REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 403 OF 2015

COMMISSION FOR THE IMPLEMENTATION

OF THE CONSTITUTION…….....
….....PETITIONER

VERSUS

SPEAKER OF THE NATIONAL ASSEMBLY…….....RESPONDENT

JUDGMENT

Introduction

1. This petition raises a question as to the constitutionality of the National Assembly's Standing Order No 66. The Petitioner asserts that the Standing Order offends Articles 50(1) and 25(c) of the Constitution with regard to fair trial rights of a Cabinet Secretary who faces an impeachment motion in the National Assembly. The Petitioner argues that the Standing Order is null and void.

Parties

2. The Petitioner, the Commission for the Implementation of the Constitution, was one of the independent constitutional Commissions under Chapter 15 of the Constitution. Established under Section 5(1) of the Sixth Schedule to the Constitution and duly regulated by the provisions of the Commission for the Implementation of the Constitution Act 2010, the Petitioner's tenure expired in December 2015.The tenure and term was not extended by Parliament.
3. The functions of the Petitioner entailed amongst others monitoring, facilitating and overseeing all legislation and other administrative procedures required to implement the Constitution 2010. The Petitioner was also obligated to work with other constitutional commissions and the three arms of government to ensure that the letter and spirit of the Constitution was and is respected.
4. The Respondent is the Speaker of the National Assembly, elected under Article 106(9) of the Constitution. The Respondent was sued in his capacity as the presiding officer and representative

of the National Assembly of the Republic of Kenya.

The Petition

5. The Petitioner filed the Petition herein challenging the constitutionality of the National Assembly's Standing Order No. 66 by which the National Assembly operationalized the powers vested in Parliament for the removal of a Cabinet Secretary under Article 152 of the Constitution.
6. The Petitioner in consequence sought the following reliefs:

a. ***A declaration that the provisions of [The] National Assembly Standing Order no. 66 is void to the extent that it is inconsistent with a right to a fair trial enshrined in Article 50(1) as read with Article 25 of the Constitution.***
b. ***Any other order that this Honourable court deems fit and just in the circumstances.***
c. ***Costs of this Petition.***

7. The Petition was opposed.
8. Subsequent to the parties' final submissions and after I had reserved the judgment date in this Petition, the Petitioner's constitutional tenure and term expired. Parliament did not extend the term or tenure and neither did the Petitioner request for extension.
9. The issues raised by the Petition being constitutional in nature were however quite alive and justiciable with both the impugned Standing Order, and the relevant Constitutional provision still intact. A determination was, in my view, necessary.

The Petitioner's case

10. The Petitioner's case was urged by Mr. Paul Nyamodi.
11. Mr. Nyamodi stated that Article 1(3) of the Constitution bound Parliament to abide by and perform all its functions in accordance with the Constitution. Accordingly, the court had jurisdiction to interrogate whether any acts done in the name of the Constitution by any state organ including Parliament and in this case the National Assembly had been done constitutionally.
12. Counsel submitted that the National Assembly had both oversight and legislative functions to perform and so long as such functions were being performed pursuant to powers donated by the Constitution the performance had to be constitutional. Thus where it was alleged that the power was unconstitutional or that the National Assembly was acting unconstitutionally or based on an unconstitutional process or rules, then, the court had jurisdiction to scrutinize the exercise of such mandate.
13. Mr. Nyamodi relied on the cases of **Commission for the Implementation of the Constitution –v- National Assembly of Kenya & 2 Others [2013]eKLR** as well as the case of **Peter O. Njoge –v- Francis Ole Kaparo & 4 Others [2007]eKLR** for the proposition that notwithstanding the doctrine of separation of powers the court could intervene and interrogate actions of all state organs including the Legislature, the Executive as well as the Judiciary, with a view to upholding the provisions of the Constitution.
14. The jurisdiction of the court included a supervisory one over the National Assembly's standing orders.
15. Mr. Nyamodi contended that the National Assembly's Standing Order No. 66 was unconstitutional as it led to an instance where the constitutional process of the removal of a cabinet secretary was conducted in a manner that was neither independent nor impartial and hence contrary to Article 50(1) as read together with Article 25(c) of the Constitution. According to Mr. Nyamodi, Standing Order No. 66 which operationalized the power of removal of a Cabinet Secretary vested in the National Assembly under Article 152 of the Constitution was unconstitutional as it envisaged a procedure other than one envisaged by a harmonized interpretation of Article 152(6) of the Constitution as read together with Articles 50(1) and 25(c) of the Constitution.
16. Mr. Nyamodi then referred to the 9th Edition of Blacks' Law Dictionary to eke out the meaning of the words 'independent' and 'impartial' under Articles 50(1) of the Constitution. Counsel stated that the words in their totality meant an "*unbiased and disinterested entity not subject to any*

influence or control". Counsel stated that in the case of Standing Order No. 66 which operationalized the process of removal of a cabinet secretary, there was no impartiality as the mover of the motion could not be stated to be disinterested and, besides, it was the same National Assembly to frame the grounds of the Cabinet Secretary's removal, constitute a select committee and substantiate the grounds, vote on the removal and request the President to remove the Cabinet Secretary.

17. Mr. Nyamodi also relied on the case of **Stephen Nendela –v- County Assembly of Bungoma & 4 Others [2014]eKLR** where the High Court held that Section 40(3) of the County Governments Act was void in so far as it was inconsistent with Article 50(1) of the Constitution when the County Assembly had been donated with powers to remove a member of the county executive Committee after an investigation by a select committee of the same County Assembly .
18. Mr. Nyamodi therefore urged the court to interpret the Constitution in a harmonized manner and declare the National Assembly's Standing Order No. 66 unconstitutional.

