



**Bor & 5 others v Kericho County Assembly & 4 others (Constitutional
Petition E006 of 2023) [2024] KEELRC 169 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 169 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CONSTITUTIONAL PETITION E006 OF 2023**

**HS WASILWA, J
FEBRUARY 8, 2024**

BETWEEN

**WESLEY BOR 1ST PETITIONER
BRENDA BILL BII 2ND PETITIONER
LEONARD NGETICH 3RD PETITIONER
ALPHONCE ROTICH 4TH PETITIONER
GILBERT BII 5TH PETITIONER
BETSY CHEBET 6TH PETITIONER**

AND

**KERICHO COUNTY ASSEMBLY 1ST RESPONDENT
CLERK KERICHO COUNTY ASSEMBLY 2ND RESPONDENT
SPEAKER KERICHO COUNTY ASSEMBLY 3RD RESPONDENT
GOVERNOR KERICHO COUNTY 4TH RESPONDENT
KERICHO COUNTY PUBLIC SERVICE BOARD 5TH RESPONDENT**

RULING

1. Before this Court for determination, is the Petitioners/ Applicants’ Notice of motion dated 16th August, 2023 and filed on the 17th August, 2023 and brought pursuant to Article 20,21,27,28,35,41,43,47 & 50 of *the Constitution* and all other enabling provisions of the law, seeking for the following Orders; -

1. Spent.



2. Spent.
 3. Spent.
 4. That pending the hearing of this application inter-partes an order be issued directed at the Respondents, their servants, agents and or persons acting under their authority to maintain the status quo ante the recommendations made by the Ad hoc committee.
 5. That pending the hearing and determination of the Petition, Conservatory orders be issued staying the implementation of the recommendations made by the ad hoc committee of the County Assembly of Kericho in relation to the removal of the applicants/ petitioners listed above.
 6. That pending the hearing and determination of the petition, an order of injunction be issued restraining the 4th Respondent, their agents, servants or any person whatsoever from initiating the removal process or taking any further steps in relations to the recommendations made by the Ad Hoc Committee.
 7. That pending the hearing and the determination of the petition, an order be issued directed at the Respondents, their servants, agents and/or persons acting under their authority to maintain the status quo ante the recommendations made by the Ad Hoc Committee.
 8. That such further and other reliefs be granted to the petitioners as this Court deem fit.
 9. That costs of the Application be provided for.
2. The application is supported by the grounds on the face of the Application and the affidavit sworn on 16th August, 2023 by Dr. Wesley Bor, the 1st Petitioner/ Applicant.
 3. The affiant stated that on the 30th June, 2023, Serena area in Londiani was engulfed in a shroud of sorrow as a ghastly road accident led to the loss of 53 Lives and 24 casualties, an impact that send shock waves through the community, leaving a trail of devastation that would forever be etched in their memories.
 4. In the wake of the said accident the National and the County Government united in a resolute to provide support to the bereaved families and those affected by the said accident and on 1st July, 2023, the Governor of Kericho County H.E Dr. Erick Mutai formed a team from the County Executive of Kericho, County Commissioner and other area leaders to plan, conduct and generally manage the fundraiser to mitigate the disaster.
 5. Tasked with the Responsibility of overseeing the fundraiser, the team was to identify and compile a comprehensive list of victims who lost their lives and the survivors to ensure that the funds raised are equitably distributed among them. Further that the team was to prepare a comprehensive report detailing the fundraising activities, the funds collected, the beneficiaries and the disbursement process. This Report was intended to be presented to his excellency the Governor for transparency and accountability purposes.
 6. Regrettably, prior to the completion of the fundraiser and the presentation of the report, there was unfounded and misconceived public outcry, alleging misappropriation, misuse and or misdirection of the collected funds by the team, these allegations cast a shadow of doubt on the integrity of the fundraising effort and team commitment.



7. Based on the public outcry, the County assembly formed an Ad Hoc committee on 1st August, 2023 comprised of 15 members and 3 secretariats who were tasked with the following responsibilities to establish; -
- i. The exact number of people who had passed on as a result of the Londiani accident and morgue charges per deceased person;
 - ii. The exact number of casualties as a result of the Londiani accident and cost incurred per patient;
 - iii. The total amount of money raised at the fundraiser for the Londiani accident victims;
 - iv. The amount to be waived by the County Government of Kericho for the health services rendered to the said victims (both casualties and deceased);
 - v. Report on breakdown of how the funds raised was distributed to the casualties and the families of the deceased including their places of residence.
 - vi. Composition of committee (if any) formed for utilization and distribution of the said funds and terms of reference of the said committee;
 - vii. The number of vehicles used for facilitation to support the victims, the departments they were drawn from and the fuel cost used per vehicle;
 - viii. The properties that were destroyed during the incident and how much was paid out from the fund as compensation; and
 - ix. Report on breakdown on utilization of the said funds for activities other than the compensation to the casualties and families of the deceased
8. Upon conclusion of the Ad Hoc Committee's mandate, they came up with the following recommendations; -
- i. That the County secretary violated various provisions of the law through forgery of minutes, approval of withdrawal of funds contrary to the provisions of section 138 of the *Public Finance Management Act*, oversaw misappropriation of funds, abuse of office. The committee recommends to the H.E, the Governor Dr. Eric Mutai for removal from office of one Dr. Wesley Bor. the county Secretary and Head of County Public Service.
 - ii. That the CECM, Health Services violated various provisions of the law through abuse of office, oversaw misappropriation of fundraiser funds, non-disclosure of information and accountability. The committee recommends to the H.E. the Governor Dr. Eric Mutai for removal from office of one Brenda Bit, CECM for Health Services.
 - iii. That the CECM, Finance and Economic Planning. violated various provisions of the law through the approval of withdrawal of funds contrary to the provisions of Section 138 of the *Public Finance Management Act*, abuse of office and nondisclosure of information, transparency and accountability The committee recommends to the H.E, the Governor Dr. Eric Mutai for removal from office of one Mr. Leonard Ngetich. CECM for Finance and Economic Planning and Head of County Treasury.
 - iv. That the County Chief Officer in the Executive office of the Governor violated various provisions of the law through forgery. abuse of office, violation of procurement rules and procedure. The ad hoc committee recommends to the H.E, the Governor Dr. Eric Mutai for



removal from office of one Mr. Alphonse Rotich, County Chief Officer in the Executive Office of the Governor.

- v. That the County Chief Officer for Finance violated various provisions of the law through misappropriation of fundraiser funds, abuse of office, professional negligence and violation of procurement laws. The ad hoc committee recommends to the H.E, the Governor Dr. Eric Mutai for removal from office of one Mr. Gilbert Bii, County Chief Officer Finance and Ag. Chief Officer Economic Planning.
 - vi. That the County Chief Officer Lands, Housing & Physical Planning and Ag. Chief Officer Public Service Management violated various provisions of the law through, non -disclosure of information and accountability, perjury, misuse of fund raiser funds, misappropriation of fund raiser funds, abuse of office. The ad hoc committee recommends to the H.E, the Governor Dr. Eric Mutai for removal from office of one Ms. Betsy Chebet, County Chief Officer Lands, Housing & Physical Planning and Ag. Chief Officer Public Service Management.
 - vii. H. E the Governor, with immediate effect liaise with the County Public Service Board and commence dismissal of the Chief Officers.
 - viii. That the said County Executive Committee members and the County Secretary should be removed with immediate effect by H. E The Governor.
9. The Applicants herein being the target person for removal from office, contest the legality, procedural correctness and substantive basis of these recommendations on the basis that the recommendations lack a solid foundation in law and fail to adhere to established procedural norms for the removal of the said County officers as such are unjust.
 10. It is the Applicants' case that the procedure undertaken by the Ad Hoc Committee during investigation, deliberation and passage of the motion in the assembly approving the report containing recommendations for the removal of the petitioners was procedurally flawed and in violation of constitutional principles and tenets of natural justice.
 11. That unless the Orders sought are granted the recommendations made by the Ad Hoc Committee are likely to be implemented to the detriment of the petitioners who will suffer damage to their reputation, livelihoods and overall wellbeing.
 12. In the supporting affidavit, the affiant state that there is a notably disparity between the terms of reference and the recommendations made by the Ad Hoc Committee. Further that someone like the County Secretary is an employee of the County Public Service Board and subject to disciplinary procedures and removal protocols under the County Government Act, therefore that the Ad Hoc Committee does not have the powers to remove the such an employee.
 13. It was stated also that the procedure for removal of County Executive member is stipulated under section 40 of the County Government Act, which was no done on this case because the motion for removal of CECs was not presented to the County Assembly and thus the recommendations made was not anchored in any law.
 14. It is their case that they were not accorded any hearing as is required under Article 50 of *the Constitution*. Rather that they were merely invited by the committee to give information regarding the incident and not to defend themselves.
 15. It is the affiant's case that the funds collected in the fundraiser cannot be termed as funds within the scope of Article 224 of *the Constitution*, thus the allegations of misappropriation of funds under Article 224 is misinformed and unfounded. Further that the said money cannot be termed as donation



money under section 138 of the *Public Finance Management Act*, and the classification thereof is inappropriate as the said funds were not and are not intended for development purposes.

16. The affiant stated that the removal of the petitioner on allegations of abuse of office is misconceived because the petitioners were not discharging their official mandate as stipulated under the County Government Act.
17. It was stated further that the recommendations for the removal of the petitioner on the grounds of misappropriation of funds is erroneous because the money collected from the fundraiser is was not money drawn from the exchequer.
18. In totality that the recommendations made by the Ad Hoc Committee for the removal of the petitioner was an attempted coup against the County Government of Kericho by circumventing the law and using illegal and unauthorized channels.
19. It's based on the above narration that the Applicant urged this Court to allow the Application and issue the conservatory orders sought.
20. The Application herein is opposed by the Respondents, with the 1st, 2nd and 3rd Respondent being represented by H & K Law Advocates, who filed a replying affidavit deposed upon on 27th September, 2023 by Martin Epus Patrick, the holder of the office of the 2nd Respondent.
21. The affiant stated the subject of the application herein emanated in the horrendous accident that occurred in Londiani junction within Kericho County on the 30th June, 2023, where a heavy truck lost control, veered off the road and rammed into other vehicles and people, killing 53 people and injuring 24 persons.
22. Following this accident, people of all walks of life came together to mourn the departed and contribute funds towards helping the affected families assuage the burden as most of the affected families were indigent. It's on this front that a team, including the petitioner herein was constituted to spearhead the requiem mass and the fund raiser held on the 4th July, 2023 at Londiani, where the event was graced by His Excellency, the Deputy President and a host of other leaders in which approximately Kshs 14,500,000 was raised.
23. The deponent stated that soon thereafter, reports emerged that the money collected in the fund raiser had been misappropriated and used for other purposes and only a marginal figure distributed to the families of the affected and or the victims.
24. As a result of public outcry, a motion was presented before the 1st Respondent assembly by the member of County Assembly of Londiani Ward, Hon. Vincent Korir, seeking an establishment of an Ad Hoc Committee to investigate the veracity of the allegations of misappropriation of funds.
25. On 1st August, 2023, the members of the 1st Respondent voted for the motion and passed the said motion. Then 15 members of the committee began on their responsibilities that included visiting hospital facilities and morgues, where they obtained receipts, medical bills, invoices among others to aid in the investigations.
26. Further that the committee invited various persons who had necessary information, including the Deputy Governor, Eng. Fredrick Kirui who was the whistle blower, the members of the fundraiser panel such as the petitioners herein, the staff of the County Government of Kericho who dealt with transaction of the funds in one way or another.
27. After gathering information, the ad hoc Committee invited the petitioners to explain some of the contentious issue pertaining the raised money and admitted all documents produced by the



- petitioners. Further that suppliers of goods and services such as Supertrix Limited and Rays Hotel were invited for questioning. Also that the church ministers who presided over the Requiem mass and paid were all called for interrogations.
28. Similarly, that presentations were made by select members of the victims' families and the representatives of the BodaBoda operators whose motorbikes were damaged.
 29. After collecting all their information, the committee compared the documents produced by the Petitioners vis a vis the ones they collected from hospitals and they drew their conclusion and presented a report before the 1st Respondent dated 4th August, 2023.
 30. The Respondent herein stated that the compelling reason that informed the decision of the Ad Hoc Committee is that; Firstly, that the fundraiser committee had under declared the funds collected and wrote Kshs 13,682,660 instead of Kshs 14,589, 624, which they used for other purposes leaving a balance of Kshs 5,490,000 for the victims' families. Secondly that the minutes of the meeting that agreed on the distribution of the funds was a sham and a forgery as some of the committee members swore affidavits denying attending any of such meeting when their names and signatures appeared in the minutes and Thirdly that the Hospital bills had been manipulated and inflated.
 31. The Respondents herein stated that they tabled the Ad Hoc Committee recommendations before the County Assembly in line with Kericho County Assembly Standing Orders and Section 14 of the County Government Act and upon debate, all 22 members present that day in the house unanimously agreed with the findings of the Ad Hoc Committee.
 32. Subsequently, on 14th August, 2023, the 3rd Respondent wrote to the 4th Respondent informing him of the Recommendations of the County Assembly and forwarded the same for his action. A response was received from the 4th Respondent on the 15th August, 2023, declining any action against the Petitioners and instead advised the 3rd Respondent to constitute a select Committee of the 1st Respondent to hear the allegations against the petitioners who were County Executive (CECs) and County Secretary, while he forwarded the recommendations to the County Public Service Board to institute disciplinary action against the petitioners who were Chief Officer(COs).
 33. The 3rd Respondent wrote to the 4th Respondent informing him that the County assembly was Functus Officio when it voted on the matter and that it was precluded by standing order 60 from moving the same motion.
 34. He stated that the county assembly is not merely a conveyor belt of recommendation as such the issue cannot be debated afresh. Further that this Court lacks wherewithal to impede the County assembly from performing its mandate by reversing the recommendations made in discharge of its oversight role under Article 185(3) of *the Constitution*. He added that the petitioners were all heard before the said recommendation were made as such the recommendations are sound, followed the law and the same should thus be acted upon.
 35. To this end, the Respondent submitted that the argument by the petitioner that the recommendations were not anchored in law, is not only escapist but flies in the face of Article 185(3) of *the Constitution*. Further that even though the said money was not for development, the same ought to be utilized prudently. He added that the fact that the funds were not meant for development does not remove it from definition of public resources and the radar county assembly oversight.
 36. It was reiterated that the purpose of the funds was clear from the onset as such the petitioners were not given a leeway to designate and apply the funds the way they wished, therefore their argument at



- paragraph 26 is filled with arrogance and cavalier attitude among public officers which the County sought to rightly arrest in its recommendations.
37. The affiant stated further that the procedure for removal of county CECs is provided for under section 40 of the County Government Act which empowers the County assembly supported by one-third of all members to propose a motion requiring the Governor to dismiss a CEC on grounds of gross violation of *the Constitution*, incompetence, abuse of office, gross misconduct or conviction of an offense punishable with an imprisonment of at least six months.
 38. Additionally, that the Governor has powers under Section 31 of the County Government Act to dismiss the CEC at any time, if it considers appropriate, without regard to section 40 of the County Government Act.
 39. On argueability of the Petitioners' case, the Respondent stated that the Petition herein has not been brought in good faith but in pursuit of private interest when by virtue of the recommendations by the County assembly, shows that they are unfit to hold office. Also that the Applicants have not shown any irreparable damage that will be visited on them if conservatory Orders are not issued. Additionally, that the issue in dispute in which conservatory orders are sought are private matter and not public interest matters.
 40. The Respondents herein called upon this court to refrain from interfering with the County assembly mandated and only review final outcome if seized with the matter, because the granting of the Orders sought amounts to injuncting the County assembly processes.
 41. The 4th and 5th Respondents also filed a replying affidavit deposed upon on 22nd September, 2023 by Gideon Mutai, the County legal officer. In his affidavit he confirmed that indeed a grisly road accident occurred on the 30th June, 2023 in Londiani area claiming several lives and following that accident a team was formed to plan, conduct and manage a fundraiser and then disburse the funds collected therefor. Before the conclusion of the exercise, there was public outcry on alleged misappropriation of funds and therefore that an Ad hoc committee was constituted to look into the issue.
 42. He stated that the 4th and 5th Respondent were furnished with copies of the recommendations of the Ad Hoc Committee. Also that the Petitioners were heard by the Ad Hoc Committee on a fact finding and inquiry purposes and not on their defence.
 43. The Respondents herein stated that a look at the terms of reference vis a vis the recommendations made, shows clearly that the recommendation by the Ad Hoc Committee spill beyond the scope of its mandate.
 44. It is averred that the 1st Respondent's move to appoint the said Committee pending the report of fundraiser committee appointed by the 4th Respondent was in breach of principles of separation of powers of arms of the County Government. Additionally, that the appointment of the Ad Hoc Committee was premature and based on unfounded speculations in the circumstances. Additionally, that the fundraiser Committee was frustrated by the appointment of the Ad Hoc Committee, which was done before they completed their tasks, as such a report was not filed on time.
 45. The 3rd and 4th Respondent supported the Petitioners application and Petition and stated that the funds collected do not form funds under the ambits of Article 224 of *the Constitution*, neither does the funds qualify as donation or grant as stipulated under sections 138 and 139 of the *Public Finance Management Act*.
 46. It is also stated that the Ad Hoc Committee did not give any tangible evidence to demonstrate that indeed the petitioners misappropriated the funds. In any event that the 4th Respondent was not



furnished with a motion from the 3rd Respondent recommending the removal of the petitioners in line with sections 40 and 44 of the County Government Act.

47. The Respondent also stated that the victims and their families have not raised any concerns on the alleged misappropriation of funds an indication that all the victims were duly compensated and no money was misappropriated as alleged.
48. In response to the replying affidavit of the 1st to 3rd Respondents, the petitioner filed a further affidavit deposed upon on the 24th October, 2023 and stated that the report of lost funds was unfounded and premature and the Respondents merely relied on newspaper reports that lacked verification and substantiation.
49. He confirmed that they appeared before the Ad Hoc Committee but only to brief the committee on the progress of their mandate. Thus the recommendation made were made without affording them fair hearing.
50. He stated that the ad hoc Committee was formed at a time when the fundraiser was still under way and the team was still in the process of identifying the victims, as such it was done prematurely.
51. The petitioners stated that the Respondents misconstrued their pleadings because the petition does not seek to challenge the role of the County assembly but only the validity of the Ad Hoc Committee processes in reaching the specific recommendations that included their removal from office.
52. The Petitioner stated that section 31(b) of the County Government Act makes it mandatory that any form of dismissal of any members of County Executive committee must be done in accordance with Section 40 of the Act. He added that this Court has jurisdiction to issue conservatory Orders sought.
53. The Application herein was canvassed by written submission, with the Petitioners filling on 26th October, 2023. The 1st to 3rd Respondents filed their submissions on the 18th January, 2024 and the 4th and 5th Respondents filed on the 24th October, 2023.

Petitioners/Applicants' Submissions.

54. The Petitioners submitted that the fundamental issue for determination is whether the the application merited. Accordingly, that the Petitioners are seeking conservatory Orders pending the determination of the petition herein. On that note they define what conservatory order are by relying on the case of *Invesco Assurance Co. Ltd vs. MW (Minor suing thro' next friend and mother (HW) [2016] eKLR*, which defined conservatory order as follows: -

“A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.”

55. They also cited the case of *Judicial Service Commission vs Speaker of the National Assembly & Another [2013] eKLR* which the Court had the following to say about the nature of conservatory orders:

“Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under *the Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in



personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."

56. Based on that, they submitted that before conservatory Orders are issued, there are principles that must be complied with as held in the case of Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 Others [2015] eKLR. they include; -
- a. The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.
 - b. The second principle is whether the grant or denial of the conservatory relief will enhance the Constitutional values and objects of a specific right or freedom in the Bill of Rights.
 - c. Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
 - d. Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny conservatory order.
57. On the first principle of establishing a prima facie case, the Petitioners, define what amounts to prima facie case by relying on the definition in the case of Mrao vs. First American Bank of Kenya Limited & 2 Others [2003] KLR 125 that: -
- “In a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”
58. Similarly, that in determining whether prima facie case has been established, a Court must consider the entirety of the matter. It should assess the pleadings, the factual foundation, the parties’ stances, the remedies sought, and the applicable law, albeit in a superficial manner. It is argued that while in this process, a Constitutional Court must adhere to Articles 22(1) and 258(1) of *the Constitution*, which guarantees the right to initiate legal proceedings when a right or fundamental freedom in the Bill of Rights is denied, violated, threatened, or when there is a contravention. Hence, the Court ought to maintain the status quo while it interrogates the alleged infringement.
59. Secondly, that the Court should determine whether granting or denying conservatory relief aligns with the constitutional values and objectives associated with a specific right or freedom outlined in the Bill of Rights. Additionally, the Court must assess whether the denial of an interim conservatory order would render the petition or its core aspects ineffective, rendering it meaningless. Furthermore, that the Court needs to consider the impact on public interest in exercising discretion to either grant or deny a conservatory order.
60. Consequently, that in the present case, the petitioners’ constitutional rights, particularly under Articles 47 and 50 of *the Constitution* have been violated and if this Court fail to grant interim conservatory orders, the Petition would be nullified.
61. It was also submitted that the circumstances surrounding the present case have undeniably captured public attention, drawing significant interest from the community. In light of this, that it is essential that the petition undergoes a thorough and comprehensive examination, ultimately reaching a just and logical resolution. This process is not merely for the benefit of the concerned parties but also to address the apprehensions raised regarding the alleged gross misconduct attributed to the petitioners



who bear the weighty responsibility of ensuring the provision of essential services vital to the welfare of the people. Given their entrusted role, it becomes imperative to scrutinize the petition meticulously, upholding the principle of fairness and justice.

62. In conclusion, the Petitioner submitted that it is evident that their application has met the criteria for the grant of conservatory Orders and urged this Court to grant the interim Orders pending the hearing and the determination of the Petition.

4th and 5th Respondents' Submissions

63. The Respondents herein in support of the Application submitted on three issues; whether the 1st Respondent's actions of appointing ad hoc committee amounted to breach of the doctrine of separation of powers, whether any of the orders sought by the Petitioners should issue against either the 4 or 5th Respondent; and who should bear the costs of this Application.
64. On the first issue, it was submitted that the act by the 1st Respondents of appointing an ad hoc committee in the pendency of the circumstances of the instant Application and Petition amounts to usurpation of the powers and functions of the 4th Respondent and breach of the principle of separation of powers allocated to respective arms of the County Government under Article 176 of *the Constitution* of Kenya, 2010 and functions detailed in Chapter 11 of *the Constitution*. Therefore, that the powers of each arm of the County Government should be respected as was reiterated by Odunga J (as he then was) in the case of Wilfred Manthi Musyoka v Machakos County Assembly & 4 others [2018] eKLR as follows:

“79, Therefore when an issue arises as to the constitutionality of any act done or threatened by either the Legislature or the Executive, it falls upon the laps of the Judiciary to determine the same....separation of powers between the judiciary, executive and legislature is one of the hallmarks of our Constitution. Each body or organ of state is bound by *the Constitution* and should at all times acquaint itself of its provisions as it works within its sphere of competence. Constitutional interpretation is not the sole preserve of the judiciary but the judiciary has the last word in the event of a dispute on the interpretation and application of *the Constitution*.”

65. Similar position was restated by the Supreme Court in the case of Senate & 2 others v Council of County Governors & 8 others (Petition 25 of 2019)[2033] KESC 7 (KLR) (Constitutional and Human Rights) (17 February 2022) (Judgment) wherein the learned Judges held at paragraph 65 as follows:

“Therefore, it is inconceivable as it is absurd to have a Senator whose functions are clearly delineated by *the Constitution*, and who is expected to provide oversight of the county government, to at the same time take charge of a Board which is essentially a county organ. This is legislative overreach that does not honour the constitutional guardrails that donates specific and distinct powers to the Senate and to the devolved units.”

66. Likewise, that in the instant Application the 1st Respondent hastily rushed to appoint the ad hoc committee in question without taking into account the fact that the 4th Respondent had appointed a team to carry out the process of fundraising in aid of the victims affected by the accident and the fact that such team was yet to table a formal report with the 4th Respondent. That by virtue of appointment of the ad hoc committee in question, the 1st Respondent's attempts to prevent the workability of the



office of the 4th Respondent from effectively delivering its mandate to the people. As such that the 1st Respondent was clearly in blatant contravention of the cardinal constitutional doctrine of separation of powers of arms of government in the County Government of Kericho. Therefore, that the report of the ad hoc committee is a product of violation of *the Constitution* and thus should not be admitted by this Court but pronounced as inconsequential.

67. It was also submitted that the 1st Respondent went beyond the scope of its mandate by appointing the impugned ad hoc committee while the team appointed by the 4th Respondent was still working to deliver its mandate.
68. On whether the orders to be granted by this Court should be issued against the 4th and 5th Respondents, the Respondents submitted in the affirmative and stated that it is clear that the 1st Respondent acted beyond scope hence infringing on the powers and functions of the office of the 4th Respondent and on that grounds the Ad Hoc Committee report ought to be struck out because it does not stand the test of legality. In support of their argument, they relied on Article 176 of *the Constitution* and Parts II, III and V of the County Government Act which make provision for separation of powers for respective arms of the County Government.
69. In light of the arguments above, the Respondents herein submitted that the Petitioners have satisfied the evidentiary threshold that warrant the grant of prayers sought in both the Application and the Petition as against both the 4th and the 5th Respondent and therefore that this Court should issue the Orders against the 4th and 5th Respondents as prayed.
70. On costs, the Respondents herein submitted that section 27(1) of the *Civil Procedure Act*, states that awarding of costs shall be at the discretion of the Court or Judge who has the power to determine to whom the costs will be awarded, out of what property and to what extent such costs are to be paid. In this case, they argued that costs of the instant Application do follow the event.

1st, 2nd and 3rd Respondents' Submissions

71. The Respondent herein opposed the application and submitted on three issues; whether the Petitioners/Applicants have satisfied the threshold for grant of conservatory orders, whether the Petitioners have made a case for grant an order of injunction sought pending the hearing and determination of the Petition herein and who bears the costs of the Application.
72. On the first issue, it was submitted that the jurisdiction of this Honourable Court to consider a prayer for conservatory orders is derived from Articles 22 and 23 of *the Constitution*, sections 12(1) and (3) of the *Employment and Labour Relations Court Act*, Order 40 Rule 2 of the Civil Procedure Rules, as well as Rules 3,4 and 23 of *the Constitution* of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013. That the Petitioners have alleged violation, contravention, denial and/or threatened to their fundamental rights to fair administrative action, fair labour practices, equality, among other rights but have not satisfied the test for grant of the conservatory Orders sought.
73. It was argued that the principles guiding the courts when considering whether or not to grant a conservatory order was succinctly enunciated by the Supreme Court in *Gatirau Peter Munya Vs. Dickson Mwendwa Kithinji and 2 Others* [2014] eKLR, where the Court stated as follows;

“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable



harm” occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay. Conservatory orders consequently should be granted on the inherent merit of a case bearing in mind the public interest the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes.”

74. That the purpose of Conservatory Order is to enable the court to maintain the status quo of existing situation or set of facts and circumstances so that the trial process is not rendered nugatory or a futile academic discourse. Implicitly, therefore, a party seeking conservatory orders must satisfy the following requirements;
- i. The applicant ought to demonstrate a prima facie case with a likelihood of success and that he is likely to suffer prejudice as a result of the violation or threatened violation if the conservatory order is not granted
 - ii. The grant or denial of the conservatory relief ought to enhance Constitutional values and objects specific to the rights or freedoms in the Bill of Rights.
 - iii. If the conservatory order is not granted, the Petition or its substratum will be rendered nugatory.
 - iv. The Public interest should favour a grant of the conservatory order.
 - v. The circumstances dictate that the discretion of the court be exercised in favour of the applicant after a consideration of all material facts and avoidance of immaterial matters
75. Based on the grounds listed above, the Respondents submitted that the petitioners do not raise serious triable issues of law with likelihood of success. Further that they have not demonstrated that their constitutional rights will continue being violated by the Respondents if the Conservatory orders are not issued pending the determination of the Petition. In support of this view, they relied on the case of Board of Management of Uhuru Secondary School Vs City County Director of Education & 2 others [2015] eKLR the Court posited that:
- “It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential argueability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis...”
76. It was submitted further that granting conservatory orders in this case will not serve to enhance the national values and principles of governance as enshrined under Article 10 of *the Constitution*, and specifically the values and principles of equality and non-discrimination, rule of law and human rights. To the contrary, the grant of the reliefs sought will only lend judicial imprimatur to the assault on Chapter six of *the Constitution* by the Applicants.
77. Also that even if the orders sought are denied, the substratum of the Petition will not be rendered nugatory especially because the 4th Respondent has not commenced the process of replacement of the Petitioners and therefore that it will still be possible for the eventual orders of the Court to be implemented. He thus urged this Court to find that the public interest does not favour the grant of conservatory orders sought, save for the unfounded fears of loss of the petitioners jobs.
78. The Respondents submitted that the third consideration that the Court should take into account is whether a conservatory order is in the public interest and is supported by *the Constitution*. On this it was argued that the instant case is neither in public interests nor in accordance with *the Constitution* of Kenya but in the interest of people whose integrity is questionable to hold public office. Further,



that Conservatory orders must be consistent with the values and principles of *the Constitution*, which Constitution calls for accountability and integrity from public officials. On the converse that the grant of the reliefs sought would offends the national values and principles under Articles 10 and 232 of *the Constitution* as well as the entire Chapter 6 on leadership and integrity. To support this, they relied on the Supreme Court of Kenya in Julius Kariuki mate and another Vs Martin Nyaga Wambora & Another [2017] eKLR where the Court cautioned against courts rushing to issue conservatory orders that hinder other arms of government from exercising their constitutional and statutory roles.

79. In light of the above decision, the Respondent invited this court to restrain itself from interfering with the processes and mandate of the County Assembly and only review final outcome if seized with the matter.
80. It is the Respondents submissions that the public interest and the proportionate magnitudes, and priority levels attributable to the present case militate against grant of interim orders and added that if this Court grants the orders sought in the interim, it would be unnecessarily intruding into the province of the County Assembly which has the requisite mandate of oversight over the positions held by the Petitioner/Applicants. He then argued that in determining whether or not to intervene on either the threshold or procedure adopted in the removal process, the Court is likely to interfere with the functions of other state organs. In support of their argument, the Respondents relied on the supreme Court decision In the Matter of the Speaker of the Senate & Another [2013] eKLR where the Court held that;-

“Upon considering certain discrepancies in the cases Cited, as regards the respective claims to legitimacy by the judicial Power and the legislative policy - each of these claims harping on the separation-of-powers concept — we came to the conclusion that it is a debate with no answer; and this Court in addressing actual disputes of urgency, must begin from the terms and intent of *the Constitution* our perception of the separation of powers concept must take into account the context design and purpose of *the Constitution*’ the values and principles enshrined in *the Constitution*, the vision and ideals reflected in *the Constitution*...The context and terms of the new Constitution, this Court believes, vests in us the mandate when called upon, to consider and pronounce ourselves upon the legality and propriety of all constitutional processes and functions of State organs. The effect, as we perceive it, is that the Supreme Court’s jurisdiction includes resolving any question touching on the mode of discharge of the legislative mandate.”

81. Accordingly, that the Courts cannot supervise the workings of the Legislative arm of government, in this case, the County assembly, and the institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another. Further that any conservatory orders that curtail the operations of the legislative arm of the County government will not promote constitutional values.
82. It is submitted that the Applicants have failed to satisfy the provisions of Article 23(3)(e) of *the Constitution*. That the only fear that the petitioners are protecting is loss of their jobs and salaries, which loss is reversible in the event the Petition succeeds. In this they cited the case of Centre for Rights Education and Awareness(CREAW) & 7 Others v Attorney General, [2011] Eklr.
83. On whether the Petitioners have made a case for grant of an order of injunction. It was submitted in the negative and stated that the Applicants have not, in both their Petition and the Application, raised serious and triable issues of law with likelihood of success as such have not satisfied the threshold for issuance of an order of injunction as set forth in the case of Giella vs. Cassman Brown.



84. Further that the removal of the Petitioners from their positions will not in any way occasion them irreparable damage which may not be sufficiently compensated by damages. Additionally, that while there is concerned fear expressed by the petitioners of the eminent loss of their jobs, the Court must not divert from the jurisdictional bar apparent in its path and the need to ensure the rule of law is achieved.
85. On the allegation that the petitioners' constitutional rights have been infringed, the Respondents herein submitted that the said Applicants have alleged violation of their constitutional rights, but have failed to demonstrate any element of public interest that was involved in such violation when it is in public interest to require persons who have been adjudged by the County Assembly to step aside from public office. In fact, that there will be greater loss of public funds and violation of the Constitution in the event this Court was to allow the Applicants to continue holding office.
86. In light of the foregoing, the Respondents urged this Court to dismiss the Application with costs.
87. I have examined all the evidence and submissions of the parties herein.
88. The application before me has been brought in the interim for this court to grant interim orders to stay any implementation of the recommendation made by the ad hoc committee of the County Assembly in relation to the removal of the applicant/petitioner herein. When the applicants appeared before this court *ex parte* on the 18th August 2023 this court granted interim injunctive reliefs as prayed.
89. The main contention by the applicants relate to the manner in which the 1st & 2nd respondents proceeded to establish the culpability or otherwise of the applicants and hence the recommendation made.
90. The applicants aver that the investigation and recommendation in relation to the applicants was bad in law and in particular Act 185 (3) of the constitution which grants the County Assembly an oversight role in performance of the work of the County Government.
91. The applicants herein have described themselves as County Executive Committee members (1, 2 & 3) and County Chief Officers (4, 5 & 6).
92. The recommendations made by the ad hoc committee was for the removal of the County Executive Committee Members by the governor and for a recommendation by H. E. the Governor for the dismissal of the chief officers by the County Public Service Board.
93. Section 30 of the County Government Act empowers the governor to dismiss a County Executive Committee Member (CECM) on his own volition.
94. Section 40 of the County Government Act on the other hand also makes provision for the removal of member of Executive Committee Members as follows:-
95. Section 40 (2) to (6)
 - “(2) A member of the county assembly, supported by at least one-third of all the members of the county assembly, may propose a motion requiring the governor to dismiss a county executive committee member on any of the grounds set out in subsection (1).
 - (3) If a motion under subsection (2) is supported by at least one-third of the members of the county assembly—
 - (a) the county assembly shall appoint a select committee comprising five of its members to investigate the matter; and



- (b) the select committee shall report, within ten days, to the county assembly whether it finds the allegations against the county executive committee member to be substantiated.
 - (4) The county executive committee member has the right to appear and be represented before the select committee during its investigations.
 - (5) If the select committee reports that it finds the allegations—
 - (a) unsubstantiated, no further proceedings shall be taken; or
 - (b) substantiated, the county assembly shall vote whether to approve the resolution requiring the county executive committee member to be dismissed.
 - (6) If a resolution under subsection (5) (b) is supported by a majority of the members of the county assembly—
 - (a) the speaker of the county assembly shall promptly deliver the resolution to the governor; and Meetings of the county executive committee.
 - (b) the governor shall dismiss the county executive committee member”.
96. The process for the removal of CEMC is therefore two pronged;-
- a. Where the Governor may initiate the process suo moto.
 - b. Where the County Assembly initiates the process as stated above.
97. In this petition the contention is about the process initiated by the County Assembly which the applicant avers is flawed.
98. The respondent avers that the process was first initiated by the 1st respondent pursuant to a motion presented before it on 1st August 2023.
99. The respondent cited before this court Exh. MEP 2 a copy of the Notice of Motion presented before the 1st respondent on 1/8/2023.
100. As per Section 40 (3) of the County Government Act once such a motion if tabled must be supported by at least one third of the members of the County Assembly.
101. The respondents have averred that a motion to establish an ad hoc committee was presented before the assembly and 1st respondent members voted to establish, “The Londiani Accident ad hoc committee.”
102. From the Order Paper of the Assembly of 1st August 2023 at 2.30pm, the motion by Hon. Vincent Korir was part of the order of Business of the house.
103. However no evidence has been presented before this court how this motion was debated and passed by the house as the hasard proceedings were never presented to court.
104. That not-withstanding the applicants have submitted that they were condemned unheard and therefore the process of the investigations were flawed.



105. The respondents aver that the applicants were given an opportunity to appear before the ad hoc committee during the investigation. The applicants aver that they were summoned to give information on the Londiani Accident on specified issues but this was not a disciplinary process against them.
106. Indeed the applicants were summoned by the respondents ad hoc committee during the investigation but the process didn't accord the applicants any opportunity to be heard before the committee reached a conclusion that grounds warranting their removal had been established.
107. The wording of Section 40 of the County Government Act envisages that the process established by the County Assembly for the removal of CECM must be fair and just because the CECMs have no other avenue to explain culpability since the findings of the committee if against a CECM, have no other avenue to defend themselves.
108. The right to be heard must be exercised at this level which I find was not accorded to the applicants.
109. On this ground alone, I find the process as conducted was flawed and therefore cannot be allowed as it were.
110. On the case of the Chief officers, these are employees of the CPSB. They can only be removed following due process by their employer the CPSB. Any decision for their removal must be made by the CPSB which exercises disciplinary control over them as per Section 55 of the County Government Act.
111. The applicants have averred that the recommendations made by the respondents for their removal by the Governor and the CPSB flawed as explained above.
112. For the reasons explained in this ruling, I find that the applicants have established a prima facie case with a probability of success to warrant issuance of the orders sought.
113. The 1st, 2nd & 3rd respondents have executed their mandate and I therefore grant orders restraining the 4th respondents, their agents, servants or any person whatsoever from initiating the removal process or taking any further steps in relation to the recommendations made by the 1st, 2nd and 3rd respondents pending the hearing and determination of this petition.
114. Costs in the petition.

RULING DELIVERED VIRTUALLY THIS 8TH DAY OF FEBRUARY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Tunen Kiplangat for petitioners – present

Lerut holding brief for Kiplangat for 1st, 2nd & 3rd respondents - present

Court assistant – Fred

