



REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CONSTITUTIONAL PETITION NO.4 OF 2014

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT NO.17 OF 2012

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLE 10 (2) (B), 20 (1), 92, (3), (4), 21, 22, 28 & 50 (1), (2)

BETWEEN

STEPHEN NENDELA.....PETITIONER

AND

- 1. THE COUNTY ASSEMBLY OF BUNGOMA)**
- 2. THE SELECT COMMITTEE OF THE ASSEMBLY**
- OF THE COUNTY OF BUNGOMA)**
- 3. CLERK TO THE ASSEMBLY OF BUNGOMA COUNTY).....RESPONDENTS**
- 1. H. E. THE GOVERNOR OF BUNGOMA)**
- 2. THE GOVERNORS' COUNCIL).... INTERESTED PARTIES**

JUDGMENT

1. Chapter Eleven of the Constitution of Kenya (hereinafter “COK”) provides for devolution whereby Article 176 provides for County Governments through out the Republic. Pursuant to Article 200, the National Assembly enacted the County Government Act, 2012 (hereinafter “CGA”) to give effect to the said devolution.

2. Section 40 of the CGA provides, *inter alia*, that:-

“(1) Subject to subsection (2), the Governor may remove a member of the County Executive Committee from office on any of the following grounds:-

- a. *incompetence;*
- b. *abuse of office;*
- c. *gross misconduct;*
- d.
- e.
- f.

(2) A member of the County Assembly, supported by at least one third of all the members of the County Assembly, may propose a motion requiring the Governor to dismiss a County Executive Committee Member on any of the grounds set out in subsection (1)."

3. Subsections 3 and 4 of that Section provides the procedure to be followed by the County Assembly on how to exercise that oversight power and ultimately have a member of the County Executive Committee removed from office. Therefore Section 40 may be said to be one of the means by which the County Assembly exercises its oversight over the performance of the County Executive Committee.

4. In or about 2013, Stephen Peter Nendela (hereinafter "the Petitioner") was appointed by the Governor of Bungoma to serve as the County Executive in charge of Roads and Public Works for the County of Bungoma. Before such appointment, he had been vetted by the Public Service Board and the appointment procedurally debated and approved by the County Assembly of Bungoma (hereinafter "the 1st Respondent"). Upon such appointment, the Petitioner took office and started to discharge his duties as required.

5. By a Petition amended on 28th April 2014, the Petitioner contended that in the discharge of his duties, he is bound by Article 227 (1) of the Constitution to ensure that the procurement of goods and services is characterized by a system of fair, equitable, transparent, competitive and cost effective; that the Chief Officers in-charge of Roads and Public Works for Bungoma County were appointed in or about a month before the filing of the Petition; that due to the late appointment of the said Chief Officers, there was delayed preparation and publication of several operational documents by the County Executive Committee. He set out these documents in the Amended Petition. According to him, all these documents were work in progress.

6. He contended that, in accordance with the Constitutional and Statutory Provisions, on an unspecified date, the County Government of Bungoma invited tenders for the execution of Civil Works in Bungoma County and in particular road works for the year 2013/2014 whereupon, several service providers were pre-qualified as determined by the Tender Committee. That marked the beginning for his troubles. He contended that he was promptly inundated by telephone calls, personal entreaties by several members of the County Assembly (hereinafter "the MCA'S") and persons associated with them requesting, *inter alia*, that the execution of road works in their respective areas of representation be placed under their control and that companies associated with their respective associates be given preferential treatment in the award of the said tenders. Sadly, he declined these requests. In his view, a division of the sum of Kshs.712,000,000/=, meant for roads in the County among the 45 representative units within the County would mean that each unit would be given only Kshs.15,822,222/= which sum, according to him, would be too minimal for any meaningful impact. He also opined that, that would violate the constitutional and statutory principle of equity, cost effectiveness and value for money.

7. The Petitioner contended that as a result of the foregoing, on 25th March, 2014 a motion was table before the County Assembly of Bungoma seeking his removal from office. That motion was passed and on 14th April, 2014, the Petitioner was served with a letter to appear before a Select Committee of the Assembly the following morning to receive presentations for or against his removal from office.

8. By his Amended Petition, the Petitioner has contested that the process and content of the said inquiry is unconstitutional, capricious arbitrary, pre-determined, injudicious and contaminated by and actuated by malice, self-interest and improper motive on some of the members of the Assembly and it violates the Rules of Natural Justice. He set out in his Amended Petition thereasons for his contention as; failure to be given adequate notice for his defence; failure to give sufficient detail of allegations against

him; failure to accord him representation by an Advocate of his choice and violation of Articles 47 and 50 of the Constitution as to fair hearing and the unconstitutionality of Section 40 of the CGA. He therefore sought various declarations.

9. The 1st, 2nd and 3rd Respondents filed a Response to the Amended Petition. They contended that while respecting the principle of separation of powers, the County Assembly may exercise oversight over the County Executive Committee including the removal of the latter's members under Section 40 of the CGA; that the Petitioner had been in office since June 2013 and had not laid before the County Assembly any strategic work plan. The Respondents denied that any member of the County Assembly made any calls to the petitioner to seek favours; that the Petitioner had failed to produce any work plan for the budgetary allocation under his docket and that this is what had led to the passing of the motion for his removal by the County Assembly.

10. The Respondents further contended that while investigating the Petitioner, the County Assembly was aware of the provisions of Section 9 (2) of the CGA; that the Petitioner was allowed time to present his case and interrogate evidence against him on 16/4/2014 from 2.30 p.m to 4.30 p.m; the Respondents denied breaching the rules of natural justice or there being any malice or self interest on the part of the MCA'S. They contended that due to the constitutional timeline of reporting to the assembly within 10 days, the notice given to the Petitioner was adequate as the exercise could not go past the 16th April, 2014 due to Easter Vacation; that the Petitioner participated in the proceedings of 15th April, 2014 but refused to do so on 16/4/2014; that Section 40 of the CGA is not unconstitutional and that no Order of Certiorari could issue as no decision has been made by the Respondents. They urged that any such Order would be inhibiting the functions of the County Assembly and they denied the transcripts of the proceedings produced by the Petitioner for 16th and 17th April, 2014 and termed them as strange. They therefore urged that the Petition be dismissed.

11. In the Replying Affidavit sworn on 13/5/14, Edward Simiyu Barasa the Chairman of the Select Committee swore that a five (5) Member Select Committee was constituted to investigate the petitioner after due passage of a motion to that effect; that on 15/4/2014, the Petitioner appeared before the Select Committee and made an application through his Advocate for deferral which was declined; that on 16/4/2014 the Petitioner and his Advocate stormed out of the proceedings terming the Select Committee a 'Kangaroo Court'. Mr. Barasa swore that the Select Committee took time to study the evidence gathered and compiled a report to be tabled before the Assembly as per the law provided. He challenged the admissibility of the transcripts relied on by the Petitioner. In the Affidavit of John Ongwae Mosongo, the Clerk of the County Assembly, sworn on 13/5/2014, it was contended that the transcripts produced by one Noellah Musundi on behalf of the Petitioner did not agree with the Official Hansard which he held. He stated that the said proceedings contained in the official Hansard were confidential.

12. I have considered the various Affidavits on record, the written submissions and oral hi-lights of Learned Counsel. I have also considered the testimony of Noellah Namulanda Musundi who appeared before me and was cross-examined at length on the issue of the transcripts she had produced in her Supplementary Affidavit in support of the Petition.

13. In his submissions, Mr. Wasilwa, Learned Counsel for the Petitioner set out a total of nine (9) issues for determination which Mr. Situma, Learned Counsel for the Respondents fully addressed and raised two others. On his part, Mr. Kituyi, Learned Counsel for the Interested Parties did not make any submissions but left the matter to the court. After considering the pleadings, and Affidavits on record, the written submissions and oral hi-lights of Learned Counsel, the court considers that the issues that arise for determination are six (6). These are as follows:-

- a) Whether the Petition is premature.
- b) Whether this Court has jurisdiction to hear this matter.
- c) Whether the evidence of Noellah Musundi is admissible.

- d) Whether the Select Committee violated Article 50 (1) (a), (c), (g) and (k) of the COK.
- e) Whether Certiorari can issue in this matter.
- f) Whether Section 40 (3) of the CGA is inconsistent with Article 50 of the COK.

a) Is the Petition premature?

14. It was submitted on behalf of the Respondents that the Petition was anchored on activities of an ad hoc Select Committee constituted by the County Assembly; that this Select Committee has no legal character to be capable of being sued and that since its report had not been presented to the County Assembly, the Petition was premature as it could not be argued that the Select Committee had infringed any of the Petitioner's rights. On the part of the Petitioner, it was argued that the Petition was not premature as it was in accordance with Article 22 of the COK and that it was meant to preserve the Petitioner's rights under Articles 47, 50 and 236.

15. Article 22 (1) of the Constitution of Kenya provides:-

“22 (1)Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of Rights has been denied, violated or infringed, or is threatened.” (underlining supplied)

From this Article, it is clear that the Constitution allows a party to approach the court through a Constitutional Petition either once rights have been violated or when there is a threat of their violation. In this regard, a Petition can be filed to prevent the infringement of a fundamental right or freedom. One need not wait until a right has been violated or infringed before he can come to court.

16. From the record, the Petitioner contended that the County Assembly had passed a motion to discuss his removal as a public servant for the County of Bungoma; that he had been served with an inadequate notice for the proceedings of 15th April, 2014 before the Select Committee of the 1st Respondent; that on 16th April, 2014, the said Select Committee denied him the right to an Advocate of his choice and for him to test evidence tendered against him through cross-examination. The Petitioner contended that his rights under Articles 47, 50 and 236 of the Constitution had either been breached or were about to be violated. Whichever the case, the Petition was perfectly within Article 22 (1) of the Constitution. There was clearly a claim that fundamental rights had either been violated or were threatened to be violated. The Petition was not premature as contended by the Respondents.

b) Whether the court has jurisdiction to hear and determine the Petition

17. On the jurisdiction of this Court, I reiterate what was held in **BGM Petition No.2 & 2A of 2014 John Mining Temoi & Anor -vs- The Governor of Bungoma County (UR)** that:-

“However, for the avoidance of doubt, this court reiterates that no person, state officer or state organ is above the Constitution or the law. All organs created by the constitution are subordinate to it. Further, Article 10 (1) binds all state organs, state officers, public officers and all persons while applying, interpreting, the Constitution or the law or public policy. Therefore when any of these organs, including the County Executive, County Assembly and Speakers of either Parliament or County Assemblies act in breach of the Constitution or outside their areas of operation, this court will not hesitate to intervene and reverse those actions. The Constitution is supreme and its dictates are to be jealously protected by this court. That is what Article 165 of the constitution decrees.”

18. To that extent therefore, if any law, be it Section 17 of the CGA as read with Section 29 of the National Assembly (Powers and Privileges) Act or any other law, purports to oust the jurisdiction given to this court under Article 22 (1) and 165 (3) (b) and (d) of the COK where there is an allegation of the

violation of the Constitution or infringement or threat to violation of fundamental rights and freedoms, that law will be inconsistent to the constitution and will be null and void to that extent. There is nothing that was produced to show that this court is precluded from inquiring on the allegations of the breach of the petitioner's fundamental rights in this case. Accordingly, this court has the jurisdiction to hear and determine the Petition as amended.

c) Is the evidence of Noellah Musundi admissible?

19. Noellah Musundi swore a Supplementary Affidavit in support of the Petition and therein produced transcripts of content of recording of a programme carried out by a radio station known as West FM and the proceedings of the Select Committee. She attended court and was cross-examined on those transcripts. She produced as Pexh1 an external disc store jet serial number B-306682288 in respect of the proceedings of the Select Committee of the county assembly and a DVD in respect of the transcript for the West FM radio station programme.

20. It was submitted on behalf of the Respondents that Noellah's evidence did not meet the evidential threshold set out in Section 106 B of the Evidence Act; that the transcripts were not produced digitally as required by law. The Cases of **Republic -vs- Stojananovic Milan alias Allan & Anor [2008] eKLR and Republic -vs- P. C. Edward Kirui [2010] eKLR** were relied on.

21. Section 106 B of the Evidence Act provides how documents containing electronic evidence is to be produced. Sub-section (2) thereof provides the conditions that must be met before electronic evidence is to be admitted as evidence. In the instance case, apart from Ms Noellah deponing on what she heard in the West FM Radio Station and witnessed during the proceedings of the Select Committee, she produced the original device she used to record and transcribe the proceedings of the Select Committee as Pexh1. She also produced a certificate as required under Sub-section (4) of Section 106 B of the Evidence Act.

22. To my mind, whilst the evidence relating to the proceedings of the Select Committee was satisfactory and admissible, that relating to the West FM Radio was not. In the latter case, the DVD produced was not in the form set out in sub-section (2) of Section 106 B of the Evidence Act. I will agree with Mr. Situma that the transcript relating to the programme in the West FM Radio Station is not acceptable.

23. However, as regards the evidence relating to the proceedings before the Select committee, I am satisfied that it met the criteria set out in Section 106 B of the Evidence Act. It was contended by the Respondents in their Replying Affidavit that the transcript was different from the official Hansard of the 1st Respondent. The 1st Respondent however did not produce that Hansard to discredit Noellah's evidence. In this regard, Noellah's evidence as to the proceedings before the Select Committee being the best evidence available is admissible whilst that on the West FM radio station is not.

d) Did the Select Committee Violate Articles 50 (1) (2) (a) (c) (g) and (k) and 236 of the COK?

24. The evidence on record shows that, on the 14th day of April, 2014, the Clerk of the 1st Respondent issued a notice to the Petitioner in the following terms:-

“In accordance with Section 40 (1) of the County Government Act and the County Assembly standing Orders Section (sic) 62 (1) and 63 (1), the County Assembly of Bungoma has initiated the process to have you removed from office. A Select Committee on the same will be sitting on the 15th and 16th April, 2014 at the Kenya Industrial Estates Boardroom to receive presentations for and/or against your removal from the said office. This is therefore to notify you to avail yourself before the committee in order to answer the allegations to the charges levelled against yourself as herein below:

Incompetence

1. ***Failure to submit quarterly reports to the County Assembly;***
2. ***Failure to submit Sectoral work plans to the requisite committee;***
3. ***Failure to develop and submit for approval an infrastructural development policy.***

Gross Misconduct

1. ***Placement of illegal advertisements and withdrawal of the same causing loss of public funds.***
2. ***Misrepresentation of KERRA roads to belong to the County Government of Bungoma.***
3. ***Harassment of County Employees. the sessions will run from 9.00 a.m to 12.30 p.m and 2.15 p.m to 4.30 p.m on both days.”***

That notice was shown to have been received by the Petitioner at 4.12 p.m of 14/04/2014.

25. Faced with that notice, on 14/4/14 the Petitioner wrote to the Clerk of the 1st Respondent, *inter alia*, as follows:-

“Ref: DEFERRAL OF SUMMONS

Reference is made to your letter dated 14th April, 2014 which was received in my office at 4.12 P.m. In accordance to the rules of natural justice and fair hearing enshrined in the Constitution under Article 50, I request that the summons be deferred for one day to enable me collect evidence, information, prepare my defence and consult my legal counsel. I hope that one day is reasonable in the circumstances. Kindly consider my request.”

26. That letter was delivered and received at the offices of the Clerk of the Assembly at 8.00 a.m on 15th April, 2014. The Petitioner swore that, what prompted the request for deferral was that when he contacted his Advocates Mr. Wasilwa and Peter Wanyama of Nairobi, they indicated that they needed time to take detailed instructions and collect evidence from the Petitioner's Secretariat at Bungoma. The Petitioner's request was promptly rejected on the 15th April, 2014 at 8.30 a.m by the Select committee. Further, when one of his Advocates appeared before the Select Committee that afternoon at 2.30 p.m, he made two applications. He sought that the matter be adjourned to the following day and for an opportunity to cross-examine witnesses. Both of these requests were declined by the Select Committee promptly whereby, the Petitioner rushed to this court for temporary relief.

27. All these matters as set out above were not denied by the Respondents. What the Respondents contended was that the law (Section 40 of the CGA) requires that the Select Committee carry out its investigations and make recommendations to the Assembly within 10 days of being constituted; that the Assembly was proceeding or breaking for Easter Vacation between the 17th until 21st April, 2014 which would have really affected the statutory timelines on the investigation and the reporting to the whole Assembly. Finally, the Respondents contended that the Petitioner came with his Advocate on 16th April, 2014 on the morning and requested the Select Committee to listen to a tape; that when the Select Committee advised that they wait until their time reached at 2.30 p.m, they stormed out terming the Select Committee a ***“Kangaroo court”***.

28. Article 50 (1) of the COK provides for fair hearing of disputes by an impartial body. Sub-Article (2) provides:-

“Every accused person has the right to a fair trial, which includes the rights:

- a) **to be presumed innocent until the contrary is proved;**
- b)
- c) **to have adequate time and facilities to prepare a defence;**
- d)
- e)
- f)
- g) **to choose and be represented by, an advocate, and to be informed of this right promptly;**
- h)
- i)
- j)
- k) **to adduce and challenge evidence;**
- l) **.....”**

29. Although Article 50 (2) uses the term an “**accused person**”, I am of the view and so hold that, an accused person in this case does not denote or refer to a person accused in a criminal trial only, but also to any person accused of any allegation which if proved against him, the consequences would be prejudicial to him. Accordingly, I hold that the Petitioner in this case stood in the position of an accused person in sub – article (2) of Article 50, since his position as a Member of County Executive Committee for Bungoma County was at stake. Any adverse decision would lead to his removal as such member. Accordingly, the rights set out thereunder applied to the Petitioner as well.

30. Article 236 of the Constitution provides:-

“236. A Public Officer shall not be

- a)
- b) **dismissed, removed, from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.”**

The Petitioner in this case is a Public Officer for Bungoma County. To my mind, he was facing a disciplinary process for his removal under Section 40 of the CGA in view of the allegations he faced. In this regard Article 236 decrees that the Petitioner is entitled to due process. Due process has been defined in **Blacks Law Dictionary (supra)** at pg 575 as:-

“The conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights including notice and the right to a fair hearing before a tribunal with the power to decide the case..... “

31. In view of the foregoing, I am of the view and hold that an elementary, basic and fundamental requirement of due process in any investigation, inquiry or proceeding whose consequences would impact on the private rights of a person is a notice reasonably calculated, under all the circumstances, to appraise

the concerned person or persons the existence of the proceeding or inquiry and afford such person or persons a reasonable opportunity to present his/their objections or defence. Such notice in my view, must be of a nature as to reasonably inform the concerned party sufficient information on the inquiry.

32. In the present case, although the notice of the allegations which the Petitioner faced seems to have been too insufficient as no particulars of the allegations were supplied, I will not fault the same since at the earliest opportunity the Petitioner had, when he responded to the notice, he never complained of its insufficiency. He complained of other matters. therefore reject the Petitioner's contention that the notice did not have sufficient detail of the allegations facing him.

33. As regards Article 50 2 (a) as to the Petitioner being presumed innocent until the contrary is proved, the Petitioner did not adduce any sufficient material to show that the Respondents had breached this right. I also reject his contention.

34. As regards Sub-Article (2) (c) (g) and (k) of the Constitution, these concerns the rights of giving of adequate time, to choose and be represented by an advocate and to adduce and challenge evidence. The notice given to the Petitioner was between 4.12 p.m of 14/4/2014 to 9.00 a.m the following day. That was approximately 16 hours. The Petitioner requested for one day extra (24 hours) but the request was turned down. He had indicated that the time requested was meant to enable him instruct his lawyers and prepare his defence. His request to cross-examine the witnesses who were giving testimony against was likewise turned down. This court finds the notice of 16 hours given to the Petitioner to appear before the Select Committee to have been too short. The explanation given by the Respondents is not plausible. The Respondents knew the statutory requirement for completion of the investigations and reporting to the Assembly to be ten (10) days. It was also within their knowledge that as they passed the motion to investigate the Petitioner and appoint the Select Committee, that the Assembly would be proceeding for the Easter Vacation on 17th April, 2014 which was likely to interfere with the aforesaid statutory 10 days period. Can a Constitutional Court in the circumstances, permit the Respondents to act at their convenience to the extreme prejudice of an individual? I do not think so. Public bodies are expected to act reasonably in the exercise or discharge of their duties and in that regard, try as much as practically possible to promote and safeguard the rights of the individual as set out in the Constitution.

35. It is on record that the Petitioner's request for time to engage Advocates of his choice was turned down. Further, the request to cross-examine the witnesses and test the veracity of their testimonies was likewise shot down by the Select Committee. In this regard, I am satisfied that from the evidence on record, the Select Committee was in breach of and violated the provisions of Articles 236 (b) and 50(2), (c), (g) and (k) of the Constitution. The notice given to the Petitioner was too short, the Petitioner was denied a chance to engage an advocate of his choice and he was denied a chance to test the evidence produced against him through cross-examination. The deliberations of the Select Committee infringed the Petitioner's Constitutional rights thereunder and those deliberations cannot be allowed to stand.

e) Can Certiorari Issue?

36. It was contended by the Respondents that since the Select Committee has no legal personality, its deliberations were only a preliminary investigation and not of a quasi-judicial nature. It was further argued that such a function being merely inquisitorial and a means of establishing facts to be tabled before the assembly, and since no decision had been made Certiorari cannot issue. The Case of **Bautista - vs- Court of Appeals GR No.143375** was relied on. It was also argued that, on the authority of **Mumo Matemu -vs- Trusted Society of Human rights Alliance & 5 Others [2013] e KLR** this court has no jurisdiction to review the merits of the deliberations of the Select Committee or the County Assembly for that matter.

37. I am in agreement with Mr. Situma that where proceedings are merely preliminary and of an investigative nature, whose conclusions are subject to further examination and testing where the rules of natural justice would be safe guarded, Certiorari will not issue (See **Evan Rees and others -vs- Richard Alfred Crane [1994] 2 WLR.**) However, if the preliminary investigation has some finality which will lead to imposition of any sanctions or damages ones reputation or, by their very nature require the rules of

natural justice to be observed, Certiorari will issue if the investigator breaches those rules.

38. Further, I am in agreement that this court cannot review the merits of the deliberations of the County Assembly or its Select Committee. It was argued that the courts cannot interfere with ongoing deliberations in the Assembly in reverence to the principle of separation of powers. This may be so. However, if such deliberations violate or threaten to violate or are in breach of the Constitution, this court has jurisdiction under Article 165 (3) and (b) and (d) and Sub-article (6) as read with Article 22 (1) of the Constitution to intervene. Kenyans in their wisdom mandated the High Court to intervene immediately there is a claim that the Constitution or a constitutional right is about to be violated. The High Court only exercises the power of the people of Kenya under Article 159 of the COK. It is only Kenyans, through the Constitution, that can soundly tell the courts to stop from making any inquiry on a threatened infringement of the Constitution or the rights given therein through an amendment to Articles 22 (1) and Article 165 (3) (b) of the Constitution. So long as those Articles are still alive, this court will not hesitate to move with haste to uphold the constitution. There is no amount of argument that can change that reality. Kenyans having spoken through Articles 159 (1), 22 (1) and 165 3 (b) and (d) of the COK, this court will strenuously uphold the Supremacy of the Constitution through those Articles!

39. In the present case, the investigative proceedings in the Select committee were not preliminary in nature. By dint of Section 40 (4) of the CGA, its deliberations are required to be in accordance with the rules of natural justice. This is so because that sub-section requires that the person being investigated be given a hearing. Further, the Petitioner has contended in his Petition that the deliberations of the Select Committee had infringed or was about to infringe his Constitutional rights under Articles 50 (1) (2) (c) (g) and (k) and 236 of the Constitution. In this regard, if those allegations are proved and for the reason that sub-section (4) of Section 40 of the CGA requires the observance of the rules of natural justice, Certiorari will issue as a relief which is provided for under Article 23 of the Constitution.

40. In his Petition, the Petitioner contended that the investigations against him were prompted by his refusal to allow the MCA's take control and manage roads in their respective units of representation. He swore that the MCA's requested that funds meant for road infrastructure for the County be disbursed to them to oversee the implementation of the civil works on roads in their wards. These allegations were denied by the Respondents. The Petitioner did not give the particulars of the concerned MCA's. The only named person is one Bethwel Mwambu. He was named in respect of the utterances he is alleged to have made during some programme in West FM radio station. Since the court rejected the transcript relating to that fact, I will not consider the same as proved.

41. This court's view is that it is not necessary to examine the issue of whether there was bias or not on the part of the Select Committee in view of the findings that have been made above. Since the court has found that the deliberations and proceedings of the Select Committee were in violation of Articles 50 (1), (2), (c) (g), (k) and 236 (b) of the COK, Certiorari as a remedy will issue. Further, for reasons that the Petitioner complained that the County Assembly or its members (MCA'S) were keen to infringe and violate the principle of separation of powers, a declaration to preserve that principle as set out in Article 185 (3) of the COK and Section 9 of the CGA will issue. On the issue of whether the Select Committee was a body capable of being sued, I agree with the submissions of Mr. Situma that a Select committee of the Assembly cannot be sued as an entity. I also have doubts about the Clerk of the Assembly. The correct Officer to be sued is the Speaker of the Assembly who is both the Constitutional and titular head of the Assembly. However since the County Assembly is a party to the proceedings, the mistake is curable under the Article 159 (2) (d) of COK. No prejudice was suffered by any of the parties to these proceedings by that mistake.

f) Is Section 40 (3) of the County Government Act 2012 Unconstitutional?

42. It was argued by the Petitioner that there was inconsistency in Sections 31 (a), 40 (3) as read with Section 40 (6) (b) with Article 50 (1), (2) (k) and 236 (a) and (b) of the Constitution. Mr. Wasilwa Learned Counsel for the Petitioner submitted that, in allowing partisan members of the County Assembly to form a Committee for removal or even vote in plenary for removal of a Member of Executive Branch introduces caprice, personal and subjective standards that are incompatible with fairness, impartiality and

absence of bias. He further submitted that the provisions of Article 50 of the COK pre-supposes the position obtaining in the Commonwealth where an independent body is the one to recommend removal. He gave Section 188 of the Nigerian Constitution as an example.

43. On their part, the Respondents submitted that no case had been made by the Petitioner how the constitution of the Select Committee under Section 40 (3) (a) of the CGA violates Article 50 (2) of the Constitution. In Mr. Situma's view, the Select Committee was properly and procedurally constituted in accordance with the law and it had adhered to Article 50 of the COK and the rules of natural justice since it had accorded the Petitioner an opportunity to be heard which he declined.

44. From the outset, it should be noted that, the principle of devolution and separation of power among state organs are enshrined in our Constitution. The County Government Act, 2012 was enacted by the national Assembly pursuant to Article 200 of the COK. The legislation contemplated under that Article, was one to give effect to matters provided for under Chapter 11 of the Constitution on devolution. Further, Article 185 (3) of the Constitution gives the County Assembly oversight functions over the County Government and its organs. The Sub Article provides:-

“185 (3) A county assembly, while respecting the principle of separation of powers, may exercise oversight over the County Executive Committee and any other County executive Organ.”

45. The provision of CGA complained of as being unconstitutional is Section 40 (3) which provides:-

“40 (3) If a motion under sub-section (2) is supported by at least one-third of the Members of the County Assembly-

a) the county assembly shall appoint a select committee comprising five of its members to investigate the matter;

b) the select committee shall report within ten days to the county assembly whether it finds the allegations against the county executive committee member to be substantiated.”

46. A reading of sub-sections (5) (b) and (6) of Section 40 shows that, if the report of the Select Committee is to the effect that the allegations are substantiated, the county assembly will vote to approve whether or not to dismiss the executive committee member and if the vote is in favour of removal, the executive committee member shall be dismissed by the governor.

47. It is clear that under Section 40 of the CGA, the County Assembly has the power to pass a motion introduced by one of its members to remove a County Executive Committee Member, investigate allegations leveled against such a member, receive a report of whether the allegations against such member have been substantiated or not and finally vote for the removal of such an Executive Committee Member.

48. According to the Respondents, this is in the exercise of the oversight power given to the County Assembly under Article 185 of the COK. This Article on oversight is akin to Article 95 (5) (a) of the Constitution that gives the National Assembly oversight functions over state organs. When dealing with the issue on how this oversight power is to be exercised by the National Assembly in the Case of **The Judicial Service Commission -vs- Speaker of the National Assembly and others Petition NO.518 OF 2013 (UR)** the Court delivered itself as follows:-

“185: In considering Parliamentary oversight, it is useful to also consider the purpose and scope of such oversight, as this further helps in understanding the meaning and implications of the concept.....Parliamentary oversight is intended to be people centered: the people must be the beneficiaries or intended beneficiaries of Parliamentary Oversight. Thus Parliamentary Oversight is not an end in and of itself or

a mandate to be exercised in a whimsical or capricious manner.....As an integral process for the enhancement of the rule of law, Parliamentary Oversight is bound within established contours hence must be exercised in accordance with the law.”

I will add here that such oversight must not only be exercised in accordance with the law but also strictly in accordance with the Constitution.

49. In the Case of **Richard Bwogo Birir -vs- Narok County Government & 2 Others [2014] eKLR** when considering the application and effect of Sections 31 and 40 of the CGA, the the Court delivered itself thus:-

“The Court has considered the provisions of the two sections and is of the opinion that both sections prescribe a disciplinary action in a due process that may conclude into an imposition of the punishment of dismissal..... Under Section 40, the process is initiated by a member of the County Assembly. In the opinion of the court, the mischief is obvious, there may be instances of adverse circumstances against a given County Executive Committee Member and the Governor fails to invoke the executive disciplinary process under Section 31 (a) and in which event a County Assembly Member may invoke the oversight jurisdiction of the County Assembly under Section 40 to deal with the mischief.”

I am in agreement with that decision to the effect that, since the process under Section 40 is of a disciplinary nature whose possible consequences are loss of office, there has to be due process. To my mind, due process includes and/or connotes fair hearing which Kenyans in their wisdom decided to enshrine in their supreme law vide Article 50.

50. Article 50 (1) of the Constitution provides for fair hearing. It reads:-

“50 (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”

In my view, fair hearing connotes impartiality, just, equitable disinterested judicial session held for the purpose of deciding issues of fact or determining a controversy or a setting in which an affected person presents arguments to a decision maker (**see Blacks Law Dictionary 9th Edn, West pgs 694 and 788**). Article 50 of the Constitution is very specific that a dispute has to be decided in a fair manner and by an independent and impartial body.

51. According to **Blacks Law Dictionary (Supra)**, an independent body is one that is unbiased and disinterested. It follows that, in any process undertaken where rights of a person are likely to be adversely affected, it is a requirement that there be due process and a fair hearing before a decision is arrived at. In this regard, the strict application of the principle that no man should be a judge in his own cause is but mandatory.

52. In **Halbury's Laws of England Vol 1 4th Edn, para. 67**, it is stated that:-

“It is a fundamental principle that, in the absence of statutory authority or consensual agreement or the operation of necessity, no man can be a judge in his own cause. Hence, where persons having a direct interest in the subject matter of an inquiry before an interior tribunal take part in adjudicating upon it, the tribunal is improperly constituted.”

53. As it was found in the **Richard Bwogo Birir -vs- Narok County Council Case (Supra)**, the process set out in Section 40 of the CGA is a disciplinary process. Its likely result is loss of office for the concerned member of the county executive committee. A member of the County Executive Committee is in the public service of the respective County Government. His employment into public service not only

enables him to serve public interest but also benefits him individually through compensation for services rendered. To my mind therefore, such a member acquires an interest in the position of employment he occupies which evolves into a legal right capable of being protected under the law. In this regard, any decision that might affect that position must be pinned on the objective criteria set by the Constitution.

54. In this regard, is the set criteria in Section 40 (3) objective and in accordance with the Constitution? Article 50 (1) of the Constitution underpins the principle of fair hearing whereby disputes, and therefore decisions affecting one's fundamental rights, are to be determined objectively by an impartial and independent tribunal or body. It should be noted that, while Article 181 of the COK allows for removal of a Governor by the County Assembly, Section 33 of the CGA which is the enabling provision, maintains the Constitutional safeguards of fair hearing by subjecting the decision of the County Assembly to scrutiny by the Senate. The Senate becomes a second tier of investigation and review before Governor is finally removed. This does not seem to be the case with Section 40 (3) as relates Members of the County Executive Committee. A question of double standards by provisions within the same Act may arise.

55. The Constitutional practice of separating the bodies that are charged with removal of public servants is not restricted to the gubernatorial positions in Kenya alone. Section 188 of the **Constitution of the Federal Republic of Nigeria, 2004** provides, *inter alia*, that:-

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

56. It is clear from the Nigerian set up that it is only after an independent panel has made a report to the assembly to the effect that the allegations leveled against the governor have been proved, that the House of Assembly votes for the removal of the Governor or his deputy as the case may be. It is also clear that the procedure in the Nigerian experience for removal of Governors as well as that of Kenya, the principle of due process and fair hearing is maintained in that there is clear separation between the body that investigates the allegations against the concerned officer and the body that finally sanctions the removal.

57. In the case of Section 40 (3) of the CGA, the procedure for removal of a County Executive Committee commences with the County Assembly, by way of an allegation being laid before it in the form of a motion, if passed, a Select Committee, whose membership is drawn from the assembly, is formed to carry out investigations. That Committee then reports back to the County Assembly which votes on the report. In my view, this is a perfect example of the complainant or accuser being both the investigator, the prosecutor and the Judge. All the members of the assembly are interested in the outcome of the proceedings in that, having passed the motion to investigate the County Executive Committee Member, it is difficult to disabuse their minds when carrying out their investigations as to the intention of the assembly. To my mind, the Select Committee can not be the independent and impartial body or tribunal envisaged by Article 50 (1) of the Constitution. The Select Committee is not only part of the assembly that sanctions the motion for investigation, but its members are part of the assembly that will vote for or against the recommendations for removal of the County Executive Committee Member.

58. To my mind, in giving themselves a Constitution wherein they entrenched the principle of **fair hearing** as a fundamental right of every person, Kenyans did not envisage a situation where their Parliament will enact a law that violates that very principle. They expect Parliament to enact laws that protect that Constitutional principle. Further, in donating the oversight function over County Executive Committees and other Executive Organs to the County Assemblies, vide Article 181 of the Constitution, it was not in the contemplation of Kenyans that the County Assemblies will exercise that power as to the accusers, investigators, prosecutors and judges of the County Executive Committee Members. To the extent that Section 40 (3) of the CGA as read with Sub-section (5) (b) and (6) thereof, provides for the investigations to be carried out by a Select Committee of the Assembly and for the Assembly to vote for

the removal of a County Executive Committee Member, the provision runs foul of the Constitutional principle of fair hearing. It is in violation of Article 50 (1) of the Constitution and is null and void to that extent. Under Article 259 of the COK, the purposeful interpretation requires that no Article of the Constitution violates the other. Article 185 was not meant to override Article 50 (1). The law to be enacted under Article 200 was intended to comply with the provisions of Article 50 (1) of the Constitution safeguarding fair hearing and not one that will concentrate the powers of accusation, investigation, prosecution and passing of judgment over Members of County Executive Committee in one body. Such a scenario has a likelihood of abuse of power.

59. Accordingly, this court holds that Constitutionally, no County Assembly can purport to remove a county executive committee member pursuant to Section 40 (3) of the CGA. That provision negates the principal of independence and impartiality stipulated by Article 50 (1) of the Constitution and is null and void to that extent. Parliament should enact a law that provides for a separate, independent impartial and unbiased body that will be charged with the jurisdiction of carrying out investigations once a motion is passed by a County Assembly under Section 40 (2). It is that separate and independent body that should carry out investigations and report to the Assembly on its findings for the latter to vote on. To the extent that no such independent and impartial body exists, County Assemblies cannot purport to remove a member of the County Executive Committee under Section 40 of the CGA. That will be unconstitutional.

60. Accordingly, I will allow the Petition and make the following declarations:-

a) Section 40 (3) of the County Governments Act, 2012 is inconsistent with Article 50 (1) of the Constitution of Kenya and vide Article 2 (4) of the Constitution, Section 40 (3) of the County Government Act is void to the extent of such inconsistency.

b) The Select Committee of Bungoma County Assembly as constituted under Section 40 (3) (a) of the County Government Act, 2012 to investigate Stephen Peter Nendela violates and is inconsistent with the imperative of Article 50 (1) and (2) of the Constitution and its actions, decisions and outcome reports are null and void.

c) An order of Certiorari is hereby issued to bring forth into this court for quashing and quashes the decision of the 1st, 2nd and 3rd Respondents and each of them from proceeding to hear or determine or continue to hear, investigate or make or receive a report in respect of the Petitioner Stephen Peter Nendela, pursuant to the notice referenced BGM/ASS/10/1/18 Vol.1 (29) and dated 14/4/2014 or any other letter or summons or document by or from the County Assembly of Bungoma for contravening Articles 47, 50 (1) and (2) and 236 of the Constitution of Kenya.

d) A declaration is hereby issued that the County Assembly of Bungoma cannot purport to or claim to control, manage, possess, implement, conduct or execute any County Policy Work Plan, or Executive roles vested in the Executive Committee of the County of Bungoma under Article 183 (1) of the Constitution and Section 9 (2) (a) and (b) of the County Government Act.

e) Since this was a Constitutional matter raising novel issues of public interest and concerns public bodies and a public servant, I will order that each party do bear his or its own costs.

It is so ordered.

DATED and DELIVERED at Bungoma this 07th day of October, 2014.

A. MABEYA

JUDGE

