



**Nkaduda v County Assembly of Tana River & 4 others (Constitutional Petition 006 of 2021) [2022] KEELRC 1605 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1605 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI  
CONSTITUTIONAL PETITION 006 OF 2021**

**BOM MANANI, J**

**JULY 29, 2022**

**IN THE MATTER OF ARTICLES 2(1), 3(1), 10, 19, 20, 22, 23, 25 (C), 27, 28, 47, 48, 50, 159, 165, 196 AND 236 OF THE CONSTITUTION OF KENYA AND  
IN THE MATTER OF ALLEGED CONTRAVENTION OF THE CONSTITUTION OF KENYA AND IN THE MATTER OF VIOLATION OF THE RIGHT TO FAIR HEARING, DIGNITY AND PROTECTION FROM DISCRIMINATION AND SECURITY OF PERSONS AND  
IN THE MATTER OF SECTION 11 OF THE COUNTY GOVERNMENTS ACT, 2012 AND  
IN THE MATTER OF STANDING ORDER NOS 69 AND 75 OF THE TANA RIVER COUNTY ASSEMBLY STANDING ORDERS AND  
IN THE MATTER OF A RESOLUTION TO IMPEACH THE SPEAKER OF TANA RIVER COUNTY, HONOURABLE MICHAEL JUSTINE NKADUDA AND  
IN THE MATTER OF THE COUNTY ASSEMBLY OF TANA RIVER AND  
IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015**

**BETWEEN**

**MICHAEL JUSTINE NKADUDA ..... PETITIONER**

**AND**

**COUNTY ASSEMBLY OF TANA RIVER ..... 1<sup>ST</sup> RESPONDENT**

**CLERK, THE COUNTY ASSEMBLY OF TANA RIVER ..... 2<sup>ND</sup> RESPONDENT**

**MOHAMED BUYA YUSA ..... 3<sup>RD</sup> RESPONDENT**

**GALOLE SADDAM HUSSEIN ..... 4<sup>TH</sup> RESPONDENT**

**ABDI ERGAMSO GOBU ..... 5<sup>TH</sup> RESPONDENT**



## JUDGMENT

1. This is a petition challenging the decision of the County Assembly of Tana River, the 1<sup>st</sup> Respondent, to impeach its County Speaker, the Petitioner herein, from office. The Petitioner sought to challenge the decision on the grounds that it was arrived at through a process that was flawed, in contravention of the applicable law and violation of his rights.
2. Broadly, the general intent of the case is to implore the court to declare the process as null and void. In addition, and as the Amended Petition shows, the Petitioner seeks for other ancillary reliefs such as orders for compensation for infringement of his constitutional rights.
3. Needless to say that the petition is opposed by the Respondents who, in their view, believe that they processed the Petitioner's removal in a manner that was not only lawful but also just and equitable.

### Facts Surrounding the Dispute

4. According to the Amended Petition, the Petitioner was until his removal from office, the County Speaker of the 1<sup>st</sup> Respondent. That on 21<sup>st</sup> April 2021, he was forced out of his office by some members of the 1<sup>st</sup> Respondent after they were incited to do so by the 5<sup>th</sup> Respondent. That in the process of his ejection, the Petitioner was not even allowed to collect his personal belongings including his medicine for managing his high blood pressure and diabetic conditions.
5. In the Petitioner's view, this action by the members of the 1<sup>st</sup> Respondent against him was not only uncivil but also inhuman. It violated the Petitioner's rights to human dignity, fair administrative action and exposed him to untold suffering resulting in his hospitalization.
6. The Petitioner contends that the Respondents' activities of 21<sup>st</sup> April 2021 were orchestrated by their singular desire to set in motion the process of unlawfully ending the Petitioner's tenure as Speaker of the County Assembly of Tana River County. According to the Petitioner, he later learned that the 3<sup>rd</sup> Respondent had in fact drafted a motion for the Petitioner's impeachment. That this motion was forwarded to the 2<sup>nd</sup> Respondent on the same date it was prepared that is to say 21<sup>st</sup> April 2021.
7. That the motion was apparently hurriedly approved by the 2<sup>nd</sup> and 4<sup>th</sup> Respondents and tabled before the House on the afternoon of 21<sup>st</sup> April 2021. That the House went ahead to approve it for further processing. That all this was done without the Petitioner first being notified of the motion in contravention of the law and the Petitioner's right to be heard.
8. The Petitioner contends that on 30<sup>th</sup> April 2021, he received an email from the 1<sup>st</sup> Respondent inviting him to appear before an *ad-hoc* select committee. That this committee had apparently been constituted to investigate and authenticate the grounds upon which it was proposed that the Petitioner be removed from the office of Speaker of the 1<sup>st</sup> Respondent.
9. That attached to the email were a couple of other communications to wit the following: a Notice of Motion document dated 21<sup>st</sup> April 2021; a Notice of Hearing of the Speaker's Removal dated 29<sup>th</sup> April 2021; and the Hansard Report of 28<sup>th</sup> April 2021. According to the Petitioner, the Notice of Motion aforesaid had allegedly been approved by 2<sup>nd</sup> and 4<sup>th</sup> Respondents on 21<sup>st</sup> April 2021.
10. It is the Petitioner's case that contrary to the law, the Notice of Motion delivered to him by email on 30<sup>th</sup> April 2021 did not provide particulars of the accusations against him. It only had generalized grounds of the accusations.



11. Further, the Petitioner contends that the said Notice of Motion only bore the signature of the 3<sup>rd</sup> Respondent. Yet, the law requires that such motion be supported by at least one third (1/3) of the members of the County Assembly who must all signify their support for the motion by appending their signatures on it.
12. The Petitioner also contends that the *ad-hoc* select committee that investigated his matter was not properly constituted. According to the 1<sup>st</sup> Respondent's Standing Orders (SOs), such committee must have at least one third of the members of the 1<sup>st</sup> Respondent in order for it to be properly set up. Yet, the committee that investigated him comprised of seven (7) out of the twenty (23) members of the 1<sup>st</sup> Respondent.
13. From the record, the *ad-hoc* select committee invited the Petitioner to attend its investigative session scheduled for 3<sup>rd</sup> May 2021 at 10.00 am. On that day, the Petitioner indicates that he was unable to attend the *ad-hoc* committee's investigative session as he was unwell. Instead, he asked his lawyers to appear and notify the committee of his indisposition and the fact that between 30<sup>th</sup> April 2021 when the invitation was sent out and 3<sup>rd</sup> May 2021 when the session was to be held was a weekend. Therefore, the notice did not afford him sufficient time to prepare for the session. Apparently, the Petitioner had also sent an email to the committee on Saturday, 1<sup>st</sup> May 2021 communicating the same position.
14. The Petitioner indicates that the lawyers attended before the *ad-hoc* committee on 3<sup>rd</sup> May 2021 and sought to adjourn the session. However, the request was declined. According to the Petitioner, he was told that the reason why the request to adjourn the committee session was declined was that any such move would jeopardize the timelines given to the committee to finalize and hand over its report on the matter under Standing Order (SO) 69(8) of the 1<sup>st</sup> Respondent's SOs.
15. The *ad-hoc* committee went on to hold its session as scheduled and apparently came up with a report on the same day. On the very same 3<sup>rd</sup> May 2021 at 3.56 pm (the email shows 3.57 pm) after the *ad-hoc* committee's session, the 2<sup>nd</sup> Respondent sent out an invitation to the Petitioner to attend the full house of the 1<sup>st</sup> Respondent on 4<sup>th</sup> May 2021 to respond to the allegations against him on the floor of the House before the report of the *ad-hoc* committee could be debated. The session of the full house was scheduled for 9.30 am on 4<sup>th</sup> May 2021.
16. From what I can gather from the Respondents' case, the full house session of the 1<sup>st</sup> Respondent set for 4<sup>th</sup> May 2021 proceeded as scheduled. From the Respondents' documents, the *ad-hoc* committee's report was presented to the 2<sup>nd</sup> Respondent for approval on the morning of 4<sup>th</sup> May 2021. The 2<sup>nd</sup> Respondent is then shown as having granted his approval on the same date just in time for the full house session by the 1<sup>st</sup> Respondent.
17. Going by the record, this process of presenting the report to the 2<sup>nd</sup> Respondent for approval and the 2<sup>nd</sup> Respondent granting his approval to it must have happened between 8.00 am and 9.30 am on the material date (4<sup>th</sup> May 2021). The Order Paper listing the report for debate must also have been prepared between 8.00 am and 9.30 am on the same day that the report was receiving approval by the 2<sup>nd</sup> Respondent (4<sup>th</sup> May 2021).
18. From the Amended Petition, it would appear that the Petitioner had in the meantime resolved to instruct his lawyers to move to court to try and stall the impeachment process. From the record, this Petition was first filed before the High Court sitting at Garsen on 27<sup>th</sup> April 2021 as E002 of 2021.
19. From the record, the matter was later that day forwarded to the High Court sitting at Malindi. On 28<sup>th</sup> April 2021, the Deputy Registrar, High Court, Malindi dispatched the file to the Employment



- and Labour Relations Court (ELRC), Mombasa as the High Court Judge, Malindi had directed that the cause, being premised on a dispute arising from an employment relation, ought to be handled by the ELRC.
20. As the record shows, on 28<sup>th</sup> April 2021, the ELRC certified the application for conservatory orders in the matter as urgent and set it down for hearing on 4<sup>th</sup> May 2021. Meanwhile, the court ordered the Petitioner to cause service of the Petition and Notice of Motion application upon the Respondents within two (2) days of the 28<sup>th</sup> of April 2021.
  21. According to the affidavit of service dated 3<sup>rd</sup> May 2021, the pleadings in the cause together with a Hearing Notice for 4<sup>th</sup> May 2021 were delivered to the premises of the 1<sup>st</sup> Respondent on 30<sup>th</sup> April 2021 and received by one Mohamed Drogba on behalf of all the Respondents. Indeed, all the Respondents entered appearance in the cause on 4<sup>th</sup> May 2021 (the court receipt shows the Memorandum of Appearance was paid for on 4<sup>th</sup> May 2021 even though the document was stamped on 5<sup>th</sup> May 2021), an indication that the Respondents had been served with the court's processes some date earlier than 4<sup>th</sup> May 2021. As the record shows counsel appeared on behalf of the Respondents on 4<sup>th</sup> May 2021.
  22. On 4<sup>th</sup> May 2021, the Petitioner avers that they recorded a consent permitting the Petitioner to amend his Petition and also forbidding the Respondents from concluding the impeachment process against the Petitioner unless conducted within the parameters of the law. This position is self-evident from the court record.
  23. It would appear that unbeknown to the Petitioner, as the parties were holding the court session on 4<sup>th</sup> May 2021, the 1<sup>st</sup> Respondent was simultaneously processing the impeachment proceedings against him. Consequently, by the time the consent order was delivered to the Respondents, the 1<sup>st</sup> Respondent had already passed a resolution adopting the report of the *ad-hoc* committee to impeach the Petitioner.
  24. The Petitioner's case is that the 1<sup>st</sup> Respondent's resolution of 4<sup>th</sup> May 2021 was contemptuous of the consent order issued by the court on the same date. Further, the resolution infringed on the Petitioner's rights to a fair hearing and fair administrative action as protected under both the *Constitution* and the *Fair Administrative Actions Act*.
  25. On their part, the Respondents maintain that their action against the Petitioner was justified. First, the Respondents assert that there were valid grounds to justify the impeachment of the Petitioner. These grounds were initially indicated to include: gross misconduct; incompetence; and abuse of office. However, after the *ad-hoc* committee's investigations, they came down to incompetence and gross misconduct as can be seen from the report by the *ad-hoc* committee.
  26. According to the Respondents, a Notice of Motion was validly initiated by the 3<sup>rd</sup> Respondent to remove the Petitioner on the aforesaid grounds. The motion received support of at least eighteen (18) members of the 1<sup>st</sup> Respondent's twenty-three (23) members. Therefore, it met the statutory threshold that requires such motions to be supported by at least one third (1/3) of the members of the County Assembly where the targeted Speaker works.
  27. That on receipt of the Notice Motion on 21<sup>st</sup> April 2021, the 2<sup>nd</sup> Respondent after being satisfied that it met the statutory threshold, forwarded it to the 1<sup>st</sup> Respondent for further processing. That the acting Speaker of the 1<sup>st</sup> Respondent approved the Motion and placed it before the 1<sup>st</sup> Respondent's House on 28<sup>th</sup> April 2021 for further processing.



28. That on the day the Motion came on the floor of the house (28<sup>th</sup> April 2021), the chair of the Selection Committee one Ibrahim Salah Adonow, moved a motion for the appointment of an *ad-hoc* select committee to investigate the accusations against the Petitioner. That this was in compliance with the [County Governments Act \(CGA\)](#) and the 1<sup>st</sup> Respondent's SOs.
29. That the SOs require that the *ad-hoc* select committee comprises at least one third (1/3) of the 1<sup>st</sup> Respondent's twenty-three (23) members. That as a result, the chair of the Selection Committee tabled names of seven (7) members of the 1<sup>st</sup> Respondent before the 1<sup>st</sup> Respondent House for approval as members of the said committee. These names were approved by the House.
30. That SOs require that the *ad-hoc* select committee so appointed investigates the matter for which it has been set up and prepares and files its report with the 1<sup>st</sup> Respondent within ten (10) days. That in compliance with these legal requirements, the *ad-hoc* committee commenced its sessions immediately upon appointment with a view to meeting the statutory timelines aforesaid.
31. That on 29<sup>th</sup> April 2021, the committee issued the Petitioner with an invitation to appear before it on 3<sup>rd</sup> May 2021. That the invitation was sent to the Petitioner on 30<sup>th</sup> April 2021 through email around 3.57 pm. The email also forwarded to the Petitioner copies of: the Notice of Motion and the Hansard report for 28<sup>th</sup> April 2021. The Respondents contend that the particulars of the charges against the Petitioner were set out in the Hansard.
32. That the *ad-hoc* committee convened on 3<sup>rd</sup> May 2021 as programmed when the Petitioner's Advocates tried to adjourn the session. That the request to adjourn for seven (7) days could not be granted as it would have taken the committee's work to a date that would make it impossible for it to meet its statutory timelines.
33. That although the Petitioner argues that the committee was improperly constituted, his lawyers did not take up this objection on 3<sup>rd</sup> May 2021 when they appeared before it. Therefore, the objection is a mere afterthought.
34. That the 1<sup>st</sup> Respondent traditionally convenes its sessions on Tuesdays and Wednesdays. Therefore, the committee had to table its report either on 3<sup>rd</sup> May 2021 or 4<sup>th</sup> May 2021 in order for the House to convene on the following respective dates, that is to say, 4<sup>th</sup> May 2021 or 5<sup>th</sup> May 2021.
35. That if the Petitioner's request to adjourn for the duration he suggested would have been granted, it would have taken the committee to around 7<sup>th</sup> May 2021 which date fell outside the ten (10) days within which the committee was required to have concluded its business on the issue. That this would have nullified the entire exercise and consequently resulted in wastage of public resources.
36. That the Petitioner's lawyers were advised that an adjournment could only be permitted if it would not unduly prejudice the timelines that the committee was working within. That the lawyers were asked to suggest dates with this in mind but declined to do so and hence the decision by the committee to decline the request to adjourn.
37. The Respondents also aver that the Petitioner's lawyers' attempt to have the matter moved forward on the ground that the Petitioner had not been supplied with particulars of the charges against him was also declined. This was because the Hansard report for the proceedings of the House on 28<sup>th</sup> April 2021 which had been sent to the Petitioner contained particulars of the accusations against him.
38. It is the Respondents' case that the Petitioner had the opportunity to appear before the select *ad-hoc* committee but failed to. As a result, the committee processed the matter in terms of the law and filed its report with the 2<sup>nd</sup> Respondent who after approving it, caused to be prepared an Order Paper for



4<sup>th</sup> May 2014 when the recommendations of the *ad-hoc* committee were tabled before the full house of the 1<sup>st</sup> Respondent.

39. It is the Respondents' case that the Petitioner ignored calls to appear before the full house of the 1<sup>st</sup> Respondent to answer to the allegations against him before the report of the *ad-hoc* committee was debated. Despite this failure to appear, the 1<sup>st</sup> Respondent considered and approved the *ad-hoc* committee's report. Thus, the Petitioner was thereby lawfully impeached.

### **Issues for Determination**

40. The parties did not frame issues for determination at the pre-trial stage. However, they did so in their final submissions.
41. In the Petitioner's view, the following are the issues for determination: -
- a. Whether the 2<sup>nd</sup> Respondent has authority to swear the Replying Affidavit and appear on behalf of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents.
  - b. Whether the impeachment process undertaken by the 1<sup>st</sup> Respondent was lawful, procedural and fair.
  - c. The constitutionality or otherwise of the 1<sup>st</sup> Respondent's actions in purporting to impeach the Petitioner.
  - d. What reliefs, if any, are available to the Petitioner?
42. On their part, the Respondents also framed issues for determination in their written submission. In large part, they mirror those of the Petitioner save for the following: -
- a. Whether the prayers sought in the Petitioner's submissions dated 14<sup>th</sup> July 2022 can be issued.
  - b. Whether the Respondents in undertaking the impeachment process acted in contempt of the Court order dated 4<sup>th</sup> May 2021.
  - c. Whether the reliefs sought by the Petitioner run against the letter and spirit of the separation of power doctrine.

### **Analysis and Findings**

43. After some back and forth, the parties agreed to have the Petition disposed of on its merits. It was further agreed that the parties give oral evidence in addition to the affidavit evidence that was already on record. The parties have also filed written submissions which I have considered in this decision.
44. I will begin examining this matter from the point at which the process of impeachment was triggered. This was through the events that took place on 21<sup>st</sup> April 2021. Because of the number of questions that have to be answered, I will undertake the exercise under several subheadings. Importantly, as I answer the several proposed questions, I will also be reacting to the issues as framed by the parties even though sometimes indirectly.
45. However, just before I examine the first question of authority to the 2<sup>nd</sup> Respondent to plead on behalf of the other Respondents, I note that counsel for the Respondent has alluded to the concept of separation of powers in the list of issues in her final submissions. It is not clear to me in what context this matter is taken up by counsel. It was neither pleaded nor addressed during the oral hearing of the Petition.



46. I note perhaps that counsel may have alluded to the issue based on the observations she came across on the subject in the case of *Ameja Zelemoi v County Assembly of Baringo Speaker of the County Assembly of Baringo & another* [2020] eKLR. However, without contextualizing the matter, I cannot make any pronouncements on it particularly so that the issue was not the subject of the trial.

**a. Authority of 2<sup>nd</sup> Respondent to Plead on behalf of other Respondents**

47. This matter appears not to have its basis in the pleadings filed by the Petitioner. Therefore, it will be improper for the court to be invited on the basis of submissions and oral evidence to pronounce itself on it.

48. Importantly, a perusal of the pleadings gives the impression that Respondents numbers two, three, four and five were all sued because of activities relating to execution of their official mandate as either members or officials of the 1<sup>st</sup> Respondent. In the premises, it is appropriate in my view for the 2<sup>nd</sup> Respondent to plead on their behalf.

**b. Removal of Petitioner from Office**

49. The Petitioner's case is that he was forcibly ejected from his office on 21<sup>st</sup> April 2021. Besides, making this assertion in the Amended Petition, the Petitioner actually alludes to it at paragraph 10 (l) of his supplementary affidavit dated 15<sup>th</sup> June 2021. It should be noted that this affidavit was adopted by the Petitioner as part of his evidence when he testified under oath in support of his case.

50. At paragraph 5 of their defense, the Respondents deny that they forcibly ejected the Petitioner from his office as he asserts. However, they did not address this issue in the replying affidavit adopted by the 2<sup>nd</sup> Respondent as part of the defense evidence. And neither did the 2<sup>nd</sup> Respondent address the matter during his oral testimony nor file a supplementary affidavit to address it.

51. That the Petitioner ceased being physically in office from 21<sup>st</sup> April 2021 finds support in the evidence on record. First, this assertion is supported by the Petitioner's own affidavit and oral evidence alluded to above. Second, the defense evidence provides corroboration of the Petitioner's claim. For instance, after 21<sup>st</sup> April 2021, the only methods of communication that the Respondents say they were using to reach the Petitioner were through emails and allegedly by phone calls. If indeed the Petitioner was still within the precincts of the 1<sup>st</sup> Respondent between 21<sup>st</sup> April 2021 and 4<sup>th</sup> May 2021, nothing would have been easier than for the Respondents to deliver their processes to him physically.

52. In the absence of evidence by the Respondents to rebut the Petitioner's evidence that he was physically ejected from his office and thereafter kept away from the precincts of the 1<sup>st</sup> Respondent, I hold that the Petitioner's position on this issue reflects the factual position on the matter.

53. The law regulating the removal of a County Speaker from office is set out under section 11 of the *CGA*. Nothing under this provision sanctions the physical ejection of a sitting Speaker even as impeachment proceedings commence. Further, article 236 of the *Constitution* of Kenya 2010 and section 4 of the *Fair Administrative Action Act* frown at such arbitrary action against a public officer.

54. To the extent that the Respondents subjected the Petitioner to this form of arbitrary action on the morning of 21<sup>st</sup> April 2021 and even declined to allow him time to collect his medicine and other personal effects, I find that they handled the Petitioner in a manner that was not only arbitrary but also in violation of his rights to due process, fair administrative action and human dignity.



**c. Notice of Intention to move a Motion to Remove the Speaker versus Notice of Motion for Removal of the Speaker: the distinction, form and content.**

55. Section 11 (2) of the CGA provides for the grounds for the removal of a sitting Speaker of a County Assembly. These include: gross misconduct; incompetence; and gross violation of the Constitution and the law. Some of the above grounds are what allegedly informed the Respondents' decision against the Petitioner.
56. Where it is desired to remove a Speaker from office on any of the grounds set out under section 11(2) of the CGA, section 11(3) of the Act requires that a notice of such intention be issued to the Clerk of the County Assembly. This notice of intention to remove the Speaker must be: given in writing to the said Clerk; signed by at least one third (1/3) of all the members of the County Assembly; and state the grounds for the proposed removal as set out in section 11(2) of the Act.
57. Under section 11(4) of the Act, a motion for the removal of the Speaker must specify: the grounds for removal as specified in section 11 (2) of the Act; and the facts constituting those grounds.
58. Clearly, there is a distinction between the "Notice of intention to remove the Speaker" issued under section 11(2) of the Act and the "Motion for the removal of the Speaker" issued under section 11(4) of the Act. In the former, all that the law requires is for the notice to state the naked grounds for the proposed process of removal of Speaker. Conversely, in the latter document, the law not only requires that the naked grounds for removal be stated but also the particulars of the facts constituting those grounds. I understand the law as saying that whilst the first of these two documents merely expresses the intention to move a motion to remove the Speaker, the second one actualizes this intention by moving the motion for impeachment.
59. From the evidence that was tendered by the parties, what the 3<sup>rd</sup> Respondent filed with the 2<sup>nd</sup> Respondent, the Clerk of the 1<sup>st</sup> Respondent on 21<sup>st</sup> April 2021 was a "Notice of Motion for the removal of the Speaker." There is no evidence of the 3<sup>rd</sup> Respondent having filed with the 2<sup>nd</sup> Respondent a "Notice of Intention to Remove the Speaker." What is clear from the evidence by the defense is that the Respondents treated the two documents as one and the same.
60. The documents presented to the 2<sup>nd</sup> Respondent and which is clearly headed "Notice of Motion" while stating the grounds for the proposed removal of the Petitioner in compliance with section 11(2) of the CGA does not provide the facts or particulars in support of the proposed grounds in contravention of section 11(4) of the CGA. In a bid to excuse this failure to comply with the requirement of law, the 2<sup>nd</sup> Respondent stated that the particulars of the charges against the Petitioner were included in the Hansard Report of 28<sup>th</sup> April 2021 which was sent to the Petitioner.
61. There are however, challenges presented by the position expressed by the 2<sup>nd</sup> Respondent that particulars of the accusations against the Speaker can be incorporated in a document other than the Notice of Motion. First, section 11(4) of the CGA which provides for the requirement to provide particulars of the grounds for impeachment is expressed in mandatory terms. And the subsection specifies the document that should contain these particulars as the notice of motion and not the Hansard report.
62. Second, from the way the law is couched, the Speaker is entitled to be notified of the particulars of the offense against him as soon as the notice of intention to impeach him is issued. This is intended to enable him sufficient time to prepare and share his defense both with the Clerk of the County Assembly and the County Assembly.



63. If the particulars of the charges are to be supplied through the Hansard report by the County Assembly establishing the *ad-hoc* committee to investigate them, it means that the Speaker will have been deprived of the chance to effectively respond to the accusations at the point they were presented to the Clerk and the County Assembly in the first instance. Had these particulars been availed to him prior to these two stages, it is probable that he would have offered a suitable defense at the pre-committee stage that would have rendered it unnecessary for the County Assembly to recommend the formation of an *ad-hoc* select committee to look into it.
64. In their submissions, the lawyers for the Respondents argue that the Petitioner did not plead non-issuance of the Notice of Intention to Move a Motion for Removal of Speaker as a ground for attack. As such he ought not to be allowed to build his case on this ground as it falls outside his pleadings.
65. I respectfully do not agree with the Respondents on this point. Paragraph 9 of the Amended Petition states that the Notice of Motion for the removal of the Petitioner was debated and passed by the 1<sup>st</sup> Respondent without following the procedure laid down under, *inter alia* section 11 of the [CGA](#) and Standing Orders 69 and 75 of the 1<sup>st</sup> Respondent's Standing Orders. The Petitioner then goes ahead to reiterate this position at paragraph five (5) of his affidavit dated 15<sup>th</sup> June 2021 which was adopted in evidence.
66. It is section 11 of the [CGA](#) that provides for the requirement for issuance of a notice of Intention to Move a Motion for the Removal of Speaker. Thus, by pleading that the procedure under this section was not followed, the Petitioner was simply stating that all the process under the section including the issuance of the notice aforesaid were not adhered to. And indeed, this is clear from the Petitioner's affidavit of 15<sup>th</sup> June 2021 which is his evidence in support of the foregoing pleading.

#### **d. Duty to Convey Notice of Intention to remove Speaker to the Speaker and the Right to Respond**

67. Under section 11 (5) of the Act, once the Clerk receives the notice of intention to remove the Speaker, he must within five (5) days of such receipt notify the Speaker of the charges and invite him to respond to them. The Speaker's response must be in writing and be tendered within seven (7) days from the date of notification of the charges. The Speaker is at liberty to plead the grounds of opposition to the motion if any.
68. In his evidence, the 2<sup>nd</sup> Respondent stated that once he received the Notice of Motion on 21<sup>st</sup> April 2021, he approved it and forwarded it to the acting Speaker of the 1<sup>st</sup> Respondent on the same day. There is no mention of the 2<sup>nd</sup> Respondent having notified the Petitioner of the notice of intention to remove him by the 3<sup>rd</sup> Respondent contrary to section 11(5) of the [CGA](#). Similarly, there is no evidence that the 2<sup>nd</sup> Respondent requested the Petitioner in writing to state his objection to the motion for his removal before the notice was forwarded to the 1<sup>st</sup> Respondent contrary to the stipulations of section 11(5) of the [CGA](#). In fact, the first time the Petitioner was served with the notice was on 30<sup>th</sup> April 2021 after the acting Speaker and 1<sup>st</sup> Respondent had on 28<sup>th</sup> April 2021 deliberated on and approved it for further processing without the input of the Petitioner's defense.
69. Under section 11(5) of the [CGA](#), once the Speaker is notified by the Clerk of the intention to remove him, he has seven (7) days to file his objection if any. This is before the matter can be escalated to the County Assembly for further processing.
70. The purpose of these provisions of law is to protect the Speaker's right to be heard in response to the allegations against him at this preliminary stage. In my view, this is a pivotal requirement towards protecting the right to due process as contemplated under article 236 of the [Constitution](#).



71. From the record, the 2<sup>nd</sup> Respondent threw this legal obligation to the wind and sacrificed the rights of the Petitioner to due process at the altar of convenience. Instead of following the procedure set out under section 11 of the CGA, the 2<sup>nd</sup> Respondent bypassed the Petitioner and forwarded the Notice of Motion directly to the acting Speaker of the 1<sup>st</sup> Respondent on the very same day that he received it thereby throwing into jeopardy the Petitioner's right to fair administrative action. This was notwithstanding that the process that had been initiated by the Respondents was going to adversely affect the Petitioner's right to remain in office.

**e. Endorsement of the Notice of Impeachment of the Petitioner**

72. The other issue with the Notice of Motion is how it was endorsed. On the face of it, the Motion was signed by one (1) individual, the 3<sup>rd</sup> Respondent. Since the Respondents elected to treat the document as both the "Notice of Intention to Remove the Speaker" and "Notice of Motion for the Removal of the Speaker", it was for the 3<sup>rd</sup> Respondent to have the document signed by at least one third (1/3) of the twenty- three (23) members that admittedly constitute the membership of the 1<sup>st</sup> Respondent excluding the Speaker.

73. The 2<sup>nd</sup> Respondent asserts that the notice was signed by eighteen (18) members. In support of this contention, he relies on the addendum list dated 21<sup>st</sup> April 2021 that has names of eighteen (18) individuals with their signatures on it.

74. The Petitioner on the other hand states that the document he received through email on 30<sup>th</sup> April 2021 bore only the signature of the 3<sup>rd</sup> Respondent. The other document with signatures of eighteen (18) individuals was not included in the documents sent to him on 30<sup>th</sup> April 2021.

75. First, since the Petitioner contested having been served with a notice supported and signed by the eighteen (18) individuals, this became a contested fact in the cause. Its resolution required the tendering of evidence.

76. As it is the Respondents who asserted that the notice of intention to remove the Petitioner was signed by more than one third (1/3) of the 1<sup>st</sup> Respondent's members, the evidential burden lay with them to provide evidence to demonstrate that the motion sent to the Petitioner on 30<sup>th</sup> April 2021 contained the addendum list with the signatures of the eighteen (18) individuals that are said to have been in support of it. This is particularly so because it is the Respondents who stated that they served the Petitioner with the compliant notice.

77. Further, since the notice was sent by the Respondents electronically, it was within their power to display the raw email data to the court to show the actual content of the documents annexed to the said email. For some reason, this was not done.

78. The addendum list raises genuine concerns that were never addressed by the Respondents. For instance, in the ordinary sequence of events, if a document runs into several pages, it is generally expected that it will be paginated to demonstrate continuity. Yet, neither the notice of motion by the 3<sup>rd</sup> Respondent nor the list is paginated to give credence to the assertion by the Respondents that one is the continuation of the other.

79. Second, the 3<sup>rd</sup> Respondent is shown as having signed on the face of the notice. Yet, he again appended his signature on the addendum list. Why would an individual sign a document twice where there is no express legal requirement that he does that? Does the fact of double signature by the 3<sup>rd</sup> Respondent on the two documents not suggest that the 2<sup>nd</sup> document is in fact a separate and distinct instrument?



80. Whilst the SOs acknowledge the fact that the notice of intention to remove Speaker may be delivered to the Clerk while unsigned, the proviso to SO 69(6) states that in such case, the Clerk shall prepare a list of all the members of the County Assembly with a space for their signature which shall be headed "Signatures in Support of a Motion for the Removal of the Speaker." The addendum list is certainly not the list contemplated under this proviso. It neither contains the names of all the twenty- three (23) members of the 1<sup>st</sup> Respondent nor does it bear the title aforesaid.
81. The document by the 3<sup>rd</sup> Respondent purporting to be either the "Notice of Intention for Removal of Speaker" or "Notice of Motion for the Removal of the Speaker" certainly had grave gaps. I am therefore not convinced that the notice of intention to remove the Petitioner that was initially issued contained the signatures of at least one third (1/3) of the members of the 1<sup>st</sup> Respondent in support of the proposed removal.

#### **f. Statutory Quorum of the Ad Hoc Committee**

82. Standing Order number 69(8) provides as follows regarding constitution of the *ad-hoc* select committee to investigate the removal of a Speaker of the 1<sup>st</sup> Respondent: -
- "When the motion has been passed by at least half of all members of the Assembly, the Assembly shall, within seven (7) days, appoint a Select Committee comprising a third of the members to investigate the matter....."
83. In effect, the *ad-hoc* select committee must comprise of at least a third of the total membership of the 1<sup>st</sup> Respondent for it to be compliant with the 1<sup>st</sup> Respondent's SOs. The parties are in agreement that the 1<sup>st</sup> Respondent had, at the time of the matters giving rise to the cause of action in this case, a total of twenty three (23) members of County Assembly. It is also common ground that mathematically, a third of this membership is about seven decimal six (7.6) persons. And as a natural person cannot be fragmented into a fraction, the logical thing would be to round off the decimal six to the nearest round number.
84. The Respondents argue that the 1<sup>st</sup> Respondent settled for seven (7) members to address the above challenge. In the Respondents' view, the decision to go with seven (7) members was because it was desirable for the committee to have an uneven membership just in case any of its decisions was to require resolution through voting. That the other nearest number to the one third (1/3) requirement would have been eight (8) members which is an even number.
85. It is not contested that the SOs of the 1<sup>st</sup> Respondent require the *ad-hoc* committee under SO 69 (8) to be made up of one third (1/3) of the total membership of the 1<sup>st</sup> Respondent. Seven (7) is a third of twenty one (21). It therefore does violence to logic for the Respondents to say that by settling for seven (7) individuals as members of the *ad-hoc* committee, the 1<sup>st</sup> Respondent met threshold set by its own SOs.
86. In terms of matters rounding off, the standard practice is that when there is need to round off, one rounds off to the nearest number. In this case, the nearest number to seven decimal six (7.6) is eight (8) not seven (7). Therefore, the Respondents would ordinarily have been expected to round off their number to eight (8). However, as eight (8) is an even number, the nearest uneven number to eight (8) which satisfies the quorum requirements of SO 69(8) would be nine (9). It is therefore baffling that the Respondents elected to settle for seven (7) members to sit on the *ad-hoc* select committee because this was certainly below quorum.



87. I appreciate that under section 53 of the Interpretations and General Provisions Act (IGPA), the committee's decision may not be impugned if it is made while there is a vacancy in its membership. However, the word "vacancy" denotes the fact of an unoccupied position. This presupposes that the position has first been created and exists.
88. In the current case, it is not that the *ad-hoc* committee had been established with the requisite statutory membership of one third (1/3) but that one or more of its members had vacated office at the point it rendered its decision in respect of the Petitioner. What was obtaining at the committee was not a vacancy within the meaning of section 53 of the IGPA. It was just a case of a committee set up in contravention of the rules.
89. At the time of its creation, the 1<sup>st</sup> Respondent's committee was set up with seven (7) members. And when it undertook investigations and made its decision these seven (7) members were all on board. Therefore, having regard to its initial formation, it cannot be reasonably argued that the committee had a vacancy at the time of rendering its decision.
90. It is perhaps also necessary to point out that SO 69(8) uses a mandatory term "shall" when directing that the *ad-hoc* committee to be set up should comprise one third (1/3) of the membership of the County Assembly. In the face of such command, it is doubtful that the 1<sup>st</sup> Respondent had the discretion to set up a committee with less than one third (1/3) of its membership.
91. The Respondents argue that the Petitioner's objection to the committee's constitution through this Petition comes too late. That the Petitioner's lawyers never raised this issue when they appeared before the committee on 3<sup>rd</sup> May 2021 to seek an adjournment of its proceedings. That it is an afterthought. Consequently, the court should ignore the grievance.
92. I do not agree with this view expressed by the Respondents. We cannot possibly confer jurisdiction on an improperly constituted organ through acquiescence.
93. A decision of an improperly constituted body amounts to no decision. For all purposes and intents, such decision is null and void.
94. Accordingly, I hold that to the extent that the *ad-hoc* select committee set up to investigate the Petitioner was under-populated ab initio, it was improperly constituted. Therefore, its report on the Petitioner was null and void for want of proper constitution.

#### **g. Flawed hearing by Ad Hoc Committee**

95. The record shows that after its constitution on 28<sup>th</sup> April 2021, the *ad-hoc* committee scheduled its first meeting on 3<sup>rd</sup> May 2021 at 10.00 am. It then went ahead to prepare a notice dated 29<sup>th</sup> April 2021 inviting the Petitioner to the session of 3<sup>rd</sup> May 2021. Although the notice was apparently ready on 29<sup>th</sup> April 2021 as is evident from the date on the face of the document, it was not dispatched to the Petitioner until 30<sup>th</sup> April 2021 at 3.54 pm as is clear from the email trail from the 1<sup>st</sup> Respondent of even date.
96. At page six (6) of the *ad-hoc* committee's report dated 4<sup>th</sup> May 2021, the committee members indicate that while applying for the adjournment of the hearing, the Petitioner's lawyers pointed out to the committee that the Petitioner had not been afforded sufficient time to prepare for his defense. That the Petitioner only learned of the invite to attend the session for 3<sup>rd</sup> May 2021 on 30<sup>th</sup> April 2021 at around 10.00pm. That the two days given to the Petitioner to prepare his defense (1<sup>st</sup> and 2<sup>nd</sup> May 2021) fell on a weekend rendering it logistically difficult to prepare for the session.



97. It is also noted that besides the lawyers' application on 3<sup>rd</sup> May 2021, the Petitioner had sent a letter through email to the 1<sup>st</sup> Respondent on 1<sup>st</sup> May 2021, a Saturday pleading for a fresh date on account of absence of adequate time to prepare his defense, inability to instruct his lawyers as they did not work on weekends and his ill health. This evidence is contained in the Petitioner's supplementary affidavit dated 15<sup>th</sup> June 2021.
98. That 1<sup>st</sup> and 2<sup>nd</sup> May 2021 fell on a weekend is not denied by the Respondents. I have also taken the liberty to look at the calendar and it fortifies the Petitioner's assertion.
99. I note that the email inviting the Petitioner to the session of 3<sup>rd</sup> May 2021 having been dispatched towards 4:00 p.m. on 30<sup>th</sup> April 2021 left the Petitioner with hardly an hour before the close of business on that day to work on his defense. And as the Petitioner was to appear before the committee at 10.00 am on the next available working day, he hardly would have had time to assemble an answer to the accusations against him.
100. As I pointed out earlier, although the notice inviting the Petitioner was apparently ready on 29<sup>th</sup> April 2021 (a Thursday) the 1<sup>st</sup> Respondent did not deliver it to the Petitioner until 30<sup>th</sup> April 2021 at 3.54 pm (late Friday afternoon). Noting that the mode of service of the notice was through email, one cannot resist but wonder what prevented the Respondents from dispatching the email to the Petitioner on the Thursday that it was signed. Whilst the Respondents may have been working within very tight timelines, doesn't this conduct betray absence of good faith on their part? By this action, were the Respondents and the *ad-hoc* committee really mindful of facilitating the Petitioner's right to fair hearing during the session? It is not reasonable to entertain the thought that they were not?
101. In his evidence and pleadings, the Petitioner alluded to the fact that he was ejected from his office and was not allowed access to the said office thereafter. At the point of his removal, the Petitioner stated that he was not even allowed a chance to pick his personal belongings and medicine. Given that the charges against him were related to his work, it is reasonable to expect that some of the material he would have desired to have in his defense would be at his work place. How was the Petitioner to access such material in the short time between the Friday evening that the invite was sent out and the Monday morning that he was to appear before the committee? When was he to exercise his constitutional right to seek legal representation if he so elected?
102. On the 3<sup>rd</sup> May 2021, the committee's report also shows that the other reason why the Petitioner asked that the matter be moved forward was that he was unwell and on bed rest. Whilst not denying the fact of his ailment, the committee declined to move the matter to another date. The explanation given for this action is that the committee had ten (10) days to investigate and report on the matter. That the Petitioner's request would have meant that the committee adjourns up to 7<sup>th</sup> May 2021. This is notwithstanding that the committee's report shows that the lawyers asked for adjournment up to 6<sup>th</sup> May 2021. They were ready for any date between 6<sup>th</sup> May 2021 and 11<sup>th</sup> May 2021.
103. The 2<sup>nd</sup> Respondent stated that the 1<sup>st</sup> Respondent conducts its business on Tuesdays and Wednesdays only. Therefore, to fit into the timelines set under SO 69(8) and the 1<sup>st</sup> Respondent's time table, the Petitioner's case had to be prosecuted on a date falling before 4<sup>th</sup> May 2021 so that the committee's report is ready and presented latest on 5<sup>th</sup> May 2021, a Wednesday.
104. I was not shown any law that forbids the 1<sup>st</sup> Respondent from convening sessions outside Tuesdays and Wednesdays to accommodate genuine situations such as sickness where it has to meet timelines like those appearing in SO No 69(8). On the contrary SO 28(1) & (3) permits holding of full house sessions outside of Tuesdays and Wednesdays.



