



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, MWERA & G.B.M. KARIUKI JJ.A.)

CIVIL APPLICATION NO. NAI. 46 OF 2015 (UR 40 OF 2015)

BETWEEN

MARTIN NYAGA WAMBORA.....APPLICANT

AND

THE COUNTY ASSEMBLY OF EMBU.....1ST RESPONDENT

THE SPEAKER OF THE COUNTY ASSEMBLY.....2ND RESPONDENT

THE SPEAKER OF THE SENATE.....3RD RESPONDENT

THE SENATE.....4TH RESPONDENT

PARLIAMENTARY SERVICE COMMISSION.....5TH RESPONDENT

COMMISSION ON ADMINISTRATIVE JUSTICE.....6TH RESPONDENT

ANDREW IRERI NJERU & 31 OTHERS.....7TH RESPONDENT

(Being an application for stay and injunction pending the hearing and determination of the intended appeal from the High Court of Kenya at Nairobi, (Mwongo, Korir & Odunga, JJ.)

dated 12th February, 2015

in

Petition Nos. 7 & 8 of 2014) (Consolidated)

RULING OF THE COURT

1. The applicant, *Martin Nyaga Wambora*, has applied to this Court under Rule 5(2)(b) of the Rules of this Court for orders to restrain any person from being sworn in to occupy the office of Governor of Embu County, during the pendency of the applicant’s appeal to this Court. The appeal arises from a ruling

delivered by a three judge Bench of the High Court (*Mwongo, Korir & Odunga, JJ.*) on 12th February 2015, dismissing Embu Constitutional Petitions No. 7 and 8 of 2014 (Consolidated).

A. Background

2. In the ruling, the High Court held *inter alia* that the petition was not incompetent; that the proceedings to impeach the Governor of Embu County *Hon. Martin Nyaga Wambora* were not *sub judice*; that **section 33** of the *County Governments Act, 2012*, is not unconstitutional; that the due process for the removal of a governor was followed in the removal of *Hon. Martin Nyaga Wambora* as Governor of Embu County; and that the removal process of the Governor requires that an opportunity be afforded to the public to participate therein which opportunity was afforded in the instant case.

3. The petitioners in the consolidated petition included: the applicant as 1st petitioner and 32 others who described themselves in the petition as “Citizens of Kenya, who reside, vote and work for gain within the Embu County, who are vested with a constitutional duty to respect, uphold and defend the Constitution of Kenya as enacted”.

4. In the petition, the applicant and his co-petitioners had sought prayers as follows:

“(a) A declaration that the petitioners and members of the public are entitled the right to participate in the process of removing the Governor of Embu County from office and the same has been violated.

b. That the court be pleased to establish the required threshold of the members of public who should participate under Article 118(1) (b), Article 174(a) & (c) and Article 196 (1)(b).

c. That the Honourable Court do make a declaration that public participation is a pre-condition to proceedings for removal of a governor under Article 181 of the Constitution.

d. A declaration that the Act of removing a County Governor is not an exclusive affair of the County Assembly and the Senate.

e. Declaration that the resolution passed by the County Assembly on 29th April, 2014 is null and void for having been passed by the County Assembly in contravention of County Assembly Standing Order No. 86 and the Senate into contravention of Standing Order No. 92 of the Senate Standing Orders.

f. Declaration that the impeachment passed by the Senate pursuant to a resolution passed by the County Assembly of Embu on 29th April, 2014, is null and void.

g. Declaration that Section 33 of the County Government Act is unconstitutional for being in conflict with and flying over the face of Article 1, Article 2(1) & (2), Article 10, Article 118(1)(b), Article 174 (a) & (c) and Article 196(1)(b) for failing to allow public participation and involvement in the removal of a County Governor.

h. That the Honourable Court be pleased to issue an order of certiorari to remove to the High Court and quash the resolution passed by the County Assembly of Embu dated 29th April, 2014 and the Senate on the 13th May, 2014 to remove 1st respondent as the Governor of Embu County.

i. That the Honourable Court be pleased to issue an order of certiorari to remove to the High Court and quash the resolution passed by the Senate dated 13th May, 2014 to impeach the Governor of Embu County.

j. A declaration that the threshold of the impeachment of a Governor as envisaged (sic) under Article 181 of the Constitution were read together with other provisions.

k. **A declaration that the petitioners herein are entitled to the full protection of their right to information and the same right has been violated.**

l. **Costs of the suit.”**

B. The Notice of Motion

5. Following the dismissal of the consolidated petition, the applicant moved to this Court by way of a notice of motion brought under **Section 3A & 3B** of the **Appellate Jurisdiction Act**; and **Rules 5(2)(b)** of the **Court of Appeal Rules**, seeking orders to preserve the subject matter of the appeal he intends to file against the ruling. In particular, the applicant seeks an injunction or conservatory orders restraining any person or authority from swearing in the Deputy County Governor of Embu County as County Governor or in any way interfering with the applicant’s tenure as the Governor of Embu County, pending the hearing and determination of the intended appeal. The applicant also seeks an order restraining the Deputy Governor, Embu from assuming office as Governor or in any way interfering with the mandate of the applicant as the duly elected Governor of Embu County. During the hearing of the motion, the applicant was represented by Senior Counsel, **Mr. Paul Muite**, and **Mr. Wilfred Nyamu**.

6. The respondents in the motion before us are the County Assembly of Embu and the Speaker of the County Assembly of Embu (1st and 2nd respondents), who were represented by **Mr. Njenga** of Muchoki, Kangata, Njenga & Company Advocates; the Senate of Kenya and the Speaker of the Senate of Kenya (3rd and 4th respondents), did not respond to the application nor were they represented at the hearing; the Parliamentary Service Commission (5th respondent), was represented by **Mrs. Thanji**, instructed by Advocate Anthony T. Njoroge; the Commission on Administrative Justice (6th respondent), was discharged from the proceedings by this Court, following a letter indicating their wish not to appear in the appeal; and **Andrew Ileri Njeru** & 31 others (hereinafter referred to as 7th respondent), who were co-petitioners with the applicant in the consolidated petition were represented by Messrs Ndegwa & Ndegwa Advocates in this motion.

7. Following directions given by this Court (in consultation with the parties’ advocates) for the hearing of the appeal, written submissions were duly filed and exchanged between the applicant, the 1st and 2nd respondents, and the 5th respondent. These parties’ counsel also appeared before us on 18th May 2015, and orally highlighted the rival submissions.

C. The Applicant’s Submissions

8. In the oral and written submissions, learned counsel for the applicant referred to the 25 grounds raised in the draft memorandum of appeal that the applicant intends to file, and submitted that the applicant’s intended appeal is arguable and will, *inter alia*, raise the following fundamental issues:

- i. The rule of law and the principle of *stare decisis*, *vis-a-vis* decision of the Court of Appeal over the High Court.
- ii. Proof of the constitutional threshold for removal of the applicant as governor and the nexus between the allegations in the motion tabled in the County Assembly and the applicant.
- iii. Public participation in the removal process of a duly elected governor and the rights protected under **Article 38(2)** of the **Constitution**.
- iv. The vexed question of separation of powers and role of the courts in determining the constitutionality of removal or impeachment process.

9. Counsel argued that the High Court made several errors in its judgment, and failed to address and determine crucial issues, such as, the involvement of the applicant in the allegations of violations of the Constitution; the nexus and threshold regarding his removal as governor; and whether the removal of the

applicant as Governor of Embu county was in conformity with the Constitution. Further, that the High Court adopted a narrow and restrictive interpretation of its role in the review of the removal process, and the interpretation of the doctrine of separation of powers.

10. Learned counsel argued that it was in the public's interest that the impugned judgment and the decree of the High Court be stayed pending the hearing and determination of the intended appeal, as the process of impeachment and removal of a governor have significant political and administrative implications that in effect reverses the decision of the polarity of voters in a county.

11. In this regard, reliance was placed on *Kenya Hotel Properties Limited vs Willisden Investment Limited & 6 Others* [2013] eKLR, in which this Court quoted the following passage from *East African Cables Limited vs Public Procurement Complaints Review and Appeals Board & Another*, [2007] eKLR, on situations where public interest should take precedence:

“We think in the particular circumstances of this case, if we allowed the application, the consequences of our orders would harm the greatest number of people. In this instance, we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most good. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable”.

[Emphasis supplied].

12. Also relied on is *Gitarau Peter Munya vs Dickson Mwenda Kithinji 2 Others*, [2014] eKLR where this Court stated:

“Bearing in mind the nature of the competing claims, against the background of the public cause, we have focused our perception on the public interest, and the concept of good governance, that runs in tandem with the conscientious deployment of the scarce resources drawn from the public. Proper husbandry over public monetary and other resources, we take judicial notice, is a major challenge to all active institutions and processes of governance; and the courts by their established attributes of line drawing, must ever have an interest in contributing to the safeguard to such resources. These principles dictate that our conscientious sense of proportion stands not in favour of fresh elections for Meru County gubernatorial office, during the pendency of an appeal. By our sense of responsibility, the courts contribution to good governance in that context, takes the form of an expedited hearing of the appeal”.

13. In this case, the applicant is apprehensive that the dismissal of the petition means that unless conservatory orders are granted, his removal from the position of Governor of Embu County will take effect, and **Article 182(2)** of the **Constitution** that brings into office the Deputy County Governor for the remainder of the term of the County Governor will be enforced. The applicant maintains that such an eventuality will render his appeal nugatory, as there is no constitutional provision for the reversal of the position once the Deputy county governor assumes office and is sworn-in.

D. 7th Respondent's Reply to the Motion

14. Although the 7th respondent did not file any submissions nor appear for the hearing of the motion, a replying affidavit sworn by **Mr. Aloice Victor Njagi (Njagi)**, who was the 4th petitioner in Embu Constitutional Consolidated Petition No. 7 & 8 of 2014, was filed in response to the motion. In the replying affidavit, **Njagi** basically supported the applicant's motion. Annexed to the replying affidavit is a notice of appeal dated 16th February 2015, indicating the 7th respondent's intention to appeal against the ruling of the High Court in the consolidated petition delivered on 12th February 2015. Also annexed is a draft memorandum of appeal that contains some 25 grounds which 7th respondent intends to canvass.

15. **Njagi**, deponed that the intended appeal by the applicant is arguable as it raises *inter alia* constitutional grounds regarding the impeachment of the applicant and adherence to the law, rules of natural justice and participation of the public in the process; that it is important that conservatory orders be granted as the 7th respondent's rights of participation in the impeachment of the applicant will otherwise be prejudiced; that without the conservatory orders, the application of Article 182(2) of the Constitution will result in conflict with the outcome of the applicant's appeal that has high chances of success; that it is in the interest of justice that an injunction be issued under Rule 5(2)(b) of the Court Rules to preserve the *status quo* and the applicant's appeal.

E. 1st and 2nd Respondents' Reply and Submissions

16. The 1st and 2nd respondents opposed the applicant's motion through a replying affidavit sworn by Justus Kariuki Mate (Mate), who is the 2nd respondent being the current Speaker of 1st respondent, the County Assembly of Embu. In a nutshell, Mate deponed that the 1st and 2nd respondents have a constitutional mandate in carrying out oversight authority over the Embu County Executive with a view to ensuring accountability and transparency in the functions of the County Executive, and the application of the resources of the County Government; that the removal of the applicant as Governor of Embu County was initiated and carried out in accordance with the above constitutional mandate; that the removal of the applicant as Governor of Embu County was endorsed by the Senate; and that following the dismissal of the applicant's petition against his removal, it is in the interest of the people of Embu and the principle of good governance that the applicant be removed immediately; that there will be no vacuum as the Constitution provides that the Deputy county governor shall exercise the functions of the office of governor for the remainder of the term; and that this position would simply be reversed should the applicant succeed in its appeal.

17. Learned counsel for the 1st and 2nd respondents made oral and written submissions arguing that the orders sought by the applicant under **Rule 5(2)(b)** of the **Court Rules**, should not to be granted as the applicant is seeking an injunction restraining the Deputy county governor from exercising a right in law that has crystalized in her favour under **Article 182(2)** of the **Constitution**; that such an order cannot be issued against the Deputy county governor as she is not party to the proceedings and has not had the opportunity of being heard; that the Court cannot exercise its discretion to defeat or limit an expressed right in law that has accrued in favour of the Deputy county governor under **Article 182(2)** of the **Constitution**.

18. Counsel further submitted that the intended appeal by the applicant is not arguable as the issues identified as pertinent, are issues which were determined by the High Court based on settled law and the evidence available on record; that the burden of proof remained entirely on the applicant and he cannot use any deficiency in the evidence to constitute an arguable ground of appeal; that it was clear that sufficient public participation was undertaken and no arguable issue can arise in that regard; and that the issue of separation of powers was properly addressed in accordance with settled law.

19. In support of these submissions, learned counsel relied on **Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others [2003] eKLR**, in which it was stated that:

“The term ‘nugatory’ has to be given its full meaning.

It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank vs Norlake Investment [2002] 1 EA 227.

Whether or not an appeal will be rendered nugatory, depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved”.

20. Counsel for the 1st and 2nd respondents maintained that the intended appeal would not be rendered nugatory if the Deputy county governor assumes office under **Article 181(2)**, as the applicant would be

restored to office by the operation of law if his appeal is successful; and that the applicant's fear was merely loss of political clout and capital that would attend his removal from office.

F. The 5th Respondent's Reply and Submissions

21. The 5th respondent also opposed the motion relying on a replying affidavit sworn by **Jeremiah Nyegenye (Nyegenye)**, who is the Secretary to the Parliamentary Service Commission. **Nyegenye** deponed *inter alia* that the impeachment proceedings against the applicant as Governor of Embu County, were initiated and done in the County Assembly of Embu, and the Senate in accordance with **Article 181** of the **Constitution** as read with **Section 33** of the **County Government's Act**; that the proceedings culminated in a resolution passed by the Senate upholding a report of the special committee of the Senate, proposing the impeachment of the applicant; that the special committee of the Senate conducted its investigations against the applicant without bias and in accordance with the Constitution and the County Government's Act; that the rules of natural justice were observed as the applicant was given an opportunity to appear before the special committee but declined to do so.

22. **Nyegenye** further deponed that the removal of a governor from office is a process arising from the need to ensure accountability and good governance and that a time limit is necessary for the expeditious resolution of such a process; that the impeachment process is a purely political process provided under **Article 181** of the **Constitution** and **Section 33** of the **Government's Act** as a power to be exercised by the people's representative; and that the motion seeking the removal of the Governor of Embu County was published in the Kenya Gazette and the proceedings made open to the public as envisaged under **Article 196** of the **Constitution**.

23. In the written and oral submissions, learned counsel for the 5th respondent argued that the issues raised by the applicant as possible issues in the appeal such as public participation, threshold, nexus, principle of bias, and principle of natural justice, are not arguable issues as they are issues that have already been addressed between the parties in various High Court decisions and in this Court. Relying on **Nguruman Limited vs Jan Bonde Nielsen & 2 Others, [2014] eKLR** counsel submitted that mere existence of an arguable appeal does not warrant the grant of conservatory orders but that the applicant must demonstrate that he will suffer irreparable injury which cannot be compensated by an award of damages, and that the balance of convenience tilts in his favour. Counsel maintained that in this case if the applicant were to succeed in its intended appeal, the Court could easily reinstate the applicant into office as governor of Embu and nullify the swearing in of the Deputy county governor.

24. On the issue of balance of convenience, counsel argued that an order made by the court under **Rule 5(2)(b)** of the **Court Rules** would disrupt the smooth operations of the functions of the County Government of Embu to the detriment of the residents of Embu; that although the Court should balance the public interest against the applicant's individual rights, the public interest of the people of Embu outweigh the individual interest of the applicant; that public interest lies in upholding the findings of the County Assembly of Embu and the Senate which findings were based on thorough investigations; that it is in the public interest that the applicant ceases to exercise the functions of governor for the County of Embu to function smoothly. In this regard, the case of **Gitarau Peter Munya vs Dickson Mwenda Kithinji & 2 Others, (supra)** was cited.

25. In regard to the doctrine of separation of powers, counsel cited the following cases: **Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 Others [2013] eKLR**; **Okiya Omtata Okiiti v The Attorney General & 5 Others [2014] eKLR**; **Republic v Registrar of Societies & 5 Others ex parte Kenyatta & 6 Others [2007] eKLR**; & **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012**; to buttress the proposition that the powers of impeachment as provided by law lie solely with the County Assembly and the Senate; that the role of the Court is to discover whether the proper procedure provided in the law has been followed; that the Court cannot usurp the role of the County Assembly of Embu and the Senate by carrying out a merit review of the resolution of the County Assembly and the Senate; and that the orders sought by the applicant seek to have the Court interfere with legislative functions, as they seek to restrain the Senate and the County Assembly from undertaking their constitutional and statutory functions.

26. Finally, learned counsel for the 5th respondent submitted that the applicant has not shown that he will suffer any prejudice if the orders sought in the application are not granted as this Court will simply reinstate him into office if his appeal is successful. Thus, the Court is urged to dismiss the applicant's motion as the applicant has not met the conditions for the grant of an injunction or conservatory orders under **Rule 5(2)(b)** of the **Court Rules**.

G. The Applicable Law

27. The motion before us is one for injunctive orders under **Rule 5(2)(b)** of the **Court of Appeal Rules**. The guiding principles in invoking this Court's jurisdiction under that rule, is as restated in **Kenya Hotel Properties Limited v Willsden Investment Limited & 6 Others**, (*supra*) as follows:

“First, the intended appeal should not be frivolous or as otherwise put, the applicant must show that it has an arguable appeal, and secondly, this Court should ensure that an appeal if successful should not be rendered nugatory”.

28. As regards the nugatory aspect the following statement made by this Court in **Reliance Bank Limited v Norlake Investments Limited** (*supra*), is instructive:

“What may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term ‘nugatory’ has to be given its full meaning”.

29. The principles that govern an application for injunction under **Rule 5(2)(b)** of the **Court Rules**, are not the same as the principles that govern an application for interlocutory injunction under **Order 40** of the **Civil Procedure Rules 2010** (formally Order 39 of the repealed Civil Procedure Rules). In the latter, the principles were well settled in the celebrated case of **Giella vs Cassman Brown & Co Ltd**. [1973] EA 358, that:

“First, an applicant must show a prima facie case with a probability of success. Secondly, an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be compensated by an award of damages. Thirdly if the court is in doubt, it will decide an application on the balance of convenience.”

30. These were the principles that were applied in **Nguruman Limited v Jan Bonde Nielsen 2 Others**, (*supra*). A careful examination of these principles reveals that unlike **Rule 5(2)(b)**, where the establishment of an arguable appeal that is not frivolous is sufficient, (an arguable appeal not necessarily meaning one which must succeed), an application under **Order 40** requires that a *prima facie* case with a probability of success must be established and as stated in **Mrao Ltd. v First American Bank of Kenya Ltd. & 2 Others**, [2003] KLR 125:

“In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial.

That is clearly a standard, which is higher than an arguable case”. Emphasis added.

31. Thus the principles for granting an interlocutory injunction under **Order 40** of the **Civil Procedure Rules** provides a bar which is a notch higher than that required for granting an injunction under **Rule 5(2)(b)** of this **Court's Rule**. In our view, the case of **Nguruman Limited v Jan Bonde Nielsen 2 Others**, (*supra*), that was cited to us by the 5th respondent is not applicable in this motion as it was an appeal against a refusal to grant an injunction under **Order 39** of the now repealed **Civil Procedure Rules**, and not an application for injunction under **Rule 5(2)(b)** of the rules of this Court. We reiterate what was observed by this Court in **Reliance Bank Limited v Norlake Investments Limited**,

(*supra*) that a balance of convenience is not a pre-condition for granting an application under **Rule 5(2)(b)** but is merely a factor which depending on the circumstances of the particular case, may be taken into account in establishing the nugatory aspect of the intended appeal.

H. Analysis & Determination

32. It is not in dispute that the appeal before us has its genesis in the impeachment resolution that was passed against the applicant in the County Assembly of Embu, on 29th April 2014 and confirmed by a resolution of the Senate. The subject matter of the intended appeal is the removal of the applicant from the gubernatorial position in Embu County. The issue that arises for determination in the motion before us is whether the applicant has satisfied this Court that his intended appeal against the ruling of the High Court is not frivolous but raises arguable issues; and secondly, whether if the orders sought by the applicant in the motion are not granted, his appeal if successful, will be rendered nugatory.

33. With regard to the arguability of the appeal, the applicant and the 7th respondent have both filed draft memoranda of appeal raising several issues. A number of these issues are anchored on the interpretation of the Constitution and statutory provisions. For instance, the interpretation of Articles 181 and 182 of the Constitution that provide for removal of a county governor, and vacancy in the office of a county governor, are pertinent issues. The respondents maintain that the issues raised by the applicant are not arguable because they are based on settled law and the evidence. In effect, that is a conclusion that this Court can only arrive at upon hearing the appeal and analyzing the evidence and the law. For the purposes of the motion before us, it is enough that these issues will require interrogation in the intended appeal. The fact that the interrogation concerns interpretation of constitutional provisions cannot be taken lightly. Demonstration of a single arguable issue is all that is necessary in establishing the arguability of an appeal. We have no hesitation in finding that the appeal does raise several arguable issues.

34. As regards the nugatory aspect, since the passing of the resolution by the Embu County Assembly for the applicant's impeachment on 29th April 2014 and the confirmation of that resolution by the Senate, the applicant has remained in office pursuant to orders issued by the High Court. These were a conservatory order issued by the High Court on 15th May, 2014 pending the hearing of the consolidated petition; and an order issued by the High Court on the 12th February, 2015 after the dismissal of the consolidated petition for maintenance of the *status quo*, for a period of 14 days to enable the applicant move to this Court. Thus, the applicant has remained in office for a period of over one year from the time the impeachment resolution was passed against him.

35. The applicant is apprehensive that unless conservatory orders are granted for him to remain in office, Article 182 of the Constitution may come into play and his appeal that seeks to protect his position as Governor of Embu County will be rendered a mere academic exercise. The relevant part of **Article 182(1)** and

(2) of the Constitution states as follows:

“182. (1) The office of the county governor shall become vacant if the holder of the office –

a.

b.

c.

d.

e. is removed from office under this Constitution.

2. If a vacancy occurs in the office of county governor, the deputy county governor shall assume

office as county governor for the remainder of the term of the county governor”.

36. It was submitted that it would not be possible to remove the deputy county governor from office once he assumes the position of county governor under **Article 182(2) of the Constitution**. Our reading of this Article is that the Constitution envisages the deputy county governor occupying the county governor’s position for the remainder of the term that is, until the next elections. However, the key word in **Article 182(2)** is ‘if a vacancy occurs’. It is this event that brings **Article 182(2)** into operation. In this case, the issue of the removal of the governor under **Article 182(1)(e) of the Constitution** is still a contested issue as the applicant has filed a notice of appeal against the ruling of the High Court. This means that the matter is yet to be conclusively determined. The deputy county governor’s right under **Article 182(2)** has, therefore not crystalized, as the process of removal has not been determined and the ‘vacancy’ has not been confirmed.

37. The deputy county governor must await the finalization of the process and is not entitled under **Article 182(2)** to assume office of the county governor. Indeed, the applicant’s right of appeal should not be rendered futile by the application of **Article 182(2)** before the appeal is heard and determined. Like the High Court, this Court has no mandate to inquire into the merit of the allegations made against the applicant, as separation of powers must be maintained. The mandate of this Court in the appeal will be limited to review of the High Court’s consideration of the process and the reasonableness of the action taken against the applicant.

38. Further, there are special circumstances in this matter that must be taken into account. The office of a county governor is a public office, to which, voters pursuant to **Article 181 of the Constitution** elect the holder. Indeed, the applicant was so elected by the voters in Embu County. Thus, the issue of public interest in this matter is a relevant consideration in determining the nugatory aspect as the interest of the voters has to be taken into account. On the flip side is the fact that serious allegations have been made against the applicant, and that these allegations have been found justified by the people’s representative in the Embu County Assembly and the Senate.

39. In considering the balance of convenience we bear in mind that the position of Governor of Embu is not just about the individual rights of the applicant, but is also about the people of Embu and balancing their franchise with good governance. It must not be forgotten that while the Constitution gives every citizen including the county governor the right to access justice, it also enjoins the court to observe the national values and principles of governance when interpreting and applying the Constitution or any law. Thus, courts must not only uphold the rule of law, equity and democracy, but must also promote the values that underlie an open and democratic society based on human dignity, equity and freedom.

40. Where as in this situation a county governor challenges his ouster from officer, it is the duty of the court to ensure that his/her success does not become Pyrrhic victory. This principle holds true not only in civil and commercial law litigation, but also what may be termed political cases. For at the end of the day, the quest in all these cases is justice, and it is the duty of the court to guard against the dispensation of justice becoming Pyrrhic and scandalous.

41. The applicant was elected Governor of Embu County for a five year term, effective from March, 2013 which means almost half the term is gone. We take judicial notice of the fact that litigation in courts can drag on for a long time and a situation may arise where the court process may be manipulated or abused, so that the appeal remains pending until after the applicant’s term in office expires. Such an eventuality would neither be in the interest of justice nor good governance.

I. Conclusion

42. For the afore stated reasons, we allow the applicant’s motion to the extent of issuing a conservatory order for him to remain in office and continue to exercise his powers as Governor of Embu County for a limited period of four months effective from the date hereof. The applicant shall take appropriate action to file and serve the memorandum of appeal and the record of appeal within the next thirty (30) days, and the President of the Court of Appeal shall make arrangements for the appeal to be fast tracked and heard

within the four months period that the conservatory orders will remain in force.

43. We realize that this time frame is rather stringent but this has been necessitated by the public interest involved in this matter and the need for expeditious disposal of the dispute. A copy of this order shall be served on the Registrar of the High Court to ensure that the proceedings of the High Court and judgment are availed to the applicant to enable him comply with this order.

Costs of this motion shall be costs in the appeal. Those shall be the orders of this Court.

Dated and Delivered at Nairobi this 10th day of July, 2015.

H. M. OKWENGU

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JUDGE OF APPEAL

J. MWERA

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR