



Bor & 5 others v Kericho County Assembly & 4 others (Constitutional Petition E006 of 2023) [2024] KEELRC 2080 (KLR) (23 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 2080 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CONSTITUTIONAL PETITION E006 OF 2023**

**HS WASILWA, J
JULY 23, 2024**

BETWEEN

**WESLEY BOR 1ST PETITIONER
BRENDA BILL BII 2ND PETITIONER
LEONARD NGETICH 3RD PETITIONER
ALPHONCE ROTICH 4TH PETITIONER
GILBERT BII 5TH PETITIONER
BETSY CHEBET 6TH PETITIONER**

AND

**THE KERICHO COUNTY ASSEMBLY 1ST RESPONDENT
THE CLERK KERICHO COUNTY ASSEMBLY 2ND RESPONDENT
THE SPEAKER KERICHO COUNTY ASSEMBLY 3RD RESPONDENT
KERICHO COUNTY PUBLIC SERVICE BOARD 4TH RESPONDENT
THE GOVERNOR KERICHO COUNTY 5TH RESPONDENT**

JUDGMENT

1. By a petition of 16th August, 202 and filed on 17th August, 2023, the Petitioners sought for the following reliefs;-
 - a. A declaration that the 1st Respondent herein through the Ad Hoc committee formed on the 1st August 2023 has violated the Petitioners’ Constitutional Rights under Articles 28, 41, 47 and 50 by recommending to the 4th Respondent the removal from office of the petitioners.



- b. A declaration that the Ad Hoc committee constituted by the 1st Respondent purporting to recommend the removal from office of the petitioners is illegal to the extent that it contravenes Section 40 and 44 of the County Government's [Act No. 7 of 2012](#).
- c. Conservatory Orders are hereby issued staying the implementation of the specific recommendations made by the Ad Hoc committee of the County Assembly of Kericho in relation to the removal of the petitioners.
- d. An Order of injunction be issued restraining the 4th Respondent, their agents, servants, or any person whatsoever from initiating the removal process of the petitioners from office or taking any further steps in relation to the recommendations made by the Ad Hoc committee.
- e. An Order for general damages including aggravated and punitive damages for breach of the Petitioners' constitutional rights including the right to fair labour practices, fair administrative action, right to human dignity self-worth and fair hearing.
- f. An Order for interest on prayers (c) and (d) herein.
- g. Costs of this Petition be borne by the Respondent

Petitioners' case

2. The Petitioners state that on the 30th June, 2023, Serena area in Londiani was engulfed in a shroud of sorrow as a ghastly road accident led to the loss of 53 Lives and 24 casualties, an impact that send shock waves through the community, leaving a trail of devastation that would forever be etched in their memories.
3. In the wake of the said accident the National and the County Government united in a resolute to provide support to the bereaved families and those affected by the said accident and on 1st July, 2023, the Governor of Kericho County H.E Dr. Erick Mutai formed a team from the County Executive of Kericho, County Commissioner and other area leaders to plan and conduct the fundraiser aimed at mitigating the effects of the Londiani accident.
4. Tasked with the Responsibility of overseeing the fundraiser, the team was to identify and compile a comprehensive list of victims who lost their lives and the survivors to ensure that the funds raised is equitably distributed among them. Further that the team was to prepare a comprehensive report detailing the fundraising activities, the funds collected, the beneficiaries and the disbursement process. This Report was intended to be presented to his excellency the Governor for transparency and accountability purposes.
5. Consequently, on 3rd July, 2023 the team convened a meeting to diligently orchestrate a funeral service/ prayer service which was to be graced by His Excellency The President of Kenya. That in the meeting discussion were carried out concerning various logistical aspects of the impending fundraiser including; number of attendees, security provisions and amenities tailored to facilitate the presence of the president.
6. It is averred that the meeting was graced not only by the panel members but also member of parliament from the region, County Commissioner among other leaders who were all considered as stakeholder in matter related to the aftermath of the disaster. After plans were laid out and service providers conducted, a notice was issued on 22nd July, 2023 that the occasion was to be graced by the Deputy President Hon. Rigathi Gachagua, however that the preparation had already been made in anticipation of attendance of His Excellency the President.



7. Concurrently, that in preparation of the president attendance, the Team agreed to purchase a presidential podium and tent estimated at Kshs.2.9 Million, a VIP tent, including two holding rooms for the president and his deputy estimated at Kshs 400,000.
8. It is also stated that during the meeting the Committee resolved to designate a Pay bill number that was to be linked to an existing donation account of Kericho County. After the fundraiser, calculation were done and the Money received via Pay bill was Kshs. 935,964 and the cash collected was Kshs. 13,6653,660 all adding up to Kshs 14,589,624. The same day of the fundraiser, the Committee paid Kshs 24,000 to Wells Fargo to safely transport the cash for safe keeping.
9. On 18th July, 2023, a follow up meeting was convened on how the said money was to be utilized. As a result, a report was compiled, however the minutes of he meeting was not confirmed by the member as it become subject of investigation. Nonetheless, that the committee had made estimate of various payment i.e. Kericho Hospital, Londiani Hospital and Supertrix Limited to be approximately 2Million, 1.5 Million and 2.945 Million respectively. Kshs 411,000 was allocated to Supershine Limited for provision of VIP tent in Kericho, Kshs 100,000 was allocated to sunshine Hotel for provision of meals for a group of 100 individuals, Kshs 300,000 was collectively allocated to the office of County Commissioner and the Police and motorbike were allocated Kshs 600,000. Further that the Committee arrived at a decision to allocate Kshs 90,000 each to families that lost their loved ones , while the survivors of the disaster were paid each Kshs. 60,000.
10. In consonance to this decision, 19 cheques were duly signed of Kshs 1,140,000 for the first phase and additional 5 cheques each amounting to Kshs 300,000 were prepared for the survivors but the same remain uncollected. A further 53 cheques each of Kshs 90,000 were issued to the bereaved families, accumulating to Kshs. 4,770,000. Cumulatively that the funds disbursed to the victim families was Kshs 5,910,000.
11. It is averred that on 1st August, 2023, while the committee was still in the process of disbursing money to the victims of the accident, the Governor of Kericho County issued a directive that the County will bear full costs of funeral expenses for the victims, medical expenses for both victims and the bereaved. Consequently, that more money was retained to pay out to the survivors and the next of kin of the deceased. Consequently, the committee reconvened and made recalculation and arrived at a decision to raise the money for the survivors by Kshs 80,000 and those that suffered fatalities were to be paid Kshs. 110,000 in addition and that the payments were to be made in two phases which is pending disbursement and the said money is being held in Kericho County Donation account.
12. Due to change of prioritization of payments which delayed some payments, there was a misconceived public outcry on the use and disbursements of the monies collected from the fundraiser which informed the decision of the Kericho County Assembly to form an Ad Hoc Committee on 1st August, 2023 comprising of 15 members and 3 secretariats who were tasked with the following responsibilities; -
 - i. The exact number of people who had passed on as a result of the Londiani accident and morgue charges per deceased person;
 - ii. The exact number of casualties as a result of the Londiani accident and cost incurred per patient;
 - iii. The total amount of money raised at the fundraiser for Londiani accident victims; iv. The amount to be waived by the County Government of Kericho for the health services rendered to the said victims (both casualties and deceased);



- v. Report on breakdown of how the funds raised was distributed to the casualties and the families of the deceased including their places of residence.
 - vi. Composition of committee (if any) formed for utilization and distribution of the said funds and terms of reference of the said committee;
 - vii. The number of vehicles used for facilitation to support the victims, the departments they were drawn from and the fuel cost used per vehicle;
 - viii. The properties that were destroyed during the incident and how much was paid out from the fund as compensation; and
 - ix. Report on breakdown on utilization of the said funds for activities other than the compensation to the casualties and families of the deceased.
13. Upon conclusion of the Ad Hoc Committee's mandate, they came up with the following recommendations; -
- i. That the County secretary violated various provisions of the law through forgery of minutes, approval of withdrawal of funds contrary to the provisions of section 138 of the *Public Finance Management Act*, oversaw misappropriation of funds, abuse of office. The committee recommends to the H.E, the Governor Dr. Eric Mutai for removal from office of one Dr. Wesley Bor. the county Secretary and Head of County Public Service.
 - ii. That the CECM, Health Services violated various provisions of the law through abuse of office, oversaw misappropriation of fundraiser funds, non-disclosure of information and accountability. The committee recommends to the H.E. the Governor Dr. Eric Mutai for removal from office of one Brenda Bit, CECM for Health Services.
 - iii. That the CECM, Finance and Economic Planning. violated various provisions of the law through the approval of withdrawal of funds contrary to the provisions of Section 138 of the *Public Finance Management Act*, abuse of office and nondisclosure of information, transparency and accountability The committee recommends to the H.E, the Governor Dr. Eric Mutai for removal from office of one Mr. Leonard Ngetich. CECM for Finance and Economic Planning and Head of County Treasury.
 - iv. That the County Chief Officer in the Executive office of the Governor violated various provisions of the law through forgery. abuse of office, violation of procurement rules and procedure. The ad hoc committee recommends to the H.E, the Governor Dr. Eric Mutai for removal from office of one Mr. Alphonse Rotich, County Chief Officer in the Executive Office of the Governor.
 - v. That the County Chief Officer for Finance violated various provisions of the law through misappropriation of fundraiser funds, abuse of office, professional negligence and violation of procurement laws. The ad hoc committee recommends to the H.E, the Governor Dr. Eric Mutai for removal from office of one Mr. Gilbert Bii, County Chief Officer Finance and Ag. Chief Officer Economic Planning.
 - vi. That the County Chief Officer Lands, Housing & Physical Planning and Ag. Chief Officer Public Service Management violated various provisions of the law through, non disclosure of information and accountability, perjury, misuse of fund raiser funds, misappropriation of fund raiser funds, abuse of office. The ad hoc committee recommends to the H.E, the Governor



Dr. Eric Mutai for removal from office of one Ms. Betsy Chebet, County Chief Officer Lands, Housing & Physical Planning and Ag. Chief Officer Public Service Management.

- vii. H.E the Governor, with immediate effect liaise with the County Public Service Board and commence dismissal of the Chief Officers.
 - viii. That the said County Executive Committee members and the County Secretary should be removed with immediate effect by H. E The Governor.
14. It is averred that the final report presented in the County Assembly and forwarded to the Governor did not contain any information pertaining loss of any funds from the accounts. Rather that they were based on unsubstantiated allegations.
 15. It is the Petitioners' case that the procedure undertaken by the Ad Hoc Committee during investigation, deliberation and passage of the motion in the assembly approving the report containing recommendations for the removal of the petitioners was procedurally flawed and in violation of constitutional principles and tenets of natural justice.
 16. That there existed a noticeable disparity between the terms of reference outlined for the Ad Hoc Committee and the recommendations made by the said Committee. In effect that the the Ad Hoc Committee violated the provision of *the Constitution* under Articles 2,3,10,19,20,21,22,23,27,28,41,47,48, 50,159,162(2)(a), 175, 179, 218, 224, 232 and 236 of the Constitution of Kenya. Sections 40 and 59 of the County Government Act, Section 41,43 and 45 of the *Employment Act*. Sections 4,7,10,11 and 12 of the *Fair Administrative Action Act*.
 17. The Petitioners states that the recommendations made by the Ad Hoc Committee offended the provision of *the Constitution* of Kenya in that;-
 - a. Article 47 fair administrative action, which provides that every person has the right to. fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair the same was not extended to the Petitioners as they were unilaterally recommended for removal from their respective dockets removed from without being given an opportunity for fair hearing.
 - b. Article 175 which provides for. principles of County Government where county governments are based on democratic principles the actions by the Respondents are in violation of the democratic principles they have unilaterally performed actions which are in contravention of the principles enshrined in *the Constitution*.
 - c. Article 236 protection of Public officers where a public officer shall not be dismissed removed from office subjected to disciplinary action without due process of the law, the Petitioners who are public officers have been illegally recommended for removal from office.
 - d. That the decision by the ad hoc committee to recommend the removal from office of the Petitioners amounted to unfair Administrative Action as enumerated under the *Fair Administrative Action Act* as the decision was unfair, unreasonable and unjustifiable.
 - e. The 1st Respondent failed to uphold the fundamental freedoms provided for under Chapter 4 by purporting to recommend the dismissal of the Petitioners without adhering to the procedure set out under the *Employment Act* and *County Governments Act* No 7 of 2012.
 - f. In blatant violation of the listed provisions of *the Constitution* of Kenya, 2010 the *County Governments Act* and other written laws, the 1st Respondent herein formed an ad hoc committee which purported to have the mandate to recommend the dismissal of the



Petitioners from their respective dockets within the county. These actions are illegal, unreasonable and unconstitutional in that; the Petitioners were relieved of their duties without being given a fair hearing and without being afforded any opportunity for a fair hearing.

- g) The County Secretary, being an employee of the Kericho County Public Service, is subject to the disciplinary procedures and removal protocols established by the County Government [Act No. 7 of 2012](#). The ad hoc committee did not have any mandate to recommend the removal of a County Secretary in the manner it did.
- h. That the procedure for the removal of a County Executive Member is clearly stipulated under Section 40 of the County Government [Act No. 7 of 2012](#). The ad hoc committee did not adhere to the stipulations of Section 40. There was no motion presented in the Kericho County Assembly and the recommendations are therefore not anchored in law.
- i. The County Chief Officer, being an employee of the Kericho County Public Service Board, is subject to the disciplinary procedures and removal protocols established by the County Government [Act No. 7 of 2012](#). The ad hoc committee did not have any mandate to recommend the removal of a County Chief Officer in the manner it did.
- j. In order for the County Assembly to arrive at the conclusions it did, fundamental principles of justice must be observed. The affected member must be accorded a fair hearing as stipulated in Article 50 of [the Constitution](#), 2010 and the opportunity to address any allegations levied against them prior to any recommendations for removal from office.
- k. The invitation to appear before the ad hoc committee to the petitioners was not a disciplinary process which required them to defend themselves against any allegations leveled against them in the specific recommendations. The purpose of the invitation was to provide information on the Londiani accident.
- l. That the fundraising initiative cannot be deemed as funds falling within the scope of Article 224 of [the Constitution](#). Article 224 specifically pertains to funds specified under a County Appropriation Bill. The allegations of misappropriation of funds under Article 224 are therefore unfounded.
- m. Further that the fundraiser cannot be classified as a donation in accordance with Section 138 of the [Public Finance Management Act](#). This classification is inappropriate as the funds are not intended for developmental purposes. The team was not bound by the provisions of the [Public Finance Management Act](#) in the management and disbursement of the funds.
- n. Hence the recommendation by the ad hoc committee for the removal of the petitioners on the grounds of abuse of office is misconceived, ill-advised, unfounded in law and misdirected as the petitioners were not discharging the duties in this team as formed by the Governor in their official capacity as stipulated under the [County Governments Act](#), No. 7 of 2012.
- o. Also that the recommendation by the ad hoc committee for the removal of the petitioners from office on the ground of misappropriation of funds is flawed/erroneous, imprudent, lack legal basis and misapplied as the amounts collected in the fundraising was not appropriated or rather drawn from the exchequer. Its application and/or use was within the purview of the team to designate and apply the said funds as per the findings of the team on those who were to benefit.



Respondents' case.

18. The Petition is opposed by the Respondents, with the 1st, 2nd and 3rd Respondent being represented by H & K Law Advocates, who filed a replying affidavit deposed upon on 27th September, 2023 by Martin Epus Patrick, the holder of the office of the 2nd Respondent.
19. The affiant stated the subject of the suit herein emanated in the horrendous accident that occurred in Londiani junction within Kericho County on the 30th June, 2023, where a heavy truck lost control, veered off the road and rammmed into other vehicles and people, killing 53 people and injuring 24 persons.
20. Following this accident, people of all walks of life came together to mourn the departed and contribute funds towards helping the affected families assuage the burden as most of the affected families were indigent. It's on this front that a team, including the petitioner herein was constituted to spearhead the requiem mass and the fund raiser held on the 4th July, 2023 at Londiani, where the event was graced by His Excellency, the Deputy President and a host of other leaders in which approximately Kshs 14,500,000 was raised.
21. The deponent stated that soon thereafter, reports emerged that the money collected in the fund raiser had been misappropriated and used for other purposes and only a marginal figure distributed to the families of the affected and or the victims.
22. As a result of public outcry, a motion was presented before the 1st Respondent assembly by the member of County Assembly of Londiani Ward, Hon. Vincent Korir, seeking an establishment of an Ad Hoc Committee to investigate the veracity of the allegations of misappropriation of funds.
23. On 1st August, 2023, the members of the 1st Respondent voted for the motion and passed the said motion. Then 15 members of the committee began on their responsibilities that included visiting hospital facilities and morgues, where they obtained receipts, medical bills, invoices among others to aid in the investigations.
24. Further that the committee invited various persons who had necessary information, including the Deputy Governor, Eng. Fredrick Kirui who was the whistle blower, the members of the fundraiser panel such as the petitioners herein, the staff of the County Government of Kericho who dealt with transaction of the funds in one way or another.
25. After gathering information, the ad hoc Committee invited the petitioners to explain some of the contentious issue pertaining the raised money and admitted all documents produced by the petitioners. Further that suppliers of goods and services such as Supertrix Limited and Rays Hotel were invited for questioning. Also that the church ministers who presided over the Requiem mass and paid were all called for interrogations.
26. Similarly, that presentations were made by select members of the victims' families and the representatives of the BodaBoda operators whose motorbikes were damaged.
27. After collecting all their information, the committee compared the documents produced by the Petitioners vis a vis the ones they collected from hospitals and they drew their conclusion and presented a report before the 1st Respondent dated 4th August, 2023.
28. The Respondent herein stated that the compelling reason that informed the decision of the Ad Hoc Committee is that; Firstly, that the fundraiser committee had under declared the funds collected and wrote Kshs 13,682,660 instead of Kshs 14,589, 624, which they used for other purposes leaving a



- balance of Kshs 5,490,000 for the victims' families. Secondly that the minutes of the meeting that agreed on the distribution of the funds was a sham and a forgery as some of the committee members swore affidavits denying attending any of such meeting when their names and signatures appeared in the minutes and Thirdly that the Hospital bills had been manipulated and inflated.
29. The Respondents herein stated that they tabled the Ad Hoc Committee recommendations before the County Assembly in line with Kericho County Assembly Standing Orders and Section 14 of the County Government Act and upon debate, all 22 members present that day in the house unanimously agreed with the findings of the Ad Hoc Committee.
 30. Subsequently, on 14th August, 2023, the 3rd Respondent wrote to the 4th Respondent informing him of the Recommendations of the County Assembly and forwarded the same for his action. A response was received from the 4th Respondent on the 15th August, 2023, declining any action against the Petitioners and instead advised the 3rd Respondent to constitute a select Committee of the 1st Respondent to hear the allegations against the petitioners who were County Executive (CECs) and County Secretary, while he forwarded the recommendations to the County Public Service Board to institute disciplinary action against the petitioners who were Chief Officer(COs).
 31. The 3rd Respondent wrote to the 4th Respondent informing him that the County assembly was Functus Officio when it voted on the matter and that it was precluded by standing order 60 from moving the same motion.
 32. He stated that the county assembly is not merely a conveyor belt of recommendation as such the issue cannot be debated afresh. Further that this Court lacks wherewithal to impede the County assembly from performing its mandate by reversing the recommendations made in discharge of its oversight role under Article 185(3) of *the Constitution*. He added that the petitioners were all heard before the said recommendation were made as such the recommendations are sound, followed the law and the same should thus be acted upon.
 33. To this end, the Respondents stated that the argument by the petitioners that the recommendations were not anchored in law, is not only escapist but flies in the face of Article 185(3) of *the Constitution*. Further that even though the said money was not for development, the same ought to be utilized prudently. He added that the fact that the funds were not meant for development does not remove it from definition of public resources and the radar of the County assembly oversight.
 34. It was reiterated that the purpose of the funds was clear from the onset as such the petitioners were not given a leeway to designate and apply the funds the way they wished, therefore their argument at paragraph 26 is filled with arrogance and cavalier attitude among public officers which the County sought to rightly arrest in its recommendations.
 35. The affiant stated further that the procedure for removal of county CECs is provided for under section 40 of the County Government Act which empowers the County assembly supported by one-third of all members to propose a motion requiring the Governor to dismiss a CEC on grounds of gross violation of *the Constitution*, incompetence, abuse of office, gross misconduct or conviction of an offense punishable with an imprisonment of at least six months.
 36. Additionally, that the Governor has powers under Section 31 of the County Government Act to dismiss the CEC at any time, if it considers appropriate, without regard to section 40 of the County Government Act.
 37. It is stated that the Petition herein has not been brought in good faith but in pursuit of private interest when by virtue of the recommendations by the County assembly, shows that they are unfit to hold



- office. Also that the Petitioners have not shown any irreparable damage that will be visited on them if conservatory Orders are not issued. Additionally, that the issue in dispute in which conservatory orders are sought are private matter and not public interest matters.
38. The 4th and 5th Respondents also filed a replying affidavit deposed upon on 22nd September, 2023 by Gideon Mutai, the County legal officer. In his affidavit he confirmed that indeed a grisly road accident occurred on the 30th June, 2023 in Londiani area claiming several lives and following that accident a team was formed to plan, conduct and manage a fundraiser and then disburse the funds collected therefor. Before the conclusion of the exercise, there was public outcry on alleged misappropriation of funds and therefore that an Ad hoc committee was constituted to look into the issue.
 39. He stated that the 4th and 5th Respondent were furnished with copies of the recommendations of the Ad Hoc Committee. Also that the Petitioners were heard by the Ad Hoc Committee on a fact finding and inquiry purposes and not on their defence.
 40. The Respondents herein stated that a look at the terms of reference vis a vis the recommendations made, shows clearly that the recommendation by the Ad Hoc Committee spill beyond the scope of its mandate.
 41. It is averred that the 1st Respondent's move to appoint the said Committee pending the report of fundraiser committee appointed by the 4th Respondent was in breach of principles of separation of powers of arms of the County Government. Additionally, that the appointment of the Ad Hoc Committee was premature and based on unfounded speculations in the circumstances. Additionally, that the fundraiser Committee was frustrated by the appointment of the Ad Hoc Committee, which was done before they completed their tasks, as such a report was not filed on time.
 42. The Respondent herein supported the Petition and stated that the funds collected do not form funds under the ambits of Article 224 of *the Constitution*, neither does the funds qualify as donation or grant as stipulated under sections 138 and 139 of the *Public Finance Management Act*.
 43. It is also stated that the Ad Hoc Committee did not give any tangible evidence to demonstrate that indeed the petitioners misappropriated the funds. In any event that the 4th Respondent was not furnished with a motion from the 3rd Respondent recommending the removal of the petitioners in line with sections 40 and 44 of the County Government Act.
 44. The Respondent also stated that the victims and their families have not raised any concerns on the alleged misappropriation of funds an indication that all the victims were duly compensated and no money was misappropriated as alleged.
 45. In a rejoinder, to the replying affidavit by the 1st to 3rd Respondents, the petitioners filed a further affidavit deposed upon on the 24th October, 2023 and stated that the report of lost funds was unfounded and premature and the Respondents merely relied on newspaper reports that lacked verification and substantiation.
 46. He confirmed that they appeared before the Ad Hoc Committee but only to brief the committee on the progress of their mandate. Thus the recommendation made were made without affording them fair hearing.
 47. He stated that the ad hoc Committee was formed at a time when the disbursement of fundraised money was still under way and the team was still in the process of identifying the victims, as such it was done prematurely.



48. The petitioner stated that the Respondents misconstrued their pleadings because the petition does not seek to challenge the role of the County assembly but only the validity of the Ad Hoc Committee processes in reaching the specific recommendations that included their removal from office.
49. The Petitioner stated that section 31(b) of the County Government Act makes it mandatory that any form of dismissal of any members of County Executive committee must be done in accordance with Section 40 of the Act. He added that this Court has jurisdiction to issue conservatory Orders sought.
50. The suit herein was disposed of by written submissions.

Petitioners' Submissions.

51. The Petitioners submitted that pursuant to the Order issue by the Court in the ruling of 8th February, 2024, the only issue for determination in this Court is on whether the recommendations of the Ad Hoc Committee regarding the removal of the Petitioners from office were procedural and legally founded. On that basis it was argued that in the ruling, this Court established that the County Executive Committee members (CECs) were not accorded fair and just hearing pursuant to section 40 of the County Government Act. Further that the Chief Officers (COs) can only be removed from office by their employer, the County Public Service Board, as provided for under section 55 of the County Government Act and not any other body, including the Ad Hoc Committee and the County Assembly in this case.
52. Accordingly, It was submitted that the substratum of the Petition herein is on removal of the Petitioners from office and having determined that the process was flawed , it follows that the results of this flawed process and by extension the recommendation of the Ad Hoc Committee are null and void, them having been derived from a fundamentally flawed process.
53. It was argued that the principle that a flawed process renders its outcome invalid is well established in law and cited by various court including in the case of Judicial Service Commission vs Mbalu Mutava & Another [2015] eKLR, where the Court of Appeal emphasized that procedural fairness is a fundamental tenet of justice and that any decision reached without observing due process is invalid.
54. Similarly, in Republic Vs National Lands Commission & Another Ex parte Farmers Choice Limited[2020]eKLR, the High Court reiterated that administrative actions must be procedurally fair and any deviation from this requirement renders the resulting decision null and void.
55. On award of damages, it was submitted that it is imperative for this Court to consider the profound impact of the flawed process on the petitioners' constitutional rights and the resultant recommendations by the Ad Hoc Committee, which accused the petitioners of misappropriating funeral funds from a tragic accident, allegations that elicited strong public sentiments. Further that the facts that they were not granted fair hearing in accordance with the law before the said recommendation were made, caused the Petitioners intense public mockery and chastisement which caused them mental anguish. On that note, the petitioner prayed for award of damages for the violation of their constitutional right, relying on the decision in Siewchand Ramanooop Vs The AG of T&T, PC Appeal No 13 of 2004, where the Court held that;

“When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing



the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches.”

56. Similarly, that given the substantial mental anguish, reputational damage, and the severe impact on their dignity, it is only just that the petitioners be granted general damages for the breach of their constitutional rights. They, thus recommended an award of Kshs. 2,000,000/= for each petitioner for the breach and violation of their constitutional rights. That, the award of such damages will not only compensate the petitioners for their suffering but also reinforce the imperative of adherence to Constitutional Rights.
57. It was also submitted that costs follow event so that the losing party indemnify the successful party for the expenses incurred in prosecuting the case. Similarly, the Petitioner urged this Court to award them costs of this suit. In support of this, they relied on the case of Supermarine Handling Services Ltdv. Kenya Revenue Authority [2010] eKLR, where the Court of Appeal reiterated that the general rule is that costs should follow the event unless there are special circumstances which justify otherwise. The court held that the purpose of awarding costs is to indemnify the successful party for the expenses.

4th and 5th Respondents’ Submissions

58. The Respondents herein in support of the Petition submitted on three issues; whether the 1st Respondent's actions of appointing ad hoc committee amounted to breach of the doctrine of separation of powers, whether any of the orders sought by the Petitioners should issue against either the 4 or 5th Respondent; and who should bear the costs of this Application.
59. On the first issue, it was submitted that the act by the 1st Respondents of appointing an ad hoc committee in the pendency of the circumstances of the instant Petition amounts to usurpation of the powers and functions of the 4th Respondent and breach of the principle of separation of powers allocated to respective arms of the County Government under Article 176 of *the Constitution* of Kenya, 2010 and functions detailed in Chapter 11 of *the Constitution*. Therefore, that the powers of each arm of the County Government should be respected as was reiterated by Odunga J (as he then was) in the case of Wilfred Manthi Musyoka v Machakos County Assembly & 4 others [2018] eKLR as follows: “79, Therefore when an issue arises as to the constitutionality of any act done or threatened by either the Legislature or the Executive, it falls upon the laps of the Judiciary to determine the same....separation of powers between the judiciary, executive and legislature is one of the hallmarks of our Constitution. Each body or organ of state is bound by *the Constitution* and should at all times acquaint itself of its provisions as it works within its sphere of competence. Constitutional interpretation is not the sole preserve of the judiciary but the judiciary has the last word in the event of a dispute on the interpretation and application of *the Constitution*.”



60. Similar position was restated by the Supreme Court in the case of *Senate & 2 others v Council of County Governors & 8 others (Petition 25 of 2019)*[2033] KESC 7 (KLR) (Constitutional and Human Rights) (17 February 2022) (Judgment) wherein the learned Judges held at paragraph 65 as follows:

“Therefore, it is inconceivable as it is absurd to have a Senator whose functions are clearly delineated by *the Constitution*, and who is expected to provide oversight of the county government, to at the same time take charge of a Board which is essentially a county organ. This is legislative overreach that does not honour the constitutional guardrails that donates specific and distinct powers to the Senate and to the devolved units.”

61. Likewise, that in the instant petition, the 1st Respondent hastily rushed to appoint the ad hoc committee in question without taking into account the fact that the 4th Respondent had appointed a team to carry out the process of fundraising in aid of the victims affected by the accident and the fact that such team was yet to table a formal report with the 4th Respondent. That by virtue of appointment of the ad hoc committee in question, the 1st Respondent’s attempted to prevent the workability of the office of the 4th Respondent from effectively delivering its mandate to the people. As such that the 1st Respondent was clearly in blatant contravention of the cardinal constitutional doctrine of separation of powers of arms of government in the County Government of Kericho. Therefore, that the report of the ad hoc committee is a product of violation of *the Constitution* and thus should not be admitted by this Court but pronounced as inconsequential.
62. It was also submitted that the 1st Respondent went beyond the scope of its mandate by appointing the impugned ad hoc committee while the team appointed by the 4th Respondent was still working to deliver its mandate.
63. On whether the orders reliefs sought should issue against the 4th and 5th Respondents, the Respondents submitted in the affirmative and stated that it is clear that the 1st Respondent acted beyond scope hence infringing on the powers and functions of the office of the 4th Respondent and on that grounds the Ad Hoc Committee report ought to be struck out because it does not stand the test of legality. In support of their argument, they relied on Article 176 of *the Constitution* and Parts II, III and V of the County Government Act which make provision for separation of powers for respective arms of the County Government.
64. In light of the arguments above, the Respondents herein submitted that the Petitioners have satisfied the evidentiary threshold that warrant the grant of prayers sought in the Petition as against both the 4th and the 5th Respondent and therefore that this Court should issue the Orders against the 4th and 5th Respondents as prayed.
65. On costs, the Respondents herein submitted that section 27(1) of the *Civil Procedure Act*, states that awarding of costs shall be at the discretion of the Court or Judge who has the power to determine to whom the costs will be awarded, out of what property and to what extent such costs are to be paid. In this case, they argued that costs of the instant Application do follow the event.

1st, 2nd and 3rd Respondents’ Submissions

66. The Respondents herein submitted on two issues; whether the Petitioners have made a case for grant of the orders sought and who bears the costs of the Petition.
67. On the first issue, it was submitted that, the jurisdiction of this Honourable Court to consider a prayer for conservatory and declaratory orders sought is derived from Articles 22 and 23 of *the Constitution*, sections 12(1) and (3) of the *Employment and Labour Relations Court Act*, as well as, Rules 3, 4 and 23



of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013.

68. It was submitted that the Petitioners have alleged violation, contravention, denial and/or threat to their fundamental rights to fair administrative action, fair labour practices, equality, among other rights. However, that whereas this Court has jurisdiction under Article 23(3) to grant conservatory and declaratory orders sought by the Petitioners, the Petitioners have not satisfied the test for grant of those orders.
69. It was argued that the 1st Respondent has already rendered itself in so far as the suitability of the petitioners to hold office is concerned, and the alleged apprehension of the Petitioners is neither here nor there.
70. On the merit of the petition, it was argued that the Court should take into account whether the orders sought are in the public interest and supported by the Constitution and for a suit to be considered to be in public interest, the court must determine whether its decision is just, equitable and efficient. Accordingly, that the instant case is neither in public interests nor in accordance with the Constitution of Kenya because to allow the Petitioners will mean people whose integrity is questionable are to be retained in a public office. Therefore, that the Petitioners seek to use the Court process to unfairly advantage themselves and shield themselves from oversight.
71. It was argued that the reliefs sought, if granted, must be consistent with the values and principles of the Constitution that calls for accountability and integrity from public officials. However, that in his case, if the reliefs sought are granted, the award will offend the national values and principles under Article 10 and 232 of the Constitution as well as the entire Chapter 6 on leadership and integrity. To support this, the Respondent relied on the decision by the Supreme Court of Kenya in Justus Kariuki Mate & Another & Martin Nyaga Wambora & Another [2019] eKLR where the Apex Court cautioned against courts rushing to issue conservatory orders that hinder other arms of government from exercising their constitutional and statutory roles.
72. The Supreme Court also in Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] eKLR (Supra) set out the following principles to be applied by the Courts while observing the doctrine of separation of powers:-

“From the course of reasoning emerging from such cases, it is possible to formulate certain principles, as follow; a) each arm of Government has an obligation to recognize the independence of other arms of Government; (b) each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate; (c) the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment; (d) for the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case; (e) in the performance of the respective functions, every arm of Government is subject to the law.”
73. Similarly, the Respondents urged this Court to restrain itself from interfering with the processes and mandate of the County Assembly because, the reliefs sought by the Petitioners would amount to injuncting county assembly processes.
74. The Respondents submitted that the interpretation of the Constitution calls for a delicate balance in the respective mandates of the different arms of government. Additionally, that no Governmental agency should encumber another to stall the constitutional motions of the other. The best practices from the



comparative lesson, signal that the judicial organ must practice the greatest care, in determining the merits of each case. In support of this, they relied on the case of High Court in Charity Kaluki Ngilu v County Assembly of Kitui & 2 others [2020] eKLR where, although the subject was an impeachment, the Court appreciated thus:

“The Applicant is therefore correct that the respondents have a duty to comply with *the Constitution*, statutory provisions and the Standing Orders of the Assembly...Although this Court is indeed mandated to intervene in the process where there is alleged denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights, the Court should only engage its powers where there is clear and imminent threat to *the Constitution*. It is important to note that impeachment is a tool used to oversight the county executive and a county assembly in carrying out its constitutional mandate in debating an impeachment motion.”

75. It is contended that, the public interest and the proportionate magnitudes, and priority levels attributable to the present case militate against grant of the orders sought. Were this Court to grant the orders, it would be unnecessarily intruding into the province of the County Assembly which has the requisite mandate of oversight over the positions held by the Petitioners.
76. That in determining whether or not it is appropriate to intervene on either the threshold or procedure adopted in the removal process, they urged this Court to appreciate that there is a likelihood of interference with the functions of other state organs. In this regard, it argued that this Court has to take into account the doctrine of separation of powers and determine the objectivity of such interference. In support of this, they relied on the Supreme Court decision In the Matter of the Speaker of the Senate & another [2013] eKLR which held:-

“Upon considering certain discrepancies in the cases cited, as regards the respective claims to legitimacy by the judicial power and the legislative policy – each of these claims harping on the separation-of-powers concept – we came to the conclusion that it is a debate with no answer; and this Court in addressing actual disputes of urgency, must begin from the terms and intent of *the Constitution*. Our perception of the separation-of-powers concept must take into account the context, design and purpose of *the Constitution*; the values and principles enshrined in *the Constitution*; the vision and ideals reflected in *the Constitution*...The context and terms of the new Constitution, this Court believes, vests in us the mandate when called upon, to consider and pronounce ourselves upon the legality and propriety of all constitutional processes and functions of State organs. The effect, as we perceive it, is that the Supreme Court’s jurisdiction includes resolving any question touching on the mode of discharge of the legislative mandate.”

77. They are also relied on the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR where it was held:

“It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a precommitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other’s functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function...”



78. The Respondents reiterated that the Court cannot supervise the workings of the Legislative arm of government, in this case, the County assembly, and 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. That the Petition as framed is an invitation to intrude and unjustifiably so into the space of the County assembly. Moreover, that any orders that curtail the operations of the legislative arm of the County government will not promote constitutional values. It is our submission that the Petitioners have not demonstrated the nature of specific rights violated by the impugned recommendations.
79. It was submitted that public office is not private property and there is nothing inherently wrong in the Petitioners being asked to step aside following a finding of guilt by the assembly on the allegations levelled against them. Also that the rule of law cannot be achieved by breach of law.
80. In light of the foregoing, it was argued that public interest and the cause of justice will best be served by a dismissal of the Petition.
81. I have examined all the averments and submissions of the parties herein. Flowing from this court's ruling dated 8th February 2024, this court issued conservatory orders restraining the 4th Respondent, their agents, servants or any person whatsoever from initiating the removal process of the Petitioner in relation to recommendations made by the 1st 2nd and 3rd Respondents pending the hearing and determination of this petition.
82. The reason for the interim orders were informed by the finding of this court that the Ad hoc Committee put in place by the County Assembly made recommendation for the removal of the Petitioner without according them any right to be heard.
83. I also determined that Chief Officers are employees of the County Public Service Board (CPSB) and can only be removed from office by the said head exercising its disciplinary mandate under section 55 of the County Government Act.
84. It was therefore true that the recommendations for the removal of the Chief Officer by an Adhoc Committee could not lie.
85. Having established as above, what remains to be resolved in this petition are the final remedies to be granted in relation to the processes that were initiated by the Respondents and which this court found was unprocedural.
86. Indeed the County Assembly has its mandate and which must be exercised responsibly as per the laid down law. However, it is clear as established that the 1st to 3rd Respondents breached the law and procedure usurping even the mandate of the CPSB to recommend removal of Chief Officers.
87. It is indeed true that the 1st Respondent through the Ad hoc Committee formed on 1st August 2023 proceeded without fair procedure and so violated the Petitioners Constitutional rights under Articles 47, 41 and 50 of *the Constitution*.
88. It is also true that in the circumstances of the case, the process commenced without following due procedure cannot be allowed to proceed.
89. I will therefore find for the Petitioners and award them nominal damages of Kshs. 200,000 each since the illegality was arrested by this court and not allowed to proceed. They are still in office currently and there is no evidence that they have suffered any great damage due to the recommendations made against them.



90. This order in my view is not in any way also a bar to the Respondents in proceeding to initiate proper and procedural action against the Petitioners if there is any need to do so. There will be no order of costs.

JUDGEMENT DELIVERED VIRTUALLY THIS 23RD DAY OF JULY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -

Court assistant; - Fred Nyakundi

Simiyu for the petitioners

Kipkurui h/b for Kiplgat for the 1st 2nd and 3rd Respondents

Mweni for the 4th and 5th Respondents

