



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MILIMANI LAW COURTS**

**JR APPLICATION NO.258 OF 2016**

**IN THE MATTER OF: ARTICLES 2, 3, 10, 19, 20, 23, 25, 27, 47,165(6),**

**258 AND 260 OF THE CONSTITUTION OF KENYA,**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF RIGHTS AND FUNDAMENTAL  
FREEDOMS**

**UNDER ARTICLES 2 (1), 3 (1) 10 (1) (2), 19 (2), 20 (2), 27 (1), 35 (1), 38(1) (2)**

**& (3), 47 (1) (2), 48, 50 (1) (2), OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: SECTIONS 4 AND 5 FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF  
2015**

**AND**

**IN THE MATTER OF: STANDING ORDER NO.111 OF THE NATIONAL ASSEMBLY  
STANDING ORDERS**

**BETWEEN**

**JAMES OPIYOWANDAYI.....APPLICANT**

**AND**

**KENYA NATIONAL ASSEMBLY.....1<sup>ST</sup> RESPONDENT**

**THE SPEAKER OF THE NATIONAL ASSEMBLY.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

## Introduction

1. The ex parte applicant herein, **James Opiyo Wandayi**, is the sitting elected Member of Parliament for Ugunja Constituency, a constituency within the Republic of Kenya.
2. According to the applicant, he was in attendance in a joint sitting of parliament during the state of the nation address by H. E the President of the Republic of Kenya on 31<sup>st</sup> March 2016 pursuant to the provisions of Article 132 of the Constitution 2010. In his view, in exercise of his constitutional right of representation and airing the grievances of his constituents and further pursuant to his constitutional right to picket as envisaged under Article 37, he exercised that right and duty peacefully while in the National Assembly in an effort to draw the attention of the President on the suffering of his people.
3. The applicant contended that the 2<sup>nd</sup> Respondent in utter disregard of the clear provisions of Article 201 of the Constitution unlawfully mentioned and ordered him out of the National Assembly without according him the slightest of opportunity to explain himself. According to him, his unwavering attempts to catch the attention of the 2<sup>nd</sup> Respondent and get an opportunity to explain himself were unlawfully and unjustly construed as disobeying and resisting the order by the 2<sup>nd</sup> Respondent to leave the chambers.
4. Accordingly, the 2<sup>nd</sup> Respondent while arbitrarily invoking the evidently unconstitutional provisions of the Standing Order No. 111 of the **National Assembly Standing Orders** mentioned him for contempt and suspended him for the remainder of the session without regard to the unequivocal provisions of the Constitution and law of natural justice requiring any person to be accorded a right to fair hearing and administrative action. Further, the 2<sup>nd</sup> Respondent while discharging his duties on behalf of the 1<sup>st</sup> Respondent also publicly declared that his decision would not be rescinded and that the applicant would not be given any room to appeal the decision to suspend him for the remainder of the parliamentary Session.
5. The applicant contended that his attempts to explore internal remedial measures in order to get justice have all been frustrated hence the reason for the current petition (sic). According to the applicant, the irrational treatment by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have now been extended to the staff in the applicant's office who have effectively been locked out of their working stations unprocedurally. In addition, the applicant has been effectively barred from accessing parliamentary precincts or chambers and cannot therefore discharge his constitutional duty of representation to the prejudice of the constituents of Ugunja.

## Respondents' Case

6. In response to the application, the respondents contended that on 31<sup>st</sup> March 2016, His Excellency, the President, **Honourable Uhuru Kenyatta** was set to address Parliament in a special sitting convened via Kenya Gazette Notices Nos. 2038 of 22<sup>nd</sup> March 2016 and 2039 of 21<sup>st</sup> March 2016. At the said special sitting of Parliament, some Members of Parliament including the Applicant disrupted the proceedings of the House thereby making it impossible for the President to address the House. It was contended that pursuant to the Standing Orders of both Houses and in light of the powers conferred upon the Speakers of Parliament by Article 106 of the Constitution, both the Speaker of the National Assembly and the Senate sought to admonish the disorderly members of Parliament and restore order in the House. However, despite several and repeated warnings to the members, the Applicant continued to engage in disruptive behaviour.
7. The Respondents' position was therefore that having failed to heed the numerous warnings, the Speaker of the National Assembly ordered that the Applicant and other disorderly members to withdraw from the chamber pursuant to Standing Order 107 of the **National Assembly Standing Orders**. According to the Respondents, several Members other than the Applicant obeyed the orders of the Speaker with regard to their disorderly conduct and withdrew from the Chamber in full knowledge of the sanctions imposed by the Standing Orders of the House. However, the Applicant refused to heed the Speaker's directions and declined to withdraw from the chamber.

8. The Respondents maintained that the Applicant having failed to obey the direction of the Speaker to withdraw from the chamber, the Speaker of the National Assembly invoked Standing Order 111 of the *National Assembly Standing Orders* (hereinafter Standing Order 111) which provides that:

***If any Member shall refuse to withdraw when required to do so, by or under these Standing Orders, the Speaker or the Chairperson of Committee as the case may be, having called the attention of the House or Committee to the fact that recourse to force is necessary in order to compel such Member to withdraw, shall order such Member to be removed and such Member shall thereupon without question put be suspended from the service of the House during the remainder of the Session and shall during such suspension, forfeit the right of access to the precincts of Parliament and the Serjeant-at-arms shall take necessary action to enforce the order.***

9. According to the Respondents, the Standing Orders of the National Assembly were made by membership of the National Assembly for the orderly conduct of the proceedings of the House and its committees in furtherance to the provisions of Article 124(1) of the Constitution and that the same Standing Orders were adopted by the National Assembly on 9<sup>th</sup> January, 2013 during the Fourth Session of the Tenth Parliament. To the Respondents, the Standing Orders regulate the proceedings of the House and its Committees and the Speaker's role is to enforce them in order to guide the proceedings of the House. It was further contended that under Standing Order 111, the Speaker of the National Assembly is empowered by the rules of procedure made and adopted by the House to order the removal of a Member from the House after informing the House that recourse to force is necessary in order to compel such a Member to withdraw from the House and restore order in the House. These implications are within the knowledge of Members and were within the knowledge of the Applicant at all material times.

10. The Respondents therefore were of the view that the actions of the Speaker of the National Assembly to order the removal of the Applicant from the Chamber for grossly disorderly conduct were therefore lawful pursuant to Article 124 of the Constitution and Standing Order 111 which Standing Order incorporates due process as required under Articles 47 and 50 of the Constitution and the ***Fair Administrative Action Act, 2015***. This was explained by the Respondents as the Member first being cautioned for disorderly conduct and thereafter ordered to withdraw from the Chamber for the remainder of the sitting or such further period for gross disorderly conduct. If the Member refuses to withdraw and the Speaker informs the House that it shall require force to compel the withdrawal of the Member from the house, a final order for removal of the Member is made and the misconduct of the Member attracts suspension from the service of the House for the remainder of the Session.

11. It was contended that Standing Order No. 1 of the National Assembly Standing Orders allows the Speaker to provide guidance to the House on any procedural matters that arise which are not covered within the text of the Standing Orders, such as the issue of reviewing or appealing any orders made pursuant to Standing Order Nos. 107 to 111 and that had the Applicant challenged the decision of the Speaker with regard to Standing Order 111, the Speaker would have had no option but to present the appeal to the House for resolution.

12. The Respondents denied that the Speaker publicly declared that the decision now challenged by the Applicant could not be rescinded or reviewed. The Respondents asserted that as a consequence of the application of Standing Order 111, the question of the Applicant's discharge from the service of the House is one of privilege as it relates to the loss of his privileges and immunities for the remainder of the session of the House. To them, in accordance with Parliamentary precedent and practice, a House of Parliament ought to be allowed adequate opportunity to resolve and determine any question touching the rights of the House collectively, its safety, dignity and integrity of its proceedings as well as the rights, reputation and conduct of its Members. Further in accordance with parliamentary precedents and practice, a question such as that of the loss of a Member's privileges and immunities is given the first priority before any other business, save for preliminary items, whenever it is brought before House. In addition, in accordance with parliamentary precedents and practice, it is possible should the Applicant chose to seek redress availed by the conventional parliamentary practice, his appeal would be considered by the House as a matter of priority as espoused in *Jefferson's Manual on Rules and Practice*, (originally prepared by

Thomas Jefferson to guide the rules and procedure of the Congress of the United States and a leading text on widely adopted parliamentary practice and procedure) that-

**“A resolution reported as a question of the privileges of the House, or offered from the floor by the Majority Leader or the Minority Leader as a question of the privileges of the House, or offered as privileged under clause 1, section 7, article 1 of the Constitution shall have precedence of all other questions except motions to adjourn. A resolution from the floor by a Member, Delegate or Resident Commissioner other than the Majority Leader or the Minority Leader as a question of the privileges of the House shall have precedence of all other questions except motions to adjourn only at a time or place, designated by the Speaker, in the legislative schedule within two days after the day on which the proponent announces to the House his intention to offer the resolution and the form of the resolution”. (p.410).**

13. The Respondents averred that the aforesaid parliamentary usage reflects the nature of the priority given to questions of privilege by Houses of Parliament whereby the Speaker of a House of Parliament is obliged to accord priority consideration to such a question. However, despite the leeway afforded to the Applicant under Standing Order No. 1 to move the Speaker and the House for a review of or an Appeal against the sanctions imposed on him, and the priority given to dispensing with questions of privilege before transacting other parliamentary business, the Applicant has made no effort to avail himself the opportunity and instead has elected to move this Honorable Court prematurely.

14. The Respondents reiterated that the Standing Orders of the National Assembly afford a Member a fair hearing both during the proceedings of the House and in the event that one is dissatisfied with a directive from the Speaker during proceedings. It was accordingly averred that the legitimate expectation of the Applicant had not been breached as he willfully failed to avail himself to existing avenues of reviewing the decision made against and sanctions imposed on him. To the Respondent, in accordance with accepted parliamentary precedent and practice, the issue of disciplinary proceedings by a House of Parliament against its Member, being a question of privilege, ought to be first handled and dispensed with in finality by the House to guard against arbitrary and unreasonable encroachment into the affairs of the House which ought to have complete authority concerning its procedure.

15. The Respondents contended that the Applicant has now come to this Honourable Court aggrieved by the decision made by the Speaker of the National Assembly on the floor of the House during a sitting of Parliament. Based on legal advice, the Respondents contended that in law, that the Application seeks orders which, if granted, would be a breach of Article 124 of the Constitution which provides for Parliament to establish its committees and make Standing Orders for the orderly conduct of its proceedings. Further, the orders sought by the Applicant violate the provisions of Article 117 of the Constitution which provides that Parliament may, for the purpose of the orderly conduct of its committees, provide for the powers, privileges and immunities of Parliament, its committees, the leader of the majority party, the leader of the minority party, the chairpersons of committees and members. Additionally, the Application lacks any basis in law as the orders sought violate the constitutional power granted to Parliament to regulate its internal rules of procedure as well as the **National Assembly (Powers and Privileges) Act**. To the Respondent, the orders sought in the Application violate the principle of separation of powers as they seek for this Honourable Court to interfere with the internal management of Parliament. In their view, each of the three arms of Government ought to be allowed to conduct its affairs without undue interference from the other arms of Government hence this Application is a violation of the principle of separation of powers as it seeks that the Court delves into matters of internal procedure of the Legislature. The Respondents adopted the position that the conduct of business in Parliament is the exclusive reserve of the Speaker as provided under Article 107 of the Constitution and the Application herein seeks orders that violate the independence of the legislature which conducts its affairs in accordance with the Constitution, its Standing Orders and its customs and traditions of procedure. The National Assembly makes its Standing Orders and can, by resolution of a majority of members; suspend, either temporarily or permanently, the application of any particular Standing Order.

16. To the Respondents, the Applicant had not demonstrated to this Court that the grounds, upon which judicial review can be sought, have been met and therefore this Honourable Court ought to decline to

exercise its powers of judicial review. In their view, this Honourable Court can only be invoked in the event of an excess of jurisdiction by way of breach of the Constitution and there has been no violation of the Constitution. Further, judicial review is strictly limited to a review of the procedure of a public body; however the Application herein seeks for this Honourable Court to delve into the merits of the decision of the Speaker of the National Assembly and therefore this Honourable Court ought to decline from sitting as an appellate court from the decision of the Speaker of the National Assembly.

17. The Respondent's position was that on the question of internal procedure and the conduct of parliamentary business, the Supreme Court of Kenya, in **Speaker of the Senate & another vs. Attorney General & 4 Others [2013] eKLR**, held that the Court cannot supervise the workings of Parliament and 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. Further, the High Court has also declined to interfere with the internal business of the legislature in its recent decision in **Republic vs National Assembly Committee of Privileges & 2 Others ex-parte Ababu Namwamba; JR Case No. 129 of 2015**.

18. The Respondents were of the view that the provisions of Article 103(1)(b) of the Constitution do not apply in respect of Standing Order 111 as the Applicant cannot be deemed to be absent without the written permission of the Speaker. Standing Order 111 was enforced by the Speaker and the Applicant cannot allege that its enforcement results in the loss of his seat as a Member of Parliament.

19. It was therefore the Respondents' case that the application herein lacks merit they urged this Court to decline to exercise its discretion by granting leave to the Applicant or stay as sought in the Application.

#### **Leave**

20. On 14<sup>th</sup> June, 2016, after hearing the application for leave, I was satisfied that the applicant had disclosed a *prima facie* case for the purposes of leave. The applicant contended that he was named and banished from the House without being afforded a hearing. To this the Respondents answered that a decision made pursuant to Standing Order 111 is similar to one made by the Court where there is contempt on the face of the Court. Even if that were so, section 36(4) of the ***High Court (Organisation & Administration) Act***, No 27 of 2015 provides as follows:

***In exercise of its powers under this section, the Court shall observe the principles of fair administration of justice set out in Article 47 of the Constitution.***

21. So that even where the Court is exercising the power to punish for contempt in the face of the Court, the procedure to be adopted must be fair and must not be arbitrarily exercised. As to whether the procedure adopted by the Speaker met the threshold of fairness or not is a matter which will have to await the hearing.

22. Again there is the issue as to whether the decision which was taken by the Speaker violated the principles of proportionality or not. Proportionality has been defined by **De Smith, Woolf and Jowel**, ***Judicial Review of Administrative Action***, Fifth Edition (pp.594-596) as:

***“a principle requiring the administrative authority, when exercising discretionary power to maintain a proper balance between any adverse effects which its decision may have on the rights, liberties, or interests of persons and the purpose which it pursues.”***

23. It was contended that The Speaker ought to have considered the ramifications of his decision not only to the Applicant but also to those whose interests the applicant represented. This was the position adopted in **The Indian Borough of Newham vs. Khatun-Zeb and Iqbal [2004] EWCA Civ. 55** where it was held that:

**“Clearly a public body may choose to deploy powers it enjoys under Statute in so draconian a fashion that the hardship suffered by the affected individuals in consequence will justify the**

**court in condemning the exercise as irrational or perverse...At all events it is plain those oppressive decisions may be held to repugnant to compulsory public law standards.”**

24. In my view the issue of proportionality ought to be seen in the context of rationality. This position is the one prevailing in England as was highlighted by **Lord Steyn** in **R (Daly) vs. Secretary of State For Home Department (2001) 2 AC 532** where it was held that: (1) Proportionality may require the reviewing Court to assess the balance which the decision maker has struck, not merely to see whether it is within the range of rational or reasonable decisions; (2) Proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations; and (3) Even the heightened scrutiny test is not necessarily appropriate to the protection of human rights.

25. In my view Article 47 of the Constitution is now emphatic on the fairness of administrative action. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

26. The Court of Appeal has recently dealt with the issue in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] KLR**, at paras 55-58 as hereunder:

**“An issue that was strenuously urged by the respondents is that the appellant’s appeal is bad in law to the extent that it seeks to review the merits of the Minister’s decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, Section 7 (2) (l) of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a “greater intensity of review” than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in *Article 24 (1) (b) and (e) of the Constitution to wit that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications. Analysis of Article 47 of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7 (2) (f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; Section 7 (2) (j) identifies abuse of discretion as a ground for review while Section 7 (2) (k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7 (2) (k) subsumes the dicta and principles in the case of Associated***

**Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. Section 7 (2) (i) (i) and (iv) deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in Section 7 (2) (i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was taken and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that even if the merits of the decision is undertaken pursuant to the grounds in Section 7 (2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.”**

27. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

28. More importantly is the contention by the Respondents that the decision taken by the Speaker met the principles under the ***Fair Administrative Action Act***. Section 5 of the said Act provides that:

***(1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall-***

***(a) issue a public notice of the proposed administrative action inviting public views in that regard;***

***(b) consider all views submitted in relation to the matter before taking the administrative action;***

***(c) consider all relevant and materials facts; and***

***(d) where the administrator proceeds to take the administrative action proposed in the notice-***

***(i) give reasons for the decision of administrative action as taken;***

***(ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to***

***appeal; and***

***(iii) specify the manner and period within the which such appeal shall be lodged.***

29. That the ***Fair Administrative Action Act***, is an Act of Parliament enacted pursuant to the provisions of Article 47 of the Constitution is clear. Therefore it is arguable whether the failure to comply with the provisions of the said Act may by extension be construed to amount to a violation of the spirit of the Constitution. If that were to be the position, even the Respondents admit that this Court has the power to investigate actions which amount to a violation of the Constitution. As this Court held in **The Council of Governors and Others vs. The Senate Petition No. 413 of 2014:**

**“this Court [is] vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation. In that regard, the Petition before us alleges a violation of the Constitution by the Respondent and in the circumstances, it is our finding that the doctrine of separation of power does not inhibit this Court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of the Constitution. In fact the invitation to do so is most welcome as that is one of the core mandates of this Court”.**

30. In arriving at the said decision the Court cited with approval the decision **Kasanga Mulwa, J in R vs. Kenya Roads Board exparte John Harun Mwau HC Misc Civil Application No.1372 of 2000** wherein the learned Judge stated that:

**“Once a Constitution is written, it is supreme. I am concerned beyond peradventure that when the makers of our Constitution decided to put it in writing and by its provision thereof created the three arms of Government namely the Executive, the Legislature and the Judiciary, they intended that the Constitution shall be supreme and all those organs created under the Constitution are subordinate and subject to the Constitution.”**

31. Subsequently, the Supreme Court in **Speaker of National Assembly –vs. Attorney General and 3 Others (2013) eKLR** stated as follows:

**“Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering his Opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act.”**

32. The Court went on to state as follows:

**“Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signaled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of “right” and “wrong” in such cases, short of a solution in plebiscite, is only the Courts.”**

33. This was the position adopted by the Supreme Court in **Zacharia Okoth Obado vs. Edward Akong’o Oyugi & 2 others [2014] eKLR** where it was held that:

**“Article 3(1) of the Constitution imposes an obligation on every one, without exception, to respect, uphold and defend the Constitution. This obligation is further emphasized with regard to the exercise of judicial authority, by Article 159(2) (e) which requires that in the exercise of judicial authority the Courts must pay heed to the purpose and principles of the Constitution being protected and promoted. However, all statutes flow from the Constitution,**

and all acts done have to be anchored in law and be constitutional, lest they be declared unconstitutional, hence null and void. Thus, it cannot be said that this Court cannot stop a constitutionally-guided process. What this Court would not do is to extend time beyond that decreed by the Constitution. However, a process provided for by the Constitution and regulated by statute can be stayed, as long as it is finally done within the time-frame constitutionally authorized. For that reason, this Court would, by no means be interfering with a constitutionally-mandated process, if the order for stay is granted. This is because an order for stay will be sufficient to bring to a halt the preparation of the by-election by the IEBC as well as stop the swearing in of the Speaker.”

34. Nyamu, J was even more blunt in his opinion in Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728 where he expressed himself as follows:

“To exempt a public authority from the jurisdiction of the Courts of law is, to that extent, to grant doctorial power. It is no exaggeration, therefore, to describe this as an abuse of power of Parliament speaking constitutionally. This is the justification for the strong, it might even be rebellious, stand which the courts have made against allowing Acts of Parliament to create pockets of uncontrollable power in violation of the rule of law. Parliament is unduly addicted to this practice giving too much weight to temporary convenience and too little to constitutional principle. The law’s delay together with its uncertainty and expense, tempts governments to take short cuts by elimination of the Courts. But if the courts are prevented from enforcing the law, the remedy becomes worse than the disease.”

35. Professor Sir William Wade in his authoritative work, *Administrative Law*, 8<sup>th</sup> Edition at page 708 properly captured the failure of Parliamentary draughtsman as hereunder:

“Parliament is mostly concerned with short term considerations and is strangely indifferent to the paradox of enacting law and then preventing courts from enforcing it. The Judges, with their eye on the long term and the rule of law, have made it their business to preserve a deeper constitutional logic, based on their repugnance to allowing any subordinate authority to obtain uncontrollable power.”

36. Lord Green in Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation [1948] 1 KB 223 that:

“In considering whether an authority having so unlimited a power has acted unreasonably, the court is only entitled to investigate the action of the authority with a view to seeing if it has taken into account any matters that ought not to be or disregarded matters that ought to be taken into account.”

37. It was accordingly held by Rawal, J (as she then was) in Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006 [2007] 2 KLR 331 that:

“Whereas the court is mindful of the principle that the Legislature has the power to legislate and Judges shall give due deference to those words by keeping the balances and proportionality in the context of fast progressing issues of human rights which have given birth to the enshrinement of fundamental rights in the Constitution, the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits.”

38. I agree and would add that when any of the state organs steps outside its mandate, this Court will not hesitate to intervene.

39. This Court will therefore be called upon to determine whether the interests of the people who the ex

parte applicant represent in the National Assembly ought to have been taken into consideration before the impugned decision was arrived at and whether the same were considered.

40. Where therefore it is alleged that an organ of the State has acted in a matter that violates the Constitution, the doctrine of separation of powers will not avail the Respondent. Whereas at this stage of the proceedings, this Court cannot make a definitive finding, the issue cannot be summarily dismissed at this stage offhandedly as being frivolous.

### Stay

41. Having found that the case presented by the *ex parte* applicant cannot be termed as frivolous, the next issue for determination is whether in the circumstances of this case, this Court ought to direct that the leave so granted ought to operate as a stay of the Speaker's decision pending the hearing and determination of the Motion.

42. The principles that guide the grant of an order that the leave do operate as stay of the proceedings in question have been crystallised over a period of time in this jurisdiction. Where, the decision sought to be quashed has been implemented leave ought not to operate as a stay since where a decision has been implemented stay is no longer efficacious as there may be nothing remaining to be stayed. It is only in cases where either the decision has not been implemented or where the same is in the course of implementation and its implementation has not come to an end that stay may be granted. See **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.**

43. In this case, the period of suspension of the applicant is still running. In other words the act complained of is not complete and has not come to an end. Accordingly, this Court is still seized of the jurisdiction to arrest the same from being completed. This was the position adopted by **Dyson, LJ in R (H) vs. Ashworth Hospital Authority [2003] WLR 127** at 138 where the Lord Justice held that:

**“The purpose of a stay in a judicial review is clear. It is to suspend the “proceedings” that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the judicial review process and make it more effective. It will ensure, so far as possible, that, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success. In *Avon*, Glidewell, LJ said that the phrase “stay of proceedings” must be given wide interpretation so as to enhance the effectiveness of the judicial review jurisdiction. A narrow interpretation, such as that which appealed to the Privy Council in *Vehicle and Supplies*, would appear to deny jurisdiction even in case A. That would indeed be regrettable and, if correct, would expose a serious shortcoming in the armoury of powers available to the court when granting permission to apply for judicial review... Thus it is common ground that “proceedings” includes not only the process leading up to the making of the decision but the decision itself. The administrative court routinely grants a stay to prevent the implementation of a decision that has been made but not yet carried into effect, or fully carried into effect.”** [Underlining mine].

44. What I understand the Court to be saying is that stay of proceedings may include stay of the decision itself where the circumstances permit. However, whereas this Court appreciates that in certain cases a stay may be granted even where its effect may be to temporarily reverse the decision, that remedy may only be resorted to in exceptional cases and the onus is upon the applicant to prove that such exceptional circumstances exist. It is in this light that this Court understands the decision of **Gladwell LJ in Republic vs. Secretary of State for Education and Science, ex parte Avon County Council (No. 2) CA (1991) 1 All ER 282** where he said that:

**“An order that a decision of a person or body whose decisions are open to challenge by judicial review shall not take effect until the challenge has been finally determined is, in my view, correctly described as a stay.”**

45. **Maraga, J** (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others**

**Mombasa HCMISCA. No. 158 of 2006** was of the view that:

“...as injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction...I also want to state that in judicial review applications like this one the Court should always ensure that the *ex parte* applicant’s application is not rendered nugatory by the acts of the Respondent during the pendency of the application. Therefore where the order is efficacious the Court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that the stay orders are discretionary and their scope and purpose is limited. What then is the scope and purpose of stay orders in the judicial review jurisdiction? The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made. It is not limited to judicial or quasi-judicial proceedings as some people think. It encompasses the administrative decision making process (*if it has not yet been completed*) being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body *if it has been taken*. A stay is only appropriate to restrain a public body from acting. It is, however, not appropriate to compel a public body to act. With this legal position in mind I now wish to turn to the facts of this case and decide whether or not the Ex parte Applicant’s case is deserving of a stay order. The Ex-parte Applicant seeks:

“THAT the grant of leave do operate as a stay stopping each and all the Respondents from restraining the Applicant from the exercise of his office, functions, duties and powers as the Mayor of Mombasa and as a nominated councilor in the Municipal Council of Mombasa.”

Can I grant this prayer in view of the scope and purpose of the stay order as stated above? I think not. Not as it is framed. To grant it as prayed would be compelling the Respondents to reinstate the Ex-parte Applicant to his position as Mayor before hearing them. Even in the cases cited by Mr. Orengo stay orders were not granted in the circumstances and terms as sought in this case. As I have already said, however, when dealing with applications like this the court should always ensure that the applicant’s application is not rendered nugatory. Having considered all the circumstances of this case I am satisfied that the Ex-parte Applicant is deserving of a stay order but not as prayed in the application. What I think is an appropriate order to make in the circumstances of this case is to direct, which I hereby do, that the leave granted shall operate as a stay to restrain the Respondents jointly and severally from nominating or causing to be nominated another councilor or to hold the elections or elect the Mayor of Mombasa until this matter is heard and determined.” [Emphasis added].

46. In addition, it is trite that in giving effect to the rights the courts must balance fundamental rights of individual against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions. See **Bell vs. DPP [1988] 2 WLR 73.**

47. As appreciated by Francis Bennion in *Statutory Interpretation*, 3<sup>rd</sup> Edition at page 606:

“it is the basic principle of legal policy that law should serve the public interest. The court... should therefore strive to avoid adopting a construction which is in any way adverse to the public interest”.

48. Further, in **Kenya Anti-Corruption Commission vs. Deepak Chamanlal Kamani and 4 Others, [2014] EKLR** it was held that:

“...a matter of public interest must be a matter in which the whole society has a stake, anything affecting the legal rights or liability of the public at large”.

49. As is appreciated in *Black’s Law Dictionary, 9<sup>th</sup> Edn.* “public interest” is the general welfare of the

public that warrants recognition and protection and it is something in which the public as a whole has a stake; especially an interest that justifies governmental regulation.

50. The role of public interest in applications for conservatory orders was appreciated by the Supreme Court in **Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Ors [2014] eKLR** where the highest Court in the land held:

**“Conservatory orders’ bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold 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 orders of stay. Conservatory orders consequently, should be granted on the *inherent merit* of the case, bearing in mind *the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.*”**

51. Article 1(1) of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution while under Article 1(3)(c) sovereign power under this Constitution is delegated *inter alia* to the Judiciary and independent tribunals. Dealing with a similar provision in **Rwanyarare & Others vs. Attorney General [2003] 2 EA 664**, it was held with respect to Uganda that Judicial power is derived from the sovereign people of Uganda and is to be administered in their names. Similarly, it is my view and I so hold that in Kenya under the current Constitutional dispensation judicial power whether exercised by the Court or Independent Tribunals is derived from the sovereign people of Kenya and is to be administered in their name and on their behalf. It follows that to purport to administer judicial power in a manner that is contrary to the expectation of the people of Kenya would be contrary to the said Constitutional provisions. I therefore associate myself with the decision in **Konway vs. Limmer [1968] 1 All ER 874** that there is the public interest that harm shall not be to the nation or public and that there are many cases where the nature of the injury which would or might be done to the Nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it.

52. It is therefore my view and I so hold that in appropriate circumstances, Courts of law and Independent Tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. Therefore the Court or Tribunals ought to appreciate that in our jurisdiction, the principle of proportionality is now part of our jurisprudence and therefore it is not unreasonable or irrational to take the said principle into account in arriving at a judicial determination.

53. The case before this Court is unprecedented both in terms of its ramifications and effects. The suspension of the applicant from the National Assembly and its functions though expressed to be for the “remaining session” runs to almost a whole year. The decision in question does not just affect the *ex parte* applicant but also affects the people of Ugunja Constituency who elected the *ex parte* applicant to represent them in the National Assembly. These interests are by no means trivial or inconsequential. To the contrary they revolve around the sovereign rights of the people of Ugunja Constituency as decreed in Article 1.

54. It is my view that our Constitution is partly crafted based on the *Lockean* social contract theory. This is so when it is appreciated that Article 1(1) of the Constitution, the very first Article, provides that “all sovereign power belongs to the people of Kenya”. It is further important to appreciate that according to the same document at Article 1(2), that sovereign power may be exercised directly or through the people’s democratically elected representatives. When it comes to the exercise of such power through the said representatives, it is important to note that under Article 1(3) the peoples’ representatives only exercise a “delegated” function. In other words, the Members of Parliament only exercise delegated authority. Whereas the people can exercise their sovereign power directly, when it comes to the exercise of legislative power their participation therein directly is limited and highly restricted hence the role of a

Member of Parliament cannot be underestimated. The people cannot for example participate in and influence debates in the National Assembly and they cannot vote on matters affecting them.

55. The role of the National Assembly where the *ex parte* applicant sits is outlined in Article 95 of the Constitution as follows:

**(1) The National Assembly represents the people of the constituencies and special interests in the National Assembly.**

**(2) The National Assembly deliberates on and resolves issues of concern to the people.**

**(3) The National Assembly enacts legislation in accordance with Part 4 of this Chapter.**

**(4) The National Assembly—**

**(a) determines the allocation of national revenue between the levels of government, as provided in Part 4 of Chapter Twelve;**

**(b) appropriates funds for expenditure by the national government and other national State organs; and**

**(c) exercises oversight over national revenue and its expenditure.**

**(5) The National Assembly—**

**(a) reviews the conduct in office of the President, the Deputy President and other State officers and initiates the process of removing them from office; and**

**(b) exercises oversight of State organs.**

**(6) The National Assembly approves declarations of war and extensions of states of emergency.**

56. Clearly therefore the role of a Member of the National Assembly are onerous. His or her role transcends his own personal interests.

57. In this case the consequences of the decision of the Speaker are that the people of Ugunja stand to be locked out from being represented and their interests articulated in the National Assembly for almost a year. They cannot for example determine the manner in which their taxes are to be expended. The necessity for representation in Parliament in matters of collection of revenue and expenditure cannot be better put than in the phrase “no taxation without representation”, phrase that reflected the resentment of American colonists at being taxed by a British Parliament to which they elected no representatives and became an anti-British slogan before the American Revolution; in full, “Taxation without representation is tyranny.” In our case Article 210(1) of the Constitution which provides that:

***No tax or licensing fee may be imposed, waived or varied except as provided by legislation.***

58. The question is then whether this Court ought to suspend the suspension of the Applicant from the National Assembly pending the hearing and determination of these proceedings or not. In other words where is higher risk of injustice? Article 124(3)(b) of the Constitution provides that the proceedings of either House are not invalid just because of the presence or participation of any person not entitled to be present at, or to participate in, the proceedings of the House. The Constitution itself therefore recognises that the participation of “a stranger” to the proceedings of the House is not of such a serious nature as to nullify the proceedings. Accordingly, even if the applicant’s application were to fail, *prima facie* his participation in the House proceedings may not likely to render the decision passed by his participation null. On the other hand if the application was to succeed and yet as a result of his lack of participation, decisions which could have possibly carried the day did not see the light of the day, the Constitution does

not provide for a cure for such scenario. In other words the success of the applicant's application would not be of any value to him or his constituents in respect of those proceedings in which he ought to have participated but did not. As held by the High Court in Kaduna in **Econet Wireless Limited vs. Econet Wireless Nigeria Ltd and Another [FHC/KD/CS/39/208]** the decision to grant a stay involves:

**“a consideration of some collateral circumstances and perhaps in some cases inherent matters which may, unless the order of stay is granted, destroy the subject matter or foist upon the Court...a situation of complete hopelessness or render nugatory any order of the...Court or paralyse in one way or the other, the exercise by the litigant of his constitutional right...or generally provide a situation in which whatever happens to the case, and in particular even if the applicant succeeds...there would be no return to the status quo.”**

59. I therefore agree that parties who have invited the Court to adjudicate on a matter which they are disputing over ought not to create a situation whereby the decision to be made by the Court would be of no use. In that event as held by the Nigerian Court of Appeal in **United Cement Company of Nigeria versus Dangote Industries Ltd & Minister of Solid Mineral Development [CA/A/165/2005]**, the Court ought to ensure that:

**“appropriate orders are made to prevent acts which will destroy the subject matter of the proceedings or foist upon the court a situation of complete helplessness or render nugatory any judgement or order.”**

60. The Respondents raised issues which go to the merits of these proceedings. Those are matters which this Court will have to investigate during the hearing of the substantive Motion. At this stage the Court's main concern is to see to it that the outcome of these proceedings, if favourable to the applicant, will not be pyrrhic.

### **Finding**

61. . Having considered the issues raised herein, it is therefore my view and I find that the applicant's application seeking that the leave granted herein ought to operate as a stay of the decision in question is merited.

### **Disposition**

62. . Accordingly, in the public interest I issue an order staying the decision made by the 2<sup>nd</sup> Respondent, the Speaker of the National Assembly, on 31<sup>st</sup> March, 2016 suspending the applicant from the remainder of the Session of the House pending the hearing and determination of these proceedings or further orders of this Court.

63. . The costs of this application will be in the cause.

64. . Orders accordingly.

**Dated at Nairobi this 4<sup>th</sup> day of July, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Oluoch and Hon. Kaluma for the applicant***

***Mr Njoroge for the Respondents***

***Cc Mwangi***