IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 74 OF 2014

BETWEEN

NAROK COUNTY GOVERNMENT ………….………… 1ST APPELLANT

HIS EXCELLENCY

THE GOVERNOR NAROK COUNTY ………………...….. 2ND APPELLANT

AND

RICHARD BWOGO BIRIR ………………………………. 1ST RESPONDENT

ATTORNEY GENERAL ………………………………….. 2ND RESPONDENT

(An appeal from the judgment of the Industrial Court of Kenya at Nakuru (Byram Ongaya, J.) dated 14th March, 20014

in

Petition No. 1 of 2014)

****

JUDGMENT OF THE COURT

Introduction:

1. By some stroke of fate, two decisions of the Industrial Court were made by the same Judge **(Byram Ong'aya J.)** sitting in different stations (Nakuru & Nyeri) and the appeals emanating from those decisions ended up before different benches of the same court! More significantly, the underlying facts in both cases were substantially the same, as was the central legal issue for determination. The other case is ***The County Government of Nyeri & The Governor of Nyeri – vs- Cecilia Wangechi Ndungu – Civil Appeal No. 2 of 2015*** (hereinafter ***"Nyeri Governor case"***) which was decided by this Court (differently constituted) on 18th March 2015. Although that decision deserves our utmost respect and consideration, it is nevertheless not binding on us. We shall revert to it later in this judgment.

2. The appellants in this case are the Narok County Government and the Governor of Narok County who were represented before us, as they were before the Industrial Court, by **Mr. Nelson Havi**, instructed by M/s Havi & Company Advocates. We shall henceforth refer to the appellants as **"the Governor".** The first respondent is **Richard Bwogo Birir** (Birir) represented before us, as he was before the Industrial Court, by **Mr. B. N. Kipkoech,** instructed by M/S Geoffrey Otieno & Company Advocates and M/S Gordon Ogola, Kipkoech & Company, Advocates. Although the Attorney General is named as the 2nd respondent, he took no part in the appeal and did not attend court despite service of the hearing notice on them. It would also appear that the Attorney General neither filed any papers nor made any submissions before the Industrial Court.
3. Does a member of the County Executive Committee serve at the pleasure of the Governor who may dismiss or terminate the services summarily, and does ***Section 31(a)*** of the ***County Governments Act*** preserve that power? That is the central issue in this appeal which we shall grapple with shortly. There are also three other peripheral issues which we shall examine and determine.

Background:

4. By a letter dated 16th May, 2013 signed by the County Human Resource Management officer, ***Birir*** was appointed to the post of Executive Committee Member (ECM) for Agriculture, Livestock and Fisheries with effect from 14th May, 2013. He accepted the appointment and served in the said position until 23rd January, 2014 when the Narok Governor summarily relieved him of his duties.
5. Birir was aggrieved by the manner of his dismissal which he considered a violation of his constitutional rights and the rule of law. He went before the Industrial Court in Nakuru on 10th February, 2014 and filed a Constitutional Petition, which was subsequently amended with leave, seeking the following court orders:-

- ***A declaration be issued to declare that the removal and/or dismissal of the petitioner as the Executive Committee Member for Agriculture, Livestock and Fisheries vide the 2nd respondent's letter dated 23rd January, 2014 is unconstitutional and therefore unlawful on account of violation of Sections 31 and 40 of the County Governments Act, 2012 as read with Articles 47 and 236 of the Constitution of Kenya and Section 41 of the Employment Act.***

- ***An order of Certiorari be issued to bring into this Honourable Court for purposes of being quashed the decision of the 2nd respondent contained in the 2nd respondent's letter dated 23rd January, 2014 removing and/or dismissing the petitioner as the Executive Committee Member for Agriculture, Livestock and Fisheries for being in contravention of Sections 31 and 40 of the County Governments Act, 2012 as read with Articles 47 and 236 of the Constitution, 2010 as well as Section 41 of the Employment Act.***

- ***A declaration be issued to declare that under Section 31 and 40 of the County Governments Act, 2012 as read with Article 236 of the Constitution the petitioner remains the lawful holder of the position of the Executive Committee Member for Agriculture, Livestock and Fisheries of the County Government of Narok.***

- ***The court do find and uphold that the decisions, actions and omissions of the 2nd respondent in respect of the removal and/or dismissal of the petitioner from his position constitute conduct that violates Articles 10,41 and 236 of the Constitution.***

- ***The court be pleased to order for compensation to issue for violation of the petitioner's rights and an inquiry into quantum.***

6. It was Birir's case that apart from the total failure by the Governor to disclose the reasons, if any, for dismissing him, the Governor's conduct violated the national values and principles of governance under ***Article 10*** of the ***Constitution***. The same also violated his right to dignity under

Article 28; fair labour practices under ***Article 41***; fair administrative action under ***Article 47***; due process under ***Article 236*** and fair hearing under ***Article 50*** of the ***Constitution***. Birir averred that since his appointment, he had performed his duties diligently without any complaints being brought to his attention. He maintained that his dismissal was actuated by malice and ill will on the part of the Governor; that fair procedure was not adhered to prior to his dismissal contrary to ***Section 41*** of the ***Employment Act;*** and that by dint of ***Sections 31, 40, 55, 56, 57&59*** of the ***County Governments Act, 2013*** the Narok Public Service Board ought to have been involved in the decision to terminate his services.

7. The Governor responded through the County Secretary who swore an affidavit deposing that the relationship between the Governor and Birir was contractual in nature and that his dismissal was in accordance to ***Section 31(a)*** of the ***County Governments Act*** which empowers the Governor, as the appointing authority, to dismiss any ECM, including Birir, as a matter of right. He contended that the section gives the Governor unlimited power and discretion to decide on the appropriateness or necessity of dismissing any member of the Executive Committee, without assigning any reasons or giving them a hearing.
8. The Governor maintained before the trial court that Birir's remedy for unfair dismissal, if any, lay in private law and not in public law; that Birir had not demonstrated how his constitutional rights had been violated; that ***Article 200(2)*** of the ***Constitution*** expressly authorized the procedure of appointment and removal of officers in a County Government to be governed by an Act of Parliament which in this case is the ***County Governments Act***; that generalized Articles of the Constitution cannot be used to circumvent express statutory procedures; and that the remedy of reinstatement was not available to Birir.
9. The trial court in its judgment dated 14th March, 2014 set out the issues for determination as follows:-

I. ***Whether the pleasure doctrine applies in Kenya's public service and particularly in this case.***

II. ***What was the meaning and effect of the letter for dismissal dated 23/01/2014?***

III. ***Whether the petitioner's dismissal was in contravention of the cited constitutional and statutory provisions.***

IV. ***Whether the judicial review order of certiorari is available in this case.***

V. ***Whether the petitioner is entitled to the remedies prayed for.***

10. The trial court, in a considered judgment, found that the pleasure doctrine existed in common law, in the retired Constitution , and in some statutes, but held that the new Constitution, 2010 had abrogated the doctrine which was no longer applicable in this country.
11. The court further found on the other issues that the meaning and effect of the letter of dismissal dated 23.01.2014 was that the Governor imposed the punishment of dismissal against Birir without due process; that in dismissing Birir in the manner he did, the Governor was in breach of **Articles 10, 41, 50(1) and 236** of the **Constitution**; that Birir was entitled to move the court in the manner he did under **Article 22** and **258** of the Constitution to enforce not only his fundamental rights and freedoms, but also other Constitutional provisions; that the remedy of Judicial Review order of *certiorari* was available to him; and that Birir was entitled to all the orders he sought except the order for "*compensation for violation of his rights and an inquiry into quantum*" which were neither pleaded nor evidence therefor provided.
12. The court issued the following orders:-

- ***A declaration that the removal and dismissal of the petitioner as the Executive Committee Member for Agriculture, Livestock and Fisheries vide the 2nd respondent's letter dated 23/01/2014 was unconstitutional and unlawful on account of violation of Section 31(a) of the County Governments Act, 2012 as read with Articles 47 and 236 of the Constitution of Kenya and Section 41 of the Employment Act.***

- ***An order of certiorari quashing the decision of the 2nd respondent removing and dismissing the petitioner as the Executive Committee Member for Agriculture, Livestock and Fisheries vide the 2nd respondent's letter dated 23/01/2014 for being in contravention of Section 31(a) of the County Governments Act, 2012 as read with Articles 47 and 236 of the Constitution, 2010 as well as Section 41 of the Employment Act.***

- ***A declaration that under Article 236 of the Constitution, the petitioner remains the lawful holder of the position of the Executive Committee Member for Agriculture, Livestock and Fisheries of the County Government of Narok and to continue to hold the office effective 23/01/2014 with full benefits.***

- ***A declaration that the decisions. Actions and omissions of the 2nd respondent in respect of the removal and dismissal of the petitioner from his position constituted conduct that violated Articles 10, 41 and 236 of the Constitution.***

- ***The respondents jointly or severally to permit the petitioner to resume his official duties with effect from the date of this judgment.***

- ***The 1st and 2nd respondents to pay the petitioner's costs of the petition.***

The appeal and submissions of counsel.

13. It is against those orders that the Governor appeals under nine grounds:

That the learned trial Judge erred by:-

- ***holding that the contract of service between the 1st appellant and the 1st respondent did not constitute a master/servant relationship wherein neither party could be compelled to remain in.***

- ***holding that the termination of the 1st respondent was unconstitutional and unlawful whereas the appellants were entitled to terminate his services as they did under Section 31(a) of the County Governments Act.***

- ***holding that removal from office under section 31(a) was a punishment which required reasons and a hearing.***

- ***wrongly interpreting both Sections 31(a) and Section 40 of the County Governments Act as contemplating disciplinary proceedings before removal of an Executive Committee member when the former could be acted upon despite the latter.***

- ***failing to appreciate that the remedy which was available, if any, to the 1st respondent lay in private law.***

- ***issuing a prerogative judicial review remedy of certiorari contrary to previous court decisions which were binding on him.***

- ***quashing the 1st respondent's dismissal and ordering his reinstatement which was only available under the Employment Act Cap 226 and also against the common law principle that orders for specific performance in contracts of service, cannot be granted except in exceptional circumstances.***

- ***failing to hold that the 1st respondent's remedy lay in damages which had not been pleaded or proved.***

- ***failing to consider the appellant's submissions and to follow and apply binding decisions of this Court.***

14. Those grounds were compressed into four in written submissions which were orally highlighted by Mr. Havi. On the main issue relating to the pleasure doctrine, he submitted that it was still applicable in Kenya since the relationship between the Governor and Birir was contractual. The contract was concluded when the Governor's offer letter of appointment was accepted by Birir. Under ***Section 7*** of the ***Employment Act*** the said contract constituted a master/servant relationship. It was wrong therefore for the trial court to hold that it was the doctrine of servants of the people and the doctrine of due process which were applicable.
15. As to the manner of election or appointment and removal of County Government officers, counsel submitted, the Constitution under ***Article 200*** empowered Parliament to enact the relevant legislation. This has already been done and ***Section 31(a)*** of the ***County Governments Act*** was enacted giving the Governor power to summarily dismiss a member of the County Executive Committee. Birir's dismissal, therefore, had nothing to do with the pleasure doctrine but was consistent with ***Section 31(a)***.
16. Even if the pleasure doctrine was to be invoked, urged counsel, it was found by the Industrial Court **(Rika J.)** to be alive and applicable in Kenya with respect to special categories of employees, that is, Cabinet Secretaries and members of County Executive Committees. That was in the case of ***Tom Luusa Munyasya & Another –vs- Governor, Makueni County &Another – Industrial Cause No. 103 of 2014 (UR)*.** He also cited for support of the pleasure doctrine, the Court of Appeal case of ***Opoloto vs. Attorney general (1969) EA 631.***
17. The second broad issue was on the effect of the letter for dismissal dated 23rd January, 2014. Mr. Havi faulted the trial court's definition of the term ***"dismissal"*** as punishment through termination of employment, of a person due to his misconduct or performance. According to Mr. Havi, that definition had no basis in law since the dictionary meaning of the word is:

    > ***"Send away: to dispatch: to discard: to remove from office or employment: to reject, to put out of court, to discharge (law)."*** See Chambers English Dictionary.

    He maintained that punishment does not appear as an incidence of dismissal from employment in the ***Constitution, County Governments Act*** and the ***Employment Act***. The holding by the trial court that the distinction between the processes of removal of an ECM under ***Sections 31(a)*** and ***40*** of the ***County Governments Act*** was that the former was initiated by the Governor while the latter by the County Assembly and that both connote disciplinary proceedings which must comply with the established rules of natural justice and the due process of law, was thus erroneous . Mr. Havi argued that there was a clear distinction between the two sections. In his view, removal under ***Section 40*** presupposes that there must be grounds for removal and a hearing while the power of removal by a Governor under ***Section 31(a)*** is not subject to any reasons or a hearing.

18. On the third issue, Mr. Havi submitted that Birir's dismissal was not in contravention of the constitutional and statutory provisions cited by him. On the contrary, it was above board and in accordance with the law. At any rate , a claim for unfair dismissal lay in private law for **a** claim of damages and not breach of constitutional rights. In support of that argument, he cited the court of appeal cases of ***Zakhem Construction (Kenya) Ltd vs. Permanent Secretary, Ministry of Roads & Public Works & Anor (2007) eKLR 16***, ***Ronald Kimatu Ngati vs. Ukulima Sacco Society Ltd (2011) eKLR 24*** , and ***Dalmas Ogoye vs. KNTC Ltd (1969) eKLR***
19. The fourth and last issue urged was whether the judicial review remedy of *certiorari* was available in the instant case. It was submitted that Birir's claim was based on unfair dismissal hence the remedy available, if any, lay in private law for a claim of damages and not the public law remedy of Judicial Review. Mr. Havi submitted that the trial Judge ignored binding decisions of this Court on that issue and breached the rule of *stare decisis* and precedent. To buttress that argument he placed reliance in this Court's decisions in ***The Staff Disciplinary Committee of Maseno University & 2 Others vs. Prof. Ochong' Okello (2012) eKLR; Republic vs. Mwangi Kimenyi, Ex parte Kenya Institute of Public Policy and Research Analysis (KIPPRA) (2013)eKLR; Kenneth Karisa Kasemo vs. Kenya Bureau of Standards (2013) eKLR; Mumo Matemu vs.***

Trusted Society of Human Rights Alliance & 5 Others (2013)e KLR; Kenya Airways Ltd vs. Aviation and Allied Workers Union Kenya & Others (2014) eKLR; Judicial Service Commission vs. Gladys Boss Shollei & Another (2014) eKLR; and ***Abu Chiaba Mohamed –vs- Mohamed Bwana Bakari & 2 others (2005) eKLR.***

20. Mr. Havi observed that the 1st respondent in his submissions before the trial court did not insist on reinstatement. However, the trial Judge took it upon himself to create a case for, and order the reinstatement. He further faulted the trial Judge for issuing an order of reinstatement on the ground that it was contrary to the common law principle recognized under ***Section 49(4)*** of the ***Employment Act*** which stipulates that an order of specific performance ought not to be issued in a contract for service except in very exceptional circumstances. He urged us to allow the appeal.
21. In response to the four issues, Mr. Kipkoech submitted, on the first issue, that Birir's appointment was not an ordinary one made by the Governor. It was, on the contrary, a matter of public interest where members of the public and their representatives in the County assembly were involved in his vetting. He thus became a servant of the people and a public officer of the Republic of Kenya, bound by the terms and conditions of the Public Service Commission(PSC) as expressly stated in his letter of appointment. The PSC code of regulations espouses a disciplinary process that encompasses rules of natural justice and due process. Birir also became a state officer properly so defined under the Constitution and his removal became intertwined with the Constitution, such that, the provision on removal under **Section 31(a)** of the **County Government Act, 2012** has to be read with **Articles 47** (the right to fair administrative action) and **236** (protection of public officers). In the face of the new regime of national values, rule of law and constitutionalism introduced by the Constitution under **Article 10,** counsel asserted, the pleasure doctrine was not applicable in this case and the trial court was right to so hold.
22. As to the construction of ***Section 31(a)*** which must accord with the intent of Parliament as portrayed by the language used in the statute, Mr. Kipkoech submitted that it was never the intention of Parliament to bestow unfettered powers on the Governor under the said section while at the same time limiting them under ***Section 40***. In his view, the two sections must be read together and not separately to avoid the absurdity of giving with one hand and taking away with the other.
23. Referring to the wording of ***Section 31(a)*** which empowers the Governor to dismiss an ECM if he considers it ***'appropriate'*** and ***'necessary'*** to do so, Mr. Kipkoech submitted that the Governor is bound to show such 'necessity' and 'appropriateness' expressly after considering the matter. He cited the court of appeal case of ***Onyango Oloo vs. The attorney General [1986-1989]EA 456*** where ***'consider'*** was defined as *"to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold an opinion…it implies looking at the whole matter before reaching a conclusion.."* and submitted that it would be improper for the Governor, who is required by law to 'consider', to leave Birir guessing about what matters could have persuaded the Governor to dismiss him summarily. In counsel's view, the hopelessness of a person's case cannot be the reason for abridging the fundamental right to be heard before a decision adversely affecting that person is made. He argued that it would be an absurdity to allow Governors to operate with impunity without checks and balances and , certainly, ***Section 31(a)*** of the ***County Governments Act*** never gave such licence to Governors**.** The power is qualified to the extent that the Governor can only exercise the same reasonably and not arbitrarily or capriciously.
24. Adverting to the propriety of resorting to the Constitution rather than invoking the private law to seek damages, Mr. Kipkoech submitted that there was no contract of service upon which the dismissal could have been predicated. The terms and conditions that governed Birir's appointment were in the Public Service Commission realm and therefore required due process. The failure to follow due process was also a violation of Constitutional guarantees under ***Articles 47*** and ***236*** and Birir had the right to file a petition as he did. He pointed out that every person in Kenya had the right under **Articles 22** and **23** to enforce the Bill of Rights and the Constitution itself spells out the remedies, including Judicial review orders. The Industrial Court, as held in the case of ***United States International University (USIU) vs. The Attorney General & 2 Others –Petition No. 70 of 2012,*** had the same power as the High Court in interpreting the Constitution and enforcing the Bill of Rights in matters arising from disputes falling within **Section 12** of the **Industrial Court Act, 2011**. Mr. Kipkoech finally submitted that the decisions of this Court which were submitted by the appellants before the trial court were not binding, and were

distinguishable, because they had nothing to do with remedies available for breach of fundamental rights under the Constitution. He urged us to dismiss the appeal.

Analysis and Decision.

25. We are aware of our power under ***Rule 29 (1) (a)*** of the ***Court of Appeal Rules*** to re-appraise the evidence and to draw our own inferences of fact, on a first appeal. We are also conscious that the decision of the trial court is entitled to some measure of deference unless the conclusions made on the evidential material on record are perverse or the decision as a whole is bad in law. **Section 17(2)** of the **Industrial Court Act** no longer restricts appeals to matters of law only as it was deleted by **Act No. 18 of 2014** in November 2014.We have considered the entire record of appeal, the submissions of learned counsel and the law.
26. As stated at the outset of this judgment, the central issue for determination is whether **Section 31 (a)** of the **County Governments Act** preserves the pleasure doctrine. The other concomitant issues, in line with the submissions made before us, are the manner of removal of an ECM from office; whether Birir's Constitutional rights were violated; and whether the remedial orders issued by the trial court were proper.

i. ***Whither the Pleasure Doctrine?***

27. As we understand it, the Governor's contention is that under ***Section 31(a)*** of the ***County Governments Act,*** he is granted wide and unfettered discretion as a matter of right to dismiss a member of a County Executive Committee whenever he considers it appropriate or necessary. The Governor is not required to give reasons or hear the member prior to making the decision for dismissal. That proposition is synonymous with the pleasure doctrine.
28. ***Black's Law dictionary, 9th Edition*** gives the meaning of a 'pleasure appointment' as :-

> ***"The assignment of someone to employment that can be taken away at any time, with no requirement of cause, notice or hearing."***

29. The trial court, and this Court (differently constituted) in the **Governor of Nyeri case (**supra) went to great lengths in tracing the origins and history of the pleasure doctrine and we find it unnecessary to rehash it here at any length. Suffice it to say that it is traceable to the common law and in particular to feudal England where it was an unfettered prerogative power. We cite only two decisions to underscore the historical context:

Lord Reid in ***Ridge –vs- Baldwin & others (1963) 2 ALL ER*** expressed himself as follows:-

> ***"Then there are many cases where a man holds an office at pleasure. Apart from judges and others whose tenure of office is governed by statute, all servants and officers of the Crown hold office at pleasure… It has always been held, I think rightly, that such an officer has no right to be heard before he is dismissed and the reason is clear. As the person having the power of dismissal need not have anything against the officer, he need not give any reason…… I fully accept that where an office is simply held at pleasure the person having power of dismissal cannot be bound to disclose his reasons."***

Later, the Supreme Court of India had this to say in ***Union of India –vs- Tulsiram Patel (1985) 3 SCC 398***:-

> ***"In England, except where otherwise provided by statute, all public officers and servants of the Crown hold their appointments at the pleasure of the Crown or durante bene placito ('during good pleasure' or during the pleasure of the appointor') as opposed to an office held dum bene se gessarit ('during good conduct'), also called quadiu se bene gesserit ('as long as he shall behave himself well'). When a person holds office during the pleasure of the Crown, his appointment can be terminated at any time***

without assigning cause..."

30. In Kenya, the doctrine was expressly incorporated into the former Constitution and vested in the President under ***Sections 24*** and ***25. Section 24*** provided:-

> ***"Subject to this Constitution and any other law, the powers of constituting and abolishing offices for the Republic of Kenya, of making appointments to any such office and terminating any such appointment, shall vest in the President."***

On the other hand, ***Section 25*** provided:-

> ***"25(1) Save in so far as may be otherwise provided by this Constitution or by any other law, every person who holds office in the service of the Republic of Kenya shall hold that office during the pleasure of the President.***
>
> ***Provided that this subsection shall not apply in the case of a person who enters into a contract of service in writing with the Government of Kenya by which he undertakes to serve the Government for a period which does not exceed three years.***
>
> ***(2) in this section 'office in the service of the Republic of Kenya' means an office in or membership of the public service, the armed forces of the Republic, the National Youth Service or any other force or service established for the Republic of Kenya."***

That is how cases like the ***Opoloto case*** (supra) and ***Muriithi –vs- Attorney General (1983) KLR 1***, came to be decided the way they were.

31. The doctrine has since undergone a series of modifications in various jurisdictions through express qualifications, legislation or by implication. Again, this court in the ***Nyeri Governors' case*** (**supra)** commendably chronicled the metamorphosis and we need not rehash it. The Court observed:-

> ***"The evolution of the doctrine of pleasure has been on the basis first, putting to an end arbitrary action by a public authority and secondly, ensuring that such power is exercised reasonably and for the public good.***
>
> ***Comparative jurisprudence shows that the evolution of the doctrine of pleasure connotes that a public authority ought to act reasonably and/or fairly in exercising the said power"***

In the end, the Court held that the doctrine is applicable in Kenya under ***Section 31(a)*** of the ***County Governments Act*** save that the same ought to be exercised reasonably and not arbitrarily or capriciously.

32. We obviously respect the decision of our sister bench to the extent that the original doctrine has been severely restricted over time, and that the current ***Constitution*** took away the notion that sovereign power was vested in individuals or certain offices and could be exercised at the will of the said individual or office. However, we respectfully differ with the finding that the pleasure doctrine has been preserved under **Section 31 (a)** of the **County Governments Act.** We think for ourselves that the construction of the section must be made in the right context. As was stated by the Supreme Court of Canada in ***David Dunsmuir –vs- New Brunswick (2008) 1 S.C.R 190***:-

> ***"The interpretation of the law is always contextual. The law does not operate in a vacuum. The adjudicator was required to take into account the legal context in which he was to apply the law."***

33. Firstly, it is significant, and there was a good reason for it, that the provisions of ***Sections 24*** and

25 of the retired ***Constitution*** were not imported into the current ***Constitution.*** The pleasure doctrine also receives no express mention in the current Constitution. It is our Supreme Court which contextualized the philosophy behind the new Constitution and we pick it from ***The Matter of the Principle of Gender Representation in the National Assembly and the Senate, SC Advisory Opinion No. 2 of 2012:-***

> ***"A consideration of different constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and interact among themselves and with their public institutions. Where a Constitution takes such a fused form in terms, we believe a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other."***

34. The architecture and philosophy of the current ***Constitution*** is an embodiment of the exercise of the sovereign and inalienable right of the Kenyan people to determine the form of their governance system. It is based on aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. And so it is that express Articles of the Constitution speak loudly to specific aspirations which are not hollow.
35. ***Article 1*** provides that sovereign power belongs to the people of Kenya and should be exercised in accordance to the Constitution. The sovereign power of the people is exercised both at the national and county level. It is delegated to Parliament; the County Government legislative assemblies; the National Executive; County Government executive structures; the Judiciary and independent tribunals.
36. Pursuant to ***Article 10*** all state organs, state officers, public officers and all persons are bound to observe the national values and principles of governance when applying or interpreting the ***Constitution***; enacting, applying or interpreting any law; or implementing public policy decisions. These include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; good governance, integrity, transparency, accountability; and sustainable development.
37. ***Article 129*** provides that: -

> ***"Executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution.***
>
> ***(2) Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit."***

38. ***Article 73*** provides that authority assigned to a State Officer is a public trust which ought to be exercised in a manner that is consistent with the purposes and objects of the Constitution. The authority vests in the Sate officer the responsibility to serve the people rather than the power to rule them. One of the guiding principles of leadership and integrity is accountability to the public for the decisions and actions taken. Under ***Article 174*** one of the objectives of devolution is to promote democratic and accountable exercise of power.
39. It is upon consideration of those and other provisions that the trial court reached the following compelling conclusion:

> ***"…all persons holding public or state office in Kenya in the executive, the legislature, the judiciary or any other public body and in national or county government are***

servants of the people of Kenya. The court holds that despite the level of rank of state or public office as may be held, no public or state officer is a servant of the other but all are servants of the people. Thus, the court holds that the idea of servants of the crown is substituted with the doctrine of servants of the people under the new Republic as nurtured in the Constitution of Kenya, 2010. The hierarchy of state and public officers can be complex, detailed and conceivably very long vertically and horizontally but despite the rank or position held, the court holds that they are each a servant of the people and not of each other as state or public officers. They are all servants of the people. The court holds that there are no masters and servants within the hierarchies of the ranks of state and public officers in our new Republic.

The court further finds that the string that flows through the constitutional provisions is that removal from public or state office is constitutionally chained with due process of law. In the opinion of the court, at the heart of due process are the rules of natural justice. Thus, the court finds that the pleasure doctrine for removal from a state or public office has been replaced with the doctrine of due process of law. Article 236 is particularly clear on the demise of the pleasure doctrine in Kenya's public or state service" ………. "In the new Republic, the court holds that public service by public and state officers is guided by the doctrine of servants of the people and the doctrine of due process and not by the doctrines of the servants of the crown and the pleasure doctrine. In the opinion of the court, the demise of the pleasure doctrine and the demise of the doctrine of servants of the crown in the new Republic's constitutional framework constitute the very foundation of the Republic, namely, Kenya is a sovereign Republic and all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution."

With respect, we have considerable sympathy for those findings as they accord with the spirit and letter of the Constitution, 2010. Consequently, we find and hold that the pleasure doctrine is not applicable in Kenya under the current Constitution.

ii. ***What is the manner of removal of an Executive Member of the County Assembly?***

40. There is no argument that a member of the executive committee of a county government is a 'state officer'. ***Article 260*** of the Constitution so defines them and also defines a 'public officer' to include any state officer, while ***Article 236*** embodies the protection of public officers through adherence to due process of law in the removal, demotion or disciplinary action. Such due process includes fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; one where a person is given written reasons for intended action that is likely to adversely affect them (***Article 47***).
41. Okwengu, J.A. in ***<u>Judicial Service Commission –vs- Gladys Boss Shollei & Another – Civil Appeal No. 50 of 2014</u>*** expressed herself as follows: -

"The critical question is what constitutes the right to fair administrative action? Since the legislation envisaged under Article 47(3) of the Constitution has not yet been put in place, it is apt to borrow from the equivalent South African Statute the Promotion of Administrative Justice Act (Act No. 3 of 2000) which was cited by the amicus curiae. At Section 2 of this Statute 'administrative action' is defined to mean:

"any decision taken, or any failure to take a decision, by –

a. ***An organ of state, when-***

i. ***exercising a power in terms of the Constitution or a provincial constitution; or***
ii. ***exercising a public power or performing a public function in terms of any legislation; or***

b. ***a natural or juristic person, other than an organ of state, when exercising a public power or***

performing a public function in terms of an empowering provision,

> ***which adversely affects the rights of any person and which has a direct, external legal effect,…"***

Prior to the enactment of the Promotion of Administrative Justice Act 2000, the Constitutional Court of South Africa gave guidance in the case of President of the Republic of South Africa & Others –vs- South Africa Rugby Football Union & Others (CCT 16/98)[1998] ZACC 21, as follows:

> ***"the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the Executive arm of Government …what matters is not so much the functionary as the function. Further, that the purpose of the inquiry as to whether conduct is administrative action is not on the arm of Government to which the relevant actor belongs but on the nature of the power he or she is exercising."***

42. **Section 31 (a)** of the ***County Governments Act*** which provides for dismissal of an ECM by the Governor at any time, does not just stop at dismissal. It qualifies the dismissal to one that is ***'necessary or appropriate'*** and even then, after '***consideration***' by the Governor. The Supreme Court in ***Hassan Ali Joho & another –vs- Suleiman Said Shahbal – Petition 10 of 2013*** held that whenever a court is called upon to interpret an Act of Parliament, it should ensure that the Act conforms to the ***Constitution***. The use of the words 'considers' it 'necessary' and 'appropriate' have a significant bearing in ascertaining the legislator's intention in enacting the section in question. Viscount Simon in ***Hill –vs-Willism Hill (Park Lane) Ltd. [1949] AC 530*** at page 546 stated as follows:

> ***"When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which had not been said immediately before."***

In ***Placer Dome Canada –vs- Ontario (2006) 1 SCR 715***, the Supreme Court of Canada observed that under the presumption against tautology in the interpretation of statutes, every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose.

43. To ***'consider'***, according to The ***Macmillan Dictionary,*** is to think about something carefully before making a decision or developing an opinion. In our view, the use of the word 'considers' connotes that a Governor in exercising his power under that section should take into account a ground or allegation against a member of the County Executive Committee and any explanation by the said member before making a decision. In ***De Verteuil –vs- Knagge (1918) A.C. 557,*** the Governor of Trinidad was entitled to remove immigrants from an estate *'on sufficient ground shown to his satisfaction*'. Lord Parmoor at page 560 held,

> ***"the acting governor was not called upon to give a decision on an appeal between parties and it is not suggested that he holds the position of a Judge or that the appellant is entitled to insist on the forms used in ordinary but he had ....a duty of giving to any person against whom the compliant is made a fair opportunity to make relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice."***

44. Further, in our view, the use of the words 'appropriate' and 'necessary' connote that the decision to dismiss ought to be based on reasonable grounds. In the ***Dunsmuir case (supra),*** the Supreme Court of Canada while discussing reasonableness observed:-

"….A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

45. Lord Greene also famously weighed in on 'reasonableness' in ***Associated Provincial Picture Houses Ltd. –vs- Wednesbury Corporation (1947) 2 ALL ER 680***, stating: -

"It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word 'unreasonableness' in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey these rules he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L. J., I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head."

46. The above learning leads us to the finding that the Governor's contention that his power to dismiss can be exercised without any reasons being advanced has no basis in law. It is the reasons for dismissal that determine whether the power was exercised reasonably, and the reasons ought to be valid and compelling .

iii. ***Was Birir properly dismissed? Put another way, did the Governor properly exercise the power to dismiss Birir?***

47. As was correctly stated in the ***Nyeri Governor case (supra)*** regard has to be given to the relevant constitutional and statutory provisions in determining the manner in which a member of a County Executive Committee can be dismissed or removed from office.

48. The ***County Governments Act*** was enacted pursuant to ***Article 200*** of the ***Constitution*** to give effect to Chapter 11 of the ***Constitution*** which provides for devolved government. In particular, and with regard to members of a County Executive Committee, ***Sections 31 (a)*** and ***40*** of the ***County Governments Act*** were enacted to give effect to ***Article 200(2)(c)*** which provides for: -

" ..the manner of election or appointment of persons to, and their removal from, offices in the county governments…".

49. It follows that the interpretation of those sections is crucial for the determination of the issue herein. The cardinal rule for construction of a statute is that a statute should be construed according to the intention expressed in the statute itself.

" It is one of the linguistic canons applicable to construction of legislation that an Act is to be read as a whole, so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the Act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the Act is by implication modified by another provision elsewhere in the Act…" See ***Halsbury's Laws of England, 4th Edition Vol. 44(1), para 1372*** .

In ***Direct United States Cable Co. –vs-The Anglo-American Telegraph Co. (1877) 2 A.C. 394***

Lord Blackburn stated that;

> ***"The tribunal that has to construe an Act or legislation or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to inquire what is the subject matter with respect to which they are used and the object in review."***

50.***Section 40*** provides in summary:-

> ***"40 (1) Subject to subsection (2), the Governor may remove a member of the county executive committee from office on any of the following grounds:-***

a. ***Incompetence;***

b. ***abuse of office;***

c. ***gross misconduct;***

d. ***failure, without reasonable excuse, or written authority of the governor, to attend three consecutive meetings of the county executive committee;***

e. ***physical or mental incapacity rendering the executive committee member incapable of performing the duties of that office; or***

f. ***gross violation of the Constitution or any other law.***

Then follows an elaborate procedure on the motions the county assembly should follow before the Governor removes the ECM under the section.

51.***Section 31(a)*** on the other hand provides:-

> ***"31. The governor –***

a. ***may, despite section 40, dismiss a county executive committee member at any time, if the governor considers that it is appropriate or necessary to do so…"***

52. We concur with the conclusion reached in the ***Nyeri Governor case*** on the construction of the two sections as follows:-

> ***"From the language adopted by the legislator in enacting Sections 40 & 31(a) we discern two methods through which a member of a County Executive Committee can be dismissed. Firstly, under Section 40 a Governor can dismiss a County Executive Committee member on any of the aforementioned grounds following a resolution by the County Assembly for such dismissal. In that case the dismissal is initiated by the County Assembly. Secondly, under Section 31(a) a Governor can dismiss a County Executive member on his own motion at any time if he considers it appropriate and necessary to do so."***

53. We find and hold that the Governor was entitled to invoke **Section 31(a**) but the manner of exercise of his discretion under that section did not accord with the law as earlier adumbrated.

(iv) Were Birir's rights violated? If so, what remedy is most efficacious in the circumstances?

54. The letter dated 23rd January, 2015 which dismissed Birir was curt:

> ***"Pursuant to Section 31(a) of the County Governments Act, 2012, you are hereby***

> ***relieved of your duties as the Executive Committee Member of Agriculture, Livestock and Fisheries effective from the date hereof."***

It is not in dispute that he was neither informed of any allegations against him nor given an opportunity to defend himself, and no reason whatsoever was given for the dismissal. In sum, as earlier stated, there was no procedural fairness. The Supreme Court of Canada in the ***Dunsmuir case (supra)*** observed:-

> ***"79. Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however easy to apply. As has been noted many times, 'the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case."***

55. There was no adherence to the due process of the law in this case. In ***Selvarajan -vs-Race Relations Board [1976] 1 ALL ER 12*** Lord Denning held that:

> ***"…in all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on the persons affected by it. 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. The investigating body is however the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only."***

56. It is clear to us therefore, and we uphold the trial court on this, that the action of the Governor violated Birir's rights to fair administrative action under ***Article 47*** and fair labour practices under ***Article 41***. The Governor also violated various provisions of the Constitution as set out hereinabove.
57. It was the Governor's contention that the Birir's cause of action was founded on unfair termination which is contractual, and therefore, the remedy available, if any, lay in private law. It was further urged that the remedy of Judicial Review order of *certiorari* was particularly off limits as stated in various authorities.
58. In ***Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 others- Civil Appeal No. 290 of 2012*** this Court held,

> ***"In our considered opinion, the petition before the High Court was not instituted as a removal procedure nor as a complaint against the appellant in his capacity as a State Officer. The petition was a challenge to the constitutionality of the process and manner of the appellant's appointment. This Court takes the view therefore that it is not the outcome of litigation that is determinative of its nature, but its substance at the time of seizure and proceedings. Viewed thus, an order setting aside the appointment of the appellant flows from a judicial finding of the unconstitutionality of the process and manner of appointment, not as a consequence of a removal procedure."***

59. In the instant case, Birir filed a constitutional petition pursuant to ***Article 22*** of the ***Constitution*** alleging that his constitutional rights had been violated on account of his dismissal. ***Article 23(3)(f)*** provides that a court can issue a judicial review remedy in a constitutional petition instituted under ***Article 22***. Okwengu, J.A in ***Judicial Service Commission case (supra)*** while considering the applicability of judicial review orders in a constitutional petition observed:-

"As what was before the Industrial Court was a constitutional reference which sought the intervention of the court through inter alia, orders of Judicial Review, to redress violation of constitutional rights, the position is similar to what was stated by Chaskalson, J. in the South African Case of** **Pharmaceutical Manufacturers Association of South Africa & Another: exparte President of the Republic of South Africa & Others (CCT) 31/99) [2000] ZACC 1; 2000 (2) ZA 674:

> ***"Review power of the court is no longer grounded in the common law, and therefore susceptible to being restricted or ousted by legislation. Instead the Constitution itself has conferred fundamental rights to administrative justice and through the doctrine of Constitutional supremacy prevented legislation from infringing on those rights. Essentially, the clause has the effect of 'constitutionalizing' what had previously been common law grounds of judicial review of administrative action. This means that a challenge to the lawfulness, procedural fairness or reasonableness of administrative action, or adjudication of a refusal of a request to provide reasons for administrative actions involves the direct application of the constitution."***

60. The order for reinstatement of Birir was a consequence of the issuance of an order of *certiorari* and not a violation of the common law principle that in a contract of service an order of reinstatement or specific performance should only issue in exceptional circumstances because of difficulties in enforcement. The authorities cited in aid of that submission are therefore distinguishable. Nothing stops the Governor from following the law in dismissing Birir, if he must. And nothing will stop the Court from issuing relevant orders to prevent violation of the fundamental rights and freedoms of the individual or the provisions of the Constitution.

(v) ***Conclusion:***

61. We are persuaded on the whole that there is no reason to interfere with the decision of the trial court and we order that this appeal be and is hereby dismissed with costs to the 1st respondent only.

Dated and delivered in Nakuru this 17th day of December, 2015.

P. N. WAKI

..

JUDGE OF APPEAL

R. N. NAMBUYE

..

JUDGE OF APPEAL

P. O. KIAGE

..

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR