice.

[5] The 2nd application was premised on the grounds that, upon the filing this Petition and the 1st application, the first application was certified urgent and set down for hearing *inter partes* on **27 June 2019**; and that all the Respondents were duly served, not only with the application but also with a Hearing Notice indicating that the application was scheduled for *inter partes* hearing on **27 June 2019**. The Respondents did not attend court; whereupon Prayer (2) of the 1st application was granted, restraining the Respondents in the manner set out therein.

[6] It was further the contention of the Petitioner that, on the **27 June 2019**, she caused the Order to be served on the 3rd Respondent, who is the Speaker of the 1st Respondent; and the person in charge of the proceedings of the 1st Respondent. That in spite of such service, and while knowing the import of that Order, the 1st and 3rd Respondents authorized **Hon. Patrick Bundotich**, MCA Tarakwa, to table a Motion on Notice of Impeachment of the Petitioner on the grounds emanating from the 2nd Respondent's Report dated **12 June 2019**; in blatant disobedience of the Court Order dated **27 June 2019.**

[7] The Petitioner further asserted that, **Hon. Hosea Korir**, the Deputy Speaker, in flagrant disobedience of the Court Order dated **27 June**

2019, presided over the tabling of the Notice of Motion for Impeachment of the Petitioner during the proceedings of **2 July 2019** and ordered that the Motion would be in place for three days before commencement of discussions. Thus, it was the contention of the Petitioner that the wilful disobedience of the Court Order dated **27 June 2019** amounts to contempt of court and that the orders sought herein are warranted in the premises.

[8] In support of the 2nd application, the Petitioner relied on the Statutory Declaration filed therewith, setting out the particulars of the Contemnors, the relief sought against them as well as the grounds upon which their committal to civil jail for contempt is premised. In addition thereto, the Petitioner relied on her Supporting Affidavit sworn on **8 July 2019**; to which she annexed a copy of the Order dated **27 June 2019**, along with a copy of the Affidavit of Service sworn by **Joseph Ochieng Onawa** on **28 June 2019**, demonstrating that the said Order was duly served on the 3rd Respondent. The Petitioner also exhibited a copy of an electronic publication and a certificate in respect thereof, for purposes of **Section 65(8)** of the **Evidence Act, Chapter 80** of the **Laws of Kenya**, with a view of demonstrating that the Respondents acted in breach of the Order dated **27 June 2019** by tabling the Notice of Motion to Impeach her.

[9] The Respondents opposed the two applications and filed separate Replying Affidavits in respect of each application, sworn by **Shadrack K**. **Choge**, the Clerk to the 1st Respondent. In respect of the 1st Application, it was conceded, on behalf of the Respondents, that on **11 March 2019,** the 1st Respondent received a petition dated **5 March 2019** from the Uasin Gishu County Health Workers Representatives/Union to discuss the competence of the 1st Respondent with a view to declare her unsuitable to hold public office. It was further conceded by the Respondents that the petition was admitted pursuant to the 1st Respondent's **Standing Order No. 194** and was committed to the Committee on Health for consideration; and that in compliance with the procedure prescribed in **Section 40** of the **County Governments Act** and **Standing Order No. 200**, the petition was remitted to the 2nd Respondent for deliberations, after according a hearing to the Petitioner as well as the 8 witnesses who were named in the petition.

[10] Thus, it was the averment of the Respondents that the Petitioner was given an opportunity to respond to each and every allegation; and that this was in addition to filing a response and an affidavit in answer to the petition. Hence, it was the assertion of the Respondents that, it was upon hearing representations and analysing the facts that the 2nd Respondent prepared and issued its report dated **12 June 2019**; which found that the public petition dated **5 March 2019** was merited; and recommended it for adoption by the plenary of the 1st Respondent. The Respondents further conceded that the report was tabled on the floor of the Assembly pursuant to **Standing Order No. 200** and was unanimously adopted by the Members of the County Assembly. Copies of the petition, the 2nd Respondent's report and a copy of the Hansard were annexed to the Replying Affidavit as **Annexures SKC2, SKC4** and **SKC5** along with other annexures in support of the Respondents' averments.

[11] In response to the 2nd application, the Respondents filed, not only a Replying Affidavit, but also a Notice of Preliminary Objection; their contention being that the 2nd application is misconceived and fatally incompetent; and that it was made in bad faith; in that, it seeks the same conservatory orders sought in the 1st application. It was further averred by the Respondents that the 2nd application offends not only the doctrine of separation of powers enshrined in **Article 174(1)** and **Article 175** of the Constitution; but is also strange to the law in so far as it seeks leave to commence contempt proceedings in the nature of an application for leave under **Order 53** of the **Civil Procedure Rules**; yet this is not a Judicial Review application. And, with respect to Prayer 4 for leave to have **Hon. David Kiplagat, Hon. Hosea Korir** and **Hon. Patrick Bundotich** to civil jail for contempt of court, the Respondents contend that it was fatal that the alleged contemnors were not enjoined to this Petition or served with the application, yet it seeks adverse orders that have a huge impact on their right to liberty under the provisions of **Article 29** of the **Constitution**.

[12] At paragraph 6(b) of the Respondent's Replying Affidavit to the 2nd application, it was pointed out that, since the Order of **27 June 2019** was served well after the 2nd Respondent's report had been debated and adopted by the 1st Respondent, the same could not form the subject of contempt proceedings. The Respondents reiterated their stance that all members of County Assembly are immune to civil and criminal proceedings in the discharge of their mandate by dint of **Section 17** of the **County Governments Act**; and therefore that the 2nd application is similarly misconceived. Thus, in the Notice of Preliminary Objection, the Respondents contended that:

> **[a]** the application dated **8 July 2019** is an abuse of the court process as there is a pending application dated **24 June 2019** seeking similar orders; and that, in the circumstances, the application offends the provisions of **Section 6** of the **Civil Procedure Act.**
>
> **[b]** That the application offends the provisions of **Order 53** of the **Civil Procedure Rules** as it seeks leave to commence contempt proceedings, yet leave contemplated in **Order 53** is to commence judicial review proceedings.
>
> **[c]** That the application is strange in law, for it seeks both conservatory orders as well as committal to civil jail; and that it is therefore an abuse of the process of the court.
>
> **[d]** That the application offends the provisions of **Article 196(3)** of the **Constitution** and **Section 17** of the **County Governments Act** in so far as members of the 1st Respondent enjoy immunity for things said or done while conducting its business either by petition, bill, resolution, motion or otherwise.
>
> **[e]** That the application offends the doctrine of separation of powers enshrined in **Article 174(1)** and **Article 175** of the **Constitution**;
>
> **[f]** That the application offends the provisions of **Article 47 and 50** of the **Constitution** and the relevant provisions of the **Fair Administrative Actions Act** as the alleged contemnors have neither been cited nor served with the application.

[13] In the twin Supplementary Affidavits filed on **31 July 2019,** the Petitioner responded to the issues raised by the Respondents in their two Replying Affidavits and Notice of Preliminary Objection. In respect of the 1st application, the Petitioner reiterated her position that the

Court is enjoined by **Article 22** of the Constitution to entertain any proceedings instituted before it claiming that a fundamental right or freedom in the Bill of Rights has been denied, violated or infringed, or is threatened with violation or infringement; and that the Petition and the 1st application do not, in any way seek the Court's intervention with a view of usurping the 1st Respondent's power, but seeks redress for the illegalities committed by the Respondents, culminating in the report dated **12 June 2019.**

[14] In respect of the 2nd application, the Petitioner averred that her prayers in the 2nd application are totally different from the purport and prayers sought in the 1st application; and that whereas in the 1st application she asked for orders barring the Respondents from implementing the 2nd Respondent's report dated **12 June 2019**, the 2nd application speaks to orders barring the Respondents from further processing the Notice of Motion tabled by **Hon. Bundotich** on **2 July 2019,** in addition to seeking leave to commit the contemnors to civil jail. She further corrected the mistaken notion, on the part of the Respondents that the application for leave had been filed under **Order 53** of the **Civil Procedure Rules** and asserted that it had been filed under the correct provisions of the law.

[15] In response to the Respondents' assertions on separation of powers and immunity, the Petitioner averred that the Constitution, being the supreme law of the land, binds all persons and state organs at both levels of government; and therefore is binding on the Respondents in the discharge of their duties. She urged the Court to note that, in the motion tabled by **Hon. Bundotich,** the Respondents had expanded the scope of the allegations made at the committee stage; hence the 2nd application. On the averment that the contemnors have not been cited or enjoined, the Petitioner averred that due process envisages that after leave is granted, they shall be accorded the opportunity to be heard before any orders are issued.

[16] Directions having been given that the Preliminary Objection be treated as a response to the two applications, learned Counsel made their respective submissions herein on **31 July 2019**. In the written and oral submissions made by **Mr. Akenga** and **Mr. Cheruiyot** for the Petitioner, it was emphasized that the Petitioner is not herein challenging the legality of the impeachment process; but that in exercising its prowers, the Respondents failed to accord the Petitioner her constitutional rights as enshrined in **Articles 47 and 50** of the **Constitution**. In particular, Counsel urged the Court to find that the applications do not offend the principle of separation of powers or immunity of the Respondents. The case of **Republic vs. Speaker of the National Assembly & 4 Others, Ex Parte Edward R.O. Ouko [2017] eKLR** was cited to buttress the argument that the Constitution itself empowers the Court to exercise supervisory jurisdiction over any body or authority exercising a judicial or quasi-judicial function; and therefore that separation of powers and immunity would only apply when a County Assembly is exercising its legislative function.

[17] Mr. Yego for the Respondents was of a different view. His submission was that since the Petition was filed pursuant to **Article 22** of the Constitution, the Petitioner was under obligation to specify the provisions of the Constitution that have been violated and in what manner. He relied on the case of **Anarita Karimi Njeru vs. Attorney General** in this connection. He further submitted that since the petition was presented to the 1st Respondent in the exercise of delegated sovereignty by dint of **Article 1(2)** of the Constitution, the doctrine of separation of powers ought to be upheld; more so because the Petitioner was given an opportunity to respond to the allegations against her and to appear before the Committee as required by **Section 40** of the **County Governments Act.** He explained that, since the matter is still ongoing, the Petition is premature, granted that the Petitioner will be accorded an opportunity to appear before the Select Committee and to be represented by an advocate if she so wishes. Counsel relied on the Respondent's List and Bundle of Authorities filed herein on **16 July 2019** to augment his submissions.

[18] I have given careful consideration to the applications, the responses thereto as well as the submissions made by Counsel for the parties, including the authorities cited by them. I must observe at the outset that most of the authorities, save for **Kitale High Court Petition NO. 11 of 2017: William Kipurko Andiema & Another vs. County Government of Trans Nzoia & Another** were prematurely cited; and therefore had the effect of needlessly expanding the issues for consideration at this preliminary stage, noting that they are final judgments on the respective petitions or judicial review matters in respect of which they were made. The need for caution not to delve into the merits prematurely was aptly expressed thus by **Hon. Ibrahim, J.** (as he then was) in the **Muslim for Human Rights & 2 Others vs. Attorney General & 2 Others [2011] eKLR**:

> **"The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-à-vis the case of either party. The principle is similar to that in temporary or interlocutory injunctions in civil matters…"**

[19] Hence, in **Nairobi High Court Petition No. 16 of 2011: Centre for Rights Education & Awareness (CREAW) & 7 Others vs. Attorney General**, the view was expressed that:

> **"At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."**

[20] Expressing itself on the matter of conservatory orders, the Supreme Court, in the case of **Gatirau Peter Munya vs. Dickson Mwenda Githinji & 2 Others**, offered the following viewpoint:

> **"Conservatory orders bear a more decided public-law connotation; for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as "the prospects of irreparable harm" occurring during the pendency of a case or "high probability of success" in the Applicant's case for order of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant cases."**

[21] Hence, it is now settled that an applicant for conservatory orders for purposes of **Article 22 and 23(3)(c)** of the Constitution must satisfy the Court as to the following three considerations:

[a] That he/she has a *prima facie* case with a high likelihood of success;

[b] That the Petition will be rendered nugatory;

[c] That public interest weighs in his/her favour.

[22] Before embarking on a consideration of the merits of two applications, it is imperative to give thought to the Preliminary points raised by Counsel for the Respondents, bearing in mind the holding in **Mukisa Biscuits Manufacturers Ltd vs. West End Distributors Ltd [1969] E.A 696,** that:

> **"... a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration."**

[23] Going by this time-tested principle, it would follow that Grounds 3, 4 and 5 of the Notice of Preliminary Objection dated **15 July 2019** cannot pass muster, granted that they are contested points that require further examination. This principle was aptly expressed thus by **Hon. Ojwang, J**. (as he then was) in **Oraro vs. Mbaja [2005] 1 KLR 141**:

> **"...The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed... Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."**

[24] Accordingly, the only two points to consider as preliminary points are:

[a] Whether the Petitioner's 2nd application is incompetent from the standpoint of **Section 6** of the **Civil Procedure Act;**

[b] Whether the 2nd application offends the provisions of Order 53 of the Civil Procedure Act**.**

[25] According to the Respondents, the 2nd application dated **8 July 2019** is an abuse of the process of the court as there is already a pending application dated **24 June 2019** seeking similar orders; and therefore that the application offends the provisions of **Section 6** of the **Civil Procedure Act. That provision states that:**

> **"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."**

[26] However, and as rightly pointed out by Counsel for the Petitioner, the 1st application targeted the adoption of the report of its Committee on Health dated **12 June, 2019**; while in the 2nd application seeks, inter alia, that:

> **"A conservatory order do issue restraining the Respondents from debating, adjudicating, discussing or in any way processing the Notice of Impeachment laid on the floor of the 1st Respondent on 2 July 2019 by Hon. Patrick Bundotich, MCA for Tarakwa Ward, seeking the removal from office of the Petitioner on the grounds of alleged gross misconduct, incompetence and mismanagement of her docket pending the hearing and determination of the application."**

[27] It is therefore in respect of an occurrence that happened well after the first application was filed; and therefore cannot be said to be an application for similar orders. It is precisely on account of those developments that an application for leave to commence contempt proceedings has been made; and the question that then arises, which I will revert to shortly, is whether or not the 1st application has been overtaken by events. I am, consequently, far from convinced that the Petitioner's 2nd application is incompetent from the standpoint of **Section 6** of the **Civil Procedure Act.**

[28] The Respondent's second preliminary point is to the effect that the 2nd application offends the provisions of **Order 53** of the **Civil Procedure Rules** in that it seeks leave to commence contempt proceedings, yet the leave contemplated thereunder is for the commencement of judicial review proceedings; and that such leave has no place in a constitutional petition. Counsel for the Petitioner responded simply, by stating that the 2nd application has not been filed under **Order 53** of the **Civil Procedure Rules;** and that to say so is a misrepresentation. And so I have looked at the application and satisfied myself that there is no mention therein of **Order 53** of the **Civil Procedure Rules.**

[29] There can be no doubt that the argument was premised on a misapprehension of the 2nd application and in particular the enabling provisions relied on by the Petitioner, as the said application is expressed to have been filed under **Sections 3A and 63(e) of the Civil Procedure Act, Chapter 21** of the **Laws of Kenya; Section 5** of the **Judicature Act, Chapter 8** of the **Laws of Kenya; Order 52** of the

Rules of the Supreme Court of England, 1965, as well as **Order 40 Rule 3** as read with **Order 51 Rule 1** of the **Civil Procedure Rules**. I therefore find no merit in the second preliminary point and would accordingly dismiss the Respondent's Preliminary Objection and proceed to consider the merits of the applications in turn. Nevertheless, owing to the special procedure entailed by contempt proceedings under **Section 5** of the **Judicature Act,** I would agree with **Mr. Yego** that it was inappropriate for the prayer for leave to be brought in the same application as the prayer for conservatory orders.

The 1st Application:

[30] As has been pointed out herein above, the 1st application was filed under **Articles 10 and 22** of the **Constitution; Rules 4 and 23** of the **Constitution of Kenya (Protection of Fundamental Rights) Practice and Procedure, 2013;** as well as **Sections 3A and 63(e)** of the **Civil Procedure Act** and all other enabling provisions of the law. The Petitioner thereby prayed for a conservatory order to restrain the Respondents from receiving, considering, debating or adjudicating over a motion or petition seeking the removal of the Petitioner as the County Executive Member to the Uasin Gishu County Executive or in any manner acting or implementing their decision to adopt the report of its Committee on Health dated **12 June, 2019** pending the hearing and determination of the Petition. The application also prayed for a temporary injunction restraining the 1st Respondent from proceeding with the intended impeachment motion against the Petitioner pending the hearing and determination of the Petition; and that the costs of the application be provided for.

[31] The parties are in agreement that, on the **11 March 2019**, the Clerk of the County Assembly received a Petition dated **5 March 2019** from the Union Representatives of nurses, clinicians, dentists and medical practitioners in Uasin Gishu County, seeking that the Petitioner be declared unfit to hold public office. There is further no dispute that the Petition was presented before the 2nd Respondent for deliberations upon which the 2nd Respondent came to the conclusion that the Petitioner was indeed unfit to hold office; and that this was after the Petitioner was accorded an opportunity to make her response before the committee in respect of the petition. The report of the 2nd Respondent was annexed to the Petitioner's Supporting Affidavit and marked Annexure ER 2 and is dated **12 June 2019.** A similar report is marked Annexure SKC 4 to the Replying Affidavit.

[32] There is no dispute that the report was tabled before the County Assembly for adoption and was accordingly adopted; a fact expressly conceded to by the Petitioner. A copy of the Hansard, annexed to the Replying Affidavit filed in response to the 1st application confirms this at pages 19 to 42. It further confirms that the report was accordingly adopted on **13 June 2019**; for the concluding part of the Hansard, in respect of the matter reads:

> **"…The Fifth report of the committee of Health has been taken and any member is free to now invoke the standing order number 62 …and proceed to introduce another Motion…"**

[33] To that extent therefore, the Petitioner's prayer for conservatory orders to restrain the deliberations of the committee as well as the tabling of the committee report was belated. Such an order would serve no useful purpose where, as in this case, the acts and events sought to be restrained have already happened. It is for that reason that I find the 1st application misconceived. The same is accordingly hereby struck out with costs.

The 2nd application:

[34] The Petitioner's 2nd application was filed herein on **8 July 2019**, again under a Certificate of Urgency, for orders that a conservatory order do issue restraining the Respondents from debating, adjudicating, discussing or in any way processing the Notice of Impeachment laid on the floor of the 1st Respondent on **2 July 2019** by **Hon. Patrick Bundotich,** MCA for Tarakwa Ward, seeking the removal from office of the Petitioner on the grounds of alleged gross misconduct, incompetence and mismanagement of her docket pending the hearing and determination of the Petitioner's application dated **24 June 2019**; as well as the Petition herein. The application also sought that leave be granted and the Petitioner/Applicant be at liberty to apply for the committal of **Hon. David Kiplagat, Hon. Hosea Korir,** and **Hon. Patrick Bundotich** to civil jail for contempt of court for jointly and severally disobeying the Court **Order issued** on **27 June 2019.**

[35] Starting with the prayer for leave to commence contempt proceedings, there is no dispute that**,** upon the filing the Petition and the 1st application, the first application was certified urgent and set down for hearing *inter partes* on **27 June 2019.** In that regard, the court record confirms that the Respondents were thereafter duly served, not only with the application but also with a Hearing Notice indicating that the application was scheduled for *inter partes* hearing on **27 June 2019**. As the Respondents did not attend court on the appointed day, the Court proceeded to grant Prayer (2) of the 1st application.

[36] There is credible evidence to show that the interim conservatory order was served on the 3rd Respondent, who is the Speaker of the 1st Respondent, on **27 June 2019**. Accordingly, by **2 July 2019** when **Hon. Patrick Bundotich**, MCA Tarakwa, tabled a Motion on Notice of Impeachment of the Petitioner on the grounds emanating from the 2nd Respondent's Report dated **12 June 2019,** the order of **27 June 2019** had already been served on the 1st and 3rd Respondents.

[37] The Petitioner further asserted that, **Hon. Hosea Korir**, the Deputy Speaker, in flagrant disobedience of the Court Order dated **27 June 2019**, presided over the tabling of the Notice of Motion for Impeachment of the Petitioner during the proceedings of **2 July 2019** and ordered that the Motion would be in place for three days before commencement of discussions. Thus, it was the contention of the Petitioner that the wilful disobedience of the Court Order dated **27 June 2019** amounts to contempt of court and that the orders sought herein are warranted in the premises.

[38] In support of the 2nd application, the Petitioner relied on the Statutory Declaration filed therewith, setting out the particulars of the Contemnors, the relief sought against them as well as the grounds upon which their committal to civil jail for contempt is premised. In addition thereto, the Petitioner relied on her Supporting Affidavit sworn on **8 July 2019**; to which she annexed a copy of the Order dated **27**

June 2019, along with a copy of the Affidavit of Service sworn by **Joseph Ochieng Onawa** on **28 June 2019**, demonstrating that the said Order was duly served on the 3rd Respondent. The Petitioner also exhibited a copy of an electronic publication and a certificate in respect thereof for purposes of **Section 65(8)** of the **Evidence Act, Chapter 80** of the Laws of Kenya, with a view of demonstrating that the Respondents acted in breach of the Order dated **27 June 2019** by tabling the Notice of Motion to Impeach her.

[39] Needless to say that obedience of court orders is at the very core of the rule of law. I can do no better than restate the words of **Hon. Ibrahim J.** (as he then was) in **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] KLR 828,** this principle was emphasized thus:

> **"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void."**

[40] Nevertheless, as pointed out herein above, the 1st application sought orders to restrain the Respondents from receiving, considering, debating or adjudicating over a motion or petition seeking the removal of the Petitioner as the County Executive Member to the Uasin Gishu County Executive or in any manner acting or implementing their decision to adopt the report of its Committee on Health dated **12 June, 2019** pending the hearing and determination of the Petition. The application, as has been stated elsewhere in this ruling, sought to stop the proceedings of the Respondents leading to the adoption of the 2nd Respondent's report; yet by the time the application was filed, the petition had been received and committed to the 2nd Respondent; and the 2nd Respondent had proceeded, with the participation and involvement of the Petitioner, to hear witnesses and prepare its report. In essence, the report had already been adopted. In those circumstances an application for contempt would, in my respectful view, be untenable.

[41] Although the Petitioner prayed for temporary injunction in paragraph 4 of the 1st application to restrain the 1st Respondent from proceeding with the intended impeachment motion against the Petitioner pending the hearing and determination of the Petition, the only prayer that was granted in the interim on **27 June 2019** was prayer (2); which is what was extracted and served on the 1st and 3rd Respondents. I therefore take the view that, granted the tenor and effect of the order that was served, the contemnors cannot be faulted in connection therewith. I consequently find the application for leave to cite the contemnors misconceived.

[42] There is another reason why the application for leave to institute contempt proceedings is misconceived. In **Christine Wangari Gachege"vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR**, the Court of Appeal held that:

> **"…leave, now called "permission" is not required where committal proceedings relate to a breach of a judgment, order or undertaking…We find on the basis of the new Civil Procedure Rules (of England) which are now contained in the Second Supplement to the 2012 White Book that no leave is required before bringing an application, like the one before us, for committal for contempt relating to breach this court's order. The application is for that reason, incompetent and is struck out with costs."**

[43] In the premises, prayer 4 of the 2nd application dated **8 July 2018** is untenable and is accordingly declined. Thus, the only issue remaining for determination is whether, on the basis of the 2nd application, the Petitioner is entitled to a conservatory order in terms of prayer 3 of the 2nd application. The Petitioner's apprehension is premised on the averment that a Notice of Motion of her impeachment was tabled on **2 July 2019**; and therefore that the process may be proceeded with to conclusion before the hearing and determination of her Petition. In proof of her assertions, the Petitioner relied on a screenshot of a YouTube video capturing the proceedings of the 1st Respondent. A perusal of the Replying Affidavit to the 2nd application shows that this fact was not refuted; though it was questioned why the Petitioner did not avail a copy of the Hansard instead. There is no denying therefore that a Motion has been placed before the floor of the 1st Respondent and that, had it not been for the interim orders issued herein, the Respondents would have proceeded to commence debate on the Motion.

[44] There is considerable merit in the Respondent's argument that, on account of separation of powers, there ought to be deference on the part of the Court when invited to curtail functions which the Constitution and the applicable laws have bestowed on the 1st Respondent. Thus, in the **Speaker of the Senate & Another vs. Attorney General & 4 Others** the Supreme Court held that:

> **"This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another."**

[45] Similarly, in the Commission for the Implementation of the **Constitution vs. National Assembly of Kenya & 2 Others [2013] eKLR,** the words of **Ackermann, J**. in the South African case of **National Coalition for Gay and Lesbian Equality & Others, Case CCT No. 20/99** were adopted, namely:

> **"the other consideration a court must keep in mind, is the principle of 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."**

[46] Nevertheless, it is also a truism that, in discharging its mandate, the County Assemblies are expected to observe and respect the

applicable constitutional imperatives. Thus, I would endorse the viewpoint expressed in **Republic vs. Kombo & 3 Others Ex parte Waweru [2008] 3 KLR (EP) 478** that:

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

[47] In this matter, the Petitioner alleges infringement of **Articles 47** and **50** of the **Constitution**. **Article 47(1)** provides that:

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

[48] The Petitioner conceded that she was given a copy of the petition seeking her removal; and that she was aware that the same was committed to the departmental committee responsible for health matters. She further conceded that the committee heard the matter between 1 **April 2019** and **23 April 2019** in the course of which she was also given a hearing. Her only complaint was that she was not allowed to cross-examine the witnesses who appeared before the committee. She however conceded that this was an exercise for purposes of **Section 40** of the **County Governments Act**. That provision is explicit, in **Subsections (2) and (3)**, on the removal of a member of the county executive committee, that:

> **(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.**

[49] In **subsection (4)** of **Section 40** it is recognized that the county executive committee member would then have the right to appear and be represented before the select committee during its investigations. In the premises, it is my finding that the fact only that the Petitioner was not accorded the right to cross-examine the witnesses who appeared before the 2nd Respondent, is not sufficient to disclose a prima facie case; granted that the Motion is yet to be debated substantively; and its outcome ascertained. Moreover, there are inbuilt safeguards in **Section 40** of the **County Government Act** to ensure she is effectively afforded a hearing by the select committee, should the matter reach that stage. Needless to say that the right to hearing includes the right to cross-examine the witnesses marshalled against the Petitioner.

[50] In the result therefore, having weighed the rights of the Petitioner as against the public interest presented in the petition against her, it is my finding that this is not a suitable case for the issuance of conservatory orders in the manner sought by the Petitioner. Accordingly, the 2nd application dated **8 July 2019** is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 5TH DECEMBER 2019

OLGA SEWE

JUDGE