



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CONSTITUTIONAL PETITION NO. 7 OF 2014**

**IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 19, 20, 22, 23, 47, 48, 50,  
73, 159, 160, 165, 181 & 259 OF THE CONSTITUTION OF KENYA,  
2010.**

**IN THE MATTER OF: SECTION 33 OF THE COUNTY  
GOVERNMENT ACT, 2012 LAWS OF KENYA.**

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF  
ARTICLES 38, 47, 50, 159 & 181 OF THE CONSTITUTION OF  
KENYA 2010.**

**IN THE MATTER OF: THE ALLEGED REMOVAL OF THE  
GOVERNOR OF THE COUNTY GOVERNMENT OF EMBU, HON.  
MARTIN NYAGA WAMBORA.**

**BETWEEN**

**HON. MARTIN NYAGA WAMBORA.....  
...PETITIONER/APPLICANT**

**AND**

**THE SPEAKER OF THE COUNTY OF ASSEMBLY  
OF EMBU. ....<sup>ST</sup> RESPONDENT**

**THE COUNTY ASSEMBLY OF EMBU.....  
.....<sup>2ND</sup> RESPONDENT**

**THE SPEAKER OF THE SENATE.....  
<sup>3RD</sup> RESPONDENT**

**THE SENATE.....<sup>4TH</sup> RESPONDENT**

**RULING**

**Introduction**

1. The impeachment of Hon. Martin Nyaga Wambora (hereinafter “the Petitioner” or “the

**Governor”)** has been in the public limelight since January this year. Prior to the filing of the application herein, a motion had been filed on 16<sup>th</sup> January, 2014, in the Embu County Assembly (“**the County Assembly**”) for the removal of the Petitioner on various allegations of violations of the law. The Petitioner filed a suit (Petition No. 3 of 2014, Kerugoya) seeking *inter alia* orders to quash a resolution of the County Assembly and prohibiting the Senate from convening to hear charges against him. This Court (Githua, J) issued interlocutory orders restraining the County Assembly from conducting the removal proceedings without first serving the charges on and hearing the Petitioner. The County Assembly ignored the Court order, proceeded with its sittings, approved the removal motion, and forwarded its resolution to the Senate on 28<sup>th</sup> January, 2014. The Petitioner also filed contempt of Court proceedings against both the Speaker and the Clerk of the County Assembly.

2. The Petitioner, meanwhile, filed another petition (Petition No. 4 of 2014 in Kerugoya) against the Speaker of the Senate on 18<sup>th</sup> February, 2014. It sought, *inter alia*, declarations that the motion for removal of the Petitioner was unconstitutional, that the resolution of the County Assembly was in contravention of a Court order hence unlawful, and therefore that the convening of the Senate was unconstitutional, illegal, and null and void. This Court, (Majanja, J) on 3<sup>rd</sup> February, 2014 restrained the Speaker of the Senate from deliberating or allowing deliberation on the said impeachment resolution. The Senate and the Speaker both also ignored the Court order, convened a meeting to, *inter alia*, hear the charges against the Petitioner and eventually voted for his impeachment.
3. Several other related suits that had been filed were consolidated within Petition Nos. 3 and 4, and heard by a bench of three Judges sitting at Kerugoya. Ultimately, the three Judge bench determined in their judgment of 16<sup>th</sup> April, 2014 that, *inter alia*, the removal proceedings before the Embu County Assembly and impeachment in the Senate were held in violation of a Court order and therefore were null and void. The County Assembly resolution was quashed as was Gazette Notice number 1052 containing the Senate’s resolution of impeachment of the Petitioner. In addition, the Court ordered that summons be issued to the Speaker and Clerk of the County Assembly to appear before the Court for further orders in connection with the contempt proceedings.
4. This introductory information is useful because it informs the context under which the present application is made. Indeed, following the rendering of the aforesaid judgment on 16<sup>th</sup> April, 2014, a fresh notice of motion for removal of the Petitioner dated 16<sup>th</sup> April, 2014 was tabled by a member of the Embu County Assembly on 22<sup>nd</sup> April, 2014. It is not disputed that the Petitioner was served with the charges and invited to respond thereto, but did not attend. On 29<sup>th</sup> April, 2014, the County Assembly passed a removal motion.

