

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**CONSTITUTIONAL PETITION NO E231 OF 2023**

IN THE MATTER OF THE CONTRAVENTION AND THREATENED CONTRAVENTION  
OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 28, 29, 31, 32,  
47 AND 50(1) OF THE CONSTITUTION OF KENYA AND

IN THE MATTER OF DEFENCE OF THE CONSTITUTION UNDER ARTICLE 3(1) OF THE  
CONSTITUTION OF KENYA

AND

IN THE MATTER OF INTERPRETATION, ENFORCEMENT, AND PROTECTION OF THE  
BILL OF RIGHTS UNDER ARTICLES 19, 20, 22, 23, 24, 165, 258, AND 259 OF THE  
CONSTITUTION

AND

THE MATTER OF THE COUNTY GOVERNMENT ACT

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACT 2015

BETWEEN

MARY ARIVIZA MWAMI ..... PETITIONER

-VERSUS-

NAIROBI CITY COUNTY ASSEMBLY SERVICE BOARD.....1<sup>ST</sup>

RESPONDENT NAIROBI CITY COUNTY ASSEMBLY.....

.....2<sup>ND</sup> RESPONDENT

## JUDGMENT

### INTRODUCTION AND BACKGROUND

1. The Petitioner, a former Member of the County Assembly of Nairobi, has approached this court vide a Petition dated 4<sup>th</sup> July, 2023 challenging the disciplinary proceedings undertaken by the Select Committee on Powers and Privileges and the subsequent resolution of the County Assembly suspending her for thirty sittings. She alleges violation of her rights to fair administrative action, fair hearing, equality and equal protection of the law, and access to justice.
2. The factual controversy arises from events at a meeting held in Kisumu, which led to a complaint that the petitioner had misconducted herself in the forum and resulted to her being removed from the Assembly committees. Pursuant to the report of the Committee on Powers and Privileges dated 4<sup>th</sup> June, 2019, the Assembly adopted a resolution on 13<sup>th</sup> June, 2019 suspending the petitioner from the County Assembly and committee sittings for thirty sittings, suspending related allowances and requiring a formal apology. The petitioner avers that the process was procedurally unfair and substantively unjustified.
3. She therefore seeks the following reliefs from this court:
  - a. *A Declaration that the respondents have violated and infringed the provisions of Articles 27, 35, 29, 47, 48, and 53 of the Constitution.*
  - b. *An order for compensation in the sum of Kenya Shillings Ksh.6,977,200/= being the loss of earnings during the suspension period.*

- c. *Any other order that this Honorable court may deem to be fit and just to ensure that constitutional provisions are protected and enforced.*
- d. *Costs of the Petition.*

## **PETITIONER'S CASE**

4. The Petitioner's case as presented in her Petition, her sworn affidavits is that she attended a forum at Kisumu after which she was accused of misconduct and, without cogent reasons, discharged from the Select Committees she was serving. She avers that this de-whipping was unprocedural, contrary to Standing Orders which require a minimum tenure of two years in a committee, and that her nomination party, the Orange Democratic Movement, was notified of the alleged irregularity. Her subsequent request to be reinstated to the Infrastructure Committee by letter dated 30<sup>th</sup> April, 2019 was allegedly ignored.
5. The petitioner averred that she was invited by SMS to appear before the Committee on Powers and Privileges for disciplinary action in relation to the Kisumu incident and that she duly appeared on 25<sup>th</sup> April, 2019. She avers that the Committee presented video clips as evidence and questioned her, but did not call any witnesses while she was present. She contends that despite absence of witnesses and of cogent evidence, the Committee recommended her suspension from the Assembly for thirty sittings and from committee sittings, and that no formal communication of this decision was made to her.
6. She further averred that she only learnt of her suspension when the Committee's report was tabled and adopted by the Assembly, and that from

the report she discovered that the Committee had subsequently heard witnesses in her absence. She alleges that she was not afforded an opportunity to cross-examine those witnesses, contrary to Articles 47 of the Constitution. She further avers that the failure to promptly inform her of the outcome and reasons for the decision violated her rights under Articles 47, 48 and 50.

