



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

PETITION NO.5 OF 2015

IN THE MATTER OF ALLEGED VIOLATION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 27, 28, 47 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 25, 27, 28, 47, 50, 159, 165, 185, 258 & 259 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF RULE 3 AND 4 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF THE CONSTITUTION) PRACTICE AND PROCEDURE RULES 2013 AND ALL OTHER ENABLING POWERS AND PROVISIONS OF THE LAW

AND

IN THE MATTER OF SECTIONS 44, 59 AND 76 OF THE COUNTY GOVERNMENT ACT 2012

AND

IN THE MATTER OF SECTION 6 OF THE CIVIL PROCEDURE ACT CHAPTER 21 LAWS OF KENYA

AND

IN THE MATTER OF SECTION 63 AND 85 OF THE COUNTY ASSEMBLY OF KILIFI STANDING ORDERS

BETWEEN

OWEN YAA BAYA **PETITIONER**

AND

THE COUNTY ASSEMBLY OF KILIFI **RESPONDENT**

RULING

The Applicant is the Secretary to the County Government of Kilifi. His Notice of Motion dated 16/5/2015 seeks the following orders:

1. (spent)

2. **THAT this honourable court do issue an order of injunction restraining the respondent by itself and/or its ad hoc committee formed on Wednesday 1st of April 2015 from discussing and/or carrying out any hearings regarding the petitioner's intended censure motion pending the hearing and final determination of this application and the Petition.**

3. **THAT this honourable court do issue a conservatory order that status quo existing before the respondent adopted the censure motion of 31st March 2015 against the applicant be maintained pending the hearing and final determination of this application and Petition.**

4. **THAT the cost of this application be in the cause.**

Petitioner's Application:

The application is supported by the affidavit of the Applicant and a further affidavit dated 19th May, 2015 filed in response to the Respondent's Replying affidavit. In brief the Applicant states that he is the County Secretary of Kilifi County by dint of his appointment under Section 44 of the County Government Act hereinafter (CGA). He is also the head of the County Public Service and as such he is a public servant. He contends that the Respondent unprocedurally convened and illegally, debated a censure motion whose subject was the Applicant's alleged, incompetence and abuse of office among other issues. The Respondent made a resolution to set up an *ad hoc* committee to investigate the allegations which the Applicant came to learn of via print media and he had not been served with any notice thereof or of the particulars of the allegations facing him. Thus his Constitutional Rights under Article 50 were being infringed.

The applicant points out that the oversight powers of the Respondent, donated to it by Article 185 of the Constitution do not override the powers of the Public Service Board that handles all disciplinary proceedings of County Public Servants. As per Section 44(2) of the CGA, only the Governor can remove the County Secretary subject to the terms and conditions of his employment. The Respondent can only set up an investigation committee under Section 40 (3)(a) of the CGA to investigate County Executive Members and the Applicant is not such a member. The Respondent has contravened Article 185 of the Constitution on separation of powers by setting up the committee as the County Executive or its organs fall under the Executive arm of the County Government. Hence the setting up of the committee to investigate the Applicant is *ultra vires*.

One of the allegations are irregular employment of personnel which was levelled against himself, the County Executive Members and Chief Officers yet there is no move to censure them contrary to Article 27 of the Constitution which provides against discrimination. Another allegation he is facing is irregularly awarding a tender to Raindrops Company Limited. This is a matter before the Court in *High Court No. 9 of 2015 Raindrops Limited Company v the County Government of Kilifi*. Hence the censure motion contravenes Section 85 (1),(2),(3) of the Kilifi County Assembly standing orders and is *subjudice*. Besides, the Public Procurement Oversight Authority found that the tender had been regularly awarded. In addition, the issue of advertisement of tender was within the ambit of the executive arm of the County Government and not that of the Respondent who by raising it are going contrary to Article 185 of the Constitution.

The plaintiff avers that the censure motion is void and illegal as there was no prayer made of such motion on the floor of the house to censure the Applicant; instead there were recommendations to investigate which in reality is an impeachment motion. He states further that the chairperson and other members of the *ad hoc* committee had made contributions on the floor during the debate of the motion that reflected personal vendetta and grudge against the Applicant, and as such no fair administrative action is expected which is contrary to Article 47 of the Constitution. He wrote to the Clerk of the County Assembly to register his discontentment on this set up.

The Applicant also states that under Article 195 of the Constitution, the Respondent may only summon the Applicant to appear before it for purposes of giving evidence or providing information but not to investigate him as he is a public servant and that is the preserve of the County Public Service Board.

The Applicant avers that the omission to sue the Respondent through the Office of the Speaker was a technicality curable under Article 159 (2)(d) of the Constitution. Further under Articles 22(1) and 258(1) of the Constitution, the right body to sue is the Respondent who has violated his Constitutional rights. The Respondent has a duty to carry out its mandate as per Article 3 of the Constitution and not to act in excess of its powers and is bound by the values under Article 10 of the Constitution. He further avers that under Article 165(3) of the Constitution, the Court has jurisdiction to hear matters under Article 23 of the Constitution concerning breach of or threat to breach rights or fundamental freedoms in the Bill of Rights and the doctrine of separation of powers does not affect its mandate on such instances. The Applicant's concern is that he may lose his position unprocedurally and unconstitutionally.

Respondent's Response:

In response, the Respondent states that the Application is premature, misconceived and an abuse of the court process. The Respondent also states that it is not a legal entity capable of being sued in its own name and no legal rights can be accrued or enforced against it as it is a non-entity. Further, that the Respondent cannot be sued for carrying out its public duty and the Court cannot interfere unless the said action is unconstitutional and traverses beyond the Applicant's personal rights. The Respondent's mandate is provided under Article 185(3) of the Constitution. It has oversight powers over County Executive Committee and any other executive organ. It also vets and approves appointments to County Public Offices as per Section 44(2)(b) of the CGA and carries any other role under the Constitution or legislation as per Section 8(1)(f) of the CGA. Hence its role includes debating on matters concerning the County including the conduct of the Applicant who is a County Executive Organ, in carrying out his public duties. The Applicant is said to have carried out activities that have compromised public interest for the Applicant's private interest and as such the Respondent was well within its oversight mandate to set up a committee to investigate the allegations. There never was a censure motion adopted rather only an *ad hoc* committee was set up to investigate. Therefore, the Applicant misled the Court in granting him interim orders.

That the move by the Applicant to court is intended to stall the investigation and an attempt to avoid appearing before the *ad hoc* committee. The Respondent concedes that it has no powers to remove the Applicant from office or discipline him but can censure him and leave it to the Governor to decide the fate of the Petitioner. That the censure is an expression of discontentment, displeasure and disappointment of the electorate through their elected officials of the Applicant's performance of his official duties and cannot remove him from office, furthermore, it may not be adopted. The Respondent in addition states that the Applicant cannot invite the Court to consider the substance and merits of the censure motion as it is within the exclusive purview of the Respondent. In this regard, the Respondent urges the court to purge the Applicant's averments that have so invited the court.

The Respondent states that the applicant previously appeared before one of the Respondent's Committees. Hence, the Respondent wonders why the Applicant is hesitant to appear before the *ad hoc* committee. To the Respondent, the Applicant has come to court with unclean hands and as such the interim orders ought to be discharged. The Respondent also points out to the fact that under Section 16 of the CGA and Section 12 of the National Assembly (powers and Privileges) Act, the on goings of the County Assembly cannot be subjected to civil or criminal proceedings. Section 17 of the CGA adopts the provisions of the National Assembly (powers and Privileges) Act. The alleged remarks by the chairperson and members of the *ad hoc* committee are covered under these provisions under the doctrine of privilege. In any case the said chairperson had not been enjoined to the suit in regard to his alleged remarks and the Applicant has not established actual bias.

The Respondent also leans on the doctrine of separation of powers urging that the Courts should desist from interfering with the County Assemblies' mandate except in the clearest of cases to uphold the public interest over that of individual interests; otherwise the Respondent may suffer injunctive orders grounding

its business to a halt.

It is further stated that the Applicant should have waited to be summoned by the committee at which point he would be supplied with the particulars of the accusations and any other information. There is also no legal requirement that all persons adversely mentioned must be investigated at the same time, in any case, there is a programme in place for investigating them. The Respondent further points out that the Applicant has made broad allegations as to the Constitutional rights allegedly breached without stating them with precision. It also states that it is not a party to the High Court Case Malindi HCCC No. 9 of 2015 and has no intention of debating/discussing the merits of the same. That the application is speculative. To the Respondent therefore, no *prima facie* case has been established

Interested Parties' Response:

The interested parties are in support of the Respondent state that by implication of Sections 55 to 86 of the CGA, the County Public Service Board is the overall body responsible for recruitment and discipline of members of the County Public Service and that by virtue of Section 44 (3)(a) CGA the County Secretary is the head of the County Public Service. They add that the procedure for his removal is as per Section 44(2) CGA and only the Governor may remove him from the seat.

They further add that the County Public Service handles disciplinary issues under Section 76(1) CGA, the County Secretary as its head cannot sit as judge in his own case. That as the County Assembly approves the appointment of the County Secretary, then by implication of the law it can recommend his removal.

The County Assembly by virtue of its oversight powers under Article 185(3) of the Constitution is the proper institution to investigate and recommend removal and as the sovereign powers under Article 1 of the Constitution are delegated to the County Assembly under its sub-articles (2), (3) (a) & (b), it has wide & broad powers including investigative powers over the conduct of the County Secretary.

In addition, it is stated that they support the censure motion as the Applicant has interfered with proceedings of the Tender Committee by seeking to control, *inter alia*, the invitations; awarded and termination of tenders in violation of the law; has redeployed members of the County Public Service contrary to Section 73 of the CGA. They also state that the allegations that there was recommendation by the sectoral committee on Labour and Social Welfare are false as they were not mentioned in the censure motion.

The interested parties put to strict proof the Applicant as per the principle of separation of power, the censure motion does not offend section 6 of the Civil Procedure Act or the alleged standing orders. Further, that until the investigations are concluded it cannot be stated that the tendering process in issue was cleared as being proper by the Public Procurement Oversight Authority and that the Respondent is in breach of Article 185 on separation of powers.

The Petitioner's submissions:

Mr. Kilonzo, counsel for the petitioner submitted that the petitioner has a *prima facie* case with a probability of success as his Constitutional rights have been violated by the Respondent. He relies on the Court of Appeal decision of ***Mrao Ltd v First American Bank of Kenya Ltd & 2 other*** [2003] eKLR. The Petitioner as the County Secretary is also the head of the County Public Service Board and cannot be removed from office save by the Governor and subject to the terms of employment as per Sections 59(c) and 76 of the CGA. The Respondent has no mandate over the conduct of the Petitioner and its oversight role under Article 195 of the Constitution cannot override the powers of the Public Service Board. The scope of the oversight powers only covers County Executive Committee members or any organ of the County Government of which he is neither. The censure motion is an impeachment process and the Respondent has no such mandate over the County Secretary. Hence it is illegal and unconstitutional and by investigating the Applicant through the Censure Motion in place, which in reality is an impeachment motion, the Respondent is violating his rights.

Mr. Kilonzo maintains that the respondent can only set up a committee to investigate a member of the County Executive as per Section 40(a) County Government Act. The County Secretary is only subject to appear before the Respondent for purposes of giving evidence as per Sections 39 and 40 of the County Government Act read together with Article 195 of the Constitution. Hence as per the finding in **Judicial Service Commission v Speaker of the National Assembly & 8 others [2014] eKLR**, the manner in which the oversight role of the Respondent has been executed is not in accordance with the law. The Applicant is a public servant and is not a member of the County Executive Committee nor is he a member of any organ of the County Government hence the Respondent mandate does not cover him. Therefore the *ad hoc* committee set up to investigate the County Secretary is *ultra vires* these provisions and is acting unconstitutionally.

It is further submitted that the applicant will suffer irreparable damage to his reputation and be subjected to Article 73 of the Constitution as to be declared unfit to hold public office as he would be disgraced by the censure motion. The ripple effect would be that any citizenry of Kilifi County may thereafter move the Court for the declaration of unfitness and consequently his removal from office.

He contends that the right person to sue is the Respondent and for this view he relies on the finding of the High Court case of **Simon Wachira Kagiri v County Assembly of Nyeri & 2 others [2013] eKLR**. He further states that the non-joinder of one Member of the County Assembly is not an issue as he is part of the County Assembly.

The applicant submits that the Court per Article 23 & 259 of the Constitution is properly seized of the matter as there is violation of the Petitioner's rights and that the Petitioner is within his rights to protect his Constitutional rights. He distinguished the case of **Okiya Omtatah Okioti & 3 others v Attorney General & 5 others [2014] eKLR** relied on by the Respondent by stating that it was an industrial case. According to Mr. Kilonzo, the interested parties are busy bodies whose rights have not been violated and they ought to have forwarded their complaints to the public service board. The Petitioner states that under Article 22 of the Constitution has a right to pursue his right.

The Petitioner also relies on the following past decided cases though he did not submit on them: **Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others [2014] eKLR**, **David Siguna v County Assembly of Trans Nzoia & Another [2014] eKLR**.

The Respondent's Submissions

Mr. Munyao, counsel for the respondent in opposing the application relies on his pleadings and the list of authorities. He contends that the respondent is wrongly sued as it is not a corporate entity and no legal right can be enforced against it. That this is not a mere technicality and relies on the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**. It further states that the respondent has the mandate to investigate the conduct of the County Secretary but not to remove him from office. There was no motion for impeachment or removal from office and there are no disciplinary proceedings before any forum .

Its oversight mandate emanates from Article 185 (3) of the Constitution and section 44 of the CGA which extends oversight role over the County Executive Committee and any other Executive Organ and the office of the County Secretary is any other Executive Organ. That the power to vet the County Secretary also calls for power to oversee and as he is public officer, he is subject to the oversight role of the Respondent. That there is a difference between censure and an impeachment motion and the Governor may decide the fate of the Petitioner after the censure. The Petitioner has mistaken the censure for removal from office. There is no prima facie case established as the Petitioner is an employee who may be sacked and damages would be an adequate compensation. The interest of the public must override that of personal interest. That once the Court establishes these same view and after the Respondent has carried out its mandate, the Petitioner may then seek judicial review remedies.

On the doctrine of separation of powers Mr. Munyao maintains that the court ought not to interfere with the business of the Respondent. The Respondent under Article 195 (3) of the Constitution has the same

powers as the High Court and the Respondent is only summoning the Petitioner. The Respondent states that the Petitioner has not itemised the rights allegedly breached and has been given a right to be heard, he was summoned and accorded fair administrative action.

The Respondent also relies on the following past decided cases of: *Okoti case (supra)*, *Kagiri case (supra)*, *Communications Commission of Kenya & 4 others v Royal Media Services Ltd & 7 others* [2014] eKLR, *Giella V Cassman Brown* (1973)E.A 358, *Anarita karimi Njeru v The Republic* (1976-1980)1 KLR 1272, *Nick Githinji Ndichu v Clerk, Kiambu County Assembly & Another* [2014]eKLR .

Submissions by Interested Parties:

Mr. Abubakar, counsel for the interested parties also oppose the application and states that his clients are not busy bodies. They are acting as per Article 3 & 10 which accords them a duty to defend their constitutional rights as voters who have legitimate expectation that the Constitution shall be compiled with. Counsel further states that the oversight mandate of the Respondent emanates from Article 185 (3) of the Constitution and section 44 of the CGA . That the public service board is not the only body that may discipline the Petitioner as the Governor may also remove him from office. Besides, the County secretary cannot be disciplined, as per natural justice, by a body he heads; which body disciplines only junior officers as per Section 59(1)(c) of the CGA. The censure motion is justified as there is proof of the said allegations ; hence the Respondent can investigate and recommend to the Governor about his dismissal.

Mr. Abubakar differs on the Applicant's view of the process of a censure motion in particular the allegation that an *ad hoc* committee cannot be set up. The issue of bias has to be taken up by the committee so that its chair can step aside and counter the allegation that there was no mention of a censure motion on the floor of the house by stating that the motion was specific and clear. They oppose the notion that the Respondent is in breach of the Constitution or that the Applicant's constitutional rights have been breached.

Analysis and Determination:

The issues to determine are whether or not this court is clothed with the requisite jurisdiction; whether or not the petitioner is within the parameters of temporary injunctive orders ; whether or not the right party is sued; whether or not lack of itemisation of the rights allegedly breached is fatal; and the issue of costs.

As jurisdiction is everything, this ought to be the first point for determination. see *Owners of the Motor Vessel Lillian "S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1. Firstly, the Respondent has relied on the doctrine of separation of powers to put its point across as to the lack of jurisdiction by the Court. Whereas this is a true position of the law in appropriate cases, it is imperative to first look at the circumstances of this case to determine whether the doctrine of separation of powers bars this Court's intervention. There is allegation of intended breach or breach of constitutional rights and in particular that the set up of an *ad hoc* committee to investigate the applicant in an impeachment motion disguised as a censure motion is ultra vires , illegal and unconstitutional as it fails to adhere to the law.

The court cannot turn a blind eye on such allegations and until it is establishes that no such rights allegedly breached exists and or that is no breach of the rights and or the Respondent has acted unconstitutionally in fulfilling its mandate, it becomes rightfully seized of such a matter as per **Article 159 and 165 (3)(d)** of the Constitution. The role of the Court was rehearsed in *Commissioner for the Implementation of the Constitution v Attorney General & 2 others* [2013] eKLR wherein the Court of Appeal stated that the High Court possesses a constitutional interpretation jurisdiction. It further stated that the Court cannot adopt a passive and aloof attitude in the face of constitutional failures on the part of Parliament. It is alleged that there is constitutional failures on the part of the County Assembly. Ultimately, this is what the petition seeks the Court to determine. The Court of Appeal adopted with approval the High Court finding in *Federation Of Women Lawyers Kenya (FIDA K) & 5 Others Vs. Attorney General & Anor* petition NO. 102 OF 2011, [2011] eKLR; whereby the Court had held that:

“In actual fact it is the court’s sole mandate to provide checks and balances for the executive and the court will not hesitate to interfere when called upon to interpret the Constitution and supervise the exercise of constitutional mandate. We find that to do otherwise would be dereliction of our constitutional mandate.”

The Court of Appeal further stated that, ***“The constitutional interpretation jurisdiction that resides in the High Court, and which we must exercise when sitting on appeals from its determinations, is a critical and vital one. This is especially so when it comes to testing the constitutionality of legislative actions that touch on the special safeguards and protections that have progressively been adopted to protect persons and groups that are vulnerable or disadvantaged. In such instances, it is for the court to robustly and firmly affirm those protections that from their very nature may seem a counter-majoritarian irritation to those that have the weight or the numbers on their side.”***

Secondly, the Respondent in pointing to the lack of the Court's jurisdiction has wielded the doctrine of parliamentary privilege which as per the CGA is *mutatis mutandis* applicable to the County Assemblies. In the ***Okiya Omtatah Okoiti & 3 others v Attorney General & 5 others*** [2014] eKLR a 3 judge bench composed of **I. Lenaola, J, M Ngugi, J, and W.K Korir, J** held that though the members of parliament may debate anything under the sun and should do so freely it remains the mandate of the Court ***“to check the constitutionality of the resolutions and statutes made by the legislature.*** Under Article 117 of the Constitution it is provided that:

(1) There shall be freedom of speech and debate in Parliament.

(2) Parliament may, for the purpose of the orderly and effective discharge of the business of Parliament, provide for the powers, privileges and immunities of Parliament, its committees, the leader of the majority party, the leader of the minority party, the chairpersons of committees and members.

“In Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others 2014] eKLR the court held that “The Court being the only arm of government vested with the power to interpret the Constitution, and to safeguard, protect and promote its provisions has the duty and obligation to intervene in actions of other arms of government and state organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation.” The Court also held that privilege/immunity does not extend to acts that are unconstitutional. The duty of this Court then would be to determine the Constitutionality of the resolution to censure/ investigate the Petitioner. Hence the Court is properly seized of the matter before it. The legislative role of the respondent has to be carried out within the law.

The Respondent has also stated that as it is not a corporate body and as a result it cannot be sued. The position in law is that the Speaker of the House is sued as the proper party and not the National Assembly this applies *mutatis mutandis* to the County Assemblies as per Articles 1 (3)(a) and (4) (b) of the Constitution. The County Assembly is but a mirror of the National Assembly at the County Level. However in ***Judicial Service Commission v Speaker of the National Assembly & 8 others*** [2014] eKLR the Court of Appeal determined that in cases where the National Assembly is to be sued or seeks to sue, the Speaker of the House is the proper party to sue or be sued. The Court of Appeal took this omission as a mere technicality and stated that:

“Our understanding of the decision of Majanja J, in which Parliament had been sued in its name, is that under the current constitutional dispensation, a party with a legitimate claim cannot be barred from recourse simply because of the technical doctrine of legal personality. In the present case, we have taken the view that the Speaker is properly made a party to the suit, but nonetheless, irrespective of whether it was the Speaker or the National Assembly that had been enjoined in the proceedings, the constitutional dictates demand that the Court exercise its jurisdiction when moved appropriately”

I am of the same view with **Nelson Abuodha, J** in ***Simon Wachira Kagiri v County Assembly of Nyeri***

& 2 others [2013]eKLR where the Court held that [paragraph 34] :

“On the issue of whether the County Assembly may be sued in its own name the court takes the view that the County Assembly as a distinct institution in the County Government carrying out public duties as mandated by the Constitution and the County Government Act, is capable of suing or being sued in the absence of an express statutory provision. However such suit ought to be brought through its titular head - the Speaker. The omission to cite the Speaker as such party is a technical omission that does not occasion the Assembly any prejudice. It is however a practice that must not be encouraged.”

Under **Article 159 (2)(d)** of the Constitution that this omission ought to be taken as a mere technicality which is curable for the sake of substantive justice. This error is not fatal. The overriding objective is to substantively deal with the dispute at hand as opposed to shutting the door against a litigant.

The established law in granting injunctive orders is that its seeker must establish that he has a *prima facie* case with probability of success, he is likely to suffer irreparable harm or injury whereby damages would not be adequate compensation and that the balance of convenience would tilt in his favour as was long established in the landmark case of ***Giella v Cassman Brown [1973] E.A 358***.

Under **Article 185 (3) of the Constitution** the County Assembly is adorned with oversight role over the county executive committee and any other county executive organs. The word '**oversight**' as per the **Concise Oxford English Dictionary, 12th ed** is defined as : **The action of overseeing.** To '**oversee**' is defined as '**to supervise**' and to '**supervise**' as : **to observe and direct the execution of (a task or activity of the work) of (a person).** Hence it can be stated that the County Assemblies are clothed with supervisory mandate over the county executive committee and any other county executive organs. The Petitioner contends that the Respondent does not have supervisory powers over the holder of County Secretary office as he is a public servant and is neither a county executive committee member nor a county executive organ.

The **CGA** provides under **Section 44 (3)(a)** that the County Secretary heads the Public Service Board Established under **Sections 56 & 57** of the **CGA** . The petitioner contends that it is only the Public Service Board that has disciplinary mandate over public servants and as he is head of the public servant the board may discipline him. However, that it is only the Governor who can occasion his removal from office. While the removal from office by the Governor is a undisputed, his being disciplined by the same board he heads has been taken up by the Interested parties who state that one cannot be a judge over his own case. Under **Section 59 (1) (c)** of the **CGA** , persons who are subject to disciplinary measures which include removal from office are '**persons holding or acting in those offices as provided for under this Part;**' being part **Part VII** of the **CGA** entitled '**COUNTY PUBLIC SERVICE**'. The office of the County Secretary is not established under that part. It ought to be found then that he cannot be disciplined by the County Public Service Board which he heads as that too would be in breach of natural justice.

Can the Respondent then step in? **Section 44(2)(c) CGA** provides for removal of a County Secretary. It does not envisage the intervention of the County Assembly. **“(2)The county secretary- (c)may, subject to the conditions and terms of appointment, be dismissed by the governor.”** This is the point the Petitioner seeks to drive home that the resolution by the Respondent to set up a committee to investigate him is *ultra vires* the Act and its constitutional mandate. The Respondent maintains that it has not set to discipline the County Secretary or remove him from office.

The Respondent has stated on one hand that there is no censure motion and yet on the other it has owned up to its existence but has clarified that the same is not to be confused with an impeachment motion. The difference between censure and impeachment as per the **Black's Dictionary, 4th ed.** is as follows:

Censure :An official reprimand or condemnation ; harsh criticism

Impeachment:The act(by legislature)of calling for the removal from office of a public official, accomplished by presenting a written charge of the official's alleged

misconduct.

Now to oversee as before mentioned is to supervise. But can investigation be part of the Respondent's supervisory role? I would state in the positive. The word 'investigate' is defined by the **Concise English Dictionary**, 12th ed as: **To carry out systematic or formal inquiry into (an incident or allegation) so as to establish the truth. make a search or systematic inquiry.** If the Respondent sets up an ad hoc committee to investigate so as to establish the truth, then it is well within its mandate. But, does it have supervisory mandate over the County Secretary? I would find that it has a very wide role under **Article 185** of the Constitution. As part of the County Government bearing sovereign power as per **Article (3) (a)** of the Constitution, may look into the conduct of the County Secretary. Besides this, the office of the County Secretary is established under **Part V** of the **CGA entitled "COUNTY EXECUTIVE"**, it is clear that as he is not established as a member of the County Executive member, his office is an organ of the County executive. The applicant's office is part of the executive organ of the County government. The applicant undertakes an executive role. As a secretary to the executive committee, under section 44, the applicant's position cannot be equated to a mere minutes taker. He implements the executive decisions. In the process of implementing those decisions, he is accountable to the executive as well as to the people's representatives who are the members of the County Assembly.

What of the Petitioner's claim that he had not been informed of the charge the subject of the investigations? It is clear that the so called investigations are at their rudimentary stages and the Respondent concedes the Petitioner's position that he can only be sacked by the Governor. The requisite information would be passed to the Petitioner at the point of being summoned. Under **Article 195** of the Constitution, a County Assembly Committee has powers similar to the High Court to summon "**any person to appear before it for the purpose of giving evidence or providing information**". This does not exclude a county secretary. Similarly, the summoning cannot be limited to only those two issues. Giving information can include giving detailed explanation to issues raised in relation to that information.

In my view, having failed to establish a *prima facie* case, the application would fail. The County Assembly has a role to play in checks and balances of the executive. **Article 174** of the Constitution provides that: **The objects of the devolution of government are-(i)to enhance checks and balances and the separation of powers.** The Court would in halting the process engaged by the Respondent, pending the hearing of the Petition, under the circumstances be interfering with the doctrine of separation of powers.

The issue as to whether or not lack of itemisation of the rights allegedly breached is fatal as per the case of **Anarita Njeru (supra)** I believe this would be best ventilated at the hearing of the Petition.

As to the conservatory prayer, which I find to be a mandatory injunction baptised differently, as the prayer seeks an order to cause 'there not to exist' the censure motion, the *ad hoc* committee nor the ensuing investigations. The threshold for this has not been met. There are no special circumstances warranting it. The Court of Appeal in **Kenya Breweries Limited & another v Washington O. Okeyo [2002]eKLR** held that "**The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England 4th Edn. para 948 which reads:**

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff a mandatory injunction will be granted on an interlocutory application".

Also in Locabail International Finance Ltd. V. Agroexport and others [1986] 1 ALL ER 901 at pg. 901 it was stated:- "A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily

remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

Article 174 of the Constitution is quite clear on the objects of devolution. One of the objectives is to promote democratic and accountable exercise of power. It is also to enhance checks and balances and the separation of powers. The county assembly has the power to summon any officer including county ministers for purposes of explaining the affairs of the County. This is their role under Article 1 of the Constitution. The members of the County Assemblies exercise the people's sovereign power as they are their representatives. There is nothing wrong in summoning the applicant to appear before the county assembly either for purposes of being censured or for any other purpose. The applicant performs executive duties and cannot allege that he is not a member of the executive committee. Article 185 permits the County Assembly to exercise oversight over other executive organs of the County. The applicant falls within both the category of executive committee as well as other executive organs.

In the end, I do find that the applicant has not established any prima facie case with a probability of success. No irreparable damages will be suffered. The court cannot injunct the Kilifi County Assembly from exercising its oversight role over the applicant. The application lacks merit and is hereby dismissed with costs.

Dated, signed and delivered this 8th day of July, 2015.

SAID J. CHITEMBWE

JUDGE