The Respondent's case

19. Ms. Thanje appeared for the Respondent
20. Counsel argued that the power of the removal of a Cabinet Secretary is donated solely to the National Assembly by the Constitution. Likewise counsel stated that the Constitution also provides expressly for the procedure to be followed where a motion for the removal of the Cabinet Secretary has been initiated under Article 157 of the Constitution.
21. Ms. Thanje submitted that the National Assembly's Standing Order No. 66 was not unconstitutional as it merely provided for the procedure to be followed in operationalizing and implementing Article 152 of the Constitution.
22. Counsel then urged that the orders sought if allowed would lead to a constitutional lacuna as there would be no procedure for the removal of a Cabinet Secretary. In the Respondent's view, the Constitution ought to be interpreted harmoniously and in this regard Article 50 had to be read alongside Article 152 of the Constitution and likewise the National Assembly Standing Orders 66 and 67 ought to be read together.
23. Ms. Thanje further argued that the Petition infringed on the doctrine of separation of powers as the orders sought would impinge the role of the National Assembly under Articles 95(5) and 152(6) of the Constitution.
24. It was Ms. Thanje's case that the Petitioner had failed to disclose how Standing Order No. 66 violated the Constitution and consequently the Petition failed the competency test set out in the case of **Anarita Karimi Njeru -v- Republic [1976-1980] 1 KLR 1272.**
25. The Respondent also relied on the cases of **Lacson -v- Executive Secretary 301 SCRA 298 [1999]** and **Andres Sarmento –v- The Treasurer of Philippines G.R No. 125680 & 126313 (September, 2001)** for the proposition that the court must first make a presumption of constitutionality and it was then incumbent on the person alleging that a piece of legislation was unconstitutional to establish the unconstitutionality. Counsel further relied on the case of **Commission for Implementation of the Constitution -v- Parliament of Kenya & Another HCCP No. 454 of 2012** for the proposition that in determining whether or not an Act is constitutional the overall object and purpose of the Act had to be considered by the court.
26. Finally, Ms. Thanje relied on the cases of **Law Society of Kenya –v- Attorney General & 2 Others [2013]eKLR** and **Blackburn –v- Attorney General [1971] 1 WLR 1037** for the proposition that it is for Parliament to enact and amend or repeal laws and not for the court to decide what is an appropriate legislation. To do so, contended counsel, would amount to the court infringing on Parliament's legislative prerogative.

Discussion and Determination

Issues

27. The core issue in this Petition is whether the National Assembly Standing Order No. 66 is unconstitutional.
28. Two corollary issues also emerged during oral arguments. First, has this court the requisite remit

to entertain and determine the Petition? Secondly, does the Petition meet or attain the competency threshold?

29. I will deal with the corollary issues first.

A question of jurisdiction

30. The question as to jurisdiction was prompted by the Respondent's stand and contention that it is the duty of the Respondent not only to legislate but undertake an oversight function over the Executive arm of the Government. Standing Order No. 66 was stated to be part of the process of oversight and if the court was to interfere with the same, the court would have interfered with the process of Parliament which is rooted under Articles 117 and 124 of the Constitution.
31. Ms. Thanje, referred to the case of **The Speaker of the Senate & Another –v- Attorney General and 4 Others** where the Supreme Court of Kenya stated that the court cannot supervise the workings of Parliament and further that *"[T]he constitutional comity between the three arms of Government must not be endangered by the unwarranted intrusions into the workings of one arm by another"*. According to Counsel, the principle of separation of powers requires that there be mutual respect between the courts and the legislature. Counsel urged that members of Parliament must be allowed to regulate their own affairs and matters as well as perform "*their functions without having to look over their shoulders when conducting debates* "(per **Okiya Omtata Okoiti –v- The Attorney General & 5 Others [eKLR].**
32. The Petitioner's riposte was that the court is vested with the necessary jurisdiction donated by Article 165(3)(d)(i) & (ii) of the Constitution to entertain and determine the Petition.
33. According to Mr. Nyamodi, as Parliamentary Standing Orders are made pursuant to the provisions of Article 124(1) of the Constitution and further, as Standing Orders have the force of law, the court had an undoubted jurisdiction under Article 165(3) (d) (i) & (ii) of the Constitution to confirm that an act has been or had been undertaken in accordance with the Constitution and further that any law was not inconsistent with the Constitution.
34. It is beyond controversy that the jurisdiction of a court is donated by either the Constitution or statute law or both: see **Samuel Kamau Macharia & Another -v- Kenya Commercial Bank Ltd & 2 Others (SCK) [2012]eKLR.** It is not crafted nor groped for elsewhere by the court.
35. The Petitioner's case, as I understand it and simply put, is that the National Assembly Standing Order No. 66 is unconstitutional. That it is inconsistent with Articles 50(1) and 25(c) of the Constitution. That in applying Standing Order No. 66 in the process of the removal of a Cabinet Secretary, the National Assembly does not act or perform its functions in accordance with the Constitution.
36. Article 124(1) of the Constitution enjoins Parliament to make Standing Orders for the orderly conduct of its business as well as the business of its committees also established under the authority or the Constitution. Pursuant to Article 124(1) the National Assembly has made amongst others, Standing Order No. 66 to bring into effect and promote the provisions of Article 152(6) to 152(9) as to the process of removal of a cabinet secretary. Standing Orders, according to the Petitioner, have the force of law. This does not seem to be disputed by the Respondent.
37. The application of Standing Order No. 66 affects certain citizens in the name of cabinet secretaries. It may lead to their removal. In the Petitioner's view Standing Order No. 66 ran counter to Article 50(1).
38. Article 2(1) of the Constitution makes it clear that the Constitution is the supreme law of the land. The Article entrenches the principle of Constitutional supremacy rather than of Parliamentary supremacy. Every person including state organs are subservient to the Constitution. Article 1(3) reiterates the principle of subservience when it dictates that state organs including "*Parliament and the legislative assemblies in the county governments*" must perform their functions in accordance with the Constitution.
39. Then Article 95(5) of the Constitution donates powers to the National Assembly to ensure oversight over State offices as well as State organs. Part of the oversight includes initiating the process of removal of the state officers. It is easy to notice that the National Assembly in acting under Article 152 exercises a constitutional mandate and must do so subjected to the Constitution itself. If the National Assembly transgresses then an aggrieved party is certainly entitled to move to court, thanks to clear provisions in the Constitution.

40. Article 165 of the Constitution, in so far as it is relevant, states as follows:

> (*3*) ***Subject to clause (5), the High Court shall have—***
>
> ***(a)…***
>
> ***(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***
>
> ***(c)…***
>
> ***(d) Jurisdiction to hear any question respecting the interpretation of this 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;***

41. Clearly, when the National Assembly makes its Standing Orders as mandated under Article 124(j), they ought to be constitutionally compliant. Like-wise when the National Assembly undertakes a process, like that of removal of a cabinet secretary, it ought to be constitutionally compliant. The National Assembly ought to ensure that the process does not conflict with the Constitution either. The process applied or any law promulgated to drive the process or function must not be inconsistent with the Constitution. When that is alleged then the court must be ready to invoke its jurisdiction under Article 165(3)(d)(i) & (ii) and make a determination.
42. The exercise of all public power must comply with the Constitution which is the supreme law. Basically, that is the effect of Article 1(3) and when the court has to intervene pursuant to Article 165(3)(d)(ii), it would simply be to protect the Constitution and ensure the legality of any such act in exercise of public power. I would in this respect agree with the court when in the case of **Peter O. Ngoge –v- Francis Ole Kaparo & 4 Others [2007]eKLR** it stated that:

> "***The High Court has the power to strike out a law or legislation passed by Parliament which is in conflict with the Constitution. The same applies to any privileges, immunities or powers claimed by Parliament which are in conflict with the Constitution. Nothing is immune from the courts scrutiny, if in conflict with the Constitution".*** (Emphasis)

43. Slightly further away from home but more relevant to the instant Petition, is the persuasive case of **De Lille –v- Speaker of National Assembly [1998] 3 S A 430**.The South African Constitutional Court in a decision later confirmed by the Supreme Court of Appeal, held that courts may determine whether the internal procedures adopted by the National Assembly are consistent with provisions of the Constitution. It had been argued, in ***De Lille***, on behalf of the Respondent that in so far as internal proceedings are a matter of parliamentary privilege, the courts' jurisdiction to review them was excluded. This argument was rejected in the case which involved a challenge to the process and procedures adopted by an ad hoc committee of parliament appointed under the National Assembly's Standing rules to investigate and report to the House on the conduct of the claimant who had accused some members of the majority party of having been spies of the previous government. The claimant was herself a member of parliament.
44. I have no hesitation in adopting the approach and dictum in both the ***Peter O. Njoge*** and ***De Lille*** cases.
45. The Petitioner seeks this court's interpretation and determination as to whether Standing Order 66 as well as the process outlined therein is unconstitutional. Both the substance of Standing Order No. 66 and the process outlined therein are under challenge. In reviewing the same, in my view,

there is no danger of undermining or emasculating the functions and role of the legislature. Standing Order No. 66 was made pursuant to a constitutional compulsion. In its application, the National Assembly seeks to also meet a constitutional mandate of removing a cabinet secretary from office. Both the process as well as the substance ought to be constitutional.

46. The court may certainly exercise its supervisory jurisdiction on any privileges, immunities and powers of Parliament to ensure the constitutional diktat under Article 1 (3) is met. However, there has to be deference and restraint to ensure that the court itself does not trespass unto that realm which the Constitution has reserved for Parliament.
47. Before concluding on the issue of the remit of the court, it would be appropriate to briefly express a point on the doctrine of separation of powers as invoked by the Respondent. The Respondent simply argued that the doctrine of separation of powers dictated that the court must not interfere with the functions of Parliament.
48. The doctrine of separation of powers from the golden days of John Locke (1632 – 1704) and Montesquieu (1689-1755) has always been understood to mean that the functions of government must be classified as Legislative, Executive or Judicial. These functions must be performed by different branches of the Government with the purpose of preventing excessive concentration of power in one person and promise efficiency through checks and balances.
49. Even though the doctrine is still recognized under our Constitution, a rigid and formalistic approach to it in present day Kenya is however no longer tenable in light of the new constitutional dispensation.
50. Thus in **Mwangi Wa Iria & 2 Others -v- Speaker Muranga County Assembly & 3 Others [2015]eKLR** this court stated as follows with regard to judicial intervention in matters being performed by or through the legislature:

> ***[62]Judicial interference is not inappropriate. To insist otherwise would be to misunderstand what took place and what was intended when our country adopted the Constitution in 2010***
>
> ***[63]Our Constitution is supreme.***
>
> ***[64]…Put more simply, each Kenyan was given individual rights and freedoms which no government or legislature could take away. The supremacy of the Constitution cannot be gainsaid anymore. Not Parliament, not the Executive, not the judiciary, not a Member of Parliament, not a Cabinet Secretary, not a judge, not a senator, not a Governor and not even the President can claim supremacy over the Constitution.***
>
> ***[65]…***
>
> ***[66]It must also be recalled that it was a deliberate choice of the people to assign an interpretive role to the courts and command the court to declare various actions unconstitutional: see Article 165(d). In this regard, it matters little that legislators may argue that they are themselves representatives of the people. It is the same people who saw and still see the court as the independent arbiter when they have a complaint against the people (legislators) they have elected. Simply put, the people executed a social contract for the court to be the arbiter, when necessary.***
>
> ***[67]…***
>
> ***[68]…***
>
> ***[69]There is of course the need for mutual respect by the courts for the role of the Executive and Parliament, and vice versa. And the test in my view, even as an appreciation of the doctrine of separation of powers is extended, should be that; in determining whether in any particular case the subject of challenge is***

within the court's jurisdiction as provided for by the Constitution under Article 165 the question should not only be whether some matter is within the authority of Parliament. The question whether that matter or action is consistent with the Constitution or any written law should also be addressed."

51. The same observations would apply to the instant case.
52. I find that the court has the necessary remit pursuant to the provisions of Article 165(3)(d)(ii) of the Constitution to entertain and interrogate the issue as to the constitutionality of Standing Order No. 66.

A question of competence of the Petition

53. It was also the Respondent's contention that the Petition does not meet the competency threshold laid out in the case of **Anarita Karimi Njeru v- Republic [1976-80] 1 KLR 1252.**
54. Ms. Thanje contended that the Petition had failed to disclose any violation and could therefore not stand. Mr. Nyamodi, on the other hand, was of the view that the Petition was about the unconstitutionality of a certain Standing Order of the National Assembly and what was sought of the court was a declaration of unconstitutionality.
55. It ought to be virtually clear that where a Petition has been drafted with reasonable precision then the threshold of competence must be deemed to have been met. That is what the case of **Anarita Karimi Njeru -v- Republic *(supra)*** prescribed. Indeed, the court of Appeal in **Peter M Kariuki v Attorney General [2014]eKLR** has made it clear that the hardline approach in ***Anarita Karimi Njeru's*** case is no longer tenable within the current constitutional dispensation.
56. I have read the Petition. I have been painlessly able to identify the issue or question raised by the Petition. I have no doubt the Respondent did too. Both the substance of the Petition as well as the relief sought easily direct one to the main question in the Petition which invites the task of interpreting the Constitution as well. It would be important to state that the sanctified task of interpretation of the Constitution should not be easily avoided by the court where it is easily discernible that the petition invites the court to perform such a task. Instead the task of interpretation should be safeguarded by actually performing it.
57. I find and hold that the Petition meets the competency threshold and the contrary assertions by the Respondent are not merited.

The challenge to Standing Order No. 66

58. At the centre of controversy in this Petition is the National Assembly's Standing Order No. 66. It concerns the process of impeachment of cabinet secretaries. Standing Order No 66 reads as follows:

1. ***Before giving notice of Motion under Article 152(6) of the Constitution, the Member shall deliver to the clerk a copy of the proposed Motion in writing-***

a. ***Stating the grounds and particulars in terms of Article 152(6) of the Constitution upon which the proposed Motion is made;***
b. ***Signed by the Member; and***
c. ***Signed in support by at least one-quarter of all the Members of the Assembly."***

2. ***A Motion under paragraph (1) shall be disposed of in accordance with Standing Order 56(2).***
3. ***An Order Paper on which the Motion under paragraph (1) is listed shall set out-***

a. ***the grounds and particulars upon which the proposed Motion is made;***
b. ***the name of the Member sponsoring the Motion; and***
c. ***the names of the Members in support of the Motion.***

4. ***Any signature appended to the list as provided under paragraph (3) shall not be withdrawn.***
5. ***If the Motion is supported by at least one-third of the members of the National Assembly-***

a. ***the assembly shall, within seven days, appoint a select committee comprising eleven of its members to investigate the matter; and***
b. ***the select committee shall, within ten days, report to the Assembly whether it finds the allegations against the Cabinet Secretary to be substantiated***

6. ***The Cabinet Secretary has the right to appear and be represented before the select committee during its investigations.***
7. ***If the select committee reports that it finds the allegations-***

a. ***Unsubstantiated, no further proceedings shall be taken; or***
b. ***Substantiated, the National Assembly shall-***

i. ***Avail the Cabinet Secretary with the report of the select Committee, together with any other evidence adduced and such note or papers presented to the Committee at least three days before the day scheduled for his or her appearance before the Assembly;***
ii. ***Afford the Cabinet Secretary an opportunity to be heard; and***
iii. ***Consider the Report of the select committee and vote whether to approve the resolution requiring the cabinet Secretary to be dismissed.***

8. ***If a resolution requiring the President to dismiss a Cabinet Secretary is supported by a majority of the members of the National Assembly the Speaker shall promptly deliver the resolution to the President."***

59. The genesis of Standing Order No. 66 is Article 152 (6) of the Constitution which reads as follows:

> ***"152. (6) A member of the National Assembly, supported by at least one- quarter of all the members of the Assembly, may propose a motion requiring the President to dismiss a Cabinet Secretary-***

a. ***On the ground of a gross violation of a provision of this Constitution or of any other law;***
b. ***Where there are serious reasons for believing that the Cabinet Secretary has committed a crime under national or international law; or***
c. ***For gross misconduct."***

60. Cabinet Secretaries are appointed by the President with the approval of the National Assembly. They leave office when they resign or are dismissed by the President following a resolution adopted by the National Assembly under Articles 152(6) through 156(10) of the Constitution. Under Article 153 of the Constitution, Cabinet Secretaries are accountable individually and collectively to the President. Under Article 153(3) of the Constitution, Cabinet Secretaries are also expected to attend before committees of the National Assembly and answer questions relevant to their respective dockets. Besides, Cabinet Secretaries also provide Parliament (both the Senate and the National Assembly) with full and regular reports concerning matters under their respective dockets.
61. Article 153 of the Constitution is correctly intituled "***Decision, responsibility and accountability of the cabinet***", and it is apparent that in principle, Cabinet Secretaries are accountable individually and collectively, to the President, as the appointing authority. Cabinet secretaries are also accountable to the democratically elected Parliament. Accountability does not in this context however simply refer to financial reporting or the duty to explain how public money has been spent as required under the Public Finance Management Act (Cap 412C) of the Laws of Kenya. It also involves a general duty on cabinet secretaries in a constitutional democracy to explain their actions and policies to Parliament. Such latter medium of accountability, in my view , is relevant and necessary to ensure that Parliament's oversight role is actually successfully achieved.
62. It is in the context, inter alia, of the oversight function of the National Assembly and accountability by the Cabinet Secretaries that Article 95 provides, in so far as it is relevant, that

'95(5). The National Assembly-

a. ***Reviews the conduct in office of the President, the Deputy President and <u>other state officers and initiates the process of removing them from office</u>; and***
b. ***<u>Exercises oversight of state organs</u>***.'(emphasis)

63. The National Assembly not only holds the Cabinet Secretaries, together with the Executive, politically accountable but also supervises and exercises internal control over them. The National Assembly acts as a "check" but without governing or taking over the Executives role and functions.
64. It is no doubt the function of the National Assembly to hold the executive organs of the State in the national sphere of government accountable. It is also not to be doubted that the National Assembly exercises an oversight function over state organs. In the process of exercising such functions, decisions affecting a cabinet secretary including his removal, as prescribed under Article 152(6) of the Constitution may be accomplished by the National Assembly. The process leading to such removal is what has been challenged by the Petitioner.
65. The Petitioner contends that Standing Order No. 66, which lays out the process of removal of the Cabinet Secretary, from the initiation of such process by a member of the National Assembly to its finale when a resolution requiring the President to dismiss the Cabinet Secretary is delivered to the President is unconstitutional. The Petitioner points to Articles 50(1) and 25(c) of the Constitution as the provisions with which Standing Order No. 66 is in conflict with.
66. The Respondent on the other hand, holds the view that Standing Order No. 66 does not contravene any provision of the Constitution as it is a replica of Articles 152(6) to 156(10) of the Constitution. In any event, adds the Respondent, there is no 'dispute' in the process under Standing Order No 66 capable of resolution and which would warrant Article 50(1) of the Constitution to be invoked.
67. There is no doubt that this Petition calls for a construal reading of Article 50(1) and especially what constitutes a 'dispute' as well as what constitutes an 'independent and impartial tribunal'.

Some guiding principles on interpretation

68. In the celebrated case of **U.S –v- Butler 297 U.S 1 [1936]** the Supreme Court of the United States gave a bookish expression of the law as follows where legislation is challenged as being unconstitutional and the Constitution itself had to be considered:

> ***"When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to <u>lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former</u>. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."*** (emphasis)

69. That would be the starting point.
70. I hasten, secondly, to add that Article 259 of the Constitution also provides an express injunction as to how the Constitution ought to be interpreted. The Article establishes the principle in our law that the Constitution is to be interpreted in a manner that promotes its purpose, values and principles and advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance.
71. Thirdly, it is also a cardinal principle that when interpreting provisions which protect fundamental rights and freedoms a liberal interpretation that would expand and promote the freedom or right is to be given. On the other hand where a statute or provision of the Constitution limits or seeks to limit a fundamental freedom or right a restrictive and strict interpretation is to be followed. A conspectus of Articles 20(4) and 24(2) of the Constitution leads to this principle. See also

Ndyanabo -v- Attorney General [2001] E A 495 where the court stated as follows:

> ***"[20]…Secondly, the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, that our young democracy not only functions but also grows, and that the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed."***

72. It also follows that any legislative action by Parliament is presumed Constitutional and the burden is on the person challenging the legislative act to show in what manner it breaches the Constitution: see **South Dakota -v- North Carolina 192 U S 268[1940]** .Thus is the case of **Ndyanabo -v- Attorney General *(supra),*** the court stated as follows:

> ***''[20]…Thirdly, until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative.''***

73. Finally, the court must also consider the purpose of the legislation and the objective it was intended to achieve as well as the effect it has had: see **Coalition for Reform and Democracy & 2 Others –v- Republic of Kenya & Another HCCP 628 & 630 of 2014 [2015]eKLR**, where the court quoted the following passage from the Canadian Supreme Court case of **Republic -v- Big M Drug Mart Ltd [1985] 1 SCR 295:**

> ***"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."***

74. It is to be further noted that the entire Constitution has to be read together as an integrated whole and with no one particular provision destroying the other but rather each sustaining the other. No provision of the Constitution is to be segregated. That is the rule of harmony and completeness: see **Advocates Coalition for Development and Environment & Others –v- Attorney General & Another [2014] 3 E.A 9.**
75. There is then of course the principle of the supremacy of the Constitution as clearly captured under Article 2 of the Constitution.
76. I bear all the foregoing principles in mind as I determine the core issue in this Petition.
77. Mr. Nyamodi learned Counsel for the Petitioner sought to demonstrate the unconstitutionality of the National Assembly Standing Order No. 66 by stating that the National Assembly was apparently the complainant and the judge.
78. I understood the main edifice of counsel's argument to be that the principle rule that an affected party must be heard by an impartial and unbiased tribunal was being contravened. At no stage, in his view, would any cabinet secretary being subjected to an impeachment process be given a fair hearing. Counsel also added that the provisions of Article 25(c) of the Constitution dictated that the right to a fair trial or hearing was not to be taken away, not even by constitutional provisions. And, in view of the fact that there was an apparent conflict in the constitutional provisions, if Articles 124, 152, 50 and 24 were read together it would only be appropriate, if the Standing Order No. 66 was declared unconstitutional.
79. There is certainly little doubt if at all that the common law rule of natural justice *nemo judex in causa sua* (no man should be a judge in his own cause) is now subsumed in the Constitution.
80. Article 50(1) of the Constitution reads as follows:

Fair hearing

> ***"50(1) <u>Every person</u> has the right to have <u>any dispute that can be resolved by the application of law</u> decide in a <u>fair and public hearing</u> before a court or, <u>if appropriate, another independent and impartial tribunal</u>".*** (Emphasis)

81. Article 50 seeks to assist in upholding the rule of law by guaranteeing every person the due process in the resolution of justiciable disputes. It is an embodiment of the salient common law tenets of natural justice. It has basically three components namely; access to courts and other dispute resolving forums, independence and impartiality and, finally, fairness.
82. Foremost however, for Article 50 (1) to be invoked, there has to exist a 'dispute' that can be resolved by application of the law. It ought to be a controversy capable of judicious adjudication. A moral question or a question of state policy is not justiciable: see **Olum & Another –v- Attorney General [1995-98] 1 EA 258** . The law must also be applied in resolving the dispute.
83. Secondly, once there is in existence a legal dispute the adjudication is guaranteed through the court or any other appropriate forum. The grievants have a right to access the court to help resolve the dispute and must not resort to self help. It is also to be understood that though judicial authority is ordinarily vested in courts, the court may at times not be the right forum due to lack of specialization or expertise to expeditiously adjudicate.
84. In such eventuality, Article 50(1), makes provision for an alternative yet appropriate tribunal or body to adjudicate. Indeed, Article 159 (1) of the Constitution anticipates such situations and also vests judicial authority in a "*tribunal established by and under*" the Constitution. Perhaps, it may quickly be added that the alternate and appropriate tribunals may resolve and decide any disputes by the application of law except where the physical freedom of a person is at stake. Such latter instances are apparently reserved for the courts under Articles 49(f) and 50(2)(d) of the Constitution.
85. The word 'appropriate' under Article 50 (1) must thus be understood in the foregoing context.
86. The third component of Article 50(1) rights is that the court or appropriate tribunal or body must be independent and impartial. Independence and impartiality of courts is enshrined in the Constitution under Article 160(1) which is clear that in exercise of judicial authority , the judiciary is not to be subject to the control or direction of any person or authority. It is of course further underpinned by Article 1(3) as to separation of powers. That would also apply to any person or body exercising such judicial authority as may be delegated by the Constitution.
87. The test, however, of determining whether the dispute resolver is independent and impartial is of course objective and perceptive. It is whether a reasonable and informed person with correct facts will perceive the court or the tribunal as independent, unbiased and impartial: see the cases of **Jasbir Singh Rai & 3 Others -v- Tarlochan Singh Rai & 4 Others [2013] eKLR (SCK), Musiara Ltd -v- Ntimama [2005] 1 E A 317 (CAK), Porter -v- Magill [2002] 1 ALL ER 465** and **President of the Republic of South Africa -v- South African Rugby Football Union [1999] 4 S.A 147 (CC).**
88. The final component of Article 50(1) is as to 'fair and public hearing'.
89. Slouched at the heart of the rule of law is the canon that no person should be condemned without being afforded an opportunity to state his case. The latin version is "*audi alteram partem":* see **Halsbury's Laws of England 4th Ed Vol 1 page 90, para 74**. Besides the proceedings must themselves be fair. That generally is what constitutes fair hearing within the context of Article 50(1) of the Constitution.
90. A requirement that the court and any tribunal ought to uphold reasonable fair and just procedures in order to avoid violation of an individual's rights is not novel to our jurisdiction. In **Amraphael Mbogholi Msagha -v- Chief Justice of the Republic of Kenya [2006] 2 KLR 553**, the court whilst discussing the difference between the term "natural justice" and the phrase "duty to act fairly" referred to the treatise **De Smith & Brazier, *Constitutional and Administrative Law* 6th Ed (Penguin Books, UK) at pages 557 to 558** where the authors stated

> ***"The rules of natural justice are minimum standards of fair decision-making imposed by the common law on persons or bodies who are under a duty to "****act judicially****". They were applied originally to courts of justice and now extend to***

any person or body deciding issues affecting the right or interests of individuals where a reasonable citizen would have a legitimate expectation that the decision-making process would be subject to some rules of fair procedure. The content of natural justice is therefore flexible and variable.

All that is fundamentally demanded of the decision-maker is that his decision in its own context be made with due regard for the affected parties' interests and accordingly be reached without bias and after giving the party or parties a chance to put his or their case. Nevertheless some judges prefer to speak of a duty to act fairly rather than a duty to observe the rules of natural justice, often the terms are interchangeable. But it is perhaps now the case while a duty to act fairly is incumbent on every decision-maker within the administrative process whose decision will affect individual interests, the *rules of natural justice* ***apply*** *only when some* ***sort of definite code of procedure must be adopted, however flexible that code may be and however much the decision-maker is said to be master of his own procedure. The rules of natural justice are generally formulated as the rule against bias*** *(nemo judex in sua causa****) and in respect of] the right to a fair hearing*** *[audi alteram partem]."*

91. The ***Mbogholi*** case dealt with a tribunal appointed by the President for the removal of a Judge of the High Court.
92. Then in **Republic –v- Chief Justice of Kenya and 6 Others *Ex Parte* Moijo Maitaiya Ole Keiuwa [2010]eKLR,** the court expressed itself as follows:

"Whereas the rules of natural justice are not engraved on tablets of stones, fairness demand that when a body has to make a decision which would affect a right of an individual it has to consider any statutory or other framework in which it operates. In particular it is well established that when a statute has conferred on a body the power to make decision affecting individuals, the courts will only require the procedure prescribed to be introduced and followed by way of additional safeguards as that will ensure the attainment of fairness. In essence natural justice requires that the procedure before any decision making authority which is acting judicially shall be fair in all circumstances. The right to be heard has two facets, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it and such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence…….. Although the courts have for a long time supplemented the procedure that had been laid down in a legislation where they have found that to be necessary for that purpose, before this unusual kind of power is exercised, it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of legislation. Additional procedural safeguards will only ensure the attainment of justice in instances where the statute in question is inadequate or does not provide for the observance of the rules of natural justice. The courts took their stand several centuries ago, on the broad principle that bodies entrusted with legal powers could not validly exercise them without first hearing the people who were going to suffer as a result of the decision in question. This principle was applied to

administrative as well as judicial acts and to the acts of individual ministers and officials as well as to the acts of collective bodies such as justices and committees. The hypothesis on which the courts built up their jurisdiction was that the duty to give every victim a fair hearing just as much a cannon of good administration is unchallengeable as regard its substance. The courts can at least control the primary procedure so as to require fair consideration of both sides of the case. Nothing is more likely to conduce to good administration. Natural justice is concerned with the exercise of power that is to say with acts or orders which produce legal results and in some way alter someone's legal position to his advantage. As part of a reasonable, fair and just procedure the court has a cardinal duty to uphold the constitutional guarantees, the right to fair hearing which entails a liberal and dynamic approach in order to ensure the rights enjoyed by an individual is not violated...."

93. Then later Okwengu JA in **Judicial Service Commission –v- Gladys Boss Shollei & Another CACA No. 50 of 2014 [2014] eKLR** identified the various aspects of the right under Article 50(1) of the Constitution as follows:

"[87] Apart from the need for independence and impartiality, the right to a fair hearing under Article 50(1) of the Constitution encompasses several aspects. These include, the individual being informed of the case against her/him; the individual being given an opportunity to present her/his side of the story or challenge the case against her/him; and the individual having the benefit of a public hearing before a court or other independent and impartial body. In this regard, the respondent's complaints were that she was not informed of the case against her; that she was not given adequate time to present her defence; that she was not accorded an opportunity to call witnesses; that she was not accorded a public hearing; and that she was not given any reasons for the appellant's decision to terminate her employment."

94. Much more recently in **Judicial Service Commission -v- Mbalu Mutava & Another CACA No. 52 of 2014 [2015] eKLR**, the Court of Appeal re-affirmed the legal position stated in the landmark case of **Ridge –v- Baldwin [1964] AC 40 (HL)** that the rules of natural justice, in particular right to fair hearing applied not only to bodies having a duty to act judicially but also to bodies exercising administrative duties. The Court quoted Lord Denning MR in **Selvarajan –v- Race Relations Board [1976] 1 ALL ER 12, 19** where Lord Denning stated even of investigating bodies:

"In all these cases it has been held that the investigating body is under <u>a duty to act fairly</u>; but that which fairness requires depends on the nature of the investigations and the consequence which it may have on the person affected by it."

95. Then distinguishing the right to fair administrative action under Article 47 and the right to fair hearing under Article 50(1), Githinji JA in the ***Mbalu Mutava*** case observed as follows:

"Although on the surface, the three principles appear to refer to the same thing, on deeper examination they are of different legal character and their application may not be necessarily the same. Without attempting to lay an exhaustive distinction, the right to fair administrative action under article 47 is a distinct right from the right to fair hearing under article 50(1). Fair administrative action on the other hand refers broadly to administrative justice in public administration. It 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 right to fair administrative action, though a

fundamental right, is contextual and flexible in its application and as article 24(1) provides, can be limited by law. <u>"Fair hearing" in article 50(1) as the text stipulates applies where any dispute can be resolved by the application of the law and applies to proceedings before a court or, if appropriate, another independent and impartial tribunal or body."</u>(emphasis in original)

96.Githinji JA then continued as follows:

> ***"It is clear that fair hearing as employed in article 50(1) is a term of art which exclusively applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law to facts. By article 25 that right cannot be limited by law or otherwise."***

97.I am in agreement with the court decisions and observations in all the above cases. The tenets of natural justice are now subsumed in the Constitution both under Article 47 as well as Article 50(1). For non judicial bodies , Article 47 would apply whilst for judicial and quasi-judicial bodies applying the law to resolve disputes, Article 50(1) applies. The former may be limited whilst the latter cannot be derogated.

98.In the context of the current Petition, Parliament (the National Assembly) is a state organ by dint of provisions of Article 1(3). It is to perform its functions pursuant to and in accordance with the Constitution. Parliament is bound by the national values and principles of governance in Article 10 of the Constitution. Pursuant to the provisions of Article 20(1) of the Constitution, Parliament is also bound by the Bill of Rights, including the rights guaranteed under Articles 47 and 50 of the Constitution.

99.Articles 94 and 95 of the Constitution detail the role of the National Assembly. Article 94(4) provides that

> ***"(4) Parliament shall protect this Constitution and promote the democratic governance of the Republic."***

100.On the other hand, Article 95(5) invests the National Assembly with the oversight authority over other state organs and the power to review the conduct of state officers and initiate the process of removing them from office

101.Article 124 of the Constitution inter alia, then provides for the establishment of committees and making of standing orders for the orderly conduct of a House of Parliaments business including that of its committees. Articles 144 and 150 of the Constitution respectively provide for the procedure of removal of the President and Deputy President from office. Clauses 6 through 10 of Article 152 then provide the procedure for removing a cabinet secretary from office.

102.The procedure is detailed.

103.A cursory reading of Article 152(6) would appear to reveal that the process of removal is commenced by a Member of the National Assembly. In my view, however, it is not only the National Assembly that may prompt the process of removal of a cabinet secretary. The process may also be prompted by a Petition by any person under the provisions of Article 119 which provides that:

> ***"119(1) <u>Every person</u> has a right to Petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation"*** (Emphasis)

104.Parliament (the National Assembly) has under Article 95(5) of the Constitution the authority to initiate the process of removal of a Cabinet Secretary from office. It can also be prompted by a member of the public by way of Petition to commence the process of removal of a cabinet Secretary. In short, there will be instances when the National Assembly is not the originator of the process for the removal of a Cabinet Secretary.

105.Back to the process of removal.

106.It is to be noted in summary that the process runs as follows, under the Constitution.

107. A motion is proposed by a member of the National Assembly. If the motion requiring a dismissal of the Cabinet Secretary has the support of one third of the members of the National Assembly, then a select committee is formed to investigate the matter. The concerned Cabinet Secretary may appear before the select committee during the investigations. The select committee then reports to the National Assembly whether the allegations are unsubstantiated or substantiated. If the former, no further proceedings are pursued. If the latter, then the National Assembly votes on whether to approve a resolution requiring the dismissal of the concerned Cabinet Secretary but not before the cabinet secretary is afforded an opportunity to be heard. If the resolution requiring a dismissal is supported by a majority of the members of the Assembly, then the President upon receipt of the resolution from the Speaker dismisses the Cabinet Secretary.
108. By its Standing Order No. 66, the National Assembly sought to put into effect and promote the provisions of clauses 6 through 10 of the Article 152.
109. Standing Order No. 66 is however a replica of Article 152 (6) to (10) of the Constitution. The National Assembly added nothing new save for the requirement that the motion be made formally in writing and be first delivered to the Clerk of the National assembly having been signed by both the mover and the members of parliament in support.
110. Both the National Assembly Standing Order No 66 and Article 152 have the core ingredients of fair hearing, the contest must only be that it is alleged that the national assembly cannot be an independent and impartial arbiter.
111. It is clear that a decision was made by Kenyans in 2010, settled for a dual Parliamentary –cum-Presidential Government with the Cabinet Secretaries being accountable to both the President and the Legislature: see Article 153 of the Constitution. It is also clear that the people of Kenya made a distinct choice that in both the appointment and removal of a Cabinet Secretary the President as well as the National Assembly would play a role. The National Assembly would not only superintend through oversight functions and powers the executive but also occasion the impeachment or removal of the cabinet. These powers were allocated by the Constitution and ordinarily the court ought not to interfere.
112. In **Diana Kethi Kilonzo –v- Independent Electoral and Boundaries Commission (IEBC) & 2 Others HCCP 359 of 2013 [2013]eKLR** the court observed that:

> ***We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."***.

113. I would agree with such sentiments. Where the Constitution expressly mandates a particular person or body to act, the court should be reluctant to interfere or dismiss such delegation or donation of powers. It would not be right to state that such donation of power is unconstitutional. But as I have emphasized above there must be compliance with the Constitution. The process adopted by anybody ought not be in conflict or inconsistent with the Constitution.
114. That returns me to the issue whether the National Assembly Standing Order No. 66 is unconstitutional. I have indicated that Standing Order No. 66 is a replica of Article 152(6) to 152(10). A determination that Standing Order No. 66 would, *a fortiori*, also mean that Article 152 (6) to (10) is unconstitutional.
115. There is no provision in the Constitution granting the court powers to declare as unconstitutional any constitutional provision and the court must guard against such a course of action. Indeed, all provisions of the Constitution are deemed, and are indeed, constitutional.
116. In his concurring opinion in the Supreme Court case of **Judges & Magistrates Vetting Board & 2 Others –v- Centre for Human Rights & Democracy & 11 Others [2014] eKLR,** Chief Justice Willy Mutunga agreed with his fellow Supreme Court Judges and expressly stated that:

"[214]. No provision of the Constitution is unconstitutional".

Instead what is advocated is a holistic and full reading of the Constitution where context is invited. As was appositely stated in **Tinyefunza –v- Attorney General [1997] UGCC 3.**

> ***" The entire Constitution has to be read as an intergrated whole, and no one particular provision destroying the other but each sustaining the other".***

117. I entirely agree.
118. The paramountcy of the written Constitution cannot be gainsaid at all.
119. In context of the current Petition, the history of appointment and removal of Cabinet Secretaries, then known as Ministers, in the pre-2010 Constitutional dispensation is relevant. It is however not one to laugh or write excitedly about.
120. The appointment and dismissal of the then Cabinet secretaries equivalent was riddled with utmost comedy. Cabinet Secretaries were appointed from amongst members of Parliament. The appointment was at the President's whim beckon and call. Competence and integrity was of little or no relevance at all.
121. The removal or dismissal of a Cabinet Secretary was even more comical. It defied logic reason and the rule of law. A singular news item on the state owned and controlled media sufficed. It mattered not what the Cabinet Secretary was doing or whether he was ill-disposed.
122. In 2010, Kenyans opted to move away from the unsavoury approach. The Constitution now ensured participation of the public in the appointments and removals, albeit through the members of parliament and Article 118 which decreed public proceedings in both the business of the house as well as its committees.
123. Specifically, the National Assembly was tasked under the Constitution with the process of appointment and removal of Cabinet Secretaries. Given a less pedantic but liberal reflection in my view, Articles 152 to 153 inspire the wishes of Kenyans which were, inter alia, that Cabinet Secretaries be accountable and also be subjected to a structured removal process.
124. The Petitioner has argued that the impugned Standing Order No. 66 runs contrary to Articles 50(1) and 25(1) of the Constitution. The impugned Standing Order No. 66 under sub clause (1) provides for how the process of removal of a Cabinet Secretary by a member kicks off. The member does not simply present the motion. He must garner support at least one-quarter of the members of Assembly. The motion must also state grounds upon which it is predicated. These sub clauses (5) through (8) then effectively replicate clauses 6 through 10 of the Article 152 of the Constitution. The contest with Article 50 and 25 would then also be fetched on Article 152.
125. In my view, which agrees with Ms. Thanje's, when the National Assembly receives the motion and appoints a select committee to determine whether it has substance there is till then no dispute worthy of adjudication as anticipated by Article 50(1) of the Constitution. It is not a trial and neither the select committee nor the National Assembly is bound to treat it as such. It is not a controversy capable of resolution by the application of the law. The National Assembly does not seek to establish criminality or culpability but rather accountability.
126. Besides, the spirit of the Constitution places a great premium on accountability when it comes to public service and what better body would vet the accountability and or suitability of a Cabinet Secretary than the National Assembly. The safeguard against an ill-motivated motion is also availed through the medium of voting where at least one half of the members of the National Assembly must vote in favour of the motion for it to carry through.
127. The Petitioner submitted that the National Assembly may not be impartial and independent in the eyes of any reasonable and innocent bystander. The reasoning was that it commences the process of removal and also makes the final decision.
128. A reasonable and informed by-stander would require all relevant and additional facts before returning a verdict of partiality. The additional and relevant facts are that the same National Assembly approves the Cabinet Secretary's appointment. Additionally, the same Cabinet Secretary is accountable to the National Assembly as well. Further, it is not only a member of the National Assembly who may instigate the removal. Even a member of the public may do so under Article 119 of the Constitution, albeit that the motion must be presented by a Member of Parliament.

129. Additionally, the Constitution has an inbuilt mechanism to ensure impartiality and independence when it provides that votes be cast in favour of or against any resolution for removal and the resolution only be carried by a majority. The impartiality and independence anticipated by Article 50(1) would not be infringed when the National Assembly's select committee investigates and makes proposals for the removal of a Cabinet Secretary.
130. In my humble view, for the court to make a finding and declaration that Standing Order No.66, which as demonstrated above is *pari materia* Article 152, is unconstitutional would equate an amendment of the Constitution in an uncanny manner, yet Article 257 is clear on how any amendments to the Constitution are to be effected. Contrary to what Mr Nyamodi suggested that the Standing Order could be amended to invite an independent tribunal even if Standing Order No 66 was declared unconstitutional, such an amendment would result in an obviously unconstitutional Standing Order as the Constitution donates the powers of removal to the National Assembly and not any other body.
131. Besides, a holistic and harmonious reading of the Constitution would also lead one to Article 19(3)(c) of the Constitution.
132. The supremacy of the Constitution is once again illustrated by Article 19(3)(c) when it provides that fundamental freedoms and rights may be limited by the Constitution. Any express constitutional claw-back to a fundamental freedom or right ought not be faulted because of Article 19(3)(c). There could thus be considerable force in the arguments that Standing Order No. 66 of the National Assembly violates the right to fair hearing but for the existence of Article 152 which confers specifically the same powers as Standing Order No 66 upon the National Assembly there has to be reluctance and hesitation in stating that the Standing Order contradicts Article 50(1).
133. Copiously the Petitioner referred to and urged the court to adopt the decision in **Stephen Nendela –v- County Assembly of Bungoma & 4 others [2014] eKLR.** The decision is of a persuasive nature only having emanated from the High Court sitting at Bungoma. The court in ***Stephen Nendela's*** case was dealing with an Act of Parliament and not a provision of the Constitution.
134. Naturally, if there is an apparent conflict or inconsistency between a statutory provision and a provision of the Constitution, the court has no alternative but to declare the statutory provision to the extent of any such inconsistency null and void. In the case of Constitutional provisions which are alleged and appear to be in conflict a somber holistic and complete reading of the Constitution is required. The paramountcy and supremacy of the Constitution is necessary. In any event as the learned Judge pointed out in ***Stephen Nendela's*** case the County Assemblies are duty bound under Article 185 to enact laws which are constitutionally compliant. County Assemblies are not supposed to enact laws inconsistent with the Constitution. Neither should they simply reprint provisions of the Constitution.A provision of the Constitution is not unconstitutional but once removed and sub-planted as ordinary legislation it may be deemed to be in conflict with the Constitution.
135. The same does not obtain in the instant Petition as it is a provision of the Constitution to be harmonized with another. Certainly, the Kenyan mass were very aware that they were conferring the oversight responsibility upon the National Assembly with powers to approve the appointment as well as prompt the removal of cabinet secretaries.

Conclusion

136. This Petition kicked off as a challenge to the National Assembly's Standing Order No 66. It has however turned on to an interpretation of Article 152 which was replicated in Standing Order No. 66. Two constitutional provisions had to be harmonized.
137. I come to the conclusion that Article 152 as read together with Article 50(1) as well as Article 19(3)(c) of the Constitution would vindicate the National Assembly's action in making Standing Order No 66. Only the Constitution may limit any of the fundamental freedoms and rights stated under Article 25. The phrase "Despite any other provision in this Constitution" appearing in Article 25 must be read to refer to any other Article of the Constitution which sanctions the limitation of any freedom or right by legislation such as Article 24 .
138. It is now obvious that Standing Order No. 66 cannot be deemed unconstitutional for all the above reasons.

Summary of findings and disposal

139. On the reserved issues, I summarize my findings as follows:
    a. As to whether the Court had jurisdiction to determine the Petition, the answer is yes.
    b. As to whether the Petition met the competency threshold, the answer is also yes.
    c. As to whether the National Assembly Standing Order No. 66 is unconstitutional, the answer is no.
140. Finally, I thank both Counsel Mr. Nyamodi and Ms. Thanje for their rather nifty and inspired arguments in this matter.
141. In final disposal, I state that the Petition ought to be dismissed. It is so ordered. It must be dismissed. The Petition is dismissed but with no order as to costs.

Dated, signed and delivered at Nairobi this 7th day March, 2016

J.L.ONGUTO

JUDGE