105. Importantly, as can be discerned from the *ad-boc* committee's report, it was able to sit and conclude its business on 3<sup>rd</sup> May 2021. If it was able to do this on 3<sup>rd</sup> May 2021, what would have prevented it from hearing the matter and preparing its report on 6<sup>th</sup> May 2021 as it did on 3<sup>rd</sup> May 2021 in order to keep to the timelines under the SOs? I raise all these issues so as to demonstrate the fact that the conduct of the *ad-boc* committee cannot be described as anything but unreasonable in the circumstances. It certainly infringed on the Petitioner's right to fair administrative action.
106. Standing Order 75(1) protects the right of a person facing removal from office proceedings to be heard. This right can only be lost on compelling and cogent grounds. It cannot be whimsically wished away as happened in the Petitioner's case.

#### **h. Flawed hearing by Full House of 1<sup>st</sup> Respondent**

107. Standing Order 75(2) reads as follows: -

“The person being removed from the office shall be availed with the report of the select committee together with any other evidence adduced and such note or papers presented to the committee at least three days before the debate on the motion.”

108. By this regulation, the 1<sup>st</sup> Respondent was under duty to provide the Petitioner with the report of the *ad-boc* committee at least three (3) days before it convened its full session to debate the report. From the evidence on record, the *ad-boc* committee sat and concluded its investigations on 3<sup>rd</sup> May 2021. That same day at about 3:57 pm, the acting Speaker of the 1<sup>st</sup> Respondent sent out an invitation to the Petitioner to attend the full session of the 1<sup>st</sup> Respondent the following day to offer his response before the report of the *ad-boc* committee could be debated. According to the notice, this was to happen on 4<sup>th</sup> May 2021 at 9.30 am.
109. The invitation by the 1<sup>st</sup> Respondent to the Petitioner to attend a full house session the following day was clearly in contravention of its own SOs requiring that the *ad-boc* committee's report be shared with the Petitioner at least three (3) days before convening the full house session. What is more, the email of 3<sup>rd</sup> May 2021 sending the Petitioner the notice to appear before the full house on 4<sup>th</sup> May 2021 did not attach a copy of the *ad-boc* committee's report.
110. Again, it is noted that the email aforesaid was dispatched to the Petitioner late on 3<sup>rd</sup> May 2021 (3.57 pm) and required him to be ready with his rebuttal to a report he had not seen by 9.30 am the following day. Obviously, this left the Petitioner in a very awkward position. It neither gave him the time to defend himself nor the material to prepare the defense. What was the Petitioner to respond to before the full house on 4<sup>th</sup> May 2021 if the 1<sup>st</sup> Respondent had not shared the *ad-boc* committee report with him at the time of the invite or at all? From the record, this report was only shared with the Petitioner on 5<sup>th</sup> May 2021 after he had been allegedly impeached.
111. Further I take note of the fact that it is these same Respondents who had just some hours earlier on 3<sup>rd</sup> May 2021 (through the *ad-boc* committee) been notified of the ill health of the Petitioner and the fact that he was on bed rest for at least seven (7) days from 29<sup>th</sup> April 2021. Regardless of this information, the 1<sup>st</sup> Respondent was nevertheless ready to hold its full house session the following day at 9.30 am to prosecute the Petitioner's removal from office. To the Respondents, it did not matter that the person they were dealing with was down out of ill health. It is therefore not accurate for the defense counsel to submit as she did that the Petitioner elected not to attend the session of 3<sup>rd</sup> May 2021 without valid reasons.



112. The evidence on record shows that the 1<sup>st</sup> Respondent issued the Petitioner with an invite to answer to the report by the *ad-hoc* committee even before the *ad-hoc* committee presented the report to the 1<sup>st</sup> Respondent. The report filed in evidence shows that it was signed off by the *ad-hoc* committee on 4<sup>th</sup> May 2021. It was then handed over to the 1<sup>st</sup> Respondent's acting Speaker for his approval on the same, 4<sup>th</sup> May 2014. The record shows the acting Speaker approved the report on the morning of 4<sup>th</sup> May 2021 just in time for the debate by the House on it at 10.30 O'clock. Yet on 3<sup>rd</sup> May 2021, the 1<sup>st</sup> Respondent had already issued an invite to the Petitioner to attend the full house on 4<sup>th</sup> May 2021 to respond to the report.
113. Many questions arise from the foregoing scenario. Did the 1<sup>st</sup> Respondent get the report from the *ad-hoc* committee before it was even ready? How can the Respondents explain the fact of inviting the Petitioner on 3<sup>rd</sup> May 2021 to respond to a report which was signed off by the *ad-hoc* committee on 4<sup>th</sup> May 2021?
114. From the foregoing, it is clear to me that the conduct of the 1<sup>st</sup> Respondent and its officers in processing the case against the Petitioner was less than candid. It is otherwise difficult to find a reasonable explanation why the 1<sup>st</sup> Respondent was, so to speak, putting the cart before the horse with regard to handling of the *ad-hoc* committee's report as can be discerned from the events of the afternoon of 3<sup>rd</sup> May 2021 and the morning of 4<sup>th</sup> May 2021.

#### **i. Hurried Disposition of Petitioner's Case**

115. The record is replete with effort by the Respondents to fast track the Petitioner's case. While it is true that SO 69 set timelines for concluding the investigations against the Petitioner, I find it difficult to justify the Respondents' conduct solely on the basis of an honest desire to meet the timelines set by this regulation.
116. For instance, why did the 2<sup>nd</sup> Respondent elect to forward the notice of intention to impeach the Petitioner to the 1<sup>st</sup> Respondent on the same day that he received it in total disregard of the regulations requiring that the filing of the notice be first brought to the attention of the Petitioner? Why did the 2<sup>nd</sup> Respondent consider that it was unnecessary to get the Petitioner's comments on the notice before forwarding it to the 1<sup>st</sup> Respondent when the law appears to obligate him to permit such a response? Why did the *ad-hoc* committee invite the Petitioner to appear before it on a Monday morning through a notice served on him on a late Friday afternoon leaving the Petitioner with only a weekend to determine what to do with his defense when the invitation notice had been ready much earlier? Why did the *ad-hoc* committee decline to hear the Petitioner even on 6<sup>th</sup> May 2021 within its timelines and prepare its report on the same day even when there is evidence that it was able to achieve this feat on 3<sup>rd</sup> May 2021? Why did the 1<sup>st</sup> Respondent invite the Petitioner to appear before it even before it received the report of its *ad-hoc* committee or shared such report with the Petitioner?
117. Earlier on in this judgment I documented the fact that the Respondents were aware of the existence of this case earlier than 4<sup>th</sup> May 2021. This is because the learned Judge then handling the case had on 28<sup>th</sup> April 2021 directed that they be served in two (2) days. And there is an affidavit of service showing that they were served on 30<sup>th</sup> April 2021 and duly instructed counsel who came on record on 4<sup>th</sup> May 2021.
118. On 4<sup>th</sup> May 2021, counsel for the parties recorded a consent whose effect was to prevent further prosecution of the business of the 1<sup>st</sup> Respondent in relation to the Petitioner's impeachment unless the 1<sup>st</sup> Respondent was satisfied that it was within the law. As is the law, an advocate is presumed to act on the instructions of the instructing client. Therefore, the consent recorded by counsel on the



- morning of 4<sup>th</sup> May 2021 was ostensibly on the instructions of their clients who are the parties to this action.
119. As things would turn out, on the morning of 4<sup>th</sup> May 2021, the 1<sup>st</sup> Respondent went ahead to approve the recommendations of its committee to impeach the Petitioner. This was even as the Respondents' Advocates were before the ELRC recording a stay order ostensibly on the instructions of the same parties. This is why in the earlier part of this judgment I indicated that the events at the 1<sup>st</sup> Respondent's chambers on 4<sup>th</sup> May 2021 may have happened without the knowledge of the Petitioner. If it is to be presumed that the lawyers were recording the consent on 4<sup>th</sup> May 2021 to stall the impeachment pursuant to their clients' instructions, it was reasonable for the Petitioner not to have expected that the 1<sup>st</sup> Respondent would at the same time be pressing to conclude the impeachment as the parties had presumably agreed to have their lawyers record a consent on those terms in court the same morning. Unless the Respondents are saying that their lawyers did not have their instructions to record the stay order of 4<sup>th</sup> May 2021, they cannot feign ignorance of the consent at the time they were prosecuting the impeachment motion.
  120. From their pleadings and through their written submissions, the Respondents surprisingly take a different turn on the issue relating to their knowledge of the order when they argue that they were unaware of it at the time they effected the impeachment as they were yet to be served with it. Question is: why would a party not respect an ostensible agreement between them purportedly because their agent had not notified them that he had delivered it to the court?
  121. It is instructive to note that the reason the Respondents plead non-compliance with the orders of 4<sup>th</sup> May 2021 is not that they truly believed that they were acting within the law when processing the impeachment of the Petitioner. Rather, that they had not been served with the orders. Yet, the orders having issued pursuant to an agreement between their lawyers, the parties are presumed not only to have had knowledge of them before hand but also to have sanctioned their issuance.
  122. The totality of the foregoing leads to the irresistible conclusion that the Respondents' move to impeach the Petitioner was motivated by suspect intentions. Whilst I may not make any comments on whether the Respondents' conduct amounted to contempt of court there being no application for such orders before me, it is perhaps necessary to comment that the judicial process ought to be treated with some measure of respect for the good of the public.

#### **j. Decisions by the Respondents**

123. The Respondents have sought to rely on a number of decisions in support of their case. I wish to comment on these decisions.
124. In the case of *Nick Githinji Ndichu v Clerk, Kiambu County Assembly & 3 others* [2018] eKLR, the Petitioner, County Speaker of Kiambu against whom the impeachment motion was filed was accused of abuse of office on the grounds of *inter alia* using public resources for private purpose. He was also accused of awarding contracts for legal services in violation of public procurement laws.
125. In *Nick Githinji case* and unlike in the case before me, there was evidence of a notice of intention to move a motion to impeach the Petitioner having issued. There was evidence that this was followed by a motion for his removal. There was also evidence that the notice of motion gave details of the accusations against the Speaker.
126. Further, the Petitioner who was targeted for removal is shown as having approved the proceedings for his own removal as regularly processed before the full house sat to impeach him. The Petitioner is then



- shown as having attended the full house session where the motion for his removal was debated and passed. He was offered the chance to defend himself and did participate in the proceedings fully.
127. Clearly, the *Nick Githinji case* is distinguishable from the current case. In that case, there is evidence of strict compliance with the procedure for removal of Speaker set out under the now repealed Section 11 of the *CGA*. The same thing cannot be said of the proceedings against the Petitioner in the current case under the current Section 11 of the *CGA*.
128. Importantly the *Nick Githinji case* underscored the need to strictly comply with the provisions the law when processing the removal of a County Speaker. The court stated as follows: -
- “Impeachment or removal from office is a drastic step with serious ramifications on the career of an individual. It can easily consign an individual to professional oblivion. That is why Lord Denning cautioned in *Selvarajan v Race Relations Board* that “the fundamental rule is that, if a person may be subjected to pains and disabilities, or be exposed to prosecution or proceedings or to be deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case against him and be afforded a fair opportunity of answering it.
- It follows that in impeachment proceedings, due process must be followed to the letter. The impeachment procedural provisions set out in any statute, in this case the *County Governments Act*, must be strictly complied with.”
129. In *George Onyango Oloo v Kisumu County Assembly Service Board & another; Elisha Jack Oraro & 2 others (Interested Parties)* [2019] eKLR, the court was of the view that the Petitioner had received notice of the impeachment which set out details of the grounds for impeachment. The details are in fact set out in the court’s decision. Further, the court observed that the Petitioner who had been served a day earlier was spotted at the County Assembly on the day of the motion when he held a press conference and promised to attend the afternoon session to defend himself. However, he failed to turn up for the session without reason and contrary to what he had indicated during the press conference that morning.
130. Whilst I am not bound by the decision in the *George Onyango case* and I have my reservations whether the learned Judge was right in holding that the Petitioner was afforded sufficient time to defend himself in view of the time he was served with the Notice of Motion and the time it was heard, I note that in that case, the Petitioner did not give any reason for failing to turn up for the hearing at the Assembly. I also note that the court did not scrupulously scrutinize whether the impeachment process met all the requirements set out under the law.
131. *Butiya Nickson Wilson Isiji v Speaker, County Assembly of Vibiga & 2 others* [2021] eKLR involved removal of the Deputy Speaker, County Government of Vihiga. I note that the learned Judge found as a fact that the Deputy Speaker attended the plenary of the County Assembly during the prosecution of the removal motion but declined to participate. Hence, in the learned Judge’s view, the Deputy Speaker squandered the opportunity to participate in the cause and could not thereafter be heard to complain that he had been denied the right to be heard. Outside this and besides the finding that the same requirements for removal of County officers under SO 70 apply to the positions of Governor, Deputy Governor, Speaker, Deputy Speaker and County Executive Committee member, I do not see the court as having scrupulously interrogated the provisions for removal of these officers and whether they were complied with in the dispute. I am however not bound by the reasoning of my learned brother in the matter.



132. In the case of *Ameja Zelemoi v County Assembly of Baringo Speaker of the County Assembly of Baringo & another* [2020] eKLR, the court considered whether the Petitioner, who had been removed from the position of Deputy Governor, was entitled to an order for reinstatement. The court noted that the position lost by the Petitioner was not a substantive office as he continued serving as Member of County Assembly. Noting that there was no property in a public office, the court declined to order reinstatement or compensation for allowances lost by the Petitioner from the date he was removed from office.
133. While I agree with the court's view in the Ameja Zelemoi case, it is important to note that it is distinguishable from the case before me. In the former, the Petitioner had been removed from office and replaced by another elected Deputy Governor. The office was therefore no longer available. In the case before me, Justice Ongaya issued interim conservatory orders preventing the gazetting of the impugned impeachment and preserving the vacancy that had arisen from the process. This means that neither was the impeachment finalized nor did the office of Speaker get a fresh substantive holder. Put differently, the Petitioner did not lose the position of Speaker in law even though he may not have been in the office as a matter of fact.
134. Importantly, most of the cases referred to by the Respondents were decided before the amendments to the *County Governments Act* through the County Governments (Amendment) Act No 11 of 2020. These changes came into force on 27<sup>th</sup> July 2020. And as the Petitioner's purported impeachment happened after 21<sup>st</sup> April 2021, the new law applied to his case. Necessarily, the cases falling before the date of the July 2020 amendments to the *CGA* do not express the current legal position on the matter.

#### **k. Conflict between Standing Orders, Statute and Constitution**

135. Section 14 (1) of the *CGA* empowers County Assemblies to make their own SOs to assist them manage their proceedings in an orderly manner. However, such SOs must be consistent with Acts of Parliament and the *Constitution*. It is pursuant to this mandate that the 1<sup>st</sup> Respondent promulgated its SOs on 5<sup>th</sup> November 2014.
136. I have looked at SO 69 that provides the procedure for the removal of a sitting Speaker. In my humble view, it has some glaring inconsistencies with provisions of the *CGA* as currently amended, the *Fair Administrative Action Act* and the *Constitution*.
137. For instance, whilst section 11(5) of the *CGA* now requires the County Clerk to share the notice of intention to move a motion to remove the Speaker with the Speaker intended to be removed and invite him to give his response to the accusations against him, SO 69 seems to sidestep this requirement. Similarly whilst Section 11(4) of the *CGA* now requires the Notice of Motion for removal of the Speaker to set out the grounds for the proposed removal and the facts in support of such grounds, SO 69 appears not to have been amended to include this as a requirement.
138. Whilst section 4 of the *Fair Administrative Action Act* prescribes a duty for those exercising power to ensure procedural fairness (which includes informing an individual of accusations against him before hand), SO 69 by purporting to sidestep the duty to share the notice of intention for removal with the Speaker intended to be removed prior to placing the said notice before the House for purposes of constitution of the *ad-hoc* committee appears to go against the grain and spirit of the aforesaid Act. The same thing can be said of SO 69 as read against article 236 of the *Constitution*. To the extent that the SO does not expressly obligate the Clerk to disclose to the person against whom the removal is sought the accusations leveled against him before hand, it is inconsistent with the dictates of due process prescribed by article 236 of the *Constitution*.



139. Under section 31(b) of the *IGPA*, subsidiary legislation must not be inconsistent with provisions of an Act of Parliament. Where there is inconsistency between the two, such inconsistency will be resolved in favour of the statute and where applicable, the *Constitution*.
140. Section 24 (2) of the *Statutory Instruments Act* gives even more drastic directions with regard to provisions in statutory instruments that are inconsistent with the parent Acts or indeed any other Act of Parliament. Such provisions are deemed null and void to the extent of such inconsistency.
141. SO 69 of the 1<sup>st</sup> Respondent ought to be considered through the aforesaid lens. The challenges with the 1<sup>st</sup> Respondent's S.Os arise from the fact that they have not been amended to comply with the recent changes in the law. In my view, it may be helpful if the 1<sup>st</sup> Respondent had a second look at them.
- l. Whether the impugned impeachment process measures to requirements of due process under the *Constitution* and the *Fair Administrative Action Act*
142. From the above analysis, it is my holding that the Respondents' attempt to remove the Petitioner in effect violated the Petitioner's rights. The actions were done, substantially outside the parameters of the law and Constitution.
143. And there was a measure of bad faith in the manner the whole process was executed. It appears to me that the Respondents were determined to remove the Petitioner from office at all costs. In my view, this process would have been handled in a more humane way while upholding respect for due process. But this was not the case.

#### **Determination**

144. The Respondents have addressed me at length regarding the variance in the orders sought by the Petitioner in his pleadings and submissions. It is contended that to issue the orders requested for in the submissions would violate the rule against parties pursuing cases outside their pleadings.
145. In a sense, I partially agree with the Respondents' counsel's position that a court cannot issue orders that are obviously at variance with those sought by a party in his pleadings. However, I think that a court may grant orders that may not have been expressly pleaded where such orders are consequential to some other relief that is expressly sought and which has been granted and if the orders are necessary for the effectual implementation of the reliefs so granted. (see *Timsales Ltd v Samuel K. Kibara* (2016) eKLR, *Cheruiyot v Bartiony* (1988) eKLR and *Bell & another v LL. Matterello Ltd* (Civil Appeal No 72 of 2019) (2022) KECA.
146. I also note that section 12 of the *Employment and Labour Relations Court Act* empowers the court to grant any other appropriate relief as it may deem fit. I understand this as permitting the court to grant reliefs that though not expressly prayed for are nevertheless intricately connected to the subject under dispute and if such orders are necessary for the effective resolution of the dispute. It is in this context that I will consider the reliefs to grant. In any event, I note from the Amended Petition that one of the prayers by the Petitioner is for the court to issue him with any further and or other orders that may be just and appropriate in the circumstances.
147. Secondly, the Petitioner has suggested that the orders of certiorari cannot issue in the current proceedings not being Judicial Review proceedings. I do not agree with this proposition. Under article 22 of the *Constitution*, all proceedings brought in enforcement of a right are amenable to Judicial Review orders. This is notwithstanding that they are filed as constitutional Petitions or Judicial Review motions.



148. Further, the Respondents urge the court not to issue orders for reinstatement of the Petitioner as the term of the 1<sup>st</sup> Respondent has come to a close. That such order will be in vain in view of the impending general elections of 9<sup>th</sup> August 2022.
149. I will only observe in this respect that the effect of the order issued by Ongaya J on 12<sup>th</sup> May 2021 is that the Petitioner's impeachment was stalled midstream. It was not finalized through publication of a Gazette Notice. As a result, the Petitioner never lost his position. This being the position, he does not require an order of reinstatement into an office that he never lost in law.
150. Besides, under section 11 (1) (a) of the *CGA*, a seating Speaker remains in office until the new County Assembly first meets after an election. Therefore, the Petitioner remains in office until after the elections of 9<sup>th</sup> August 2022 and the first meeting of members of the 1<sup>st</sup> Respondent.
151. I therefore grant the Petitioner's prayers in the amended Petition as prayed but more specifically as follows: -
- a. I declare the process initiated on 21<sup>st</sup> April 2021 by the Respondents leading to the formation of the *ad-hoc* committee to investigate the Petitioner and the subsequent report generated by the *ad-hoc* committee (dated 4<sup>th</sup> May 2021) and as well the decision and or resolution by the 1<sup>st</sup> Respondent on 4<sup>th</sup> May 2021 adopting the motion to impeach the Petitioner as null and void.
  - b. I issue an order of certiorari to bring before this court and quash the report of the *ad-hoc* committee dated 4<sup>th</sup> May 2021 and the decision and or resolution of the 1<sup>st</sup> Respondent of even date purporting to pass the motion to adopt the report to impeach the Petitioner.
  - c. The consequence of the first two orders (and in line with the interim orders issued on 12<sup>th</sup> May 2021) is that the Petitioner is deemed not to have lost his office and benefits attendant thereto as a result of the impugned impeachment. And to avoid the need for further applications in the matter, the 1<sup>st</sup> Respondent shall through the 2<sup>nd</sup> Respondent pay the Petitioner his salary.
  - d. I issue an order of injunction barring the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents either by themselves or through their agents and or employees and or other servants from implementing the impugned decision of the *ad-hoc* committee dated 4<sup>th</sup> May 2021 and the impugned resolution of the 1<sup>st</sup> Respondent dated 4<sup>th</sup> May 2021 purporting to impeach the Petitioner.
  - e. I declare that the Respondents' actions aforesaid against the Petitioner violated the Petitioner's rights to equal protection of the law, due process, fair administrative action and human dignity.
  - f. I award the Petitioner general damages of Two Million Five Hundred Thousand Kenya Shillings (Kshs 2,500,000/=) being compensation for violation of his rights aforesaid.
  - g. I award the Petitioner costs of this case.

**DATED, SIGNED AND DELIVERED ON THE 29<sup>TH</sup> DAY OF JULY, 2022**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

Binyenya for the Petitioner

Mulwa for the Respondents

Order



In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