7. The petitioner contends that the Respondents thereby discriminated against her, treated her unequally before the law contrary to Article 27, and condemned her on the basis of no tangible evidence. She asserts that her suspension from the Assembly and committees incapacitated her from performing her constitutional and statutory duties as a nominated member representing gender equality, and that the respondents acted in bad faith and with an intention to politically incapacitate her.
8. On loss of earnings, the petitioner averred that she missed eleven weeks of sitting allowances at Kshs.31,200 per week and other specific allowances for a women's caucus, trade committee and games, leading to a total alleged loss of Kshs.1,977,200/=. She also claims general damages of Kshs.5,000,000 for psychological torture, and states that the present proceedings are the only suit presently pending, the High Court has jurisdiction, and that the petition meets the constitutional threshold.
9. In her further affidavit sworn on 22<sup>nd</sup> November, 2024, the petitioner responds to the respondents' replying affidavit by denying any abuse of privileges and averring that she did not contravene section 16 of the County Assemblies Powers and Privileges Act. She denies knowledge of any investigations conducted by the Committee prior to her appearance and

maintains that no witnesses were called during her session, and no evidence was adduced to justify the sanctions. She reiterates that the subsequent calling of witnesses in her absence and use of their evidence without giving her a chance to cross-examine infringed her rights under Articles 47 and 50 of the Constitution.

10. The petitioner also depones that Judicial Review Application, by which she had sought leave to commence judicial review proceedings for certiorari, prohibition and mandamus against the same decision, was struck out on 26<sup>th</sup> November, 2021 for failure by her then advocates to file a statutory statement as required under Order 53 Rules 1, 2 and 4 of the Civil Procedure Rules. She contends that the matter was never determined on the merits. She further contends that the present petition, which seeks constitutional declarations and compensation but not judicial review remedies, raises different causes of action and ought to be determined on merits.

## **RESPONDENT'S CASE**

11. In response, the Respondents filed a replying affidavit sworn by Edward Gichana, the Clerk of Nairobi City County Assembly on 27<sup>th</sup> May, 2024 and a Notice of Preliminary Objection dated 27<sup>th</sup> May, 2024.
12. In their replying affidavit, it is deponed that the petitioner was a member of the 2<sup>nd</sup> Assembly and that on 23<sup>rd</sup> April 2019 the then Leader of Majority reported to the House alleged abuse of privileges by the petitioner during a County Assembly Forum in Kisumu, contrary to section 16(e) of the County Assemblies Powers and Privileges Act. Pursuant to section 15 of the Act, the Select Committee on Powers and Privileges seized of the matter and

commenced investigations into the complaint. The Committee is said to have held several sittings between April and June 2019.

13. It is averred that in conducting its inquiry, the Committee observed the County Assemblies Powers and Privileges Act and the rules of natural justice. It is averred that the Committee summoned and heard witnesses, received evidence including video recordings, and afforded the petitioner an opportunity to appear, be heard and defend herself. The Committee allegedly found that the petitioner had acted in a manner demeaning to the office of the Speaker as evidenced in a video clip and that she had given untrue statements before the Committee by denying being present when the Speaker moderated the session.
14. It is the Respondents case that based on those findings, the Committee recommended, under section 17(3) of the County Assemblies Powers and Privileges Act and the applicable Standing Orders, that the petitioner be suspended from the Assembly for thirty sittings; that her committee sittings and allowances be suspended, that she be barred from the precincts of the Assembly during suspension, and that she formally apologizes to the House upon resumption. It is deponed that the Assembly adopted the report on 13<sup>th</sup> June, 2019 after debate, and that the petitioner was afforded an opportunity to address the plenary and mitigate before the vote. It is further stated that the petitioner served the suspension and thereafter resumed her duties and access to the Assembly precincts.
15. The respondents averred that the penalties were lawful and proportionate, aimed at protecting the dignity of the Assembly and upholding parliamentary privilege. They further averred that at all material times during suspension

the petitioner continued to draw her full salary, and that only sessional and committee allowances for sittings she did not attend were withheld, in line with the law. The respondents maintain that the petitioner's rights under Articles 27, 47, 48 and 50 were fully respected and that she has failed to demonstrate any constitutional violation.

16. In their notice of preliminary objection dated 27<sup>th</sup> May, 2024, the respondents contend that this Court lacks jurisdiction to entertain the petition by virtue of Article 196(3) of the Constitution and section 10 of the County Assemblies Powers and Privileges Act, 2017, which provide that no proceedings or decision of a County Assembly or its Committee of Powers and Privileges acting in accordance with the Act shall be questioned in any court.
17. They also contend that the petition is barred by section 7 of the Civil Procedure Act as res judicata, in light of Judicial Review Application No. 290 of 2019; Mary Avisia Mwami vs The Nairobi City County Assembly Service Board and the Nairobi County Assembly. They therefore urge the Court to strike out the petition as an abuse of the court process.
18. The Petition was canvassed by way of written submissions and both parties complied by filing their respective submissions.

#### **PETITIONER'S SUBMISSIONS**

19. The Petitioner filed her written submissions dated 9<sup>th</sup> July, 2024 and 20<sup>th</sup> November, 2024. On jurisdiction, the petitioner submits that Article 2 of the Constitution proclaims constitutional supremacy and binds all State organs, and that any statute, including section 10 of the County Assemblies Powers

and Privileges Act, must be interpreted in harmony with the Bill of Rights. Reliance is placed on the decision in ***Ruth Wambui Ndirangu & 2 others v Clerk County Assembly of Embu & 3 others [2019] eKLR***, where the Court held that ouster clauses in the County Assemblies Powers and Privileges Act cannot shield constitutional violations from judicial scrutiny. She also cites Article 165(3) (d) and (6), arguing that this Court has jurisdiction to hear and determine any questions on constitutional interpretation and violation of the constitution.

20. On res judicata, the petitioner submitted that Judicial Review Application No. 290 of 2019 was a leave application that was struck out on 26<sup>th</sup> November, 2021 for failure to file a statutory statement, and that there was therefore no final determination on the merits. She relies on ***Ndaka v Tekwara Services Co Ltd & 2 others; KeRRA (Interested Party) [2024] KEHC 300 (KLR)***, where the Court held that an application struck out for being an abuse of process or procedural defect does not satisfy the heard and finally decided limb of section 7 of the Civil Procedure Act. Further reliance is placed in ***C.K. Bett Traders Limited & 2 others v Kennedy Mwangi & another [2021] eKLR*** as affirming the conjunctive elements of res judicata and emphasising that the former matter must have been substantively determined.
21. On alleged violations of her constitutional rights, it was submitted that the Committee's decision and the Assembly's adoption process violated her rights to fair administrative action and fair hearing. She relied on the decision in ***Kenya Human Rights Commission v Non-Governmental Organisations Co-ordination Board [2016] eKLR*** where the Court held that Article 47 and the Fair Administrative Action Act require a procedurally fair process including

prior notice, a fair opportunity to be heard, reasons for the decision, and adherence to the audi alteram partem rule.

22. The petitioner further submitted that the Committee's failure to allow her to cross-examine witnesses who testified after she had been told the disciplinary session was over contravened her rights to fair hearing as well as fair administrative action.
23. On the form and sufficiency of the petition, it was submitted that she has pleaded with reasonable precision the constitutional provisions allegedly violated, the facts relied upon and the injury suffered. She relied on the decision in ***Catherine Chepkemoi Mukenyang v Evanson Pkemoi Lomaduny & another [2022] eKLR***, where the Court emphasised that a constitutional petition must disclose the petitioner's particulars, facts, provisions violated, nature of injury, related suits and reliefs sought.
24. On remedies, the petitioner submitted that Article 23(3) empowers this Court to grant appropriate relief including declarations, compensation and judicial review-type orders. Reliance was placed on the decision in ***Jamlik Muchangi Miano v Attorney General [2017] eKLR***, where the Court observed that monetary compensation is an accepted and effective remedy for violations of fundamental rights and is distinct from private law damages. She thus urged this court to grant her the reliefs sought and an order for compensation in the sum of Kshs.1,977,200/= being loss of earnings during the suspension period and Kshs.5,000,000/= for general damages.

## RESPONDENTS' SUBMISSIONS

25. The Respondents filed their written submissions dated 12<sup>th</sup> November, 2024 and further written submissions dated 2<sup>nd</sup> March, 2025. On whether a case of constitutional violation has been laid, the respondents submitted that the petitioner has failed to meet the threshold of a constitutional Petition as established in **Anarita Karimi Njeru vs the Republic (1976-1980) KLR 1272**, having merely cited several Articles without demonstrably linking each to specific facts.
26. The Respondents further submitted that the Petitioner was accorded all attributes of a fair administrative and disciplinary process. They argue that she appeared before the Committee, was informed of the allegations, responded to questions, and later addressed the plenary where House members also spoke for and against her before the report was adopted.
27. On loss of earnings, the Respondents argue that the claim for loss of earnings is speculative, unsubstantiated and unproven. They contend that the Petitioner has not strictly proved the alleged loss by credible documentary evidence and that, in any event, subsistence and sitting allowances are payable only where a member actually attends sittings, which she did not during the suspension. Relying on **Gitobu Imanyara & 2 others v Attorney General (2016) eKLR** and **Desert Commercial Shipping Limited & another v OCPD Chagamwe Police & 2 others (2021) eKLR** they submitted that while constitutional damages are available, they are not meant to replicate unproven special damages and must be justified by evidence and principle.
28. The respondents further relied on the decision in **Total (Kenya) Limited Formally Caltex Oil Kenya Limited v Janevams Limited**, reiterating the requirement that special damages must be specifically pleaded and strictly

proved. They submitted that the petitioner has not adduced any evidence to prove the loss of earnings resulting from her suspension.

29. On the preliminary objection, it was submitted that Article 196(3) of the Constitution as read with Section 10 of the County Assembly Powers and Privileges Act, 2017, expresses an ouster in clear terms that “no proceedings or decision of a county assembly or the committee of powers and privileges acting in accordance with this Act shall be questioned in any court”. They relied on ***Republic v Ethics and Anti-Corruption Commission ex parte Nairobi City County Assembly & 13 others (2019) eKLR*** to argue that courts cannot intervene in matters affecting the regularity of parliamentary procedure and the exercise of internal disciplinary powers, which fall within parliamentary privilege. Further reliance was placed on the decisions in ***Sonko vs County Assembly of Nairobi County and 11 others (2022) eKLR*** and ***Mumo Matemu vs Trusted Society of Human Rights Alliance and 5others***.
30. Finally, the respondents urge the Court, to find that it lacks jurisdiction to entertain the instant petition, to exercise restraint consistent with the doctrine of separation of powers and to decline to interfere with the Assembly’s disciplinary decision in the absence of demonstrable irrationality, illegality or procedural impropriety. It is submitted that allowing the petition would set a dangerous precedent whereby members who have clearly breached the Powers and Privileges regime can later seek to convert disciplinary consequences into substantial monetary claims against public coffers. They therefore pray that the preliminary objection be upheld and the petition be dismissed with costs.

## ANALYSIS AND DETERMINATION

31. Having carefully considered the pleadings, affidavits, the preliminary objection, the parties' submissions and relevant authorities relied upon, the following issues arise for determination by this court:

- i. *Whether this court has jurisdiction to entertain the petition in light of Article 196(3) of the Constitution and section 10 of the County Assemblies Powers and Privileges Act, 2017.*
- ii. *Whether the Petition herein is fatally defective of being res judicata.*
- iii. *Whether the Petitioner's constitutional rights were violated.*
- iv. *Whether the Petitioner is entitled to reliefs sought*

32. I have considered the preliminary objection and the parties' submissions in respect thereof. I will at first consider whether the objection herein has met the threshold of a preliminary objection.

33. In ***Mukisa Biscuit Manufacturing Company Ltd Vs West End Distributors Ltd (1969) E.A 696*** the court stated

*"a preliminary objection consists of a point of law which has been pleaded or which arises from clear implication out of pleadings and which if argued as a preliminary point may dispose off the suit. Examples are an objection to jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to Arbitration"*

34. In present case, the section of Law relied upon on the objection are clearly set out. I am of the view therefore that the objection, if it succeeds, is capable of disposing this suit.

35. The purpose of preliminary objection is two-fold. In the supreme court's decision in **IEBC VS Jane Cheperenyer & 2 Others (2015) eKLR** the purposes were stated as follows: -

*“the true preliminary objection serves two purposes of merit firstly, it serves as a shield for the originator of the objection against profligate deployment of time and other resources. And secondly, it served the public cause of sparing scarce judicial time so it may be committed only to deserving cases of dispute settlement...”*

36. I will now proceed to consider the issues.

***Jurisdiction in light of Article 196(3) and section 10 of the County Assemblies Powers and Privileges Act.***

37. The locus classicus on jurisdiction is the celebrated case of the Court of Appeal, **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Nyarangi J. held thus:

*“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”*

38. The respondents' position is that this court lacks jurisdiction to hear and determine the matter as it is expressly barred from doing so by section 10 of the County Assemblies Powers and Privileges Act No. 6 of 2017.

39. Various courts have interrogated the scope of the High Court's authority to adjudicate over proceedings or decisions of the county assembly in light of

the privileges and immunities conferred upon the county assemblies, their committees and members.

40. In declaring section 11 of the Parliamentary Powers and Privileges Act (No. 29 of 2017), which was *in pari materia* with section 10 of the County Assemblies Powers & Privileges Act, unconstitutional the court in ***Apollo Mboya v Attorney General & 2 others Petition No. 472 of 2017 [2018] eKLR*** held;

*“53. Section 11 of the act provides that ‘No proceedings or decision of Parliament or the Committee of Powers and Privileges acting in accordance with this Act shall be questioned in any court’....*

*75. The foregoing paragraphs summarize the nature and purpose of Parliamentary immunity. A reading of section 11 leaves no doubt that it covers more than the immunity discussed in the above paragraphs. It bars any person from challenging in Court decisions made by Parliament or its committees. The provision does not specify the nature of the decisions. It does not refer to immunity in the performance of their Parliamentary duties. It seeks to shield their decisions from court scrutiny. It is an ouster or finality clause which restricts or eliminates Judicial Review. In our constitutional dispensation, it is not Parliament, or the executive or the Judiciary that are Supreme, but the Constitution.”*

41. Similarly, in the case of ***Protus Aramba Moindi & another v Speaker of the County Assembly of Kisii County & 2 others Petition No. 13 of 2016 [2016] eKLR*** which was relied upon by the Petitioner, J.R. Karanja J. held;

“13. ... On the face of it, S.12 of the Act purports to exclude interference of the courts in matters of the National Assembly or for that matter County Assemblies. However, Article 2 of the Constitution proclaims the supremacy of the Constitution to the effect that it is Supreme Law of the Republic and binds all persons and all state organs at both levels of Government. So that, no person may claim or exercise State authority except as authorized under the Constitution and any law that is inconsistent with the Constitution is void to the extent of the inconsistency and any act or omission in contravention of the Constitution is invalid.

.....

15. Jurisdiction being the authority which a court has to decide matters that are litigated before it or to make cognizance of matters presented in a formal way for its decision, and taking into account that Article 165(3) of the Constitution grants the High Court the power to determine any question as to the interpretation of the Constitution and that the High Court is recognized as the custodian of the Bill of Rights which is the framework of social, economic and cultural policies in a democratic state such as Kenya it would follow that S.12 of the National Assembly (Power & Privileges) Act cannot restrict or oust the Constitutional mandate of this court.”

42. The above decision of the court was cited with approval by the court in the case of **Ruth Wambui Ndirangu & 2 others v Clerk County Assembly of Embu & 3 others (supra)**. In that matter the court held that Sections 10 and 11 of

the County Assemblies Powers & Privileges Act 2017 did not oust the supervisory jurisdiction of the court as provided in the Constitution.

43. In the case of ***Peter O. Ngoge v Francis Ole Kaparo & 4 Others Misc Appli 22 of 2004 [2007] eKLR***, the court cited the decision of the court in the case of ***Kenya Bus Service Ltd And Others v Attorney General & Others (2005) I EALR IIII at page 15(1)(J) and 116(a)*** where it was held that a court would only be entitled to intervene in the internal matters of Parliament in order to uphold the provisions of the Constitution.
44. The Supreme Court in ***Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another Petition No. 32 of 2014 [2017]eKLR*** referred to its decision in ***In the matter of the Speaker of the Senate & Another v Attorney General & 4 Others*** where it had called for caution against undue interference with running processes in other arms of Government. On the extent of the doctrine of separation of powers, the Supreme Court in ***Justus Kariuki Mate (supra)*** held;

“[62] A clear inference to be drawn is that, it was the Supreme Court’s stand that no arm of Government is above the law. This being a constitutional democracy, the Constitution is the guiding light for the operations of all State Organs. The Court’s mandate, where it applies, is for the purpose of averting any real danger of constitutional violation.”

45. In ***Njenga Mwangi & Ano vs The truth, justice and reconciliation Commission & 4 others, Nairobi High Court Petition No. 286 of 2013*** Justice Lenaola stated

*“... under section 29 of the powers and privileges Act, courts cannot exercise jurisdiction in respect of acts of the speaker and other officers of the National Assembly but I am certain that under Article 165(3)(d) of the Constitution this court can inquire into any unconstitutional actions on their part”*

46. The Supreme Court in ***Judicial Service Commission v Speaker of the National Assembly & 8 Others [2014] eKLR***, the Court remarked:

*“The Constitution disperses powers among various constitutional organs. Where it is alleged that any of these organs has failed to act in accordance with the Constitution, then the Courts are empowered by Article 165 (3)(d)(ii) to determine whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution” [emphasis supplied].*

47. It is trite law therefore that the courts can intervene where actions of parliament, including their internal operations are in breach of the Constitution.
48. I accept that legislative bodies enjoy significant privileges and immunities to enable them discharge their constitutional mandate. However, that privilege is not an end in itself as it must operate within the confines of constitutional supremacy and the Bill of Rights. The above cited authorities demonstrate that courts will intervene where there is a well-founded allegation of violation of fundamental rights, while remaining deferential on matters of internal procedure or political questions.
49. In the present case, the petitioner alleges violations of her rights to fair administrative action and fair hearing in a quasi-judicial disciplinary process.

That squarely engages Articles 47, 50 and 165(3)(b) and (d) of the Constitution.

