



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 458 OF 2015

IN THE MATTER OF: THE CONSTITUTION OF KENYA ARTICLES 1, 2, 3 (1) & (2), 4 (2), 10, 19, 20, 21, 22(1), 23(1), 24 (1), 35(1) (b), 38 (1) (3) (c), 47 (1) (2), 48, 50, 165 (3) (b) & (d), 73, 174, 181, 118 (1) (b), 196 (1) (b), 258, 259 & 260.

IN THE MATTER OF: SECTION 3(b), f, 14, (1), (a), 87 OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012

IN THE MATTER OF: PROPOSED REMOVAL FROM OFFICE OF A COUNTY GOVERNOR

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

BETWEEN

MWANGI WA IRIA.....1ST PETITIONER

MURANG'A COUNTY EXECUTIVE.....2ND PETITIONER

COUNCIL OF GOVERNORS.....3RD PETITIONER

AND

SPEAKER MURANG'A COUNTY ASSEMBLY.....1ST RESPONDENT

MURANG'A COUNTY ASSEMBLY.....2ND RESPONDENT

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

THE SENATE.....4TH RESPONDENT

RULING

Introduction

1. The petition herein was prompted by a Motion moved by a nominated member of the 2nd Respondent. The motion sought a resolve from the 2nd Respondent to remove the 1st Petitioner from the office of the County Governor of Muranga. The motion was made pursuant to the provisions of Section 33 of the County Governments Act No. 17 of 2012 and Article 181 of the Constitution. The motion which was debated on 21st October 2015 apparently garnered the requisite two thirds' majority support of the members of the 2nd Respondent. This set the stage for the 1st Petitioner's ultimate removal from office as the County Governor of Muranga.
2. The 1st Petitioner's reaction was to file this petition and simultaneously also seek conservatory orders to restrain the 1st and 2nd Respondents from informing the 3rd Respondent of the resolution approving the motion. The 1st Petitioner further sought orders to restrain the 3rd and 4th Respondents from receiving, introducing, discussing or otherwise debating the motion for the 1st Petitioner's removal.

Backgrounds facts

3. Gathered from the affidavits, the facts may be colourlessly stated as follows.
4. The 1st Petitioner is the Governor of Muranga County. He was elected by a popular vote in 2013 to head one of the 47 devolved governments of the Republic of Kenya.
5. On 15th October 2015 he received a letter from the 1st Respondent. The letter, which was then two days old, forwarded a proposed Motion for his removal. Through his legal counsel the 1st Petitioner sent a riposte to the 1st Respondent. The 1st Petitioner sought for further particulars and documents. He waited. And waited. The 1st Respondent did not respond.
6. On 21st October 2015 in the 1st Petitioner's absence the motion was moved, debated and put to vote. It sailed through. The 1st Petitioner then heard about the debate and vote through the media.
7. On 21st October 2015, the notification consequent upon the successful Motion was forwarded to the 3rd and 4th Respondents. It was received on 22nd October, 2015. The 3rd Respondent acted and soon a special sitting of the 4th Respondent slated from 28th October 2015 was gazetted. In the meantime, the Petitioner moved the court on 23rd October 2015 just as the Clerk to the 2nd Respondent was dispatching to the 4th Respondent various documents in regard to the successful Motion for the 1st Petitioner's removal as governor
8. Subsequently, a special committee was constituted by the 4th Respondent. The special committee held its first meeting on 28th October 2015. The special committee then scheduled a meeting with the parties concerned including the 1st Petitioner and the 2nd Respondent on 3rd November 2015.
9. The 1st Petitioner is still Governor but time runs against him. There are statutory time lines under the County Governments Act. The parties are in agreement on this.
10. The above facts are largely not contested by the parties.

The application

11. The application dated 23rd October 2015 seeks the following orders

a. ...

- b. *Pending inter partes hearing and determination of this application, the 1st and 2nd Respondents whether by themselves their agents and or servants and /or whomsoever be restrained jointly and severally from forwarding and or informing the 3rd Respondent, the decision of the 1st Respondent made on 21st October 2015 approving the Motion for the removal of the 1st Petitioner from office of County Governor, Muranga or in any other way whatsoever acting on the said Motion.*
- c. *Pending inter partes hearing and determination of this Application, a conservatory Order be and is hereby issued restraining the 3rd and 4th Respondents from receiving, introducing, discussing, sitting or otherwise deliberating on the Motion for the removal of the 1st Petitioner from Office by way of the impeachment based on the resolution forwarded to it by the 1st and 2nd Respondent passed on 21st October 2015.*
- d. *Pending the hearing and determination of the Petition herein a conservatory order be issued in the same terms as prayer (b) and (c) hereinabove.*
- e. *The Court do issue such other orders as it may deem fit in the interest of justice.*

12. It is the said interlocutory application that is the subject of my determination herein.

The Petitioners' case

13. The Petitioners' case is contained largely in the Petition.

14. It is the Petitioners' contention that the contrary to the provisions of Article 47 and 50 of the Constitution as well as Statutory Order 67 of the 2nd Respondent, the 1st Petitioner was denied the right to a fair administrative action when he was not granted a hearing by the 2nd Respondent. The 1st Petitioner also contends that his right to access information under Article 35 of the Constitution has been infringed and or is threatened with infringement. The Petitioners also challenge the impugned Motion and ultimate decision of the 2nd Respondent on the basis that, contrary to Article 196 (1) of the constitution, the Motion and the decision attendant to it were not subjected to public participation.

15. For completeness, the Petitioners state that the impugned decision of the 2nd Respondent will likely result in a violation of the 1st Petitioner's right to hold office pursuant to Article 38 (3) (c) of the Constitution.

Respondents' case

1st and 2nd Respondents' case

16. The 1st and 2nd Respondents filed a Replying Affidavit sworn by the Leonard Nduati Kariuki, the speaker of the County Assembly of Muranga.

17. The 1st and 2nd Respondents contend that the matter is beyond their arms. The matter, contend the 1st and 2nd Respondents, is now with the 4th Respondent. The 1st and 2nd Respondents also contend that the 2nd and 3rd Petitioners are strangers with no standing in the Petition.

18. The 1st and 2nd Respondents deny violating any provision of the Constitution or statute. While contending that the Petitioner was fairly treated the 1st and 2nd Respondents assert that the members of public were invited to present their views and comments in the matter of the 1st Petitioner's removal.

3rd and 4th Respondents' case

19. The 3rd and 4th Respondents' case may be found in the Grounds of Opposition as well as the Replying Affidavit of Johnstone Okoth Okello. Both were filed on 29th October 2015.
20. The 3rd and 4th Respondents state that a special committee to investigate the proposed removal of the Petitioner as Governor has already been constituted. That the 1st Petitioner will be accorded a fair hearing. This will include holding discussions and inviting all interested parties.
21. The 3rd and 4th Respondents also contend that the Petitioners have not established that the 4th Respondent is not best placed to determine whether the Motion for the removal of the Petitioner was in accordance with the Constitution. It is in these respects that the 3rd and 4th Respondents contend that the Petition is an affront to Article 181 of the Constitution as well as Section 33 of the County Governments Act.
22. The 3rd and 4th Respondents also aver that the Petition seeks to restrict the 4th Respondent from carrying out its supportive role to County Governments under Article 190(1) of the Constitution. Further, the Respondents assert that the Petition has the effect of curtailing the constitutionally granted oversight authority of the 4th Respondent.
23. For completeness, the 3rd and 4th Respondents contend that the Petition is both premature and speculative.

Arguments

24. Mr. P. K. Muite SC led Mr. Mbugua Nganga and Peter Wanyama in urging the Petitioners' case.
25. Mr. Mbuthi Gathenji argued the 1st and 2nd Respondents case while Mr. A. Njoroge urged the 3rd and 4th Respondents' case.
26. The parties made oral arguments before me on 29th October 2015.

The Petitioners' submissions

27. Mr. Muite's submissions were largely to the effect that the Petitioner had made out a case for conservatory orders. Senior counsel stated that there was need to ensure an orderly functioning of government organs and this could be attained through the issuance of conservatory orders by the court. In this regard, counsel referred the court to the Supreme Court's decision in **Gatirau Peter Muya -v- Dickson Mwenda Githinji and 2 others (2014) eKLR** whilst also submitting further that public interest was more paramount to the court when considering whether to grant or deny an application for conservatory orders made under the Constitution.
28. The Petitioners also submitted that if no conservatory order was granted there would be futility in so far as the petition was concerned. Further the Petitioners argued that an application for conservatory orders was quite distinct and separate from an application for an interlocutory injunction. The Petitioner relied on the cases of **Gatirau Peter Muya -v- Dickson Mwenda Githinji and 2 others (supra)** and **Muslim for Human Rights and 2 others -Vs- Attorney General and 2 others (2011) eKLR** for these propositions.
29. Counsel next submitted that the court had jurisdiction to intervene where there was a violation or threatened violation of the Constitution. This was in pursuant to and in exercise of the jurisdiction of the Court under Article 165 of the Constitution and as had been held by the Court of Appeal in the case of **Martin Nyaga Wambora and 3 others -v- Speaker of Senate and 6 others CACA 21 OF 2014 (2014) eKLR**.

30. In the instant case, so proceeded counsel, the 1st Petitioner's right to a fair administrative action had been violated and neither had the 1st Petitioner been granted a fair hearing (trial). Counsel added that the 1st Petitioner had been denied the right to be heard as well as access to documents and that this was contrary to the provisions of Articles 47 and 50 of the Constitution as well as Standing Order No.67 of the 2nd Respondent.

31. Arguing further that the impeachment of a Governor was a serious issue only equal to the impeachment of the national President, Mr. Muite stated that there was not enough evidence to show gross violation by the 1st Petitioner of the Constitution, under Article 181 of the Constitution. Counsel urged the court to grant the orders sought with a view to protecting and promoting devolution. An order would also ensure that the 1st Petitioner's right to hold office under Article 38 was also protected.

1st and 2nd Respondents Submissions

32. 1st and 2nd Respondents submissions as made by Mr. Mbuti Gathenji were that the 1st and 2nd Respondents were no longer participants in the matter as the rest of the process of impeachment of the 1st Petitioner was now with the 3rd and 4th Respondents.

33. Mr. Gathenji also submitted that the 2nd and 3rd Petitioners were not properly parties to the Petition as they could not and had not demonstrated their interests or grievances.

34. Counsel wound up his submissions by relying on the Replying Affidavit of Leonard Nduati Kariuki. Counsel stated that the Petitioners had not established any prima facie case as the 1st Petitioner was given the opportunity to be heard. Further, the public, including the Petitioners, were afforded an invite to make representations and comment on the 1st Petitioner's then intended removal.

The 3rd and 4th Respondents submissions

35. Mr. A. Njoroge submitted that the removal of a governor was underpinned both under the statute as well as the Constitution. He held the view that the power was vested in both the County Assembly and the Senate. The court, in his view, had no jurisdiction over the same. Referring to the final report of the Committee of Experts on the Constitutional Review, Mr. Njoroge submitted that the framers of the Constitution always intended that the impeachment of the President and by extension of governors was kept outside the judiciary, which was to be left as an avenue of appeal. Mr. Njoroge relied on the case of **Stockdale –Vs- Hansard (1839) of Ad. & El 309** where the English law lords observed as follows:

“Beyond all dispute, it is necessary that the proceedings of each House of Parliament should be entirely free and unshackled, that whatever is said or done in either House should not be liable to examination elsewhere.”

36. Placing reliance on the case of **R. -v- Registrar of Societies and 5 others ex parte Kenyatta and 6 others [2007]eKLR**, Mr. Njoroge stressed the point that the doctrine of separation of powers dictated that Courts do not interfere with the working of either Parliament or the executive as ***“parliament legislates, the executive formulates and executes policy contained in the legislation and the courts interpret the law”***

37. The 3rd and 4th Respondents' additional submissions were also that the process of impeaching the 1st Petitioner had been and was being undertaken procedurally as by law and the Constitution provided.

38. Further, it was the 3rd and 4th Respondents' submissions that even if the impeachment process was to proceed, the 1st Petitioner would suffer no prejudice and neither would the Petition be rendered nugatory.

Petitioners' rejoinder

39. In a pithy rejoinder the Petitioners' lead counsel stated that the court could intervene in the process of impeachment at any stage if the process was unprocedural. In the instant case the 2nd Respondent never gave the 1st Petitioner the opportunity to appear before it and neither did the 2nd Respondent set up a committee as prescribed by its own Standing Orders. Counsel reiterated that the Petitioners had made out a prima facie case.

ISSUE(S)

40. I have read and understood petition. I have also considered the oral arguments.

41. I am currently faced with an intermediary application for conservatory orders. I am not hearing the Petition. Consequently, at this stage of the proceedings the core issue for my determination is whether the Petitioners have made out a case for the conservatory orders sought.

42. In these respects, I must first agree with Mr. Mbuti Gathenji that the orders now sought as against the 1st and 2nd Respondents have been spent. As the parties are in agreement that the 3rd Respondent is now seized of the matter it is apparent that any order(s) against the 1st and 2nd Respondents in the terms now sought would be otiose and in vain.

43. What remains for determination is whether at this stage of the proceedings the court may grant the conservatory orders sought as against the 3rd and 4th Respondents.

Discussion and Determination

44. Applications for conservatory orders are ordinarily made under Article 23(3) of the Constitution and Rule 23(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (aka *the Mutunga Rules*). The criteria to be satisfied by an applicant and/or considered by the court is now relatively clear. As was correctly pointed out by Mr. Muite for the Petitioners, the consideration to be given is different from that of an interlocutory injunction application in an ordinary civil case.

45. In the case of **Kenya Small Scale Farmers Forum –v- Cabinet Secretary Ministry of Education NRB HCCP No. 399 of 2015 [2015] eKLR** the principles set by a series of cases and which ought to guide a court dealing with an application for conservatory orders were duly summarised. The court stated the guidelines and principles applicable as follows:

“[30]....:

- ***The applicant ought to demonstrate a prima facie case with a likelihood of success and that he is likely to suffer prejudice as a result of the violation or threatened violation if the conservatory order is not granted: see Centre for Rights Education and Awareness & 7 Others –v- The Attorney General HCCP No. 16 of 2011. It is not enough to show that the prima facie case is potentially arguable but rather that there is a likelihood of success: see Godfrey Mutahi Ngunyi –v- The Director of Public Prosecution & 4 Others NBI HCCP No. 428 of 2015 and also Muslims for Human Rights and Others –v- Attorney General & Others HCCP No. 7 of 2011.***
- ***The grant or denial of the conservatory relief ought to enhance Constitutional values and objects specific to the rights or freedoms in the Bill of Rights: see Satrose Ayuma & 11 Others –v- Registered Trustees of Kenya Railways Staff Benefits Scheme [2011] eKLR and also Peter***

Musimba –v- The National Land Commission & 4 Others (No. 1) [2015] eKLR.

- ***If the conservatory order is not granted, the Petition or its substratum will be rendered nugatory: see Martin Nyaga Wambora –v- Speaker of the County Assembly of Embu & 3 Others HCCP No. 7 of 2014.***
- ***The Public interest should favour a grant of the conservatory order: see the Supreme Court of Kenya’s decision in Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR.***
- ***The circumstances dictate that the discretion of the court be exercised in favour of the applicant after a consideration of all material facts and avoidance of immaterial matters: see Centre for Human Rights and Democracy & 2 Others –v- Judges and Magistrates Vetting Board & 2 Others HCCP No. 11 of 2012 as well as Suleiman –v- Amboseli Resort Ltd [2004] 2 KLR 589.***

46. Noting that the above principles though relatively clear are not absolutely exhaustive, I am constrained to add that in the exercise of discretion the court may also invite the proportionality dogma. As was stated by Odunga J. in the case of **Kevin K. Mwiti and 2 Others -v- Kenya School of Law and 2 Others [2015] eKLR:**

[14]In considering whether or not to grant conservatory order, it is my view that the principle of proportionality plays a not remote role. As was stated by Ojwang, AJ (as he then was) in Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589 the Court, in responding to prayers should always opt for the lower rather than the higher risk of injustice. The learned Judge expressed himself as follows:

“...Although the court is unable at this stage to say that the applicant has a prima facie case with a probability of success, the Court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted; and in these circumstances, the balance of convenience lies in favour of the applicant rather than the respondent. There would be a much larger risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant”

47. Before considering the issue(s) at hand, I must also state that at this stage of the proceedings, I am not expected to and indeed, I should not make any conclusive or definitive findings of facts or of the law. The trial court at the hearing of the petition will be expected to do that.

48. Secondly, it is necessary to dispose of two prelude issues before discussing the issue as to conservatory orders. The two issues concern, firstly, the question as to the court’s jurisdiction to issue orders concerning and touching the 3rd and 4th Respondents. The other peripheral issue concerns the 2nd and 3rd Petitioners. The 1st and 2nd Respondents have questioned their standing and or joinder.

An issue of misjoinder

49. This issue may be dealt with shortly.

50. The issue was raised by the 1st and 2nd Respondents during the oral arguments. Counsel Mr. Gathenji replicated paragraph 7 of the Replying Affidavit filed by the 1st Respondent and stated that there was no indication at all in the Petition that the 2nd and 3rd Petitioners were aggrieved or had any constitutional issues or questions to raise before this court. The Petitioners made no response to counsel’s submissions. Neither were the allegations in paragraph 7 of the Replying Affidavit challenged.

51. A cursory glance at the Petition will reveal that the only references made to the 2nd and 3rd

Petitioners is in the descriptive paragraphs of the Petition. On the face of the Petition , it is certainly unclear what grievance the 2nd and 3rd Petitioners could be having.

52.The 2nd Petitioner is however described as the County Government which is headed by the 1st Petitioner. The 3rd Petitioner on the other hand is described as a “*statutory body established pursuant to Section 19 of the Intergovernmental Relations Act, 2012 and charged with the functions inter alia, [sic] consideration of matters of common interests to County Governments*”.

53.While I am unable to discern any specific fundamental rights or freedoms as may concern the 2nd and 3rd Petitioners which have been violated or threatened with violation so as to bring the two petitioners squarely within the ambit of the principle enunciated in the case of **Anarita Karimi Njeru v- Attorney General [1979]1 KLR 154**, I am not convinced that the two petitioners are busy-bodies as was submitted by Mr. Gathenji.

54.In my judgment, both petitioners are juridical bodies who may have genuine grievances and or concerns in so far as the treatment, nay removal , of the 1st Petitioner is concerned. Besides, under Rule 5(b) of the Mutunga Rules , a Petition and by extension an application “*is not to be defeated by reasons of the misjoinder or non-joinder of parties and the court may in every proceeding deal with the matter in dispute.*”

55.I need not consequently exercise the Court’s inherent power under Rule 5(d) of the Mutunga Rules and strike out the 2nd and 3rd Petitioners as I was invited to do by Mr. Gathenji. The 2nd and 3rd Petitioners may continue to participate in these proceedings as Petitioners.

The court’s remit

56.The 3rd and 4th Respondents have raised an issue as to the court jurisdiction to grant and issue the conservatory orders against the 3rd and 4th Respondent. The Petitioners retort was that the court has the necessary remit to interfere and intervene at any time especially when there is a violation or threatened violation of the Constitution.

57.The 3rd and 4th Respondents’ approach was to invoke **Baron de Montesquieu’s** 1748 theory of tripartite systems of governance. Otherwise known as the doctrine of separation of powers, the rather rational doctrine is often abused at the convenience of each arm of government. Often the concerned branch will cry ‘independence’ and blithely forget the need for checks and balances. It is however not for the court to now review Montesquieu’s treatise “***The Spirit of the Laws***”, suffice only to state that the doctrine must always be understood in context.

58.Since 2010, discourse of the doctrine has no doubt consistently occupied our courts more intensely. It is not surprising consequently to come across arguments before the courts that Parliament should be entirely free and unshackled and not examined or questioned outside either House (of Parliament) on whatever has been said or done inside the House. That was also the 3rd and 4th Respondents’ line of argument.

59.Counsel was of the view that Article 181 of the Constitution and Section 33 of the County Government Act, solely mandated the 3rd and 4th Respondents to deal with the removal of any county governor, including the 1st Petitioner from office. The Courts were thus not to interfere. Indeed, counsel even drew from history, in the form of a report by the Committee of Experts on the Constitutional Review to illustrate that even the framers of the Constitution always intended to keep the judiciary away from Parliament in matters involving impeachment of the Country’s or counties chief executives namely the National President and the Governors respectively. In his further endeavour to illustrate the point, counsel drew case law largely from England.

60.Mr. Muite for the Petitioners not only found the arguments as to jurisdiction unreasonable but also

- untenable. The court could intervene to save, if nothing else, the Constitution, so submitted counsel.
61. I agree.
62. Judicial interference is not inappropriate. To insist otherwise would be to misunderstand what took place and what was intended when our country adopted the Constitution in 2010
63. Our Constitution is supreme.
64. That statement as to the supremacy of the Constitution is not a slogan. The Constitution became supreme when it was adopted. Put more simply, each Kenyan was given individual rights and freedoms which no government or legislature could take away. The supremacy of the Constitution cannot be gainsaid anymore. Not Parliament, not the Executive, not the judiciary, not a Member of Parliament, not a Cabinet Secretary, not a judge, not a senator, not a Governor and not even the President can claim supremacy over the Constitution.
65. However, as some of the rights and freedoms are not absolute, the government and even the legislature could justify the qualification or infringement of the rights. Inevitably disputes over meaning of rights and their qualified justifications would have to be settled and here comes the role of the judiciary to resolve these disputes. Where there is no justification or there is violation it must be stopped, by the judiciary.
66. It must also be recalled that it was a deliberate choice of the people to assign an interpretive role to the courts and command the court to declare various actions unconstitutional: see Article 165(d). In this regard, it matters little that legislators may argue that they are themselves representatives of the people. It is the same people who saw and still see the court as the independent arbiter when they have a complaint against the people (legislators) they have elected. Simply put, the people executed a social contract for the court to be the arbiter, when necessary.
67. It is for that reason that it must be held and I so hold that this court has jurisdiction to interrogate any act said to be undertaken pursuant to the provisions of the constitution and if necessary, invoke the power under Article 23(3) (c) and issue an appropriate conservatory orders.
68. In summary, the constitutional design since 2010 was refashioned to state that henceforth all Kenyans and state organs, the legislature and the executive included, performed their roles in conformity with the newly conferred constitutional rights and freedoms. Part of the design, as already indicated was for the courts to superintend such performance. As was stated by this Court in **Martin Nyaga Wambora & 32 Others v County Assembly of Embu HCCP No 7 & 8 of 2014 at Embu (consolidated) [2015]eKLR:**

“[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.”

69. There is of course the need for mutual respect by the courts for the role of the Executive and Parliament, and vice versa. And the test in my view, even as an appreciation of the doctrine of separation of powers is extended, should be that; in determining whether in any particular case the subject of challenge is within the court’s jurisdiction as provided for by the Constitution under Article 165 the question should not only be whether some matter is within the authority of Parliament. The question whether that matter or action is consistent with the Constitution or any written law should also be addressed.

70. It is truly unnecessary to create confusion by bringing in arguments concerning the respective roles of the legislature and the judiciary. That is “bottom-up reasoning” and is hallowed. Yet unfortunately, that is always the case.

71. With jurisdiction at hand, the court must then ask itself when it is appropriate in given circumstances to interfere with the decision or process of Parliament.

72. In the case of **Trusted Society of Human Rights Alliance –V- Attorney General and 2 others NBI HCCP No. 229 of 2012 (2012) eKLR** the court while appreciating that the court had supervisory powers but which had to be exercised with caution stated as follows:

“[71] However there is a legitimate question on how far authority of the court to review the decision of other state organs which exercise independent constitutional authority go. There are some areas where the court can simply not go. Some outer limits on its power to review the decisions and actions of other branches and state organs.”

73. Subsequently too in **Martin Nyaga Wambora –V- Speaker County Assembly of Embu & 2 others HCCP No. 7 of 2014 [2014]eKLR** court stressed the need for caution and stated as follows, whilst determining an intermediary application:

“[63] Where a conservatory order is sought against a public agency like a legislative assembly that is mandated to carry out certain functions in the normal course of its business, it is only granted with due caution. The interruption of the lawful functions of the legislative body should take into account the need to allow for the orderly functioning in the public interest.”

74. The court then proceeded to hold as follows:

“[65] The Court will only issue conservatory orders in exceptional circumstances and will be minded of the mandate of other constitutional organs in exercise of their constitutional mandates.”

75. The parameter should certainly be as above. The court has the supervisory jurisdiction over the other organs of the State but such jurisdiction must be exercised with caution and only in exceptional circumstances at the intermediary stage. Whilst the Court must not be “timorous and

unimaginative in exercising judicial power” (see : **Ndyanabo v Attorney General [2001]2 EA 485,493**) the court must always exercise caution when dealing with other organs of government or bodies constitutionally mandated to act. Each case must be considered on its merits.

76. In context let me now consider the application for conservatory orders. The question is whether the Petitioners have met the criteria outlined in paragraph [45] above.

77. The Petitioners state that that the 1st Petitioner was not only denied the right to be heard but also the right to access information and consequently the County Assembly ended up deciding on his fate without the benefit of his defence.

78. I have seen the documents filed in support of the Petition. I have read them. I have also read the Replying Affidavits.

79. There is no doubt that the 1st Petitioner was entitled to be heard or be given the opportunity to be heard as the process of removal of a governor, it is uncontested, is a quasi-judicial process and the rules of natural justice must apply and be observed. There is also no controversy that the 1st Petitioner was notified of the intended Motion. He was also invited to make representations on the intended motion and file appropriate evidence , if any. The invite was made in writing on 13 October 2015. The Motion was also attached to the letter of 13 October 2015. The 1st Petitioner was also given evidence in support of the Motion. He was to attend the hearing when the matter was to come up in the order paper. He however did not attend. Instead the Petitioner wrote back. He denied the allegations in the Motion. He denied that any of the documents supplied linked him to any of the alleged violations contained in the Motion. He then sought for additional documents in support of the Motion. He partly argued his case in the letter drafted on his instruction by his legal counsel. He however never attended before the County Assembly. In his absence, the debate on the Motion proceeded. He missed the debate on his removal.

80. Besides want of opportunity to be heard , the 1st Petitioner also complained that there was no nexus between the alleged violations and the 1st Petitioner. Paragraph 30 of the Petition stated as much and so did the Affidavit in support of the Petition.

81. The issue of want of nexus was first raised by the 1st Petitioner in his legal counsel’s letter of 16 October 2015 directed to the 2nd Respondent. The fifth paragraph of the letter read as follows:

“In all the documents supplied other than the letter of appointment for Mr. Christopher Ngera, there is no other document linking the Governor to any of the alleged violations contained in the proposed motion”

82. I hold the preliminary view that the nexus between any of the alleged gross violations and the 1st Petitioner was subject to prove by the mover of the Motion or the supporters thereof. It did not fall upon the 1st Petitioner to insist on the documents showing any nexus before he could prepare his defence or attend before the County Assembly. The 1st petitioner was facing charges of gross misconduct and it was not for him to show how or explain how he had misconducted himself. If there was no evidence , then it was to his benefit.

83. Secondly, I also hold the view that the issue as to whether there was a nexus between the alleged violations and the 1st Petitioner is really a matter which cries for a practical interrogation of facts. It is not for this court to undertake such an interrogation of facts at this stage of the proceedings. Even if I had to make a prima facie determination on whether or not there was a nexus between the allegations of violation and the 1st Petitioner, no material was placed before me by the Petitioners to help me make out such a determination.

84. With regard to the right to be heard, my judgment does not favour the Petitioners’ approach.

85. The 1st Petitioner, at one remove states and raises the fact that there was no fair hearing; and at another remove engages and admits that the 1st Petitioner was invited to state his case but opted to give a written response. Again, at one remove the 1st Petitioner complains and states that he was unable to attend as he was not afforded the opportunity; and at another remove the 1st Petitioner states that he asked for more time and to be supplied with documents to help prepare his defence which time was allegedly declined.
86. In my judgement and without making a final finding, it is apparent that there was an invite to the 1st Petitioner to state his side of the story. It was for the 1st Petitioner to attend. It was his call. He opted not to attend. The 1st and 2nd Respondents appeared to be very cautious and even informed the 1st Petitioner that he was entitled to a fair hearing. He was also assured of fair administrative action. Whether this happened cannot be ascertained with finality at this stage.
87. It may be necessary to interrogate further whether the time afforded to the 1st Petitioner would adequately satisfy the requirement that opportunity be afforded to an accused to prepare his defence. It may also be necessary to interrogate whether the time was generally adequate. I however take cognisance of the fact that the time set for the process, even at the Senate level, appears to heap pressure on the parties. For the 2nd Respondent to have given the Petitioner seven days to prepare his defence, would in the circumstances of the case and in view of the statutory provisions not too enormous or unconstitutional.
88. The Petitioners' next stop was that there was no public participation. The evidence tendered in reply by the 1st and 2nd Respondents was that the public were invited to make representations and comments through the print media. The invitation was placed in the Standard Newspaper. Whether the public reacted or not will be the subject of trial court, to be then interrogated. At this stage, I am satisfied that the principle established in the case of **Doctors for Life International vs Speaker of the National assembly & Others (CCT 12/05) 2006 ZACC 11** and which has been followed in various decisions in this country seemed to have been satisfied. There was real facilitation. As to whether the public reacted, and the public is not obliged to react, can only be ascertained at trial. For now and on the affidavit evidence before me, I am satisfied that the 1st and 2nd Respondents endeavoured, as they are enjoined, to involve the public in the course of governance.
89. The totality of the forgoing is that I am satisfied that the Petitioners have not laid out exceptional circumstances to warrant my interference with the process of the 1st Petitioner's removal from office as the county governor. The Petitioners have not established a prima facie case with a real likelihood of success.
90. Would the Petitioners be prejudiced?
91. There is no doubt that the 1st Petitioner remains the County Governor. That is at least until the process under Section 33 of the County Governments Act is exhausted.
92. I take cognisance of the fact that the Senate is truly, what I may call, the Impeachment Court. The Senate is expected not only to investigate the nexus of the allegations to the 1st Petitioner. The Senate must also interrogate the entire process as it scurried through the County assembly. I have seen no law that restrains the Senate from returning a verdict that the process was not conducted as detailed under the Constitution or any law for that matter. Pray, the Senate rises to the occasion and is practical and realistic in its investigations.
93. I do not see how the Petitioner will be prejudiced. Submissions by counsel that the people of the County of Muranga shall be prejudiced as their governor undergoes a trial and further that the 1st Petitioner will be subjected to public ridicule and embarrassment in my view do not hold for the simple reason that when the Petitioner accepted office he swore to protect and defend the

Constitution. He is and is to be subjected to a constitutional process of his removal. No governor should expect to avoid or shy away from a constitutional process.

94. The Petitioners also submitted that the Petition will be rendered nugatory if the conservatory orders are not granted. I have read the Petition. The reliefs sought are clear. Prayer no (c), which is the core relief, reads as follows:

(c) An order of certiorari do issue to remove to the High Court for purposes of being quashed the resolution passed by Muranga County Assembly on 21st October 2014 and/or any other subsequent decision to submit for action to the Senate the said resolution and /or any subsequent decision of the Senate for the removal of the 1st Petitioner from Office of Governor Muranga County based on the said resolution of Muranga County Assembly.

95. It is clear that if the Senate process continues and the 1st Petitioner is impeached and removed as Governor and yet when the Petition is heard the 1st Petitioner is vindicated and the court finds reason to agree with the 1st Petitioner then the orders sought may issue. The Petition will not be rendered nugatory.

96. With regard to the issue of public interest, I must state that the reason the process of the removal of governors is also subjected to a senatorial process is because the Senate is expected to protect the interest of the counties and their governments. Counties constitute people. The residents. In the circumstances of this case, a balance between the public interest on the one hand that demands that there be proper order, proper governance, accountability and proper management of counties through the oversight of the Senate and of the other hand, public interest policy that subservient bodies like the County Assembly are never allowed to misconduct themselves must be struck and weighted. The scales would dictate that the Senate be allowed to proceed on with its process with little hindrance.

97. As the Petitioner will not be prejudiced and as the Petition will not be rendered nugatory, and as public interest would favour the Senate, counsel of prudence would dictate that no conservatory order is granted.

Conclusion

98. I find and hold that there are no exceptional circumstances proven or shown by the Petitioners to warrant this Court's intervention. Having followed what happened from the documents and the affidavit evidence available, I find that there was nothing contrary to common logic to warrant judicial interference at this intermediary stage. As was stated by the Court in the case of **Martin Nyaga Wambora & 33 Others -v- County Assembly of Embu & 4 others HCCP No. 7 of 2014 [2015]eKLR**

"[243]... 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."

The petitioners have not demonstrated that "abnormal conduct" on the part of the Respondents

Disposal

99. Having considered the application, it is my view and I hold that the reserved question as to whether the petitioners are entitled to the conservatory orders sought must be answered in the negative. The application for conservatory orders fails for all the reasons advanced above. It is dismissed but with no order as to costs.

100. Orders accordingly.

Dated, signed and delivered at Nairobi this 3rd day November, 2015

J.L.ONGUTO

JUDGE

Delivered in the Presence of

P.K.Muite SC with Mbugua Nganga and P. Wanyama for the Petitioners

Mbuthi Gathenji for the 1st and 2nd Respondents

A. Njoroge for the 3rd and 4th Respondents

C/Clerk: Richard