IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A.)

CIVIL APPEAL NO. 416 OF 2019

BETWEEN

FERNINAND NDUNG'U WAITITU BABAYAO.....APPELLANT

AND

REPUBLIC …….....RESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya at Nairobi (G.W. Ngenye, J.) dated 8th August, 2019

in

ACC Revision No. 30 of 2019)

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JUDGMENT OF THE COURT

1. On 29th July, 2019 **Ferdinand Ndung'u Waititu Babayao**, the Governor of Kiambu County, (the appellant) and 12 others were arraigned before the Anti-Corruption Court at Nairobi (L.N. Mugambi, C.M.) in Anti-Corruption Case No. 22 of 2019. The first count against the appellant was **conflict of interest contrary to section 42(3) as read with section 48 of the Anti-Corruption and Economic Crimes Act, 2003.** The particulars of the offence were that between 2nd July 2018 and 13th March 2019 at Kiambu County, the appellant knowingly acquired an indirect private interest, to wit, receipt of **Kshs.25,624,500/=** in respect of payments made to Testimony Enterprises Limited for contracts awarded to the said company by the Kiambu County Government.

2. In the second count, the appellant faced a charge of dealing with suspect property contrary to **section 47(1)** as read with **sections 47(2) A** and **48** of the **Anti-Corruption and Economic Crimes Act, No. 3 of 2003**. The particulars of the offence were that between 2nd July, 2018 and 13th March, 2019 in Nairobi the appellant and Saika Two Estate Developers Limited (a company associated with the appellant), received **Kshs.18,410,500/=** from Testimony Enterprises Limited, having reason to believe that the aid amount was acquired from Kiambu County Government through corrupt conduct.

3. The third count against the appellant and his wife, **Susan Wangari Ndung'u** trading as Bienvenne Delta Hotel, was dealing with suspect property contrary to **section 47(1)** as read with **section 47(2) A** and **48** of the **Anti-Corruption and Economic Crimes Act, No. 3 of 2008**. The two were alleged to have received **Kshs.7,214,000/=** from Testimony Enterprises Limited, while having reason to believe that the said amount was acquired from Kiambu County Government through corrupt conduct.

4. The appellant denied the said charges and through his counsel, **Prof. Tom Ojienda, S.C.,** sought to be admitted to bail/bond. The Director of Public Prosecutions (DPP), through **Mr. Alexander Muteti** and **Mr. Vincent Monda**, **Senior Assistant Directors of Public Prosecutions (SADPP)** did not oppose the application but urged the trial court to impose certain conditions for the appellant's release on bail. The conditions proposed by the DPP were:

(a) The appellant to be barred from going back to the office pending determination of the criminal case.

(b) The appellant and all his co-accused to deposit their travel documents with the court.

(c) All the accused persons not to contact witnesses, either directly or indirectly or in any way tamper with the exhibits.

(d) All the accused persons not to access their offices.

5. The appellant strongly opposed the suggested terms of his admission to bail/bond, particularly the first one, arguing that imposing such conditions would amount to a violation of **Article 49(1) (h)** of the **Constitution** and **section 62(6)** of the **Anti-Corruption and Economic Crimes Act (ACECA)**, and was tantamount to unlawfully removing him from office.

6. In a considered ruling, the trial court ordered release of the appellant on a cash bail of Kshs.15,000,000/= in the alternative bond of Kshs.30,000,000 plus one surety of a like amount. In addition, the trial court ordered that appellant shall not access his office until the criminal case is heard and determined. The appellant was also ordered to deposit his travel documents with the court. The appellant and indeed all his co-accused were further ordered not to contact witnesses or interfere with prosecution exhibits or any other evidence.

7. Being aggrieved by the orders made by the trial court, on 30th July 2019 **Prof. Ojienda** on behalf of the appellant, wrote to the Deputy Registrar of the Anti-Corruption and Economic Crimes Division of the High Court requesting for revision of the trial court's order relating to the bail and bond terms. He stated, inter alia, that the bail and bond terms are excessive, issued *per incuriam* and the terms amount to a constructive denial of bail and bond without compelling reasons. He filed submissions and a list of authorities in support of the application for revision.

8. The DPP opposed the application for revision of the trial court's decision, and filed grounds of opposition stating, *inter alia*, that it offends the provisions of **section 364(5)** of the **Criminal Procedure Code** in that the applicant ought to have filed an appeal; that the applicant was seeking interpretation of various constitutional questions, a jurisdiction that is a preserve of the High Court sitting as a Constitutional Court; and that the bail terms met the threshold set out under **Article 49** of the **Constitution** and therefore there was no justification for the High Court's intervention.

9. In her ruling, Ngenye-Macharia, J. flagged three issues for determination:

> *(i) Whether the court had jurisdiction to entertain the application;*
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> *(ii) Whether the learned trial magistrate erred in imposing a condition to the bail terms that the appellant should not set foot in his office pending the hearing and determination of the trial; and*
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> *(iii) Whether the bail terms imposed were harsh and excessive.*

10. Regarding the first issue, the court held that it had supervisory jurisdiction over decisions made by the subordinate court under **sections 362 and 364** of the **Criminal Procedure Code** and **Article 165(6) and (7)** of the **Constitution**.

11. On the second issue requiring the appellant to keep off his office during the pendency of the criminal case, the learned judge held that attaching conditions to the grant of bail is not tantamount to a removal of the Governor from office. The learned judge delivered herself thus:

> ***"34. Therefore the learned magistrate considered one key factor in granting bail; which is the likelihood of interference with witnesses due to the relationship the accused persons would have with the witnesses. This is buttressed by the further condition barring them from contacting the witnesses. The question that the court registers in mind is why this condition should apply to rest of the accused persons and not the 1st Applicant.***
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> ***35. The simple rationale is premised on the charges that the accused persons face. Without restating the charges, it is clear that they concern their abuse of office, dealing with property of the County government, engaging in fraudulent procurement practices, fraudulent acquisition of public property or money laundering all revolving around the County Government of Kiambu.***
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> ***36. In as much as the accused persons remain innocent until otherwise proven, it would make a mockery, not only to the people of the County of Kiambu but to the letter and spirt of the Constitution that persons charged with such weighty offences can be allowed to go back to the office to continue with dealings that they are alleged to have committed against the law. Furthermore, the objects and purpose of ACECA can be glimpsed from the prevention, investigation and punishment of corruption, economic crime and related offences and for matters incidental thereto and connected therewith."***

12. As to whether the other bail terms imposed on the appellant and his co-accused were harsh and excessive, the learned judge found that the amount of Kshs.15,000,000/= cash bail or bond of Kshs.30,000,000/= with a surety of similar amount was appropriate.

13. Being dissatisfied with the High Court ruling, the appellant preferred this appeal, raising 16 grounds of appeal in his memorandum of appeal. However, in his written submissions, the appellant's learned counsel condensed the issues that fall for determination by this Court into two, namely:

> ***"(i) Whether the finding of the learned judge (Hon. Justice Ngenye-Macharia), that the order of the learned trial magistrate directing the appellant not to set foot in his office until his trial is heard and determined did not amount to his removal from office, (and) violated the Constitution.***
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> ***(ii) Whether the finding of the learned judge (Hon. Justice Ngenye-Macharia), that the bail granted to the Appellant by the learned trial magistrate of cash Kshs.15,000,000/= or bond of Kshs.30,000,000/= with a surety of a similar amount was appropriate and neither harsh nor excessive for charges of amounts totaling to a sum of Kshs.51,249,000/= was correct."***

14. When the appeal came up for hearing, the appellant was represented by **Prof. Tom Ojienda, Senior Counsel (SC), Hon. G.**

Imanyara, N. Havi, C. Kiprono and K. Oriri. The respondent was represented by **Alexander Muteti and Vincent Monda (SADPP) Alex Akula and Wesley Nyamache, Senior Prosecution Counsel (SPC)**.

Both parties relied on their written submissions and various authorities, which they briefly highlighted.

15. For starters, Prof. Ojienda submitted that this Court has jurisdiction to hear and grant the orders sought in this appeal, arguing that the reliefs sought on the substantive issues do not avail in the jurisdiction under **rule 59** of the **Court of Appeal Rules** which requires an appellant, before filing an appeal, to file a notice of appeal stating the nature of the acquittal, conviction, sentence or finding against which it is desired to appeal. Counsel stated that under **rule 5(2) (a)** of this **Court's Rules** this Court is empowered to grant interlocutory reliefs in order to preserve the substance of an appeal, in this case, to secure the liberty of the appellant. The appellant had filed a notice of appeal against the ruling of the High Court.

16. Counsel cited this Court's decision in **THOMAS PATRICK GILBERT CHOLMONDELEY v REPUBLIC [2008] eKLR,** where the appellant appealed against the decision of the trial court (the High Court) that he had a case to answer. Although the Court firstly held that no appeal to it lay where the appellant had not been convicted of any offence, the Court nevertheless allowed the appeal under special circumstances. The Court held that it had jurisdiction to entertain an appeal against an order of the High Court made in the course of a trial directing the defence to supply to the prosecution statements and particulars of defence witnesses and copies of any documents or forensic reports, for the reason that the order violated the constitutional right of the accused to a trial under **section 77** of the **repealed Constitution**, which breach was appealable as of right under **section 84(7)** of the **repealed Constitution**.

17. The appeal before this Court is neither purely civil nor purely criminal in nature, it raises constitutional issues that are weighty, counsel submitted. He cited the Supreme Court decision in **DEYNES MURIITHI & 4 OTHERS v LAW SOCIETY OF KENYA & ANOTHER [2016] eKLR**, where a question was brought as to whether the Court of Appeal has jurisdiction to issue orders under **rule 5(2) (b)** of its **Rules** when the appeal is neither purely civil nor purely criminal.

The Supreme Court held:

> ***"36. It is thus, not the case, that the Court of Appeal lacked jurisdiction to issue Orders in the Rule 5(2) (b) application, just because the matter is sui generis, and is constitutional in nature, and neither civil nor criminal. The High Court has already, quite properly, taken the position that it is unnecessary to bring such special matters under a wholly novel regime of procedural law.***
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> ***The High Court at Kisii, in Peter Ochara Anam & 3 Others v. Constituencies Development Fund Board & 4 Others, Constitutional Petition No. 3 of 2010; [2011] eKLR, found that the particular issue, though occurring in a constitutional petition, was civil in nature. It thus held:***
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> > ***"In as much as the Constitutional petition is a special jurisdiction, it is in the nature of civil proceedings. In the absence of rules made thereunder, the procedure of handling such a petition must be akin to civil proceedings. It cannot be that merely because it is a special jurisdiction, the rules of evidence for instance should not apply, be ignored nor witnesses should not be sworn, pleadings should not be signed and questions in cross-examination should not be asked. That will be a direct invitation to judicial chaos and legal absurdity. I do not therefore wholly agree or subscribe to the submissions of the petitioners that the petition being neither a criminal nor civil proceedings, it must be conducted in vacuum."***
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> ***37. It is evident to us that appeals dealing with constitutional issues, may in substance be civil in nature. Accordingly, the Court of Appeal has the power to exercise its original and discretionary jurisdiction to entertain interlocutory applications to preserve the subject matter of any appeals."***

Prof. Ojienda urge this Court to find and hold that it has jurisdiction to hear and determine this appeal.

18. Turning to the question whether the finding of the learned judge that the trial court's order directing the appellant not to set foot in his office until his trial is heard amounted to his removal from office and violated the Constitution, counsel cited the provisions of **sections 30 and 31** of the **County Governments Act** that set out the functions and responsibilities of a County Governor and his powers respectively. To deny the appellant access to his office is to impair his ability to discharge his functions and responsibilities and amounts to his suspension from exercising his statutory roles as Governor, counsel submitted. He added that there is absolutely no law that empowers a court to occasion a vacancy in the office of a Governor or suspend his statutory duties, functions and powers through the imposition of bail terms and conditions.

19. The appellant's counsel cited **section 62(1) of ACECA** which provides that:

> ***"A public officer or State officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until the conclusion of the case: provided that the case shall be determined within twenty-four months".***

He then drew our attention to **section 62(6)** of **ACECA** which provides that:

> ***"This section does not apply with respect to an office if the Constitution limits or provides for the grounds upon which a holder of the office may be removed or the circumstances in which the office must be vacated."***

From the provisions of the latter, a holder of a constitutional office such as the appellant, can only be removed and/or suspended from office in accordance with the laid down constitutional procedure, counsel urged.

20. Counsel further submitted that although the learned judge indicated that her approach to the interpretation of the various relevant provisions of the Constitution was holistic, the said approach was at odds with the principle of harmonization as a cannon of interpretation cited in the case of **JOSEPH MBALU MUTAVA v ATTORNEY GENERAL & ANOTHER [2014] eKLR,** which requires that all the provisions bearing upon a particular subject be construed as a whole, without any one provision destroying the other, but each sustaining the other. In that regard, counsel stated, the learned judge ought to have borne in mind the provisions of **Articles 181 and 182** of the **Constitution** instead of limiting her interpretation to **Article 49(1)(h)** regarding the right to bail.

21. Prof. Ojienda faulted both the magistrate and the learned judge for adopting the ruling of Mumbi Ngugi, J. in **MOSES LENOLKULAL v DPP, Criminal Revision No. 25 of 2019** with regard to interpretation of **section 62(6)** of **ACECA** and Chapter 6 of the Constitution where the learned judge held, *inter alia*:

> ***"47. The question then arises: after promulgating the Constitution with the national values and principles of Article 10 and the clear provisions on leadership and integrity in Chapter Six, could the people of Kenya have intended to then pass legislation that allowed state officers for whom grounds of removal from office are provided in the Constitution, to ride roughshod over the integrity required of leaders, face prosecution in court over their alleged corrupt dealings, and still continue to enjoy the trappings of office as they face corruption charges alleged to have been committed while in office and committed within the said offices?***
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> ***48. Could the people of Kenya have wished to have their legislative authority, which they have delegated, under Article 1, to the legislature, to be exercised in such a way as to pass legislative provisions such as section 62(b) of ACECA that allow state officers whose removal is provided for in the Constitution to remain in the same offices that they are alleged to have abused and used to their personal enrichment to the detriment of the public they are supposed to serve while undergoing prosecution for such offences?***
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> ***53. It seems to me that the provisions of section 62(6), apart from obfuscating, indeed helping to obliterate the 'political hygiene' that Mr. Nyamodi spoke of, are contrary to the constitutional requirements of integrity in governance, are against the national values and principles of governance and the principles of leadership and integrity in Chapter Six, and undermine the prosecution of officers in the position of the applicant in this case. In so doing, they entrench corruption and impunity in the land …."***

22. Counsel submitted that the learned judge, like Mumbi Ngugi, J, went on an unnecessary frolic of purporting to test the constitutionality of **section 62(6)** of **ACECA** as against an entire chapter of the Constitution on Leadership and Integrity instead of applying a straight forward provision of ACECA that parliament enacted to shield constitutional offices from the excesses of the Executive.

23. Counsel cited the **"omitted-case"** cannon of statutory interpretation as discussed by a former Associate Justice of the United States of America Supreme Court, Antonin Scalia, in his book, Scalia, A, & Garner, B. (2002). **"READING LAW".** St. Paul, MN: Thomson/West. The rule simply states that: **"Nothing is to be added to what the text states or reasonably implies".** In other words, a matter not covered is to be treated as not covered. In that regard, counsel submitted, the learned just should have interpreted **section 62(6) of ACECA** literally as granting an exemption to constitutional offices from suspension on their arraignment in court on corruption or economic crime charges.

24. Prof. Ojienda submitted that in **MUHAMMED ABDALLA SWAZURI & 16 OTHERS v REPUBLIC [2018] eKLR** the High Court did not find any unconstitutionality in the provisions of **section 62(6) of ACECA** and urged the Court to find that the learned judge erred in her interpretation of that section.

25. On the last issue, it was submitted that the appellant's request for revision of the terms of bail and bond was based on the provisions of **Articles 49(h)** and **50 (2) (a)** of the **Constitution**, **sections 123, 123A, 362 and 364** of **Criminal Procedure Code** and the **Judiciary Bail and Bond Policy Guidelines**. Counsel argued that the excessive terms of bail and bond set by the trial court and affirmed by the learned judge contravened the aforesaid provisions of the law. Several cases were cited where courts have held that bail and bond terms are intended to ensure the attendance of an accused person for trial and should not be unreasonable.

26. For the aforesaid reasons, the Court was urged to allow the appeal; set aside the High Court ruling; allow the appellant to access his office and discharge his constitutional functions; and reduce the cash bail from Kshs.15,000,000/= to Kshs.2,000,000/= or a bond of Kshs.5,000,000/=.

27. The DPP opposed the appeal. He filed submissions and a bundle of authorities that were highlighted by Mr. Monda. He started by pointing out that the appeal is incurably defective as it is based on wrong rules; that the appellant had filed a civil appeal whereas both the decision of the trial magistrate and that of the High Court are purely criminal matters; consequently, this Court does not have jurisdiction to entertain the appeal.

28. Regarding the merit of the appeal, Mr. Monda submitted that the appellant was simply barred from accessing his office pending hearing and determination of the criminal case for purposes of preserving the integrity and credibility of the case and public interest; and that the order is not tantamount to a removal of the appellant from office.

29. Mr. Monda further submitted that **section 62(6)** of **ACECA** which the appellant was citing as his refuge is inconsistent with the letter and spirit of the Constitution in that it is discriminatory in favour of constitutional office holders charged with corruption or economic crimes compared to common public officers.

30. Counsel urged the Court to interpret the Constitution and **section 62** of **ACECA** wholesomely and in a manner that brings life to the

Constitution and development of the law. He urged the Court to adopt the position taken by S.T. Manyindo, Deputy Chief Justice, in **MAJOR GENERAL DAVID TINYEFUZA v ATTORNEY GENERAL [2002] UCCA No. 1 of 1997**, where the learned judge held:

> ***"In my opinion Constitutional provisions should be given liberal construction, unfettered with technicalities because while the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed may give rise to new and fuller import to its meaning. A Constitutional provision containing a fundamental right is a permanent provision intended to cater for all time to come and, therefore, while interpreting such a provision, the approach of the Court should be dynamic, progressive and liberal or flexible, keeping in view ideals of the people, socio-economic and politico-cultural values so as to extend the benefit of the same to the maximum possible.***
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> ***In other words, the role of the Court should be to expand the scope of such a provision and not to extenuate it. Therefore, the provisions in the Constitution touching on fundamental rights ought to be construed broadly and liberally in favour of those on whom the rights have been conferred by the Constitution.***
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> ***The second principle is that the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution. The third principle is that the words of the written Constitution prevail over all unwritten conventions, precedents and practices. I think it is now also widely accepted that a Court should not be swayed by considerations of policy and propriety while interpreting provisions of a Constitution."***

31. Lastly, regarding the other terms that were imposed by the trial court in granting bail to the appellant, and which were affirmed by the High Court, Mr. Monda submitted that they were fair and reasonable and the court struck the right balance between the appellant's personal interest and public interest. In any event, counsel added, no evidence was placed before the court to show that the appellant had encountered any difficulties in complying with the imposed condition. With that, we were urged to dismiss the appeal in its entirety.

ANALYSIS AND DETERMINATION

Jurisdiction

32. Following delivery of the impugned ruling on 8th August, 2019 in **Criminal Revision No. 30 of 2019,** the appellant through Prof. Tom Ojienda & Associates filed a notice of appeal under **rule 75** of the **Court of Appeal Rules**; which falls under **Part IV** of the **Rules**, that deals with civil appeals. **Rule 75** requires any person who desires to appeal to the Court to give notice in writing within fourteen of the date of the decision against which it is desired to appeal.

33. **Part III** of the **Court of Appeal Rules** is the one that deals with criminal appeals. **Rule 59** requires any person who desires to file a criminal appeal to give notice within fourteen days of the date of the decision sought to appeal from. The notice should state the nature of the acquittal, conviction, sentence or finding against which it is desired to appeal. Ordinarily, in criminal matters there are no interlocutory appeals, appeals are filed only after the final determination of a case.

34. The DPP urged us to find that this Court has no jurisdiction to entertain the appeal as instituted and strike it out.

35. On the other hand, the appellant's counsel submitted that this is a *sui generis* appeal, as it is neither criminal nor civil in nature, it largely relates to interpretation of various constitutional and statutory provisions and therefore we have jurisdiction to entertain it as a civil appeal, even if the initial case before the trial court is a criminal case and the matter before the High Court was instituted as criminal revision.

36. We must ask ourselves: How then did the case metamorphose from a criminal matter to a civil one? Why was it not filed as a criminal appeal as in the case of **THOMAS PATRICK GILBERT CHOLMONDELEY v REPUBLIC** (supra)? We do not have any answer to these questions and neither did the appellant's learned counsel shed any light. While we do not encourage this kind of practice, we note what the Supreme Court stated in **DYNES MURIITHI & 4 OTHERS v LAW SOCIETY OF KENYA & ANOTHER** (supra), that appeals dealing with constitutional issues may in substance be civil in nature.

37. Further, we think that to decline jurisdiction and strike out the appeal simply because it was not instituted as a criminal appeal would be tantamount to summary rejection of the appeal on a matter of form rather than substance, which would be contrary to the spirit and intent of **Article 159 (2) (d)** of the **Constitution**.

Denial of access to his office: Did it amount to removal of the appellant from office?

38. The trial magistrate held that barring the appellant from accessing his office neither violated the Constitution nor amounted to his removal from office; it was only **"intended to ensure the integrity and credibility of this trial and to ensure the public interest is safeguarded"**.

The learned judge concurred with the trial magistrate. We have already quoted her sentiments on the issue.

39. On the other hand, Prof. Ojienda argued that the learned judge's holding amounted to constructive removal and/or suspension of the appellant as the Governor of Kiambu County. He cited **Black's Law Dictionary**, 10th Edition, which defines **"office"** as a position of duty, trust, or authority for a public purpose; a place where business is conducted or services are performed. The same dictionary defines **"removal"** as the immediate termination of an office holder's privilege to serve in that office, usually after a vote. **"Suspension"** is defined to mean the temporary deprivation of a person's powers or privileges, especially of office or profession; it also includes temporary withdrawal from employment, as distinguished from permanent severance.

40. Counsel submitted that the effect of the trial court's orders that were affirmed by the High Court was to occasion an unlawful vacancy in the office of Governor of Kiambu County, which is contrary to the provisions of **Article 182 (1)** of the **Constitution**. The Article stipulates that the office of Governor falls vacant when the holder thereof dies; resigns in writing addressed to the Speaker of the County Assembly; ceases to be eligible to be elected county governor under **Article 180 (2);** is convicted of an offence punishable by imprisonment for at least twelve months; or is removed from office under the Constitution. He concluded by saying that there is absolutely no provision of law that empowers a court to occasion a vacancy in the office of a Governor through the imposition of bail terms and conditions.

41. The determination of this issue involved interpretation of **Articles 49(1) (h), 181** and **182** of the **Constitution** as well as **section 62 (6)** of the **ACECA.** The learned judge had that in mind and stated: **"since the Constitution provides for mechanisms of removal or vacating such state offices no other law would supersede it."** She then considered the provisions of **Articles 181** and **182** of the **Constitution** that relate to removal of a county governor and vacancy that office respectively and concluded as follows:

> ***"This Court having aligned itself to the supremacy of the Constitution holds that attaching conditions to the grant of bail is not tantamount to a removal of the Governor from office."***

42. We do not think that the learned judge can be faulted for arriving at that conclusion. **Article 49(1) (h)** of the **Constitution** provides that an arrested person has the right **"to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released".**

43. **Section 62(1)** of **ACECA** provides that:

> ***"A public officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until the conclusion of the case…."***

Whereas **section 62(6)** stipulates that:

> ***"This section shall not apply with respect to an office if the Constitution limits or provides for the grounds upon which the holder of the office may be removed or the circumstances in which the office must be vacated."***

44. In our view, to the extent that neither the trial magistrate nor the learned judge's holding purported to remove or suspend the appellant from office of Governor, Kiambu County, **section 62 (6)** of **ACECA** had no application in the matter that was before her. The appellant has not been suspended from his office, he is still the Governor of Kiambu County; he is still entitled to his full pay, not half. In the circumstances, the learned judge cannot be accused of having failed to apply the **"omitted case"** cannon of statutory interpretation in affirming the terms of the appellant's grant of bail. The issue of constitutionality or otherwise of **section 62 (6)** of **ACECA** is not before us for determination in this appeal and therefore we cannot express any opinion on the same.

45. Regarding the conditions attached to the grant of bail by the trial court, the learned judge was of the view that the trial court wanted to ensure that the relationship between the appellant and potential witnesses does not undermine the interests of justice, and so she held:

> ***"47. After considering the nature of the charges, the whereabouts of potential witnesses, the source of evidence and the position of influence held by the 1st Applicant, (the appellant) it was reasonable for the trial court to attach the condition that the 1st Applicant will not access the Kiambu County Government offices".***

46. **Article 49(1) (h)** of the **Constitution** grants an accused person the right to be released on bond or bail on reasonable terms and conditions pending trial, unless there are compelling reasons not to be released. The **Bail and Bond Policy Guidelines** formulated by the Judiciary requires courts in granting bail to take into consideration, *inter alia*, the facts and circumstances of each case; and to balance the rights of an accused person against the interests of justice.

47. The same considerations are applicable to all accused persons, irrespective of their standing in society. In **REPUBLIC v ZACHARIA OKOTH OBADO, [2018] eKLR**, the accused is the Governor of Migori County and was charged with murder. Among the conditions for his release on bail were that he shall not go anywhere within 20 kilometres of Homa Bay – Migori boarder; he shall report once a month to the High Court's Deputy Registrar; and that he shall not contact or intimidate, whether directly or indirectly, any of the prosecution witnesses.

48. In the case of the appellant, bearing in mind the nature of the charges preferred against him; the circumstances under which the alleged offences were committed; that some of the prosecution witnesses are county staff who are answerable to the appellant, it was not far-fetched for the prosecution to contend that the appellant would most likely interfere with their witnesses or conduct himself in a manner likely to compromise their case if he was not barred from accessing his office during the pendency of the case. There are documented incidents of loss and/or disappearance of vital documents from certain offices where public or state officers, charged with corruption or economic crimes related to their work, have been allowed unrestricted access to their offices during the pendency of the cases.

49. Looking at the statutory functions and responsibilities of a county governor; the structure of governance; and the legislative and administrative institutions of a county, we do not think the impugned bail terms, unless set aside, are likely to paralyse the operations of Kiambu County as was submitted by the appellant's learned counsel.

Whether the Kshs.15,000,000 cash bail or bond of Kshs.30,000,000 with a surety of similar amount was harsh and excessive.

50. The appellant argued that above terms as set by the trial court and affirmed by the High Court are harsh and excessive; unreasonable;

contrary to **Article 49 (1) (h)** and **sections 123** and **123A** of the **Criminal Procedure Code**; the Judiciary Bail and Bond Policy Guidelines; and were fixed without regard to the circumstances of the case and evaluation of the nature or seriousness of the case; the character, antecedents, associations and community ties of the appellant; the appellant's record in respect of the fulfilment of obligations under previous grants of bail; and the strength of the evidence of the appellant having committed the offence. The learned judge found the bail/bond sums imposed by the trial court appropriate.

51. The learned judge held that the grant of bail by the trial court was an exercise of discretion and the High Court could only interfere if the decision was shown to be plainly wrong or granted without consideration of relevant factors. The learned judge stated:

> ***"57. The court was under a duty to consider the grant of bail for each individual accused person, examine their circumstances before setting commensurate bond or bail terms and attaching conditions. It is trite that the setting of bond or bail amounts is an exercise of discretion by the trial court and before interfering with that exercise this court must be cautious as was ably enunciated by Baroness Hale, as she then was, in Re J (A Child) (Child Returned Abroad: Convention Rights) [2006] UKHL 4, that:***
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> > ***"If there is indeed a discretion in which several factors are relevant, the evaluation and balancing of those factor is … a matter for the trial [Magistrate]. Only if his decision is so plainly wrong that he must have given far too much weight to a particular factor is the appellate court entitled to interfere: … Too ready an interference by the appellate court, …., risks robbing the trial [Magistrate] of the discretion entrusted to him by law."***

52. We respectively agree with the learned judge's holding and we have no basis of faulting her in any way.

53. In conclusion, therefore, we find this appeal devoid of merit and dismiss it in its entirety. The appellant shall bear the costs of the appeal. It is so ordered.

Dated and delivered at Nairobi this 20th day of December, 2019.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR