IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: MAKHANDIA, MUSINGA & KIAGE, TT.A)
CIVIL APPEAL NO. 18 OF 2016

NICK GITHINJI NDICHU..... APPELLANT

AND

CLERK, KIAMBU COUNTY ASSEMBLY..... 1st RESPONDENT

KIAMBU COUNTY ASSEMBLY..... 2nd RESPONDENT

GEORGE MUGOYE MBEYA T/A

MUGOYE & ASSOCIATES ADVOCATES..... 3rd RESPONDENT

THE LAW SOCIETY OF KENYA..... 4th RESPONDENT

(An appeal against the Judgment and Decree of the Employment and Labour Relations Court at Nairobi (Nduma Nderi, J) delivered on 25th September, 2015

in

ELRC No. 11 of 2014)

JUDGMENT OF THE COURT

Since promulgation of the current Constitution and coming into force of the two tier system of government, that is, the National and County Governments, it has been the bane of the governors, speakers and chief officers of the County Governments to face motions of impeachment or threats of such motions from time to time from members of the County Assemblies. Simply put, they are terrorised and kicked around at will by members of the County Assemblies. The response by the would be victims, has been to dash to court for protection by way of judicial review or constitutional petition proceedings for various declarations, orders of certiorari, prohibition, damages, conservatory orders and so forth. This case was no different.

Nick Githinji Ndichu, "the appellant", was a budding lawyer and politician when he successfully contested for the position of Speaker of the Kiambu County Assembly, "the 2nd respondent", and was so elected pursuant to Article 178(1) of the Constitution on 22nd March 2013. He was also a member of the Law Society of Kenya, "the 4th respondent". As such member, he was entitled to take part in its professional activities from time to time. It was in this regard that on 5th November 2013, the 4th respondent invited him and other speakers of county assemblies to its annual retreat scheduled for Brazil between 22nd and 29th November 2013 at a cost of Kshs.530,000. Upon accepting the invitation the appellant informed the Clerk, Kiambu County Assembly, "the 1st respondent", the accounting officer of the 2nd respondent, to facilitate the processing of payments and necessary travel arrangements. The appellant thereafter left for Brazil on 30thNovember 2013 but unexpectedly returned on 3rd December 2013, his sojourn having been cut short due to pressing family problems.

However, members of the 2nd respondent were unimpressed by the appellant's excursion to Brazil and on 25th February 2014, through Hon. Mbuiyu Nelson Munya, member of County Assembly for Ndeiya Ward, they introduced a motion seeking his removal as speaker of the County Assembly on the grounds that; he had forced the finance department to pay for his travelling expenses to Brazil that was not sanctioned by the 1st respondent; had personally authorised the trip without any legal basis and without the sanction of the 1st and 2nd respondents; had not in fact travelled to Brazil; the money spent for the alleged retreat amounting to Kshs 530,000 was just but theft and misuse of public resources; the assembly's procurement staff were not involved in any way with the procuring of the travel tickets or other incidentals and therefore the appellant was guilty of flouting procurement laws; procuring the legal services of the 3rd respondent unprocedurally; and finally, that the appellant was guilty of using derogatory language to members of the 2nd respondent who had raised concerns over his leadership. He was also accused of having employed political persecution in order to instil fear to these respondents as well as staff. On 25th February 2014, the motion for the removal of the appellant as aforesaid was overwhelmingly passed.

The appellant however, complained that; though present, he was denied a chance to respond to the allegations contrary to standing order 64(3) of the county standing orders; the manner of voting was in breach of the standing orders and in particular the invocation of standing order number 68; the impeachment was unfair, unreasonable, unconstitutional and offended the mandatory provisions of the Constitution and in particular, the right to be heard; no notice of intention to move the motion was given to the 1st respondent as required by law, signed by at least a third of the members of the 2nd respondent, which was a contravention of the appellant's statutory rights under section 11(4) of the County Governments Act and Standing Order number 58(2) read in tandem with the

Article 178 (3) of the Constitution, Articles 47 and 50 of the Constitution as read with Standing Order number 63, too were contravened; the 1st respondent failed to ensure that the appellant appeared before a relevant select committee of the 2nd respondent considering the matter and to ensure that he was given a chance to enlist the services of counsel and in contravention of the appellant's constitutional rights under Articles 47 and 50 as read together with standing order number 63(2) the respondents failed to ensure that any report on the findings of the select committee together with any other evidence adduced was availed to the appellant at least 3 days before the date of the motion.

It was on the basis of the foregoing raft of complaints that the appellant lodged in the Employment and Labour Relations Court at Nairobi, Constitutional Petition Number 11 of 2014 against the 1st and 2nd respondents as well as George Mugoye Mbeya T/a Mugoye & Associates Advocates, "the 3rd respondent", and the 4th respondent, whom he named in the petition as 1st and 2nd interested parties respectively. The 3rd respondent's walk into the petition was on the footing that the appellant had unprocedurally, improperly and single handedly instructed the said law firm to act for the 1st and 2nd respondents when it had earlier been disqualified for want of a valid tax compliance certificate. As for the 4th respondent, it was because it had invited the appellant for the retreat in Brazil.

The petition was to secure the enforcement of the appellant's rights and freedoms guaranteed under the Constitution. Alternatively, the appellant claimed that his removal from office constituted unfair termination of employment, summary dismissal which was against his legitimate expectation of employment for the whole term of 5 years that he was entitled to as an elected speaker. The appellant therefore claimed a total sum of Kshs 39,809,250 as compensation on account of loss of employment for the remainder of the term, 3 months payment in lieu of notice, gratuity for the legitimate expectation of 5 years, allowances due to him for presiding over and chairing committees, the service board and leave days for the remainder of the expected term of 5 years.

The appellant's other cause of action was founded on the tort of defamation. In the same petition he claimed that on 26th February 2014, the 1st and 2nd respondents jointly and severally, maliciously and without justifiable cause, wrote, printed and published a libellous article in the Standard Newspaper dated 26th February 2014 titled "Kiambu Speaker loses seat over fraud claims: Ward Reps kick Ndichu out after they allege he defrauded assembly of Kshs. 530,000 by faking a trip to Brazil". The impugned article read as follows;

> "Mr. Ndichu seen as key ally of the Governor William Kabogo, was accused of defrauding the Assembly of shs 530,000.00 for travel to Brazil, a trip members claimed he failed totake..... ".

To the appellant, the words complained of above were false and maliciously authored, printed and or published and in their natural and ordinary meaning, the words were understood to refer to the appellant and to mean that he was a corrupt, fraudulent, dishonest, untrustworthy and crooked individual. Thus, the words injured, disparaged and lowered his esteem with which the right thinking members of the society in general regarded and held him, and as such he had suffered mental anguish, psychological torture, distress, embarrassment and being a lawyer who left his profession for the employment by the 1st and 2nd respondents, the nature of the malicious allegations rendered him incapable of getting clients to continue effectively and efficiently running his law firm to earn a livelihood. Pursuant to all the foregoing, the appellant prayed for:

> a) A declaration that his removal from office by the respondents was illegal, unlawful and unconstitutional as it contravened his rights guaranteed under the Constitution.
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> b) A conservatory order to reinstate him to the office as existed ante 25th February 2014.
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> c) An Order of Certiorari to quash Gazette Notice Number 1319 dated 26th February 2014 de-gazetting him as the Speaker of the County Assembly of Kiambu and the impeachment decision.
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> d) Permanent Injunction to restrain the 1st and 2nd respondents from advertising, recruiting, interviewing or in any other manner filling the position of the County Speaker.
>
> e) General, Punitive,aggravated, exemplary damages and compensation for unfair and unlawful loss of employment.

In their joint response to the petition the 1st and 2nd respondents asserted that the petition was fatally defective, unmeritorious, incompetent, frivolous and an abuse of the court process; that the proceedings leading to the ouster of the appellant as the speaker of the 2nd respondent were conducted legally, procedurally and with due regard to all provisions of the law and the standing orders of the Assembly. In particular, they confirmed that the Notice of Intention to remove the appellant from office was issued and served on 25th February, 2014; it was duly supported and signed by more than the threshold of members of the 2nd respondent required in law; that the procedure for the removal of the speaker of the 2nd respondent was provided for in Standing Orders Numbers 58, 64, 83 and 228. All these standing orders were strictly adhered to during the proceedings leading to the removal of the appellant as the speaker. That the procedural motion for his removal pursuant to standing order number 228 together with the substantive motion pursuant to standing order number 58 were tabled before the County Assembly Business Committee, which the appellant chaired and were approved. Subsequent thereto, the appellant presided over the County Assembly proceedings and knowingly or deliberately failed, refused and or otherwise declined to raise the purported procedural flaws. He was thus estopped from raising them now. The appellant despite being accorded opportunity to defend himself, failed to convince the

members of the 2nd respondent to their satisfaction as to why he could continue serving them as their speaker. It was then that the motion was overwhelmingly carried. Indeed, a record number of 69 out of 82 members of the 2nd respondent voted for his impeachment. In the premises the appellant had no legal basis to petition the High Court for the grant of the reliefs sought, the 1st and 2nd respondents argued.

With regard to the trip to Brazil, it was the contention of the respondents that the trip was a private affair as the invitation was never addressed or received by the 1st respondent as required and the appellant used undue influence, intimidation, coercion and threats to the accounts office to secure the money for the personal trip. To the utter surprise of these respondents, the appellant attended County Assembly Service Board meeting on the morning of the 4th December, 2013 immediately upon arrival from Brazil without first reverting to the purported family issues that had made him cut short his retreat, and thereafter proceeded to another meeting in Malindi.

With regard to the 3rd respondent, the 2nd respondent took the view that the appellant once again unprocedurally and single handedly sourced its services contrary to the procurement laws. That though the firm had applied for pre qualification for provision of legal services, it did not qualify on account of lack of a valid tax compliance certificate. These respondents had no bone to pick with the 4th respondent.

The removal of the appellant as the speaker, according to these respondents, having complied with the provisions of the Constitution, County Governments Act and the Assembly Standing Orders, it could not be deemed, therefore, that the termination of his employment was unfair or amounted to a summary dismissal under the Employment Act, hence no damages were payable.

With regard to defamation, the stand taken by these respondents was that at no time did they write, print, publish and or report the libellous article in the

Standard Newspaper. They denied circulating any of the publication or defamatory article whether in print or electronic media. Therefore, any claim for damages on account of defamation was misguided, unfounded, misconceived, an afterthought, baseless, vexatious and an abuse of the court's process, the 1st and 2nd respondents contended.

The 3rd respondent supported the petition. He contended that sometime in November 2013, the 2nd respondent advertised a tender notice inviting tenders and pre-qualification from bidders for various supplies of goods and services for the financial year 2013/2014, one of them being the provision of legal services. Desirous of being on the panel, this respondent on 29th November 2014 bought the tender documents and, after providing the necessary information required, submitted the same for evaluation. On 3rd February 2014, he received instructions via a telephone call from the 1st respondent to act for the appellant who had been sued in Nairobi HC Petition No. 47 of 2014, Jedidah Njoki Kiarie V IEBC & Kiambu County Assembly Speaker. The respondent acted in the matter to completion without any complaint being raised regarding his appointment. He therefore verily believed that by receiving instructions from the 1st respondent to act as aforesaid, the 1st respondent had followed the laid down procedure and that the appointment was valid and dispelled the notion by the 1st and 2nd respondents that he was handpicked single handedly by the appellant to act for the 2nd respondent.

As for the 4th respondent, its case was that on or about the 5th November 2013, it invited Speakers of County Assemblies, who were its members, including the appellant, to an annual retreat scheduled to take place in Brazil between 22nd and 29th November 2013 at a cost of Kshs 530,000. The appellant was among those who confirmed their participation and was duly registered and payment made directly to its secretariat; that the appellant and other members of the 4th respondent left for Brazil on 30th November 2013. However, on 3rd December 2013 the 4th respondent was informed by the appellant that he had to cut short his visit and travel back home immediately due to pressing family problems.

Confronted with these set of facts, Nduma Nderi, J had no difficulty in concluding that the appellant was impeached by 69 out of 82 members of the 2nd respondent for abuse of office, in that, he unlawfully caused public funds to be used for his private trip, and had therefore abused his office in that respect. Secondly, that the appellant wrongfully retained the legal services of 3rd respondent while he was not on the list of the prequalified service providers and had, in fact, been disqualified for want of a tax clearance certificate. Further, his appointment was in violation of the 2nd respondent's procurement regulations and policy.

On the question of unlawful termination of employment or summary dismissal, the Judge found that the 1st and 2nd respondents had demonstrated that the appellant had used public resources on a private retreat, which action was contrary to the laws and policy governing the operations of the 2nd respondent.

They had also demonstrated that the appellant awarded work to the 3rd respondent contrary to the procurement policy and regulations of the 2nd respondent. Accordingly, the petitioner had failed to discharge the evidential burden on a balance of probabilities to show that his removal was for non valid reasons.

On the procedure followed by the 1st and 2nd respondents in the removal of the appellant, the Judge ruled that the said respondents had successfully demonstrated that they complied with the procedures provided in the County Governments Act and Standing Orders of the 2nd respondent in the impeachment. Accordingly, there was proof that none of the appellant's constitutional rights as set out in the petition were violated.

On defamation, it was the view of the Judge that the information set out in the petition and published by the local media reflected the allegations made by the 2nd respondent against the appellant and the named media, which in any event, had not been enjoined in the petition, had a legitimate reason to publish the said information emanating from the floor of the 2nd respondent. Therefore the information published was not defamatory as it reflected the true position of public proceedings before the 2nd respondent. Furthermore, there was no evidence from any of the cited newspapers or the appellant as to the source of the published information.

Finally, the Judge ruled that the 1st and 2nd respondents had not specifically traversed the appellant's claims for payment in lieu of notice, gratuity and 3 months' salary in lieu of notice. All these claims totalled Kshs 1,739,250 and therefore remained uncontested. He therefore found in favour of the appellant in respect of the specific claims as they constituted legitimate terminal benefits duly earned by the appellant. He also awarded costs against the 1st and 2nd respondents.

Aggrieved by part of the judgment as to his removal as the Speaker of the 2nd respondent, and that the information published against him in the media was not defamatory, the appellant proffered this appeal. He sought to impugn the above holdings on 5 grounds, to wit:- that the learned judge erred in: finding that the appellant was impeached procedurally but did not take into account the right to be heard thereby arriving at a decision that was erroneous in terms of fair procedure; wrong interpretation and application of section 43(1) as read with section 47 (5) of the Employment Act, vis-a-vis the evidence adduced, thereby arriving at an erroneous finding that the appellant was lawfully terminated from employment by the 2nd respondent; failing to adequately and substantively address the constitutional violations meted out on the appellant, more particularly as embodied in Articles27, 47, 50 and 236 of the Constitution and more so, the violation of the doctrine of Audi Alteram Partem; failed to consider and or address the principle of legitimate expectation thereby narrowing the monetary award and lastly, misinterpreted Article 35 (5) of the Constitution vis-a-vis the evidence adduced thereby arriving at a finding that there were no defamatory claims made against the appellant.

At the pre-hearing conference before the Deputy Registrar of this Court, parties agreed to dispense with the appeal by way of written submissions with limited oral highlights. Subsequently, parties filed and exchanged their respective written submissions which we have carefully read and considered.

The appellant's submissions were to the effect that in the impugned judgment, there is no mention of the appellant's right to be heard contained in the standing orders numbers 63 and 64 of the 2nd respondent. Accordingly, failure of the Judge to take cognizance of these integral standing orders led to a miscarriage of justice. In particular the principle of legality and due process was thus violated; that the appellant was ambushed, legally waylaid and not given sufficient time to respond to the allegations levelled against him. In support of the above propositions, the appellant sought refuge in the case of County Assembly of Kisumu & 2 Others V Kisumu County Assembly Service Board & 6 Others, Civil Appeal No 17 & 18 of 2015 (Consolidated), where this Court held that impeachment or removal from office is a drastic step with serious ramifications on the career of an individual and can easily consign an individual to professional oblivion. It follows therefore that in impeachment proceedings, due process must be followed to the letter and must be strictly complied with. The appellant went on to submit that a proper report prepared as envisaged by standing order number 63 by a select committee of the 2nd respondent would have cleared the air regarding the appellant's rendezvous in Brazil and the circumstances thereof. The select committee would have had all the facts and documents surrounding the travel and the purpose for such travel thereby according all parties an opportunity to interrogate contents and findings emanating from such report. In any event, the appellant submitted that, he was not the accounting officer of the 2nd respondent, the 1st respondent was; and that money for the travel was paid directly to the secretariat of the 4th respondent. Even on the pertinent issue of the provision of legal services to the 2nd respondent by the 3rd respondent, all the correspondence between the 2nd and 3rd respondents were through the Deputy Clerk and Director of Legislative and Procedural Services of the 2nd respondent. In any event, the appellant submitted that the 3rd respondent provided urgent legal services prompted by certificates of urgency in not one, but two High Court cases. In the circumstances, it was the appellant's submission that it was unfair for the Judge to conclude that the appellant had failed to discharge the burden of proof on a balance of probabilities on the question of travel to Brazil as it was clearly a professional as opposed to a private retreat, attended by other County Assembly Speakers.

On legitimate expectation, it was submitted that the appellant had a legitimate expectation to claim compensation for the minimum duration of five years since he had committed no offence to warrant impeachment, and that this legitimate expectation would take the form of damages in the sum of Kshs 39,908,250. On this concept of legitimate expectation, the appellant relied on the case of Diana Kethi Kilonzo & Another v Independent Electoral and Boundaries Commission & 10 others (2013) EKLR where it was held that:

> "At its core, and in its broad sense, the doctrine of legitimate expectation is said to arise out of the promise by a public body or official which the person relying on anticipates will be fulfilled. It is also said to arise out of the existence of a repeated or regular practice the public body or official which could reasonably be expected to continue. Essentially, once made, the promise or practice creates Estoppels against the public body or official, so that the promise or practice would not be withdrawn without due process or consultation"

On the Judge's misapplication of Article 35(2) of the Constitution, it was submitted that the evidence adduced before court pointed to a distortion of the proceedings and the procedural irregularities visited upon the appellant. Information flowed freely and maliciously from members of the 2nd respondent, information that was libellous and scandalous to the person of the appellant that was subsequently printed, published and or reported in the print media. On damages for defamation, the appellant submitted that in assessing such damages the court had to consider the circumstances of the each case, position and standing in society of the person libelled, mode and extent of the publication, apology if offered and at what time of the proceedings, and the conduct of the defendant from the time when the libel was published up to the time of judgment. The damages should be fairly compensatory in light of the nature of the injury to reputation and that the award should also appear realistic in all the circumstances so as to vindicate the aggrieved party.

The 3rd respondent supported the appeal. He did so by merely adopting and associating himself with the submissions of the appellant. The 4th respondent neither supported nor opposed the appeal as it never appeared for the hearing of the appeal nor did it file written submissions.

Opposing the appeal, the 1st and 2nd respondents submitted that section 11 of the County Governments Act provided for the process for the removal from office of the speaker of the County Assembly which procedure was strictly adhered to. That the necessary notice was issued, the appellant was heard in response to the motion from the floor of the 2nd respondent, followed by the motion being carried by at least 75% of the members. There was no doubt that the appellant used public resources for a private function, single handedly sourced the 3rd respondent to provide legal services to the 2nd respondent in violation of the procurement laws of the 2nd respondent. All these were impeachable grounds. The respondents further submitted that the Judge correctly applied sections 43

(1) and 47(5) of the Employment Act in refusing to find that the appellant's employment was unlawfully or summarily terminated. With regard to the violations of the fundamental rights under Articles 27, 47, 50 and 236 of the Constitution and legitimate expectation, it was the respondents' submission that none of these violations were particularised in the petition. On the question of defamation, it was submitted that there was absolutely no evidence tendered in support of the claim.

As already intimated, the appeal is restricted to the holding by the Judge that the appellant was removed as Speaker of the 2nd respondent legally, procedurally and for valid reasons. Secondly, that the information published against him in the media was not defamatory. These are the only issues for determination in this appeal. We shall, therefore, not consider the submissions made with regard to the alleged termination of the appellant's employment as well as the question of legitimate expectation. Turning to the first issue, it is quite apparent that the procedure for the removal of a speaker of the County Assembly is elaborately spelt out in section 11 of the County Governments Act. It is in these terms:

> "11. (1) A speaker of a county assembly may be removed from office by the county assembly through a resolution supported by not less than seventy five percent of all the members of the county assembly.
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> (2) A notice of the intention to move a motion for a resolution to remove the speaker shall be given in writing to the clerk of the county assembly, signed by at least one third of all the members of the county assembly stating the grounds for removal.
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> (3) A motion for a resolution to remove the speaker shall be presided over by a member of the county assembly elected under section 9 (4).
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> (4) Before the debate and voting on a motion under subsection (3), the speaker shall be accorded an opportunity to respond to the allegations on the floor of the county assembly."

From this provision, four conditions have to be met before a speaker of the County Assembly can be lawfully removed. First, there must be a formal notice to the Clerk of the County Assembly to that effect, signed by a third of all members of the county assembly; second, the proceedings must be presided over by a Member of the Assembly elected by members of the county Assembly other than the incumbent speaker; third, the speaker must be afforded an opportunity to be heard; and lastly, the resolution must be passed by at least seventy five percent of the County Assembly members. This position was reinforced by the decision of this Court in the case of County Assembly of Kisumu & 2 others V Kisumu County Assembly Service Board & 6 others (supra). The Court stated;

> "Standing Order 58 of the 1st respondent's Standing Orders which mirrors word for word Section 11 of the County Governments Act requires four conditions to be met before impeachment of a County Speaker. First, there must be a formal notice to the clerk of the County Assembly stating the grounds of removal and signed by at least a third of the members of that County Assembly; secondly, the Speaker must be accorded an opportunity to respond; thirdly; the proceedings must be presided over by a member elected under section 9(4) of that Act; and fourthly, the resolution to remove the speaker must be passed by at least seventy five percent (75%) of the members."

There is a reason why the threshold for the removal of the speaker is that

high. The reason was given in the same judgment thus:

> "85. Impeachment or removal from office is a drastic step with serious ramifications on the career of an individual. It can easily consign an individual to professional oblivion. That is why Lord Denning cautioned in Selvarajan V Race Relations Board that "the fundamental rule is that, if a person may be subjected to pains and disabilities, or be exposed to prosecution or proceedings or to be deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case against him and be afforded a fair opportunity of answering it
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> 86. It follows that in impeachment proceedings, due process must be followed to the letter. The impeachment procedural provisions set out in any statute, in this case the County Governments Act, must be strictly complied with."

It is not disputed by the appellant that a formal notice to remove him dated 24th February 2014 was issued and served on the Clerk to the County Assembly,

one Mr. John Mwivithi Mutie on 25th February, 2014. The notice listed the grounds for his removal and was signed by a whopping 67 out of 82 of the County Assembly, surpassing the one-third threshold. The motion was originated by Hon. Mbuiyu Nelson Munga, member of the County Assembly for Ndeiya Ward. The reasons advanced for the removal of the appellant in the notice were that he had authorised the finance department to pay for his cost of travel to Brazil that had not been sanctioned by the 1st respondent and was not part of the Assembly work; that the assembly's procurement staff or tender committee were not involved in any way in procuring the tickets or other incidentals, and therefore he was guilty of flouting the procurement laws; that the 2nd respondent advertised for prequalification of goods and services and the 2nd respondent's evaluation completed the evaluation but, the appellant ignored the list and single-handedly picked the 3rd respondent to represent the 2nd respondent in suits which was in breach of section 29 of the Public Procurement and Disposal Act and finally, that the appellant had been using derogatory language to members of the 2nd respondent and staff and employing political intimidation to instil fear.

The procedure for the removal of the speaker of the 2nd respondent is duly provided for under the 2nd respondents standing orders as well. In

particular, standing order number 58 which is a replica of the provisions of section 11 of the County Governments Act aforesaid. Furthermore, standing order number 83 provides for a notice period of three days for any substantive motion touching on the personal conduct of the speaker or the conduct of the holder of an office whose removal from such office is dependent upon a decision of the County Assembly. Further, standing order number 228 empowers the Assembly to exempt any business of the Assembly from the provisions of the standing orders save for specific parts outlined in the said order and standing order number 83 is among them, and finally, standing order number 64 (1) provides that any motion for the removal of a person from office shall take precedence over all other business in the order paper for the day.

On the material before us, it is not disputed that, prior to the motion for impeachment of the appellant being moved, a procedural motion was proposed pursuant to standing order 228 by the leader of the majority party in the County Assembly, one Hon. Simon Kimani Komu, to exempt the motion from the provisions of standing order number 81(1) that require three days notice. Standing order number 47 mandates the County Assembly Business Committee to allocate time and sequence of the publication in the order paper of every motion which must be approved by the Speaker who in this case was the appellant. It does appear that both the procedural motion together with the substantive motion, were tabled before the County Assembly Business Committee on the 25th February, 2014 with the appellant in the chair. It is also not lost on us that the appellant, in his capacity as the speaker, pursuant to standing order number 44 (3) (e), was under obligation to satisfy himself as to whether the motion contained substantiable grievances and or allegations, so as to direct either, that the motion is inadmissible or notice of it should not be given without alterations or amendments as he may approve. However, and as it is readily apparent, the appellant in his capacity as the speaker, peremptorily accepted the motion for his removal as drafted and without any misgivings, amendments or alterations. He must therefore be taken that he was satisfied as to its merit, and that it had satisfied both legal and procedural requirements. Having chaired the County Assembly Business Committee that approved the notice and substantive motion, and knowingly and deliberately failed, refused or neglected to point out the purported procedural flaws he now alludes to, he is estopped from raising them now. As correctly submitted by the counsel for the 1st and 2nd respondents, the allegations by the appellant were clearly not well founded, misleading and an afterthought. The Judge was therefore right in disregarding them. It is not in doubt that the appellant himself, presided over the procedural motion exempting the three days notice period. Subsequently and pursuant to section 11(3) of the County Governments Act, the appellant left the chair and the motion for his removal was presided over by a member of the Assembly, one, Hon. Antonny Kimani Macharia as envisaged by the law. When the motion was eventually moved, the Hansard of the day, 25th February 2014 shows that the appellant was accorded an opportunity to be heard and respond to the allegations and accusations from the floor of the house pursuant to section 11(4) of the County Governments Act which chance he took up. This is how the proceedings were recorded in the Hansard:

> "Before l open debate for the members to contribute, l now accord the Speaker the opportunity to defend himself.
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> The Speaker (Mr. Ndichu): thank you for this opportunity. I have read and understood the allegations that have been placed before this house for debate, and l would like to thank the mover of this motion, because it is always said that the character of a man is identified in such moments. I want to make it clear that l do not take this motion with a heavy heart. Why, because this is a procedure that is envisaged and enshrined in the County Governments Act and in the standing orders. So the framers or the people who enacted this County Governments Act anticipated such situation. The only thing I would like to urge you members is that as we go through this debate, let us be sober, objective so that at the end of the day we will be able to look back and see whether we have done the right thing, or whether we have done a justifiable thing. Now, without saying much in regard to that, l would like to affirm and reiterate that the Speaker's office is a creation of the constitution. I want to believe that most of us are alive to that situation. It is on that basis that l will give my submission and also emphasize that the removal of the Speaker, in my contemplation and in my judgment, should be based on constitutional grounds..."

From there, the next three pages are all dedicated to his defence on matters of law as well as fact. That being the case, how can the appellant then turn around and claim that he was denied the right to be heard or that there was a violation of Audi Alteram partem rule; or there were constitutional violations meted out against him. We should also not lose sight of the fact that the appellant is a lawyer who knows his rights to a fair process very well. Had there been any departure from the rules of engagement to his detriment, we have no doubt at all that he would have taken up the issue on the floor of the house. He did not. In fact, nowhere in the proceedings did he complain about the short notice given to him to respond to the allegations and or the accusations. Nor did he ask for time out so that he could engage the services of counsel and he was denied the opportunity.

The upshot is that we are persuaded, just like the trial judge that the process of impeachment was carried out according to the rule book, and the appellant cannot be heard to complain.

On the grounds of impeachment, it is correct as observed by the 1st and 2nd respondents that there are no specific provisions as to the grounds for the removal of the a County Speaker either in the Constitution or the County Governments Act. The Constitution in Article 178(3) merely provides that parliament shall enact legislation providing for the election and removal from office of Speakers of the County Assemblies. We would want to assume that the contemplated legislation is the current County Governments Act which, as already stated, is silent on the grounds for the removal of County Speakers. The matter purely rests with the discretion or resolution of the County Assembly, a very sad state of affairs indeed. That leaves the Speaker sought to be removed at the mercy, whim or caprice of the members of the County Assembly. He/she is a lame duck really, which impacts negatively on the effective discharge of speaker's office. We would recommend that the national assembly moves with alacrity and speed to close this gaping hole or loopholes so that the grounds of removal are well known before hand. As it is, a speaker could be removed for any reason under the sun.

However, the seriousness of the allegations made against the appellant in this matter cannot be gainsaid. They were indeed so serious such that if proved, and they were, were sufficient to send the appellant packing. The appellant admitted on the floor of the house to having used public resources for unofficial trip and retreat to Brazil. The 2nd respondent paid for the trip including travelling, accommodation and out of pocket expenses notwithstanding that he was not attending to an official function sanctioned by the 1st and 2nd respondents. Secondly, the appellant is said, and there was evidence to that effect through the affidavit of John Mwivithi Mutie, that he used his office and position to intimidate the finance department staff into releasing the money for the personal trip, and lastly, the appellant had a hand in the picking of the 3rd respondent to represent the 1st and 2nd respondents, in violation of the procurement laws. The evidence of the Principal Procurement Officer and Secretary to the tender committee, Eva Wanjiru Kamau, which was not seriously challenged, was to the effect that she had been

informed that the appellant had procured legal services on behalf of the 2nd respondent unilaterally, though it ought to have been done competitively since the 2nd respondent was a public body bound by the procedures stipulated in Public Procurement and Disposal Act, 2005. That though the 3rd respondent applied to provide the legal services, it was not prequalified since it did not have all the statutory requirements and more particularly, did not have a valid tax compliance certificate. That on 5th February, 2014, when the appellant procured the services of the 3rd respondent, there was a pre-qualified list of firms which ought to have been invited to provide a quotation of fees pursuant to section 88 of Public Procurement and Disposal Act. That even if the procuring of services was urgent, the appellant ought to have sought the advice of her office or sought quotations from at least three firms before settling on one. In accordance with the Public Procurement and Disposal Act, direct procurement of services and goods is only allowed where there is a threat to the public health or natural calamity, which was not the case here.

To our mind, these were impeachable indiscretions on the part of the appellant and he cannot be heard to complain that they were minor indiscretions that could have been ignored.

As to whether the information published against the appellant in the print media was defamatory, the appellant anchored this complaint on Article 35 (5) of the Constitution. He complains that the Judge erred in his interpretation of the said article vis-a-vis the evidence adduced before him and thereby arrived at an erroneous finding, that there were no defamatory claims or statements made against the appellant.

Article 35 is in these terms:

"Access to information."

35.(1) Every citizen has the right of access to-

(a) information held by State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicise any important information affecting the nation"

As can readily be seen, there is no Article 35(5) of the Constitution. Secondly, the appellant's claim in the trial court was not about the State's failure in any of the above respects. Nor was his case that he sought information held by the 1st and 2nd respondents and he was denied. Neither did he assert that he demanded of the said respondents to correct or delete the untrue and misleading information that affected him and they refused. Simply put, the Article was quoted out of context and does not assist the appellant in advancing his appeal. As we understand it, the appellant's claim in the trial court was simply that the 1st and 2nd respondents defamed him when they wrote, printed, published and reported a libellous article in the Standard Newspaper dated 26th February 2014 to the effect that the appellant had lost the Speaker's seat due to his fraudulent conduct. It was on this account that he sought general, punitive and exemplary damages.

In response, the respondents denied writing, printing, publishing and reporting the article complained of and were not aware of the same. They also denied having circulated it in print or electronic media, and that, if at all it was published, then they were not the proper parties to be sued. In any event, the constitutional petition was not the proper forum for the adjudication and vindication of the claim. Finally, it was their defence that all discussions relating to the appellant's conduct were on the floor of the house and therefore privileged.

The Judge determined on the above set of facts that;

> "...the information published was not defamatory as it reflected the true position of public proceedings before the Kiambu County Assembly. Furthermore, there is no evidence from any of the cited newspapers or the petitioner as to the source of the published information".

On the evidence laid before the trial court, we cannot fault the trial court for that finding. There was absolutely no evidence to advance the defamation cause of action against the 1st and 2nd respondents. The appellant never called evidence of whatever kind to demonstrate that as a result of the libellous article, he had been shunned and brought to public odium by members of society. There was no demonstration whatsoever as to his mental anguish, psychological torture, distress and embarrassment he suffered. There was no connection or nexus regarding the libellous statements and the 1st and 2nd respondents. In other words, the appellant did not prove that the respondents were responsible for the publication and circulation of the offending statement. And in a fatal move, the appellant did not even bother to enjoin in the petition the print media publishers of the defamatory statement or at least call them as witnesses to shed light or disclose the source of the published information. In the case of Phinelas Nyaga v Gitobu Imanyara (2013) eKLR, the court observed thus;

> "...the plaintiff chose not to call anyone from the star publication to shed light on where the offending story emanated. In the absence of evidence attributing the statement to the defendant the mere fact that the same was published by the star newspaper does not meet the threshold of proof on a balance of probabilities that the publication was actual fact done at the behest of the defendant".
>
> Do we need to say more?

In the result, the appeal fails and is accordingly dismissed with costs to the 1st and 2nd respondents.

Dated and delivered at Nairobi this 7th day of December, 2018.

ASIKE-MAKHANDIA

JUDGE OF APPEAL
D. K. MUSINGA

JUDGE OF APPEAL
P. O. KIAGE

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR