



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL NOS. 17 & 18 OF 2015 (CONSOLIDATED)

BETWEEN

COUNTY ASSEMBLY OF KISUMU1ST APPELLANT
HON. GABRIEL O. OCHIENG2ND APPELLANT
COUNTY EXECUTIVE OF KISUMU.....3RD APPELLANT

AND

KISUMU COUNTY ASSEMBLY SERVICE BOARD.....1ST RESPONDENT
ANN ATIENO ADUL2ND RESPONDENT
ELIUD OWEN OJUOK.....3RD RESPONDENT
NICHOLAS STEPHEN OKOLA4TH RESPONDENT
HON. ATTORNEY GENERAL5TH RESPONDENT
NELCO MASANYA SAGWE6TH RESPONDENT
PETER ODERO ANDITI7TH RESPONDENT

(Being an appeal from the Judgment of the Employment & Labour Relations Court at Kisumu (Wasilwa, J.) delivered on 12th January, 2015

in

INDUSTRIAL PETITION NO. 297 OF 2014)

JUDGMENT OF THE COURT

Introduction & The Background

1. This is an appeal from the judgment of Wasilwa, J delivered on 12th January 2015 in Industrial

- Petition No. 297 of 2014 (the petition). In that judgment, the learned Judge granted most of the prayers in that petition including declarations that the impeachment of the Speaker of Kisumu County Assembly and suspension of the Kisumu County Assembly Service Board by the County Assembly of Kisumu were null and void.
2. The background of the matter was that on 15th October 2014, the County Assembly of Kisumu (the 1st appellant) passed a resolution in which it suspended the Kisumu County Assembly Service Board (the 1st respondent) and thereafter caused the redeployment to other duties of **Nelco Masanya Sagwe** (the 6th respondent) and **Peter Odero Onditi**, (the 7th respondent) who were the interim Clerk and interim Assistant Clerk of the County Assembly respectively and replaced them with **Eliud Owen Ojuok** (the 3rd respondent) and **Nicholas Stephen Okola** (the 4th respondent).
 3. By its further resolution passed on 21st October 2014, the 1st appellant censured and removed from office its Speaker, **Anne Atieno Adul**, (the 2nd respondent) and, replaced her with **Gabriel Ochieng** (the 2nd appellant) whom it appointed as Acting Speaker.
 4. Aggrieved by those resolutions, the 1st and 2nd respondents filed a joint petition in the High Court at Kisumu in which the 6th and 7th respondents joined as interested parties. The 6th and 7th respondents had also filed a separate petition in the High Court at Kisumu (Constitutional Petition No. 286 of 2014) which has, to date, not been heard.
 5. In their amended petition, the 1st and 2nd respondents raised a myriad of allegations and claims including the contention that in passing the said resolutions, the 1st appellant purported to act under **Section 11** of the County Governments Act and its **Standing Order No. 58** both of which are unconstitutional; that the 1st appellant, *inter alia*, violated the 2nd, 6th and 7th respondents' constitutional rights under **Articles 28, 47 and 50** of the Constitution; that the 1st appellant unlawfully suspended the 1st respondent; that the 1st appellant erred in purporting to constitute offices in the County Government and redeploying county officers to non existent offices; that contrary to the principle of separation of powers demanding mutual respect for other state organs and their respective mandates, the 1st appellant usurped the 1st respondent's powers under **Sections 59, 60, 61, 62, 63, 64, 65, 66 and 69** of the County Governments Act; and that the 1st appellant purported to appoint the 3rd respondent, who lacked the requisite academic qualifications, as Acting Clerk of the County Assembly.
 6. On those allegations, the 1st and 2nd respondents prayed for declarations that the 1st appellant's said resolutions were unlawful and an order of certiorari to quash them; that the 3rd appellant's usurpation of the functions of the 1st respondent was unconstitutional; that the replacement of the 6th and 7th respondents with the 3rd and 4th respondents was unlawful and an order of prohibition to restrain the 3rd and 4th respondents from performing the duties of the 6th and 7th respondents; reinstatement of the 2nd, 6th and 7th respondents to their positions; and costs.
 7. At the instance of the appellants, on 5th November 2014, Maina, J. of the High Court transferred that petition to the Employment & Labour Relations Court (the ELRC) on the ground that though the High Court had jurisdiction to determine the petition, it was convenient to have it heard by the ELRC.
 8. After hearing the petition on the basis of affidavit evidence on record and submissions filed in court by counsel for the parties, in her judgment delivered on 12th January 2015, Wasilwa, J. of the ELRC, as stated, granted literally all the prayers in that petition thus provoking this appeal.

Grounds of Appeal

9. The appellants' 18 grounds of appeal in the main raise five issues. They are whether or not the petition was competent; whether or not the ELRC had jurisdiction to entertain the petition; whether or not electronic evidence was admissible in the petition; whether or not the learned Judge was justified in quashing the suspension of the 1st respondent and the redeployment of the 6th and 7th respondents to other duties; and whether or not there was justification in quashing the 2nd respondent's impeachment proceedings on alleged account of failure to follow due process.
10. We shall determine these grounds of appeal seriatim. However, before we do that, we would like to state the limit of our jurisdiction.
11. Although this is a first appeal, **Section 17(2)** of the **Industrial Court Act** restricts our jurisdiction to consideration of only matters of law. That means that in appeals from decisions of the ELRC, this Court has no jurisdiction to re-evaluate the evidence on record and come to its own conclusions as it does in ordinary appeals not limited to only points of law.
12. As the Supreme Court stated in the case of **Peter Munya v. Dickson Mwenda Kithinji & 2 Others**, points of law include the conclusions of the trial or the first appellate court in the case of a second appeal. So in appeals, even those arising from the decisions of the ELRC or other appeals where the appellate jurisdiction is limited to only points of law, "*where the appellant claims that [the conclusions of the trial court] were based on 'no evidence', or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were 'so perverse', or so illegal, that no reasonable tribunal would arrive at the same....*", the appellate court, without preferring one set of facts to another or substituting the trial court's decision with its own, has jurisdiction to review the evidence on record and determine whether the trial Judge indeed committed the improprieties it is accused of.
13. In this appeal, the appellants have challenged the conclusions of the trial court as being perverse or based on no evidence or a misapprehension of the evidence on record. We therefore have jurisdiction, within the above set parameters, to consider the evidence on record to determine if indeed the trial court's conclusions were perverse or based on no evidence or were based on a misapprehension of the evidence on record as the appellants claim.

