



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

PETITION NO. E004 OF 2021

**IN THE MATTER OF ALLEGED INFRINGEMENT OF THE PROVISIONS OF
ARTICLE 191), 1(3), 2(1), 2(4), 3(1), 10, 23(3), 25(c), 35, 47(1), 50(1) & (2) (B), 165(6),
236, 258(1) & (2) AND 259 (1) OF THE CONSTITUTION OF KENYA 2010.**

AND

IN THE MATTER OF SECTIONS 40(2) & (3) OF THE COUNTY GOVERNMENT ACT.

BARNABAS K. NGENO.....PETITIONER

-VERSUS-

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

SPEAKER, COUNTY ASSEMBLY OF KERICHO.....2ND RESPONDENT

RULING

1. This Ruling is in respect of Two Applications; Notice of Motion dated 26th January, 2021 filed by the Petitioner and the Notice of Motion dated 1st February, 2021 filed by the Respondents herein.

2. The Petitioners filed their application dated 26th January, 2021 through the firm of Manyonge Wanyama & associates LLP relying on Section 1A, 1B, 3A, 63(e) and 80 of the civil procedure Act, Order 40 Rule 7 and Order, 45 Rule 1 of the Civil Procedure Rules and sought the following orders That;

Ex-parte

1) The Honourable Court be pleased to certify this Application urgent.

2) Pending the hearing of this Application inter partes, a Conservatory Order be issued suspending the impeachment proceedings against the Petitioner commenced by the County Assembly of Kericho vide a Gazette Notice No 495 of 2021 and communicated to the Petitioner vide a letter dated 26th January 2021.

3) Pending the hearing of this Application inter partes, a Temporary Injunction be issued to stop the Respondents from initiating, continuing and concluding any impeachment proceedings against the Petitioner solely based on the decision of the County Government of Kericho to reconstitute the Municipal Boards made pursuant to the provisions of Urban Areas and Cities (Amendment) Act No. 3 of 2019 and reinforced through the Interpretation of the Court in Kericho ELRC Petition No 6 of 2019: Magerer Langat & Another versus Governor, Kericho County Government & 2 others.

Inter- parte

4) Pending the hearing of this Petition, a Conservatory Order be issued suspending the Impeachment proceedings against the Petitioner commenced by the County Assembly of Kericho vide a Gazette Notice No 495 of 2021 and communicated to the

Petitioner vide a letter dated 26th January 2021.

5) Pending the hearing of this Petition, a Temporary Injunction be issued to stop the Respondents from initiating, continuing and concluding any impeachment proceedings against the Petitioner solely based on the decision of the County Government of Kericho to reconstitute the Municipal Boards made pursuant to the provisions of Urban Areas and Cities (Amendment) Act No. 3 of 2019 and reinforced through the interpretation of the Court in Kericho ELRC Petition No 6 of 2019: Magerer Langat & Another versus Governor, Kericho County Government & 2 Others.

6) Pending the hearing of the Petition, the Honourable Court issues an Order suspending impeachment proceedings made by the County Assembly of Kericho and based on matters relating to the decision of the County Government of Kericho to reconstitute the Municipal Boards made pursuant to the provisions of Urban Areas and Cities (Amendment) Act No. 3 of 2019 and reinforced through the interpretation of the Court in Kericho ELRC Petition No 6 of 2019: Magerer Langat & Another versus Governor, Kericho County Government & 2 Others.

3. The Application is supported by the grounds set out therein and in the Supporting Affidavit of **Barnabas K. Ngeno**, the Petitioners herein.
4. The petitioner states that in 2018, the County Government of Kericho established two municipal boards in accordance with the Urban Areas and Cities Act, 2011 (UACA), being Kericho and Litein municipal Boards. Subsequently, in 2019, Parliament amended the Urban Areas and Cities Act, 2011 thus changing the qualifications of Board members and the composition of board membership as was provided for under section 14 of the old Act.
5. It is stated that the amendments were followed through with an advisory from the Attorney General detailing the consequences of the new law on the existing Urban Boards. According to the advisory, all existing Boards at that time had to be reconstituted in compliance with the provisions of section 14 of Urban Areas and Cities (Amendment) Act No. 3 of 2019 as they had been rendered illegal by operation of the law.
6. It is stated that the County Government of Kericho, upon receiving the Attorney General's advisory immediately embarked on the reconstitution exercise for both Kericho and Litein Municipal Boards. This was considered urgent given the serious risks of allowing an illegal statutory body to operate.
7. As soon as the process began, two members of Kericho Municipal Board filed a case in court, Kericho ELRC **Petition no. 6 of 2019: Magerer Langat & Another versus Governor, Kericho County Government & 2 others** which became the basis of the first attempt of the Petitioner's impeachment by the County Assembly of Kericho, with a wrong understanding that the County Executive of Kericho County Government had committed an illegality.
8. The Petitioner states that, Judgement in **Kericho ELRC Petition no. 6 of 2019: Magerer Langat & Another versus Governor, Kericho County Government & 2 others** was delivered in favor of the County Executive of Kericho County Government, and the process of reconstituting the Boards continued which was completed in November 2020. Thereafter a list of Board Members was approved by the County Executive Committee on 6th January 2021 and reports were forwarded to the County Assembly of Kericho through a letter dated 11th January, 2021.
9. It is indicated that the two new Boards were launched afresh on 19th January, 2021 and the following activities took place;
 - a) The Chief Officer responsible for urban areas took an oath of office as the substantive Board member for both Kericho and Litein municipalities, as provided for in Urban Areas and cities (Amendment) Act no. 3 of 2019. The Chief officer did not require the vetting and approval of the county assembly since he had already been vetted during his appointment as the Chief officer and his membership to the Board is by virtue of the office he holds.
 - b) Two senior public officers from the department for urban areas took an oath of secrecy and signed the code of ethics. The two were nominated by the CEC member responsible for Urban Areas and approved by the County Executive. The two are to represent the CEC Member in each Municipal Board. They are not substantive Members of the Board but are representatives of the CEC Member. Their Membership in the Board is to represent a substantive Board Member, the CEC, whose membership in the board is by virtue of the office he holds.
 - c) All members who had been retained from the old Boards did not need to take a fresh oath of office as they had already been sworn in.
 - d) All new nominees, whose names required vetting and approval of the County Assembly of Kericho, did not participate in the ceremony of 19th January, 2021 as they await to be submitted to due process.
10. That on 20th January 2021, the Petitioner noticed the Kenya Gazette Notice No 495 of 2021, with an item concerning his impeachment. In the Gazette Notice the County assembly of Kericho listed the removal of the Petitioner by way of impeachment by the formation of a Select Committee to discuss his conduct. Upon inquiry of the issue, the Petitioner noticed that the County Assembly of Kericho had acted irregularly by approving a motion to impeach him presumably on the following grounds:

(a) The Chief Officer required the vetting and approval of the County Assembly of Kericho before being sworn into office

as a Board Member of the two Municipal Boards.

(b) The public officers, nominated by the CEC member and approved by the County Executive to represent the CEC member in the Board, required the vetting and approval of the County Assembly before taking up their roles in the Boards.

(c) The process is in violation of the Urban Areas and Cities Act, 2011 and the Constitution.

11. On 20th January 2021, the Speaker of the County Assembly of Kericho published in the Kenya Gazette Notice No. 495 a special sitting of the County Assembly scheduled on 22nd January, 2021 to discuss four agenda items. Agenda four was the motion for the formation of Select Committee to discuss the conduct of the Committee Member in charge of Lands, Housing and Physical Planning, a docket the Petitioner herein is responsible for.

12. Pursuant to the Kenya Gazette Notice No. 495, the County Assembly of Kericho approved the motion to form a Select Committee to investigate the conduct of the Petitioner on 22nd January 2021.

13. The Petitioner, avers that, the approved Motion is open ended and does not outline the grounds for impeachment, the specific matters to be investigated and the specific violations of the Constitution and statutory law committed by the Petitioner. He stated that the Select Committee is required by law to table a report before the whole house only within 10 days. Time is of essence and the Petitioner is appreciably apprehensive that the actions of the County Assembly of Kericho violates the principles of natural justice and are unfair within the meaning of Article 35, 47 and 50 (1) of the Constitution.

14. By a letter of 26th January, 2021, the County Assembly of Kericho invited the Petitioner to appear before the Select Committee on Friday, 29th January, 2021; The letter however, did not disclose the grounds upon which the Committee is investigating the Petitioner to enable him to sufficiently prepare.

15. The Petitioner states that the procedure for impeachment is governed by the provisions of Section 40 (2) of the County Government Act, 2012 and the Constitution. Further, that the process is quasi-judicial and the Petitioner is entitled to receive allegations against him with particularity so that he can adequately respond.

16. It is stated that the ongoing proceedings against the Petitioner are in severe breach of section 40 of the County Government Act, 2012 and the primordial rights of the Petitioner to know the allegations against him.

17. He therefore, urged this Honourable Court to determine the legality of the impeachment proceedings conducted and whether the proceedings are a nullity on account of violation of Article 25 (c), 35, 47 and 50 (1) & (2) (b) of the Constitution and in doing so grant the interim orders sought.

18. The Respondents filed their Replying Affidavit sworn by **Dominic Rono**, the 2nd Respondent herein, on 5th February, 2021 through the firm of SMS Advocates LLP.

19. The Respondents stated that the petitioner erroneously interpreted the judgement in **Kericho ELRC Petition no. 6 of 2019: Magerer Langat & Another versus Governor, Kericho County Government & 2 others**, in a skewed manner aimed at misleading this Honourable Court to issue him with orders. Further that, that suit was not a basis for summoning the petitioner before the select committee.

20. It is averred that the process used by the petitioner herein in reconstituting the municipal Boards did not comply with the lawful process as the petition did not subject the appointed member to vetting and approval by the assembly and also appointing his relative in total contravention of the law.

21. It is alleged that the previous boards and its membership was terminated by operation of law, when the Act was amended therefore the petitioner ought to have commenced the process of appointing and or recruiting new members afresh.

22. That on 12th January, 2020, the petitioner wrote an internal memo to all the then board members of litein municipal board thanking them for services rendered and requesting them to hand over all government documents and property in their possession and assured them that he would engage them in future if an opportunity arises.

23. According to the Respondents, the import and tenor of the said internal memo was that all board member of Kericho and litein municipal board were terminated and offices rendered vacant so that any such other recruitment was going to be completely new and ought to undergo fresh approvals and vetting by the county assembly.

24. They contend that section 14(1) of the Urban Areas and Cities Amendment Act, 2019 provides that a board of a municipality shall consist of Nine (9) members appointed by the county governor with approval of county assembly. Therefore, they averred that the action of the petitioner in appointing, reconstituting and swearing in board members to the two municipal boards was and is still illegal as it violates the law.

25. Accordingly, the respondent states that the argument by the petitioner that some members, such as the representatives of the county executive committee member, were exempted from vetting and approval by the county assembly is based on misapprehension of the law.

26. The respondents urged this court to interpret section 14 of the Urban Areas and Cities Amendment Act in its intended context to give

rational implication of what its enactment had and wanted to cure. Further that from the reading of the entire section, no member of the Board is exempted from vetting and approval by the court assembly, regardless of the appointing authority. section 14 according to the respondents reflects the wishes of the public which they urged this court to effect such wishes.

27. It was further stated that, the vetting and approval are constitutional requirements by all public officers before assuming office as envisaged under Article 10 of the constitution of Kenya. In addition, the county assembly acts as an oversight body for the County executive as espoused under Article 185(3) of the Constitution.

28. The respondent states that their decision to investigate the petitioner was informed by the petitioner's unilateral decision of appointing, reconstituting and swearing in board members without vetting and approval by the county assembly and following a flawed process which was against the law.

29. Pursuant to section 40(1) of the county government Act and Order 58 of the county assembly of Kericho, upon establishing that the applicant had violated the law, the assembly in compliance with the law convened and a motion to investigate the petitioner was approved by at least one third on 22nd January, 2021. Subsequently, a select committee was formed to undertake the investigations. They annexed a copy of the motion marked as annexure DR-2.

30. It was averred that in order to implement the decision of the assembly and give an opportunity to the applicant / the petitioner herein to be heard, the clerk of the county assembly invited the applicant herein by a letter of 26th January, 2021, for hearing before the select committee on 2nd February, 2021. They annexed the invitation letter marked as annexure DR-3.

31. That on 27th January, 2021, the applicant requested to be furnished with documents, the select committee intended to rely on during hearing to enable him prepare for the said hearing which the clerk of the county assembly responded and sent him; a letter dated 27th January, 2021, order of business of special sitting of 22nd January, 2021, the motion tabled approved by the house and minutes of the select committee formed. They annexed the letter of 27/1/2021 and bundle of documents as annexure DR-4 and DR-5 respectively.

32. The respondents state that the applicant herein moved this Honourable Court on 26th January, 2021 and obtained an order suspending the impeachment process which orders were served upon the county assembly on 29th January, 2021. Nevertheless, it is stated that the petitioner appeared before the select committee on 2nd February, 2021 as earlier scheduled but states that pursuant to the court Order, the select committee have not yet prosecuted the charges levelled against the applicant. They attached a copy of the Hansard marked as annexure DR-6.

33. The respondents contend that they gave the applicant sufficient time and documents to enable him prepare for hearing. Further that the motion was particularized and not open ended as alleged. They thus urged this court to vacate the orders on 29th January, 2021 to enable the select committee complete its investigation and hearing.

34. They further indicated that there are no provisions of the constitution that have been violated by the respondents in carrying out the said investigations as empowered under Article 185(3) of the Constitution.

35. **On 1st February, 2021**, the Respondents filed an application Notice of Motion under certificate of Urgency through the firm of SMS Advocates LLP seeking the following Orders;

- a) **THAT this application be certified urgent heard ex parte and service thereof be dispensed with in the first instance.**
- b) **THAT this Honourable Court be and is hereby pleased to vacate, review and/or set aside the conservatory orders Issued on 29th January, 2021 forthwith.**
- c) **THAT this Honourable Court be and is hereby pleased to Issue an order directing the petitioner to appear and defend himself before the county assembly select committee on the allegations of gross violation of the law as approved by the assembly in the motion of 22nd January, 2021 upon being given appropriate notice and better particulars of the allegations.**
- d) **THAT this Honourable Court be and is hereby pleased to strike out the notice of motion application and petition both dated 26th January, 2021 for being premature and lacking in merit.**
- e) **Any further orders as this Court may deem fit and just to grant.**

36. Application is supported by the grounds enumerated therein and the supporting affidavit of **Honourable Dominic K. Rono**, the speaker of the county assembly of Kericho, sworn on 31st January, 2021 on his behalf and on authority for the 1st respondent.

37. It is stated that the procedure for impeaching a county executive committee member is provided elaborately under Section 40(1) of the County Government Act, 2012; which removal can be on any of the following grounds (a) incompetence; (b) abuse of office; (c) gross misconduct; (d) failure, without reasonable excuse, or written authority of the governor, to attend three consecutive meetings of the county executive committee; (e) physical or mental incapacity rendering the executive committee member incapable of performing the duties of that office; or (f) gross violation of the Constitution or any other law.

38. They deponent stated that, once a motion to remove executive committee member is supported by at least one third of the members of the county assembly, a select committee is formed to investigate the said allegation and report its' findings to the house within ten (10) days.

39. It is stated that in the present case, the county assembly voted in a motion tabled before the floor of the house on 22nd January, 2021 by **Hon. Collins Byegon** to establish a select committee to investigate the executive committee member in charge of Lands, Housing and Physical Planning Department for gross violation of the law in that;

- a) The executive committee member appointed, approved and swore into office new members to the Municipal Board without vetting by the County Assembly on 19th November, 2020.
- b) The executive committee member appointed and swore into office new members to the Municipal Board before the lapse of term of members serving in the previous Board.
- c) The executive committee member appointed his maternal cousin as the town manager,
- d) The executive committee member acted in gross violation of the law.

40. That On 26 January, 2021, the 1st Respondent through the Clerk invited the petitioner herein to appear before the Select Committee on 2nd February, 2021, to discuss his conduct on the allegations of gross violations of the law stated above. That, the said notice had attached the motion with allegation against him which in essence provided appropriate safeguards to ensure that the executive committee member's rights and fundamental freedoms are protected by giving him the details of the allegations to prepare and advance his defense.

41. Conversely, it is stated that, instead of preparing to appear before the Select Committee of the House as required, the Applicant herein moved this court prematurely and by misrepresentation of the processes of the assembly to injunct it on allegation of not receiving the particulars of the said investigation

42. Accordingly, the Respondents allege that the applicant herein concealed, out of the need to misrepresent to the court the correct position of the law by hiding material facts thus misleading the Honourable court to issue the conservatory orders in the circumstances.

43. Further that, the actions of the assembly and its processes are Constitutional mandated, and the processes can only be interfered with in exceptional circumstances. In addition, the respondents argued that the applicant's application is futuristic as it is based on the speculation that he will not get a fair hearing. It is only after the appearance before the Select Committee and its investigation concluded that the executive committee member can allege for the court to determine the issue as to whether he was accorded a fair hearing or not.

44. It is alleged that the applicant misinterpreted the law by his assertion that he will not have a fair hearing before the Select Committee of the Assembly. This assertion is without merit. His rights will be protected since he will be entitled to appear with representation of his choice.

45. The Respondents aver that the county Assembly cannot be stopped from executing its legislative and oversight role as mandated by Article 185 of the Constitution especially where the procedures have been duly complied with, as in this case. Further that the orders issued by this Court on 29th January, 2021 violates the Constitution and affect the operations of the Assembly which should be left to execute its lawfully mandate. They therefore urged this court to vacate the conservatory orders to allow the process already started come to an end.

46. They contend that the application and petitions filed is fatally and incurably defective and ought to be dismissed and/or struck off *suo sponte* as it amounts to a blatant abuse of the court process and is aimed at circumventing and defeating the cause of justice.

47. The respondents in conclusion implored upon this Honourable Court to vacate the conservatory orders issued and direct the Petitioner to appear before the Select Committee to defend himself against the allegations leveled against him.

48. The petitioner in opposition to the respondents' application of 1st February, 2021 filed his replying affidavit sworn on 18th February, 2021.

49. He contends that the impeachment proceeding emanated from **Kericho ELRC Petition No. 6 of 2019: Magerer Lagat and another – Versus- Governor, Kericho County & 2 others** and not any of the allegations listed by the respondent in their application.

50. He stated that the constitution of the Kericho and litein municipal boards was lawfully completed in November, 2020 and the list of board members was approved by the county executive committee on 6th January, 2021 and the report forwarded to the county assembly by the letter of 11th January, 2021 who conducted an inauguration ceremony on 19th January, 2021.

51. That the attorney general's advisory opinion was clear that all board members who meet the criteria set out in section 14 of the urban Areas and Cities Act, 2011 can complete their term and any further appointments should be done according to law. subsequently, it is stated that the members who qualified were all retained and the new appointees who are required to be vetted are still awaiting vetting and approval by the county assembly.

52. According to the petitioner, section 14 of the urban Areas and Cities (Amendment) Act, does not require all municipal board member to be vetted, rather that some members are exempted i.e. the board member nominated by the county executive member for the time being responsible for cities and urban areas or his representative and the chief officer responsible for urban development.

53. He stated that, he did not carry out the reconstitution of the municipal boards as alleged by the Applicants/ Respondent as he does not have the powers to reconstitute the municipal boards and swear member into office.

54. The Respondent/petitioner avers that the motion to impeach him was published on 20th January, 2021 under gazette Notice number 495 while the special sitting of the county assembly was scheduled on 22nd January, 2021 begging the question when was the substantive motion debated and approved.

55. Accordingly, the petitioner/ Respondent herein avers that the procedure in conducting the impeachment proceeding was flawed. He further stated that the list of the one third members alleged to have approved the motion has not tabled before this Court.

56. He avers that the motion placed before this court as the respondent evidence and marked as annexure DR-2 has not been signed contrary to the 1st respondent standing orders.

57. He contends that at the time the gazette notice No. 495 was published on 20th January, 2021, there was no motion tabled before the house business committee seeking to investigate his conduct contrary to standing order number 58. He alleges that the motion was sneaked in and filed on 22nd February, 2021 when the same was not signed though tabled, debated and approved.

58. He took issue with the way the motion tabled and approved by the county assembly as the same did not contain the allegations, terms of reference indicating the scope of investigations as required in the standing orders that normally govern the county assembly conduct of business.

59. He thus stated that the process adopted by the assembly in commencing the investigations was contrary to the standing orders in that according to order 58(2) before a motion is tabled, the mover of the motion shall deliver to the clerk the proposed motion in writing signed by the said member and supported by at least one third of all the member before it is submitted to the speaker. Conversely, it is stated that the motion was not signed neither was it supported by the one third members.

60. After the motion has been received by the speaker, the speaker ought to approve the motion before the same is table before the house business committee for time allocation, a fact that he alleges the respondents failed to prove. He thus contends that there was no proper motion tabled before the county assembly for debate an approval on 22nd January, 2021.

61. The Petitioner/ Respondent states that the select committee members present in the meeting held on 2nd February, 2021 were Nineteen (19) as evidenced by the respondent/ applicant annexure DR-5, contrary to section 40(3) (1) of the County Government Act and the Standing Orders number 172 that requires select committee members to be not less than Five (5) and not more that Nine (9).

62. He alleged that the letter of 26th January, 2021 did not contain the approved motion by the county assembly or the charges levelled against him as alleged, prompting him to request for further particulars by his letter of 27th January, 2021 which the county clerk only forwarded a motion without the requested particulars.

63. That in absence of an approved motion detailing the allegations and terms of reference and an unlawful select committee, the entire impeachment process as commence is unconstitutional, null and void as they violate Article 35, 47, and 50 (1)(2)(b) of the constitution.

64. That the opaque manner in which the investigations were conducted compelled him to file these proceedings to stop the impeachment process which according to him had contravened the law and the constitution.

65. He further took issue with the respondent's deponent who swore his affidavit on 31st January, 2021 to an application dated 1st February, 2021, therefore alleges that the application and the entire application was premeditated.

66. Finally, he alleged that he is targeted pursuant to the ongoing review of the county valuation roll 2020- 2030 which proposes to increase land rates by over 500% and that the respondent is being housed by one of the multinational tea companies that is bound to be affected by the said rate. He therefore urged this Court to disallow the application and compel the respondents to follow due procedure and accord him fair hearing.

67. The Applications were conversed by way of written submissions, with the Petitioners filing his submissions dated 9th March, 2021 and the Respondents filed their submissions on 15th March, 2021.

Petitioners Submissions

68. The Petitioner submitted that the motion approved by the county assembly did not contain the allegations, the terms of reference indicating the scope of the investigations as required under the standing orders, he thus argued that the investigations were and are still prone to abuse. He relied on the case of **uhuru highway development limited –versus- central Bank of Kenya & others [1995] eklr** where the Court of Appeal held that;

“In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following .

i. The duty of the applicant is to make a 'full and fair disclosure of all the material facts':

ii. The material facts are those which it is material for the judge to know in dealing with the application as

made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers:

iii. **The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.**

iv. **The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant (c) the degree of legitimate urgency and the time available for the making of inquiries.**

v. **if material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains ...an ex parte injunction without full disclosure is deprived of an advantage he may have derived by that breach of duty.**

vi. **Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.**

vii. **Finally, it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms:**

69. He submitted that there was no proper motion tabled before the county assembly for debate and approval on 22nd January, 2021 as the agenda for the special sitting was to form a select committee to investigate the petitioner's conduct and not to debate and approve the alleged motion as debating and adopting a motion in a single day would be contrary to standing order 58.

70. He further submitted that the letter of 26th January, 2021 inviting him to appear before a select committee on 2nd February, 2021 failed to include the motion and the outlined charges against him. He indicated that it was until he requested for detailed and particularized basis for the impeachment that the respondents served him with a notice of motion without any particulars.

71. He also argued that the respondents are the ones guilty of material non-disclosure since they have not disclosed before this court when the main motion was tabled before the house and debated as the agenda for the sitting of 22nd January, 2021 was to only form a select committee to investigate the petitioner's conduct.

72. The petitioner submitted that pleadings can only be struck out when; it discloses no reasonable cause of action of Defence in law; it is scandalous, vexatious or frivolous; may prejudice embarrass or delay fair trial of the action and when it amounts to an abuse of process of court. He reinforced this argument by citing the case of **Kivanga Estates Limited –versus- national bank of Kenya limited [2017] eKLR** where the court held that;

“It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction, capable of bringing a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations.”

73. He thus submitted that the current application and the petition herein are based on violation of the petitioner's sacrosanct right to be heard and not vague as alleged by the respondents. He argued that the petitioner application and the petition raises key constitutional questions that need to be addressed by this court and listed these issues as follows; -

- a) Whether the Respondents failure to inform the Petitioner grounds of the impeachment with sufficient detail to answer it and to form basis for investigation by the Select Committee violates the provisions of Article 25 (c), 35, and 47 of the Constitution.
- b) Whether the Respondents decision of approving a motion to form a Select Committee to investigate the Petitioner without any grounds under section 40(1) of the County Governments Act, 2012 violates Article 50 (1) & (2)(b) of the Constitution.
- c) Whether the Respondents decision of approving a motion to form a Select Committee to investigate the Petitioner without any grounds under section 40(1) of the County Governments Act, 2012, violates Article 10 of the Constitution.
- d) Whether the Respondents decision of approving a motion to form a Select Committee to investigate the Petitioner without any grounds under section 40(1) of the County Governments Act, 2012 and without following the due process violates Article 236 of the

Constitution.

74. He submitted that the respondents' application dated 1st February, 2021 is a delay tactic aimed at forestalling the hearing and determination of the petitioner's suit herein and urged this court to dismiss the same for lacking merit.

Respondents Submissions

75. The Respondents submitted that the principles to be satisfied in granting of a conservatory order was expressed by justice Onguto J. (as he then was) in the case of **Board of management of uhuru secondary school- verus- city county director of education 2 others [2015] eklr**. Where the learned judge held;

“An applicant seeking conservatory orders in a Constitutional case must demonstrate that he has a prima facie case with a likelihood of success. Once the applicant has established to the court's satisfaction a prima facie case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights. Thirdly, flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. Fourthly, the court must consider conservatory orders also in the face of the public interest dogma and finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order.”

76. The Respondents submitted that the Petitioner has not established a prima facie case to warrant the issuance of conservatory orders sought and submitted that conservatory orders bear a more deicide public law connotations and that they are not linked to such private party issue as illustrated in the supreme court case of **Gatirau Peter Munya –versus Mwenda Kithinji & 2 others [2014] eklr**.

77. It is the Respondents submissions that, the petitioner herein was summoned to appear before a select committee in accordance with Article 185(3) of the Constitution and section 40 of the County Government's Act, following approval of a motion tabled before the county assembly. It is argued that the summons was meant to give the petitioner an opportunity to defend himself and give his side of the story. That the said investigation and hearing were conducted pursuant to the respondent oversight role placed upon it by the law.

78. Its further submitted that no prejudice could have been visited upon the petitioner when he appears before the select committee, infact the respondent states that the petitioner already appeared before the select committee as scheduled only that hearing did not proceed in observance of this Court's Orders.

79. It is submitted further that, by dint of admission by the petitioner that he does not have a problem appearing before the select committee, confirms that indeed, no prejudice will be visited upon the petitioner if this Court ordered that he be subjected to the select committee.

80. The respondents submitted that they have not breached any law in summoning the petitioner to appear before the select committee, as it was performing its' roles as mandated by Article 185(3) of the Constitution. Further that they are empowered under section 8(1) of the county Government Act to vet and approve nominees to the county Public Office and section 40(1) of the county government Act together with standing Order 58 of Kericho County assembly donated the powers of investigation of public officers upon a select committee. In addition, it was submitted that the applicant was given enough time to prepare and served with documents he needed for the said hearing. They relied on the case of **The county government of Bungoma & 2 others –versus- Stephen Nendela & 2 others [2017] eklr**.

81. They thus submitted that the petitioner has failed to meet the threshold for the grant of conservatory orders and urged this court to vacate the Orders issued ex parte and the respondent be allowed to complete the investigative process by the select committee.

82. On the Respondents' application dated 1st February, 2021 seeking to discharge the orders of 26th January, 2021; it was submitted that, any Order for injunction may be discharged, varied and or set aside by the Court on an application by the party dissatisfied with such orders.

83. The respondents argued that the petitioner failed to disclose all facts before this court, with the intention to mislead this Court to issue him with orders. He further submitted that non- disclosure and misrepresentation of the processes undertaken by the respondents denies the petitioner further enjoyment of the conservatory orders sought. It was argued that, has there been no motion with detailed allegations then the applicant could not have appeared before the select committee on 2nd February, 2021 and present a detailed memorandum of response as he did. He cited the case of **Aviation –versus- Kenya Airport Authority [2014] eklr**. Where the court held;

“when a party comes to Court on an application supported by an Affidavit under oath and fails to outline and disclose matters that are material to the granting of orders, such a party is acting in a manner suggesting that they are peddling falsehood while under oath. The consequences of such conduct are well settled in law. Any advantage gained by such non-disclosure, the grant of *ex-parte* orders will be taken away from the offending party.”

84. They further relied on the case **Ruaha Concrete Co Ltd –versus- paramount universal bank ltd, HCCC No. 430 of 2002**. Where the court gave the principle of non-disclosure as already quoted in the case of **Uhuru Highway Development Limited –Versus- Central Bank of Kenya & others [1995] eklr (supra)**.

85. The respondents finally submitted that the Petitioner is clearly quilt of material non-disclosure as he filed this application before this Court seeking conservatory orders on the ground that he was not served with a detailed motion containing the charges leveled against him and still went ahead and prepared and submitted a detailed memorandum of response before the select committee on 2nd February, 2021.

86. They concluded by urging this Court to dismiss the petitioner application and allow their application seeking to discharge the ex parte

orders issued on 29th January, 2021.

87. I have examined the averments of the parties herein. The main issue for this court's consideration is whether the applicants have established a prima facie case with a likelihood of success which would make the court issue the conservatory orders being sought.

88. I will first consider the petitioner's application dated 26/1/2021. In this application the applicant sought orders suspending the impeachment proceedings against the petitioner commenced by the County Assembly of Kericho vide a gazette notice No. 495/2021 and communicated to the petitioner vide a letter dated 26/1/2021.

89. The applicant also sought orders stopping the respondent from initiating, continuing or concluding any impeachment proceedings against the petitioner solely based on the decision of the County Government of Kericho to reconstitute the Municipal Branch made pursuant to the provision of the Urban Areas and Cities (Amendment) Act No. 3 of 2019 and reinforced through the interpretation of the court in KRCH ELRC PETITION 6 OF 2019.

90. The petitioner applicant contends that the branch were reconstituted and the process completed in November 2020. The list of the Board members was then approved by the County Executive Committee on 6th January, 2021 and reports forwarded to the County Assembly of Kericho vide a letter dated 11.1.2021.

91. The applicant contends that on 20.1.2021 he noticed that vide Gazette Notice No. 495/2021 the County Assembly had an item relating to his impeachment on the grounds of violation of Urban Areas and Cities Act 2011 and constitution.

92. The applicant further contends that the Assembly also approved a motion to form a select committee to investigate his conduct on 20/1/2021 but that the motion was open ended and did not outline the grounds for his impeachment and specific matters to be investigated and violation he had committed.

93. He contends that the process used for his impeachment is governed by Section 40 of the County Government Act 2012 and the constitution and is quasi Judicial in nature but that the process is flawed and breaches the law and his rights.

94. The respondent's position is that the applicant misinterpreted the Judgment in KRCH ELRC Petition No. 6 of 2019 in a skewed manner aimed at misleading the court to issue him with orders.

95. They aver that that suit was not a basis for summoning the petitioner before the select committee. They contend that the petitioner erred in not subjecting the appointed members to vetting and approval of the assembly and also appointing his relative in total contravention of the law.

96. That being the averment of the petitioner and respondent, the issue this court will delve into is not the merit of the impeachment process against the applicant rather it is about the impeachment process. The applicant on the other hand contends that the process of the impeachment is flawed.

97. In determining whether the process is flawed, I am averse to the provision of the law that this court may not interfere with internal disciplinary processes unless the interference would be limited to putting the proper process on course.

98. The respondents on the other hand filed an application dated 1.2.2021 where they sought orders for this court to vacate/review its orders issued on 12.1.2021 staying the impeachment process of the applicant herein.

99. The respondent applicant in the 2nd application contend that the impeachment process was properly on course as the respondents were following the process provided under Section 40 of the County Government Act 2012.

100. Section 40 of the County Government Act provides as follows;-

40. Removal of member of executive committee

(1) Subject to subsection (2), the Governor may remove a member of the county executive committee from office on any of the following grounds—

(a) incompetence;

(b) abuse of office;

(c) gross misconduct;

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

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

(f) gross violation of the Constitution or any other law.

(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

(b) the governor shall dismiss the county executive committee member.

101. For the law, the motion for impeachment is supposed to be supported by at least 1/3rd of its members. What therefore follows is appointment of a select committee comprising of 5 members to investigate the matter.

102. The select committee is expected to report back to the Assembly within 10 days.

103. From the pleadings herein, the County Assembly voted to appoint a select committee to investigate the applicant for gross violation of the law on 4 grounds as stated at paragraph 39 of this Judgment.

104. On 26.1.2021 the 1st respondent through its clerk invited the applicant to appear before the select committee on 2nd February, 2021 to discuss his conduct on the allegation of gross violation of the law.

105. The applicant has averred that the letter inviting him did not disclose the grounds upon which the committee was investigating him to enable him prepare sufficiently.

106. The letter which invited the applicant to the hearing by the select committee has not been presented before this court by either the applicant or respondents.

107. This court is unable to determine whether the grounds or reasons which were requiring the applicant to answer were put to him as envisaged by the law.

108. In this court's view the contention by the applicant is that he was expected to appear before the committee on grounds which were not disclosed.

109. Failure to disclose what he was to answer before the select committee was indeed in breach of the law in particular Section 40 of the County Government Act and also the constitution.

110. In the circumstances, I find the impeachment process already commenced against the applicant was flawed and cannot be allowed to continue as commenced.

111. In the circumstances, I confirm the interim orders granted on 29.1.2021 pending the hearing and determination of the petition.

112. The respondent is however free to institute free, fair and transparent investigation and disciplinary processes against the applicant but they must strictly adhere to the law and in particular Section 40 of the County Government Act 2012.

113. The respondent's application fails in the circumstances.

114. Costs of the application to the applicant/petitioner.

Ruling delivered virtually this 26TH day of MAY, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Ms. Cherotich holding brief for Sigei for 1st respondent – present

Ms. Munyao holding brief for Peter Munyao for petitioner & 2nd Intended petitioner – present

Court Assistants – Wanyoike and Fred