REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(CORAM: MWONGO, PJ; KORIR, J; AND ODUNGA, J.)

EMBU CONSTITUTIONAL PETITION NOS. 7 & 8 OF 2014 (CONSOLIDATED)

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA ART. 1, 2(1), (2) and (5), ART. 3 (1) and (2), ART. 4(2), ART. 10, ART. 19, ART.20, ART.21, ART.22(1) and (2) (b) and (c), ART. 23(1), ART.24 (1), ART.33(1)(a), ART.35, ART 38(1), ART. 47(1) and (2), ART. 48, ART.52, ART. 93 (1), ART. 96, ART.165 (3)(b) and (d) (ii), ART. 73 (1) and ART.75 (1) (c), ART. 174 (a) and (c), ART. 175. ART.181, ART. 118 (1) (b), ART. 196(1) (b), ART. 200, ART.258, ART.259 and ART.260.

AND

IN THE MATTER OF ART.1, ART.3 AND ART. 25(a) OF THE INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL RIGHTS OF 1996.

AND

IN THE MATTER OF ART.20 OF THE AFRICAN [BANJUL] CHARTER ON HUMAN AND PEOPLES' RIGHTS, ADOPTED JUNE 27, 1981.

AND

IN THE MATTER OF SECTION 2(1) (b) AND SECTION 148 OF THE PUBLIC FINANCE MANAGEMENT ACT CAP.412

IN THE MATTER OF SECTION 2(a), 3(b) AND (f) SECTION 14(1) (a) SECTION 87 OF THE COUNTY GOVERNMENT ACT CAP.17

AND

IN THE MATTER OF THE REMOVAL OF THE GOVERNOR OF EMBU COUNTY

AND

IN THE MATTER OF VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOM

BETWEEN

MARTIN NYAGA WAMBORA……..…..…….…...……...1ST PETITIONER

ANDREW IRERI NJERU…..…….……...……...….2ND PETITIONER

BEN KANYENJI……...…….….3RD PETITIONER

ALOISE VICTOR NJAGI……...…….....…..…..4TH PETITIONER

GERALD KINYUA MBOGO…….……...……...……...…….5TH PETITIONER

SIRIAKA MURINGO NJUKI..……...…….....…...6TH PETITIONER

LYDIA MBAKA NJERU ..…….…….……7TH PETITIONER

FELIX NJIRU……..…...…….…..…….…..….8TH PETITIONER

SICILI TIRA NGOCI.....….…..……..…..……...…….....……9TH PETITIONER

NAMU NDEREVA…….……...……...….……10TH PETITIONER

JAMES KARIUKI NYAGA…..…….....….……...……11TH PETITIONER

JACINTA IGOKI NYAGA……...…….12TH PETITIONER

FLORA MBURA……...……...…….……13TH PETITIONER

FRIDA WANJIRA……...…….……...…..…….....14TH PETITIONER

VERONICA KIOKO……...……...……...…….….15TH PETITIONER

ROSE MUTURI…….……...……...……...……16TH PETITIONER

MONICAH MUTURI……...……...……...…....…….…17TH PETITIONER

ALBINA WEVETI…….……...……...…….…….…18TH PETITIONER

PETER NYAGA…….……...……....……...…..…..19TH PETITIONER

GRACE WANGUI KARANJA…….……....…….....20TH PETITIONER

NANCY NDEGI……...…….…..……...…….21ST PETITIONER

JOSPINE WAMBUGI……..……...……...…..…..…..22ND PETITIONER

DOMINIC NJERU…….……...…….…..…..23RD PETITIONER

ROSEMARY MUNYAGA……..…….……...…..…..……24TH PETITIONER

JOHN NAMU…….……..…….…..…..….25TH PETITIONER

JAMES NYAGA……...…..…..……....…....…..26TH PETITIONER

AGABIO NJIRU……...……....…..……27TH PETITIONER

ERICK KINYUA…….…….……..…….....…….….28TH PETITIONER

MUTHONI MUNENE……..……..……....…….29TH PETITIONER

ALFRED NJERU…….…….....….30TH PETITIONER

IRENE MUTHONI……..……..…….....…....31ST PETITIONER

SIMON NAMU……...…….…....……32ND PETITIONER

JOHN NAMU……...……..…....……33RD PETITIONER

VERSUS

COUNTY ASSEMBLY OF EMBU……...…..…..…….....….....1ST RESPONDENT

SPEAKER OF THE COUNTY ASSEMBLY..……..…….....….2ND RESPONDENT

THE SPEAKER OF THE SENATE…..…….....…...3RD RESPONDENT

THE SENATE……...……..….……...4TH RESPONDENT

PARLIAMENTARY SERVICE COMMISSION…….....……INTERESTED PARTY

COMMISSION ON ADMINISTRATIVE JUSTICE.....…….….MICUS CURIAE

JUDGMENT

INTRODUCTION

1. The historic impeachment of the Embu County Governor, Hon. Martin Nyaga Wambora ("**The Governor**"), has been fraught with litigation at every turn. The first impeachment proceedings against the Governor occurred pursuant to a resolution for his removal in the Embu County Assembly passed on 29th January, 2014. This was swiftly followed by proceedings in the Senate, resulting in a resolution of impeachment published in *Gazette Notice number 1052* of 17th February, 2014.
2. By a judgment dated 16th April, 2014, in **Consolidated Petition No 3 of 2014 (formerly Embu Petition No 1 of 2014), Petition No 4 of 2014 (formerly Pet No 51 of 2014 (Nairobi), Judicial Review No 6 of 2014 (formerly Nairobi JR Misc. Applic No. 17 of 2014) and Misc**. **Applic No 4 of 2014,** this Court (Ong'udi, Githua and Olao, JJs.) invalidated, in entirety, the first impeachment proceedings against the Governor. He was consequently restored to office as Governor. Immediately following the judgment of the Court, a second impeachment motion against the Governor, was commenced in the County Assembly of Embu on 16th April, 2014. This was followed by a confirmatory resolution in the Senate.
3. The consolidated petitions herein were instituted in reaction to the second impeachment motion against **the Governor**. Both Petition Nos. 7 and 8 of 2014, herein, were filed together with notices of motion on 30th April 2014, at Embu under certificate of urgency. At the hearing of the certificates, Ong'udi J, recused herself and forwarded both matters to the Principal Judge. Following interlocutory hearings of the motions, Mwongo, PJ, declined to issue any orders in Petition No 7, but issued a conservatory order in Petition No 8. It is by virtue of that order that Hon. Martin Nyaga Wambora, the 1st Petitioner herein, still holds office as the Governor of Embu today. Subsequently, the two petitions were consolidated and the Chief Justice empanelled this bench to hear them on merit. It is these consolidated petitions that are for determination by this

Court.

4. The basis of the impeachment presently complained about, is a replication of the first impeachment process. The substance of the facts giving rise to the complaints allegedly occurred in 2013. The County Government of Embu had advertised tenders for the supply of maize, and had procured services to face-lift Embu stadium. According to the complaint in the County Assembly, the maize was allegedly below quality and did not germinate. Where it did grow, such growth did not exceed more than 20 percent. As for Embu Stadium, it was alleged that the amount spent on it far exceeded what had been budgeted for, and the refurbishment was unsatisfactory. The Members of the County Assembly found this inexplicable as the project had been taken over from the Ministry of Works which had done some of the works.
5. The County Assembly had on the 3rdJanuary 2014, summoned the County Secretary to appear on 6th, January 2014, before the joint committees on Agriculture, Livestock, Fisheries and Co-operatives; Infrastructure; and Youth and Sports. She was to answer queries over seeds supplied to farmers, together with clarifying issues concerning the stadium renovations. Thereafter, the County Assembly recommended her suspension to the Governor pending investigations by the Ethics and Anti-Corruption Commission. The Governor declined to act as recommended.
6. Triggered, inter alia, by the Governor's refusal to act on the County Assembly recommendation, an impeachment motion was tabled in the County Assembly on 16th January, 2014. It was premised on the grounds that the Governor's conduct amounted to gross violation of the Constitution and an abuse of office. This started off the first impeachment process, which was concluded by the Kerugoya High Court's decision, mentioned above, invalidating the impeachment, and reinstating the Governor into office.
7. Hot on the heels of the delivery of the said judgment at Kerugoya, a Notice of Motion dated 16th April, 2014 – the same date the judgment was delivered – was filed in the County Assembly of Embu. The motion was for the removal of the Governor, and was approved by the Speaker on the same day. A notice thereof was given on 22nd April 2014. The Governor was served with a notice requiring him to attend the Assembly on 29th April, 2014, to defend himself. He, however, failed to appear when the motion was due to be discussed in the County Assembly. On 29th April, 2014, an impeachment resolution was passed by the County Assembly. Communication thereof was forwarded the next day to the Senate, which went ahead with the next phase of the impeachment proceedings under its own procedures.
8. In the meantime, the Petitioners filed **Petition Nos. 5 and 6 of 2014** in the Embu High Court, seeking to stop discussion of the motion. They withdrew these soon after the County Assembly passed the resolution to impeach the Governor in the second impeachment proceedings. The details of these petitions have not been indicated.
9. After grant of leave to amend the petition, and allowing for responses, it was mutually agreed that all parties do file written submissions together with lists and copies of authorities. The oral hearing was held on 6th November, 2014.

THE PARTIES

10. The 1st Petitioner is the Governor of Embu elected pursuant to **Article 180** of the **Constitution**. He will hereinafter be referred to variously as the "**1st Petitioner"** or "**Mr Wambora**" or "**the Governor**". The 2nd-33rd Petitioners are male and female citizens, registered as voters in Embu County. They will hereinafter be referred to as "**the Petitioners**". The petitioners were represented by Mr. Paul Muite, Senior Counsel, Mr. Nyamu, Mr Ndegwa and Mr. Njoroge advocates.
11. The 1st Respondent is the County Assembly of Embu established pursuant to **Article 176(1)** of the **Constitution** and is referred to herein as '**the County Assembly'.**
12. The 2nd Respondent is the Speaker of the County Assembly of Embu ("**the Speaker"**) established pursuant to **Article 178** of the **Constitution**. The 1st and 2nd Respondents were represented by Prof. T Ojienda, Senior Counsel, Mr. Njenga and Ms. Jane Mugambi, advocates.
13. The 3rd and 4th Respondents are the Speaker of the Senate and the Senate, established under **Article 93(1)** and **Article 98(1)(e)** of the **Constitution** respectively. They neither filed any pleadings nor did they appear in these proceedings at any stage. They were unrepresented.

14. The Parliamentary Service Commission (hereinafter the '**PSC'**) was admitted as an Interested Party. It is established pursuant to **Article 127** of the **Constitution**. It was represented by Mr. Njoroge and Ms. Thanji, advocates.
15. The Commission on Administrative Justice was admitted as a friend of the Court and shall hereafter be referred to as the **'Amicus**'. It is established under **Article 59(4)** of the **Constitution** and the **Commission on Administrative Justice Act, 2011**. Its counsel on record was Mr. Chahale, advocate, who did not appear at the oral hearing.

THE AMENDED PETITION

16. In the amended petition dated 23rd May, 2014 and supported by the affidavit of **Aloise Victor Njagi** sworn on the same date, the petitioners sought the following reliefs from this Court:

> ***"a) A declaration that the Petitioners and Members of the Public are entitled the right to participate in the process of removing the Governor of Embu County from office and the same has been violated.***
>
> ***b) That the court be pleased to establish the required threshold of the members of public who should participate under Article 118(1) (b), Article 174(a) and (c) and Article 196 (1) (b).***
>
> ***c) That the honorable court do make a declaration that Public Participation is a Pre-condition to proceedings for removal of a governor under article 181 of the Constitution.***
>
> ***d) A declaration that the act of removing a County Governor is not an exclusive affair of the county assembly and the Senate.***
>
> ***e) Declaration that the resolution passed by the County Assembly on 29th April, 2014 is null and void for having been passed by the County Assembly in contravention of County Assembly of Embu Standing Order No. 86 and the Senate in toto contravention of Standing Order No. 92 of the Senate Standing orders.***
>
> ***f) Declaration that the impeachment passed by the Senate pursuant to a resolution passed by the County assembly of Embu on 29th April, 2014 is null and void.***
>
> ***g) Declaration that Section 33 of the County Government Act is unconstitutional for being in conflict with and flying over the face of Article 1, Article 2(1) and (2), Article 10, Article 118 (1)(b), Article 174 (a) and (c) and Article 196 (1) (b) for failing to allow public participation and involvement in the removal of a county Governor.***
>
> ***h) That the Honorable Court be pleased to issue an order of certiorari to remove to the High Court and quash the resolution passed by the County Assembly of Embu dated 29th April, 2014 and the Senate on the 13th May 2014 to remove (the) 1st Respondent (sic) as the Governor of Embu County.***
>
> ***i) That the Honorable Court be pleased to issue an order of certiorari to remove to the High Court and quash the resolution passed by the Senate dated 13th May, 2014 to impeach the Governor of Embu County.***
>
> ***j) A declaration that the threshold of the impeachment of a Governor as convisaged (sic) under Article 181 of the Constitution were read together with other provisions (sic).***
>
> ***k) A declaration that the Petitioners herein are entitled to the full protection of their right to information and the same right has been violated.***

l) Costs of the suit."

17. To assist the Court, the petitioners set out at Paragraph 92 of the Amended Petition, what they styled as the **"Questions for interpretation"** to be answered by the Court as the main, or part of the key issues for determination. These were set out in the Amended Petition as follows:

"92. The Petitioners proposes for a (sic) Constitutional interpretation of the following questions.

a. ***Whether the action of removing and impeaching the Embu County Governor without involving the Petitioners violates the Petitioners' rights? If so what is the expected threshold of the number of members of public who should participate in the removal process and what criteria would be applied in facilitating the public participation?***
b. ***Whether the action of removing and impeaching the Embu County Governor without involving the members of the public and the petitioners violated their sovereign power to directly participate in the removal and impeachment process?***
c. ***Whether the act of removing a County Governor ought to be an exclusive affair of the county assembly and the Senate?***
d. ***Whether the resolution passed by the County assembly on 29th April, 2014 in toto disregard of the Embu County Assembly Standing Order No. 86 Order and Senate Standing Order No. 92 is valid and capable of initiating the removal of the Governor?***
e. ***Whether if the answer to the question (d) above is in affirmative, whether the said motion can form the subject of debate in the Senate and its committee under section 33 (3) of the County Government Act No. 17 of 2012?***
f. ***Whether section 33 of the County Government Act is unconstitutional for being in conflict with and flying over the face of Article 1, Article 2 (1), (2), Article 10, Article 118 (1) (b), Article 174 (a) and (c) and Article 196 (1) (b) for failing to allow public participation and involvement in the removal of a County Governor?***
g. ***Whether the petitioners' right to information under Article 35 has been violated?***
h. ***Whether principles of natural justice have been violated by both the County Assembly and the Senate? "***

THE PETITIONERS' CASE

18. It was the Petitioners' case that the removal and impeachment of Mr. Wambora by the Respondents is inconsistent with the provisions of **Articles 1, 2(1), (2)** and **(5), 3(1), (2), 4(2), 10, 118(1)(b), 174(a)** and **(c)** and **196(1)(b)** of the **Constitution** and those rights as enshrined under the Bill of Rights; in particular **Articles 38(1)** and **35**.
19. In opening their submissions, the Petitioners questioned the propriety of the appearance of the PSC in the suit as it had not been sued. They argued that in the circumstances, there were limits to its participation in the proceedings.
20. The Petitioners' opposition to the inclusion of the PSC in these proceedings was also based on the fact that the Senate had not entered appearance in the proceedings. It was their submission that the Constitution establishes the PSC with responsibility for matters under **Article 127(6)** of the **Constitution**. As such, the actual legislative functions of the Senate are not part of the work of the PSC. Thus, the Senate should have been the proper party appearing and not the PSC.
21. The Petitioners also argued that the petition was necessitated by the injustices meted on the Governor. Counsel stated that the impeachment proceeded despite there being no nexus between the alleged violations complained of and the Governor's specific actions or conduct. It was the Petitioners' submission that the Governor is not the accounting officer for the County under either **Article 226** of the **Constitution** or **Section 149** of the **Public Finance and Management Act, 2012** or the **Public Procurement and Disposal Act, 2005.**
22. Counsel pointed out that the High Court in **Martin Nyaga Wambora & 4 Others v Speaker of the Senate & 6 others, [2014] eKLR (Kerugoya, Petition No. 3 of 2014) (**hereinafter **"Wambora 1"),** made a finding that in order to remove the Governor from office, there has to be a nexus between the Governor and the conduct complained of. The Petitioners noted that the Court also found that there has to be gross violation of the Constitution or other written law by the

Governor. It was their submission that the Court held that it was for this Court to make the decision on whether the alleged conduct was a gross violation of the Constitution.

23. The Petitioners submitted that the basis for the charges against the Governor was tenders issued by officers of the County; that the Governor had no role in procurement and tendering issues; that there were specific officers of the County who are vested with the responsibility and legal obligation to handle procurement and related matters as accounting officers; that there was no basis in law for his removal since in any event investigations into the procurements had not found him liable; and consequently, that the threshold required for his impeachment had not been achieved.
24. With regard to the criteria and threshold for removal of the Governor, the Petitoners invited the Court to consider the Court of Appeal decision in **Martin Nyaga Wambora & 3 Others v Speaker of the Senate & 6 Others [2014] eKLR (Nyeri, Civil Appeal No. 21 of 2014) (**hereinafter **the "Wambora 1 Appeal")**. The Court there held, Counsel submitted, that there must be proof of personal wrong-doing by the Governor. It was counsel's further submission that the seriousness with which impeachment is treated in law is exemplified by the fact that grounds for removal of a Governor under **Article 181** of the **Constitution** is in *pari materia* with the criteria for the removal by impeachment of the President under **Article 145** of the **Constitution**. The allegations with which the Governor was charged were not serious in those terms.
25. It was submitted for the Petitioners that what is *'gross violation'* amounts to a serious crime against the law, and is an issue of law for determination by the Court. Such serious crime must be clearly demonstrated. It was counsel's submission that the Court of Appeal in the ***Wambora 1 Appeal*** defined '*gross violation*' to include proof of the personal involvement of the Governor in the subject matter of the charge.
26. Counsel faulted the High Court in ***Wambora 1*** for not making a determination on the question whether there was a nexus in the acts alleged to have been committed and the involvement of the Governor. The 1st Petitioner's case was that he was not involved in the tendering and procurement process, as there are specific officers who deal with such aspects as provided under **section 149** of the **Public Finance and Management Act.** It was contended that the person who should have been summoned and charged was the accounting officer or the County Secretary, who are the responsible officers. The Court was also told that investigations pertaining to the issue of the seedlings and the stadium were carried out, and he was not found culpable.
27. The Petitioners asserted the High Court's jurisdiction to interfere with the actions of the County Assembly and Senate. They submitted that although the Court of Appeal in ***Wambora 1 Appeal*** held, under the core function test, that no organ should interfere with the functions of the other, the High Court as regards supervisory jurisdiction, derives its mandate from **Article 165 (3)** and **Article 165(6)**. Thus, it was submitted that the removal of a Governor is a political as well as a quasi-judicial process. Accordingly, the petitioners argued, where the High Court exercises its supervisory jurisdiction, it cannot be said to be interfering with other organs under the separation of powers prism. It was contended that supervisory jurisdiction is exclusive to the High Court and when exercised, it does not amount to interference with other state organs.
28. On public participation, it was the Petitioners' contention that they were entitled to fully participate in the removal and subsequent impeachment of the Governor by virtue of **Articles 1(2)** and **10** of the **Constitution**. In particular, it was contended that the removal and impeachment of the Governor amounts to "any other business" of the county assembly as envisaged under Article **196(1)(b)** of the **Constitution**. Further, that under **Article 174(a)** and **(c),** of the **Constitution**, in terms of the promotion of the objects of devolution, accountable exercise of power and enhancing self-governance and participation of the people in the exercise of state power, the Petitioners were entitled to directly participate in the respondents' business, whatever the nature of such business.
29. It was submitted that the right to public participation consists of at least two elements: First, a general right to participate in public affairs, including engaging in public debates and dialogue with elected representatives at public hearings, which necessarily demands that citizens have the essential information and effective opportunity to exercise the right to public participation. Secondly, it involves the more specific right to vote or to be elected.
30. It was argued that the level of public participation expected is that set out in the case of **Robert N. Gakuru & Others v The Governor Kiambu County Petition No. 532 of 2013.** In that case, Odunga, J. stated that county assemblies are obliged in enacting legislation to ensure that the spirit

of public participation is attained both quantitatively and qualitatively, and ought to take all reasonable measures to ensure that as many of their constituents are aware of the intention to pass legislation.

31. It was also submitted that the evidence submitted by the 1st Respondent showing that a committee had previously gone round talking to farmers, amounted to no more than a mere investigation. At that point, the impeachment process had not commenced, and the committee's actions did not amount to public participation in the impeachment process itself.
32. The Petitioners submitted that as no affidavit had been filed to show that there was public participation of the people of Embu County, the exercise fell afoul of the principles of good governance. Counsel cited the case of **Doctors for Life International v The Speaker of the National Assembly & Others (CCT 12/05) [2006] ZACC 11; 2006 (12) BCLR 1399(CC); 2006 (6) SA 416(CC) (17 August 2006)** in support of the necessity of public participation.
33. It was also averred that lack of public participation infringed the Petitioners' civil and political rights under **Articles 1, 3** and **25 (a)** of the **International Convention on Civil and Political Rights** and **Article 20** of the **African [Banjul] Charter on Human and Peoples' Rights.**
34. Additionally, the Petitioners submitted that **section 33** of the **County Governments Acts**, **2012,** (hereinafter referred to as the Act) which sets out the procedure for the removal of a governor by the Senate and County Assembly, was unconstitutional. It was argued that the provision is in conflict with **Article 1, Article 2 (1), (2), Article 10, Article 118 (1) (b), Article 174 (a)** and **(c)** and **Article 196 (1) (b)** of the **Constitution.**
35. The Petitioners asserted that **Section 33 of the Act**:

"…lacks an integral part of the letter and spirit of the Constitution";

and that the cited Articles of the Constitution create:

"…an obligation and duty on the part of the senate and the county assembly to facilitate public participation and involvement in the legislative and other business that fundamentally affect their socio, economic or political affairs".

36. It was the petitioners' case the said **Section 33**, as enacted, denies them the right to participate in matters pertaining to the removal of the Governor. As such the Petitioners' sought a declaration that **section 33** of the Act is unconstitutional.
37. On the right to information, it was the petitioners' case that according to **Article 35** of the **Constitution**, they are entitled to access information relating to the running of the affairs of the 1st Respondent and held by the state regarding the impeachment, which information should have been widely published. This right was violated by the County Assembly, which did not avail such access. It was counsel's submission that the state must publish and publicize any information affecting the nation. This, it was submitted, must be done through a recognized instrument such as the Kenya Gazette. The Petitioners' contention was that the mere fixing of notices on the notice board was insufficient and did not amount to publication.
38. The Petitioners contended that during the second impeachment process, there was bias. This was argued to be based on two facts: The first was that the Speaker of the County Assembly was facing contempt proceedings at the time of approving the motion for removal of the Governor and was thus biased. The second was that during that impeachment process before the Senate, the Special Committee constituted comprised of the same members as had sat in the first impeachment process. This, it was argued, was unfair and unreasonable since those very members had in the earlier impeachment proceedings found the Governor liable. It was urged that this contravened **Article 47** of the **Constitution**. Further, that the principle of *nemo judex in causa sua* is applicable where there is a real likelihood of bias. The Petitioners contended that, bias was clearly manifested in the Senate report which was not distinct from the one made in the earlier impeachment proceedings. Counsel cited **Halsbury's laws of England 4th Edition pages 86 to 90** on the issue of bias.
39. For all these reasons the Court was urged to nullify all the proceedings for removal of Mr. Wambora from office as Governor of Embu County.
40. It was contended that the proceedings before the County Assembly were conducted in

contravention of the *sub judice* rule since there were court proceedings relating to the issue before the said Assembly

THE RESPONDENTS' CASE

41. Counsel, for the 1st and 2nd Respondents, relied on the affidavit of Hon. Justus Kariuki Mate, the Speaker of the County Assembly of Embu, who is also the 2nd Respondent herein. Deposed on 3rd June, 2014, on his own behalf and on behalf of the 1st Respondent, the affidavit outlined the constitutional and statutory foundation of the County Assembly of Embu, and how its membership is constituted. He pointed out that the Speaker is an *ex officio* member of the County Assembly.
42. The deponent further averred that the role of the County Assembly included exercising an oversight role over the County Executive and any other County executive organs. The object was to ensure there was accountability and transparency in the execution of the functions of the County executive and in the application of the resources of the County Government. He outlined the functions of the Speaker of the County Assembly under **Article 178 of the Constitution** as essentially to preside over the sitting of the County Assembly and to facilitate the orderly and effective sitting of the County Assembly of Embu.
43. The Respondents noted that the roles of the members of a County Assembly are set out under the provisions of the **Act**, which include the following:-

> ***"a) Maintain close contact with the electorate and consult them on issues before or under discussion in the County Assembly.***
>
> ***b) Present views, opinions and proposals of the electorate to the County Assembly.***
>
> ***c) Provide a linkage between the County Assembly and the electorate on public service delivery."***

44. The Speaker highlighted provisions that enjoin the County Assembly to consider matters of accountability and transparency of the County Government; the proper application of County resources for the better welfare and provision of the electorate at the grass roots level; and to take appropriate action to ensure that the resources available to the people were applied optimally and transparently. In realising these provisions, he stated, the County Assembly is provided with various powers in law through which it exercises its oversight authority over the County executive and the various organs and offices in the County Government structure which included:-

> ***"i. Approval of nominees for appointment to County public offices as may be provided in the County Government Act.***
>
> ***ii. Approval of the budget and the expenditure of the County Government as provided under the provisions of section 8(c) of the County Government Act.***
>
> ***iii. Approval of borrowing by the County Government as provided under section 8 (d) of the County Government Act.***
>
> ***iv. Approval of County development planning***
>
> ***v. Approve the establishment or abolition of the offices in the County public services as provided under section 62 (2) of the Act***
>
> ***vi. Approving County Executive members*.*"***

45. In his affidavit, the Speaker averred that the County Assembly, in its oversight role, is given power in law to remove various officers within the County government structure. These included powers for:

"a) Removal of speaker under section 11 of the County Government Act

b) Removal of members of the executive committee under section 40 of the Act

c) Removal of the governor and Deputy Governor under Article 181 of the Constitution as read together with section 33 of the Act."

46. According to him, the County Assembly is mandated in law to establish committees for such general or special purposes as it considers fit and necessary for the efficient execution of its constitutional mandate. In so doing, the County Assembly of Embu has constituted, among others, a Committee for Agriculture, Fisheries, Livestock and Co-operatives as provided for under **Standing Order 191(5) of the Embu County Assembly** for the following purposes:-

"a) To investigate, inquire into and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the departments.

b). To study and review all the County legislations referred to it.

c). To study the program and policy objectives of the departments and the effectiveness of the implementation.

d). To investigate and inquire into all matters relating to the departments as it may deem necessary and may be referred to them by the County Assembly

e). To vet and report on all the appointments where the Constitution or any law requires the County Assembly to approve.

f). To make reports and recommendations to the County Assembly as often as possible including the recommendation of proposed legislation."

47. The Speaker averred that a first motion of impeachment was filed on 16th January, 2014, which process had proceeded through the Senate, and an impeachment decision was passed. However, the impeachment had subsequently been nullified by the High Court.
48. Consequently, the process of removal of the Governor was again commenced on 16th April 2014, when he received a new Notice of Motion for the removal of the Governor from office. After confirming that there was no pending suit on the matter and that there was no order issued by the Court restraining the County Assembly from being seized of the motion, he approved the motion. Notice of the Motion, he said, was presented to the Assembly by the mover, **Hon. Ibrahim Swaleh,** on the 22nd April 2014.
49. He averred that, applying the guidance of this Court in its judgment in ***Wambora 1****(supra),* he directed that a notice of the motion be served on the Governor for his attendance on the 29th April, 2014, when the motion was to be moved. However, when the motion was served on him, the Governor made efforts to have the matter amicably settled, and there was extensive discussion of it in public fora and the media. Despite the 1st Petitioner's efforts to settle the impeachment amicably, the motion was moved on 29th April 2014 before the Assembly where the 1st petitioner was called upon to respond to the allegations levelled against him.
50. According to the deposition, the Governor failed to appear before the Assembly and instead filed Embu High Court **Petition No. 5 of 2014 Hon. Martin Nyaga Wambora v The County Assembly of Embu and Others** seeking interim orders to stop the County Assembly from deliberating on the Motion. This time the Court did not grant any conservatory orders and consequently, the suit together with Embu High Court **Petition No. 6 of 2014** which had been filed by the 2nd Petitioner and others, were withdrawn.
51. The deponent further asserted that **Petitions Nos. 5** and **6** were filed with the sole intention of pre-empting and frustrating the debate on the removal motion before the County Assembly, and that when they did not yield any conservatory orders as intended, the petitioners withdrew the

petitions. The Motion at the County Assembly was passed and the decision communicated to the Senate. Subsequently, the Senate constituted a special committee to hear the charges against the 1st Petitioner; that a hearing was conducted on 11th May 2014; that parties appeared in the company of their advocates; and that after the hearing, the Senate found that three of the charges against the 1st Petitioner had been substantiated and on 13th May 2014, by a near unanimous vote, the Senate proceeded to remove him from office by way of impeachment.

52. With regard to the complaint that the Governor was not procedurally removed, the Respondents contended that this petition should be dismissed as unmeritorious for the reason that the petitioners failed to demonstrate that there was any breach of the procedure in respect of the removal of the Governor by way of impeachment. The petition, they argued, had been brought by way of collateral attack to the findings against the Senate. They asserted that the Governor was twice afforded the opportunity to raise issues in his defence against the charges at the County Assembly of Embu on 29th April 2014, and before the select committee of the Senate on 11th May, 2014. On both occasions, however, he failed to appear either by himself or to lead witnesses to refute the allegations made against him. The County Assembly of Embu and the Senate were both guided by the decision of this Court in ***Wambora 1*** with regard to the applicable procedure and the role of the Assembly and the Senate in their mandates.
53. The Respondents asserted that this petition was effectively an appeal from the decision of the County Assembly of Embu and the Senate, which this Court had no jurisdiction to determine. He added that the threshold required for removal of a Governor was expressed by the number of votes required to pass such a resolution, which included a two-thirds majority at the Assembly and a majority at the Senate.
54. The Respondents submitted that the threshold required in the removal of the Governor under **Article 181** of the **Constitution** was realised since the charges were based on well documented evidence that was availed to both to the County Assembly and the Senate; that the Governor's written responses to the charges were found to be inadequate; and that there was no jurisdiction for appeal to this Court against a finding of the County Assembly and Senate under the doctrine of separation of powers; that the findings of the County Assembly and Senate were final and binding upon all parties herein; and that there was no basis for the Court to interfere.
55. On this submission, the Respondents relied on the case of **Doctors For Life** (*supra*) which discusses the law on separation of powers, where it was held, *inter alia*, that:

> "…***what the court should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligations that parliament is required to fulfil in respect of the passage of laws, on one hand and respect which they are required to accord to other branches required by the principle of separation of powers."***

56. It was the Respondents' submission that the County Assembly and the Senate by virtue of their composition and political orientation are the best placed persons to make a proper decision or judgment with regard to the applicable standard and threshold for the removal of a governor. They argued that impeachment by its nature is a quasi-judicial and political question. This explained the rationale as to why the mandate to exercise that jurisdiction was properly vested in the County Assembly and Senate. As such, the Court has no jurisdiction to take out a merit review on such a process by seeking to replace the opinion of those two organs with its own.
57. The Respondents further argued that the Governor had failed to demonstrate any breach of his constitutional rights in the process aforesaid, having been given notice to defend himself; that he failed to offer any substantive defence to the charges levelled against him; and that the rights pleaded by the petitioners in the present petition were not absolute rights since they were limited by the very Constitution that provides for them – including providing for the removal of a governor.
58. It was urged that **Article 181 of the Constitution** sat on the premise that even where a County Governor is validly elected under the provisions of **Article 180** and is seized of a bona fide right under **Article 38** to hold a political office to which he has been elected, he could be validly removed from office for such reasons as are set out under **Article181.** As such, the operation of **Article 181 of the Constitution** and statute could not by itself without proof of a breach of due

process, constitute an affront to the constitutional rights of the 1st Petitioner.

59. The Respondents stated that the finding of the special committee of the Senate was that the Governor had clearly failed in the discharge of his functions and in the role of the office of the Governor, resulting to the loss of public funds. This loss occasioned disenfranchisement, disadvantage, inconvenience, injustice and inequity upon the people of the Embu County.

60. On the Petitioners' allegations that the Senate select committee was tainted with bias, the Respondents argued that this was an unfounded and baseless claim. They noted that the court in ***Wambora 1*** did not make a finding that the select committee had misconducted itself in any way in the hearing of the matter; and that the Senate is established under **Article 93 of the Constitution** with a fixed membership set out under **Article 98** for a fixed five year term. Thus, in the absence of concrete evidence on bias in the present case, there would be no basis to impute bias on the part of the Senate merely on the ground that the Governor was required to attend before the same members as those of the earlier select committee.

61. Further, the Respondents pointed out that the mandate of a select committee appointed under **section 33(3)(b) of the Act** is purely investigative, and does not make the decision as to whether or not a governor should be removed from office. That is a reserve of the Senate in plenary under **section 33(7)**. The Senate is enjoined under **section 33(6)(b)** to hear a governor even where a select committee finds that the charges have been substantiated. It is from this hearing that the Senate makes the determination by a vote on whether such a governor should cease to hold office.

62. On public participation, the Respondents argued that the complaints giving rise to the investigations and subsequent charges against the Governor were made by the public to their elected representatives. In turn, the representatives raised complaints in the County Assembly, prompting investigations against the Governor in respect of mis-procurements by his office. For example, with regard to the bad maize seed, extensive field research had been carried out with input from the farmers who were affected, and findings were made and considered. Consequently, findings were made by both the Assembly and the Senate that the seeds were unlawfully procured to the detriment of the farmers.

63. It was contended that the petitioners were not an objective public, but a diehard group of ardent supporters of the Governor who expressed clear bias against the Assembly and its officials in their petition. This explained why they constantly alleged that there was no public participation in the removal process. The Respondents further argued that the County Assembly, in fulfilment of the statutory requirement to involve the public in its business, developed infrastructure for public participation in July 2013. This included the establishment of public contact offices in each of the County Assembly wards and the recruitment of ward staff to facilitate public participation. Thus the County Assembly, through the office of the Clerk, disseminated notices of all its business to the public through public notice boards, religious institutions and the ward office infrastructure developed for that purpose.

64. The Respondents argued that the requirement for public participation under **Article 196** of the **Constitution** does not create an obligation for establishment of a referendum of all citizens on all business of the Assembly. All that is necessary is that there is appropriate notice and a forum in which the public could participate in the business of the Assembly. Given that the notices by the Assembly had from time to time received various responses and input from the public – which information was maintained by the office of the Clerk – that amounted to public participation.

65. It was submitted that this Court, in examining whether or not there was public participation, has to consider the nature of the business and the context under which a specific undertaking is done. The Respondents cited the case of **Commission for implementation of the Constitution v Parliament of Kenya and another [2013] eKLR** where the court held that:

> ***"The National Assembly has a broad measure of discretion in how to achieve the object of public participation. How this is effected will vary from case to case but it must be clear that a reasonable level of participation has been afforded to the public".***

66. They also cited the case of **Doctors for Life International v The speaker of the National Assembly and Others,** applied with approval in **Robert N. Gakuru & Others v Governor, Kiambu County [2014] eKLR** where the court held that:

"Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement. This discretion will apply both in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes".

67. The Respondents contended that there was reasonable public participation sufficient to satisfy the requirement of **Article 10** as read together with **Article 196** of the **Constitution,** adding that the process of removal of a governor was a quasi-judicial and political process; that when an Assembly sits as a quasi-judicial body it exercises its Constitutional and Statutory mandate donated by **Article 181** of the **Constitution** and **Section 33** of the Act**;** and that it acts like a court receiving a complaint, examining facts, considering the defence offered by the person against whom the charges are brought and making a determination on whether or not the charges had been established.
68. It was also argued that the nature and extent of public participation in legislation and in removal of a governor would differ for the reason that the impact of promulgated legislation is long-term and affects everyone subject to it; in respect of a governor's removal the impact is less felt and concerns mostly the governance aspect. It was further submitted that in its legislative function the Assembly is enjoined to be more of a consultative forum receiving proposals and facilitating public participation. When it is performing a quasi-judicial and political function such as removal which concerns examining and investigating a complaint or charges and making a determination thereon, it acts more like a court.
69. It was submitted by the Respondents that **Section 33** of the **Act** provides the procedural framework within which a removal charge under **Article 181** of the **Constitution** is predicated. Accordingly, in considering the question whether or not there was public participation in the process, one must consider how such participation would find expression within the framework of this law. In the context of a charge against a governor under **section 33** of the Act the nature and form of public participation required is specific to the various processes set out under the law that provide for the hearing, investigation and determination of the charges in issue. It was further submitted that on 29th April 2014, the County Assembly did in fact hold the debate in public as there was a public gallery register maintained by the Clerk of the Assembly and Senate as enjoined by **Article 196** of the **Constitution.**
70. On the issue of *sub-judice*, the Respondents faulted the Petitioners in their claim that the motion to impeach the governor was passed when **Embu Petition Nos 5 and 6 of 2014** had not been determined by the Court. They referred to **section 6** of the **Civil Procedure Act** and **Standing Order No. 86** of the Embu County Assembly which is *pari materia* **standing order 92 of the Senate Standing Orders** that provide for the principle of *sub judice*. They argued that **Section 6** of the **Civil Procedure Act** provided that for a matter to be *sub judice* it had to be considered against a previously instituted suit between the same parties on the same issues. In this case, however, the Motion before the Assembly was filed on the 16th April 2014 and notice given on 22nd April 2014, whereas **Embu Petition Nos 5 and 6 of 2014** were filed on the 28thApril 2014. Accordingly, when the motion before the Assembly was instituted there was no pending matter in Court in relation to the issues covered by the motion.
71. In this case, the petitioners had not demonstrated that Embu **Petition Nos**. **5** and **6 of 2014**, were active, or had been set down for trial, as no notice or proceedings had been exhibited to show that the matters were under active prosecution. Further, no orders of the court had been produced.
72. The Respondents also pointed out that under **Standing Order 86(2)** of the **County Assembly of Embu Standing Orders** it is for a member alleging *sub judice* to demonstrate that the discussion of such a matter in the Assembly would prejudice its fair determination. Indeed, it is for a member, under **standing Order 86(4),** to adduce evidence to show that the matter before the house was *sub judice*. The argument as to sub-judice was available only to a member of the Assembly in the specific sitting and not to third parties who are not subject to the standing orders.
73. The respondents submitted that the petitioners had not established any basis for their claim that **section 33 of the Act** is unconstitutional. Instead, they argued that **section 33** draws its life from **Article 181** of the Constitution, the substantive basis for impeachment, and noted that **Section 33** contains the procedural basis for operationalization of **Article 181.** Thus, the provision is not

unconstitutional.

74. The Respondents relied on the case of **Walter Barasa –vs- The Cabinet Secretary Ministry of Interior and others Pet No 488 of 2013** where the Court considered the principles applicable to the question of whether or not a statute ought to be declared unconstitutional. Key among the requirements, is that the impugned section should be juxtaposed to the relevant Article, and a case made out as to how the section fails to square out with the Article. This had not been done. They therefore prayed that the petition be dismissed.

THE INTERESTED PARTY'S CASE

75. The Interested party filed its replying affidavit through **Jeremiah M Nyegenye,** the Clerk of the Senate. He stated that the orders sought by the 1st petitioner were a ploy to prevent the Senate from discussing matters arising from the decision of the County Assembly of Embu to remove him as the Governor of Embu County. He added that the orders sought infringed on the powers, privileges and immunities of Parliament as set out under **Article 117** of the **Constitution** and **sections 4** and **29 of the National Assembly (Powers and Privileges) Act Cap 6,** Laws of Kenya.
76. On the issue of public participation, the Interested Party submitted that a quasi-judicial body having the role of determining gross violation of the Constitution need not take views from the public, as this was a matter of fact and law.
77. The Interested Party concurred that **Articles 118(1)(b)** and **119(1)(b)** require Parliament and the County Assemblies to *"facilitate public participation and involvement in the legislative and other business"* of the houses, and their committees. This provision, they submitted, must be read in the light of **Article 259**, which requires that the Constitution *"shall be interpreted in a manner that promotes good governance"*. It was argued that the interpretation that would achieve this, is that the sort of public participation envisaged in proceedings for removal of a governor would be such as are open to the public so that they are aware of the charges that have been levelled against him.
78. It was also submitted that the Constitution and the Act have given a special quasi-judicial role of impeachment to the County Assemblies and the Senate comprising people who, under **Article 1(2),** exercise the sovereign power of the people as democratically elected representatives. This was strengthened by the case of **Inakoju & 17 Ors v Adeleke & 3 Ors (2007)4 NwlR (PT1025)423 S.C**. which upheld **Akintola v Aderemi All NLR 442 (1962) 2 SCNLR 139** where it was stated that the proceedings leading to removal of a governor should be available to any willing eyes, and the public can see watching from the gallery.
79. With regard to the alleged unconstitutionality of **Section 33** of the Act , the Interested Party relied on the decision of the Supreme Court of the Phillipines in **Andres Sarmiento et al v. The Treasurer of the Phillipines (GR No 125680 & 126313, September 4, 2001)** where the court stated:

> ***"….In fine, jurisprudene is replete with cases that every law has in its favour the presumption of constitutionality, and to justify its nullification, there must be a clear and unequivocal breach of the Constitution, not a doubtful and argumentative one.***
>
> ***A statute or part thereof, will be sustained unless it is plainly, obviously, palpably and manifestly in conflict with some provisions of the fundamental law"***

80. The Interested Party submitted that the petitioners had not discharged the burden of proof to establish the unconstitutionality of **Section 33 CGA**.
81. The Interested Party submitted that the proceedings taken out by the petitioners should be struck out on the ground of incompetence. It was submitted that non-joinder of the Attorney General, was a fatal breach of **Section 12** of **the Government Proceedings Act,** which requires that any proceedings by or against the Government should be instituted against by or against the Attorney General.

AMICUS CURIAE'S CASE

82. The *amicus curiae*, through counsel, submitted that they are statutorily mandated to investigate any conduct in state affairs in both the national and county governments, dealing largely with issues of administrative justice.
83. The Amicus submitted that the process of impeachment of a governor is as much a parliamentary process as it is a quasi-judicial one. As such, Parliament cannot claim exclusive jurisdiction particularly where there are allegations of violation of the Constitution or fundamental rights. It added, however, that the Court can only interfere after the parliamentary process had been concluded by considering the decision making process. Counsel submitted that interference by the Court, when the proceedings were pending before Parliament, would go against the principle of separation of powers as that would interfere with the parliamentary mandate.
84. On the threshold for the removal of a governor, it submitted that under **Article 181** of the **Constitution,** the term gross violation would depend on the facts of a case. They cited the Supreme Court of Nigeria in **Inakoju (supra)** in which the Court gave the following guidelines for determining *"gross violation"*, namely that the conduct must:-

    (a) Be serious substantial and weighty;

    (b) There must be a nexus between the governor and the alleged gross violation of the Constitution or any other written law;

    (c) The Charged framed against the governor and the particulars thereof must disclose a gross violation of the Constitution or any other written law ;

    (d) The charges as framed must state with a degree of precision the Article or even sub articles of the Constitution or the provisions of any other written law that are alleged to have been infringed.

85. Counsel noted that **Article 181** provided for "abuse of office and gross misconduct" as one of the grounds for removal. He submitted that County Assemblies, being at the infant stages of their formation, may not have the infrastructure to conduct the necessary investigation to affirm whether a governor had abused his office or power or grossly misconducted himself. Amicus was of the view that under **Article 59(4)** of the **Constitution** the Commission on Administrative Justice has power to investigate complaints of abuse of power, or of conduct in state affairs, or acts or omissions in public administration in any sphere of government that is alleged or suspected to be prejudicial or improper.
86. It was submitted that it would be proper for the County Assemblies, the Senate or National Assembly when faced with the business of impeachment of a public or state officer on the grounds of abuse of powers or office, or gross misconduct, to refer the same to the Commission on Administrative of Justice for investigations and thereafter upon receiving the resultant report from the Commission proceed with the process. This would provide the basis for proper investigations thereby allaying fears of unfairness or administrative injustice.
87. It was further submitted that in light of **Articles 35** of the **Constitution** the objective of public participation in matters of governance was a principle adopted by the Kenyan people under **Article 10** of the **Constitution.** The object was to enable the people to be involved in the decision making process. In this regard, it was argued, the state is obliged to facilitate the involvement of the people and in this instance the County Assembly was required to facilitate public involvement in the legislative and other business of the Assembly and its committees. It was further submitted that **Article 181** provided for grounds for the removal of a governor and **section 33** set out the removal procedure. It was submitted that where the law or the Constitution places a particular responsibility on a certain body, person or authority to perform that function, then it is the exclusive duty of that person, body or authority to perform that function.
88. Amicus was in agreement with the Interested Party that law places the function of the actual removal of a governor under the relevant County Assembly and the Senate. In instances where committees comprising members of the County Assembly have been formed and have inquired into certain conduct of a governor by inviting those privy to the allegations against the governor, that amounts to involving the public in the process. When the stage of conducting the actual

removal proceedings is reached, it cannot be argued that members of the public ought to be involved as this is a jurisdiction that is exclusively granted by the Constitution and the law to the County Assembly and the Senate.

89. The Amicus argued that a provision of general application such as **Article 196(1)** of the **Constitution** cannot be invoked to defeat a jurisdiction granted by dint of the Constitution to a certain person, body or authority. If it were to be construed that the general public must be involved in the actual removal proceedings then the impeachment process would be converted from a quasi-legal process to a purely political process. In such case it could not be said that good governance would be promoted. The Amicus asserted that the principle of public participation cannot be construed to mean that there must be a direct physical involvement in all instances of parliamentary and county assembly business, and each case must be construed on its own facts.

90. It was submitted that a proper interpretation of **Article 35** on the right to access information held by the state, would suggest that the state was under an obligation to provide information it held to any citizen who had sought it. This would presuppose that the individual in need of certain information would have to prompt the state to provide the same. **Article 35(3)** then provides that the state should publish and publicize any important information affecting the nation. Counsel added that as it was not in contention that the removal of a governor is one piece of information that the state ought to publish and publicize, the court should be careful to pronounce at what stage the state is obliged to publish such information.

91. The Amicus further submitted that its view was that the information should be published at the end of the process so that the end result is communicated to the public. Counsel pointed out that the other reason for the duty to publicize information for the public was to ensure that the public are duly informed, and not so that the public may participate in those particular proceedings. One of the objectives of **Article 35(3),** it was contended, was to keep the public informed of happenings that affect the nation, so as to avoid a situation where decisions that affect the nation are made without such information being relayed to the public.

92. Finally, it was submitted that the removal of the 1st Petitioner was in the public domain through all forms of media as well as publication in public places. It therefore cannot be said that the matter had not come to the attention of the public. However, Counsel was clear that the duty of the state to publish and publicize information was neither diminished nor ousted, and that such failure in the situation such as the present case where the matter is actually in the public domain, could not alone invalidate the impeachment process unless for other reasons.

ISSUES FOR DETERMINATION

93. Having carefully listened to the parties and having considered the pleadings, we think that the issues which this Court is required to determine are as follows:

1. Whether the petition is competent; which incorporates the issues as to:

a) Non-Joinder of the Attorney General.

b) The role of the Parliamentary Service Commission in the Petition.

c) Whether the Petition was brought in good faith.

2. Whether the proceedings to impeach the Governor in both the County Assembly and the Senate were *sub-judice.*

3. Whether Section 33 of the County Governments Act, 2012 is unconstitutional for being in contravention of Article 1, Article 2(1) and (2), Article 10, Article 118(1)(b); Article 174(a) and (c) and Article 196(1) (b).

4. What is the process and procedure for removal of a Governor?

5. Whether the Rules of Natural Justice were complied with in the removal of the

Governor.

6. Whether the removal of the Governor requires public participation, and if so; whether there was public participation; and whether Article 35 of the Constitution on access to information was complied with.

7. To what extent, if any, can the Court intervene in the removal process?

8. Who should bear the costs of the petition?

ANALYSIS AND DETERMINATION

94. We now deal with each of the issues identified for determination.

Whether the Petition is competent

95. The first issue raised in these proceedings touching on the competency of the consolidated petition is the failure to join the Attorney General to these proceedings.
96. The Petitioners also took issue with the participation of the PSC in these proceedings. According to them, **Article 127** of the **Constitution** establishes the said Commission and at **clause (6)** thereof provides that it is responsible for the efficient functioning of Parliament. However the actual legislative work is not part of the functions of the Commission. It was therefore submitted that if the Senate and the Speaker intend to urge a particular point they ought to appear before the Court and ought not to do so through a proxy or through the backdoor. According to the Petitioners the issues in this petition are not issues for the Commission.
97. On the part of the PSC, it was argued that **Article 127(6)(d)** and **(e)** of the **Constitution** provides that the PSC promotes parliamentary democracy and that the Court had already ordered the joinder of the Commission which was rightly assisting the Court. It was submitted that in parliamentary democracy the 1st and 2nd Respondents enjoy the powers, privileges and immunities under **Article 117** and **195** of the **Constitution** as read with the **National Assembly (Powers and Privileges) Act** Cap 6 the Laws of Kenya which apply by virtue of **section 7** of the **Sixth Schedule** to the **Constitution**. It was therefore submitted that pursuant to **sections 4 and 29** of the **National Assembly (Powers and Privileges) Act**, since the Speaker of the Senate and the Senate enjoy immunities from legal proceedings, they ought not to have been parties to these proceedings. Instead, the proceedings ought to have been served on the Attorney General by virtue of **section 12** of the **Government Proceedings Act** since impeachment is a quasi-judicial process.
98. In rejoinder, the Petitioners submitted that no body, including Parliament, is immune from judicial scrutiny and that immunity and privilege only apply to lawful actions since it is the Constitution which is supreme. It was contended that **Article 117** has nothing to do with the issues which fall for determination. Since the replying affidavit was sworn on behalf of the Interested Party the Court was urged to find that the complaints raised by the petitioners had not been defended by the Speaker and the Senate hence they had no answer thereto.

Non joinder of the Attorney General

99. **Article 156(4)(b)** of the **Constitution** provides that the Attorney-General shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings. **Section 12(1)** of the **Government Proceedings Act, Cap 40 Laws of Kenya** on the other hand provides that *"subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be*".
100. However the preamble to the **Government Proceedings Act**, provides that it is:

"An Act of Parliament to state the law relating to the civil liabilities and rights of the Government and to civil proceedings by and against the Government; to state the law relating to the civil liabilities of persons other than the Government in certain cases

involving the affairs or property of the Government; and for purposes incidental to and connected with those matters". (Emphasis added)

101. It follows that **Government Proceedings Act** only applies to civil proceedings by and against the Government. It does not apply to proceedings which are not of a civil nature such as criminal proceedings. In our view matters relating to the interpretation of the Constitution are not civil matters as contemplated under the **Government Proceedings Act** but fall under their own class. In other words they are proceedings *sui generis*. To illustrate this it was held in **Masefield Trading (K) Limited vs. Rushmore Company Limited and Another [2007] 2 EA 288**, that:

> ***"The rights and duties of individuals are regulated by private law. The Constitution on the other hand is an instrument of government, which contains rules about the Government of the country…The Constitution is the supreme law of the land and the Constitution and the rules made thereunder do not provide for serving the notices that are required to be issued to the Attorney General prior to filing suits or applications in which there are allegations of breach of constitutional provisions. Once a party alleges violation of their fundamental rights, the court will hear them and the requirement of notices to the Attorney General like in civil cases does not arise."***

102. Similarly, in **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443** it was held:

> ***"The respondents have contended that this matter is time barred under the Limitation of Actions Act Cap 22. However the Act does not apply to judicial review which is sui generis. "Suit" as defined in s 2 of the Civil Procedure Act means "all civil proceedings commenced in any manner, prescribed" "Action" under the Interpretation and General Provisions Act Cap 2 means "all civil proceedings in a Court and includes any suit as defined in s 2 of the Civil Procedure Act." Since the actions set out in Part II of the Limitation of Actions Act Cap 22 of the Laws of Kenya must have the same meaning as set out above, the Act has no application to judicial review matters and constitutional matters."***

See also **Kibunja vs. Attorney General & 12 Others (No. 2) [2002] 2 KLR 6.**

103. **Article 156(4)(b)** of the **Constitution** on the other hand, in our view, only deals with legal representation of the national government in Court or in any other legal proceedings to which the national government is a party. It neither deals with criminal proceedings nor does it require that the Attorney General be a party to the proceedings.
104. **Rule 2** of **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**, otherwise known as the **Mutunga Rules**, defines "***respondent***" as meaning "***a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom***." It follows that the said **Rules** contemplate that a person other than the Attorney General may be cited as a Respondent.
105. It is therefore our view that the failure to bring these proceedings against the Attorney General is not fatal to these proceedings.

The Role of the PSC

106. Another argument by the Petitioners was that the PSC ought not to have been a party to these proceedings. In our view nothing turns on this objection as the said Commission was joined to these proceedings by an order of the Court which order has not been challenged either by review or on appeal and has not been set aside. In addition, it was not contended that the presence of the PSC had caused any prejudice to any party.
107. With respect to the immunities of the Senate and the Speaker of the Senate, **section 4** of the **National Assembly (Powers and Privileges) Act** is clear that it applies only to criminal and civil proceedings, and as we have held hereinabove, matters relating to interpretation and application of

the Constitution are neither criminal nor civil. To hold otherwise would amount to elevating the Senate and the Speaker above the Constitution. It must always be remembered that under **Articles 1 and 2** of the **Constitution** all sovereign power belongs to the people of Kenya and is to be exercised only in accordance with the Constitution; that the Constitution is the supreme law of the Republic and binds all persons and all State organs; that no person may claim or exercise State authority except as authorised under the Constitution; and that any act or omission in contravention of the Constitution is invalid.

108. The institution constitutionally mandated to hear and determine any question respecting the interpretation of the Constitution ***including*** the question whether anything said to be done under the authority of the Constitution or if any law is inconsistent with, or in contravention of, the Constitution is the High Court under **Article 165** of the **Constitution**. It therefore follows that no State Organ can hold itself to be immune to proceedings challenging the constitutionality of its actions and that includes Parliament and its speakers. In other words immunity only applies to situations where the particular entity is acting constitutionally. The position was restated by the Supreme Court of India in **State of Rajasthan vs. Union of India [(1977) 3 SCC 592]** where it was observed that:

"This Court has never abandoned its constitutional function as the final Judge of constitutionality of all acts purported to be done under the authority of the Constitution. It has not refused to determine questions either of fact or of law so long as it has found itself possessed of power to do it and the cause of justice to be capable of being vindicated by its actions. But, it cannot assume unto itself powers the Constitution lodges elsewhere or undertake tasks entrusted by the Constitution to other departments of State which may be better equipped to perform them. The scrupulously discharged duties of all guardians of the Constitution include the duty not to transgress the limitations of their own constitutionally circumscribed powers by trespassing into what is properly the domain of other constitutional organs. Questions of political wisdom or executive policy only could not be subjected to judicial control. No doubt executive policy must also be subordinated to constitutionally sanctioned purposes. It has its sphere and limitations. But, so long as it operates within that sphere, its operations are immune from judicial interference. This is also a part of the doctrine of a rough separation of powers under the Supremacy of the Constitution repeatedly propounded by this Court and to which the Court unswervingly adheres even when its views differ or change on the correct interpretation of a particular constitutional provision."

109. It was argued that this petition was brought in bad faith based on the fact that the petitioners failed to give particulars of and demonstrate any breach of their constitutional rights, and the petition is largely speculative and intended to achieve a political end being to safeguard and secure the 1st Petitioner's position as the Governor, Embu County. According to the Respondents, the petitioners before the court are not litigating *bona fide,* but are urging for a position that will secure and safeguard the position of the 1st Petitioner as governor of Embu County. The 2nd Petitioner, it was contended, was actively involved in meetings held to urge the respondents not to proceed with the motion and when that failed they collected signatures petitioning the President for the suspension of the county under **Article 192** of the **Constitution**. The 2nd - 33rd Petitioners, it was contended are therefore not persons claiming that they were not involved in the process but political supporters of the 1st Petitioner who have taken the position that if he cannot be governor, then the County should be suspended. The respondents relied on **Mumo Matemu vs. Trusted Society of Human Rights [2013] eKLR,** where it was held:

> ***"However, we must hasten to add that the person who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice. Where a person acts for personal gain or private profit or out of political motivation or other oblique consideration, the court should not allow itself to be seized at the instance of such person and must reject their application at the threshold."***

110. Even if it were correct that the action of the other petitioners apart from the 1st Petitioner are

mala fides, that would not necessarily dispose of this Petition since the 1st Petitioner's petition would remain intact. Article 3(1) of the Constitution enjoins every person to respect, uphold and defend the Constitution. **Article 258** entitles any person to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention and such actions may be instituted by a person acting as a member of, or in the interest of, a group or class of persons or by a person acting in the public interest. It has not been contended that the petitioners are not entitled to bring these proceedings. The mere fact that the success of these proceedings may result in safeguarding and securing the 1st Petitioner's position as the Governor, Embu County, does not disentitle them from instituting these proceedings. In our view, in the current constitutional dispensation, the Courts must resist the temptation to try and contain constitutional challenges in a straight-jacket and must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them. In our view the petitioners cannot be faulted for bringing these proceedings simply because they are perceived supporters of the 1st Petitioner. Whereas we agree with the decision in ***Mumo Matemu Case*** (supra), we are of the view that the mere fact that attempts were made at resolving the impasse through alternative avenues does not necessarily connote bad faith.

Whether the impeachment proceedings were sub-judice.

111. It was claimed that the proceedings to impeach the 1st Petitioner were *sub judice*. *Sub judice* is defined in ***Blacks Law Dictionary*** 9th Edn. page 1562 as *"under a judge; Before the Court or judge for determination."* For proceedings to be said to be *sub judice*, the same must be pending before the court or a judge for determination. The *sub judice* doctrine applies to situations where there are pending proceedings in a Court of law. A person cannot institute proceedings in a Court of law with a view to stalling an ongoing legal process by relying on the *sub judice* principle. For *sub judice* to apply, the proceedings sought to be stayed ought to have been the ones subsequently commenced and not *vice versa*. In this case, Embu **Petition Nos. 5 and 6 of 2014** were filed on the 28thApril 2014, whereas the Motion before the County Assembly was filed on the 16th April 2014 and notice given on 22nd April 2014. Therefore when the motion was instituted there was no pending matter in court in relation to the issues herein. The two petitions filed in court were withdrawn and discontinued immediately after the motion was passed on the 29th April 2014. In our view the *sub judice* rule cannot in the circumstances of this case be successfully invoked.

Whether Section 33 of the County Governments Act, 2012, is unconstitutional

112. It was asserted by the petitioners that **Section 33** of the Act is in violation of the Constitution. Specifically, it was alleged that the section contravened **Article 181,** upon which it derives its existence, and **Articles 1; 2(1),(2); 10; 118(1)(b); 174(a) and (c**) and **Article 196(1)(b)**.
113. In the petitioners' pleadings, the question raised for determination at paragraph 92(f) and also the declaration sought in that regard in prayer (g), both assert the unconstitutionality of **Section 33** of the **Act** in the following limited and narrow manner, namely, that it is unconstitutional:

> ***"…for failing to allow public participation and involvement in the removal of a county Governor"***

114. This narrow approach in respect of the scope of unconstitutionality of the section notwithstanding, we have taken the view that the section should be interrogated in a broad sense as to whether it is unconstitutional in any event, as against the cited provisions of the Constitution.
115. There was no contest as to whether this Court has jurisdiction to determine the constitutionality of a provision of a statute. For good measure, we will state such jurisdiction at the outset. It is contained in **Article 165(3)(d)(i)** of the Constitution which provides that the High Court has:

> ***"(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; "

116. It is now accepted that in interrogating the constitutionality of a provision of a statute or a statute, the starting point is statutory interpretation. There are several principles which have been developed over the years that must be taken into account.

117. The first guiding principle is that a statute is presumed to be constitutional unless the contrary is proved. This was reiterated in the case of **Wyclife Gisebe Nyakina & another v Institute of Human Resource Management & another {Petition No 450 of 2013} [2014] eKLR** where Mumbi Ngugi, J, quoting **Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers v Kenya Revenue Authority & Others High Court Petition No. 544 of 2013** stated as follows:

> ***"[25].The principles upon which the court determines the constitutionality of statutes are now well settled. <u>It is well established that every statute enjoys a presumption of constitutionality and the court is entitled to presume that the legislature acted in a constitutional and fair manner unless the contrary is proved by the petitioner.</u> In considering whether an enactment is unconstitutional, the court must look at the character of the legislation as a whole, its purpose and objects and effect of its provisions (see Ndyanabo v Attorney General of Tanzania (2001) 2 EA 485, Joseph Kimani and Others v Attorney General and Others Mombasa Petition No. 669 of 2009 [2010] eKLR, Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 (Unreported)), Samuel G. Momanyi v Attorney General and Another Nairobi Petition No. 341 of 2011 (Unreported)".*** (Emphasis added)

118. The second guiding principle is that the courts are concerned only with the power to enact statutes not with their wisdom. This was well stated in the dissenting decision in **U.S v Butler, 297 U.S. 1 [1936],** in the U.S Supreme Court where it was observed that:

> ***"The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that <u>courts are concerned only with the power to enact statutes, not with their wisdom.</u> The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our sense of self-restraint. <u>For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government."</u>*** [Emphasis supplied]

119. Clearly therefore, the primary role of the Court is to interpret the law, as enacted by Parliament, and that entails giving effect to the legislative intent of Parliament. Thus, the Court is not concerned with *'what ought to be'* but with *'what is'*, as exemplified in the Indian Case of **Re Application by Bahadur [1986] LRC 545 (Const.),** where it was stated:

> ***"I would only emphasize that one should not start by assuming that what Parliament has done in a lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown…"***

120. In this regard, the Court in **Republic vs The Council of Legal Education [2007] e KLR,** cited with approval the Indian Case of **Maharashtra State Board of Secondary and Higher Secondary Education and Another v Kurmarstheth [1985] LRC** where it had been found as follows:

> ***"…It is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provision of the statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or***

regulations for the efficacious achievement of the objects and purposes of the Act. It is not for the court to examine the merits or demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulations fall within the scope of the regulation…"

121. The third guiding principle is that the purpose and effect of the statute or provision impugned must be considered in determining the constitutionality or otherwise of a statute. This test was well stated by the Supreme Court of Canada in the case of **R. v Big M Drug Mart Ltd., [1985] 1 S.C.R. 295,** in the following words:

"I cannot agree. In my view, both <u>purpose and effect</u> are relevant in determining constitutionality; either unconstitutional purpose or unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realised through the impact produced with the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's objects and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus, its validity." *(Emphasis added)*

122. The fourth guiding principle is that the court must look at the character of the legislation as a whole.

123. The fifth guiding principle is that the provision or statute alleged to contravene the constitution must be juxtaposed against the provision(s) of the constitution alleged to be impugned to determine the variance. That is to say, a comparative enquiry must be done to determine whether the statutory provision squares out with the constitutional provision. In the majority decision of the US Supreme Court in **U.S v Butler, 297 U.S. 1 [1936],** it was held that:

"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 added]

124. Finally, within that exercise of seeking to determine the constitutionality of any statutory provision, there is the overarching constitutional obligation to

interpret the constitution itself, in accordance with the constitutional construction imperatives stated in **Article 259** as follows:

"259. (1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance

……

(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking…."

125.The constitutional basis and rationale for the promulgation of the **Act** can be found embedded in the provisions of the Constitution. **Article 200** commands Parliament to enact legislation to provide for all matters relating to **Chapter 8** on Devolution. Specifically, Parliament is mandated to make provision as follows at **Article 200(2) (c)** and **(d)**:

"(2) In particular, provision may be made with respect to –

(a)…

(b)…

(c) the manner of election or appointment of persons to, and their removal from, offices in county governments, including the qualifications of voters and candidates;

(d) the procedure of assemblies and executive committees including the chairing and frequency of meetings, quorums and voting…"

126.With regard to the removal of a governor, **Article 181(1)** sets out the grounds for his or her removal, and **Article 181(2)**, requires Parliament to make legislation for removal procedures of a governor in the following terms:

"(2) Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds specified in clause (1).

127.**Article 261**, the **Sixth Schedule Section 3(b)** and the **Fifth Schedule** to the **Constitution** all stipulate the time frame within which Parliament must enact legislation on various aspects of devolved government. With regard to legislation on removal of a governor under **Chapter Eleven**, the constitutionally specified time frame is indicated as eighteen months from the effective date of the Constitution.

128.The constitutional mandate and time frame for enacting the said legislation is exceedingly stringent. So stringent, indeed, that **Article 261** of the **Constitution** provides for extension of the time frame only once by Parliament – pursuant to a two thirds majority – and the extension cannot be for a period of more than one year. Further, a failure to enact such legislation within the stipulated time frame may result in issuance of a declaratory order of the High Court specifying the period within which Parliament must enact the legislation and provide a progress report to the Chief Justice. Under **Article 261(7)**, should Parliament fail to comply with such an order of the Court, the Chief Justice shall advice the President to disssolve Parliament, and on such advice the President shall so dissolve Parliament.

129.Pursuant to the constitutional mandate, the objects and purposes of the **Act** are set out in **Section 3(a),** where the relevant object is stated as follows :

"Provide for matters necessary or convenient to give effect to Chapter Eleven of the Constitution pursuant to Article 200 of the Constitution''

130.In **Doctor's for Life International v The Speaker National Assembly and Others 9CCT12/05) [2006] ZACC II** the Constitutional Court of South Africa noted as follows regarding the court's role in maintaining the delicate balance between its role as the guardian and enforcer of constitutional values and principles on the one hand, and deference to legislative and executive functions, on the other:

"What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligation that Parliament is required to fulfill in respect of the passage of laws, on the one hand, and the

respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand." *(at Para. 70)*

131. The obligation on Parliament to enact law to operationalise the removal procedures of governors was stringent and a constitutional necessity. As may be clearly seen from the above discussion, **the Act** and, in particular, **Section 33** thereof are intended to operationalise **Chapter 11** of the **Constitution** on Devolution, and **Article 181** of the constitution, respectively. The purpose of both the Act and of **Section 33** therefore have a sound constitutional underpinning, under stringent time demands.
132. The purpose of **Section 33** of the **Act** is to give effect to **Article 181** of the Constitution whose purpose is to foster accountable exercise of power through, *inter alia*, the removal of unfit public officials who have been elected by the people to govern at the county level. The power of self governance and participation of the people provided for by **Article 174 (c)** of the **Constitution** must be read together with **Article 1** to the effect that people may also indirectly exercise sovereignty. This they do through electing their representatives at the county level who make decisions on their behalf. To this extent the mandate of impeachment has been placed on the peoples' representatives. Thus, to the textual approach of interpreting the Constitution which asks the question: where does the power of impeachment lie? The answer is that it lies with the County Assembly and the Senate.
133. As far as the effect of **Section 33** is concerned, therefore, its effect is to ensure that the objectives of **Article 181** are met in accordance with the Constitution, and to this extent we find that **Section 33** is *intra vires* the **Constitution**.
134. What now remains is to answer the question whether **Section 33 of the Act** contravenes the various constitutional provisions cited by the petitioners. For this, we must employ the principle of juxtaposing the section against each constitutional provision alleged to be contravened, and determine whether they *'square'* out.
135. **Section 33** of the **County Governments Act**, **2012** provides as follows :

"(1) A member of the county assembly may by notice to the speaker, supported by at least a third of all the members, move a motion for the removal of the governor under Article 181 of the Constitution.

(2) If a motion under subsection (1) is supported by at least two-thirds of all the members of the county assembly—

(a) the speaker of the county assembly shall inform the Speaker of the Senate of that resolution within two days; and

(b) the governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section.

(3) Within seven days after receiving notice of a resolution from the speaker of the county assembly—

(a) the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the governor; and

(b) the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.

(4) A special committee appointed under subsection (3) (b) shall—

(a) investigate the matter; and

(b) report to the Senate within ten days on whether it finds the particulars of the allegations against the governor to have been substantiated.

(5) The governor shall have the right to appear and be represented before the special committee during its investigations.

(6) If the special committee reports that the particulars of any allegation against the governor—

(a) have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or

(b) have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the impeachment charges.

(7) If a majority of all the members of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.

(8) If a vote in the Senate fails to result in the removal of the governor, the Speaker of the Senate shall notify the speaker of the concerned county assembly accordingly and the motion by the assembly for the removal of the governor on the same charges may only be re-introduced to the Senate on the expiry of three months from the date of such vote.

(9) The procedure for the removal of the President on grounds of incapacity under Article 144 of the Constitution shall apply, with necessary modifications, to the removal of a governor.

(10) A vacancy in the office of the governor or deputy governor arising under this section shall be filled in the manner provided for by Article 182 of the Constitution."

136.This is then juxtaposed against **Article 1** which provides :

(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.

(2) The people may exercise their sovereign power either directly or through their democratically elected representatives.

(3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—

(a) Parliament and the legislative assemblies in the county governments;

(b) the national executive and the executive structures in the county governments; and

(c) the Judiciary and independent tribunals.

(4) The sovereign power of the people is exercised at—

(a) the national level; and

(b) the county level.

137.The general complaint of the petitioners on this score was that the sovereign power of the people to participate in the removal of their popularly elected governor was denied. **Article 1(2)** is to the effect that sovereign power belongs to the people and may be exercised either directly **or** indirectly. **Article 1(3)(a)** is to the effect that the peoples' sovereign power is delegated to, among other state organs, the *''legislative assemblies in the county governments''*. Further, under **Article**

38 of the Constitution the people exercise their sovereignty directly through the political right to vote by electing their representatives through a secret ballot.

138. Reading these provisions together, there can be no doubt that the elected representatives exercise sovereignty on behalf of the people, through the principle of delegation of power to state organs. In this case, the delegation is to the legislative assembly in the county government. There is nowhere any requirement for a popular exercise of political right to vote in respect of the removal of a governor.

139. We therefore find that **Section 33** is not in any way inconsistent with **Article 1** of the **Constitution**. When they chose to invoke **Section 33** and to debate the motion on the impeachment of the Governor, and when the Senate followed suit, neither the Embu County Assembly members nor the Senate were acting in contravention of the Constitution, as **Section 33** is not unconstitutional to that extent.

140. We now juxtapose **section 33** against **Article 2(1)** and **(2)** of the Constitution. The latter provide:

> ***"(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.***
>
> ***(2) No person may claim or exercise State authority except as authorised under this Constitution"***

141. We have carefully considered **section 33** of the **Act** against the above Article, and we can find nothing either in the petitioners' arguments or in the content of the said provisions that suggests any sense of inconsistency between the two. We need say no more on this.

142. **Article 10** which is also alleged to be contravened by **Section 33** provides as follows:

> ***"10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—***
>
> ***(a) applies or interprets this Constitution;***
>
> ***(b) enacts, applies or interprets any law; or***
>
> ***(c) makes or implements public policy decisions.***
>
> ***(2) The national values and principles of governance include —***
>
> ***(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;***
>
> ***(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;***
>
> ***(c) good governance, integrity, transparency and accountability; and***
>
> ***(d) sustainable development" (emphasis added)***

143. **Section 33** has provisions for the removal of the governor, and the question is whether those provisions have the content that meets the standards required under the national values and principles of governance in **Article 10**. Two essential points that arise concern: first, the distinction between the question whether **Section 33** contains all, or only some, of the ingredients comprising the national values and principles of governance and thus whether the absence of any one or more particular components in the list in **Article 10** would thereby render the Section unconstitutional; and the second is a question of fact as to whether in the actual impeachment process, the County Assembly and the Senate complied with **Article 10**. The latter issue is not a subject of contention in this case. In **Article 10(2)** the distinctive word used in identifying the national values and principles is the word *"include"*. **Article 259(4)(b)** of the **Constitution**

provides the following interpretive assistance when that word is used:

> ***" the word 'includes' means 'includes but is not limited to' "***

144. Thus, in interpreting **Article 10** in light of **Article 259(4)(b),** it is implied that the list contained in **Article 10** is an example from an unexhausted generic categorization of the components of values and principles of good governan**ce.** Natu**r**ally, therefore, it cannot be construed that every aspect provided for under **Section 33** would, or should, be expected to contain all the unexhausted components listed as national values and principles. What is required in our view, is that for a statute or provision to be compliant with **Article 10**, it must contain a majority of, or fundamentally similar, components of the listed values and principles within the subject matter under consideration in the provision. In addition, it must not contain provisions with components contradictory to those within the generic ambit of those in the national values and principles list.
145. We now assess the subsections of **Section 33** in light of the above interpretation for compliance with **Article 10**. **Section 33 Subsection 1** concerns issuance of notice, and support of a motion by one third of the members. These comply with the rule of law and fair administrative action principles. **Subsection 2** concerns the requirement for two-thirds support of a motion, and information to the Speaker of the Senate, and the right of a governor against whom an impeachment motion is passed to continue in office pending completion of proceedings. These comply with the rule of law and notice principles, and the principle of fair administrative action and non-prejudice to a governor's rights until found culpable. **Subsection 3** concerns convening of the Senate by notice, hearing of charges, and establishment of an investigation committee. These comply with due process rights and the right to be heard by an investigating body. These comply with principles of good governance, human dignity and rule of law.
146. **Subsections 4, 5** and **6** concern investigations into the complaint, reporting back to the Senate on the substantiation or otherwise of the particulars of charges; the right of the governor to be represented and defend himself prior to a vote. These comply with due process rights, the right to be heard and be represented, fair administrative justice and good governance. **Subsections 7** and **8** concern a majority vote by members of the Senate. These comply with representative rights, good governance, rule of law and transparency and accountability principles.

Having carefully considered **Section 33** against **Article 10**, we see nothing in **Section 33** that does not square with **Article 10**. In light thereof, we are unable to find anything unconstitutional about **Section 33**.

147. We now consider **Articles 118(1)(b)**, and **196(1)(b)** of the **Constitution** which relate to the requirement for public participation in legislative and other business. The petitioners made heavy weather of these provisions, particularly **Article 196(1)(b)** relating to county assemblies. Their contention was that removal of a governor amounted to other business, and it was incumbent on the County Assembly to ensure that the petitioners, and other interested members of the public generally, were facilitated to be involved in the removal of the Governor.
148. **Article 196(1)(b)** provides as follows:

> ***"196. (1) A county assembly shall—***
>
> ***(a) …..***
>
> ***(b) facilitate public participation and involvement in the legislative and <u>other business</u> of the assembly and its committees."***

149. What amounts to public participation is dealt with elsewhere in this decision where the question whether there was public participation has been considered. Here, the only question is whether **Section 33** squares with **Article 196(1)(b)** in respect of the process of removal of a governor. **Section 33** provides for participation of members of county assemblies and senators. At the Senate there is scope for investigations on the charges levelled against the governor, which could reasonably include inviting witnesses or any other person to appear before it pursuant to the

Senate's powers under **Article 125** to call for evidence.

150. **Article 196(1)(a)**, and **(2)** provide that public participation includes: holding of county assembly business in an open manner; holding sittings in public and not excluding the public or media from any sitting except in exceptional circumstances. **Article 196(3)** requires Parliament to enact legislation, and such legislation on public participation under the Act is contained in **Part VIII, Sections 87-92** on **Citizen Participation** in the **Act**. We highlight two relevant provisions on "citizen participation" that may relate to public participation in the removal process: **Sections 87(d)** and **88** of the **Act.**

151. **Section 87(d)** requires citizen participation to be based on, *inter alia*, the principle of affording legal standing to interested or *affected* persons to appeal from, or review decisions or redress grievances. **Section 88(1)** provides citizens with the right to petition the county government as follows :

> ***'' Citizens have the right to petition the county government on any matter under the responsibility of the county government.''***

These provisions of the Act would both apply to the situation of a governor facing removal where he, or the citizens, desire to participate in the process.

152. We must also take into account and consider the nature of public participation constitutionally required in respect of recall of a member of Parliament and member of County Assembly, as compared to that constitutionally provided for removal of a governor. All are elective political offices. However, whereas the people of Kenya provided for removal by recall of a member of Parliament through involving the electorate, the people did not provide a similar requirement for removal of a governor.

153. **Article 259** of the **Constitution** provides that the constitution shall be interpreted in a manner that promotes its purposes values and principles. As such it has to be read as an integral document. In the case of **Tinyefuza vs. AG**, **Constitutional Appeal No. 1 of 1997, [1997] UGCC 3*:***

> ***"…the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution."***

154. The Court of Appeal in the case of the **Center for Rights Education and Awareness & Another v John Harun Mwau & 6 Others Civil Appeal No 74 of 2012 [2012] eKLR** reaffirmed and set out the principles of interpreting the constitution and stated thus:

> ***"These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statues which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. Lastly, although the question of the election date of the first elections has evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, has minimal role to play. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution."***

155. In light of the forgoing, we do not find **Section 33** of the **Act** to be contrary to **Article 196** of the **Constitution**, as alleged.

What Is The Process And Procedure For The Removal Of A Governor? Was It Complied With In Respect To The 1st Petitioner?

156. The devolved system of government under the Constitution, vests in the County government various powers. The Constitution under **Chapter Eleven** makes provision for Devolved Government. It, *inter alia*, makes provision for removal of a county governor. Through **Article 181(1)** provision is made for the removal from office of a county governor on any of the following grounds:

"(a) gross violation of this Constitution or any other law;

(b) where there are serious reasons for believing that the county governor has committed a crime under national or international law;

(c) abuse of office or gross misconduct; or

(d) physical or mental incapacity to perform the functions of office of county governor."

157. Through **Art 181(2)** the **Constitution** empowered Parliament to enact legislation providing for the procedure for the removal of a county governor on any of the grounds mentioned in **clause (1).** In compliance with **Article 181(2)** of the **Constitution,** Parliament provided through **Section 33** of the **Act** the procedure for the removal of a county governor. We have reproduced elsewhere in this judgement section 33 of the **Act**.

158. Specific to the 1st Petitioner is **Part 8** of the **County Assembly of Embu Standing Orders** which under **Standing Order No. 61** makes provision for removal of a governor by impeachment as follows:

"(1) Before giving notice of Motion under, section 33 of the County Governments Act, No. 17 of 2012 the member shall deliver to the Clerk a copy of the proposed Motion in writing stating the grounds and particulars upon which the proposal is made, for the impeachment of the Governor on the ground of gross violation of a provision of the Constitution or of any other law; where there are serious reasons for believing that the Governor has committed a crime under national or international law; or for gross misconduct or abuse of office. The notice of Motion shall be signed by the Member who affirms that the particulars of allegations contained in the motion are true to his or her own knowledge and the same verified by each of the members constituting at least a third of all the members and that the allegations therein are true of their own knowledge and belief on the basis of their reading and appreciation of information pertinent thereto and each of them sign a verification form provided by the Clerk for that purpose.

(2) The Clerk shall submit the proposed Motion to the Speaker for approval.

(3) A member who has obtained the approval of the Speaker to move a Motion under paragraph (1) shall give a seven (7) days notice calling for impeachment of the Governor.

(4) Upon the expiry of seven (7) days, after notice given, the Motion shall be placed on the Order Paper and shall be disposed of within three days; Provided that if the County Assembly is not then sitting, the Speaker shall summon the Assembly to meet on and cause the Motion to be considered at that meeting after notice has been given.

(5) When the Order for the Motion is read, the Speaker shall refuse to allow the member to move the motion, unless the Speaker is satisfied that the member is supported by at least a

third of all Members of the County Assembly to move the motion; Provided that within the seven days' notice, the Clerk shall cause to be prepared and deposited in his office a list of all Members of the County Assembly with an open space against each name for purposes of appending signatures, which list shall be entitled "SIGNATURES IN SUPPORT OF A MOTION FOR REMOVAL OF GOVERNOR BY IMPEACHMENT"

(6) Any signature appended to the list as provided under paragraph (5) shall not be withdrawn.

(7) When the Motion has been passed by two-thirds of all members of the County Assembly, the Speaker shall inform the Speaker of the Senate of that resolution within two days."

159. Through **Standing Order No. 68** of the **Senate Standing Orders** the procedure for the removal of a Governor is stated as follows:

"(1) Within seven days after receiving notice of a resolution from the speaker of a County Assembly supporting the removal of a governor of the county pursuant to Article 181 of the Constitution—

(a) the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the governor; and

(b) the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.

(2) A Special Committee appointed under subsection (2) shall—

(a) investigate the matter; and

(b) report to the Senate within ten days on whether it finds the particulars of the allegations against the governor to have been substantiated.

(3) The governor shall have the right to appear and be represented before the Special Committee during its investigations.

(4) If the special committee reports that the particulars of any allegation against the governor—

(a) have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or

(b) have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the charges.

(5) If a majority of all the county delegations of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.

(6) If a vote in the Senate fails to result in the removal of the governor, the Speaker of the Senate shall notify the Speaker of the concerned County Assembly accordingly and the motion by the assembly for the removal of the governor on the same charges may only be re-introduced to the Senate after the expiry of three months from the date of such vote."

160. Further**, Standing Order 69** on the right to be heard provides that:

"Whenever the Constitution or any written law requires the Senate to consider a petition or a proposal for the removal of a person from office, the person shall be entitled to appear before the relevant Committee of the Senate considering the matter and shall be entitled to legal representation."

161. The Court of Appeal aptly summarised the procedure for the removal of a county governor when it stated at paragraph 31 in **Wambora 1 Appeal** that:

> ***"…Section 33 of the County Governments Act provides for the procedure of removal of an erring Governor. The organ vested with the mandate at first instance to move a motion for the removal of a County Governor is the County Assembly. Neither the Courts nor the Senate have the constitutional mandate to move a motion for the removal of a County Governor. The Senate's constitutional mandate to hear charges against a Governor is activated upon receipt of a resolution of the County Assembly to remove a Governor. Upon receipt of such a resolution, the Senate shall convene a meeting to hear the charges against the Governor and may appoint a Special Committee to investigate the matter. It is our considered view that the jurisdiction and process of removal of a Governor from office is hierarchical and sequential in nature. There are three sequential steps to be followed: first is initiation of a motion to remove the Governor by a member of the County Assembly; second there is consideration of the motion and a resolution by two thirds of all members of the County Assembly and third, the Speaker of the County Assembly is to forward the County Assembly's resolution to the Senate for hearing of the charges against the Governor."***

162. The procedure for the removal of the 1st Petitioner is found in the Act and the standing orders of both the County Assembly of Embu and the Senate. The County Assembly and the Senate ought to strictly adhere to the procedure lest the removal is declared illegal for failing to comply with the law.

163. We have already set out the law governing the removal of a governor. We will now proceed to set out the events leading to the process of the removal of Mr. Wambora as Governor of Embu County. The 2nd Respondent avers that on 16th April, 2014 he received a notice of motion proposing the removal of the 1st Petitioner from office, which he approved after confirming that there was neither pending suit nor court order on the matter. It was supported by one third of the members of the County Assembly, and thus met the statutory threshold. On 22nd April, 2014 the said motion was presented to the Assembly by Hon. Ibrahim Swaleh. By a letter dated 23rd April, 2014, the 1st Petitioner was informed of the notice of motion for his removal from office by impeachment, and in the same letter he was invited to appear in person or to be represented by an advocate before the County Assembly during its plenary, on 29th April, 2014.

164. We find it important to reproduce the said letter which read as follows:

> ***"RE: NOTICE OF MOTION FOR REMOVAL OF GOVERNOR FROM OFFICE BY IMPEACHMENT.***
>
> ***I write to notify you that Members of the County Assembly gave a Notice of Motion on 22nd April 2014 seeking for removal of the Governor of Embu County by impeachment pursuant to article 181 of the Constitution of Kenya, 2010 and Section 33 of the County Government Act, 2012. The particulars of the allegations made against you are hereon attached.***
>
> ***The principles of natural justice and procedural fairness dictate that a person, who may be adversely affected by a decision, should be accorded an opportunity to be heard. In fulfillment of this principle, the House Business Committee in its sitting of 22nd April 2014 resolved the following;***
>
> ***(a) THAT, you be duly notified in writing of the notice of motion as tabled in the***

Assembly.

(b) THAT, you be invited in writing, which I hereby do, to appear in person or be represented by an advocate or yourself and advocate at the County Assembly of Embu Plenary on 29th April 2014 at 2.30p.m.

(c) THAT, you be allocated one (1) hour for your oral defense, which time you may share with your advocates on 29th April 2014.

(d) THAT, should you elect to make any written submissions to the Assembly as part of your defense, the same should be received on or before Monday 28th April 2014 at 9.00a.m. You are kindly requested to provide the Assembly with at least 35 copies of such written submissions."

The letter was signed by the Clerk of the County Assembly.

165. We were told, and this has not been controverted by the petitioners, that the 1st Petitioner neither appeared at the plenary nor filed any submissions. The Embu County Assembly Hansard that has been availed to this Court shows that the 2nd Respondent dispatched the Sergeant-at-Arms to locate the 1st Petitioner within the precincts of the Assembly but the search was futile.
166. On 29th April, 2014, the County Assembly debated the motion and 23 out of 33 members supported it. The statutory threshold of two-thirds was thus met. Following the resolution of the County Assembly, and by a letter dated 29th April, 2014, the Speaker of the County Assembly of Embu informed the Speaker of the Senate of the approval of the motion by the County Assembly pursuant to **Section 33(2)** of the **Act.**
167. Pursuant to **section 33(3)(b)** of the **Act**, the Senate then constituted a Special Committee to hear the charges against the 1st Petitioner. He appeared through counsel during the hearing on 11thMay, 2014, and raised objection to the proceedings but he was overruled. Counsel indicated to the Committee that he had no instructions to proceed beyond that point. Prior to that, the 1st Petitioner had on 10th May, 2014 responded in writing to the allegations made against him.
168. The Committee later tabled its report with a finding that the allegations had been substantiated. The majority of the members of the Senate voted in support of **The Report Of The Special Committee On The Proposed Removal From Office Of Martin Nyaga Wambora, The Governor Of Embu County'** dated 13th May, 2014 (hereinafter referred to as "**the Report"**) thus leading to the removal of the 1st Petitioner.
169. It is the 1st and 2nd Respondents' case that the Governor was twice afforded a forum; before the County Assembly on 29th April, 2014, and subsequently before the Special Committee of the Senate on 11th May, 2014, to raise his defence. However, he opted not to take advantage of these opportunities.
170. Looking at what took place prior to the ejection of the Governor, we are satisfied that the laid down procedure was followed in his removal. In fact, the petitioners have, correctly, not impugned the process and procedure followed by the Senate and the County Assembly. We have also looked at the law and we are satisfied that it provides several opportunities for a governor to be heard before being removed from office. As can be seen from **Section 33** of the Act**,** where the Senate opts for the formation of a special committee, as was done in the case of the 1st Petitioner, the governor will have an opportunity to be heard by the special committee and another opportunity to be heard by the full House, where removal has been recommended by the special committee.

Whether the Rules of Natural Justice were complied with in the removal of the Governor.

171. Related to the issue of the removal process is that of adherence to the rules of natural justice. It was argued by the petitioners that the principles of natural justice were not only available to the Governor but were also available to the other petitioners. The petitioners contended that their

rights as enshrined in **Articles 1, 2(4), 10, 19, 33(1), 35(1), 47, 118(1)(b) and 196(1)(b) of the Constitution** were violated as they were denied the opportunity of participating in the removal of the Governor. They submit that failure to effectively facilitate an inclusive and participatory process violated the rules of natural justice.

172. The petitioners argued that the fact that all members of the Special Committee that had participated in the initial removal proceedings, had also been nominated to the Special Committee that recommended the ouster of the 1st Petitioner, was in breach of the rules of natural justice. According to the petitioners, this was equivalent to allowing judges to sit on appeal over their own decision. It is their case that since the initial removal had been quashed, the members of the Special Committee were naturally offended hence the likelihood of bias. The petitioners contended that there was no way that the members of the Committee would have arrived at a different conclusion considering that they were dealing with the same charges and facts.

173. On a related issue, the petitioners asserted that the removal proceedings were tainted with bad faith on the part of the 1st and 2nd respondents. Their argument was that the motion that led to the removal of the 1st Petitioner was moved by the same member of the 1st Respondent who had moved the removal motion resulting in the initial impeachment of the Governor, which had been declared illegal by the High Court at Kerugoya. In support of their allegation of bad faith they pointed to the fact that the motion was moved on the same date the Court declared the initial removal null and void. Further, that the 2nd Respondent and the Clerk of the 1st Respondent were facing contempt of court proceedings in respect of the initial removal, and their prompt commencement of the current removal proceedings could only have been driven by bad faith.

174. The petitioners were also perturbed that the respondents did not resort to the other constitutional processes for dealing with the issue, considering that the alleged violations had even been even referred to the Ethics and Anti-Corruption Commission for investigations which were indeed on-going. To them, the 1st and 2nd respondents abused their powers by resorting to the severe remedy of removal of the Governor. From the submissions of the petitioners, we conclude that their argument is that the twin pillars of the rules of natural justice were not adhered to.

175. What then are these two pillars of the rules of natural justice? They were succinctly summarised by the learned authors of **Halisbury's Laws of England** at **page 218 (paragraph 95), Vol. 1(1)** as:

> ***"Natural justice comprises two basic rules; first that no man is to be a judge in his own cause (nemo judex in causa sua), and second that no man is to be condemned unheard (audi alteram partem). These rules are concerned with the manner in which the decision is taken rather than with whether or not the decision is correct.''***

176. Scholars have debated about the import and extent of these principles but the courts have had no problem with understanding what these rules mean. The overriding consideration is that the rules are applicable on a case by case basis. The underlying foundation of these principles is that in so far as the *audi alteram partem* rule is concerned, before a decision is taken, the person to be affected by the decision must be informed of the impending decision or action, notice of the matters to be taken into account against the person should be given, and that person must be given an opportunity to be heard. In a serious matter like the one before us, those rules must be applied without exception.

177. As for the *nemo judex in causa sua* rule, the first requirement is that no man should sit as an adjudicator in a case in which he has an interest. This is a rule that should be followed strictly, for one cannot be expected to be fair where the outcome of his decision will affect his interests. Secondly, no biased person should be allowed to sit in judgement over the fate of another. The bias could be real or perceived. What amounts to actual bias or perceived bias will be deduced from the facts of the case and the general observations on the behaviour and actions of the umpire.

178. The case of **R v London Rent Assessment Panel Committee, ex p. Metropolitan Properties Co (FGC) Ltd, [1969] 1 QB 577,** is a case that arose from the decision of a rent assessment committee. The chairman of the committee was a solicitor who lived with his father in a flat whose landlord was an associate company of the landlord involved in the case before the committee. The solicitor had also acted in the past for tenants against his father's landlord on matters similar to those in question in the case before the committee.

179. Setting the test for establishing whether there was bias Lord Denning, MR stated that;

> ***"In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was impartial as he could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit."***

180. In Kenya, administrative action that is *"expeditious, efficient, lawful, reasonable and procedurally fair"* is entrenched in **Article 47** of the **Bill of Rights**. The petitioners have cited several reasons to demonstrate that the removal of the 1st Petitioner was not fair.

181. The procedure for the removal of a governor has already been outlined. It is clear that the process starts with the issuance of a notice of motion by a member of the county assembly. Once the Speaker is satisfied that the motion is in order, the same is debated and a vote taken on it. Where two-thirds of the members of the county assembly approve the motion, the matter is escalated to the Senate for investigation of the allegations.

182. We will now examine what happened at the County Assembly in this case. There is no evidence on record to show that the Speaker manifested bias or that a bystander would have formed the opinion that he was biased. By accepting the motion, he was only doing that which the law required him to do. The role of the Speaker in the process is therefore statutory.

183. As for the mover of the motion, it is indeed true that he is the one who had moved the initial motion. There was, however, no law pointed out to us barring him from moving a similar motion the second time. Since the earlier removal had been declared null and void, **Section 33(8)** of the **Act** which bars reintroduction of a removal motion on the same grounds within three months was inapplicable. The motion was therefore properly before the floor of the Assembly and the 2nd Respondent was mandated by the law to preside over the debate of the motion.

184. The petitioners claimed that the tabling of the motion on the day the Court declared the earlier proceedings null and void was influenced by the fact that the 2nd Respondent and the Clerk were facing contempt of Court proceedings in **Wambora 1.** That indeed could be one of the reasons why the motion was moved at lightning speed.

185. This allegation calls for examination of the role of the Speaker of a County Assembly. Under **Article 177** of the **Constitution**, the Speaker of the County Assembly is an *ex officio* member of the Assembly. It is not alleged that the motion to remove the 1st Petitioner was engineered by the Speaker of the County Assembly. To the contrary, the evidence before us is that the motion was in fact initiated by Hon. **Ibrahim Swaleh** a member of the Embu County Assembly representing Kirimari Ward. In our view no nexus has been made between the contempt proceedings which were facing the Speaker and the subsequent motion to impeach the 1st Petitioner. Further the tabling of the motion could not come to the aid of the 2nd Respondent as the matter was already in the hands of the Court and the motion could not have in any way influenced the direction of the contempt of Court proceedings.

186. Moving to the question of bias on the part of the Special Committee appointed by the Senate to conduct investigations into the allegations against the Governor, we note that it is indeed true that all the members of the initial Special Committee were picked to serve in the second Special Committee that was to investigate the allegations against the Governor. This issue was debated at length by the Senate and it was decided that there was nothing wrong in allowing the same members to sit in the new Committee.

187. Although we do not find anything untoward in the filling of the Special Committee with members who had dealt with the first removal, we share the petitioners' concerns that the decision by the Senate did not give the impression that justice would be seen to have been done. We would therefore strongly advice against such course of action in future. The Court in **Wambora 1** did indeed declare the first removal null and void, but that order did not disabuse the minds of the members of the Special Committee of the information gathered during the first hearing. Human beings are prone to prejudices and biases and any independent observer may easily reach the

conclusion that the 1st Petitioner was not treated fairly by being subjected to the same people who had dealt with him before over the same matter.

188. In the circumstances, there ought to have been no difficulty in appointing different members of the Senate to the second Special Committee. In any case, a special committee is formed as and when the need arises. It should be remembered that under **Section 33(6)(a)** of the **Act** a special committee can report that particulars of any allegation against the governor have not been substantiated and that would be the end of the matter. The special committee therefore has a critical role to play in the removal proceedings. The fate of a governor may well depend on the report of the special committee.

189. Having said so, we find that no prejudice was occasioned to the 1st Petitioner as the report of the Special Committee was adopted by an overwhelming majority of the whole House. We, however, agree with those opposed to this petition that the Senate has a fixed membership, save for any vacancies, during its lifetime, and where a matter is supposed to be handled by the House then nobody should be heard to say that the matter ought to have been handled by different people for there can only be one Senate at a time. Nothing however, turns on this issue.

190. The petitioners posed the question as to why the County Assembly did not go for more palatable options, rather than removal, in dealing with the allegations against the Governor. We do not wish to speculate on answers to that question. Our view, however, is that violation of the law and the Constitution by a governor can be remedied, *inter alia*, through removal or institution of criminal charges. The people of Kenya must embrace the doctrine of political responsibility. Those voted into public offices should not be heard to say that theirs is only about policy formulation. They should know that they are in charge of the institutions they oversee and when those institutions fail they may be called upon to explain their role in such failures. Although removal from office is still at its infancy on our shores, we think it is a useful tool for ensuring that governors and public officers in general are accountable to the electorate and the public. Waiting for five years to remove an inept, incompetent, corrupt or unaccountable leader may be disastrous and that is why removal may sometimes be a useful tool in appropriate cases.

Whether the removal of the Governor requires public participation, and if so; whether there was public participation; and whether Article 35 of the Constitution on access to information was complied with.

191. The petitioners submitted that they were constitutionally entitled to participate in the impeachment process of the Embu County Governor as provided under **Article 10(1)** of the Constitution. This Article provides for the national values and principles of governance which bind all state organs, state officers and public officers whenever any of them applies or interprets the Constitution including peoples' participation.

192. Public participation in governance is an internationally recognised concept. This concept is reflected in international human rights instruments. **The Universal Declaration of Human Rights of 1948** proclaims in **Article 21** that everyone has the right to take part in the government of his country, directly or through freely chosen representatives. **The International Covenant on Civil and Political Rights (ICCPR)** affirms at **Article 25**, that:

"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions;

a. To take part in the conduct of public affairs, directly or through freely chosen representatives;

b. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

c. To have access, on general terms of equality, to public service in his country."

193. The right to public participation is based on the democratic idea of popular sovereignty and

political equality as enshrined in **Article 1 of the Constitution.** Because the government is derived from the people, all citizens have the right to influence governmental decisions; and the government should respond to them. Therefore, participation must certainly entail citizens' direct involvement in the affairs of their community as the people must take part in political affairs.

194. **Article 196(1)(b**) of the Constitution enjoins a County Assembly to facilitate public participation and involvement in the legislative and other business of the assembly and its committees. Whereas the Constitution does not expressly task the County Assembly with the role of removal of a Governor, **Article 181(2)** of the Constitution empowers Parliament to enact legislation providing for the procedure of removal of a county governor on the grounds specified under the said **Article**. Pursuant to the said provision Parliament enacted the **County Governments Act** and in **section 33** the procedure for removal of a Governor is to be initiated in the County Assembly. Accordingly, the removal of a governor is one of the businesses statutorily assigned to the County Assembly. In our view the question is not whether the public ought to participate in the process of the removal of a governor but to what extent should that participation go. In our view, some level of public participation must be injected into the process in order to appreciate the fact that a governor is elected by the County, and in order to avoid situations where an otherwise popular governor is removed from office due to malice, ill will and vendetta on the part of the Members of the County Assemblies.

195. Our view is reinforced by the decision in **Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2),** (supra) where **Ngcobo, J** expressed himself *inter alia* as follows:

> ***"Our constitutional democracy has essential elements which constitute its foundation; it is partly representative and partly participative. These two elements reflect the basic and fundamental objective of our constitutional democracy. The provisions of the Constitution must be construed in a manner that is compatible with these principles of our democracy. Our system of government requires that the people elect representatives who make laws on their behalf and contemplates that people will be given the opportunity to participate in the law-making process in certain circumstances. The law-making process will then produce a dialogue between the elected representatives of the people and the people themselves. The representative and participative elements of our democracy should not be seen as being in tension with each other…….What our constitutional scheme requires is "the achievement of a balanced relationship between representative and participatory elements in our democracy." The public involvement provisions of the Constitution address this symbolic relationship, and they lie at the heart of the legislative function. The Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process……To uphold the government's submission would therefore be contrary to the conception of our democracy, which contemplates an additional and more direct role for the people of the provinces in the functioning of their provincial legislatures than simply through the electoral process. The government's argument that the provisions of section 118(1)(a) are met by having a proposed constitutional amendment considered only by elected representatives must therefore be rejected…..Before leaving this topic, it is necessary to stress two points. First, the preamble of the Constitution sets as a goal the establishment of "a society based on democratic values [and] social justice" and declares that the Constitution lays down "the foundations for a democratic and open society in which government is based on the will of the people." The founding values of our constitutional democracy include human dignity and "a multi-party system of democratic government to ensure accountability, responsiveness and openness." And it is apparent from the provisions of the Constitution that the democratic government that is contemplated is partly representative and partly participatory, accountable, transparent and makes provision for public participation in the making of laws by legislative bodies. Consistent with our constitutional commitment to human dignity and self respect, section 118(1)(a) contemplates that members of the public will often be given an opportunity to participate in the making of laws that affect them. As has been observed, a "commitment to a right to . . . public participation in governmental decision-making is derived not only***

from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self respect."

196. In our view an opportunity must be availed to the voters in a County to air their views on the process of the removal of their Governor before a decision is arrived at either way. To completely lock out the voters from being heard on such important matter as the removal of their Governor would be contrary to the spirit of **Article 1(2)** of the Constitution. Whereas it may not be possible that each and every person in the County be heard on the issue, those who wish to put across their views on the impeachment ought to be allowed to do so though the ultimate decision rests with the County Assembly.

197. The essence of public participation was captured in the case of **Poverty Alleviation Network & Others vs. President of the Republic of South Africa & 19 others, CCT86/08 [2010] ZACC 5, in the following terms:**

"…engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision. As this Court observed in Doctors for Life, both the duty to facilitate public involvement and the positive right to political participation "seek to ensure that citizens have the necessary information and the effective opportunity to exercise the right to political participation." This can be achieved not only through elected representatives, but also by enabling citizens to participate directly in public affairs, "through public debate and dialogue with elected representatives, referendums and popular initiatives or through self-organisation".

198. This was reaffirmed in **Doctors for Life International vs Speaker of the National Assembly and Others (CCT 12/05) 2006 ZACC 11,** where it was held:

"The right to political participation is a fundamental human right, which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements; a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected ….Significantly, the ICCPR guarantees not only the "right" but also the "opportunity" to take part in the conduct of public affairs, This imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation….The right to political participation includes but is not limited to the right to vote in an election. That right, which is specified in Article 25(b) of the ICCPR, represents one institutionalization of the right to take part in the conduct of public affairs. The broader right, which is provided for in Article 25(a), envisages forms of political participation which are not limited to participation in the electoral process. It is now generally accepted that modes of participation may include not only indirect participation through elected representatives but also forms of direct participation……"

199. As already outlined hereinabove, **Standing Order** 61 which we have reproduced, of the County Assembly of Embu makes provision for the removal of a governor**.**

200. In our view public participation ought to commence from the time of the notification of the motion to remove the Governor by a member to the Clerk which notification in our view is the mandate of the Assembly. This is when the removal process crystallises. However, it is clear that the period provided between the notification and the time for debating and the determination of the motion by the Assembly in the Standing Orders is very limited. It is therefore not plausible to expect that the mode of public participation in such circumstances would be commensurate with that of the enactment of a legislation. As was appreciated by **Sachs J**. in the South African case of the **Minister of Health vs. New Clicks South Africa (Pty) Ltd [2005] ZACC:**

"The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. <u>What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.</u>" [*Emphasis supplied****]***

201. A similar position was adopted in **<u>Doctors for Life International vs. The speaker of the National Assembly and Others</u>** (supra) cited with the approval in **<u>Robert N. Gakuru & Others vs. Governor, Kiambu County</u>** (supra) that*:*

"Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement. This discretion will apply both in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes".

202. A word of caution was, however, given in the **Gakuru Case** when the Court stated that:

"In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively."

203. In making a determination whether the County Assembly complied with its duty to facilitate public participation, the Court will consider what the County Assembly has done and in this case the question will be whether what the County Assembly has done is reasonable in all the circumstances. The factors that would determine reasonableness would include the nature of the business conducted by the County Assembly and whether there are timelines to be met as set by the law. This will be the ultimate determination on the method of facilitating public participation
204. The parameters of consultation was the subject of the holding in the South African case of **<u>Maqoma vs. Sebe & Another 1987 (1) SA 483</u>**, where the court held:

"It seems that 'consultation' in its normal sense without reference to the context in which it is used, denotes a deliberate getting together of more than one person or party…in a situation of conferring with each other where minds are applied to weigh and consider together the pros and cons of a matter by discussion or debate. The word consultation in itself does not presuppose or suggest a particular forum, procedure or duration for such discussion or debate. Nor does it imply that any particular formalities should be complied with. Nor does it draw any distinction between communications conveyed orally or in writing. What it does suggest is a communication of ideas on a reciprocal basis."

205. It is however our view that for the purposes of the impeachment proceedings public participation should relate to the impeachment proceedings themselves. It cannot be justified on the basis of events that took place before the said proceedings were formally commenced by notice to the Clerk of the Assembly. Therefore the prior processes of investigations of the alleged complaints by the farmers cannot in our view constitute public participation for the purposes of the impeachment process.
206. The respondents contended that the County Assembly in fulfilment of the statutory requirement to involve the public in its business developed infrastructure for public participation by July, 2013. This included the establishment of public contact offices in each of the County Assembly Wards, and the recruitment of Ward staff to facilitate public participation. It was further contended that the Assembly through the office of the Clerk disseminates notices of its business to the public through public notice boards, religious institutions and the ward office infrastructure developed for that purpose. In support of these averments copies of notices were exhibited. From the annextures availed, the notices that fell within the period between 16th April, 2014 when the notification was received and 29th April 2014 when the motion was debated, were three. The same bore the stamps

for Kyeni North Ward, Mbeti South Ward and Supreme Council of Muslims and were all dated 24th April, 2014 and received on 25th April, 2014. Was this sufficient notification?

207. In the **Gakuru Case,** it was stated as follows:

> ***"…It is not just enough in my view to simply "tweet" messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action."***

208. In that decision the Court relied on the holding in **Doctors for Life International vs. Speaker of the National Assembly and Others** (supra) to the effect that:

> ***"The phrase "facilitate public involvement" is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are "facilitate" and "involvement". To "facilitate" means to "make easy or easier", "promote" or "help forward". The phrase "public involvement" is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of "involve" includes to "bring a person into a matter" while participation is defined as "[a] taking part with others (in an action or matter); . . . the active involvement of members of a community or organization in decisions which affect them". According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. That is the plain meaning of section 72(1)(a). This construction of section 72(1)(a) is consistent with the participative nature of our democracy. As this Court held in New Clicks, "[t]he Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies." The democratic government that is contemplated in the Constitution is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process."***

209. **Section 91** of the **County Governments Act** establishes the modalities and platforms for citizen participation. It provides that the county government shall facilitate the establishment of structures for citizen participation including—

> ***" a. information communication technology based platforms;***
>
> ***b. town hall meetings;***
>
> ***c. budget preparation and validation fora;***
>
> ***d. notice boards: announcing jobs, appointments, procurement, awards and other important announcements of public interest;***
>
> ***e. development project sites;***
>
> ***f. avenues for the participation of peoples' representatives including but not limited to members of the National Assembly and Senate; or***

g. establishment of citizen fora at county and decentralized units."

210. At this juncture, it is important to set out the parties' evidence with respect to public participation.

211. According to the affidavit sworn by Aloise Victor Njage on behalf of the petitioners on 23rd May, 2014 at paragraphs 6 and 7:

> "***6. That by virtue of Article 10, Article 118(1) (b), Article 174 (a) and (c) Article 196 (1) (b) of the Constitution, your Petitioners avers that they are entitled to directly participate <u>in all businesses</u> of the Respondents of whatever nature and form and most especially an activity that touches or relates to good governance and/or establishment of the Embu County Government and that the removal and impeachment of their 1st Petitioner constitutes or amounts to <u>any other business</u> contemplated in the fore mentioned Article, and that the said right has been infringed by the Respondents when they moved to remove and impeach the 1st Petitioner in exclusion of the Petitioners herein, and as such your Petitioners are therefore entitled to Petition this Honourable Court for protection and restoration of the said right.***
>
> ***7. That the Petitioners contend that have a right to information as enshrined under Article 35(1) (a) and (3) of the Constitution to enable comprehensive participation based on accurate information that pertains to them and affairs of the County Assembly."***

212. For the Respondents, the affidavit sworn by Justus Kariuki Mate on 3rd June, 2014 at paragraph 32 deposed as follows:

> ***"That the County Assembly of Embu is consultative Assembly that has always involved the public in its business. Accordingly, I verily believe that the allegations made by the Petitioners that the 1st Respondent failed in its obligations under Article 196 with regard to public participation are not true for reasons that;***
>
> ***i. The complaints giving rise to the investigations and subsequent charges against the 1st Petitioner were made by the public to their elected representatives and who raised them in the County Assembly and thereby precipitating investigations against the 1st Respondent (sic).***
>
> ***ii. In investigations made and in receiving evidence on the allegations made against the 1st Petitioner and which have now been substantiated, the County Assembly received data and information from the public. In the matter of the procurement of bad maize seeds by the office of the 1st Petitioner, an extensive field research was carried out with input from the farmers and thereby leading to the findings of the assembly and the senate that the said maize seeds had been unlawfully procured to the detriment and loss of farmers.***
>
> ***iii. All the committee and plenary proceedings of the assembly are open to the public for their input and contribution.***
>
> ***iv. The only reason why the Petitioners herein allege that there was no public participation in the process herein is because they are not an objective public but a group of the 1st Petitioner's supporters who have even in their petition expressed clear bias against the Assembly and its officials and would therefore not be an objective guide on the question of whether or not there was public participation.***
>
> ***v. The motive of the collection of signatures by the Petitioners is clear from the depositions of Aloise Victor Njagi in the affidavit sworn on 7th May 2014 where at paragraph 8 thereof he confirms that the signatures presented to this court vide their***

annextures1 to that affidavit, are not of persons alleging that the County Assembly did not involve the public in the process herein but signatures in support of a Petition to have the County suspended by the President under the provisions of Article 192 (1)(b).

vi. The said signatures are now introduced to these proceedings to mislead the court that the public is not involved in the business of the Assembly.

vii. The county Assembly in fulfilment of the statutory requirement to involve the public in its business developed infrastructure for public participation by July 2013, which included establishment of Public contact offices in each of the County Assembly Wards, and the recruitment of Ward staff to facilitate public participation.

viii. The County Assembly of Embu Through The office of the clerk disseminates notices of its businesses to the public through public notice boards, religious institutions and the ward office infrastructure developed for that purpose.

ix. I verily believe that the requirement for public participation under Article 196 does not require a referendum of all citizens on all business of the Assembly as long as there is provided notice and forum for the public to participate in the business of the Assembly.

x. From the notices, the Assembly has from time to time received various responses and input from the public and which information is maintained by the office of the clerk."

213. The averments above made by the Respondents were not rebutted by a further affidavit of the Petitioners.
214. We have taken into account the period provided within which public participation may be conducted and the statutory structures for citizens participation, as well as the mode of notification formulated by the County Assembly. According to the respondents these included establishment of public contact offices in each of the County Assembly Wards, and the recruitment of Ward staff to facilitate public participation. They also contended that the County Assembly through the office of the Clerk disseminates notices of its business to the public through public notice boards, religious institutions and the ward office infrastructure developed for that purpose.
215. From the averments by the parties which are before the Court, we are not satisfied that the allegation made by the Petitioners that they were not afforded an opportunity to participate in the removal proceedings has been proved. We are unable to stretch the averments in the supporting affidavit set out hereinabove to mean that the respondent's infrastructure stated in paragraph 32 of the replying affidavit was not adhered to in this case. It must be emphasized that in matters such as this evidence is contained in the affidavit rather than in submissions.

To what extent, if any, can the Court intervene in the removal process?

216. Having decided that the formal procedure as provided by the law was followed in the removal of the 1st Petitioner, we will now look at the issue of threshold. Impeachment of governors came with the introduction of counties by the **2010 Constitution.** Although the Constitution replaced in 2010 had provision for impeachment of the President, such power was never exercised by Parliament and we need to look at decisions of other jurisdictions to have a clear understanding of how this power should be exercised.
217. **Black's Law Dictionary, 9th Edition** at **page 820** defines impeachment as:

"The act (by a legislature) of calling for the removal from office of a public official, accompanied by presenting a written charge of the official's alleged misconduct; esp., the initiation of a proceeding in the U.S. House of Representatives against a federal official, such as the President or a judge….

In the United Kingdom, impeachment is by the House of Commons and trial by the House of Lords."

218. The word '*impeachment*' derives from Latin roots expressing the idea of being caught or entrapped, and is analogous to the modern French verb *empêcher* (to prevent) and the modern English word '*impede'*. Impeachment also means prosecution, indictment or arraignment.

219. We note that although the Standing Orders of the County Assembly of Embu provide for the removal by impeachment, the **Constitution** and the **Act** do not mention impeachment in reference to governors. The two documents only refer to removal from office. A closer look at the Constitution explains why the drafters of the Constitution stuck with the words *'removal from office'* in the case of governors.

220. There are two provisions in the Constitution for the removal of the President. Under **Article 144,** the President can be removed from office on grounds of incapacity whilst under **Article 145,** he may be removed by impeachment. However, in the case of a governor, the grounds of removal are lumped together under **Article 181**.

221. One of the grounds for removal of a governor from office is *'physical or mental incapacity to perform the functions of office'*. A person cannot be blamed, accused or prosecuted for being physically or mentally unable to discharge the duties of office hence the avoidance of the word *'impeach'* in respect of the removal of county governors from office. That also explains why Parliament provided under **Section 33(9)** of the **Act** that removal of a governor from office on the grounds of physical or mental incapacity will be done in accordance with **Article 144** of the **Constitution** with necessary modifications. Owing to our explanation, we think that it would not be wrong to say that a governor has been removed by impeachment if the removal is not on the ground of physical or mental incapacity to perform the duties of office.

222. In the United States of America, the Constitution under **Article 1, Section 3, Clause 6** provides that the "**Senate shall have the sole Power to try all Impeachments."** To better understand why the framers of the Constitution of the United States of America vest impeachment solely on the House of Representatives, Michael J. Gerhardt in his article, **'The Special Constitutional Structure of the Federal Impeachment Process'**, Law and Contemporary Problems, Vol. 63: Nos. 1 & 2, pages 245-256, at page 246 states that;

> ***"By vesting the impeachment authority in the politically accountable authorities of the House and the Senate, the framers of the Constitution deliberately chose to leave the difficult questions of impeachment and removal in the hands of officials well versed in pragmatic decision-making. Members of Congress are pragmatists who can be expected to decide or resolve issues, including the appropriate tests, by recourse to practical, rather than formalist, calculations. In fact, members of Congress decide almost everything pragmatically, and decisions about impeachment and removal are no exception. The vesting of impeachment authority in political branches necessarily implies the discretion to take various factors, including possible consequences, into consideration in the course of exercising such authority."***

223. Therefore, under the Constitution of the United States of America, the impeachment process is the preserve of the House of Representatives and the Senate. Accordingly, there is no provision for intervention by any other organ or arm of the government.

224. **Article XI, section 6** of the **1987 Constitution of the Republic of the Philippines** provides that:

> ***"The Senate shall have the sole power to try and decide cases of impeachment. When sitting for that purpose, the Senators shall be on oath or affirmation. When the President of the Philippines is on trial, the Chief Justice of the Supreme Court shall preside, but shall not vote. No person shall be convicted without the concurrence of two-thirds of all the Members of the Senate."***

225. Closer home, the **Constitution of the Federal Republic of Nigeria 1999** under **section 188** provides for the removal of a governor or deputy governor. This provision was set out by the Supreme Court in the case of **Hon. Muyiwa Inakoju** (supra). It provides that:

> ***"188. (1) The Governor or Deputy-Governor of a State may be removed from office in***

accordance with the provisions of this section.

(2) Whenever a notice of any allegation in writing signed by not less than one-third of the members of the House of Assembly -

(a) is presented to the Speaker of the House of Assembly of the State;

(b) stating that the holder of such office is guilty of gross misconduct in the performance of the functions of his office, detailed particulars of which shall be specified, the Speaker of the House of Assembly shall, within seven days of the receipt of the notice, cause a copy of the notice to be served on the holder of the office and on each member of the House of Assembly, and shall also cause any statement made in reply to the allegation by the holder of the office, to be served on each member of the House of Assembly.

(3) Within fourteen days of the presentation of the notice to the Speaker of the House of Assembly (whether or not any statement was made by the holder of the office in reply to the allegation contained in the notice), the House of Assembly shall resolve by motion, without any debate whether or not the allegation should be investigated.

(4) A motion of the House of Assembly that the allegation be investigated shall not be declared as having been, passed unless it is supported by the votes of not less than two-thirds majority of all the members of the House of Assembly.

(5) Within seven days of the passing of a motion under the foregoing provisions of this section, the Chief Judge of the State shall at the request of the Speaker of the House of Assembly, appoint a Panel of seven persons who in his opinion are of unquestionable integrity, not being members of any public service, legislative house or political party, to investigate the allegation as provided in this section.

(6) The holder of an office whose conduct is being investigated under this section shall have the right to defend himself in person or be represented before the Panel by a legal practitioner of his own choice.

(7) A Panel appointed under this section shall -

> ***(a) have such powers and exercise its functions in accordance with such procedure as may be prescribed by the House of Assembly; and within three months of its report its findings to Assembly (sic).***
>
> ***(b) within three months of its appointment, report its findings to the House of assembly.***

(8) Where the Panel reports to the House of Assembly that the allegation has not been proved, no further proceedings shall be taken in respect of the matter.

(9) Where the report of the Panel is that the allegation against the holder of the office has been proved, then within fourteen days of the receipt of the report, the House of Assembly shall consider the report, and if by a resolution of the House of Assembly supported by not less than two-thirds of all its members, the report of the Panel is adopted, then the holder of the office shall stand removed from office as from the date of the adoption of the report.

(10) <u>No proceedings or determination of the Panel or of the House of Assembly or any matter relating to such proceedings or determination shall be entertained or questioned in any court.</u>

(11) In this section -

"gross misconduct" means a grave violation or breach of the provisions of this Constitution or a misconduct of such nature as amounts in the opinion of the House of Assembly to gross misconduct." [Emphasis supplied]

226. In Kenya, the threshold for removal from office of a governor is provided under the **Constitution** and the **Act.** The **Senate Standing Orders** and the standing orders of various county assemblies make further provision on the issue.
227. **Section 33 (1)** of the **Act** provides that to move a motion, it has to be supported by at least a third of all the members of the County Assembly. Thereafter, during the vote, the motion has to be supported by at least two-thirds of all the members of the County Assembly. At the Senate, **Section 33 (7)** of the **Act** provides that for removal of a governor to succeed it must be supported by a majority of all members of the Senate.
228. Looking at the applicable laws in the various jurisdictions it is clear that other jurisdictions have provided for a more stringent procedure for impeachment. For example the inclusion of the Chief Justice in the Philippines in the impeachment panel; and the constitution by the Chief Judge of an independent impeachment panel in Nigeria. Ideally, that should be the case as removal from office has the potential to ruin a person's career and reputation spanning many years. The Kenyan laws appear to have left this issue entirely in the hands of the politicians – the County Assembly and the Senate. It is judgement by peers. On account of this, it is imperative that the judiciary exercise greater vigilance in its supervisory role.
229. However, unlike in the United States where the power of impeachment is expressly reposed in the legislature and Nigeria where the jurisdiction of the judiciary is ousted, the Kenyan Constitution leaves room for the judiciary to ensure that whatever is done by the County Assembly and the Senate is in consonance with the Constitution-see **Article 165(2)(d)(ii).**
230. Do the numbers amount to threshold? **Black's Law Dictionary, 9th Edition at page 1619** defines threshold in respect to parliamentary law as **"the number or proportion of votes needed for election".** We do think that numbers constituting the threshold for the removal count for something.
231. With regard to the case presented before this Court, it was the petitioners' case that the allegations made by the 1st and 2nd respondents can be narrowed down to gross violations of the **Public Procurement and Disposal Act** and **Public Finance and Management Act.** Of the four grounds listed in **Article 181**, it appears that the Governor's removal from office was narrowed to gross violation of the Constitution and other laws. We will therefore deal with this ground of removal only.
232. It has been argued that the gross violation attributed to Mr. Wambora had not been demonstrated. Gross violation of the **Constitution** or any other law is a ground for removal from office as provided under **Article 181(1)(a).** The question that then arises is how you qualify gross violation. Who is the one to assess that the allegations amount to gross violation?
233. In stating what amounts to gross violation, the Supreme Court of Nigeria in **Hon. Muyiwa Inakoju** (*supra*) held that:

"(i) The word "gross" in the subsection does not bear its meaning of aggregate income. It rather means generally in the context atrocious, colossal, deplorable, disgusting, dreadful, enormous, gigantic, grave, heinous, outrageous, odious and shocking. All these words express some extreme negative conduct. Therefore a misconduct which is the opposite of the above cannot constitute gross misconduct. Whether a conduct is gross or not will depend on the matter as exposed by the facts. It cannot be determined in vacuo or in a vacuum but in relation to the facts of the case and the law policing the facts.

(ii) Gross misconduct is defined as (a) a grave violation or breach of the provisions of the Constitution and (b) a misconduct of such nature as amounts in the opinion of the House of Assembly to gross misconduct.

(iii) By the definition, it is not every violation or breach of the Constitution that can lead to the removal of a Governor or Deputy Governor. Only a grave violation or breach of the Constitution can lead to the removal of a Governor or Deputy Governor. Grave in the context does not mean an excavation in earth in which a dead body is buried, rather it means, in my view, serious, substantial, and weighty.

(iv) The following, in my view, constitute grave violation or breach of the Constitution: (a) Interference with the constitutional functions of the Legislature and the Judiciary by an exhibition of overt unconstitutional executive power, (b) Abuse of the fiscal provisions of the Constitution, (c) Abuse of the Code of Conduct for Public Officers, (d) Disregard and breach of Chapter IV of the Constitution on fundamental rights, (e) Interference with Local Government funds and stealing from the funds or pilfering of the funds including monthly subventions for personal gains or for the comfort and advantage of the State Government, (f) instigation of military rule and military government, (g) Any other subversive conduct which is directly or indirectly inimical to the implementation of some other ' major sectors of the Constitution.

(v) The following in my view, are some acts which in the opinion of the House of Assembly, could constitute grave misconduct (a) Refusal to perform constitutional functions, (b) Corruption. (c) Abuse of office or power, (d) Sexual harassment. I think I should clarify this because of the parochial societal interpretation of it to refer to, only the male gender. The misconduct can arise from a male or female Governor or Deputy Governor as the case may be. (e) A drunkard whose drinking conduct is exposed to the glare and consumption of the public and to public opprobrium and disgrace unbecoming of the holder of the office of Governor or Deputy Governor, (f) Using, diverting, converting or siphoning State and Local Government funds for electioneering campaigns of the Governor, Deputy Governor or any other parson, (g) Certificate forgery and racketeering. Where this is directly connected, related or traceable to the procurement of the office of the Governor or Deputy Governor, it will not, in my view, matter whether the misconduct was before the person was sworn in. Once the misconduct flows into the office, it qualifies as gross misconduct because he could not have held the office but for the misconduct. Such a person, in my view, is not a fit and proper person to hold the office of Governor or Deputy Governor. It is merely saying the obvious that a Governor or Deputy Governor who involves in certificate forgery and racketeering during his tenure has committed gross misconduct."

234. With regard to what amounts to gross violation the Court in **Wambora 1** observed at paragraph 253;

"….whatever is alleged against a Governor must:

(a) Be serious, substantial and weighty.

(b) There must a nexus between the Governor and the alleged gross violations of the Constitution or any other written law.

(c) The charges framed against the Governor and the particulars thereof must disclose a gross violation of the Constitution or any other written law.

(d) The charges as framed must state with degree of precision the Article(s) or even sub-Article (s) of the Constitution or the provisions of any other written law that have been alleged to be grossly violated."

235. On appeal, the Court of Appeal at Nyeri as regards what amounts to gross violation, held at paragraph 46 in **Wambora 1 Appeal** that:

"We reiterate that what constitutes gross violation of the Constitution is to be determined on a case by case basis. Gross violation of the Constitution includes violation of the values and principles enshrined under Article 10 of the Constitution and violation of Chapter six (Leadership & Integrity) of the Constitution; or intentional and/or persistent violation of any Article of the Constitution; or intentional and blatant or persistent violation of the provisions of any other law. The rationale for this definition is that the values and principles embodied in the Constitution provide the bedrock and foundation of Kenya's constitutional system and under Article 10(1) these values bind all state organs, state officers, public officers and all persons. We hasten to state that the facts that prove gross violation as defined above must be proved before the relevant constitutional organ. Examples of the constitutional Articles whose violation amounts to gross violation include:

i. Chapter 1 on the Sovereignty of the People and Supremacy of the Constitution more specifically Articles 1, 2, and 3 (2) of the Constitution.

ii. Chapter 2- Article 4 that establishes Kenya as a sovereign multi-party Republic & Article 6 that establishes devolution and access to services.

iii. Article 10 on national values and principles of good governance.

iv. Chapter 4 on the Bill of Rights.

v. Chapter 6- Articles 73 to 78 on Leadership and Integrity.

vi. Chapter 12 - Article 201 on principles of public finance.

vii. Chapter 13- Article 232 on values and principles of public service.

viii. Chapter 14 - Article 238 on principles of national security.

ix. Article 259 (11) on advice and recommendation.

x. Any conduct that comes within the definition of the offence of treason in the Penal Code (Cap 63 of the Laws of Kenya)."

236. A body exercising its quasi-judicial function should be very careful in deciding what amounts to gross violation or misconduct. The Supreme Court of Nigeria in **Hon. Muyiwa Inakoju** (*supra*) warned that:

"It is not a lawful or legitimate exercise of the constitutional function in section 188 for a House of Assembly to remove a Governor or a Deputy Governor to achieve a political purpose or one of organised vendetta clearly outside gross misconduct under the section. Section 188 cannot be invoked merely because the House does not like the face or look of the Governor or Deputy Governor in a particular moment or the Governor or Deputy Governor refused to respond with a generous smile to the Legislature qua House on a parliamentary or courtesy visit to the holder of the office. The point I am struggling to make out of this light statement on a playful side is that section 188 is a very strong political weapon at the disposal of the House which must be used only in appropriate cases of serious wrong doing on the part of the Governor or Deputy Governor, which is tantamount to gross misconduct within the meaning of subsection (11). Section 188 is not a weapon available to the Legislature to police a Governor or Deputy Governor in every wrong doing. A Governor or Deputy Governor, as a human being, cannot always be right and he cannot claim to be right always. That explains why section 188 talks about gross misconduct. Accordingly, where a misconduct is not gross, the section 188 weapon of removal is not available to the House of Assembly."

237.The Court of Appeal in **Wambora 1 Appeal** did accept that the process had a political element when it held at paragraph 31 that:

> ***"Our reading and interpretation of Article 181 of the Constitution as read with Section 33 of the County Governments Act shows that removal of a Governor is a constitutional and political process; it is a sui generis process that is quasi-judicial in nature and the rules of natural justice and fair administrative action must be observed. The impeachment architecture in Article 181 of the Constitution reveals that removal of a Governor is not about criminality or culpability but is about accountability, political governance as well as policy and political responsibility."***

238.On the doctrine of separation of powers, the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] e KLR** held that:

> ***"It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other's functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore agree with the High Court's dicta in the petition the subject of this appeal that:***
>
> ***"[Separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet, as the Respondents also concede, the Courts have an interpretive role - including the last word in determining the constitutionality of all governmental actions..."""***

239.We have no doubt in our minds that this Court has a supervisory role to play in the process of the removal of a governor. Time and again it has been said and will continue being said, that so long as the Constitution remains as it is, this Court has a duty to check the constitutionality and legality of anything done by Parliament (National Assembly and Senate) and the county assemblies. The Court must zealously and firmly guard this power for to do otherwise would amount to subverting the Constitution by abdicating a clear constitutional responsibility. In the same breath it must be stated that the courts cannot take over the roles clearly reposed in the other arms of government by the Constitution. Again, that would amount to an overthrow of the Constitution in the pretext of exercising supervisory powers. Of course this is within the context of exercise by such state organ of its mandate within the Constitution and the law. A delicate balance must indeed be struck in order to attain harmonious and smooth operation of the engine of governance. The Court must not severely restrict the constitutional mandates of the other state organs to the extent that those organs cannot execute their work. Such restrictions may result in the Constitution looking like a green and beautiful tree that bears no fruit.

240.The Court of Appeal in **Wambora 1 Appeal** at paragraph 53 of the judgement delineated the role of the Court in removal proceedings as follows:

> ***"It is incumbent upon the High Court to determine if the facts in support of the charges against a Governor meet and prove threshold in Article 181 of the Constitution. For example, was the 4th appellant an employee of the 1st appellant or of the County Government? Is a Governor to bear personal vicarious liability for the acts and omissions of officers of the County Government? We are of the view that Article 181 and Section 33 of the County Governments Act are not ouster clauses that limit or oust the jurisdiction of the High Court as conferred by Article 165 (3) (d) (ii) and(iii) of the Constitution. Though the process of removal of a governor from office is both a constitutional and a political***

process, the political question doctrine cannot operate to oust the jurisdiction vested on the High Court to interpret the Constitution or to determine the question if anything said to be done under the authority of the Constitution or of any law is consistent with or in contravention of the Constitution."

241. We hold the view that the powers exercisable by this Court are powers of review and such powers can only check compliance with the Constitution, the law, the rules of natural justice and the rationality of impugned decisions. Where the decision of the impeaching organs is contrary to common logic, then this Court can quash such a decision for being unreasonable.
242. We associate ourselves with the dicta of Souter, J in his concurring opinion in **Nixon v United States, 506 U. S. 224 (1993)** where he observes that although removal proceedings should be left to the Senate:

"One can, nevertheless, envision different and unusual circumstances that might justify a more searching review of impeachment proceedings. If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was simply " 'a bad guy'"…judicial interference might well be appropriate. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence."

243. In our view, the conduct of the county assemblies and the Senate should only raise the antenna of this Court if they do something perverse to normal conduct to the extent of perplexing and agitating the mind of the ordinary man going about his business in Gikomba market in Nairobi.
244. In our case there are clear steps provided in the process leading to the removal of a governor. That process begins at the county level then proceeds to the Senate. Where the motion for removal has succeeded in the County Assembly, it does not necessarily mean the Senate will automatically approve the removal. In fact a careful reading of the relevant laws shows that the actual trial is by the Senate. Under **Article 96(1)** of the **Constitution** the role of the Senate is to represent the counties, and protect the interests of the counties and their governments. In the removal of a governor, the County Assembly and the Senate are performing their functions under the **Constitution** and the **Act.**

Can the courts intervene?

245. It is our considered opinion that the courts have to be very careful before they intervene in matters that are properly in the domain of other state organs. We opine that the courts can only intervene where constitutional issues are raised. As was observed by the Supreme Court of India in the case **State of Rajasthan** (*supra*)**:**

'….it is true that if a question brought before the Court is purely a political question not involving determination of any legal or constitutional right or obligation, the Court would not entertain it, since the Court is concerned only with adjudication of legal rights and liabilities. But merely because a question has a political complexion that by itself is no ground why the Court should shrink from performing its duty under the Constitution if it raises an issue of constitutional determination. Every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political. A constitution is a matter of purest politics, a structure of power and as pointed out by Charles Black in Perspectives in Constitutional law' "constitutional law' symbolizes an intersection of law and politics, wherein issues of political power are acted on by persons trained in the legal tradition, working in judicial institutions, following the procedures of law…."

246. We agree with the Court of Appeal in **Mumo Matemu** (*supra*) where it was stated that:

"We [also] reiterate that a court reviewing the procedure of a legislature is not a super-legislature, sitting on appeal on the wisdom, correctness or desirability of the opinion of the impugned decision-making organ. It has neither the mandate nor the institutional equipment for that purpose in our constitutional design. Moreover, the process cannot be wrong simply because another institution, for example the courts, would have conducted it differently. It must be accepted that the institutional environment is controlling on the manner in which an organ disposes of its issues."

247. In **Wambora 1 Appeal** (supra) the Court of Appeal was of the opinion that this Court has to interrogate the facts in order to determine whether there was nexus between the Governor and the alleged gross violations. That would call for a substantive interrogation of the charges and evidence leading to the removal in order for the Court to make any meaningful and legitimate intervention.

248. However in this case we were not supplied with material which would enable us to conduct interrogation, and there is the danger of the Court speculating as to whether what led to removal of the Governor met the threshold. For example, the evidence which was tabled before the investigations committees was not availed to this Court. In addition, evidence such as was availed to the Senate and which is referred to in the Hansard was not availed before the Court. This is the nature of evidence which might have enabled the Court to deal with the issues of nexus and threshold.

249. We now consider whether there was a nexus between the 1st Petitioner and the alleged gross violation of the Constitution and the relevant laws. The summary of the findings of the Special Committee of the Senate is found at page 68 of the Report where it is stated that:

*"**CONCLUSION***

153. The Special Committee, having executed its mandate under section 33 of the County Governments Act and standing order 68 of the Senate Standing Orders has found as follows-

(1) On the Charge of Gross Violation of the Public Procurement and Disposal Act, Chapter 412A of the Laws of Kenya, pursuant to section 33(6) of the County Governments Act, 2012 and standing order 68(4) of the Senate Standing Orders, the Committee finds this Charge to be substantiated;

(2) On the Charge of Gross Violation of the Public Finance Management Act, Chapter 412 C of the Laws of Kenya, pursuant to section 33(6) of the County Governments Act, 2012 and standing order 68(4) of the Senate Standing Orders, the Committee finds this Charge to be substantiated; and

(3) On the Charge of Gross Violation of the Constitution of Kenya, 2010 pursuant to section 33(6) of the County Governments Act, 2012 and standing order 68(4) of the Senate Standing Orders, the Committee finds this Charge to be substantiated."

250. A perusal of the report clearly shows that the Senate analysed the evidence put forward in support of each allegation. The Senate also considered the 1st Petitioner's written answer to the charges before making its determination. The allegation of gross violation of the **Public Procurement and Disposal Act** was premised on the purchase and distribution of maize seed that did not germinate or whose germination did not surpass 20%, and the procurement of works for the face-lifting of Embu Stadium.

251. After considering the evidence availed to it concerning the purchase of maize seeds, the Special Committee at pages 46-49 of the **Report** observed and concluded that;

"99. The Governor, in his response, seems to have taken the approach of denying liability and assigning blame to other officials within the County, specially the procurement officials, arguing that procurement was not undertaken by the Governor but by these officials. On the lack of germination of seeds, the Governor, in his response, blamed

"lack of adequate rainfall or other non-procurement reasons". This, however, is not corroborated by the documentation from the experts - KEPHIS and the County Executive Committee Member for Agriculture – which make no mention of lack of adequate rainfall as a factor that may have contributed to the non-germination or poor germination of the DK 8031 maize seeds.

100. Article 179(4) of the Constitution provides that the Governor is the "chief executive" of the County. Where the entire County is virtually at a stand-still due to a failed crop, and the County Executive is virtually on trial by the residents of Embu County, it is unthinkable that the chief executive of the County would do nothing except to shift blame to junior officers in the County and to blame, without any proof, lack of adequate rainfall as the cause of the failed crop. As chief executive, the Governor retains an overall oversight responsibility over the affairs of his County, including matters of procurement, and he cannot therefore be heard to say, on a matter so important to the County as the distribution of failed maize seeds that "it was not me".

101. Article 227 of the Constitution provides for "procurement of goods and services" and requires, at sub-article (1) that "when a State organ or any other public entity contracts for goods and services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective". In this matter, the Special Committee observes that there is no evidence that the procurement of the maize seeds was conducted in a fair, equitable, transparent, competitive and cost-effective manner. The evidence of the County Assembly and that of the County Executive Committee for Agriculture points to procurement of DK 8031 maize seed which was authorized by the Office of the Governor but that fell below the threshold under article 227 of the Constitution. The County Assembly in making its case stated that the entire procurement of the maize seeds demonstrated "complacency, incompetence and manipulation of the procurement system to aid fraud". This position was not rebutted by the response of the Governor which merely sought to place blame on the procurement officials.

102. Section 27 of the Public Procurement and Disposal Act, 2005, further requires at sub-section (3) that "each employee of a public entity and each member of a board or committee of the public entity shall ensure, within the areas of responsibility of the employee or member that this Act, the regulations and the directions of the Authority are complied with". No evidence was presented by the Governor to demonstrate that, as the chief executive of the County Executive, he had ensured compliance with the Public Procurement and Disposal Act, 2005 before taking the steps of launching the DK 8031 maize seeds and extensively distributing the maize seeds within the County. There was also no evidence that the Governor had directed the County Secretary or the officials serving in his office to adhere to the procurement laws. Had the Governor done so, he would probably have forestalled the massive losses occasioned to the farmers.

103. The Committee further observed, as had been submitted by the County Assembly, that the annual procurement plan of the Director of Agriculture prepared in accordance with section 26(3) of the Public Procurement and Disposal Act, provided for the purchase of two varieties of maize: KDV 1 and KDV 6. The County Executive, with the authorization and full knowledge of the Office of the Governor, proceeded to instead purchase maize of variety DK 8031 without the authority of the Tender Committee as required under section 26(4) of the Public Procurement and Disposal Act and in accordance with the procurement procedure detailed under section 34 of the Act."

252. The Special Committee made almost similar findings on the procurement of works for the face-lifting of Embu Stadium. It observed that the tender was floated at a time that a Tender Committee did not exist within the County.
253. As for the allegation of gross violation of the **Public Finance Management Act, 2012,** the Special Committee concluded at page 62 that:

"143. As the chief executive of the County, the Governor had a responsibility to ensure that he discharged the obligation under section 162 of the Public Finance Management Act, 2012 with respect to the management and utilization of County resources. The response of the Governor to the allegations set out by the County Assembly does not demonstrate to the Committee that the Governor has indeed discharged his mandate under section 162 of the Public Procurement and Disposal Act, 2012."

254. The allegation of gross violation of the **Constitution** was considered by the special Committee which made several observations one of them being at pages 66-67 as follows:

"150. The Special Committee further observed that the standard response by the Governor to all the allegations set out by the County Assembly has been "it was not me". This response by the Governor does little to "promote public confidence" in the office of the Governor as required under Article 73(1)(a)(iv) of the Constitution. The Governor seems to have abdicated from taking any responsibility for the goings on in his office and in his County, despite being the elected chief executive of the County. This is in violation of section (sic) 73(2)(d) of the Constitution which requires that State officers be guided by the principle of "accountability to the public for decisions and actions".

255. In **Wambora 1 Appeal** the Court stated that the standard of proof in such proceedings is;

"….neither beyond reasonable doubt nor on a balance of probability. Noting that the threshold for removal of a governor involves "gross violation of the Constitution", we hold that the standard of proof required for removal of Governor is above a balance of probability but below reasonable doubt."

If that be so, then we do not hesitate to hold that the Senate attained this standard.

256. As a matter of observation, we note that the decision of the Senate came before the decision of the Court of Appeal. In its Report the Special Committee had grappled with the issue of the standard of proof required in removal proceedings and although it did not make any specific conclusion, it appears to have left the standard of proof, which was deemed to be above a balance of probabilities and rising up to beyond reasonable doubt, to the discretion of individual senators. Depending on the individual senators, their standard of proof was higher than that set by the Court of Appeal.

257. After citing **Article 73** of the **Constitution** on the responsibility of leadership, the Senate concluded at page 37 that;

"75. These are therefore the standards by which the Governor should be judged when considering the allegations against him and the evidence produced in support of the allegations. The violations must be gross, that is, a glaring error, flagrant and extreme. The violation must be such that it brings dishonour and lowers the dignity of the office of the governor. A minor infraction of the law cannot attract the sanction of impeachment."

258. From the foregoing it is apparent that the Senate understood the constitutional threshold that had to be met. We have no reason to fault the Senate in its conclusion.

259. In line with our power to consider the reasonableness of the decision of the Senate, we have looked at **the Report** and find nothing in it that would invite the review powers of this Court.

260. In summary, our view is that this Court can only review proceedings relating to the removal of a governor. We have nevertheless subjected to scrutiny **the Report** of the Special Committee on the removal of the 1st Petitioner and we have found the same to be satisfactory. We find no reason for disturbing the decision of the Senate. Whether or not we agree with it is another thing altogether.

APPRECIATION

261. Before we conclude we must express our gratitude to counsel for thorough research and very eloquent submissions made in the prosecution of and in opposition to this petition. If we have not referred to all the authorities referred to us by counsel, it is not due to disrespect or out of lack of the appreciation for counsels' industry.

DISPOSITION

262. Having considered this petition it is our view and we hold as follows on each of the issues vented for determination:

1. This petition is not incompetent.

2. The proceedings to impeach the Governor of Embu County Hon. Martin Nyaga Wambora were not *sub judice*.

3. Section 33 of the County Governments Act, 2012 is not unconstitutional.

4. The due process for the removal of a governor was followed in the removal of the Governor of Embu County Hon. Martin Nyaga Wambora.

5. The removal process of the Governor requires that an opportunity be afforded to the public to participate therein which opportunity was afforded in the instant case.

6. The courts can intervene where constitutional issues are raised.

7. That in the result this petition fails and is dismissed.

COSTS

262. On the issue of costs we find that this litigation has been useful in advancing the law concerning the removal of governors from office. Although the petition has been lost, we do not think that the litigation has been in vain. Therefore, the appropriate order on costs is to direct each party to meet own costs and we so order.

Orders Accordingly.

Signed and Dated at Nairobi this 12th day of February, 2015.

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R MWONGO

PRINCIPAL JUDGE

_____

W KORIR

JUDGE

_____

G V ODUNGA

JUDGE

In the presence of:

1. Mr. Nyamu with Mr. Njoroge for the petitioners in petition No. 7 of 2014.

2. Mr. Ndegwa for the Petitioners in petition No. 8 of 2014

3. Mr. Njenga for the 1st and 2nd respondents.

4. Miss Thanjifor the interested party

5. Miss Tallam for the amicus