50. The common thread in the preceding authorities is that the court's jurisdiction to interrogate the constitutionality of any act including that of the county assembly cannot be ousted. The court is mandated to safeguard the sanctity of the Constitution and where it is called upon to determine whether there has been a violation of the Constitution it must not shy away from its duty. I am in agreement with the decisions of the courts in the foregoing authorities that the powers and privileges of the county assembly do not restrict or oust the Constitutional mandate of this court to look into the constitutionality of the decisions of the county assemblies.
51. Having regard to all the above, it is my opinion that indeed this court has jurisdiction to handle any matter where the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution. The same is enshrined in Article 165 (3) of the Constitution as well as in the Supreme Court decision in ***Judicial Service Commission v. Speaker of the National Assembly & 8 Others (supra)***.
52. Accordingly, I find that the preliminary objection on want of jurisdiction grounded on Article 196(3) of the Constitution and section 10 of the County Assembly Powers and Privileges Act is without merit and fails.

***Whether the Petition herein is fatally defective of being res judicata***

53. The doctrine of Res judicata is embodied or anchored on Section 7 of the Civil Procedure Act, where it provides as follows: -“No court shall try any suit or

issue in which the matter directly and subsequently in issue has been directly and subsequently in issue in a former suit between the same parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

54. Hence, in ***John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39*** the Supreme Court held:

*“59. For res judicata to be invoked in a civil matter the following elements must be demonstrated: a. There is a former judgment or order which was final; b. The judgment or order was on merit; c. The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and d. There must be between the first and the second action identical parties, subject matter and cause of action.”*

55. The Supreme Court further stated thus in respect of the applicability of res judicata to constitutional petitions:

*“81. We reaffirm our position as in the Muri Coffee case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the*

verdict duly translates into fruits for one party, and liability for another party, conclusively. To further bolster our position, we borrow from the decision from India in *Karam Chand another v Union of India and others* on 24 April, 2014 where it was restated the principles upon which the doctrine of *res judicata* is founded as follows:

...it is clear that the rule of *res judicata* is mandatory in its application and should be invoked in the interest of public policy and finality. The matters which have actually been decided would also apply to the matters which have been impliedly and constructively decided by the court. These principles are to be applied to preserve the doctrine of finality rather than frustrate the same. The doctrine of *res judicata* is the combined effort of public policy so as to prevent repeated taxing of a person to litigation. It is primarily founded on the following three maxims:

- (1) *nemo debet bis vexari pro una et eadem causa*: no man should be vexed twice for the same cause.
- (2) *interest republicae ut sit finis litium*: it is in the interest of the state that there should be an end to a litigation; and
- (3) *res judicata pro veritate occipitur*: a judicial decision must be accepted as correct.

.....The doctrine of *res judicata* is conceived not only in the larger public interest which requires that all litigation must sooner rather than later come to an end but is also founded on equity, justice and good conscience.”

56. Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not disjunctive, but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

57. The same elements were applied in the decision in ***Uhuru Highway Development Ltd v Central Bank of Kenya [1999] eKLR*** which rendered the elements as follows:“(a)the former judgment or order must be final;(b)the judgment or order must be on merits;(c)it must have been rendered by a court having jurisdiction over the subject matter and the parties; and(d)there must be between the first and the second action identity of parties, of subject matter and cause of action.”

58. In the present case, the Respondents raised an objection against the instant petition in that it violates the provision of section 7 of the Civil Procedure Act on res judicata. The Petitioner on the other hand averred that she previously filed Judicial Review Application No. 290 of 2019 seeking leave to apply for certiorari, prohibition and mandamus to challenge the same Committee decision and Assembly resolution. The uncontroverted evidence is that the

leave application was struck out for failure by her then advocates to file a statutory statement in compliance with Order 53 Rules 1, 2 and 4 of the Civil Procedure Rules. There is no evidence that a substantive motion was ever filed or that the legality of the decision was determined on merits.

59. The earlier proceedings therefore did not culminate in a final judgment on the merits on the lawfulness or constitutionality of the impugned decision.

60. The court in the case of **George Kamau Kimani & 4 others v County Government of Trans-Nzoia & another [2014] eKLR** held as follows:

*"I have considered the points raised by the first defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of preliminary objection. The best way to raise a ground of res judicata is by way of notice of motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of notice of motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of raising the issue of res judicata. The other points raised in the preliminary objection are issues which require ascertainment of facts by way of evidence. They cannot be brought by way of preliminary objection."*

61. Being guided by the above decision, the claim of the matter being Res-judicata cannot be raised by way of a Preliminary objection. I accordingly find that this limb of the Preliminary objection fails.

### ***Whether the Petitioner's constitutional rights were violated***

62. The Petitioner invokes Articles 27,28,29,31,47,48, 50 and 53 of the Constitution but the gravamen of her complaint lies in alleged breaches of the rights to fair administrative action and fair hearing. Article 47(1) guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, while Article 47(2) and the Fair Administrative Action Act require that where a right or fundamental freedom is likely to be adversely affected, the person has the right to written reasons. Article 50(1) further secures the right to a fair hearing in determination of civil rights and obligations
63. Under Article 47 (2) of the Constitution as read with the provisions of the Fair Administrative Actions Act of 2015, the common law position that there is no duty to give reasons for administrative decision is no longer a general principle of law in Kenya. A shift has taken place and there is requirement to give reasons for administrative decisions. (See also Section 45 (2) (a) and (b) of the Employment Act No. 11 of 2007). In ***Judicial Service Commission -v- Hon. Justice Mutava Mbalu, Civil Appeal No. 52 of 2014***, Githinji JA in considering the duty to give reasons for administrative action in light of Article 47 (2) of the Constitution expressed that reasons for decision should be given as a matter of right where a right under the Bill of Rights has been or is likely to be adversely affected by the administrative action and not otherwise; that the right to be given written reasons for the decision can be limited by law for a reasonable and justifiable cause.
64. Article 47 (2) of the Constitution as read with Sections 4 (3) (d) and 5 (d) (i) and 6 (2) (a) and 6 (4) of the Fair Administrative Action Act require written

reasons for administrative decision. Section 6 (1) as read with Section 6 (2) (a) of the Act stipulates that every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary and such information shall include reasons for which the action was taken and any relevant documents relating to the matter. Sections 3(d), 5 (d) (i) and 6 (2) (a) and 6 (4) of the Fair Administrative Act encompass a statutory obligation upon decision-makers to give written reasons for their decisions. This contrasts with common law that had stopped short of requiring reasons for all administrative decisions.

65. The fact that fair administrative action is a constitutional right was emphasized in the South African case of ***President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT 16/98)2000(1) SAI*** thus-

*“The right to a just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with constitutional standards of administrative justice...”*  
(emphasis)

66. In ***Kenya Human Rights Commission v Non-Governmental Organizations Co-ordination Board (supra)***, the Court underscored that the right to just

administrative action is now entrenched as a constitutional control over the exercise of public power and emphasised that courts must interrogate not only legality but also the process and procedure adopted for compliance with natural justice. The Court drew on *Ridge v Baldwin* [1964] AC 40 to reaffirm the universal application of the right to fair hearing on administrative acts or decisions affecting rights. This standard is equally applicable to quasi-judicial proceedings of County Assembly committees.

67. The evidence before me shows that the Petitioner was notified of allegations of misconduct linked to the Kisumu meeting and was invited to appear before the Committee on Power and Privileges. She did appear before the Committee on 25<sup>th</sup> April, 2019. During that sitting, the Committee played video recordings and questioned the Petitioner. The Petitioner concedes that she was heard by the Committee, and the Committee's report records her attendance and responses.
68. The Petitioner's principal complaint is that witnesses whose evidence was later relied upon by the Committee were heard after she had been informed that the disciplinary meeting was over, and that she was not accorded an opportunity to cross-examine them. The Respondents insist that witnesses were called and that the Petitioner was afforded a fair hearing, but they do not specifically refute her assertion that some witnesses testified after she had left.
69. The County Assemblies Powers and Privileges Act, at sections 18–20, allows a County Assembly or committee to summon witnesses, receive documents and administer oaths, and recognises that persons summoned are entitled to the same rights and privileges as witnesses before a court. While the Act

does not expressly spell out a right of cross-examination, the nature of quasi-judicial proceedings, particularly where adverse findings may lead to sanctions, requires that the person affected be given a fair opportunity to challenge material evidence against them, unless there are compelling reasons to limit that right in a manner consistent with Article 24.

70. On the material before me, it is clear that the Petitioner was given notice, was heard by the Committee, and later addressed the plenary before the adoption of the report. She has not placed before the Court the full record of proceedings of the Committee or Hansard extracts of her plenary appearance to demonstrate that she requested to cross-examine specific witnesses or that such a request was denied. The Committee's report indicates that the findings against her were based partly on a video recording showing her conduct and partly on testimony. The weight to be given to such evidence is primarily for the Committee and the House, unless the process is shown to have been manifestly unfair.
71. While it would have been best practice for the Committee to ensure that any critical witnesses whose evidence was averse to the Petitioner be heard in her presence or that she be recalled to respond to their testimony, the Petitioner bears the burden of proving, on a balance of probabilities, that the overall process fell below the constitutional threshold of fairness. In this regard, I find the record equivocal. She was heard by the committee and has not demonstrated, beyond her bare assertion, that she sought to test particular evidence and was refused that opportunity.
72. As regards the failure to communicate the Committee's recommendation before the plenary adoption, I accept that the Petitioner learnt of her formal

suspension when the report was tabled in the House. However, she was present during the adoption, she was given an opportunity to speak and could have sought a deferment or reconsideration. The delay between the Committee's report and the Assembly's adoption, though not ideal, has not been shown to have occasioned specific prejudice or to be so unreasonable as to amount to a violation of Article 47.

73. The alleged violations of Articles 27,28, and 48 were not sufficiently particularized or supported by evidence. The Petitioner did not demonstrate that she was treated differently from other members facing similar disciplinary processes, nor that she was denied access to courts or other remedial processes. Applying the precision standard articulated in **Anarita Karimi Njeru v Republic (supra)** and reaffirmed in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR**, I find that, save for the Article 47 and 50 complaints already addressed, the other alleged violations remain at the level of general assertion.
74. In sum, the Petitioner has not, on the evidence presented, discharged the burden of proving that the Respondents' conduct amounted to a violation of her constitutional rights under Articles 47 and 50, or the other Articles cited. The disciplinary process, viewed holistically, afforded her notice and multiple opportunities to be heard, and the penalty imposed fell within the statutory and Standing Orders framework.

***Whether the Petitioner is entitled to reliefs sought***

75. Having found no proved violation of the Petitioner's constitutional rights, it would ordinarily be unnecessary to dwell at length on remedies. However,

given the detailed submissions on constitutional damages and loss of earnings, I will briefly address them for completeness. Under Article 23(3), this Court may grant appropriate relief including declarations, injunctions, compensation, and an order of judicial review.

76. The ***Supreme Court of Canada in Vancouver (City) v. Ward, 2010 SCC 27, [2010] 2 S.C.R. 28*** where the Court while considering a colossal award for a Constitutional violation and Sec 24 of the Canadian Charter, held that:

*“... In the end, s. 24(1) damages must be fair to both the claimant and the state. In considering what is fair to both, a court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests...”*

77. In ***Bangue Indosuez vs DJ Lowe and company Ltd [2006] 2KLR 208*** the Court held inter alia that;

*“It was trite that special damages must not only be claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and probability of proof required depends on the circumstances and the nature of the acts themselves.”*

78. The Petitioner claims Kshs.1,977,200/= as loss of earnings during the suspension period and Kshs.5,000,000/= as general damages. On the evidence, she has annexed some payslips showing entitlement to certain allowances, but has not provided a detailed breakdown linking each

component of the claimed sum to specific sittings or events missed during the thirty-sitting suspension period. Neither has she produced Assembly financial records or independent verification of the claimed amounts.

79. Even if a constitutional violation had been established, a claim of this nature bears strong resemblance to a claim for special damages, which the authorities require to be specifically pleaded and strictly proved. Special damages must not only be particularized but also supported by cogent proof, such as receipts or documentary records. The Petitioner's material falls short of this.
80. As concerns general damages for psychological torture there is no medical evidence, expert evidence, nor any detailed narration beyond the Petitioner's assertion. While constitutional damages can be awarded without strict proof akin to personal injury claims, courts still require some objective basis to calibrate an award. In the absence of a demonstrated violation of rights, there is no foundation upon which to consider such relief.
81. Finally, I must bear in mind the public interest dimension. The Respondents are public bodies funded by taxpayers. Courts have repeatedly cautioned against making monetary awards against public bodies where the evidential foundation is thin or where the alleged violations are not made out, lest public resources be diverted from essential services. In these circumstances, the balance of justice does not favour granting the monetary or declaratory reliefs sought, even if the substance of the claims had been proved, which in this case they have not.
82. In totality, I therefore find that the Petitioner is not entitled to the orders and reliefs sought in the petition.

83. Accordingly, while I find the preliminary objection dated 27<sup>th</sup> May, 2024 raised by the Respondents fails, the Petition dated 4<sup>th</sup> July, 2023 is however hereby dismissed in its entirety for lack of merit with no orders as to costs.

Orders accordingly. File closed accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20<sup>TH</sup> DAY OF NOVEMBER 2025.**

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**BAHATI MWAMUYE MBS**

**JUDGE**

In the presence of: -

Counsel for the Petitioner – Ms. Kemunto

Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents – Ms. Odour

Court Assistant –Ms. Lwambia