The Competence of the Petition

14. On the issue of the competence of the petition, Mr. Omogeni, teaming up with Mr. Rodi for the 1st and 2nd appellants, raised two points. The first one was that only natural persons and not corporate bodies can petition to enforce their constitutional rights and the second one was that State organs cannot seek to enforce against each other their respective constitutional rights.
15. On the first point, counsel for the appellants submitted that although the definition of the term "person" in **Article 260** of the Constitution includes corporate bodies, such bodies cannot enforce their fundamental rights under **Article 22(1)** of the Constitution. Only natural persons can. They cited the High Court decision in **The County Government of Meru v. The Ethics and Anti-corruption Commission**, as authority for that proposition. In the circumstances, counsel urged us to find that the petition by the 1st respondent in this matter was incompetent.
16. In response, Mr. Okongo teaming up with Mr. Njenga for the 1st and 2nd respondents, dismissed the appellants' said contention as ridiculous. He argued that in the light of the provisions of **Section 12** of the County Governments Act establishing the County Assembly Service Boards as statutory body corporates and the definition by Article 260 of the Constitution of the term "person", the 1st respondent is a "person" which is entitled to move the court under **Articles 22** and **23** to enforce its constitutional rights.
17. We have considered these rival submissions by counsel for the parties, the authorities they have cited to us as well as the various provisions of the Constitution and Acts of Parliament on this

issue.

18. **Article 22** of the Constitution, in as far as it is relevant to this issue, grants “*every person*” a right to commence court proceedings for the enforcement of “*a right or fundamental freedom in the Bill of Rights.*” **Article 260** of the Constitution defines the term “person” to include “*incorporated*” bodies. It is not in dispute that the 1st respondent is a State corporation established by **Section 12** of the County Governments Act. Section 12(2) of that Act states that “[*t*]he county assembly service board shall be a body corporate with perpetual succession and a common seal.” In the circumstances, the 1st respondent is a person entitled to enforce its fundamental rights.
19. We know of no constitutional or statutory provision restraining a State organ from enforcing its constitutional rights against another State organ. What Majanja J. said in the case of **The County Government of Meru v. the Ethic and Anti-Corruption Commission** (supra) which counsel for the appellants relied on in support of their contention, was that the Meru County Government as a State organ could not lodge a claim under **Article 22** to enforce against another State organ its fundamental rights to privacy, freedom of information, property and fair administrative action under **Articles 31, 35, 40** and **47** respectively. The 1st respondent in this matter never sought any relief under the Bill of Rights in the Constitution. It is the 2nd respondent, a natural person and a joint petitioner in the petition, who sought relief under Article 22 of the Constitution which is in the Bill of Rights. The relief the 1st respondent sought in the petition was that the Kisumu County Assembly had no constitutional or statutory authority to disband, dissolve or suspend the Kisumu County Assembly Service Board. The persuasive authority in that case is therefore distinguishable.
20. In the circumstances, we cannot see why the Kisumu County Assembly Service Board cannot challenge an unlawful act that threatens its very existence. We therefore hold that a State organ can enforce its constitutional rights against another State organ. Accordingly this ground of appeal also fails.
21. Related to this issue is the appointment of Eliud Owen Ojuok, the 3rd respondent, as interim Clerk of the Kisumu County Assembly. Counsel for the 1st and 2nd respondents submitted that at the time of his appointment, the 3rd respondent had not attained the requisite academic qualification.
22. In response, counsel for the 3rd and 4th respondents submitted that the letter dated 23rd September 2014 from the University of Nairobi made it quite clear that the 3rd respondent had completed his LLB degree. And in his replying affidavit, the 3rd respondent averred, which averments have not been controverted, that he had had 10 years experience. Counsel faulted the learned Judge for ignoring all that evidence and holding that the 3rd respondent had not met the requisite academic qualification to be appointed as Clerk to the Kisumu County Assembly. In so doing, counsel claimed, the Judge also shifted the burden of proof under **Section 107** of the Evidence Act from the 6th and 7th respondents to the appellants.
23. For appointment as Clerk of a County Assembly, **Section 13(2)** of the County Governments Act requires one to be a holder of a degree from a recognized university and at least five years relevant professional experience. Unlike those of the previous years which state that he had passed and had been allowed to proceed to the next level, the recommendation on the 3rd respondent’s result slip for the fourth year of his LLB course did not state that he had passed and had been allowed to graduate as would be expected if he had indeed successfully completed his LLB course. Instead it stated: “RESIT LESS COURSES TAKEN.” That throws into doubt the authenticity of the letter dated 23rd September 2014 from the University of Nairobi claiming that the 3rd respondent has successfully completed his LLB studies. That letter was at any rate written for the Associate Dean, School of Law, University of Nairobi, Kisumu Campus, by an unidentified person. That is not the kind of evidence to be relied upon by a diligent employer to engage a person for a senior position like Clerk of the County Assembly.

24. Be that as it may, we concur with the learned trial Judge that the 3rd respondent did not have the requisite professional experience. In his affidavit sworn on 30th October 2014, the 3rd respondent claimed that “*having worked for the defunct councils for the last 10 years*”, he had the required relevant experience. This averment lacks particulars of where the 3rd respondent had worked. It is therefore difficult to ascertain if indeed he had the requisite professional experience.
25. The 3rd respondent undertook his LLB degree course between January 2010 and July 2014. If he graduated at all, and there is nothing to show he did, then it must have been after July 2014. The work experience he referred to therefore related to the period prior to attaining the LLB degree. That is not the work experience required by Section 13(2) of the County Governments Act. That section requires post-graduation experience. In this case the 3rd respondent was required to have gained five years experience after qualifying as a lawyer. In the circumstances, we find that the 3rd respondent had not qualified to be appointed as interim Clerk of the Kisumu County Assembly.
26. The next issue for our determination is whether or not the ELRC had jurisdiction to determine the petition. Before we consider it, we would like to state that we deprecate the conduct of counsel for the appellants in this matter. When it suited them, on 5th November 2014 they urged Maina, J. to dismiss the petition as the issues raised therein fell within the jurisdiction of the ELRC and not that of the High Court. Maina, J. obliged but instead of dismissing the petition, she transferred it to the ELRC. Before the ELRC, the appellants’ counsel did not question that court’s jurisdiction to determine the petition. However, when they lost and the petition was granted, they came to this Court up in arms contending that the ELRC lacked jurisdiction to entertain the petition. Counsel, as officers of the court, should be candid and state the correct position of the law even when it affects their clients’ cases. They should not approbate and reprobate. Having said that, we now wish to consider the issue of jurisdiction.

Whether the ELRC had Jurisdiction to determine the petition

27. The appellants raised three points on the issue of jurisdiction. They are that under the doctrine of separation of powers, proceedings of a county assembly are immunized against challenge before any court and the ELRC had therefore no jurisdiction to entertain the petition; that it is only the High Court which has jurisdiction to determine petitions for enforcement of constitutional rights; and that the dispute in this matter did not fall within the purview of the matters reserved for the ELRC.

Separation of Powers

28. On the first point, counsel for the appellant cited the provisions **Article 117** of the Constitution as well as those of **Sections 12** and **29** of the National Assembly (Powers and Privileges) Act as read with **Section 17** of the County Governments Act and submitted that no court has jurisdiction to question the validity of the “*proceedings or decision of the Assembly or the Committee of Privileges acting in accordance with*” the National Assembly (Powers and Privileges) Act as such proceedings cannot “*be questioned in any Court.*”
29. **Article 117** of the Constitution of Kenya provides for powers, privileges and immunities of Parliament. It states that:

“(1) There shall be freedom of speech and debate in Parliament.

(2) Parliament may, for the purpose of the orderly and effective discharge of the business of Parliament, provide for the powers, privileges and immunities of Parliament, its committees, the leader of the majority party, the leader of the minority party, the chairpersons of committees and members.”

30. We are aware that the **Parliamentary Powers and Privileges Bill, 2014**, which was intended to

operationalize the provisions of Article 117 of the constitution, has been presented to Parliament but to the best of our knowledge that Bill has not been enacted into law. The relevant law therefore remains to be the **National Assembly (Powers and Privileges) Act. Section 12** of that Act provides;

“No proceedings or decision of the Assembly or the committee of Privileges acting in accordance with this Act shall be questioned in any Court”

31. **Section 29** of the same Act asserts that:

“Neither the Speaker nor any officer of the Assembly shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in the Speaker or such officer by or under this Act or the standing orders”.

32. **Section 17** of the County Governments Act applies the above immunity to proceedings before the County Assemblies. It provides that:

“The national law regulating the powers and privileges of Parliament shall, with the necessary modifications, apply to a County Assembly.”

33. Understanding of, and respect for, the principle of separation of powers is the *sine qua non* of a democratic State. The essence of the doctrine of separation of powers is that the Executive, the Legislature and the Judiciary constitute three separate and independent arms of government with different and exclusive responsibilities. The legislative function, that is the enactment of laws, belongs to the legislature; the implementation of law and government policies is the role of the Executive; and the interpretation and enforcement of the rule of law is the mandate of the Judiciary. By virtue of this separation, it is not permissible for any branch to interfere with the others' spheres.

34. With regard to the issue before us, under the doctrine of separation of powers, the court should not interfere with the freedom of speech and debate of legislative bodies. The court must resist unwarranted intrusion into internal procedures of Parliament and the County Assemblies unless they act unconstitutionally. As this Court stated in **Martin Nyaga Wambora & Others v. Speaker of the Senate & Others**, where it is shown that in conducting its proceedings, a legislative authority has acted within the confines of the Constitution, courts have no jurisdiction and ought not to interfere simply because anybody is aggrieved by a decision passed by the legislative authority. However, where they have not, the court can interfere. This is because the legislative assemblies, like all other organs of state and indeed every person, must act in accordance with the Constitution.

35. **Article 2(1)** of the **Constitution** declares that the Constitution is “*the supreme law of the Republic*” which “*binds all persons and all state organs at both levels of government.*” Every person, organ or institution is therefore enjoined to respect, uphold and defend the Constitution. It follows that Parliament or any County Assembly cannot seek refuge under the **National Assembly (Powers and Privileges) Act**, if it violates any provision of the Constitution. The Supreme Court reiterated this point in the case of **Speaker of the Senate & Another v. Attorney General & 4 Others** in the following terms:

“...Kenya’s legislative bodies bear an obligation to discharge their mandate in accordance with the terms of the Constitution, and they cannot plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation... If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law... to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This court would be averse to

questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution.”

36. This view was echoed by the South African Constitutional Court in the case of **Doctors For Life International v. Speaker of The National Assembly And Others** where it held that:-

“Courts are required by the Constitution ‘to ensure that all branches of government act within the law’ and fulfill their Constitutional obligations.”

37. In this case, in determining whether the trial Court had jurisdiction to pronounce itself on the proceedings of the County Assembly with regard to removal of the Speaker, it must be borne in mind that it is the Constitution of Kenya that establishes the office of Speaker of a County Assembly.

38. **Article 178 (1)** of the Constitution stipulates that each County Assembly shall have a Speaker elected by the County Assembly itself from any persons who are not members of the assembly. **Sub Article (3)** thereof empowers Parliament to enact legislation providing for the election and removal from office of Speakers of County Assemblies. Pursuant to this provision, Parliament enacted the County Governments Act **Section 11** of which provides for the removal of the Speaker. Removal of a Speaker of a County Assembly contrary to this Section is therefore a violation of the Constitution. As we have stated, the Constitution being “*the supreme law of the Republic*” which “*binds all persons and all State organs at both levels of government*” nobody, including State organs like Parliament and the County Assemblies can violate it with impunity. It is therefore no derogation from the doctrine of separation of powers for a court to question any unconstitutional acts of legislative assemblies.

39. In this case, relying on the provisions of **Articles 28, 41, 47, 50** and **178(3)** of the Constitution and **Section 11** of the County Governments Act, the 2nd respondent challenged her removal from office by the 1st appellant as unconstitutional. That was a pertinent issue which the court was obliged to determine. In the circumstances, the ELRC was under obligation to determine that petition. The first limb of the ground challenging the ELRC’s jurisdiction to entertain the petition giving rise to this appeal based on the doctrine of separation of powers therefore fails.

40. Besides the above provisions, under the supervisory jurisdiction vested upon it by **Article 165(6)** of the Constitution, the trial court was also entitled to interrogate the issue of impeachment of the Speaker. The Article asserts that:

“(6) The High Court has supervisory jurisdiction over subordinate courts and over any person, body or authority exercising judicial or quasi judicial function but not over a superior court.” [Emphasis added]

41. On the basis of the above provision therefore, in the exercise of their quasi-judicial functions, the County Assemblies (and even the National Assembly) are subject to the supervisory jurisdiction of the court.

42. Article 178(3) of the Constitution as read with Section 11 of the County Governments Act, provide an unequivocal procedure to be followed in proceedings for the impeachment of the Speaker of a County Assembly. **Article 181** of the Constitution and **Section 33** of the County Governments Act provide for more or less the same procedure for the impeachment of a Governor of a County Assembly. We concur with the High Court decision in the case of **Hon. Martin Nyaga Wambora v. The Speaker, County Assembly of Embu**, that under that procedure, the impeachment of a Governor of a County Assembly is quasi-judicial in nature. It follows that the removal of a Speaker of a County Assembly is equally quasi-judicial in nature.

43. According to **Article 162** of the Constitution, the ELRC has the status of the High Court. This being the case, it follows that in matters falling within its jurisdiction, the ELRC has supervisory

powers over “any person, body or authority exercising judicial or quasi judicial functions.” We have already found that the removal of a Speaker of a County Assembly is a quasi-judicial function. As we shall shortly demonstrate, the issues raised in the petition fell within the jurisdiction of the ELRC. We therefore find that the challenge of the impeachment of the 2nd respondent was a matter that fell squarely within the ELRC’s supervisory mandate.

44. On the second point on the issue of jurisdiction, counsel for the appellants argued that **Articles 23(1) and 165(3)** of the Constitution vest in the High Court, as the constitutional court, and not in the ELRC, the jurisdiction to determine petitions seeking to enforce constitutional rights. He asserted that the ELRC not being the constitutional court, it had no jurisdiction to entertain the petition giving rise to this appeal.

45. In response, Mr. Okongo, learned counsel teaming up with Mr. Njenga for the 1st and 2nd respondents, dismissed this contention. He submitted that there is no court in Kenya known as the constitutional court established to determine constitutional issues. He argued that as **Articles 22 and 23** simply talk of a “court”, every court in Kenya has jurisdiction to determine constitutional issues that arise in disputes within its jurisdiction.

46. Having considered the rival submissions on this point, we agree with counsel for the respondents that the Constitution does not establish a stand-alone constitutional court with exclusive jurisdiction to adjudicate upon constitutional issues. There are several authorities in support of this proposition. Suffice it to cite only **Prof. Daniel N. Mugendi v. Kenyatta University & Others**, in which the main issue for determination was whether or not the Industrial Court had jurisdiction to adjudicate upon issues of violation of constitutional rights. In affirming that the court had such jurisdiction, this Court cited with approval the decision of Majanja, J. in **United States International University (USIU) v. The Attorney General & Others** in which the learned judge observed that:

“Since the court is of the same status of the High Court, it must have jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the Constitution and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce, not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within the matter before it.”

47. This Court reiterated this position in the case of **Judicial Service Commission v. Shollei**, where it held that the ELRC has jurisdiction to determine constitutional issues which arise within the purview of its jurisdiction. The second point on jurisdiction therefore also fails.

48. The third point on the issue of jurisdiction is that there is no employer/employee relationship between the Speaker of any County Assembly and the County Assembly itself to warrant the invocation of the ELRC’s jurisdiction to entertain the petition. Counsel for the appellants cited to us this Court’s recent decision in **Jefferson Kalama Kengha & 2 Others v. Republic** and argued that the ELRC is a specialized court whose jurisdiction, as is clear from **Article 162(2)(a)** of the Constitution when read together with **Section 12(1)(a)** of the Industrial Court Act, is limited to “employment and labour relations” disputes, that is to say “disputes relating to or arising out of employment between an employer and an employee.”

49. In this case, counsel for the appellants further argued, the relationship between the Speaker of a County Assembly and the County Assembly itself is “a quasi-political and procedural one” in that the Speaker of a County Assembly is elected and not appointed. As such, there is no employer/employee relationship between them. In the circumstance, counsel said, in the words of the late Justice Nyarangi in **Motor Vessel “SS Lillian”**, the ELRC should have “downed its tools” and struck out the petition for lack of jurisdiction.

50. For the respondents, it was submitted that there is a contract of service between the Speaker and the County Assembly and the ELRC had therefore to determine the petition.
51. As is clear from these submissions, both sides of the divide in this appeal agree that pursuant to the provisions of **Article 162(2)(a)** of the Constitution as read with **Section 12(1)** of the Industrial Court Act, the jurisdiction of the ELRC stems from the existence of employment and labour relations. The main issue in this appeal therefore is whether or not such relationship exists between a Speaker and a County Assembly. The appellants contended that employer/employee relationship arises on appointment and not on election and since the position of a Speaker is elective, such relationship does not exist. The respondents contended otherwise arguing that the determinant factor is remuneration.
52. The position of the Speakers of the National and County Assemblies should be distinguished from those of the Members of the National and County Assemblies. The Members of National and the County Assemblies are elected by the public at large to represent them and urge their interests in their respective assemblies. The Speakers, on the other hand, are not elected to represent any constituency. They are elected by their respective Assemblies to assist the Assemblies conduct their businesses in an orderly and lawful manner. Their responsibilities include managing House business and facilitating the operations of the National or County Assemblies. To provide for seamless support for the workings of the County Assembly, the Speakers of the County Assemblies also chair the County Assembly Service Boards which are responsible for the provision of services and facilities, including the appointment of office holders such as the Clerks and the Deputy Clerks of the County Assemblies to ensure the effective and efficient operations of the County Assemblies. In a sense therefore, the Speakers' roles are akin to those of managing directors of body corporates answerable to their Boards of Directors on the day-to-day operations of the companies. The Speakers' elections are therefore akin to appointments which create employer/employee relationships.
53. As Nduma J correctly observed in **Nick Githinji Ndichu v. Clerk Kiambu County Assembly & Another**, a decision followed by Sitati J. in **Peter Kingoina v. County Assembly of Nyamira** employer/employee relationship exists when there is a “*contract of service*” as defined by **Section 2** of the Employment Act, 2007. We concur with the learned Judge that the law is not concerned with the manner of engagement or assumption of the position of employee. What is important is the existence of a contract of service “*whether oral or in writing, and whether expressed or implied to employ or to serve as an employee for a period of time...for wages or a salary.*” On this additional criterion, we once again concur with the learned Judge that there exists a contract of service between a Speaker of a County Assembly and the County Assembly concerned.
54. On the basis of these points, we therefore uphold Wasilwa, J's finding that the ELRC had jurisdiction to determine the petition. We accordingly dismiss the ground on jurisdiction.
55. The next issue we wish to consider is whether or not a County Assembly has powers to suspend a County Assembly Service Board. Having considered the rival submissions on this issue, we agree with counsel for the respondents that County Assembly Service Boards do not exist at the pleasure of County Assemblies or any other State organ. County Assembly Service Boards are autonomous State corporations established under **Section 12** of the County Governments Act. Although, as is clear from **Section 12(7)** of the County Governments Act, they are established to provide services and facilities for the efficient and effective functioning of County Assemblies, they are not subordinate to County Assemblies or any other State organ. County Assemblies have no constitutional or statutory authority to disband, dissolve or even suspend the operations of County Assembly Service Boards. In the circumstances, we find that the Kisumu County Assembly unlawfully purported to suspend the Kisumu County Assembly Service Board.
56. After the suspension of the Kisumu County Assembly Service Board, the Kisumu County Executive arrogated to itself the role of establishing offices within the Kisumu County Government and in that regard purported to redeploy the 6th and 7th respondents to other duties. It

had no powers to do that. The County Governments Act vests that mandate in the County Assembly Service Boards. In the circumstances, we also find that the Kisumu County Executive's redeployment of the 6th and 7th respondents to the positions of Assistant Sub-County Administrators was null and void.

57. The last issue for our consideration is whether or not the Kisumu County Assembly followed due process in the removal of its Speaker, the 2nd respondent. We shall consider this issue together with the one of the admissibility of electronic evidence.

Due Process

58. On the removal of the 2nd respondent, counsel for the appellants as well as the 3rd and 4th respondents who supported this appeal, faulted the learned Judge for allegedly distorting the factual evidence on record. They argued that contrary to the Judge's finding that the notice of the motion to remove the 2nd respondent was only signed by one member of the 1st appellant, the notice was actually signed, not by just one-third as required by **Section 11(2)** of the County Governments Act, but by 38 out of 49 which is over 75% of the members of the Kisumu County Assembly.

59. Counsel also argued that contrary to the learned Judge's finding, the 2nd respondent was given sufficient time to prepare her defence. They argued that besides the service of the notice of motion upon the 2nd respondent vide the County Secretary's letter of 17th October 2014 which was delivered to the 2nd respondent's secretary, on 21st October 2014 at about 12.04 pm, a reminder was admittedly emailed to the 2nd respondent to appear before the County Assembly at 2.30 pm on the same day and defend herself but she refused to do so.

60. Counsel also dismissed the respondents' contention that the 1st appellant went on with the debate on the removal of the 2nd respondent despite knowledge of a court order restraining the 2nd respondent's impeachment and accused the learned Judge of shifting the burden of proof to the appellants contrary to **Section 107** of the Evidence Act.

61. Counsel further submitted that the learned Judge ignored clear affidavit evidence that the 2nd respondent rebuffed the Sergeant at Arms who had gone out to usher her into the Assembly Chamber to defend herself. Instead, and contrary to **Section 106B** of the Evidence Act, the learned Judge erroneously relied on inadmissible electronic evidence that the 2nd respondent had been restrained from accessing the Chamber. In the circumstances, counsel said the 2nd respondent squandered the opportunity accorded to her to defend herself. On the authority of **Union Insurance Company of Kenya Ltd v. Ramzan Abdul Danji** cited with approval in **Bernard Muia Tom Kiala v. Speaker of the County Assembly of Machakos & 4 Others**, they urged us to find that the 2nd respondent has herself to blame for the ex-parte impeachment proceeding.

62. In response, counsel for the respondents submitted that the 2nd respondent had forcibly been ejected from the County Government premises on 15th October 2014 and her office locked long before the impeachment proceeding on 21st October 2014. Contrary to **Section 11** of the County Governments Act and the 1st appellant's own **Standing Order No. 58**, the 2nd respondent was not served with a valid notice of intention to move a motion to remove her. The notice was signed by only one person and emailed to the 2nd respondent at 12.04 on 21st October 2014. When she went to the County Assembly at about 2.25 pm on that day pursuant to that email, as is clear from the affidavit of Phildas Odidi, the 2nd respondent was denied entry into the County Assembly Chamber. In the circumstances, counsel concluded, contrary to **Articles 47, 50(1) and 236(b)** of the Constitution and this Court's decision in **County Government of Nyeri & Another v. Cecilia Wangechi Ndungu**, the 2nd respondent was denied an opportunity to defend herself.

63. Having also considered these rival submissions, we would first like to dispose of the issue of the admissibility of electronic evidence before we consider the right to a fair hearing.

64. In her affidavit sworn on 24th October 2014, the 2nd respondent claimed that she went to the Kisumu County Assembly on 21st October 2014 at about 2.25 pm but, on instructions of the 3rd respondent and Samuel Ong'ou, the Majority Leader, the sentry guards at the gate to the County Government premises restrained her from accessing the County Assembly debating Chamber to defend herself. In support of that contention, the 2nd respondent sought to rely on the electronic evidence contained in a DVD produced by one Denis Kongo, a freelance photojournalist.

65. **Section 106B** of the Evidence Act states that electronic evidence of a computer recording or output is admissible in evidence as an original document *“if the conditions mentioned in this section are satisfied in relation to the information and computer.”*

66. In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B(2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced. For ease of reference, we wish to reproduce Section 106B of the Evidence Act in its entirety:

“106B (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—

(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of sub section (2) was regularly performed by computers, whether—

(a) by combination of computers operating in succession over that period; or

(b) by different computers operating in succession over that period; or

(c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

(5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.”

67. In relation to this case, the relevant conditions in that section are (a) if the computer output was recorded by a person having lawful control over the computer used; (b) if the output was recorded in the ordinary course of that person’s activities using a computer or some other electronic device and fed into a computer that was properly operating throughout the material period; and (c) if that person gives a certificate that to the best of his knowledge, the output is an electronic record of the information it contains and describes the manner in which it was produced.

68. The Evidence Act does not provide the format the certificate required under sub-section 106B(2) thereof should take. The certificate can therefore take any form including averments in the affidavit of the recorder.

69. In this case as we have said the electronic record was made by one Denis Kongo, a freelance photojournalist. He, however, did not annex to his affidavit sworn on 11th December 2014 the required certificate. The averments in that affidavit themselves did not meet the above stated threshold of sub-section 106B(2) of the Evidence Act. Those averments therefore fell short of the required certificate. In the circumstances, we agree with counsel for the appellants that the electronic evidence of Denis Kongo was inadmissible and the learned Judge erred in relying upon it.

70. Having disposed of the issue of the admissibility of electronic evidence, we now turn to consider the issue of whether or not the 2nd respondent was given a fair hearing in the matter. That is to say whether or not due process was followed in the impeachment of the 2nd respondent.
71. The primary meaning of the rule of law as anybody who has anything to do with the law knows, “*is that everything must be done according to law.*” In relation to governmental power, this means that every government authority must justify its action, which deprives an individual of his right or infringes his liberty, as authorized by law. This “*is the principle of legality.*” But the rule of law demands more than just the principle of legality. It demands, and this is the second meaning of the rule of law, “*that government should be conducted within a framework of recognized rules and principles which restrict discretionary power.*” This is the principle of due process.
72. Due process is a fundamental aspect of the rule of law. Due process is the right to a fair hearing. The right to a fair hearing encapsulated in the *audi alteram partem* rule (*no person should be condemned unheard*) and founded on the well-established principles of natural justice, is not a privilege to be graciously accorded by courts or any quasi-judicial body to parties before them. As is clear from Articles 47 and 50 of our Constitution, it is a constitutional imperative.
73. Whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now well settled. In granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it. The person charged is entitled to what, in legal parlance is referred to as the right to “*notice and hearing.*” That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary. In the epigram of the indomitable Lord Denning in **Kanda v. Government of Malaya**

“If the right to be heard is to be a real right which is worthy anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.”

74. What amounts to sufficient notice also varies from case to case. But as stated, the notice must contain substantial information with sufficient details to enable the person charged to ascertain the nature of the allegations made against him. The notice must also comply with any statutory requirements where the same are provided.
75. In this case, we find that the notice of intention to move a motion for the removal of the 2nd respondent contained sufficient information of the charges against her. That notwithstanding, however, we agree with counsel for the 2nd respondent that it was not a valid notice.
76. **Standing Order 58** of the 1st respondent’s Standing Orders, which mirrors word for word **Section 11** of the County Government 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. Were these conditions met in this case? We do not think so.
77. First, no valid notice was served upon the 2nd respondent. Contrary to the above provisions, the notice in this case was signed by only one person. We reject the appellants’ contention that the list dated 16th October 2014, brought on board in this appeal by the supplementary record of appeal,

was part of the notice. Neither the body of the notice itself nor the letter dated 17th October 2014 vide which it was allegedly served upon the 2nd respondent make any reference to the list.

78. As regards sufficient time to respond to the notice, along with Lord Denning's decision in the case of **Kanda v. Government of Malaya** (supra), we also concur with the High Court decision in the case of **Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others**, that the right to a hearing "*encompasses ... sufficient time to respond.*"

79. In this case the 2nd respondent was also not granted sufficient time to respond to the allegations leveled against her. **Standing Order No. 63** of the 1st appellant's Standing Orders requires notice of removal from office of any officer to be served upon such officer at least three days prior to the debate on the motion. In her supplementary affidavit sworn on 24th October 2014 in support of the Petition, the 2nd respondent complained that the 3rd respondent's letter of 17th October 2014 entitled "*Notice of Removal from Office*" giving her notice to appear before the Kisumu County Assembly's Committee of the whole House on 21st October 2014 at 2.30 pm and defend herself and to which was annexed the notice with allegations against her, was emailed to her on the same day, that is on 21st October 2014 at 12.05 pm. Clearly, the 1st appellant contravened its own standing orders by failing to adhere to the stipulated period of service. We agree with her that it was not served upon her secretary on 17th October 2014 as the appellants claimed. Contrary to the Sergeant at Arms' contention in his affidavit sworn on 29th October 2014 that he delivered that letter to the 2nd respondent's secretary on 17th October 2014, the delivery note contained in the supplementary record of appeal shows that that letter was delivered to the 2nd respondent's secretary on 21st October 2014. At any rate the 2nd respondent claimed that her office was barricaded and she was, from 15th October 2014, restrained from accessing it. So even if that letter together with the notice were indeed delivered to her secretary on 17th October 2014, she could not have seen them.

80. Even if a valid notice was issued and sufficient time was given to the 2nd respondent to respond, as stated above, **Section 11(4)** of the County Governments Act and the 1st respondent's **Standing Order 58** required the 1st appellant to accord the 2nd respondent a reasonable opportunity to be heard. As the US Supreme Court, while dealing with the issue of deprivation of welfare benefits in the old case of **Goldberg v. Kelly**, stated, "*[t]he fundamental requisite of due process of law is the opportunity to be heard... at a meaningful time and in a meaningful manner.*"

81. In this case, we find that the 2nd respondent was totally denied the opportunity to present her case. As we have stated, the 2nd respondent averred in her affidavit sworn on 24th October 2014 that she went to the Kisumu County Assembly premises on 21st October 2014 at 2.25 pm but, on instructions of the 3rd respondent and Samuel Ong'ou, the Majority Leader, the sentry guards restrained her from accessing the debating Chamber to defend herself. None of the sentry guards of the Kisumu County Assembly swore an affidavit to controvert that averment. We have already cast aspersions on the integrity of the Sergeant at Arms with regard to his claim that he delivered the letter with the requisite notice to the 2nd respondents secretary on 17th October 2015 when the delivery book shows that that letter was delivered on 21st October 2014. In the circumstances, his contention that the 2nd respondent rebuffed his request to go into the debating chamber to defend herself cannot be believed.

82. In their affidavits entitled "REPLY TO SUPPLEMENTARY AFFIDAVIT" sworn on 27th October 2014, Eliud Owen Ojuok, the Acting Clerk of the County Assembly, and Gabriel Ochieng, a member of the Kisumu County Assembly, averred that on 21st October 2014, they both saw the 2nd respondent "*within the precincts of the Kisumu County Assembly at 2:00pm*" although they denied that she was restrained from accessing the County Assembly debating Chamber. In

our view, that confirms the 2nd respondent's assertion that she went to the County Assembly but was denied access. It defeats logic that the 2nd respondent could go to the County Assembly premises at that particular time when the motion for her removal was being debated and refuse to go into the debating Chamber to defend herself. In the circumstances, the inadmissibility of the electronic evidence of Denis Kongo notwithstanding, we find that the 2nd respondent was indeed restrained from accessing the Kisumu County Assembly debating Chamber. As such, she was denied a hearing on the motion for her removal and an opportunity to defend herself.

83. The 1st appellant not only denied the 2nd respondent an opportunity to be heard, but also fragrantly disobeyed a court order restraining it from proceeding with the impeachment.

84. On 21st October, Maina, J. issued an order in Petition No. 22 of 2014 restraining the 1st appellant from proceeding with the impeachment or replacement of the 2nd respondent. The 1st appellant's Hansard report of 21st October 2014 shows that in the course of the debate on the impeachment of the 2nd respondent, on 21st October 2014 Hon. Kadede thundered: "*Point of Order! I would like to inform the House that there is a court order stopping what we are doing.*" In response to that, Hon. Gabriel Ochieng, with whom the majority of the County Assembly agreed, rubbished the court order as inconsequential and proceeded with the impeachment proceedings, purportedly under the immunity the Assembly enjoys under the Parliamentary Powers and Privileges Act. So despite lack of evidence of service of the order upon it, the 1st appellant was aware of that court order but disregarded it. As Romer LJ stated in the now *locus classicus* case of **Hadkinson v. Hadkinson**, stated:

"A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid- whether it was regular or irregular.... [T]hey should come to the court and not take upon themselves to determine such a question.... [T]he course of a party knowing an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed."

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 penalties, or be exposed to prosecution or proceedings or 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."

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.

87. We are alarmed by the rampant actions of some leaders in this country in blatant disregard of the rule of law. The impression we get in this case is that the Kisumu County Assembly thinks it can do anything under the sun as long as it passes a resolution to do it whether or not such an act is constitutional. That happens only in dictatorships. In constitutional democracies like ours, the entire object of the doctrine of separation of powers, which the appellants harped on, albeit erroneously, is to limit the powers of each of the three arms of government. As stated, the mandate of the legislative authorities is limited to enactment of legislations. In addition, the Constitution has given the National and County Assemblies oversight roles. In the discharge of those mandates, as we have stated, the National and County Assemblies must act in accordance with the

Constitution.

88. *By the Constitution they gave themselves on 27th August 2010, the Kenyans prescribed the rules by which they should be governed. The County Assemblies, of which the 1st appellant is one, came into existence courtesy of that Constitution. The self same Constitution admittedly confers enormous powers upon them. But they should understand that they are required to exercise those powers within the confines of the provisions of the self same Constitution or the statutes made pursuant to it.*
89. *The principle of devolution, under which the County Governments were created, is one of the central pillars of our Constitution. Everything should therefore be done to strengthen and not trifle with the operations and processes of its constituent parts, in particular those of County Governments. The County Governments have to comply with the letter and the spirit of the Constitution. If they don't and instead violate the Constitution and the processes created under it, the court, by virtue of the authority conferred upon it by the same Constitution as its custodian, is under an obligation to overrule them.*
90. *In this case, as we have demonstrated, in the impeachment of the 2nd respondent, the 1st appellant flagrantly disregarded every rule in the book. In a nutshell, we find that no valid notice was served upon the 2nd respondent and we agree with counsel for the respondents that contrary to **Articles 47, 50(1) and 236(b)** of the Constitution, the rules of natural justice and this Court's decision in **County Government of Nyeri & Another v. Cecilia Wangechi Ndungu**, she was denied an opportunity to defend herself. In the circumstances, whatever sins the 2nd respondent may have committed which we are not concerned with in this appeal as we are not reviewing the merits of the case, we have no option but to uphold the trial court's decision quashing the impeachment of the 2nd respondent.*

Conclusion

91. In conclusion, for the above stated reasons, we make the following findings and final orders:
- a. The Kisumu County Assembly Service Board is a "person" as defined by **Article 260** of the Constitution. Like a natural person, it is entitled to seek redress, even against another State organ, for violation of its constitutional rights. The petition giving rise to this appeal was therefore competent.
 - b. We find that there is an employer/employee relationship between a County Assembly and its Speaker. In the circumstances, besides its supervisory jurisdiction, the ELRC had jurisdiction to determine the petition.
 - c. In the absence of constitutional or statutory authority empowering a County Assembly to suspend the County Assembly Service Board, the suspension by the Kisumu County Assembly of the Kisumu County Assembly Service Board and the redeployment of the 6th and 7th respondents was null and void.
 - d. Eliud Owen Ojuok was not academically qualified to be appointed interim Clerk of the Kisumu County Assembly having failed to meet the threshold set out in Section 13(2) of the County Governments Act.
 - e. All persons, including State organs, are obliged to comply with and defend the Constitution. The Constitution subjects the discharge of the mandates of all persons including the National and County Assemblies, which are quasi-judicial in nature to the supervisory jurisdictions of the High Court and the ELRC. As the doctrine of the separation of powers is part of the architecture of the self same Constitution, it is no derogation from the doctrine of separation of powers to subject the County legislative Assemblies (and even the National Assembly) to the supervisory jurisdiction of

the court if, in the exercise of their quasi-judicial functions, they violate the Constitution.

- f. In the impeachment of its Speaker in this matter, the Kisumu County Assembly exercised a quasi-judicial function and was therefore subject to the supervisory jurisdiction of the ELRC.
- g. The Kisumu County Assembly did not follow due process in the impeachment of its Speaker, the 2nd respondent. In the circumstances, the removal of the 2nd respondent from office was null and void.

92. For these reasons, save on the issue of admissibility of electronic evidence, we uphold the decision of Wasilwa, J. and dismiss these appeals with costs to the 2nd, 6th and 7th respondents against the appellants and the 3rd and 4th respondents jointly and severally.

DATED and delivered at Kisumu this 6th day of October, 2015.

D.K. MARAGA

.....

JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR
