



IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 379 OF 2014

MUDANYA KISANYA PETER.....1ST PETITIONER

MARTHA WAMBUI MUNGAI.....2ND PETITIONER

VERSUS

THE SPEAKER NAIROBI CITY COUNTY

ASSEMBLY & OTHERSRESPONDENTS

JOSEPH SAMICH..... INTERESTED PARTY

JUDGMENT

Introduction

1. The petitioners, **Mudanya Kisanya Peter** and **Martha Wambui Mungai** describe themselves as adult, law abiding and public spirited citizens of Kenya and residents of Nairobi City County. They have filed the instant petition against the Nairobi City County Assembly, its Speaker and members of the Public Accounts Committee of the Nairobi City County Assembly (hereafter “the PAC”) alleging, among other things, violation of the provisions of Article 229 of the Constitution and Articles 47 and 50 of the Constitution in respect of certain individuals named in the PAC report.
2. The interested party, **Mr. Joseph Samich**, one of the persons named in the PAC report, applied and was joined to the proceedings as an interested party as he alleges violations of his rights by the respondents.

Background

3. The genesis of this petition is a Special Audit Report by the Kenya National Audit Office on the financial operations of the Nairobi City County in 2013. The report contained findings and other relevant details of the transition to devolved government audit conducted by the Auditor General on the transactions and handing over of assets and liabilities just before, during and after the creation of the Nairobi City County Government. The report was laid before the Nairobi City County Assembly on 27th February, 2014, and was then committed for consideration by the PAC of the Nairobi County Assembly.
4. The petitioners are aggrieved by what they state is the preparation of two contradictory committee

reports emanating from the same process. They assert that the PAC, consisting of the 3rd to 21st respondents, prepared and compiled two contradictory Reports which they also signed. One report was prepared in June 2013 but signed by the Chairman of the PAC on 2nd July 2014, and a second report in July 2014. The two reports, according to the petitioners, have glaring anomalies. One report recommended that certain persons named therein, namely a Ms. Lilian Ndegwa, the County Secretary, Jimmy Kiamba, the Chief Officer Finance and Economic Planning, Ms. Leah Oyake, the Chief Officer for Environment and Forestry, Dr. Robert Ayisi, the Medical Officer of Health, Mr. Karisa, the Director of the Legal Department, Mr. Joseph Samich, a Pharmacist Technologist, and Ms. Lucy Maitai, the County Fleet Manager, be suspended from offices immediately pending completion of investigations.

5. The second report, prepared in July 2014 but also signed by the Chairman and members of the PAC on 2nd July 2014, recommended that the officers listed in the report, “*who include but not limited to*” Mr. Jimmy Kiamba, the Chief Officer Finance and Economic Planning, Mr. Joseph Samich, a Pharmacist Technologist, Ms. Lucy Maitai, the County Fleet Manager, and Eng. T. O Ajwang, the Chief Mechanical Engineer, should step aside with immediate effect to allow for further investigations.
6. The petitioners allege that the names of some persons who were named in the first report were curiously, mischievously and corruptly omitted from the second report, while that of Eng. T.O Ajwang, the Chief Mechanical Engineer, who had not been named in the first Report, was included in the second.
7. The petitioners assert that they have a reasonable and legitimate expectation, by dint of Article 2(3) and 2(4) of the Constitution, that state officers such as the respondents can only act in accordance with the Constitution and the law and should not contravene it in any way. They further allege that the 1st respondent, which is established under Article 178 of the Constitution, is obligated to promote, protect and uphold the rule of law and defend public interest but has failed to do so.
8. The petitioners further assert that Article 22(1) of the Constitution gives them the right, either on their own or acting in the public interest, to institute court proceedings to enforce their rights and fundamental freedoms which have been denied, violated or infringed, or to act on behalf of other persons whose rights have been violated, or to act in the public interest.
9. They further claim that under Article 165 as read with Article 159(1) of the Constitution, the High Court has jurisdiction to hear any question regarding the violation of rights, to determine the constitutional validity of any acts or omissions, and to interpret the Constitution. It is also their claim that under Article 258, a person acting on his own behalf, on behalf of others, or in the public interest may institute court proceedings to claim that the Constitution has been contravened or is threatened with contravention.
10. The petitioners had approached the Court by way of an application for conservatory orders dated 28th July 2014 in which they sought the following orders:

1. That this application be certified as urgent and the same be heard ex-parte in the first instance.

2. That pending the hearing and determination of this petition and/or further orders, this Honourable court be pleased to issue a conservatory order restraining the 1st respondent and/or the deputy speaker of Nairobi City County Assembly and/or any other person acting in that capacity from approving and including for debate, presiding, conducting and allowing the debate slated for 30/7/2014 by the Nairobi City County Assembly or any other report and/or reports of the Public Accounts Committee of The Nairobi City County Assembly dated 2/7/2014 and tabled before

the Nairobi City County Assembly on 24/7/2014.

3. *That pending the hearing and determination of this petition and/or further orders, this Honourable court be pleased to issue a conservatory order restraining the 1st respondent and/or the deputy speaker of the Nairobi City County Assembly and/or any other person acting in that capacity, from listing in the Order Paper for debate, allowing for consideration and or debate by the Nairobi City County Assembly either on 30/7/2014 or any other day, of the Report and/or Reports of the Public Accounts Committee of The Nairobi City County Assembly dated 2/7/2014 and/or tabled before the Nairobi City County Assembly on 24/07/2014 and/ or taking any appropriate action on the basis of the said report and/or reports.*
4. *That pending the hearing and determination of this petition and/or further orders, this Honourable court be pleased to issue a conservatory order restraining the 2nd respondent from listing in the Order paper for debate, considering and or debating either on 30/7/2014 or any other day and/ or considering the Report and/or Reports of the Public Accounts Committee of the Nairobi City County Assembly dated 2/7/2014 and tabled before the Nairobi City County Assembly on 24/7/2014 and/or taking any appropriate action on the basis of the said Report and/or Reports.*
5. *That pending the hearing and determination of this petition and/ or further orders, this Honourable court be pleased to issue a conservatory order restraining the 3rd respondent as the chairman of the Public Accounts Committee of the Nairobi City County Assembly and/ or the 4th to 21st respondents as members of the Public Accounts Committee of the Nairobi City County Assembly, from moving the motion for debate either on 30/7/2014 or any other day, and debating and or calling upon the Nairobi City County Assembly to consider and debate the Report and/ or Reports of the Public Accounts Committee of the Nairobi City County Assembly dated 2/7/2014 and tabled before the Nairobi City County Assembly on 24/7/2014.*
6. *That this honourable court be pleased to give such orders or other conservatory orders and or directions as would preserve the set of circumstances in such a way that the constitutional petition is not rendered nugatory.*
7. *That this honourable court be pleased to give such directions and other orders and or directions as to the hearing of the petition filed as it may deem just in the light of all the circumstances.*
8. *That the petitioner be at liberty to apply for such other or further orders and or directions as this honourable court may deem fit and just to grant.*
9. *That this honourable court do issue leave to the petitioners to amend their petition if and when necessary.*
10. *That costs of this application be provided for.*
11. *By a consent order entered into between the parties on 30th July 2014, the parties agreed that orders numbers 2, 3 and 4 set out above should be granted pending hearing and determination of the petition.*

The Petitioners' Case

12. *The petitioners contend that the respondents, in preparing the two contradictory reports and making their recommendations, exceeded their mandate and considered matters that were not contemplated within their mandate. They therefore allege that the respondents acted in violation*

of Standing Order No. 178 of the Nairobi City County Assembly.

13. The petitioners further charge the respondents with breach of the constitutional timelines set out in Article 229 of the Constitution. It is their contention that Article 229 gives a constitutional timeline of three months within which reports of the Auditor General should be tabled, which the respondents in this case did not adhere to. According to the petitioners, the Committee was supposed to table the report on or before 30th May, 2014, but that it was tabled in June, 2014, and the two reports emanating therefrom were therefore unlawful, un-procedural and unconstitutional and thereby invalid.
14. The petitioners also allege violation of the rights of the persons named in the two reports. They allege that from a reading of the reports, the respondents did not summon the persons adversely mentioned in the reports as they were required to under section 15 of the **National Assembly (Powers and Privileges) Act**; and that they also denied the said persons a chance to be heard fairly in accordance with Article 50 of the Constitution and Standing Order No 63 of the Nairobi County Assembly.
15. The petitioners therefore claim that to the extent that the decision and findings of the 3rd to 21st respondents had been influenced by corrupt practices in violation of the leadership and integrity thresholds set out under Chapter Six of the Constitution, the County Government Act and the Leadership and Integrity Act, the two reports tabled and laid before the Nairobi County Assembly are, within the meaning of Article 2 (4) of the Constitution, invalid for having contravened the Constitution.
16. The petitioners aver, with regard to their allegation of corruption against the 3rd -21st respondents, that on or about 14th July, 2014, the Ethics and Anti-Corruption Commission, alarmed by the practices and unethical conduct of some members of Nairobi County Assembly, brought to the attention of the members of the Assembly the standards of conduct expected of them as public officers under Chapter Six of the Constitution and the Leadership and Integrity Act. The petitioners assert that the 3rd to 21st respondents were under a statutory duty to exercise their mandate in a manner that promoted confidence in the integrity of the PAC.
17. While asking the Court to answer some ten questions set out in their petition, the petitioners pray for the following orders:
 - i. A declaration that the constitution as the supreme law is binding on all levels of Government and no less on Nairobi City County Assembly and consequently Nairobi City County Assembly in exercise of its mandate and authority under Article 229(8) of the Constitution is mandated to act in accordance with, and within the limits of the Constitution.*
 - ii. A declaration that the Report and/or Reports of the Public accounts Committee of the Nairobi City County Assembly dated 2/7/2014 and tabled before the 2nd Respondent on 24/7/2014 are unconstitutional, illegal, invalid and null and void by dint of Article 2(4) of the Constitution of Kenya, 2010 for having contravened Article 229(8) of the Constitution of Kenya, 2010.*
 - iii. A declaration that the debate slated for 30/7/2014 on the Report and/or Reports of the Public accounts Committee of the Nairobi City County Assembly dated 2/7/2014 is unconstitutional, invalid and null and void.*
 - iv. A declaration that the 3rd to 21st Respondents as members of Public Accounts Committee of the Nairobi City County Assembly in making their findings and compiling two Reports emanating from the same process were influenced by corrupt and unethical practices.*

- v. ***A declaration that the 3rd to 21st Respondents are unfit to hold State and or public office for violating the Constitution and the law with impunity.***
- vi. ***A declaration that that the 3rd to 21st Respondents as members of Public Accounts Committee of the Nairobi City County Assembly should forthwith be disbanded for engaging in corrupt and unethical practices.***
- vii. ***An order directing the Ethics and Anti-Corruption Commission to investigate the corrupt and unethical conduct of the 3rd to 21st Respondents.***
- viii. ***An order, restraining the 1st Respondent, and/or the deputy speaker of the Nairobi City County Assembly and/or any other person acting in that capacity, from approving and including for debate, presiding, conducting and allowing the debate slated for 30/7/2014 by the Nairobi City County Assembly or any other day of the Report and/or Reports of the Public Accounts Committee of the Nairobi City County Assembly dated 2/7/2014 and tabled before the Nairobi City County Assembly on 24/07/2014.***
- ix. ***An order restraining the 1st Respondent and/or the deputy speaker of the Nairobi City County Assembly and/or any other person acting in that capacity, from listing in the Order Paper for debate, allowing for consideration and or debate by the Nairobi City County Assembly either on 30/7/2014 or any other day, of the Report and/or Reports of the Public Accounts Committee of the Nairobi City County Assembly dated 2/7/2014 and tabled before the Nairobi City County Assembly on 24/07/2014 and/or taking any appropriate action on the basis of the said Report and/or Reports.***
- x. ***An order restraining the 2nd Respondent from listing in the Order Paper for debate, considering and or debating either on 30/7/2014 or any other day and/or considering the Report and/or Reports of the Public Accounts Committee of the Nairobi City County Assembly dated 2/7/2014 and tabled before the Nairobi City County Assembly on 24/07/2014 and/or taking any appropriate action on the basis of the said Report and/or Reports.***
- xi. ***An order restraining the 3rd Respondent as the chairman of the Public Accounts Committee of the Nairobi City County Assembly and/or the 4th to 21st Respondents as members of the Public Accounts Committee of the Nairobi City County Assembly, from moving the motion for debate either on 30/7/2014 or any other day, and debating and or calling upon the Nairobi City County Assembly to consider and debate the Report and/or Reports of the Public Accounts Committee of the Nairobi City County Assembly dated 2/7/2014 and tabled before the Nairobi City County Assembly on 24/07/2014.***
- xii. ***Any such further orders this Honourable court shall deem just.***
- xiii. ***Costs of this petition be borne jointly and severally by the Respondents.***

The Interested Party's Case

18. Mr. Joseph Samich, named in the two PAC reports as a Pharmacist Technologist, applied and was joined in the petition as an interested party. He filed his affidavit sworn in 17th September 2014, in support of the petition, in which he prayed that his name be expunged from both reports.
19. The interested party makes various averments of fact to support his contention that he should not

have been included in the PAC report. He contends that he did not have authority to incur expenditure in view of his duties and obligations and so there was no way he could be responsible for cash and any losses incurred by Nairobi County.

20. He also deposes that he will be condemned unheard and surcharged the sum of Kenya shillings three million two hundred and twelve thousand, one hundred and sixty four in accordance with the recommendations in report, yet he had not been availed the particulars of the claim against him by the respondents to enable him know his fate or defend himself against the findings of the Committee.
21. Mr. Samich contended that the collective actions of the PAC violated his rights to an objective and impartial decision making that was not influenced by nepotism, favouritism, other improper motives or corrupt practices as provided under Article 73 of the Constitution. He contends that the PAC relied on blatant lies and investigative journalism by causing to be published defamatory articles on the 28th April and 14th May 2014. He contended that the said articles were made in a reckless and offensive manner without affording him the benefit of doubt on the nature, object and/or intention of the investigations. He states that as a result of the findings of the PAC, he was transferred to a hospital within his county which action he believed was as a result of the implementation of the recommendations by the PAC without his being given a chance to respond.
22. The interested party further argues that the investigations undertaken by the respondents were shoddily done and violated his right to fair administrative action guaranteed under Article 47 of the Constitution. He therefore supported the prayers sought in the petition that the said reports be quashed and/or his name be struck out for failure by the respondents to follow the Constitution and adhere to the laid down procedure in discharge of its mandate.
23. The interested party further alleged that the PAC violated his right to fair treatment and equality before the law guaranteed under Article 27 of the Constitution and section 15 of the National Assembly (Powers and Privileges) Act.

The 1st and 2nd Respondents' Case

24. The 1st and 2nd respondents filed an affidavit in opposition to the petition sworn by Mr. Alex Sanaika Ole Magelo on 12th August, 2014. They contend that the PAC acted within its mandate under Standing Order No 186 (2) (a-c) that gives it discretion on the manner in which to perform its duties
25. The respondents denied the contentions by the petitioners that there were anomalies in the preparation of the report. It was their case that the Auditor General's Special Audit Report was tabled before the Nairobi County Assembly on 27th February, 2014, and the County Assembly then committed the report to the PAC for its consideration. Consequently, following its deliberations, investigations and considerations of the Auditor General's report, the PAC prepared its report dated July, 2014.
26. It is their case therefore that the Auditor General's report and the report of the PAC on the Auditor General's report are two separate reports and cannot be deemed as one; that there is no express constitutional or statutory limitation period within which the PAC can deliberate on a report before it; and the Nairobi County Assembly discharged its constitutional mandate as stipulated under Article 229 (8) of the Constitution when it forwarded the Auditor General's report to the PAC on 27th February, 2014. Their contention is that the action of forwarding the report to the PAC was the most appropriate action that it could have taken.
27. According to the respondents, the County Assembly had sittings between 11th February, 2014 to 30th April, 2014 and further from 3rd June to 28th August, 2014. They denied that the PAC presented its report on 3rd June, 2014 since it was at the time carrying out deliberations and

investigations on the issues raised by the Auditor General's report. They allege that the PAC, through its Chairman and in reliance on common parliamentary practice, requested for an extension of time to allow it to conclude its findings and on 24th July, 2014, the Committee tabled the report with leave from the Nairobi County Assembly.

28. It is the respondents' position that the report was prepared in a lawful manner and that the persons adversely mentioned in the report were summoned and granted the right to be heard as stipulated under Article 50 of the Constitution.
29. The respondents allege that they are strangers to the document marked 'MKP4' in the petitioners' affidavit in support of the petition alleged to be a report from the PAC, and the allegations of corruption made by the petitioners against the respondents. They contend that the said allegations are baseless and have not been substantiated as no member of the PAC has ever been charged and convicted of any corruption related offences.
30. The respondents also question the competence of the petition. They allege, first, that the 1st petitioner does not have authority to swear the supporting affidavit on behalf of the 2nd petitioner. They allege, secondly, that the petition violates various provisions of the Constitution and Acts of Parliament. They contend that under Article 75 (2) (a) of the Constitution, the petitioners should have, in respect to complaints against an act immunized by the National Assembly (Powers and Privileges) Act, utilized the disciplinary procedures stipulated under section 10 of the National Assembly (Powers and Privileges) Act.
31. It was also their case that the petitioners had not complied with the provisions of section 3 (d) of the Leadership and Integrity Act which emphasizes compliance with Article 75. They contend, further, that section 4 of the National Assembly (Powers and Privileges) Act protects the Nairobi City County Assembly, the Speaker and any members of the Assembly from suits in their personal capacity for performing their constitutional and statutory duties.
32. It is also their view that the petitioners should have filed their complaint with the Committee of Privileges in relation to the alleged corrupt or violations of the Constitutions as stipulated under Article 119 of the Constitution as read with sections 15, 88, and 89 of the County Government Act instead of filing the present petition, their position being therefore that the petitioners had rushed to court without exhausting the immediate avenues available to them. They therefore term this petition incompetent and an abuse of the court process and ask the Court to dismiss it with costs.

The 3rd to 21st Respondents' Case

33. Through the affidavit sworn on their behalf by Mr. Robert Mbatia on 22nd December 2014, the 3rd -21st respondents, members of the Nairobi City County PAC, associated themselves with the averments and submissions made on behalf of the 1st and 2nd respondents and urged the Court to dismiss the petition for being an abuse of the court process.

Analysis and Determination

34. That our governance institutions at both the national and devolved level are plagued with corruption and wastage of public resources is not in dispute. Media and various reports of the controller and Auditor General attest to this. That the officers, elected and appointed to serve *Wanjiku* at both levels of government have a constitutional obligation to serve with integrity in the interests of the citizen is also not in dispute. That they have often not done so is also not in dispute, and this is what the petitioners allege has brought them to this Court.
35. Their claim alleges violation of the Constitution with respect to the tabling of the report of the Auditor General as required under Article 229 of the Constitution. They also allege violation of the rights of various persons named in the two reports allegedly prepared by the 3rd -21st

respondents, and accuse the members of the PAC, the 3rd -21st respondent, of corruption and a lack of integrity in the preparation of the reports and in removing the names of some of the persons whom the petitioners allege had been recommended for suspension.

36. I have considered the respective pleadings of the parties, and their submissions, both oral and written, in support of their positions in the matter. While I appreciate the concerns of the petitioners with respect to the actions of the respondents, I am cognisant of the fact that I have before me a constitutional petition alleging violation of constitutional rights, as well as of the Constitution itself. I have no capacity to investigate any issue to establish whether or not the allegations of corruption against the respondents have been made out. I will therefore confine myself to the issues that I deem appropriate for determination by a court dealing with allegations of constitutional violations. Such issues, in my view, are the following:

- a. *Whether the Court has the jurisdiction to determine the issues raised in the petition;*
- b. *Whether the present petition is competent and properly before the Court;*
- c. *Whether there has been a violation of the Constitution or of the fundamental rights of any party;*
- d. *What relief, if any to grant.*

Jurisdiction

37. The respondents contend that the Court lacks the jurisdiction to determine this matter. They submitted that under section 12 of the National Assembly (Powers and Privileges) Act, no proceedings or decisions of the Assembly or the Committee of Privileges acting in accordance with the Act shall be questioned in any court. They therefore argue that the acts of the PAC were done under the Act and the Court therefore lacks the jurisdiction to interfere with its actions.

38. The petitioners, relying on the decision in **Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Limited [1989] KLR 1 pg 14** maintained that this Court has the competence and should exercise its jurisdiction on the issues raised in this petition. They argue further that the Court has the jurisdiction under Article 165 (3) (d) as read with Article 159 (1) of the Constitution to determine the matter. They cite the decision in **Hon. Martin Wambora vs The Speaker of the County Assembly of Embu and Others, Kerugoya High Court Petition No 3 of 2014** and **Doctors For Life International vs Speaker of the National Assembly and Others (CCT 12/05) 2006) ZACC 11**, as well as **Speaker of the Senate and Another vs The Hon. Attorney General and Others, Nairobi Supreme Court Advisory Opinion Reference No 2 of 2013** and **Dr. Christopher Ndarathi Murugaru vs Attorney General and Another, Civil Application No 43 of 2006 (24/2006)** to submit that that this Court would not be violating the doctrine of separation of powers by giving a full and true meaning and effect to Article 229 of the Constitution as it would be simply performing its solemn duty under the Constitution of asserting the authority and supremacy of the Constitution.

39. The words of Nyarangi JA in the case of **Owners of The Motor Vessel Lillian ‘S’ vs Caltex Kenya Ltd** (supra) are generally accepted as the definitive enunciation of the Court’s duty when the issue of its jurisdiction is raised. In his decision, the Learned Judge stated as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

40. The petitioners allege violation of the Constitution and the Standing Orders of the Nairobi City County Assembly. They state, which the respondents dispute, that the Court has jurisdiction to deal with the issues they raise in light of the provisions of Article 165 (3) of the Constitution as read with Article 159. Article 159 vests judicial authority of the state in the judiciary and sets out the principles to guide the exercise of such authority.

41. With respect to the jurisdiction of the High Court, Article 165 (3) provides as follows:

(3.) Subject to clause (5), the High Court shall have-

- a. ...
- b. ***Jurisdiction to determine the question whether a right or fundamental freedom in the Bill or Rights has been denied, violated, infringed or threatened;***
- c. ...
- 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;***
 - ii. ***The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;***
 - iii. ...;

42. A consideration of the above provisions leads to the inevitable conclusion that the Court has jurisdiction to deal with the issues raised in this petition. It is correct, as submitted by the respondents, that section 12 of the National Assembly (Powers and Privileges) Act stipulates that no proceedings or decision of the Assembly or the Committee of Privileges acting in accordance with this Act shall be questioned in any court. It is also correct that section 29 of the Act provides that the Speaker and officers of the Assembly are not subject to the jurisdiction of the Court with respect to ***the exercise of any power conferred under the Act or the Standing Orders.***

43. However, it is beyond dispute that the County Assembly Standing Orders, as indeed the Standing Orders of the National Assembly and Senate, are creatures of the Constitution under Article 124 (1), the powers and privileges of the National Assembly and its Standing Orders being extended to the Standing Orders of County Assemblies by section 16 and 17 of the **County Governments Act, Act No. 17 of 2012**. As has been held in this and other jurisdictions, such Standing Orders and the acts of the National and County Assemblies and their Speakers are subject to the constitutional jurisdiction of the Court.

44. In the case of **Biti and Another vs The Minister of Justice, Legal and Parliamentary Affairs and Another (2002) AHRLR 266 (ZwSC 2002) Supreme Court Judgment No SC 10/02 which was cited with approval in the Coalition for Reform and Democracy (CORD) and 2 Others vs Republic of Kenya and 10 Others, Petition No. 628 of 2014**, the Zimbabwean Supreme Court rendered itself as follows with respect to the position of standing orders:

[18] “There is therefore merit in the submission that, having made such a law, Parliament cannot ignore that law. Parliament is bound by the law as much as any other person or institution in Zimbabwe. Because Standing Orders arise out of the Constitution, and because the Constitution mandates Parliament to act in accordance with Standing Orders, they cannot be regarded merely as rules of a club’. Standing Orders constitute legislation which must be obeyed and followed.” (Emphasis added)

45. To a similar argument that the acts performed by the National Assembly could not be subjected to

the jurisdiction of the Court, the Supreme Court went on to observe that:

[36] “In a constitutional democracy it is the courts, not Parliament, that determine the lawfulness of actions of bodies, including Parliament....”

[42] There is therefore no merit in the submission of Mr Majuru when he said that: “... this Honourable Court is precluded from enquiring into the internal proceedings of Parliament with regards to the third reading and passage of the General Laws Amendment Bill (now the General Laws Amendment Act Number 2 of 2002).” (Emphasis added).

46. The Court in **Coalition for Reform and Democracy (CORD) and 2 Others vs Republic of Kenya and 10 Others** (supra) stated:

0. **“The doctrine of separation of powers does not stop this court from examining the acts of the Legislature or the Executive. Under Article 165(3) (d) of the Constitution, the Judiciary is charged with the mandate of interpreting the Constitution; and has the further mandate to determine the constitutionality of acts done under the authority of the Constitution.”**

47. The Supreme Court of Kenya had also addressed its mind with regard to the jurisdiction of the Court vis a vis other arms of government and re-emphasised the jurisdiction of the Court in **Advisory Opinion No 2 of 2013** (supra) when it observed as follows:

[61] “ It emerges that Kenya’s legislative bodies bear an obligation to discharge their mandate in accordance with the terms of the Constitution, and they cannot plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation. This Court recognizes the fact that the Constitution vests the legislative authority of the Republic in Parliament... It is therefore clear that while the legislative authority lies with Parliament, the same is to be exercised subject to the dictates of the Constitution. While Parliament is within its general legislative mandate to establish procedures of how it conducts its business, it has always to abide by the prescriptions of the Constitution. It cannot operate besides or outside the four corners of the Constitution. This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.”

48. The Supreme Court went on to observe as follows:

[62] “ If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution....

[150] Earlier in this Advisory Opinion we have considered the proper scope of judicial discretion, where a failing is attributed to the internal procedures of Parliament during legislation; and our position is that while the Court has all the powers when such a course of conduct is set against the terms of the Constitution, it is necessary for the Court to have a sense of the prevailing state of fact; thus, the Court has a discretion in appraising each instance, and taking a decision as may be appropriate...” (Emphasis added)

49. I fully agree with the views of the decisions of the Court in the above matters, bearing in mind the words of the Constitution with respect to its supremacy contained in Article 2 that:

(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 authorized under this Constitution.

50. It is alleged in this case that the respondents have violated the Constitution and the Standing Orders of the County Assembly. These are matters that fall for adjudication before this Court in accordance with Article 165(3)(d) of the Constitution. Should the violations be established, then the Court has jurisdiction to so pronounce, and to afford appropriate remedies to the petitioners.

51. The second jurisdictional issue raised against the petition is that the petitioners had an alternative forum which they should have employed for the resolution of their complaints before filing this petition. The 2nd respondent argues that the petitioners should have utilized the provisions of section 10 of the **National Assembly (Powers and Privileges) Act** which establishes the Powers and Privileges Committee and gives it the mandate to hear complaints as follows:

...

(4). The Committee of Privileges shall, either of its own motion or as a result of a complaint made by any person, inquire into any alleged breach by any member of the Assembly of the Code of Conduct under section 9, or into any conduct of any member of the Assembly within the precincts of the Assembly (other than the Chamber) which is alleged to have been intended or likely to reflect adversely on the dignity or integrity of the Assembly or the member thereof, or to be contrary to the best interest of the Assembly or the members thereof.

52. It is evident that the intention behind the provisions of section 10, which, in accordance with the County Government Act, applies with necessary modifications to County Assemblies, is to deal specifically with matters pertaining to conduct within the National (and County) Assembly. It does not, in my view have the jurisdiction to deal with matters such as are raised in the present petition regarding the conduct of committees of County Assemblies and their alleged violation of the standing orders and of the Constitution. It is therefore my finding that the petition is properly before me.

Whether the Petitioners Have the Locus to Institute the Petition

53. The petitioners have alleged violation of the constitutional rights of the persons named in the PAC reports. In particular, they alleged that the right to a fair hearing under Article 50 has been violated in that the said persons were not heard before the decision to recommend their suspension was reached. This argument has been echoed by the interested party.

54. The respondents argue that the petitioners have no *locus* to lodge this petition. Ms. Ekin submitted on their behalf that an action alleging violation, denial, or threat of violation of the right under Article 50 of the Constitution can only be brought in accordance with the provisions of Article 22. It is their contention that the petitioners do not fall under any of the four categories of persons specified under Article 22 (2) of the Constitution as having the right to lodge a petition under the said Article.

55. The petitioners' submission in response is that they are claiming that the Constitution has been contravened and violated, and they therefore have the locus to institute the instant proceedings within the meaning of Article 258 of the Constitution. It is also their contention that they have the right to access justice under Article 48, which right includes the right to seek redress for denial,

violation, infringement and/or a threat to the contravention of the Constitution. They rely on the decision in **Benson Ritho Mureithi vs J.W Wakhungu, Cabinet Secretary Ministry of Environment, Water and Natural Resources and Others, Nairobi High Court Petition No. 19 of 2014** to submit that as citizens, they have a right to challenge the constitutionality of the report of the PAC in the public interest.

56. It is correct, as submitted by the petitioners, that they have a right, under Article 258, to institute court proceedings claiming that the Constitution has been violated. Under Article 22, a person can lodge a petition with respect to the violation or threat of violation of his or her fundamental rights, on behalf of another person who cannot act in his or her own name, or acting as a member or in the interest of a group or class of persons, in the public interest.

57. The petitioners have alleged violation of the rights of the persons named in the PAC report. They have also alleged violation of Article 229 of the Constitution with respect to the preparation of reports by the Public Accounts Committee. In this regard, it is my view that they have a right to lodge a petition alleging violation of the constitutional provisions under Article 229.

58. I agree with the respondents, however, that the petitioners have no basis for alleging violation of the rights of the persons named in the PAC report. They have not presented any evidence before the Court that the said persons are, for any reason, unable to lodge a claim in their own names to vindicate the alleged violation of their rights.

59. The respondents have also questioned the competence of the petition on the basis that the 1st petitioner had not exhibited authority from the 2nd petitioner to swear an affidavit on her behalf. It is therefore their contention that the petition is not valid as it is supported by an affidavit sworn without authority, and should be struck out.

60. I have, however, considered the Court record and the documents filed by the parties. I note that the 2nd petitioner, Ms. Martha Wambui Mungai, swore an affidavit on 28th July 2014 in support of the petition in which she confirms the contents of the affidavit sworn by the 1st petitioner. There is therefore no basis for this attack on the competence of the petition.

Whether there has been a violation of the Interested Party's Constitutional Rights

61. Mr. Samich agreed with the submissions by the petitioners that his constitutional rights under Article 50 of the Constitution were violated. It was his contention that he had been scandalized, demoted and transferred as a result of the adverse findings in the PAC report. He relied on an excerpt from **Halsbury Laws of England, 5th Edition 2010 Vol. 61** and the decision in **Peris Wambogo Nyaga vs Kenyatta University and 2 Others, MISC Civil Application No 34 of 2009** to submit that the respondents were under a duty to accord him the opportunity to be heard.

62. It was his contention, further, that as a public officer, under Article 236 of the Constitution, he should not be victimized or discriminated against for having performed the function of office in accordance with the Constitution or any other law; or dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process.

63. Mr. Samich further argues that his right to fair hearing was violated as he was not given time to prepare his case nor was he informed by the Committee in advance of all the allegations levelled against him to enable him prepare for the important meetings and enable him to respond to their questions. It is his case that the conduct of the respondents of summoning him through a phone call and ordering him to appear before the Committee within twenty minutes was a violation of the law and procedural fairness as regards summoning of witnesses to appear before the PAC, and there were no written summons for him to appear before the PAC. It was his submission that this was in gross violation of Article 195 of the Constitution. According to the interested party, an accused person is presumed to be innocent until proven guilty but in the instant case, he was

declared guilty while unheard because the respondents failed to administer an oath to him.

64. In response, the respondents submitted that Mr. Samich's name appears on the petitioners' annexure which indicates that he was invited and given audience by the PAC, and further, that he was accorded a hearing. It was her submission that his application and argument that his name should be expunged from the list lacks merit.
65. The respondents submitted further that the interested party had not proved any violation of constitutional rights. It was also their submission that the interested party had raised new issues of fact which were not in his affidavit and asked the Court to expunge paragraph 9 (page 2-4) of his submissions.
66. I have considered the averments by the interested party, as well as his submissions dated 28th January 2015. It is correct, as submitted by the respondents, that the submissions raise new issues of fact. Indeed, they are couched in the nature of a narrative of facts as would be expected to be placed before the Court on oath, and with an opportunity to the opposite party to respond thereto. I agree with the respondents that they cannot be relied on.
67. With regard to the alleged violation of the interested party's rights under Article 50, it is important to bear in mind that the respondents were exercising their mandate pursuant to Standing Order 186 (2) (a) which is to the effect that:

“There shall be a select committee to be designed as the Public Accounts Committee and shall be responsible for the examination of the accounts showing the appropriation of the sum voted by the House to meet the public expenditure and of such other accounts laid before the House as the committee may think fit”

68. The interested party, like the petitioners, impugn the contents of the report of the PAC which recommended that he, among others, be suspended. The respondents defend the contents of the report. At paragraph 12 page 6 of the report, the Committee outlines how it gathered evidence during the compilation of the report and states as follows:

“During our hearings we demanded answers from County Officials to serious questions about deals concluded with contractors which did not seem to properly protect the public interest and which appeared not to comply with our own procedures and protocols. At times the committee was frustrated. Officials mystified and snubbed to answer our questions properly despite our requiring them to give evidence on oath. Nevertheless, we uncovered serious systematic issues which substantially damaged the public interests resulting to loss of county assets including cash.”

69. The Minutes of the 129th sitting of the Committee held on Wednesday 14th May, 2014, at Room 276, 2nd Floor, City Hall Buildings at 10:00 am, indicate that Dr. Robert Ayisi, a Medical Officer in charge of Health attended the sitting accompanied by Mr. Samich. He gave evidence before the Committee on matters of medical supplies. There is nothing in the minutes to indicate that the interested party requested for a postponement of the hearing by the Committee to give him more time to prepare himself for the hearing. Had he felt that he had not been given reasonable notice or time to prepare for the hearing, there was no a reason why he did not request for time to prepare. In the circumstances, I am unable to find that there was a violation of his constitutional rights under Article 50 of the Constitution as he alleges.

70. In addition, I note that the interested party has gone into a great deal of detail with regard to the facts that should exonerate him from the allegations against him. However, I must state that such matters do not fall into the ambit of this Court, for it does not have the jurisdiction to inquire into the merits of the facts presented to the PAC, on the basis of which it made its recommendations. Should decisions affecting the interested party have been made on the basis of the

recommendations of the PAC, then the interested party can challenge the said decisions appropriately. This Court is not in a position to determine the issue on the basis of the material before it.

Whether there has been a violation Article 229 of the Constitution and Standing Order No 178 of the Nairobi City County Assembly.

71. I now turn to consider the final issue raised in this petition. This is whether the respondents violated Article 229 of the Constitution and Standing Order No. 178 of the County Assembly's Standing Orders.

Violation of Article 229

72. The petitioners' complaint with regard to the provisions of Article 229 is in two limbs. It is their contention, first, that the 2nd respondent was constitutionally mandated to have debated, considered and taken appropriate action on the Special Audit Report of the Auditor General within three months from the date the said report was tabled before the Nairobi County Assembly. Mr. Kamwendwa submitted on behalf of the petitioners that since there are timelines set by the Constitution during which the PAC should have acted on the report, any action on the report after the three months is invalid. According to the petitioners, having been tabled on 27th February, 2014, the report ought to have been debated, considered and appropriate action taken (including the examination of the report) by the Committee on or before 30th May, 2014.

73. It is their contention therefore that the tabling of the PAC report on 24th July, 2014, almost five months after the Special Audit Report was tabled before the Assembly, was a breach of Article 229 (8) of the Constitution. Their submission was therefore that in the circumstances, the PAC report is invalid in accordance with Article 2 (4) of the Constitution.

74. Article 229 of the Constitution creates the office of the Auditor-General. It then proceeds to provide in Article 229(4), that within six months after the end of each financial year, the Auditor-General shall audit and report, in respect of that financial year, on the accounts of, among others, the national and county governments.

75. According to the respondents, Article 229 (8) does not specify the nature of the action to be taken. In their view, the appropriate action required from the County Assembly, which it took, was to commission the PAC to scrutinize the report.

76. They submit further that the Special Audit Report is dated 19th December, 2013. It was tabled before the County Assembly on 27th February, 2014, when it was committed to the PAC for scrutiny. The County Assembly therefore discharged its mandate when it committed the report to the PAC.

77. The respondents further argue that the Constitution only provides timelines for the tabling of the audit report before the County Assembly. It does not provide timelines for subsequent reports that may be generated by County Assembly Committees emanating from the audit report such as the PAC as in the present case, and Article 229 (8) of the Constitution does not apply to the Committee's report.

78. I have considered the provisions of Article 229(8) of the Constitution, which provides as follows:

Within three months after receiving an audit report, Parliament or the county assembly shall debate and consider the report and take appropriate action.

79. I must agree with the respondent that the said Article requires the tabling of the report before Parliament or County Assemblies within a period of three months from the date of submission by

the Auditor General. The Assemblies are then required to “**debate and consider the report and take appropriate action.**” Such appropriate action must include what the County Assembly in this case did: commit the report to a Committee for consideration. The report submitted to the County Assembly dated 24th July 2014 is, on the facts before me, a report made after consideration of the Special Audit Report of the Auditor General on the Financial Operations of Nairobi City County 2013. It is my view therefore that in this case, the respondents acted in accordance with Article 229(8).

80. The petitioners have also alleged that there were two reports emanating from the PAC, one dated June 2013 and another dated July 2014. The response from the respondents is that they are aware of only one report, the one dated July 2014 and annexed to the petitioners’ affidavit as annexure “**MKP 5**”. They argue that there could not have been a report dated June 2013 as the Report of the Auditor General is dated 19th December, 2014.

81. Again, I am constrained to agree with the respondents on this point. The parties are in agreement that the Special Audit Report of the Attorney General related to the year 2013, and was dated 19th December 2013. The origin and authenticity of the report dated June 2013 is questionable. It has been denied by the respondents, and I have no basis for assuming that two reports were produced by the PAC, one before the Audit Report it was supposed to be in respect of was submitted to the County Assembly.

Violation of Standing Order No. 178

82. The petitioners contend that the mandate of the Public Accounts Committee of Nairobi County Assembly was limited by Standing Order No 178 to only the examination of the Special Audit Report of the Kenya National Audit Office. They contend that the 3rd to the 21st respondents exceeded their mandate and considered matters that were not within their mandate when they recommended the stepping aside or the suspension from office of the officers mentioned in the said report, or their further investigation. They submit therefore that the recommendations were a violation of the said Standing Order.

83. It is also their contention that the power of investigation is vested upon the Auditor General under Article 229 of the Constitution. Their submission is that the 3rd- 21st respondent therefore usurped the powers of the Auditor General under Article 229.

84. The petitioners tie in their complaint with regard to the usurpation of the powers of the Auditor General with their complaint that the petitioners were not given an opportunity to be heard, citing Articles 50 of the Constitution, as well as section 15 of the National Assembly (Powers and Privileges) Act with respect to the issue of summons for persons to appear before the PAC. They assert that while the PAC made adverse recommendations against the persons named in the report, there is no evidence that they were given a chance to be heard, or served with the Special Audit Report, or accorded the right to legal representation.

85. I have already found elsewhere above that the petitioners have no capacity to lodge a petition on behalf of the persons named in the report alleging violation of their rights under Article 50. Whether the respondents did accord the said persons the rights under the Constitution, or summon them in accordance with the provisions of the National Assembly (Powers and Privileges) Act, it is only those persons who can provide such evidence. The petitioners cannot properly argue that there is no such evidence before the Court. I will therefore not enter into a determination of the issue when the parties directly affected have not deemed it fit to challenge the issue.

86. While the petitioners have sought to rely on the decision in **Benson Ritho Mureithi vs J.W Wakhungu & Others** (supra) the present petition is easily distinguishable from that decision. There is a clearly discernible public interest in the issue that was the subject of the **Benson Ritho Mureithi** decision, as opposed to the present case where the petitioners seek to litigate primarily

personal interests of parties not before the Court.

Violation of Articles 73 (2) (b) and 75 of the Constitution and the Provisions of the Leadership and Integrity Act

87. The petitioners have alleged that in examining the Special Audit Report and reaching their findings and recommendations, the 3rd- 21st respondent were influenced by unethical and corrupt practices which amounted to a violation of the above provisions of the Constitution and the Leadership and Integrity Act. They contended that the omissions from the second report of names of some persons adversely mentioned in the first report was influenced by corruption. They state in particular that the Legal Officer and the County Secretary were adversely mentioned in the first report, but that there was no recommendation for their removal in the second report. They cite this, along with the unexplained delay in tabling the report, as a clear pointer to influence by corrupt and unethical practices, and allege that the delay was for purposes of extorting money from persons who were adversely mentioned.

88. The response from the respondents is that the petitioners have not substantiated the allegations of corruption, and have not provided any proof of these allegations. They also deny that they have contravened Chapter Six of the Constitution or the Leadership and Integrity Act.

89. Regrettably, corruption has become endemic in our country and within our governance structures, and it may well be possible that there were corrupt practices in the preparation of the report by the PAC of the County Assembly. However, this is not the forum for investigation of such allegations. As all parties are fully aware, there are institutions such as the Ethics and Anti-Corruption Commission which has the constitutional and legislative mandate to receive complaints and investigate allegations of corruption.

Conclusion

90. The petitioners raised a series of question and sought declarations from the Court, which I have set out above. A number of the questions that the petitioners sought answers to or ask the Court to make declarations with regard to basically ask the Court to answer and make declarations with respect to the obvious:

- i. ***I need not declare that the Constitution is the supreme law and that it binds all levels of government. The Constitution itself expressly states so.***
- ii. ***I have found that the Report of the Public Accounts Committee of the Nairobi City County Assembly dated 2nd July 2014 and tabled before the 2nd Respondent on 24th July 2014 did not violate Article 229(8) of the Constitution. Consequently, the debate thereon that had been slated for 30th July 2014, and which the parties agreed by consent on 30th July 2014 to postpone, was not unconstitutional.***
- iii. ***This Court is not the proper forum to determine whether or not the 3rd to 21st respondents as members of Public Accounts Committee of the Nairobi City County Assembly, in making their findings were influenced by corrupt and unethical practices.***
- iv. ***Consequently, I am unable to make a declaration that the said respondents are unfit to hold public office, or that the Public Accounts Committee of the Nairobi City County Assembly should be disbanded for engaging in corrupt and unethical practices.***

91. Should the petitioners have evidence that would merit the intervention of the Ethics and Anti-corruption Commission, an independent Commission under Article 250 of the Constitution, then they should lodge a formal complaint with the Commission.

92. The upshot of my findings above is that I have been unable to find, on the material before me, a violation of the Constitution and legislation. I therefore dismiss the petition, but with no order as to costs.

Dated, Delivered and Signed at Nairobi this 4th day of December 2015.

MUMBI NGUGI

JUDGE

Mr. Kamwendwa instructed by the firm of N. M. Kamwedwa & Co. Advocates for the petitioner.

Mr. Ekin instructed by the firm of Ekin & Associates Advocates for the respondents.