#### **The Present Notice of Motion**

5. The Petitioner filed the Notice of Motion herein dated 30<sup>th</sup> April, 2014 at Embu under certificate of urgency. By a ruling on 2<sup>nd</sup> May, 2014, Ong’udi, J, certified the application urgent but disqualified herself from hearing it. The learned Judge directed that the application be placed before me for *inter-partes* hearing and placement before the Honourable the Chief Justice to appoint a Judge to hear the petition.
6. The application seeks six prayers, the first three of which are spent. Those presently before the court for determination are as follows:

***“4. THAT pending inter-partes hearing and determination of the substantive Petition, this Honourable Court be pleased to issue a Conservatory Order restraining the 3<sup>rd</sup> Respondent or any Member of the 4<sup>th</sup> Respondent from introducing, discussing, seizing or otherwise deliberating the impeachment of the***

***Petitioner based on the Resolution forwarded by the 1<sup>st</sup> Respondent.***

***5. THAT pending inter-partes hearing and determination of the substantive Petition, this Honourable Court be pleased to stay the resolution passed and or made by the 2<sup>nd</sup> Respondent regarding the motion dated 16<sup>th</sup> April 2014 and passed on 29<sup>th</sup> April 2014 resolving to remove the Petitioner from office by impeachment.***

***6. THAT costs of this application be provided for.”***

7. The background to the application is contained in the grounds. Briefly, they are, *inter alia*, that on 22<sup>nd</sup> April, 2014 the Speaker of the County Assembly and the County Assembly allowed Hon. Ibrahim Swaleh, MCA for Kirimari Ward, to table a motion dated 16<sup>th</sup> April, 2014 for the removal of the Petitioner before the County Assembly; that such motion was *sub-judice* Embu Petition No. 5 of 2014, but was nevertheless debated and passed in violation of Standing Order No. 86 of the County Assembly; that the said motion was passed despite not achieving the threshold set by the High Court in Petition No. 3 of 2014, Embu; that the Petitioner not being an accounting officer under **section 148** of the **Public Finance Management Act** was not in breach of the **Public Procurement and Disposal Act** as charged in the motion for removal; that the Speaker of the County Assembly was biased as he was facing contempt of court proceedings initiated by the Petitioner emanating from Petition No. 3 of 2014, Embu; that three months have not elapsed between the date of the vote in the Senate on 14<sup>th</sup> February, 2014 and the date of the introduction of the resolution in the Senate; that unless the convening of the Senate is stopped and the resolution resulting thereon is stayed the Petition will be rendered nugatory.
8. In support of the application the Petitioner annexed the following documents in his petition and the Supplementary Affidavit of Mr. Nyamu:
  - a. A document containing the motion for Removal of County Governor by impeachment “MNW1”
  - b. The Judgment in Kerugoya High Court Petition No. 3 of 2014 “MNW2”.
  - c. Notice of Motion by Hon. Ibrahim Swale MCA dated 16<sup>th</sup> April, 2014 “MNW3.”
  - d. Special issue of Kenya Gazette of 2<sup>nd</sup> May, 2014 containing Gazette Notice No. 3020, “WNM1”.
9. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Replying Affidavit of Hon. Justus Kariuki Mati (the 1<sup>st</sup> Respondent) on 6<sup>th</sup> May, 2014. He avers, *inter alia*: that the County Assembly is a constituent arm of the County Government of Embu as established under **Article 176** and **177** of the **Constitution** as read with **section 7** of the **County Government Act** (hereinafter “**the CGA**”); that the role of the County Assembly under **Article 185** of the **Constitution** as read with **section 8 CGA** includes, *inter alia*, exercising oversight over the County Executive; that the functions of the Speaker include presiding over the County Assembly; that it is the statutory function of the County Assembly to consider matters of accountability and transparency in the use of resources of the County Government; and that the County Assembly voted on 28<sup>th</sup> January 2014 to remove the Petitioner from office.
10. Further, the deponent states that the proceedings before the County Assembly were set aside by the High Court in Kerugoya in Petition No. 3 of 2014 on the dual basis that they were carried on in disobedience of a Court order; that he received a subsequent motion to remove the Governor and after confirming that there was no Court order restraining the Assembly from admitting the same; and that **section 37 (8)** of the **CGA** is not applicable since the High Court in Kerugoya had ruled that it was as if the previous resolution and proceedings were never there; that the motion before the County Assembly had to be moved by its proposer and thereafter the Governor called to respond and be afforded a fair hearing; that the process of removal of a Governor is constitutional

in character and provides for an investigation at the Senate to ensure that all material factors are considered before a determination is made; that the Governor is intent on using the court and its processes as a shield from any investigation under the guise of breach of his constitutional rights.

11. There were no annexures to the 1<sup>st</sup> Respondent's Replying Affidavit.
12. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents did not participate in the proceedings. Efforts made to serve them resulted in all process being directed to the parliamentary Director of Legal Services at Protection House, Nairobi. Process were stamped received on behalf of the Speaker/Clerk of the National Assembly/Parliamentary Service Commission to whom service was made. Counsel for Petitioner filed two Affidavits of Service, one sworn by him, deposing that due to non-cooperation of the officers at the County Offices of the Speaker of the Senate and or Clerk of Senate, he left a copy of the pleadings and hearing notice at the reception of the County Offices.

### **Preliminary Objection**

13. The application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who also filed, simultaneously with their Replying Affidavit, a preliminary objection on two grounds as follows:

*“a) THAT this honourable court has no jurisdiction in this matter, where the subject constitutes proceedings of the County Assembly of Embu and where no breach of process is alleged or demonstrated under the provisions of Article 196 (3) of the Constitution as read together with the Sections 4 and 12 of the National Assembly (Powers and Privileges) Act, Chapter 6, Laws of Kenya and Section 17 of the County Governments Act, Chapter 17 of 2012.*

*b) THAT the present application and proceedings are Res Judicata in consideration of the judgment of the court in Kerugoya Petition No. 3 of 2014, Hon Martin Nyaga Wambora & Others v. The Speaker of the Senate and Others.”*

14. For expeditious disposal of the matter, I directed that the preliminary objection be heard first, followed immediately by the motion. The Court directed that its ruling on both the objection and the motion would be issued together. I now deal with the preliminary objection.

### *Jurisdiction*

15. Mr. Njenga for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the proceedings before the County Assembly of Embu were in contravention of the powers, privileges and immunities of the County Assembly as provided for under the **National Assembly (Powers and Privileges) Act, Chapter 6, Laws of Kenya**. As such, Counsel urged that the jurisdiction of this court was ousted, and the court could not entertain either the application or petition herein.
16. Counsel contended that, the provisions of **Article 196(3) of the Constitution**, read together with **Sections 4 and 12 National Assembly (Powers and Privileges) Act, Chapter 6**, (hereinafter referred to as “**Cap 6**”) and **section 17** of the **CGA** vest in the County Assembly the exercise of these privileges.
17. Counsel placed reliance on the case of **Martin Wambora & 4 others v. Speaker of the Senate & 4 others, Petition No. 3 of 2014, Embu**, where the court observed that where the County Assembly and the Senate exercise jurisdiction it would be wrong for the courts to question the merits of the decision made by the County Assembly. However, Counsel conceded that the Court can review the process carried on in a County Assembly under **Article 165** of the **Constitution**.
18. Mr. Nyamu, for the Petitioner conceded that under **Article 196** of the **Constitution**, Parliament is required to enact legislation providing for powers and privileges of the County Assemblies. He

argued, however, that **Cap 6** only applies to the National Assembly and not the County Assembly and the Senate, which he pointed out are distinct constitutional organs. Thus, he argued, the County Assembly cannot take cover under **section 17** of the **CGA**, to apply **Cap 6** which essentially relates to the National Assembly.

19. Counsel further submitted that the Petitioner's right to hold office as envisaged under **Article 38(3)(c)** of the **Constitution** was threatened, and that the right to fair administrative action under **Article 47** of the **Constitution** can be heard by the High Court as provided for under Article 165 of the Constitution. In particular, if no *nexus* is shown between the charge and the Petitioner's acts under the **Public Procurement Act** and the **Public Finance and Management Act**, the Petitioner's rights would be violated.

20. It was therefore submitted that the Court cannot ignore constitutional violations in favour of parliamentary privilege, and can inquire into the constitutionality of actions of members of the National Assembly despite **section 29** of **Cap 6**. Counsel argued that the actions of the County Assembly in charging the Petitioner with the same charges as he had been previously charged with, amount to double jeopardy which is against the rules of natural justice.

21. **Article 196(3)** of the **Constitution** provides that Parliament shall enact legislation providing for the powers, privileges and immunities of county assemblies, their committees and members.

22. On the other hand, **Section 17** of the **County Government Act, 2012** provides that:

***“The national law regulating the powers and privileges of Parliament shall, with the necessary modifications, apply to a county assembly.”***

23. **Cap 6** provides at **Section 4** that:

***“No civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to, the Assembly or a committee, or by reason of any matter or thing brought by him therein by petition, Bill, resolution, motion or otherwise.”***

The same Act provides at **Section 12** 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.”***

24. The preamble to **CAP 6** states that it is:

***“An Act of Parliament to declare and define certain powers, privileges and immunities of the National Assembly and of the members of the National Assembly; to secure freedom of speech in the National Assembly; to make provision regulating admittance to and conduct within the precincts of the National Assembly; to give protection to the persons employed in the publication of the reports and other papers of the National Assembly; and for purposes incidental to or connected with the matters aforesaid”.***

25. **Article 196(3)** of the **Constitution** gives powers to Parliament to enact legislation providing for powers, privileges and immunities of county assemblies, their committees and members. Further, **section 17** of the **CGA** provides that the national law regulating the powers and privileges of Parliament shall, with the necessary modifications, apply to the County Assembly.

26. **Section 7** of the **Sixth Schedule** to the **Constitution** provides that all law in force immediately before the effective date of the Constitution shall be construed with the alterations adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution. In light of this provision, and noting that **Cap 6** was in existence before the effective date, I am persuaded that it is applicable in relation to the Senate and the County Assembly pursuant to **Article 196(3)**

and **section 17** of the **CGA**.

27. I am aware of no other law that regulates the powers and privileges of Parliament, within the meaning of **Article 93** of the Constitution, which includes the Senate. Accordingly, I find on this point that the argument by Mr. Nyamu is not plausible, and that **Cap 6** is applicable to the Senate with the necessary modifications, as it is to the County Assembly. I have no doubt, therefore, that both the County Assembly and the Senate enjoy the powers and privileges provided in **Cap 6**, which is the national law regulating powers and privileges of Parliament.
28. Having stated as above, the question that now arises is whether the Court has jurisdiction in this matter, given that the issues and procedures before the County Assembly are by law within the mandate of the County Assembly and Senate.
29. **Article 165 (3)** of the **Constitution** vests the High Court with unlimited original jurisdiction in civil matters. Further, the High Court has jurisdiction, under **Art 165(3) (b) and (d) (ii)**, to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; and to hear any question respecting the interpretation of this Constitution including the determination of 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.
30. The thrust of the application and the petition as contended by the Petitioner, is that there have been violations of his constitutional rights as enshrined under the Constitution by the County Assembly and the Senate. As such, I find and hold that the Court, clothed with the above mentioned constitutional provisions, is seized of jurisdiction to entertain the suit and the application herein.

#### *Res Judicata*

31. On the objection as to the issue of *Res Judicata*, it was submitted by Mr. Njenga that to the extent that the present petition questions the validity of the removal of the Governor by resolution of the County Assembly and further by impeachment in the Senate, it is *res judicata*. Counsel contended that under **section 7** of the **Civil Procedure Act, Cap 21** any matter or issue that arises directly from a matter previously litigated before the court is *res judicata*. He argued that pursuant to the judgment of the court in **Hon. Martin Nyaga Wambora & Others v. The Speaker of the Senate and Others** the prayers sought in the present petition are similar to those sought in the previous petition.
32. **Section 7** of the **Civil Procedure Act, 2010 (CPR)** provides as follows in regard to *res judicata*:

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”***

33. In the case of **Hon. Martin Wambora** (supra) the court stated that the process before the County Assembly was a nullity by virtue of disobedience of a court order. Therefore, the resolution passed and all the other processes that followed were null and void and thus of no consequence.
34. The principle behind *res judicata* holds that litigation must come to an end on a matter the substance of which has previously been heard and determined by the Court. Such matter can therefore not be re-opened to be restarted all over again, unless the decision reached has been set aside. See **Benson Ngugi v Francis Kabui Kinyanjui and Others Civil Appeal No 1 of 1996 Court of Appeal**. Further, it is not the reasons for the decision that are *res judicata* but the

decision itself. See **Kenya Cannery Ltd v Titus Muiruri Doge Civil Application No 119 of 1996 Court of Appeal**.

35. It is important to note that in this case, the first process of removal of the County Governor commenced on 14<sup>th</sup> January, 2014. It concluded with the rendering of the Court's decision on 16<sup>th</sup> April 2014, declaring the processes null and void both at the County Assembly and at the Senate, *inter alia*, on grounds of failure to obey the Court's orders. Contrariwise, the subject of the present suit, commenced on the 16<sup>th</sup> April, 2014 with a fresh notice of motion in the County Assembly, resulting in a resolution which is presently under consideration in the Senate. The present facts and circumstances are not the same as those in the earlier litigation, and the two processes are, in my view, completely different processes. The Petitioner has moved to Court to litigate on the second process that was commenced on the 16<sup>th</sup> April, 2014, which is a new matter, the substance of which has not been litigated before.
36. In terms of **Section 7** of the **CPR**, the present matter is not one that qualifies as being "*in the former suit*" or as a matter which has "*been heard and finally decided*". It therefore cannot be said to be the same matter as that in **Petition No 4 of Hon. Martin Wambora** (supra). I therefore find that the present suit is not *res judicata*, given the circumstances that precipitated the filing of the present suit.
37. In light of the foregoing, I disallow the Preliminary Objection in its entirety with no order as to costs.

#### **Parties' Submissions on the Notice of Motion**

38. After carefully listening to the submissions of counsel for the parties and considering the material before me, I am of the view that the oral submissions made drove deep into the merits of the petition itself, and were also repetitive of some of the submissions in respect of the preliminary objection. At this stage, I must warn myself that I am not required to determine the petition on its substantive merits. I have therefore not reproduced from the record the full substance of the said submissions for purposes of this ruling.
39. Mr. Nyamu submitted that the proceedings at the Senate arising from the resolution of the County Assembly are likely to infringe the Petitioner's rights under **Articles 38, 28 and 47** of the Constitution. Counsel also argued that under **section 33(8)** of the **CGA**, a reintroduction of a removal vote can only be brought to the Senate three (3) months after a previous similar vote. However, counsel argued that the previous vote effectively failed to remove the Governor from office, and thus the three months have not expired.
40. Counsel also submitted that the **Mutunga Rules** provide for preservation of a situation by conservatory orders pending the Court's determination of the substantive complaint. According to Counsel, all that the court needs to ask itself is whether at this juncture the Petitioner has made out a *prima facie* case. Counsel cited the case of **Centre for Rights Education and Awareness (CREAW) & 7 Others v. Attorney General, Petition No. 16 of 2011** and the Ruling in the case of **Martin Wambora & Others v Speaker of the County Assembly & Others, Petition No. 3 of 2014**. Counsel cautioned that there was a danger of a violation occurring as against the Petitioner because under **section 33(7)** of the **CGA**, if a majority of the Senate members vote in favour of the motion, then the Governor must vacate office. Counsel thus urged the Court to issue the conservatory orders sought as the petition raises arguable issues.
41. In opposing the application Mr. Njenga, submitted that it does not disclose a *prima facie* case and that the Petitioner has not demonstrated how his rights have been violated and or threatened. It was Counsel's submission that the Petitioner's right under **Article 38** of the **Constitution** is not absolute. Further, that **Article 24** of the Constitution is clear on the circumstances in which a right can be limited. He added, that it cannot be said that the right to hold office is unquestionable, or that **Article 38** avails immunity for actions in conduct of office especially given the oversight role

of other constitutional organs.

42. **Article 181** of the **Constitution** is material in providing for the process of the removal of a Governor by a process initiated by the County Assembly and thereafter forwarded to the Senate. It was therefore submitted that the process initiated by the County Assembly vide the resolution made on the 16<sup>th</sup> January, 2014, culminating in the Senate's finding was not faulted by the court in the case of **Hon. Martin Wambora** (*supra*). The only fault the Court found was that the resolution of the County Assembly was concluded in disobedience of a Court order. Further, that the Court did not find that there had been a breach of the Petitioner's rights as alleged under **Article 28, 38** and **47** of the **Constitution**.

43. It was also submitted that the Petitioner seeks conservatory orders to restrain the Senate from investigating accountability issues emanating from the County Assembly that involve use of County resources and funds. On this ground, Counsel submitted that issuance of conservatory orders will prejudice the Respondents as the process under **section 33(4)** of the **CGA** is time bound. In the premises, Mr. Njenga urged the court to dismiss the application.

### **Determination**

44. What is sought by the Petitioner are conservancy orders; first, to restrain the 3<sup>rd</sup> Respondent and any member of the 4<sup>th</sup> Respondent from discussing seizing or deliberating the impeachment of the Petitioner; and second, to stay the resolution presented by the County Assembly regarding the motion dated 16<sup>th</sup> April, 2014 and passed on 29<sup>th</sup> April, 2014, resolving to remove the Petitioner from office by impeachment.

45. Mr. Nyamu has stressed that all that this court is required to do is determine whether the petition is arguable and if a *prima facie* case has been established, which he believed he had done, conservatory orders should be issued.

### *The Rights to Hold Elective Office and to Human Dignity*

46. With regard to the alleged breach of the political right of the Petitioner to hold elective office under **Article 38**, and to human dignity under **Article 28**, it has been alleged that the removal resolution was introduced in bad faith and in breach of the requirements of a fair trial and fair administrative action. Further, that the resolution as introduced was *sub-judice* because the matter was the subject of litigation. I have carefully perused the documents annexed to Petitioner's supporting affidavit and have not seen any evidence that either there was a court order when the removal resolution was passed or even that there was ongoing related litigation as evidenced by pleadings or proceedings.

47. According to the Petitioner, the allegations of breach of fair administrative action are compounded by the alleged fact that the charges against him do not muster the threshold of seriousness and nexus prescribed by the High Court in **Petition No. 3 of 2014, Embu**. My view here, without being drawn into the substantive merits of the matters which may be the subject of the petition, is that when the County Assembly is exercising its statutory mandate under **section 33CGA** and pursuant to the constitutional power under **Article 181**, it is for that Assembly, and not for this Court, to ascertain that the legal threshold is satisfied whilst conducting its *quasi-judicial* inquiry. The Court's role cannot precede the County Assembly's inquiry role. And the role of the court is not essentially to conduct a merit review of the Assembly's actions. For this proposition, see **Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** as enunciated by the Court of Appeal at paragraphs 51 - 58.

48. Here, the Petitioner has not disputed that he was invited by the County Assembly or that he failed to attend and participate in the Assembly's deliberations. Nor is there any indication that the County Assembly did not, in terms of the requirements of natural justice, deliberate on the charges to ascertain their legality or otherwise.

49. Accordingly, I am not satisfied on this ground that the Petitioner has demonstrated a *prima facie* case that calls for the issuance of a conservatory order to preserve his right to hold office. I say so because the right under **Article 38(3)(c)** is constitutionally circumscribed by **Article 181** and a statutory process is prescribed under **section 33 CGA** for effecting the removal of the office holder.

#### *The Three Month Rule*

50. I turn now to the alleged breach of the three-month rule under **section 33 (8)** of the **CGA**. That provision states as follows:

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

51. Counsel for the Petitioner argued that where, as in this case, there had been a failed vote in the Senate that had not resulted in a removal of the Governor, a subsequent motion by the County Assembly to again deliberate his removal must abide a three month waiting period before re-introduction.

52. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent responded by pointing out that in discussing the effect of the said vote of the Senate in **Petition No. 3 of 2014**, the 3 Judge bench in **Wambora’s case** (supra) found that the vote there was done in breach of Court orders, and void. There, the Court discussed two authorities on the effect of disobedience of court orders and concluded as follows:

***“282. We are in agreement with the authorities to the effect that anything done in disobedience of court orders is null and void ab initio and is a nullity in law. It is like the resolution was never passed in the first place...In the circumstances there was no valid resolution which could have been forwarded to the Speaker of the Senate for action under section 33 (2) of the Act. The subsequent actions of the Senate are a nullity...”***

53. That characterization of the word “nullity” is the trite and common legal appreciation of it, which is also described in **Black’s Law Dictionary** as follows:

***“Nullity”: Nothing; no proceeding; an act or proceeding in a cause which the opposite party may treat as though it had not taken place, or which has absolutely no legal force or effect.”***

54. If the previous resolution as presented to the Senate, and the subsequent Senate proceedings had already been described by this Court in **Wambora’s case** (supra) as non-existent or a nullity, it follows on a *prima facie* basis, that no vote could have taken place there. I therefore consider the Petitioner’s allegation of breach based on **section 33 (8)** rather trifling. That ground does not therefore assist the Petitioner’s plea of a *prima facie* case meriting a conservancy order.

#### *Allegations of Breach of Article 47 and 28 of the Constitution*

55. The sub-issues raised under this issue were: *whether the threshold was met; whether the Governor could be dealt with as if he were the Accounting Officer; and Sub-judice*

56. The petitioner contends that in light of **Articles 28, 38** and **47** of the **Constitution**, the procedures at the County Assembly and by extension the Senate are under question as he considers that they are unlawful. Counsel thus urged the Court to look into these allegations. He also urged that the threshold for the removal of the petitioner had not been met further bringing into question the role

of the petitioner and the functions vested by his office. It was also argued that the Petitioner is not an accounting officer in terms of the **Public Finance Management Act, 2012**, and should not be held liable for acts of other officers.

57. This Court can only interrogate the above issues during the hearing of the petition. Further, it has not been furnished with enough information to make a substantive finding on the same.

58. On this issue sub-judice Black's Law Dictionary, 9<sup>th</sup> Edition at page 1562 defines sub-judice as a matter pending:

**“Before the court or judge for determination”.**

As earlier noted the Court at this point does not have enough information to determine whether the matter before it is actually *sub-judice*.

### **Whether the Court can intervene and issue Conservatory orders**

59. In determining whether or not to grant conservancy orders, several principles have been established by the courts. The first is that:

***“...[an applicant] must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution”***

This was the holding in the case of **Centre for Rights Education and Awareness (CREAW) and 7 Others v Attorney General and Others Petition No 16 of 2011, Nairobi**.

60. To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention.

61. The second principle, which naturally follows the first, is whether if a conservancy order is not granted, the matter will be rendered nugatory.

62. The third principle is one recently enunciated by the Supreme Court in the election petition case of **Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others SCK Petition No 2 of 2013**. The principle is that the public interest must be considered before grant of a conservatory order. Ojwang and Wanjala JJSC stated that:

***“[86] ‘conservancy orders’ bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes”***

63. Thus, where a conservancy 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 to be granted with due caution. The interruption of the lawful functions of the legislative body should take into account the need to allow for their ordered functioning in the public interest

64.The court appreciates that the petition raises weighty issues. No interlocutory order in this case can, however be issued unless the Court has the benefit of all the arguments by all the parties on the merits. The Court should further be minded that this matter begun through a process enshrined under the Constitution, by virtue of **Article 181** and **Section 33** of the **County Government Act, 2012** and is now before the Senate.

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 mandate.

66.The upshot of all the forgoing is that I am not satisfied that this application merits the orders of conservancy sought at this stage. Accordingly the notice of motion is hereby dismissed with no order as to costs.

67.Orders accordingly.

**Dated, Delivered and Signed at Nairobi this 12<sup>th</sup> day of May, 2014.**

**RICHARD MWONGO**

**JUDGE**

In the presence of:

1. Mr. Wlfred Nyamu, Counsel for the Petitioner
2. Mr. Njenga, Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents