



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**PETITION NO. 299 OF 2014**

**BETWEEN**

**HON. PETER WARUTERE**

**THE COUNTY GOVERNMENT OF NAIROBI.....PETITIONERS**

**AND**

**SPEAKER COUNTY ASSEMBLY OF NAIROBI.....1<sup>st</sup> RESPONDENT**

**CLERK COUNTY ASSEMBLY OF NAIROBI.....2<sup>nd</sup> RESPONDENT**

**THE COUNTY ASSEMBLY OF NAIROBI.....3<sup>rd</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>th</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The 1<sup>st</sup> Petitioner is a member of the County Assembly of Nairobi. He was lately the chairman of the County Assembly's Committee on Trade, Tourism and Cooperative Development ("the TTC Committee"). He was impeached and subsequently removed as chairman of the TTC committee. It is such impeachment and removal that he challenges through this petition. He states that the impeachment was contrary to the rules of natural justice as well as fair administrative action. He seeks the courts intervention and asks that the impeachment be voided. He also asks for costs and other incidental reliefs.

**Background facts**

2. The factual background is largely not in contest. I may reprise the same as follows

3. In April 2013, shortly after the general elections where the 1<sup>st</sup> Petitioner had been elected as a member of the 2<sup>nd</sup> Petitioner's Assembly, the 1<sup>st</sup> Petitioner was elected as the Chairman of the TTC Committee. Then slightly over one year later in July 2014, the TTC Committee impeached the 1<sup>st</sup> Petitioner as the chair. The committee members had accused the Petitioner of misconduct. The members expressed no

confidence in the 1<sup>st</sup> Petitioner. The members deemed the 1<sup>st</sup> Petitioner unfit to chair the TTC committee. Some members prepared a notice to pass the resolution of no confidence. They held a meeting and the no confidence motion sailed through in June 2014.

4. The 1<sup>st</sup> Petitioner then quickly came to court contesting his impeachment.

### **Petitioner's case**

5. The 1<sup>st</sup> Petitioner contested the no confidence resolution and his impeachment generally. The 1<sup>st</sup> Petitioner contended that Articles 10, 35, 47, 58, 179, 181, 185 and 196 of the Constitution had been violated.

6. The 1<sup>st</sup> Petitioner contended that he was never served with a notice of the intended impeachment. Any notification, the Petitioner contended was received with only a short period to go before the motion of no-confidence was tabled and debated.

7. The 1<sup>st</sup> Petitioner also contended that he had no idea of the accusations and charges he faced and that his impeachment was simply ill-motivated and actuated by malice.

8. The 1<sup>st</sup> Petitioner further contended that he was never supplied with the motion to remove him despite his requests contrary to Article 10 and Article 35 of the Constitution. The 1<sup>st</sup> Petitioner further alleged that the Respondents had abused their powers by impeaching him.

9. The 1<sup>st</sup> Petitioner further contended that the Respondents had failed to observe the principles of natural justice by failing to accord him an opportunity to be heard and to defend himself. As the Respondents had also not given the 1<sup>st</sup> Petitioner the reason for his impeachment, the 1<sup>st</sup> Petitioner contended that the Respondents actions violated Articles 47 and 50 of the Constitution.

10. In consequence, the Petitioner asked that the process leading to his impeachment be declared unconstitutional null and void. The 1<sup>st</sup> Petitioner, additionally, sought that an order do issue by way of a writ of certiorari to quash the resolution for his removal as chairperson of the TTC Committee.

### **Respondents' case**

11. Only the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents reacted to the petition. A replying affidavit sworn by Jacob Ngwele, clerk to the County Assembly was filed on 18<sup>th</sup> July 2014 whilst a notice of grounds of opposition had been filed a day earlier.

12. Whilst admitting that a no-confidence motion was passed against the 1<sup>st</sup> Petitioner, the Respondents contended that the motion was dealt with properly so as far procedure was concerned and that as there was merit the motion duly sailed through. According to the Respondents, the Petitioner was notified of the impending impeachment and he was always aware of the motion. The Respondents contended that the 1<sup>st</sup> Petitioner's conduct was discussed and at a meeting held on 24<sup>th</sup> June 2014 a motion was debated deliberated and put to secret vote. The motion of no-confidence in the 1<sup>st</sup> Petitioner sailed through by a majority vote.

13. The Respondents denied that they had violated any provision of the Constitution or of any law.

### **Parties' arguments in court**

14. Mr. Njiiri Kariu urged the Petitioners' case while the Respondents case was argued by Ms. M. A. Abongo.

### *Petitioners' submissions*

15. The Petitioners' counsel submitted that the Respondent had failed to comply with Standing Order No. 174 of the County Assembly. Additionally, counsel stated that the motion of impeachment had absolutely no merit, coupled with all the procedural improprieties. The procedural impropriety contended the Petitioners' counsel, was that the notice of intended impeachment was not served upon the 1<sup>st</sup> Petitioner and further that the Respondents never obtained the requisite number of members to call upon the clerk to convene a meeting pursuant to Standing Order No. 174 (2) of the County Assembly.

16. On the merits of impeachment, Mr. Kariu submitted that the 1<sup>st</sup> Petitioner had been accused of misconducting himself by distributing bread in and around the chamber and not conducting the committee's business yet the evidence tabled showed that the 1<sup>st</sup> Petitioner had actually been attending to the TTC Committee's business including chairing meetings. Counsel insisted that the Motion for impeachment lacked the requisite merit and was baseless.

### **Respondents' submissions**

17. Ms. Abongo commenced her submissions by stating that the entire impeachment process was perfectly procedural and merited. Counsel stated that the 1<sup>st</sup> Petitioner was always aware of the intended motion and the scheduled meetings. Counsel referred the court to minutes of the TTC Committee's meetings which were attended by the 1<sup>st</sup> Petitioner and where his conduct was discussed. Counsel pointed out that the Motion had been tabled and passed pursuant to Standing Order No. 174 of the County Assembly.

18. Ms Abongo additionally submitted that the petition had been overtaken by events as a new chairman had on 3<sup>rd</sup> July 2014 been elected by the TTC Committee. Counsel urged that the Petition be dismissed with costs.

### **Discussions and determination**

19. It would be important to point out from the outset that the 1<sup>st</sup> Petitioner is a member of the County Assembly. In contest is the 1<sup>st</sup> Petitioner's removal as a chairman of one of the County Assembly's Committees. The 1<sup>st</sup> Petitioner is not and was not and, indeed, cannot be a member of the County Assembly. The Constitution, under Article 179(2)(b), expressly prohibits members of a county assembly from being appointed to the County executive committee, which exercises the executive authority of the County. Pursuant to Article 185(3), the County Assembly, and by extension its committee, exercises oversight over the county executive committee or other executive organs of the county. Consequently, references by the Petitioner in his pleading as well as submissions to Articles 179(6), 183 and 185 of the Constitution in misplaced in so far as the Articles relate to the county executive committee.

20. I would also quickly point out that I was and have been unable to discern the relevance of Article 35 of the Constitution to these proceedings generally and to the 1<sup>st</sup> Petitioner's case in particular. Article 35 guarantees citizen the right of access to information held by the State and also by any other person where the citizen requires full information for the exercise or protection or enforcement of any right or fundamental freedom.

21. The pleadings by the 1<sup>st</sup> Petitioner in this regard were scanty. There was no clarity or precision with regard to the information sought and who was holding the information. There was also no clarity or precision on whether the 1<sup>st</sup> Petitioner, who is a citizen, had demanded the information. I would on that basis of want of reasonably precise pleadings, state that the 1<sup>st</sup> Petitioner's allegations of violation of Article 35 rights fail.

22. If I understood the 1<sup>st</sup> Petitioner well, the contention was that the Respondents denied him access to information as to the charges the 1<sup>st</sup> Petitioner faced on his impeachment. It was stated by the Petitioner that the Respondents did not timeously avail to the 1<sup>st</sup> Petitioner a letter containing the grounds upon

which the 1<sup>st</sup> Petitioner was to be subjected to impeachment proceedings. Consequently, it was further contended that this amounted to a violation of the 1<sup>st</sup> Petitioner's right to information as guaranteed under Article 35 of the Constitution. This contention cannot be acceded to. It appears more of a generalized collegial windfall.

23. The Constitution under Articles 49 and 50(2) provide for information to be availed to arrested persons and accused persons at various states. An arrested or accused person who has been denied information should not quickly rush to court under Article 35. The same would apply in the instant case.

24. The 1<sup>st</sup> Petitioner is challenging a decision making process. He has his alleged that his right to natural justice has been violated. Article 47 of the Constitution which has subsumed the principles of natural justice demands of administrative as well as quasi-judicial decision makers the need to extend fair procedures to persons to be affected by their decisions. Fair procedures include notice of hearing as well as details of the charges to be faced or answered. Information as to the charge, reasons for the proposed action as well as materials and evidence to be relied upon in making a decision fall all within the narrow realm of fair administrative action information (Article 47). Such information should not be roped under Article 35 of the Constitution. It is not the general and generic information in the form of records held by a public entity or a private body anticipated under Article 35.

25. I come to the basic conclusion that the 1<sup>st</sup> Petitioner's quarrel was with the manner in which the impeachment proceedings were conducted. Of course, the ultimate decision to impeach him has also been questioned.

26. Consequently, I would frame two basic issues for determination. First, was the 1<sup>st</sup> Petitioner's right to fair administrative action under Article 47 of the Constitution violated? To this is a corollary question as to whether a fair hearing was extended to the 1<sup>st</sup> Petitioner. Secondly, was the decision to impeach the 1<sup>st</sup> Petitioner merited?

27. The action and decision taken by the Respondents (save the 4<sup>th</sup> Respondent) was the impeachment and removal of the 1<sup>st</sup> Petitioner as the Chairperson of the TTC Committee. Like all other committees of the 3<sup>rd</sup> Respondent, the chairman of the TTC Committee is elected by the Committee members. The chairman is also susceptible to impeachment and removal by the same members.

28. Standing Order No. 174 of the County Assembly of Nairobi allows a vote of no confidence in the chairperson or vice-chairperson of a committee of the Assembly. Standing Order No. 174(1) provides as follows;

***Vote of no confidence in the chairperson or vice chairperson***

***(1) A committee may by a resolution supported by a majority of its members, resolve that it has no confidence in the chairperson or vice-chairperson and a member designated by the committee for that purpose shall thereupon report the resolution to the Liaison Committee which shall, as soon as it is practicable, direct the Clerk to conduct an election for the chairperson or vice-chairperson as the case may be in accordance with Standing Order No 160 (Conduct of election)***

29. According to the 1<sup>st</sup> Petitioner, the Respondents did not comply with the provisions of Standing Order No. 174 before it even proceeded with the impeachment hearing. The 1<sup>st</sup> Petitioner also contended that the entire process was not procedurally fair. The Petitioner further faulted the decision to impeach him contending that it lacked any merit.

30. The requirement of procedural fairness in decision – making is now a constitutional prerequisite. It matters not that there is no express requirement for procedural fairness. The supreme law transcends all other would be processes. Thus when a decision is to be made which affects any person's right interest or fundamental freedom, the decision maker must act expeditiously, efficiently, lawfully, reasonably and

procedurally fair. Article 47 of the Constitution is explicit that:

***“(1) Every person has the right to administrative action that is, expeditious, efficient, lawful, reasonable and procedurally fair.***

***(2) if a right or fundamental freedom of a person has been or is likely to be adversely affected by an administrative action, the person has right to be given written reasons for the action.***

***(3) Parliament shall enact legislation to give effect to the rights in clause (1) and the legislation shall –***

***a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and***

***b) promote efficient administration.”***

31. Thus in **Judicial service Commission vs. Mbalu Mutava & Another [2015]eKLR** the Court of Appeal stated as follows:

***“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed”***

32. I have no doubt that the Respondents in proceeding with the impeachment proceedings were under a compulsion to act lawfully and also be procedurally fair besides being reasonable. The 1<sup>st</sup> Petitioner contends that the Respondents acted unlawfully and were not procedurally fair and neither were they reasonable in their decision.

33. The Standing Orders of the Nairobi City County Assembly were adopted on 30 April, 2013. The Standing Orders bind the County Assembly as well as all its members. It binds all the County committees as well. Standing order 174 is no exception.

34. According to the 1<sup>st</sup> Petitioner, the process of his impeachment was a flop from the get go. The 1<sup>st</sup> Petitioner contends that there was not a majority of members of the committee to back the notice of impeachment before it was forwarded to the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Petitioner states that only seven members backed and signed the notice, yet they should have been nine to constitute a simple majority. The Respondents state that nine members signed the notice.

35. I have reviewed the notice dated 11 June 2014. It was signed by nine members. One of the signatures appears to have been appended on the point where the member’s Ward ought to have been stated. This, in my view, was not fatal. I state so with the knowledge that the format of the notice is not a prescribed one. What matters is whether the members have signed the notice. Stating the relevant constituency Ward is of little or no relevance given that some members are nominated and do not have any particular Wards ascribed to them. I am satisfied that the core requirement under Standing Order No. 174 that the notice be signed by a majority of the committee members was met. The committee had a membership of seventeen, a simple majority would be nine. Mr. Wilfred Odalo, a committee member, signed the notice twice but only one signature should be taken into consideration.

36. Secondly, the 1<sup>st</sup> Petitioner also stated that an aspect of the Standing Order No 174 had also not been

complied with. He stated that he was never notified. The Respondents retort that service was effected. An appropriate affidavit of service has been availed to establish service and rebut the 1<sup>st</sup> Petitioner's allegations of non-service.

37. The affidavit of service reveals that the notice was served upon the 1<sup>st</sup> Petitioner on 17 June 2014. The deponent also states that service was effected in the presence of a third party who is named. The 1<sup>st</sup> Petitioner has however contested the service. The contest was not through a further affidavit but through counsels' submissions where the 1<sup>st</sup> Petitioner states that at the time of the alleged service he was out of the country, in Tanzania. In the petition lodged in the court on 2<sup>nd</sup> July, 2014, the 1<sup>st</sup> Petitioner however admits that he "*received the notice on 17<sup>th</sup> June 2014 when he reported to work at about 2:00p.m.*"

38. Standing order No. 174(4) does not provide for personal service. It is adequate if the notice is delivered to the recipients. It provides as follows:

***(4) A notice under paragraph (2) shall be deemed to have been given upon delivery to the chairperson's or the vice-chairperson's official email address and by delivery of the notice to the office of the chairperson or vice-chairperson, as the case may be.***

39. The 1<sup>st</sup> Petitioner by one breath through his counsel says he was out of the country and by another admits having received the notice. The Petitioner did not however avail any evidence or documents to show that he was out of the country apart from the submission made by the Petitioner's counsel, which cannot constitute evidence. Even where a court has directed a constitutional petition to be heard and determined by way of written submissions under Rule 20 of the Constitution of Kenya( Protection of Rights and Fundamental Freedoms)Practice and Procedure Rules 2013, it is still for the parties where any fact is in dispute to place the evidence before the court. This cannot however be done through submissions, as written or oral submissions by Counsel as well as pleadings can never constitute evidence: see **Daniel Toroitich Arap Moi & Another vs. Stephen Muriithi & Another [2014]eKLR** where the Court of Appeal made it clear that submissions cannot take the place of evidence.

40. I am satisfied that the notice of the intended impeachment was served upon the 1<sup>st</sup> Petitioner as stated by the Respondents. The 1<sup>st</sup> Petitioner was aware of the intended action.

41. I now come to the question whether there was procedural impropriety allegedly due to the notice period being too short as stated by the 1<sup>st</sup> Petitioner.

42. The purpose of a notification before any intended action or decision is to enable a party to prepare his case or defence well. The notice period will consequently depend on the circumstances of each case. The evidence before the court through minutes of meetings of the TTC committee reveals that the 1<sup>st</sup> Petitioner was aware of the impending motion of no-confidence. At a meeting held on 12<sup>th</sup> June 2014 which was chaired by the Petitioner, the issue was raised. Then as I have already found, a notice was then served upon the Petitioner on 17<sup>th</sup> June 2014. The notice expressed the wish of some members to move a no-confidence motion. A meeting to discuss the motion was then held one week later. The minutes were not contested.

43. I tend to agree with the Respondents that the notice period sufficed in the circumstances of this case. The 1<sup>st</sup> Petitioner was aware of the charges he faced. He defended himself. He was as far as the notice period was concerned treated fairly in the circumstances of the case noting that the committee was already operational and had to determine the issue of their chairman soonest.

44. I return the verdict that there was no procedural impropriety in the manner the impeachment proceedings from inception to determination, were conducted. In the case of **Pastoli vs. Kabale District Local Government Council & 8 others [2008] 2 EA 300, 301** the court stated that;

***"Procedural impropriety is when there is a failure to act fairly on the part of the decision making***

***authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislature instruments by which such authority exercises jurisdiction to make a decision.”***

45. In the instant case, I have found that the TTC Committee as well as the clerk followed the prescribed procedural under Standing Order 174 in giving notice and opportunity to the 1<sup>st</sup> Petitioner to be heard on the motion to impeach him. The rules of natural justice were also observed and, indeed, none has been shown to have been disregarded.

46. I now come to the more difficult question as to the merit of the decision to impeach the Petitioner.

47. The 1<sup>st</sup> Petitioner also challenged his impeachment on the basis that it was not merited. From the minutes of the proceedings as well as the pleadings filed herein, the Petitioner appears not to challenge the reasons advanced for his removal. The Petitioner however states that they did not warrant his removal.

48. I would start by pointing out that the motion for a no-confidence vote was lodged on the basis that the 1<sup>st</sup> Petitioner had misconducted himself and abandoned his duties as the TTC committee chairperson. The accusations levelled against the petition appear in the minutes of 24<sup>th</sup> June 2014. The accusations read as follows;

*a. Deserting the Assembly to join in the ensuing fights that had disrupted seamless transaction of business of the House on 5<sup>th</sup> June 2014.*

*b. Crossing the floor and physically engaging in a tussle with one Hon. Catherine Okoth, a member of the County Assembly.*

*c. Taunting members of the party allied to the CORD coalition instead of exemplifying impartiality to lead by example as the chairman of the committee as provided vide the Standing Order No. 161.*

*d. Participating in carrying of bread in the assembly and within its precincts.*

49. It is apparent from the record (minutes of 12<sup>th</sup> June 2014) that there had been skirmishes during the meeting of the full committee of the County Assembly held on 5<sup>th</sup> June 2014. Members of rival political parties had been engaged in physical fracas. It was not a committee meeting. Some of the TTC committee members however felt slighted by the actions of the 1<sup>st</sup> Petitioner whom they accused of misconduct. The 1<sup>st</sup> Petitioner conduct was first discussed at a meeting by the TTC committee held on 12 June 2014. Again it was discussed in another committee meeting held on 24<sup>th</sup> June 2014. On both occasions the 1<sup>st</sup> Petitioner was present. In the latter meeting the 1<sup>st</sup> Petitioner defended himself against the accusations. Whilst not offering any apologies, the Petitioner contended that the accusation did not amount to a misconduct. The Petitioner explained further that he had only sought to protect the speaker from the chaos of 5<sup>th</sup> June 2014. The committee members voted and by a simple majority of 9 votes against 8, the 1<sup>st</sup> Petitioner was impeached and a resolution removing from office passed.

50. This factual position is not contested. It is not contended that all the accusations were proven. What is at contest is whether they amount to misconduct to have merited the Petitioner's impeachment through a no-confidence note.

51. Standing order 174 of the County Assembly does not detail any grounds upon which a vote of no confidence may be passed. A simple majority vote will suffice for the impeachment motion to get the nod. It however does not mean that even a meritless or groundless motion must sail through. There has to be a good ground for a vote of no confidence to sail through. The decision must be rational and

reasonable. Even though the court will appreciate and respect the power granted to the committee members to impeach their chairman and vice-chairman, the court will where appropriate intervene when such power is being abused. A good illustration of abuse is where the power is exercised capriciously or whimsically.

52. I would quickly add that I do not subscribe to the school of thought that generally the court ought to close its eyes to the issue of merit of any decision and that what happens in the county Assembly or its committees must not be questioned: See also **Mumo Matemu vs. Trusted Society of Human Rights Alliances & Others [2014] eKLR**. In **Mumo Matemu vs. Trusted Society of Human Rights and 2 others** (supra) it was stated that when a court examines the constitutionality of any action, the court will not be sitting on appeal over the opinion of the relevant organ but only examining whether relevant material and vital aspects having a nexus to constitutional and legislative purposes were taken into account in the actual process.

53. I would subscribe to a similar view and so hold that in cases of impeachment of elected officials, the court must make a consideration on a case by case basis whether or not to conduct a merit review and where appropriate and even where the process is found to have been sound, to ensure justice. This will include where the decision is obviously not proportionate or runs contrary to any legitimate expectation or is illegal or is unreasonable. It is thus with little wonder that in **Martin Nyaga Wambora & 3 Others vs. Speaker of the Senate and 6 others Civil Appeal No 21 of 2014 [2015] eKLR** the Court of Appeal stated clearly that in appropriate instances a court may go beyond its supervisory role and vet the facts or merits of the decision. So stated the court:

***“It is incumbent upon the high court to determine if the facts in support of the charges ....meet and prove the threshold...”***

54. The threshold in the instant case has not been set.

55. Standing Order No. 174 of the County Assembly does not lay down what conduct on the part of the chairperson or vice-chairperson ought to prompt an impeachment. The guidance in my view should however be that it ought to be conduct that is unacceptable and objectionable. It ought to be conduct which as was stated in the Nigerian case of **Hon. Muyiwa Inakoju & Others vs. Hon. Abraham Adeleke SC 272 of 2006 (unreported)**, is “*deplorable, disgusting, shocking, [and] outrageous.*” In short, it must be serious, substantive and weighty enough with a nexus to the office of the chairperson or vice-chairperson.

56. I however hasten to add that not all conduct that annoy and test the patience of the members of the county assembly amount to misconduct as to warrant an impeachment. If that was the case then the idea of free speech in the Assembly and the appurtenant immunity would be grossly eroded. To warrant an impeachment the reason or ground ought to be sound.

57. Given the circumstances of this case, I see no need for the court to go beyond its supervisory role and review the merits of the decision. It would be unnecessary to check and counter-check if the charges were wholly substantiated. The Petitioner admitted the charges which included distributing bread in the Assembly. The TTC Committee in undertaking the impeachment process did not step beyond limit. There was no illegality in the process. There was no illegality in the decision as the committee members could by a majority vote pass such an impeachment motion. In the circumstances, the court need not step in to review the conduct whether it met the threshold. In such a case, as was held in **Smith vs. Mukasa [1990] LRC 87**, the court must not intervene.

58. The process and the decision must be left to be. It would be more appropriate to do the same in the instant case.

## **Conclusion**

59. I have come to conclusion that the impeachment process was procedurally fair and the Standing

Orders were adhered to with the 1<sup>st</sup> Petitioner being afforded a fair hearing. I have also come to the conclusion that this is not an appropriate case for the court to go beyond its supervisory role and venture into a merit review of the decision to remove the Petitioner from office as the Petitioner conceded to all the accusations made by his accusers.

60. The 1<sup>st</sup> Petitioner has failed to prove his case.

61. The result is that the Petition lacks merit and must fail.

62. The Petition is dismissed but with no order as to costs.

**Dated, signed and delivered at Nairobi this 7<sup>th</sup> day of December, 2016.**

***J.L.ONGUTO***

**JUDGE**