



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CONSTITUTIONAL PETITION NO. 001 OF 2021

(Formerly HCCP No. 002 of 2021 at Garsen)

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

IN THE MATTER OF

ALLEGED CONTRAVENTION OF THE CONSTITUTION OF KENYA

IN THE MATTER OF

VIOLATION OF THE RIGHT TO FAIR HEARING, DIGNITY,

AND PROTECTION FROM DISCRIMINATION AND SECURITY OF PERSONS

IN THE MATTER OF

SECTION 11 OF THE COUNTY GOVERNMENTS ACT, 2012

IN THE MATTER OF

STANDING ORDER NOS. 69 AND 75 OF THE TANA RIVER

COUNTY ASSEMBLY STANDING ORDERS

IN THE MATTER OF

A RESOLUTION TO IMPEACH THE SPEAKER OF TANA

RIVER COUNTY, HONOURABLE MICHAEL JUSTINE NKADUDA

IN THE MATTER OF

THE COUNTY ASSEMBLY OF TANA RIVER

-AND-

IN THE MATTER OF

THE FAIR ADMINISTRATIVE ACTION ACT, 2015

-BETWEEN-

HON. MICHAEL JUSTINE NKADUDA..... PETITIONER

- VERSUS -

THE COUNTY ASSEMBLY OF TANA RIVER.....1ST RESPONDENT

THE CLERK, THE COUNTY ASSEMBLY OF TANA RIVER.....2ND RESPONDENT

HON. MOHAMED BUYA YUSA.....3RD RESPONDENT

HON. GALOLE SADDAM HUSSEIN.....4TH RESPONDENT

HON. ABDI ERGAMSO GOBU.....5TH RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 29th October, 2021)

RULING

The petitioner filed a notice of motion on 27.04.2021 together with a petition through Nyongesa & Company Advocates. The application and petition were initially filed at the High Court in Garsen. The matter was transferred to the High Court at Malindi and subsequently to this Court at Mombasa. The Advocates for the petitioner and the respondent attended Court on 04.05.2021 when by consent it was ordered, *inter alia*, “**2. Pending the inter partes hearing of the application or further orders by the Court the respondents not to proceed with the impeachment process against the petitioner unless in accordance with the law including compliance with timelines for service of relevant impeachment notice upon the petitioner.**” On 12.05.2021 the parties’ Advocates attended court and mutually submitted that the said order had been served on 05.05.2021 after the petitioner had been already impeached on 04.05.2021 and prior to the order being issued. Counsel for the respondents submitted that after the order had been served, the 1st respondent had nothing to complete the impeachment process, that is, publishing the impeachment in the gazette and replacing the petitioner. The Court then ordered on 12.05.2021 thus, “**1. By reason of order 2 given on 04.05.2021 and the order having been duly served, by further consent, the effect of the order is that no further action by the respondents to gazette the impeachment and fill the resultant vacancy will be undertaken pending further orders by the Court or hearing of the notice of motion filed on 05.05.2021 (but actually 10.05.2021).**” The order was extended from time to time and now until the delivery of this ruling. The petitioner withdrew the earlier notice of motion filed on 27.04.2021 and dated 26.04.2021 so as to pave way for the hearing of the one dated 10.05.2021 and filed on 11.05.2021.

The application by the notice of motion dated 10.05.2021 and filed on 11.05.2021 was filed for the petitioner through Binyenya Thurania & Company Advocates. It was pursuant to Article 159(1), (2) (d) & (e) of the Constitution of Kenya, 2010 and Rules 13, 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice & Procedure Rules, 2013 (hereinafter, “**the Rules**”). The applicant prays for orders:

1) ... (spent)

2) ... (spent)

3) That pending the hearing of the petition, a conservatory order does issue to restrain the 1st, 2nd, 3rd, 4th, and 5th respondents from in any manner whatsoever whether by themselves, their servants, agents or advocates or any of them or otherwise from effecting, implementing or enforcing the 1st respondent’s *ad hoc* Report of the Select Committee established to investigate the allegations against the Speaker dated May, 2021 and the decision or resolution adopting the motion passed by the 1st respondent on Tuesday, the 4th day of May, 2021.

4) That the Court be pleased to make any other order fit in the circumstances of the case.

5) That costs be provided for.

The application was based upon the petitioner’s affidavit and upon the following grounds:

a) The applicant is a Kenyan by birth and at the material time the Honourable Speaker for the Tana River County Assembly having been elected to serve as such as provided for in Article 178 of the Constitution of Kenya. He is a public officer per Article 260 of the Constitution. Public officers are servants of the people engaged or employed within a framework of constitutional and statutory provisions as well as lawful policies and practices.

b) The right to a fair trial is absolute and cannot be limited.

c) On Friday 30.04.2021 at 3.53pm by an email titled “**Notice of hearing – Proposed Impeachment Proceedings**” the 1st respondent invited the petitioner to appear before the select *ad hoc* committee. Attached to the email was the notice of motion dated 21.04.2021 allegedly approved on the 30.04.2021 by the 2nd and 4th respondents, a notice of hearing of the Speaker’s removal dated 29.04.2021 and the Hansard Report of Wednesday, 28.04.2021.

d) The select *ad hoc* committee with 7 members was not properly constituted as provided in Standing Order 69(8) of the County of Tana River and which provides, “**8. 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; and shall, within ten days, report to the Assembly whether it finds the allegations against the Speaker to be substantiated.”

e) The notice of motion dated 21.04.2021 and allegedly approved on the even date by the 2nd and 4th respondents is only signed by the 3rd respondent. The motion is not signed by at least a third of the members of the 1st respondent as provided in section 11(2) of the County Government Act, 2012 and Standing Order 69 (2) of the County of Tana which states, “**2. A notice of the intention to move a motion for a resolution to remove the Speaker shall be given in writing to the Clerk of the Assembly, signed by at least one third of all the Members of the Assembly stating the grounds for removal and the Clerk shall submit the proposed Motion to the Speaker.**”

f) On Monday 03.05.2021 at 3.56pm and by email titled “**Invitation to appear before the house**”, the 1st respondent invited the applicant to appear before the House to respond to allegations before the findings of the *ad hoc* committee were debated. Attached to the email was an invitation to appear before the House dated 03.05.2021.

g) On 03.05.2021 the applicant was represented at the select *ad hoc* committee by Ms. Judith Thuku and Mr. Kelvin Mbura with a brief to request for adjournment of the proceedings for the reasons that the notice was short and also that the applicant was indisposed and on bed rest. The request to adjourn was irrationally declined allegedly because the same will interfere with the timeline given to the select *ad hoc* committee under Standing Order 69(8) of the County Assembly of Tana River Standing Orders.

h) The right to be afforded sufficient time is a requisite for the right to fair administrative action to be achieved. The applicant was not accorded an opportunity by the *ad hoc* select committee to respond to the 3rd respondent’s motion.

i) The applicant was not furnished with sufficient particulars to defend himself.

j) On 04.05.2021 by consent order (reproduced earlier in this ruling) the Court granted interim orders.

k) On 05.05.2021 at 1.25pm by email titled “**Notification of Resolution on findings of the Ad-hoc Committee**” the 1st respondent notified the petitioner that it had during the morning session of 04.05.2021 approved the findings of the *ad hoc* committee following a roll call division which was supported allegedly by 87% of all members of the 1st respondent. Attached to the email was the notification of the House resolution on impeachment dated the 04.05.2021 signed by the 2nd respondent; report of the *ad hoc* committee allegedly laid on the floor of the House on Tuesday 04.05.2021 at 10.34am; and the roll call division results.

l) The 1st respondent’s proceedings of 04.05.2021 were not presided by a member elected under section 9(4) of the County Governments Act, 2012.

m) The tabling and adoption of the select *ad hoc* committee report by the 1st respondent was contemptuous of the Honourable Court, unlawful and in breach of the law as the procedure adopted by the 1st and 2nd respondents offend the provisions of Articles 25(c), 47, 235(1) (c) and 236(b) of the Constitution of Kenya, 2010; section 4 of the Fair Administrative Action Act, 2015; sections 9(4) and 11 of the County Governments Act, 2012; and Standing Orders 69(2), (3), (4), (5), (6), (8), (9) and 13 and 75 of the County Assembly of Tana River. Specifically, the 1st respondent being aware that its recommendations if implemented would amount to removal of the applicant from a public office, the 1st respondent did not issue prior and adequate notice of the nature and reasons for the disciplinary action taken against the applicant and neither did the 1st respondent give the applicant an opportunity to be heard and make representation in that regard.

n) The 1st respondent’s select *ad hoc* committee is a calculated scheme aimed at hounding the petitioner out of a state office without following due process.

o) The applicant has established a *prima facie* case with a probability of success as the impeachment proceedings were conducted in contravention of the relevant constitutional and statutory provisions or standing orders. Further the balance of convenience tilts in the applicant’s favour.

p) Without Court’s intervention, the applicant will suffer incalculable and irreparable loss at the hands of the 1st, 2nd, 3rd, 4th and 5th respondents and the petition will be rendered nugatory.

q) The respondents will suffer no prejudice if the interim orders are granted. It is just and necessary to grant the prayers made so the petition is not rendered nugatory.

The respondents opposed the application by filing the replying affidavit of Abdullahi Husein, the 1st respondent’s Clerk, also the 2nd respondent herein. The affidavit was filed through Kilonzo & Aziz Advocates. In relation to the applicant’s grievances, the replying affidavit replies as follows:

a) Prior to 06.05.2021 the applicant was the Speaker in Tana River County Assembly. On 04.05.2021 he was lawfully impeached by the 1st respondent per section 11 of the County Governments Act. The impeachment process is complete.

b) Section 11 of the County Governments Act as read with Standing Order 69 of the 1st respondent’s Standing Orders provide for the power and authority to remove the Speaker.

c) Per Standing Order 69(3) of the 1st respondent's Standing Orders, the 1st respondent met and unanimously elected the Deputy Speaker, the 4th respondent herein to take charge of the business of the House and to transact all matters in an acting capacity.

d) The clerk received the motion for removal of the applicant on 21.04.2021 and it had the required one third signatures as required.

e) The motion was on the order paper of Wednesday 28.04.2021 duly approved by the Speaker. It was 7 days after its notice had been given on 21.04.2021. There was requisite quorum when the motion was moved. 22 votes were cast and 20 supported with 2 members being absent.

f) The motion to appoint members of the *ad hoc* committee to investigate the applicant was dated 28.04.2021. It listed 7 members. On the same date the motion was tabled and the 7 members were appointed. The respondent has 23 members and the 7 members met the third members' threshold per Standing Order 69(8) and further, **"...The said Committee could have an even number for the purposes of voting hence the decision to stick to seven members. Besides, all the members of the committee unanimously found the allegations against the Petitioner to be substantiated."**

g) As urged for the applicant he was entitled to appear before the committee and be represented during the investigations per section 11(4) of the County Governments Act and Standing Order 69(9). On 29.04.2021 the Clerk personally called the applicant inviting him for the hearing before the select committee on 03.05.2021. The invitation letter dated 29.04.2021 was forwarded to the claimant by email on 30.04.2021 at 3.57pm. The invitation was not sent on 03.05.2021 as urged for the applicant. The email of 30.04.2021 also attached the invitation letter dated 29.04.2021 to appear before the *ad hoc* committee on 03.05.2021 together with the Hansard report of 28.04.2021 particularizing grounds for removal. The applicant therefore fully knew about the case that confronted him.

h) The *ad hoc* committee convened on 03.05.2021. The applicant decided to be represented by his advocates Ms. Judy Thuku and Mr. Kelvin Mburu. The applicant was not present. No objection was raised about the composition of the committee as is being done in Court. The advocates applied the hearing be adjourned to a date between 6th and 11th May 2021 because the applicant was on 7 days bed rest effective 30.04.2021 meaning the bed rest would end on 6th May and he could attend the hearing earliest on 7th of May. The committee had to present the report within 10 days lapsing on 06.05.2021 – per Standing Order 69(8). The adjournment could not therefore be granted as it was not practical to do so. The *ad hoc* committee had been appointed on 28.04.2021 and had up to 07.05.2021 to give its report to the 1st respondent. The House also sits only on Tuesdays and Wednesdays and the committee could give its report only on Monday 3rd May or Tuesday 4th May for the same to be discussed on Tuesday 4th or Wednesday 5th May 2021. The applicant could attend earliest on 07.05.2021 thereby constraining the statutory time lines. The constraints were communicated to the applicants but they did not offer another date to fit in the prescribed 10 days. The advocates also sought to adjourn for want of the particulars of the allegations but which had already been forwarded to the applicant by email of 30.04.2021 and being particularly per Hansard report of the House proceedings of 28.04.2021. The committee took the view the applicant was evading the proceedings and his advocates were informed accordingly.

i) The committee listened to the mover and after investigation found allegations based on incompetence and gross misconduct as substantiated to warrant dismissal of the applicant by the 1st respondent. Allegations of abuse of office could not issue as are not provided for in section 11 of the County Government Act.

j) By letter dated 03.05.2021 and per Standing Order 69(13) and 76(3) the applicant was invited to appear before the 1st respondent on 04.05.2021 at 9.30am and he was informed that he was entitled to representation.

k) On 04.05.2021 the 1st respondent debated a motion for removal of the applicant by considering the committee's report. The applicant failed to attend despite the invitation to do so. 20 members voted for the motion, one was absent and one was presiding as acting Speaker.

l) By letter dated 04.05.2021 send by email on 05.05.2021, the 1st respondent notified the applicant that it had during its morning session of 04.05.2021 approved the findings of the *ad hoc* committee following a roll call that was supported by 87% of all members of the Assembly.

m) The procedure of impeachment of the applicant was legal and procedural per the safeguards in law. Equity follows the law and the equitable remedies are not available. Prayers sought undermine separation of powers between the judiciary and the legislature. The application be dismissed as an abuse of court process.

n) Judicial review orders of prohibition and certiorari as opposed to injunction and stay orders would most appropriate way for the petitioner to move the Court.

o) The office of Speaker is sensitive not to be run by incompetent person or not to remain vacant.

The applicant filed a supplementary affidavit on 16.06.2021 and further urged as follows:

a) The impeachment process was unprocedural, in breach of law and unfairly conducted.

b) The 3rd respondent did not issue a notice of intention to move for a resolution to remove the applicant as provided in section 11(3) of the County Governments Act.

c) The 3rd respondent's motion dated 21.04.2021 was signed by at least one third of all members of the 1st respondent as required in

section 11(3) (b) of the County Governments Act – it was only signed by the 3rd respondent. The list after exhibit AH3 and before AH4 is irrelevant to the dispute – and is not marked as an exhibit as sealed by the Commissioner for oaths as required.

d) The 3rd respondent's motion dated 21.04.2021 did not set out the particulars or specify the facts constituting the grounds for removal as required under section 11(4) (b) of the County Governments Act but it only gave general grounds for removal per section 11(4) b(a) of the Act. The particulars were not to be given in the Hansard Report for the debate of the motion as is being urged for the respondents.

e) The 2nd respondent breached section 11(5) of the County Governments Act by failing to notify the applicant within 5 days the fact of receipt of the 3rd respondent's motion of 21.04.2021 and requiring the applicant to respond in writing within 7 days setting out his grounds of opposition.

f) Section 11 of the County Governments Act, 2012 was on 09.07.2020 deleted pursuant to section 7 of the County Governments (Amendment) Act, 2020 by deleting section 11 and introducing a fresh provision. The amendments also introduced section 9A of the Act per section 6 of County Governments (Amendment) Act, 2020. The amendments came into operation on 27.07.2020. On 26.11.2020 W. Korir J in HCCP No. E242 suspended section 11 (1) (c) and 11(6) of the County Governments Act, 2012. The applicant refers to the consequence to be that the Speaker shall not cease to perform his functions pending the resolution of the Assembly in the impeachment proceedings and the term acting speaker in the Standing Order is ultra vires the statutory provision – section 14(1) (a) of the County Governments Act, 2012 requiring the 1st respondent to make Standing Orders which must be consistent with the Constitution and the County Governments Act, 2012. Further section 9(4) of the Act prescribing that the County Assembly may elect an acting Speaker was deleted on 09.07.2020 per section 4 of the County Governments (Amendment) Act, 2020.

g) It is misconceived for the respondents to urge that the petition is an affront to the doctrine of separation of powers because the applicant is entitled to enforce his rights as provided for in the Constitution per Articles 22 and 258 thereof.

The Court has considered the application, the affidavits filed for the parties and the submissions, both written and oral. The Court makes pertinent findings as follows:

The **1st issue** for determination is whether the 2nd respondent validly made the replying affidavit on behalf of the 3rd, 4th and 5th respondents who were sued in their individual capacity. It is submitted for the applicant that the 2nd respondent could not do so without exhibiting authority by the 3rd, 4th, and 5th respondents to do so. It is submitted that sub rule 15(2) of the Rules required them to enter appearance, and file either, a replying affidavit or a statement setting out the grounds relied upon to oppose the petition. Further sub rule 15(3) required that they thereafter, respond to the petition by filing a replying affidavit or other written document. The 2nd respondent could not therefore file a replying affidavit on behalf of the 3rd, 4th and 5th respondents. There were no submissions made for the respondents on this point. The Court finds that indeed the 3rd, 4th and 5th respondents are natural persons with an autonomous personality. The 2nd respondent has not exhibited their authority for him to make the replying affidavit on their behalf as purported in paragraph 2 of the replying affidavit. However, in so far as their advocates have filed on 24.05.2021 the 1st, 2nd, 3rd, 4th and 5th respondents' answer and response to the petition, the Court finds that the 3rd, 4th and 5th respondents have duly complied with rule 15(3) in response to the petition. The Court further finds that the replying affidavit is not thereby impaired (as relates to the facts the 2nd respondent states and swears to) for want of the authority of the 3rd, 4th, and 5th respondents.

The **2nd issue** for determination is whether the document between exhibit AH-3 and exhibit AH-4 of the replying affidavit is properly before the Court and therefore valid evidence that the notice of motion commencing the applicant's removal was signed by at least a third of the members of the 1st respondent as provided in section 11(2) of the County Government Act, 2012 and Standing Order 69 (2) of the County of Tana River. The document in dispute lists presumably 18 names of the members of the county assembly and their respective signatures and wards or the fact of nomination. It is submitted for the applicant that the document was not part of the documents forwarded to the applicant by email of the 2nd respondent dated 03.05.2021. Further it offends rules 9 and 10 of the Oaths and Statutory Declarations Rules that all exhibits shall be securely sealed thereto under the seal of the commissioner and shall be marked with serial letters of identification; and the forms of the jurat and of identification of exhibits shall be those set out in the third schedule. The applicant relies on the holding by Angote J in **Francis A. Mbalanya –Versus- Cecilia N. Waema [2017]eKLR** that it was not true that the failure to seal and number the annexures is a procedural technicality that can be saved by the provisions of Article 159(2) (d) of the Constitution and Sections 1A and 1B of the Civil Procedure Act. For the respondents it was submitted that the document in dispute is part of exhibit AH-3 which has complied with the rules cited for the applicant. Being a continuation of exhibit AH-3, the disputed document is properly on record. Further it was part of the document send to the claimant by the 2nd respondent by email dated 30.04.2021. The notice of motion dated 21.04.2021 was duly signed by at least a third of the members of the Assembly.

The Court has considered the submissions and the exhibits in issue. The notice of motion exhibit AH-3 is dated 21.04.2021 and is signed by Hon. Mohamed Buya Yusa, Member for Mikinduni Ward. Nothing on its face suggests that it is page 1 with a subsequent second page. Turning to the disputed document, it is on a fresh letterhead denoting a fresh document. It does not have a date, say 21.04.2021, suggesting it is being signed on the same 21.04.2021, the date of the notice of motion. Most important, one of the 18 persons signing it is the same Hon. Mohamed Buya, Mikindani Ward. The Court finds that if it was a continuation, then why is it that Hon. Mohamed Buya is signing for the 2nd time – it is not only unnatural for people to be superfluous, but also, the respondents have carefully failed to submit on the applicant's concern that the disputed document was not part of the documents forwarded by email to the applicant or refer to the necessary exhibit by the respondents establishing that the notice of motion together with the disputed document were forwarded by the email as alleged. The Court finds that on a balance of probability (and pending resolution of the issue at full hearing of the petition) the disputed document was not part of the notice of motion. At this interlocutory stage and looking at the material on record, it appears to be a document that is strange to the impeachment proceedings that were being commenced against the applicant by the notice of motion dated 21.04.2021. The Court finds that even if in the Hansard there is reference to 18 members having signed, the actual notice of motion as exhibited had been signed only by Hon.

Mohamed Buya and approved by the Clerk. The Court finds that the disputed document not being a continuation of the previous document, it failed to comply with and it offended rules 9 and 10 of the Oaths and Statutory Declarations Rules and as held by Angote J, it is liable to being expunged or not relied upon as evidence of whatever it purports to establish.

The Court therefore returns that the document between exhibit AH-3 and exhibit AH-4 of the replying affidavit is not properly before the Court and therefore the notice of motion commencing the applicant's removal was not signed by at least a third of the members of the 1st respondent as provided for in section 11(2) of the County Government Act, 2012 and Standing Order 69 (2) of the County of Tana River.

To answer the 3rd issue for determination the Court finds that the respondents fundamentally breached the statutory procedures in initiating the impeachment proceedings against the applicant. In view of the finding on issue No. 2, the Court returns that as urged for the applicant, the Motion dated 21.04.2021 fell short of a proper motion of intention to impeach the applicant per sub-section 11(3) (a) of the County Governments Act, 2012 as it was not signed by at least a third of all the members of the Assembly per subsection 11(3) (b). Further, the Court finds that as urged for the applicant, the motion for removal of the applicant dated 21.04.2021, while purporting to list conceived grounds in subsection 11 (2) (a) of the Act, it failed to set out the facts constituting the grounds as required in subsection 11(4) (b) of the Act. The Court finds that it was misconceived for the respondents to urge that such facts or particulars were to be found in the Hansard Report of 21.04.2021 which in fact did not have such particulars or facts and was obviously a belated approach to providing the particulars as it was contrary to the statutory provision. Further the Court finds that the 2nd respondent failed to invite the applicant to respond in writing within 7 days, setting out his grounds of opposition as required in sub-section 11(5) (b) of the Act.

To answer the 4th issue, the Court finds that if the sum of the members of the Assembly was 23 and the ad hoc committee had 7 members, then on account of the doctrine of materiality and the mathematics of nearest whole numbers, the respondents failed to substantially comply with the prescription of a third of members envisaged in the Standing Order 69(8). Thus, $1/3 \times 23 = 7.66$ making the nearest whole number 8 and not 7. If the respondents wanted an odd number of the members of the *ad hoc* committee (for ease of voting purposes as was submitted), then the Court considers that it was open to have 9 members rather than 7 who fell below a third threshold as was prescribed.

To answer the 5th issue for determination, the court finds that whereas the Court has found the process initiating the impeachment to have been in breach of the relevant statutory provisions as initiated against the applicant, the Court further finds that the *ad hoc* committee proceeded without considering the applicant's case at all. That amounted to serious breach of the petitioner's entitlement to be heard. There is no dispute that the applicant was on bed rest as was demonstrated before the committee by the applicant's advocates. Even if the prescribed 10 days were running, the Committee appears not to have explored other ways to consider the applicant's case such as by affidavit and the advocates' submissions as could be made on an adjourned date as may have been reasonable within the prescribed timelines required of the committee to submit its report. The Court readily appreciates the committee's predicament flowing from the impaired manner the impeachment process appears to have been commenced - because in any event, the applicant had not been provided facts or particulars for the alleged grounds of contravention, and, the 2nd respondent had not required the applicant to provide a written response as was envisaged in the relevant statutory provisions referred to earlier in this ruling. The Court returns that the impeachment appears to have proceeded in complete disregard of the applicant's right to be heard towards his exculpation. Further the Court finds that the processes and procedures flowing from the work of the committee were already impaired and the Court will not delve into the propriety or otherwise of the purported invitation of the applicant before the full House in view of the purported committee findings. The Court finds that in the present case the applicant asked for time out in view of his prescribed bed rest and the case is distinguishable from Nick Githinji Ndichu –Versus- Clerk Kiambu County Assembly & 3 Others [2018]eKLR where the Court of Appeal (Makhandia, Musinga & Kiage JJ.A) held, “**The petitioner did not ask for time out so that he could engage the services of counsel and he was denied. The upshot is that we are persuaded, just like the trial judge that the process of impeachment was carried out according to the rule book and the appellant cannot be heard to complain.**”

The 6th issue for determination is whether the applicant has satisfied the criteria for grant of a conservatory order. As submitted for the respondent, in Gitirau Peter Muya –Versus- Dickson Mwenda Kithinji and 2 Others [2014]eKLR the Supreme Court held that conservatory orders should be granted on the inherent merit of the case bearing in mind public interest, the constitutional values and proportionate magnitudes and priority levels attributable to the relevant causes. The Court has considered the findings made earlier in this ruling. Public interest refers to such matters considered so crucial that they are recognised and protected by the Constitution, statute, or decisions of the Court. The Court has found that in the present application the impeachment is shown to be proceeding or to have proceeded in breach of the relevant statutory safeguards with the consequence that the cardinal constitutional values such as in Articles 10, 47, 50(1), 232, 236 and others cited for the applicant are likely being contravened or were contravened. Such is a serious public interest that, in the opinion of the Court, entitles the applicant to the conservatory order to hold impeachment process or the consequences of the impeachment. The Court considers that parties are in agreement that the report of the *ad hoc* committee was considered and the applicant impeached but consequential steps of gazetting the vacancy and the filling of the vacancy have not taken place. The Court finds that the applicant has established a case for grant of the interlocutory order but only to that extent – that the impeachment resolution was made and only the actions consequential to the resolution can be arrested at this stage.

The Court has considered the prayers in the petition as amended such as seeking to declare the impeachment unlawful, certiorari to quash the decisions made in the impeachment proceedings, and a permanent injunction that the respondents do not implement the decisions at all. The Court considers that if the conservatory order is not granted, then the main petition may be rendered nugatory and a mere moot proceeding.

While making that finding the Court considers that the applicant has satisfied the guiding principles justifying the Court's intervention in disciplinary processes as was held in Geoffrey Mworira-Versus- Water Resources Management Authority and 2 others [2015]eKLR thus, “**The principles are clear.**”

The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a

manner that makes it impossible to deal with the breach through the employer's internal process.”

The applicant has established that the impeachment proceedings were initiated and continued in breach of relevant statutory provisions and there are no established internal mechanisms to remedy the situation.

In conclusion the application by the notice of motion dated 10.05.2021 and filed on 11.05.2021 is hereby determined with orders:

- 1) That pending the hearing of the petition, a conservatory order is issued restraining the 1st, 2nd, 3rd, 4th, and 5th respondents from in any manner whatsoever whether by themselves, their servants, agents or advocates or any of them or otherwise from effecting, implementing or enforcing the decision or resolution on the motion passed by the 1st respondent on Tuesday, the 4th day of May, 2021 including not to gazette or declare the resultant vacancy or to fill it with another person.
- 2) In view of the findings herein parties are encouraged to compromise the petition with a view of recording a consent in Court at the next mention or to take steps towards the expeditious determination of the petition.
- 3) As the matter originates from the County of Tana River and a Judge of the Court has since been deployed at Malindi, this file be transferred to the Court at Malindi for hearing and disposal of the matter; and the Deputy Registrar to cause that transfer within seven days from the date of this ruling.
- 4) Parties to agree upon a convenient date for mention at Malindi for recording compromise or further directions in the matter.
- 5) Costs of the application in the cause.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 29TH OCTOBER, 2021.

BYRAM ONGAYA

JUDGE