



**Achar v County Assembly of Kisumu. & another (Civil Appeal
56 of 2020) [2025] KECA 1781 (KLR) (24 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1781 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 56 OF 2020
MSA MAKHANDIA, HA OMONDI & AO MUCHELULE, JJA
OCTOBER 24, 2025**

BETWEEN

NERRY OTIENO ACHAR APPELLANT

AND

THE COUNTY ASSEMBLY OF KISUMU 1ST RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF KISUMU 2ND RESPONDENT

(Being an appeal from the Judgment and decree of the Employment and Labour Relations Court at Kisumu, (Nduma, J.) dated 10th March 2020 in ELRC Petition No. 24 of 2019)

JUDGMENT

1. This is an appeal by the appellant, Nerry Otieno Achar, challenging the judgment and decree of the Employment and Labour Relations Court “ELRC” at Kisumu dated 10th March, 2020. The appellant, who then served as the County Executive Committee (CEC) Member for Finance and Economic Planning in Kisumu County, disputes in this appeal the decision by the ELRC to uphold his impeachment by the County Assembly of Kisumu “the 1st respondent”. The impeachment motion was moved by Member of the County Assembly, “MCA”, Mr. Steve Ouma Owiti on 30th July, 2019. The motion was supported by more than one-third of the Members of the 1st respondent as required, prompting the formation of a Select Committee “the Committee” to investigate allegations levelled against the appellant.
2. On 1st August, 2019, the appellant was officially invited to appear before the Select Committee on 3rd and 4th August, 2019, to address ten specific allegations made against him. These included claims of incompetence in executing his duties as the County Executive Committee Member for Finance and Economic Planning, abuse of office through irregular decisions and actions, financial mismanagement in handling county funds, failure to implement the Kisumu County Finance Act by neglecting proper revenue collection, refusal to prepare or propose necessary legislative amendments for revenue



mobilization, gross violation of *the Constitution* and other financial regulations, deliberate failure to submit key financial documents required by the 1st respondent for oversight, failure to ensure timely payment of suppliers and contractors, refusal to comply with statutory provisions requiring regular reporting on budget implementation, and failure to develop and submit essential economic policies required for structured financial planning within the county.

3. The appellant requested an extension of time to appear due to the short notice as well as the scheduled days falling over a weekend which were his worship days. Instead, he proposed to appear before the Committee on 8th and 9th August, 2019. However, the 1st respondent denied this request, citing the strict legal timelines governing the impeachment process. Under section 40 of the *County Governments Act* and standing Orders Rule 65 it is required that the Select Committee must investigate and submit the report to the County Assembly within 10 days which period started running from 30th July 2019 and was due to expire on 9th August 2019. Despite multiple invitations and reminders, the appellant stuck to his guns and failed to appear before the Committee or send a legal representative, leading the Committee to proceed with its deliberations his absence notwithstanding.
4. The Committee conducted investigations, including a review of financial transactions and audit reports, and in particular, the Kisumu County Auditor General's Report for the 2017/2018 financial year. The report raised several concerns, including irregular payments of project management funds, violations of procurement laws, unauthorized payment of legal fees amounting to Kshs.137 million, and broader financial mismanagement aspects. The Committee concluded that the appellant had failed to uphold financial accountability and demonstrated gross incompetence in overseeing the County Treasury. As a result, on 7th August, 2019, the Committee finalized its report and submitted its findings to the 1st respondent recommending his impeachment.
5. In the meantime the appellant rushed to the ELRC by way of a petition on 5th August, 2019, challenging the legality of the impeachment proceedings and alleged various violations of his constitutional rights in the process. He contended that the process was unlawful and infringed upon his right to a fair hearing as guaranteed by Article 50(1) of *the Constitution* of Kenya. Specifically, he argued that he was deprived of sufficient time to prepare his defence, was not furnished with relevant documents necessary to respond to the allegations, and was summoned on days of his worship, which hindered his ability to participate effectively in the proceedings.
6. The appellant sought a declaration under Article 10 of *the Constitution*, that the respondents were bound by the key national values and principles, including the rule of law, and that they had acted contrary to these principles in conducting the impeachment proceedings. He further sought a declaration under Article 50(1) that any person facing impeachment proceedings under Section 40 of the *County Governments Act*, 2012 was entitled to be supplied with documents supporting the allegations against him before the commencement of the proceedings and must be given reasonable time to prepare a defence. Additionally, the appellant sought a declaration that the impeachment proceedings initiated against him were a nullity due to violations of Article 50(1) of *the Constitution*. He then sought an order of Certiorari to quash the decision of the 1st respondent recommending his removal from office, arguing that the entire process was procedurally flawed and unconstitutional.
7. The petition was further premised on the contention that the impeachment proceedings failed to adhere to the principles of natural justice, including audi alteram partem rule, the right to be heard, and nemo judex in causa sua, the prohibition against bias. The appellant maintained that the Select Committee was chaired by an individual who had moved the impeachment motion before the 1st respondent, thus raising concerns of impartiality. He also highlighted procedural irregularities such as the scheduling of hearings on non-business days and inadequate opportunity for defence, which



he believed rendered the process unlawful. Pursuant to the petition, the appellant obtained some conservatory orders pending the hearing and determination of the petition.

8. In response the respondents stated that the tenets of impeachment process were duly observed in the unfinished impeachment process against the appellant; that the appellant had admitted that he was invited to appear before the Committee; that instead of responding to the allegations he had rushed to the court and obtained conservatory orders; that the petition was presumptive and premature in that no decision had been made by the Assembly to impeach the appellant; that the appellant had assumed that a vote approving his impeachment shall be carried out and that a majority of members of the Assembly would support the motion.; that the intervention by the court violated the principle of separation of powers; that the court may only interfere with the actions of the legislature upon the making of a final decision by the Assembly which had not happened; that such intervention may rarely occur upon a clear violation of *the Constitution* by the Assembly and that such a case had not been proved by the appellant. Ultimately, the respondents prayed for the dismissal of the petition in its entirety.
9. Upon consideration of the petition, the response and the law, the ELRC determined that the appellant had prematurely approached the court before exhausting the 1st respondent's internal dispute resolution mechanisms. It emphasized that public interest dictated that the 1st respondent's proceedings be allowed to run its course, and the appellant's assumption that the final outcome would be unfavourable was purely speculative. In dismissing the petition, the ELRC stated further that the appellant had failed to substantiate claims of constitutional violations, and deemed the impeachment process valid.
10. Following the ELRC's decision, the appellant filed this appeal challenging its findings through a memorandum of appeal dated 5th May 2020. The appellant contended that the ELRC erred by failing to adjudicate his substantive grievances and instead focused on the application for conservatory orders. He further asserted that the court disregarded his rights under Articles 50(1) and 47(1) of *the Constitution*, particularly the entitlement to a fair hearing and fair administrative action. Additionally, he maintained that the ELRC incorrectly ruled that he approached it prematurely and failed to appreciate procedural irregularities in the impeachment proceedings, including inadequate time for defence preparation, lack of access to critical documents, and the scheduling of hearings on days that interfered with his religious practices. The appellant further complained that the ELRC should have granted an order of Certiorari to nullify the 1st respondent's decision recommending his removal from office, asserting that the entire process was unconstitutional and legally flawed. Based on these grounds, the appellant urged this Court to allow the appeal, set aside the judgment and decree of ELRC and grant the reliefs sought in the memorandum of appeal.
11. The appeal was heard virtually on 12th May, 2025. Ms. Komen, learned counsel holding brief for Mr. Manyonge Wanyama, appeared for the appellant. There was no representation for the respondent despite confirmation of service of hearing notice by court on the firm of Messrs. Okongo Wandago and Company Advocates hitherto appearing for the respondents. Neither had it filed written submissions on behalf of the respondents as per the directions of the Deputy Registrar of this during the case management conference. Before the commencement of the plenary hearing of the appeal, the court briefly engaged counsel for the appellant regarding the viability of the appeal and whether it had not been overtaken by events. Counsel was candid enough to admit that most of the prayers in the appeal and indeed the petition had been overtaken by events. Consequently, he was now only pursuing damages in the form of salaries due to the appellant for the remainder of the contract period.



12. Counsel through her written submissions argued that the trial court erred in upholding the impeachment process conducted by the 1st respondent. Counsel contended that the impeachment proceedings violated the appellant's constitutional rights, including the right to a fair hearing under Article 50(1) of *the Constitution* and fair administrative action as provided for under Article 47(1) of *the Constitution*. Counsel submitted that the ELRC improperly focused on procedural aspects rather than addressing the substantive merits of the petition. The crux of the appellant's case was a violation of his constitutional rights, including the denial of reasonable time to prepare his defence, failure to provide him with relevant documents, and scheduling of hearings on non- business days. However, instead of fully adjudicating these grievances, the trial court confined its analysis to the threshold for issuing conservatory orders. Counsel cited the case of *Raila Amolo Odinga & Another v IEBC & 2 Others* [2017] eKLR, where the Supreme Court underscored the importance of pleadings in ensuring fair hearings. She submitted that the trial court's narrow focus deprived the appellant of substantive determination of his claims and resulted in a miscarriage of justice.
13. Counsel submitted that the impeachment proceedings violated the appellant's right to a fair hearing as guaranteed under Article 50(1) of *the Constitution*. She highlighted that the 1st respondent failed to provide the appellant with adequate time to prepare his defence thereby, denying him procedural fairness. Counsel further argued that the failure to supply the appellant with supporting documents prior to the impeachment hearings contravened the established judicial principles of audi alteram partem, and nemo iudex in causa sua. She relied on the case of *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others* [2014] eKLR, where the Supreme Court articulated the principles of fair hearing. Additionally, she referred to Standing Order No. 28 of the 1st respondent which prescribes meeting hours and procedural requirements for legislative sittings. She asserted that the appellant's scheduled appearances on Saturday, 3rd and Sunday, 4th of August 2019 respectively violated established norms and limited his ability to consult legal counsel.
14. It was submitted that the appellant's decision to approach the court before the conclusion of the impeachment proceedings was justified under Article 258(1) of *the Constitution*, which allows individuals to seek judicial intervention when violation of constitutional rights is imminent or threatened. She submitted that the appellant did not need to wait for an actual violation to occur, as the impeachment proceedings presented an imminent risk of constitutional infringement. She cited the case of *Alfred N. Mutua v Ethics & Anti-Corruption Commission & Others* (Civil Application 31 of 2016) [2016] KECA 596 (KLR), where this Court held that judicial intervention is warranted in cases where constitutional rights violations face immediate and imminent threat. She contended that had the appellant waited for the process to conclude, his right to a fair hearing would have already been compromised, rendering remedial action ineffective.
15. Based on these arguments, the appellant urged this Court to allow the appeal in its entirety.
16. This is a first appeal. As a first appellate court, it is required to honour the principles set out in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, that:

“An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. Nevertheless, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities materially to



estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

17. Having considered the record of appeal, the appellant's submissions, and the cited authorities, the issues for our determination are whether: the ELRC erred by focusing on conservatory orders instead of determining the substantive petition; the appellant's rights to a fair hearing and fair administrative action were violated, and whether the appellant prematurely approached the court before exhausting the 1st respondent's internal dispute resolution mechanisms.
18. In addressing the first issue, we note that on 5th August 2019, the appellant filed a petition seeking various reliefs, including declaratory orders and Certiorari to quash the 1st respondent's decision to impeach him. Simultaneously, he sought conservatory orders to halt the impeachment proceedings pending the hearing and determination of his petition. The trial court rendered a ruling declining the application for conservatory orders and held that the appellant had approached the court prematurely without exhausting the 1st respondent's internal dispute resolution mechanisms. In reaching this determination the ELRC relied on the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR, where the Supreme Court held that conservatory orders should be granted based on the inherent merit of a case, considering public interest and constitutional values. The ELRC in the ruling found that there was no demonstrated constitutional violation warranting intervention at that stage, and the petition was premature.
19. At the hearing of the substantive petition, the issue of conservatory orders had already been determined and was no longer pending. However, the judgment of the ELRC applied the same reasoning in dismissing the substantive petition. The ELRC therefore reaffirmed its earlier position that the impeachment process had not been exhausted and that judicial intervention would violate the principle of separation of powers, as articulated in the case of *Speakers of the County Assemblies of Kisumu, Mombasa, and Murang'a v Senate & 4 Others* [2018] eKLR. The ELRC reasoned that the appellant pre-emptively assumed an adverse outcome from the impeachment proceedings and sought judicial intervention before exhausting the 1st respondent's internal dispute resolution mechanisms. The judgment opined that the appellant should at least have engaged the 1st respondent fully before moving to court, and only after a final decision was reached could he challenge the process.
20. Notably, the appellant argues that the trial court failed to adjudicate his claims on their merits, including allegations of procedural irregularity, lack of access to documents, and inadequate time to prepare defence. However, a close scrutiny of the judgment shows that the ELRC did touch on these grievances, albeit briefly, before concluding that the appellant had prematurely invoked judicial intervention. The ELRC emphasized that it was not for the judiciary to second-guess legislative processes, particularly where internal remedies were available. This approach of judicial restraint in legislative functions, unless there is a clear constitutional violation, aligns with jurisprudence from the Supreme Court and this Court.
21. In *Mate & Another v Wambora & Another* (Petition 32 of 2014) [2017] KESC 1 (KLR), the Supreme Court reiterated that courts should not interfere with ongoing legislative processes unless a fundamental breach of *the Constitution* is established, reaffirming the doctrine of separation of powers. Similarly, in *Speakers of the County Assemblies of Kisumu, Mombasa, and Murang'a v Senate & 4 Others* [supra], this Court differently constituted held that judicial intervention should only be exercised where there is blatant disregard for constitutional provisions or a violation of fundamental rights, noting that premature interference could disrupt governance and undermine the autonomy of legislative bodies. These decisions underscore the need for courts to allow legislative functions to



proceed uninterrupted unless there is a demonstrable breach of constitutional principles warranting intervention.

22. With the above in mind, we are satisfied that the ELRC did not err in its approach to the first issue. Though the ELRC addressed some of these issues at the interlocutory stage during the hearing of the application for conservatory orders albeit briefly, that alone could not bar the ELRC from revisiting the issues in its final judgment in the substantive petition. Additionally, the record demonstrates that at the time of hearing the petition, there was no pending application for conservatory orders, as the issue had already been exhausted. It is therefore fallacious for the appellant to complain that the ELRC in its judgment treated the petition as though it was dealing with the application for conservatory orders. Further, whereas the appellant argues that the court unduly focused on procedural considerations, the judgment reflects the contrary. Indeed, it shows that the trial court did examine the allegations before concluding that there was no sufficient basis for judicial intervention at that stage. In our view, the ELRC correctly applied the principles of judicial restraint and procedural propriety. There was no error in the manner the first issue was resolved, in which event, then the appellants argument is unfounded.
23. On the second issue, the appellant argues that the impeachment proceedings violated his constitutional right to a fair hearing under Article 50(1) and fair administrative action under Article 47(1) of *the Constitution* of Kenya. These provisions are fundamental in ensuring procedural fairness in administrative and quasi-judicial processes. Article 50(1) guarantees every person the right to have any dispute resolved in a fair and public hearing before a court or an independent and impartial tribunal or body. The Supreme Court in the case of *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others* (supra) stated that the right to a fair hearing is absolute and cannot be limited by procedural technicalities. The court held that procedural fairness requires that a person facing adverse action must be given adequate time to prepare a defence, access relevant documents, and be heard before a decision affecting his rights is made.
24. Similarly, Article 47(1) provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. This Court in the case of *Judicial Service Commission v Mbalu Mutava & Another* [2015] eKLR held that fair administrative action requires adherence to principles of natural justice, including audi alteram partem and nemo iudex in causa sua. The court held that failure to provide adequate notice, relevant documents, or a reasonable opportunity to be heard constitutes a violation of Article 47 of *the Constitution*.
25. Further, in the case of *United Millers Limited v Kenya Bureau of Standards & Others* (Civil Appeal No. 273 of 2019), this Court held that administrative bodies must ensure procedural fairness by providing affected persons with written reasons for adverse decisions and an opportunity to challenge them be accorded. The court emphasized that failure to comply with these prerequisites renders administrative action unconstitutional.
26. In the present case, the appellant contends that he was denied a fair hearing because he was not supplied with documents supporting the allegations against him before the commencement of the impeachment proceedings, was not given reasonable time to prepare his defence, and was summoned on 3rd and 4th August 2019, which were weekend days and days of his worship, which hampered his ability to participate fully in the proceedings. These claims align with the principles set out in the cases *Evans Odhiambo Kidero*, *Mbalu Mutava*, and *United Millers Limited*, (supra).
27. Upon reviewing the record, however, we note that the appellant was afforded an opportunity to present his defence but failed to utilize it. The evidence indicates that the Committee formally invited the appellant to appear and respond to the allegations, yet he did not attend the hearings or send legal



representation. The least he could have done was appear personally or through counsel or agent and formally request additional time or demand access to the impeachment documents before rushing to court to file the petition. No doubt, the appellant was well aware of the strict timelines under the law as regards the hearing and disposal of impeachment proceedings. Any non-observance of the timelines would surely have rendered such proceedings null and void. Could this have been his end game in the appellant's refusal to cooperate?

Obviously, this would not have been in the public interest. In our view, the right to a fair hearing does not extend to a party who deliberately fails to take advantage of the opportunity accorded.

28. In this case, the ELRC found that the appellant was invited to the proceedings but chose not to engage with the process, instead opting for judicial intervention before exhausting the 1st respondent's internal dispute resolution mechanisms. The ELRC determined, and correctly so in our view, that the appellant had preemptively assumed that an adverse decision will be returned against him without giving the impeachment process a chance to run its course. We therefore agree with the ELRC that the appellant's rights to fair administrative action and fair hearing were not violated because he was afforded an opportunity to participate in the impeachment proceedings but failed to do so. The procedural deficiencies he alleges were not sufficiently substantiated, and there is no basis for our interfering with the ELRC's determination on this issue.
29. On the third issue, the ELRC dismissed the petition on the ground that the appellant had approached the court prematurely. The doctrine of exhaustion of administrative remedies is a well-established principle in judicial review, requiring that a party seeking judicial intervention must first utilize all available non-judicial remedies before approaching the courts. This principle ensures that administrative bodies and legislative institutions have the opportunity to resolve disputes before they are escalated to the judiciary. Courts across various jurisdictions have upheld this doctrine, emphasizing the need for restraint in judicial intervention unless there is a clear constitutional violation.
30. In the case of *McKart v. United States*, 395 U.S. 185 (1969), the United States Supreme Court held that exhaustion of administrative remedies serves an important function in allowing agencies to apply their expertise before judicial intervention. The court emphasized that premature judicial interference undermines the efficiency of administrative processes and prevents agencies from correcting errors internally. Similarly, in the case of *Darby v. Cisneros*, 509 U.S. 137 (1993), the court reaffirmed that judicial review should only be sought after all administrative remedies have been exhausted unless there is a statutory exception.
31. In the Canadian case of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the Supreme Court of Canada reinforced the principle that courts should defer to administrative bodies unless there is a fundamental breach of procedural fairness or a clear constitutional violation. The court held that judicial intervention should be exercised sparingly and only where administrative processes fail to provide an adequate remedy.
32. In South Africa, the Constitutional Court in the case of *Koyabe v Minister for Home Affairs* [2009] ZACC 23 held that exhaustion of internal remedies is a prerequisite for judicial review unless exceptional circumstances exist. The court emphasized that administrative bodies must be given the opportunity to correct errors before courts intervene.
33. The Supreme Court of Kenya has also weighed in on this doctrine. In the case of *Mate & Another v Wambora & Another* (supra), the court held that judicial intervention in legislative processes should only occur where there is a clear constitutional violation. The court emphasized that the separation of powers requires courts to allow legislative bodies to conduct their functions without undue interference.



34. Lastly, this Court in *Speakers of the County Assemblies of Kisumu, Mombasa, and Murang'a v Senate* (supra) reaffirmed that courts must allow legislative processes to conclude before intervening, except where there is a blatant disregard for constitutional provisions or fundamental rights. The court reiterated that premature judicial intervention disrupts governance and undermines the autonomy of legislative bodies.
35. Taking all the foregoing into account, we note that the appellant was invited to appear before the Select Committee but failed to do so. Instead of engaging with the impeachment process, he sought judicial intervention too early and before the 1st respondent had rendered a final decision. The argument by the appellant that if he had waited for the exhaustion of the impeachment process, his constitutional rights would have been violated beyond redemption cannot fly. The process would still have been reversed by an order of Certiorari which he had in any event sought in his petition.
36. The ELRC correctly applied the doctrine of exhaustion, holding that the appellant's assumption that an adverse decision would be made against him was speculative and premature. It emphasized, and correctly so in our view, that judicial intervention should only occur after the legislative process has run its course, unless there was a demonstrable constitutional violation which in this case was lacking. We are therefore satisfied that the ELRC did not err in dismissing the petition on grounds of premature judicial intervention.
37. Having evaluated the appellant's arguments and the applicable constitutional and statutory provisions, we find no basis for interfering with the decision of the ELRC.
38. Consequently, the appeal is devoid of merit and is accordingly dismissed with no order as to costs.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF OCTOBER., 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

