



**Mike Mbuvi Sonko v OtOkiya Omtatah Okoiti & 25 others (Civil Appeal
E473 of 2021) [2022] KECA 940 (KLR) (22 July 2022) (Judgment)**

Neutral citation: [2022] KECA 940 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E473 OF 2021
MSA MAKHANDIA, F SICHALE & HA OMONDI, JJA
JULY 22, 2022**

BETWEEN

MIKE MBUVI SONKO APPELLANT

AND

OKIYA OMTATAH OKOITI & 25 OTHERS.. RESPONDENT

(An appeal against the entire Judgment/Decree Nairobi Constitutional & Human Rights Division (Korir, Chitembwe & Okwany, JJ.) dated 24th July, 2021 in Nairobi Constitutional Petition E007 of 2021 as consolidated with Petitions E005 of 2021, E433 of 2020, E009 of 2021, E011 of 2021, E012 of 2021, E013 of 2021, E015 of 2021 & E21 of 2021)

JUDGMENT

1. The appellant herein is appealing against the whole decision of the High Court delivered on 24th May, 2022, in Nairobi Constitutional Petition E007 of 2021 as consolidated with Petitions No.E005 of 2021; E433 of 2020; E009 of 2021; E011 of 2021; E012 of 2021; E013 of 2021; E015 of 2021; & E21 of 2021. The consolidated Petitions were filed by Okiya Omtatah Okoiti & 9 Others against Anne Kananu Mwenda & 6 Others & Hon. Mike Sonko Mbuvi Gidion Kioko & 9 Others as Interested Parties.
2. The background of the case which was before the High Court is that on 7th August, 2017, Hon. Michael Mbuvi Sonko and Polycarp Igathe, were elected as the Nairobi Governor and Deputy Governor respectively. Subsequently, Polycarp Igathe resigned creating a vacancy in the office of the Deputy Governor.
3. On 6th January, 2020, Hon. Sonko (hereinafter referred to as the appellant) nominated the Hon. Anne Kananu (the 11th respondent) to be vetted by the County Assembly to fill the vacant position of Deputy Governor. The appointment of the 11th respondent was challenged in Nairobi High Court Anti-corruption and Economic Crimes Division Petition No. 1 of 2020 Peter Odhiambo Agoro v



- Anne Kananu Mwenda & Another (Agoro case), and on 3rd December, 2020, the Nairobi County Assembly passed a resolution to remove the appellant as Governor and on 17th December, 2020, the Senate impeached him.
4. On 4th January, 2021, the orders blocking the vetting and appointment of the 11th respondent were discharged following the withdrawal of the Agoro case. The 11th respondent was then vetted, approved, and appointed as Deputy Governor leading to the several petitions before the High Court.
 5. The 1st petitioner's contention was that the appointment of the Deputy Governor was a nullity as the 11th respondent's nomination had been withdrawn, the appellant had already been impeached, the Speaker had already assumed office of Governor and the Independent Electoral & Boundaries Commission (hereinafter referred to as IEBC) had gazetted a by election as per [the constitution](#).
 6. The 1st petitioner argued that the vetting and approval of the 11th respondent could only be valid if the appellant had not withdrawn and or revoked her nomination, and was still a Governor at the time she was vetted and approved, that her assumption of office was unconstitutional, and that by virtue of Article 182(4) of [the Constitution](#), if a vacancy occurred in the office of Governor and Deputy Governor, the Speaker shall act as County Governor, and an election shall be held in 60 days by virtue of Article 182(5).
 7. The 1st petitioner further stated that in much the same way Article 146(2) of [the Constitution](#) prohibits the Speaker of the National Assembly, while acting as President from reconstituting the National Government, or otherwise exercising powers of an elected President, an acting Governor had no powers to exercise the powers of an elected Governor, that in the absence of a substantive Governor, no one had the constitutional power to appoint the nominee to the office of the Deputy Governor because that power rested with the Governor as the two positions are inseparable. In addition, that Section 32D (1)(b) of the [County Governments Act](#) only allows an elected Governor to appoint a nominee as the Deputy Governor, that in the absence of a substantive Governor in office there was no one with the constitutional power or authority to appoint the nominee to the office of the Deputy Governor, and the same solely vests with the Governor.
 8. The 1st petitioner further lamented that a crisis would ensue if the elected Governor were from a different party because the Deputy and Governor cannot belong to different parties (Hon. Kananu was from Jubilee party), that a Deputy Governor could only assume office of Governor if the vacancy in the office of Governor arises, while both Governor and Deputy Governor were in office at the date of vacancy.
 9. The 1st petitioner was emphatic that any by-election had to be for the position of both the Governor and Deputy Governor, and a Constitutional crisis would ensue if the Governor would be asked to appoint another Deputy Governor who had been vetted and approved by the County Assembly.
 10. The 2nd petitioner filed his petition and supporting affidavit on 10th January, 2021. He however withdrew the petition, and subsequently did not participate in the High Court proceedings.
 11. The 3rd petitioner's case was premised on the allegation that the 4th interested party, Polycarp Igathe had not resigned as the Deputy Governor (It is however on record that Mr. Igathe informed the court that he had formally resigned and had no interest in these proceedings).
 12. The 4th petitioner challenged the call by the IEBC for a by election on the basis that it violated Articles 10,38,81, 180 and 182 of [the Constitution](#) and Section 18 of the Elections Act as read with Rule 51 (4) of the [Election \(General\) Regulations](#) 2021, that IEBC could not call for a by election for the position of Governor before conclusion of the vetting exercise on the IEBC's certificate of nomination of the 11th



- respondent, and that by disregarding the certificate of nomination and calling for a by election, 11th respondent's constitutional rights had been violated as her nomination certificate is yet to be revoked.
13. The 5th, 6th and 7th petitioner's case was that the vetting and subsequent swearing in of 11th respondent as Deputy Governor usurped the power of Nairobi residents to exercise their democratic right to elect their Governor under Article 38 of *the Constitution*, and was therefore a nullity.
 14. All the petitioners contended that the appellant ceased holding office on account of impeachment, and no one else was capable of appointing 11th respondent as his Deputy, thus her swearing in was an illegality, and the Speaker who assumed office of the Governor was required to hold office until the newly elected County Governor assumed office after an election pursuant to Article 180 (1) of *the Constitution*.
 15. The 8th and 9th petitioners contested the manner in which the 11th respondent was vetted, approved, appointed and sworn in, arguing that as of 18th December, 2020, when the appellant was impeached, the office of the Deputy Governor was vacant and Article 182 (2) of *the constitution* was not applicable, that a by election should have been held in 60 days as announced by the IEBC, that since she had not been vetted by the County Assembly by the time the Governor's position fell vacant she could not be appointed as Deputy Governor as the events under Article 182(2) had crystallized, and that the legal rights attached to the nomination could not be revived as there was no substantive Governor in office to appoint her as Deputy Governor.
 16. They further argued that the election of Governor and Deputy Governor were intertwined, as such the appellant's legitimacy was derived from the electorate, and once he was impeached, the nomination of 11th respondent lost its legitimacy, her nomination as Deputy Governor was dependent on the appellant continued stay in office, and that both seats being vacant they could only be filled through a by election.
 17. It was the petitioners' further argument that Section 32D of the County Governments (Amendment) Act did not apply retrospectively to the 11th respondent's case as it did not fall under any of the exemptions perceived by the Supreme Court's decision in Samuel Kamau Macharia & Another v KCB [2012] eKLR. They further submit that a court of law had no power to stop the running of constitutional timelines, therefore the process of a by election could not be reversed, and the Speaker's act of appointing a Deputy Governor offended the doctrine of separation of powers.
 18. The 10th petitioner argued that the action of the respondents robbed the voters the opportunity to participate in the elections, the vetting process was illegal since nomination of the 11th respondent was revoked by the appellant, and that upon impeachment of a Governor only a Deputy Governor serving at the time of the impeachment could ascend to that position. That the actions and processes initiated by the appellant which were incomplete as at the time of his impeachment lapsed, that as at the time the Speaker took over the office of the Governor and Deputy Governor remained vacant and the Speaker's role could not exceed 60 days and that the said actions and processes cannot be resurrected for finalization.
 19. The petitioner further argued that the Speaker could not perform the functions of a Governor except the duty of appointing a Deputy Governor and that gubernatorial positions were elective not appointive, and that as at the time of vacancy in the office of the Governor, there was no Deputy Governor to assume office, and since the appellant had been impeached she was ineligible to be vetted and appointed as a Deputy Governor.



20. In addition as at the time the Speaker took over as acting Governor both offices of the Governor and Deputy Governor were vacant and that acting as Governor, the Speaker could not appoint a Deputy Governor.
21. The 11th respondent's case was that in nominating her, the appellant was not sincere, as he knew that once she assumed office he would be impeached. That the appellant's action to sponsor the Agoro case, and obtain orders restraining the County Assembly from vetting her was premised on the fact that he had no authority or power to withdraw the nomination once tabled, as that would violate the doctrine of separation of powers.
22. The 11th respondent maintained that the impeachment of the appellant did not affect the validity of the constitutional process of filling the vacant office of the Deputy Governor, the process of her appointment as Deputy Governor was on going as at the time the appellant was impeached; process required to run its course, and the by - election was prejudicial to her constitutional right to be appointed Deputy Governor. Further, that there was no vacancy for the Governor and Deputy Governor, so there was no reason for holding a by election.
23. The 11th respondent stated that although the County Government Act was enacted after her nomination, she was deemed to have been approved for appointment after the lapse of 14 days; that the appellant's letter purporting to withdraw her nomination had no legal effect, and the petition had been overtaken by events following the ruling by Justice Mrima authorizing her vetting. Further, that the publication of advertisements calling for submission of views by members of the public constituted sufficient public participation. The 2nd respondent, (Habib Omar Kongo) argued that at the time of the 11th respondent's nomination there was no requirement in law for the appellant to call for applications to fill the position of Deputy Governor; that after the petitioner withdrew the Agoro case, and once the court declined the cross petition, the conservatory orders dated 17th February, 2020, lapsed and paved way for the vetting of 11th respondent.
24. The 2nd respondent stated that the notification of withdrawal was not brought to the attention of the County Assembly, describing it as a forgery that was subject to police investigations. Further that the offices of the Governor and Deputy Governor are separate and distinct, and the actions performed by the occupants of either office survives any vacancies in those offices, therefore the impeachment of the appellant could not affect the nomination, vetting, approval, appointment and swearing in of the 11th respondent; that the vetting which had already commenced needed to run its course as the position could not be filled through a new vetting or election process. The 2nd respondent maintained that the courts ought to fill in gaps where *the Constitution* was vague or had a glaring lacuna, and that a Deputy Governor could assume office through election or nomination. Further, that the circumstances in this case were unique because at the time of impeachment, there was an ongoing process for the appointment of Deputy Governor which was completed after the Speaker had assumed office of Governor in an acting capacity; and the Governor became functus officio once he nominated a person for appointment as Deputy Governor.
25. The 3rd respondent argued the 11th respondent was validly nominated to be vetted for the Deputy Governor's position, and that following the withdrawal of the Agoro case nothing stopped the County Assembly from proceeding with the vetting exercise.
26. In addition, the impeachment of the appellant did not affect the pending vetting of the 11th respondent as her name had been submitted prior to the impeachment; and there was no legal provision that a nomination pending approval lapses when the appointing authority leaves.



27. He also argued that there was no valid withdrawal of the 11th respondent's nomination, dismissed the suggestion that an acting Governor could only perform limited tasks; that in any event, the current situation was not anticipated under *the Constitution*, as acknowledged by the Supreme Court in Advisory Opinion Reference No. 1 of 205; In the matter of the speaker of the County Assembly of Embu(2018) eKLR, to the effect that *the Constitution* could not foresee and provide for every scenario, and a mechanical approach in discerning the purpose of *the Constitution* was to be avoided.
28. The 3rd respondent referred to the case of *Golden Line International Limited v Bluesea Shopping Mall Limited and 3 Others*, [2016] eKLR to argue that Section 32D of the *County Governments Act 2020*, had not been enacted in February 2020 when the 11th respondent had been nominated and therefore could not apply retrospectively; a by-election could not be held since constitutional timelines had lapsed and could not be expanded. On the question as to whether there was public participation in the vetting of the 11th respondent, the 3rd respondent reiterated that the public was involved in the process.
29. The 4th respondent invoked the provisions of Article 182(4) and (5) of *the Constitution* which provides for the holding of an election whenever there is a vacancy in the office of the Governor and Deputy Governor, in such a scenario the Speaker acts as Governor for 60 days within which an election must be held and that in this case there was a validly nominated Deputy Governor at the time the Governor was impeached.
30. The 4th respondent submitted that the procedure prescribed in the Advisory opinion in Re Speaker County Assembly Embu (supra), was applied in the event of a vacancy in the office of the Deputy Governor; and following the nomination of the 11th respondent and her acceptance, the County Assembly became exclusively seized of all the matters pertaining to her nomination, vetting and approval; the nomination was not invalidated by the fact that the appellant had been barred from office as a condition for his bail, that the nomination of 11th respondent was conducted in accordance with the law in place at the time; that after vacation of the conservatory orders in the Agoro case he issued a notice inviting the public to attend the vetting hearings of 11th respondent and thereafter the public was notified of the swearing in and assumption of office via Gazette Notices. The 4th respondent argued that the processes of the County Assembly were protected from judicial interference, and the petitions offended the doctrine of separation of powers.
31. The 5th respondent, submitted that none of the petitioners cited any legal provision to support their assertion that a Deputy Governor cannot be sworn into office in the absence of the Governor; that the assumption of office by 11th respondent was validated by the ruling of Mrima, J; and once a constitutional office holder discharged his or her duty, the officer could not recall the action as he was *functus officio*.
32. The 6th respondent stated that on being informed by the Speaker of vacancies in the office of Governor and Deputy Governor, it proceeded to fix a date for the by election, and that it acted as required by law and did not violate any constitutional provisions.

That by the time the vacancies occurred the vetting of 11th respondent had been stayed; that the elections could not be held, and the stay did not expand constitutional timelines but rather froze them.
33. The appellant, maintained that a Deputy Governor could not be appointed when there was a vacancy in the office of the Governor; that the moment he was impeached all his uncompleted actions lapsed; and the Speaker in acting capacity had no power to appoint a Deputy Governor.
34. In addition, that the election ought to have been held within 60 days upon the Speaker assuming the office of Governor; that constitutional timelines could not be expanded or constricted; and that the



- appointment of the 11th respondent was devoid of mandatory public participation as envisaged in *the Constitution*.
35. The trial court narrowed the issues for determination as below;
- i. Whether the court had jurisdiction to determine the consolidated petitions. In this regard, the trial court concluded that the principle of separation of powers did not deny it jurisdiction to inquire to the alleged unconstitutionality surrounding the appointment of the 11th respondent as the Deputy Governor, which jurisdiction entitled the court to consider the processes undertaken by the County Assembly to vet and approve her.
 - ii. With regard to the Interpretation of *the Constitution*, the Judge held that *the Constitution* must be read as a whole and interpreted in a holistic manner as was stated by the Supreme Court in *Re The Matter of Kenya National Commission on Human Right* [2014] eKLR.
36. The court also noted the importance of interpreting *the Constitution* in order to address the circumstances of a given case, emphasizing on its duty to ensure that constitutional principles and objectives are promoted and fulfilled and contribute to the development of the law and good governance, and in this particular case, to enhance the objects of devolution and principles of devolved government.
- (iii) In relation to revocation of nomination, the Judge noted that from the nomination letter dated 6th February, 2020, the gist of this appointment was that the appellant was facing criminal charges; had been barred from accessing his office; and not wanting County operations to be affected by his absence he withdrew the nomination because the Agoro case had taken too long to be resolved. The court noted that the appellant only acted on the Supreme Court Advisory Opinion rendered on 9th March, 2018, two years down the line, after he had been barred from office. The court described the appellant's conduct as that of a person in no hurry to fill the Deputy Governor vacancy. The court agreed with the 11th respondent's assertions that her nomination was not sincere taking into consideration the delay, and the earlier botched attempt to appoint Miguna Miguna who was not a member of his political party. The court also noted that the appellant's desire to take over the Agoro case challenging 11th respondent's nomination confirmed her averment that her nomination was tainted with malice. The court found that there were inconsistencies in the reasons advanced by the appellant for the withdrawal of nomination.
37. The Judge found that the attempt to withdraw the nomination was unlawful and without basis, as there was no evidence that the proviso to Section 18 of the *Election Act* had kicked in. Further, that Section 51 of the *Interpretation and General Provisions Act* was not applicable since Article 182 of *the Constitution* of Kenya provided the procedure for filling a vacancy in the office of the Deputy Governor, and the appellant could not unilaterally withdraw nomination without approval and/or consent of County Assembly.
38. The Judge also observed that at the time of the alleged withdrawal, the conservatory orders in the Agoro case had not been vacated and the attempt at withdrawal was an indirect interference with the court process. In finding that the nomination was not withdrawn, the Judge agreed with the Speaker, that the letter withdrawing the nomination was not received in his office, and he only became aware of the letter through the Agoro case.
39. As regards the effect of impeachment of the appellant, and nomination of the 11th respondent, the court noted that the law had foreseen a situation where a Governor could be removed or was unable to discharge the functions of the office; that it would be absurd to erase all incomplete actions and



decisions lawfully being undertaken by a Governor at the time of his impeachment; and the position of Governor being a public office had to have continuity.

40. The Judge took judicial notice of the fact that there were counties where elected Governors had exited office through death or impeachment, yet at no time did the actions initiated by them lapse; that upon nomination of the 11th respondent, the appellant's role ended, and his impeachment did not have the effect of terminating or undoing the process that was ongoing. The court found no error in the action of the County Assembly to conclude the process after the impeachment.
41. In finding that the requirement for public participation in the appointment of the 11th respondent was met, the Judge noted that on 8th January, 2021, the County Assembly placed an advertisement in the local dailies informing residents of the impending vetting of the 11th respondent, and was of the view that clear information was provided regarding the vetting, how and where to submit the views.
42. As regards the import of Section 32D of the County Government (Amendment Act 2020) and the *Public Appointments (County Assemblies Approval) Act* 2017 on the appointment of the 11th respondent, the Judge held that Section 32D adopted the opinion of the Supreme Court in *Re speaker, County Assembly of Embu* [2018] eKLR, which gave guidance on the procedure in appointing a person to fill the Deputy Governor vacancy. The Judge noted that Section 32D clearly showed that a Governor could only appoint a Deputy Governor with approval of the County Assembly; that it does not follow that where the County Assembly approves a nominee for the position of Deputy Governor, and the specific Governor who made the nomination was unable to complete the appointment process, then the entire process is a nullity. It was the court's view that whoever replaced the Governor who had made the nomination, could then complete the process.
43. Further, that according to the Advisory, once a Deputy Governor is nominated and subsequently approved, the next step would be the swearing in of the nominee. The court found that the 11th respondent took the oath of office of Deputy Governor in compliance with Article 74 of *the constitution* and Section 30(1) of The *County Governments Act*. The Judge also noted that her appointment straddled two legal regimes, initiated under the parameters of the Supreme Court Advisory, and concluded under Section 32D of the County Government Act; that there was therefore nothing wrong with the conclusion of the process under the law that was operational at the commencement of the process; and there was no merit in the suggestion that there ought to have been a formal appointment of the 11th respondent after her approval by the County Assembly.
44. There was also the question on the effect of Section 32D of the County Governments (Amendment) Act 2020 and the *Public Appointments (County Assemblies Approval) Act*, 2017 with regard to the powers of the Speaker of County Assembly under Article 182(5) of *the Constitution*, and the question as to whether the Speaker acting as Governor could appoint a Deputy Governor whose nomination was ongoing when a Governor was impeached, the Judge held that Article 146 and 134 of *the Constitution* as relied on by the appellant, was only applicable where the President is temporarily absent, which was not a permanent scenario as the President would be expected to return to office and this could not be equated to the situation in this case.
45. The court guided by the provisions of Article 259(3) (a) & (b) found that although the Speaker of a County while acting as a Governor under Article 182(5) of *the Constitution* had no power to appoint a Deputy Governor, the peculiar circumstances of this case entitled the Speaker to complete the ongoing process of the appointment of the 11th respondent as a Deputy Governor, and that had she not been approved by the County Assembly, the by election would then have been held.



46. The court agreed with the 6th respondent position that a court order staying the occurrence of a constitutional event did not amount to breach of constitutional timelines and relied on the holding in George Michael Wanjohi case where the Supreme Court held that a stay order would not be tantamount to stopping a constitutional process.
47. Regarding the issue as to whether 6th respondent violated the law by calling for a by election, the court found that the actions of the 6th respondent are a direct consequence of the letter from the speaker informing the commission of the vacancies, and that it cannot be faulted for calling for a by election.
48. The Judge's findings were that the nomination, vetting, approval and swearing in of the 11th respondent as the Deputy Governor was constitutional and complied with the applicable laws. Consequently, the court found that the petitions challenging her ascendancy to the position of Deputy Governor were without merit and dismissed them. These findings gave rise to the present appeal, where the appellant challenges the ruling of the Superior Court on 15 grounds; which can be summarized as follows;

That; the 11th respondent did not plead the issue of adequate public participation in her cross petition, thus the superior court erred in allowing that issue to be raised and argued before them; the superior court misapprehended the law on public participation in the process of appointment of the Nairobi City County Deputy Governor; the Superior Court erred in holding that the Speaker of the County Assembly as the acting Governor lawfully appointed the 11th respondent as the Deputy Governor; the Superior Court erred in failing to abide by the principle of stare decisis by declining to adhere to the applicable and binding decisions of the Supreme Court of Kenya.

49. This being a first appeal it is this Court's primary duty to re- evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as per Rule 29 (1)(a) of the Court of Appeal Rules. See also the celebrated case of *Selle & Another V Associated Motor Boat Co. Ltd. & Others (1968) EA 123*. In our view, the main issues in in this appeal are;

- i. Whether the revocation of the Nomination of the 11th respondent is valid.

The argument is that since the appellant had revoked the 11th respondent's nomination vide letter dated 7th December, 2020, she was no longer eligible to be appointed as the Deputy Governor. The 11th respondent on the other hand contends that the purported withdrawal of her nomination was ill motivated, an afterthought with no legal effect as no reasons were given for the alleged withdrawal and that leave of the County Assembly was not sought. The County Assembly's position is that the withdrawal letter of the nomination was not brought to its attention as per the Standing Orders. The Speaker maintains that there was no letter from the appellant withdrawing the nomination, and states that he only became aware of the alleged letter on 7th January, 2021, when the appellant filed his cross petition. He further indicated that the stamp on the letter did not have a signature indicating the person who received as per procedure, nor was the letter entered in the register of documents and letters kept in his office. On 6th January, 2020, the appellant wrote a letter to Hon. Beatrice Elachi nominating the 11th respondent as the Deputy Governor (the gist of this being the criminal charges he faced, and being barred from office, he did not want County operations to be affected by his absence). On 3rd December, 2020, the Nairobi County Assembly passed a resolution to impeach him, on 7th December, 2020; the appellant wrote another letter withdrawing the nomination of the 11th respondent citing delay in concluding the Agoro case.

50. From the tenor of the said letter, there is no doubt that this action was only propelled by the fact that the appellant had been barred from accessing his office, and we concur with the finding of the



- High Court that the appellant's conduct demonstrated a reluctance in filling the vacancy. The office of Deputy Governor had been vacant until the criminal case and barring orders spurred him in to action.
51. This Court also agrees with the finding of the High Court that whereas the Supreme Court rendered its supervisory opinion on the lacuna that existed in law relating to the filling of a vacancy in the office of the Deputy Governor on 9th March, 2018, it took the appellant two years to act on the advisory opinion to nominate a person to the office of the Deputy Governor. We cannot fault the findings of the High Court that the appellant's inconsistencies as to the reasons for withdrawal of the nomination point to ill will and malice.
 52. The appellant has relied on Section 51 of the *Interpretation and General Provisions Act* as a legal provision authorizing him to withdraw the nomination. We have considered this provision and agree with the finding of the High Court that Article 182 of *the Constitution* already provides for the filling of a vacancy in the office of the Deputy Governor and the said Section does not offer him refuge. We are in agreement that it was therefore not possible for the appellant to unilaterally withdraw the nomination without reference to the County Assembly.
 53. Article 182 of *the Constitution* is clear the circumstances under which the office of the Governor can become vacant, Article 181 of *the Constitution* provides for removal of a Governor through impeachment and Section 33 of the *County Governments (Amendment) Act* 2020 provides for the removal procedure. Therefore, there was no error in law in the findings of the High Court that the law foresaw a situation where a Governor could be removed from office, or was unable to carry out his duties and as such it would be absurd to erase all the incomplete actions lawfully being undertaken by the Governor at the time of impeachment, and as such upon nominating the 11th respondent, the ship had now left the dock and was now firmly in the hands of the County Assembly.
 54. Needless to say, after the County Assembly received the nomination, the appellant's role in the process ended. We endorse the views held by the High Court that there has to be continuity in a public office, and that the appellant's impeachment could not have the draconian effect of undoing or terminating the process of nomination that was on going. It is for this reason that the High Court, in our view appropriately took judicial notice of the fact that there have been instances where elected Governors have died or been impeached whilst in office and that at no time did any actions initiated by the lapse merely because they had left office.
 55. We note with approval the observation made by the High Court that it was not far-fetched that an elected Deputy Governor can become Governor, and nominate an unelected Deputy Governor who may eventually assume the office of the Governor, and nominate an unelected Deputy, the end result being that Nairobi County would have been governed by an unelected leadership.
 56. The concept of public participation plays a central role in both legislative and policy functions of government whether at National or County level, and applies to the procedure of legislative enactment. Article 10, 174 and 196 of *the Constitution* obligates the County Assembly to facilitate public participation and involvement in the process of legislation. Further, Sections 3 and 87 of the County Governments (Amendment) Act enjoins the County Government to carry out public participation in the process of formulating and implementing policies laws and regulations among others.
 57. Any action done requiring public participation is fatal if such participation is omitted, and would render such actions invalid. In *Doctors for life International v Speaker of National Assembly and Others* (CC12/05)[2006]ZACC 11;2006(12) BCLR1399 (CC);2006 (6)SA 416(CC), the court held that;

‘the right to political participation is a fundamental human right set out in a number of international instruments. In most of these instruments the right consists of at least 2



elements, a general right to take part in the conduct of public affairs and a more specific right to vote and/or be elected...significantly the ICCPR guarantees not only the right but the opportunity to take part in the conduct of public affairs. This imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation.’

The importance of public participation has been restated by the Court of Appeal in the case of *Martin Nyaga Wambora v County Assembly of Embu & 37 Others* [2015] eKLR where it was held that,

‘...the removal of a governor was not just any other business of the County Assembly but a matter in which the electorate was deeply vested. The matter was weighty and of great interest to the people of Embu whose only opportunity to participate effectively in the removal process was from the time of communication of the motion to the speaker to time the motion was debated.’

58. There is no doubt that nomination of the Deputy Governor is an act that requires the application of *the Constitution* and the law. Clearly therefore before nomination, vetting and appointment of a Deputy Governor there must be public participation and failure to follow laid down procedures warrant the courts to negate any such actions. There is no doubt in our minds that it was necessary for the public to be involved in the process of nomination and vetting; that the public participation ought to be real, not illusory, and ought not to be treated as a mere formality for purposes of fulfilment of Constitutional dictates. The County Assemblies must urge constituents to participate in the process by making use of as many as possible such as places of worship, barazas, national and vernacular radio stations, print and electronic media and other avenues where the public are known to converge to disseminate information with respect to the intended action. Lenaola, J. agreeing with the sentiments of Sachs J. in the case of *Minister of Health v New Click South Africa (PTY) Ltd* was of the opinion that it does not matter how public participation was effected. What is required is that the public be accorded some reasonable level of participation. This same case further held at para. 155,

‘it cannot be expected of the law maker that a personal hearing will be given to every individual ...what is necessary is that the nature of the concerns ought to be communicated to the law maker and taken into account in formulating legislation.’

59. In the case of *Mui Coal Basin Local Community & 17 Others v Permanent Secretary Ministry of Energy & 15 others* [2015] eKLR the court observed that public participation did not mean that everyone must give their views which is impracticable, rather there ought to be evidence of intentional inclusivity in the participation program. The court further stated that public participation calls for innovation and malleability depending on the nature of the subject matter. In other words, no single regime or program of public participation can be prescribed, and the court will not use any litmus test to determine if public participation has been achieved or not. The only test the courts use is one of effectiveness. This court has insisted on the importance of public participation in the case of *Legal Advice Center & 2 Others vs County Government of Mombasa & 4 Others* holding that the purpose of permitting public participation is to afford the public the opportunity to influence the decision of the law makers for it to have meaning.
60. We have considered whether an opportunity was afforded to the public to air their views on the proposed nomination and vetting. The appellant was of the opinion that the 11th respondent’s appointment was devoid of public participation and that the public was not given a 7 days’ notice about the impending vetting, neither was the vetting advertised in a daily newspaper with national circulation, nor was the vetting done publicly. In response it was submitted that the public was invited



to submit views on the suitability through adverts in the local dailies, and the fact that the Members of the County Assembly vetted her was in itself a form of public participation.

61. From the evidence on record, it is clear that an advert was placed in The Daily Nation Newspaper of 8th January, 2021, informing residents of the impending vetting of the 11th respondent which was scheduled for 15th January, 2021, that she appeared before the Select Committee on Appointments on 15th January, 2021; and that the County Assembly order paper of the same day had one of its orders of business a motion to adopt the report of the Select Committee on Appointments of the vetting of the position of Deputy Governor. This Court also takes judicial notice of the public notoriety of the impeachment of the appellant, and the nomination of the 11th respondent and it is not an exaggeration to state that this was a matter already well in the public domain. It is also no secret, that the Daily Nation newspaper is a paper with wide national circulation in Kenya.
62. In the final analysis, the rule of thumb is that a reasonable opportunity was given to the public and all interested parties with timely access to information. We have reviewed the foregoing as well as the judgment of the High Court on the issue of public participation, and we are persuaded that public participation carried out passes the test of effectiveness, and that the requirement for public participation was met.
63. As regards the import of Section 32 (D) of the *County Government Act* and the *Public Appointment (County Assemblies Approval) Act*, 2017 on the appointment of 11th respondent, it was submitted that Section 32 (D) was not complied with as there was no substantive Governor in office to appoint a Deputy Governor. It is argued that there was need for a Governor to complete the process by way of a formal appointment in to office, and that such appointment be in writing under the County Seal, and that the appointment step having been skipped then the 11th respondent was not formally appointed.
64. The response to this is twofold - that even if Section 32D applied to the appointment, nonetheless from the time the Act came into force and by dint of the said Section she was deemed to have been appointed upon the lapse of fourteen days from date of her approval by the County Assembly. Secondly, that Section 32D should not be applied to the contested nomination as it was enacted in July, 2020, prior to the nomination which happened in February, 2020.
65. Prior to the enactment of Section 32D the Supreme Court had given guidance in *Re Speaker, County Assembly of Embu* supra on the procedure to be followed in the appointment of the person to fill the vacancy in the office of Deputy Governor. The Supreme Court in its advisory stated that after approval by the County Assembly the only step remaining was for the Deputy Governor to take oath of office. The High Court noted, and we agree, that a reading of Section 32D did not support the suggestion that there has to be a formal appointment of the Deputy Governor once the County Assembly approves the nomination.
66. On the other hand, Section 4 of the *Public Appointments (County Assemblies Approval) Act*, 2017 provides that the appointing authority is required to make a formal appointment upon receiving the approval of the County Assembly. The Speaker of the Assembly was at the time acting Governor, and vide Gazette Notice No. 208, Vol. CXXIII-No.13, formally appointed the 11th respondent as the Deputy Governor. The High Court noted, and rightly so that the Act came in to force on 29th March, 2017, a year before the Supreme Court rendered its supervisory opinion In Re Speaker, County Assembly of Embu [2018] eKLR. The appointment of the 11th respondent was in between two legal regimes having been initiated under the parameters of the Supreme Court's Advisory Opinion and concluded under Section 32D of the County Governments (Amendment) Act, and it was only appropriate to conclude the process under the law operational at the commencement of the appointment process.



- 67. Consequently, we hold that the High Court considered the relevant law, and analysed the applicable legal principles to arrive at the conclusion that there was no need for a formal appointment of the 11th respondent after her approval by the County Assembly.
- 68. The appeal before this court, for the above reasons, is without merit and is dismissed with costs to be borne by the appellant

DATED AND DELIVERED AT NAIROBI, THIS 22ND DAY OF JULY, 2022.

ASIKE - MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

