



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CONSTITUTIONAL PETITION NO. 35 OF 2020**

**HON. MIKE SONKO MBUVI GIDION KIOKO.....PETITIONER/APPLICANT**

**VERSUS**

**THE CLERK NAIROBI CITY COUNTY ASSEMBLY.....1<sup>ST</sup> RESPONDENT**

**THE SPEAKER, NAIROBI CITY COUNTY ASSEMBLY.....2<sup>ND</sup> RESPONDENT**

**THE NAIROBI CITY COUNTY ASSEMBLY.....3<sup>RD</sup> RESPONDENT**

**HON. PETER ANYULE IMWATOK.....4<sup>TH</sup> RESPONDENT**

**THE SPEAKER, SENATE OF KENYA.....5<sup>TH</sup> RESPONDENT**

**HON. MICHAEL OGADA OKUMU.....6<sup>TH</sup> RESPONDENT**

**RULING**

1. The petitioner/applicant filed notice of motion application dated 30<sup>th</sup> November 2020 praying for an order in the following terms *inter alia*: -

(i) This application be certified as urgent, and service thereof on the Respondents be dispensed with in the first instance on the basis of its extreme urgency (spent).

(ii) Pursuant to Rules 5(e) and 18 of Legal Notice No. 117 of 2013 (Mutunga Rules), leave be granted to the Petitioner, to forthwith enjoin the 6th Respondent, HON. MICHAEL OGADA OKUMU as a necessary and relevant party to these proceedings, and the Petitioner's Amended Petition herewith filed as exhibit "MKS 12" annexed to the Petitioner's Supporting Affidavit herein sworn on November, 20th, 2020 be deemed as properly filed, and service thereof on the Respondents be forthwith effected.

(iii) Pending the hearing and determination of this Notice of Motion, a Conservatory Order do issue, prohibiting the 3rd Respondent, by its members, or by the 1st and 2nd Respondents and/or any person acting under their behest and direction, from deliberating upon, debating, tabling for debate, making any decision upon, putting to a vote, passing any Resolution thereon, or otherwise howsoever determining the Motion by the 6th Respondent, HON. MICHAEL OGADA OKUMU dated 25/11/2020, purporting to be a Motion for the removal of the Petitioner herein HON. MIKE SONKO MBUVI GIDION KIOKO as the Nairobi City County Governor ostensibly under Article 181(1) (a), (b) and (c) of the Constitution of Kenya.

(iv) Pending the determination of the Petition herein, a Conservatory Order do issue, prohibiting the 3rd Respondent, by its members or by the 1st and 2nd Respondents and/or any person acting under their behest and direction, from deliberating upon, debating, tabling for debate, making any decision upon, putting to a vote, passing any Resolution thereon, or otherwise howsoever determining the Motion by the 6th Respondent, HON. MICHAEL OGADA OKUMU dated 25/11/2020 purporting to be a Motion for the removal of the Petitioner herein HON. MIKE SONKO MBUVI GIDION KIOKO as the Nairobi City County Governor ostensibly under Article 181(1) (a), (b) and (c) of the Constitution of Kenya.

(v) Pending the hearing and determination of this Notice of Motion, a Conservatory Order do issue, prohibiting the 2nd Respondent, (THE SPEAKER, NAIROBI CITY COUNTY ASSEMBLY, or any person acting under the behest and/or direction), from presiding over any session of the Nairobi City County Assembly to debate, deliberate upon, pass any Resolution in respect of, or concerning the Motion by the 6th Respondent herein, HON. MICHAEL OGADA OKUMU dated 25/11/2020 purporting to be a Motion for the removal of the Petitioner herein HON. MIKE SONKO MBUVI GIDION KIOKO as the Nairobi City County Governor ostensibly under Article 181(1) (a), (b) and (c) of the Constitution of Kenya.

(vi) Pending the hearing and determination of the Petition herein, a Conservatory Order do issue, prohibiting the 2nd Respondent, (THE SPEAKER, NAIROBI CITY COUNTY ASSEMBLY, or any person acting under her behest and/or direction), from presiding over any session of the Nairobi City County Assembly to debate, deliberate upon, pass any Resolution in respect of, or concerning the Motion by the 6th Respondent herein, HON. MICHAEL OGADA OKUMU dated 25/11/2020, purporting to be a Motion for removal of the Petitioner herein HON. MIKE SONKO MBUVI GIDION KIOKO as the Nairobi City County Governor ostensibly under Article 181(1) (a), (b) and (c) of the Constitution of Kenya.

(vii) Pending the hearing and determination of this Notice of Motion, a conservatory Order do issue, prohibiting the 5th Respondent, (THE SPEAKER, SENATE OF KENYA), or any person acting under his behest and/or direction), from receiving, accepting, or endorsing for debate before the Senate of Kenya any Resolution purported to emanate from the 2nd Respondent, Speaker of the Nairobi City County Assembly in respect of, or concerning the Motion by the 6th Respondent herein, HON. MICHAEL OGADA OKUMU dated 25/11/2020, purporting to be a Motion for the removal of the Petitioner herein HON. MIKE SONKO MBUVI GIDION KIOKO as the Nairobi City County Governor ostensibly under Article 181(1) (a), (b), and (c) of the Constitution of Kenya.

(viii) Pending the hearing and determination of the Petition herein, a Conservatory Order do issue, prohibiting the 5th Respondent, (THE SPEAKER, SENATE OF KENYA, or any person acting under his behest and/or direction), from receiving, accepting, or endorsing for debate before the Senate of Kenya any Resolution purported to emanate from the 2nd Respondent, Speaker of the Nairobi City County Assembly in respect of, or concerning the Motion by the 6th Respondent herein, HON. MICHAEL OGADA OKUMU dated 25/11/2020, purporting to be a Motion for the removal of the Petitioner herein HON. MIKE SONKO MBUVI GIDION KIOKO as the Nairobi City County Governor ostensibly under Article 181 (1) (a), (b), and (c) of the Constitution of Kenya.

(ix) Any purported decision to impeach the Petitioner as such Governor of the Nairobi City County purportedly executed by the 6th Respondent herein, HON. MICHAEL OGADA OKUMU dated 25/11/2020, be stayed pending the determination of the Petition herein.

(x) The costs of the Petition be to the Petitioner/Applicant in any event.

2. The petitioner relies on grounds 1 to 91 set out in the body of the Notice of Motion and amplified in the supporting affidavit of the applicant sworn on 30th November 2020 together with the annexures thereof.

3. On 30<sup>th</sup> November 2020 Hon. Nzioki Wa Makau J. issued interim orders in terms of prayers 3 of the notice of motion prohibiting the Nairobi county assembly from proceeding with a motion to impeach the applicant pending the hearing and determination of the application inter- partes which orders were not extended when the matter was brought before Hon. Rika J. on 3<sup>rd</sup> December 2020 upon Hon. Nzioki Wa Makau recusing himself from the matter in a ruling dated 9<sup>th</sup> December 2020.

4. The counsel for the applicant submitted that Justice Nzioki wa Makau inadvertently omitted to grant prayer (ii) of the application dated 30<sup>th</sup> November 2020 to enjoin the intended 6<sup>th</sup> Respondent to the suit and to grant the amendments sought by the applicant to the petition. That the court to find that the said amendments were impliedly granted and enjoin the intended 6<sup>th</sup> respondent to the suit and deem the draft amended petition to have been filed.

5. On 3<sup>rd</sup> December 2020, Hon. Rika J. also recused himself from the matter and referred the same for directions by the Principal Judge of the Court.

6. The matter was placed before me by the Principal Judge on 10<sup>th</sup> December 2020 whereupon I gave directions for the *inter-partes* hearing to take place on 15<sup>th</sup> December 2020 with a view to deliver a ruling on 16<sup>th</sup> December 2020 due to the urgency of the matter.

7. For these reasons I shall endeavour as much as possible not to regurgitate any pleadings, depositions, and submissions by the parties herein but shall deal with the issues for determination at this interim stage in a precise manner as possible. This is not to say however the court has not considered all relevant matters raised by the parties for the purposes of determining this application.

8. The gravamen of the application is that 3<sup>rd</sup> Respondent under the direction of the 2<sup>nd</sup> Respondent impeached the applicant on 3<sup>rd</sup> December, 2020 based on a motion of impeachment dated 25<sup>th</sup> November, 2020 presented before the County Assembly by the 6<sup>th</sup> Respondent.

9. The applicant states that the motion of impeachment proceeded on 3<sup>rd</sup> December 2020 despite service on the County Assembly with Interim Conservatory Orders issued by the Court on 30<sup>th</sup> November 2020 stopping the Assembly from proceeding with the said motion of impeachment.

10. That though the said orders were not extended by Rika J. on 3<sup>rd</sup> December 2020 the orders issued by Nzioki Wa Makau J. were still in place up to 12 O'clock Midnight on the 3<sup>rd</sup> December 2020. Therefore as at the afternoon of the 3<sup>rd</sup> December 2020 when the Assembly proceeded with the motion of impeachment the said orders were in place.

11. That the motion of impeachment proceeded without giving the Applicant any opportunity to be heard in that the petitioner was not provided with any report of a committee investigating his matter nor was he served with any documents containing the allegations made against him in blatant disregard of the relevant standing orders of the assembly and constitutional and Statutory imperatives to do so and therefore in violation of his human rights set out in the petition and the cardinal rules of natural justice.

12. Furthermore, there being a court order in place prohibiting debate of the motion of impeachment the petitioner was not expected as is the requirement to appear before the assembly in person or by a representative to defend himself.
13. That the conduct by the Assembly was in sheer contempt of the said Court order
14. The applicant states further that the Assembly did not conduct any public participation as mandated by the constitution of Kenya 2010 before proceeding to impeach the applicant.
15. That the purported impeachment being unlawful *ab-initio* should not be considered at all by the Senate hence the application for the court to issue conservatory orders against any such proceedings before the Senate, pending the hearing and determination of the suit.
16. That the issue of jurisdiction of the court is *resjudicata* having been already determined by Ongaya J.
17. That the applicant has satisfied the threshold for grant of conservatory orders in public domain as set out in the case of **Gatirau Munya vs Dickson Mwenda Githinji & 2 others [2014] eKLR** and the court be pleased to grant the application as prayed.

## **RESPONSE**

18. The respondents have filed their replying affidavits and the pertinent issues of fact and law raised by the respondents in opposing the grant of the application may be summarised as follows: -
19. The intended 6<sup>th</sup> respondent, the mover of the motion of impeachment of the applicant dated 25<sup>th</sup> November 2020 was not joined as a party in petition no. 35 of 2020 and therefore the initial motion of impeachment moved by the 4<sup>th</sup> respondent and the subject of this petition having been withdrawn on 26<sup>th</sup> November 2020 the petition is spent and or moot and cannot provide the basis for grant of the notice of motion dated 30<sup>th</sup> November 2020.
20. The present petition was not amended to take on board matters arising from the motion of impeachment dated 25<sup>th</sup> November 2020 and moved by the intended 6<sup>th</sup> respondent and therefore the same has been overtaken by events and cannot be the basis of the present application.
21. That Nzioki wa Makau J. did not grant prayer (ii) of the present application and the grant of the same cannot be implied as suggested by counsel for the applicant or at all this being a court of record after all the judge directed service of the application be effected on the 'intended 6<sup>th</sup> respondent' and not 6<sup>th</sup> respondent as counsel for the respondent would want the court to believe. Accordingly, the petition was not amended as per the attached draft to join the 6<sup>th</sup> respondent and to embrace the subject matter of the present application
22. That prayers 1,3,4,5,6,7,8,9 are spent and the court may not grant any of the prayers sought by the applicant and in particular the motion for impeachment has already been received by the senate on 4<sup>th</sup> December 2020; the speaker of the senate has already received the motion; and the speaker has already endorsed the motion for debate before the house which debate and determination is set for 16<sup>th</sup> December 2020 the day of the ruling of this application.
23. That the applicant has acknowledged that they have been invited to attend the impeachment hearing and no order has been sought by the applicant to stop the hearing and therefore non can be granted.
24. That the 3<sup>rd</sup> respondent is *funtus officio* and orders of court cannot issue against it in vain.
25. That Rule 5(d)(2) of the Mutunga rules provide the manner of amending a constitutional petition and leave to amend must be penned down and cannot be implied which did not happen in the present case.
26. That the initial motion of impeachment by the 4<sup>th</sup> respondent even if had not been withdrawn on 25<sup>th</sup> December 2020 when the 2<sup>nd</sup> motion was moved by the intended 6<sup>th</sup> respondent, same had lapsed by effluxion of time in terms of Standing Order 49(3) of the assembly.
27. That no order of the court was breached on 3<sup>rd</sup> December 2020 and therefore contempt of court alleged by the applicant does not arise at all. In any event there is not before court an appropriate application for contempt of court for the court to make a determination on the **matter**.
28. That the court is bound by the principle of stare decisis in terms of Article 163 (7) of the Constitution to follow the decision of the supreme court in petition no. 32 of 2014 Justus Mate Kariuki & Anor versus Martin Nyaga Wambora & Anor [2017] eKLR that conservatory orders to stop on going processes of other constitutional organs should not be issued unless in the clearest cases of blatant violation of the law in observance of the doctrine of separation of powers to aid orderly governance with minimal institutional conflicts. The supreme Court prescribed inner constraints by the courts to dispel conflicts in government.
29. That the County assembly has the mandate to impeach a governor in terms of Article 181 of the Constitution of Kenya 2010 read with section 33 of the County Governments Act 2012 on grounds stated therein following the procedure set out in the provisions and standing orders of the assembly.
30. That the assembly followed the law to the letter and the applicant has established no basis for the court to interfere with the process now pending at the senate.

31. That courts have mandate to review decision of the senate only after the process has been finalised not before. The applicant is therefore not without a remedy if the impeachment process at the senate is allowed to run its course to conclusion. The court should not encumber other organs of government in this respect.

32. That the motion introduced by the intended 6<sup>th</sup> respondent was signed by at least 1/3<sup>rd</sup> of the assembly members; that the signatures were verified by the clerk of the county assembly and submitted to the speaker; that the speaker was satisfied that the motion was in order and gave the motion a date for hearing within 7 days.

33. That in terms of Standing Order 72 of the assembly the applicant was invited to attend the session but the governor failed to attend the hearing vide a virtual link provided and the Hansard record would show that. That in any event the present application does not challenge the process followed by the assembly to impeach the applicant.

34. That the motion was tabled before the assembly in the afternoon of 3<sup>rd</sup> /12/2020, debated and carried by 88 members out of 122 members of the assembly this being more than 2/3rds of all the members of the assembly as mandated under Article 188 of the Constitution of Kenya 2010 read with Section 33 of the CGA.

35. That the applicant has not satisfied the requirements for grant of conservatory orders in public domain as set out in the Supreme Court decision in the case of *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others* [2014] eKLR AND the High Court in *KTDA vs – petition no. E242 of 2020*.

36. That there is a pending application that was heard partly by Ongaya J. and in respect of which interim orders were issued on two different occasions but is yet to be concluded on the same subject matter. That the applicant has filed several applications on the same subject matter including the present one. The matter is therefore *subjudice* and this sets up the court to issue contradictory orders on the same subject matter.

37. That the orders issued by Ongaya J. on 2<sup>nd</sup> March 2020 are merely instructive on the manner the impeachment process in respect of the initial motion by the 4<sup>th</sup> respondent was to be conducted in strict compliance with Standing Orders 67 & 72 of the assembly and the judge did not stop the process contrary to the assertions by the applicant. Furthermore, the 2<sup>nd</sup> motion dated 25<sup>th</sup> /November/2020 is not yet the subject of the present petition 35 of 2020 before court.

38. That there is no employment and labour relationship as between the applicant and the intended 6<sup>th</sup> respondent and so the court lacks jurisdiction to enjoin him in this suit and or determine any dispute between the two.

39. The parties have filed their respective submissions and highlighted the same on 15<sup>th</sup> December 2020 extensively. The Court thanks all counsel immensely for their industry, patient and courtesy extended to the court at the hearing of the matter. and the court has delineated the following issues for determination: -

**i. Whether the applicant has satisfied the requirements for grant of a conservatory order pending the hearing and determination of the Petition.**

**ii. What orders if at all should be granted by the court if the applicant satisfies (i) above.**

#### **DETERMINATION**

40. The Court has carefully considered the pleadings, depositions and exhibits annexed thereto by the parties. And having considered extensive submissions by the parties the court finds as below in respect of the two issues for determination in this interlocutory application dated 30<sup>th</sup> December 2020.

41. The ultimate test in determining whether or not an applicant should be granted conservatory orders in public litigation was set out succinctly by the Supreme Court in the case of ***Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others* [2014] EKLr** as follows:

*“(86) Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”*

42. In determining whether or not the above criteria has been met by the applicant, the court is minded not to unduly delve on the substantive issues for determination upon hearing of the petition on the merits, in this respect the Court defers to the findings by the East African Court of Justice whilst determining an interlocutory application for an interim injunction in the matter of ***Mary Aliviza & Okoth Mondoh vs Ag Kenya & Secretary General of East African Community, Application No. 3 of 2010, EALS 2005-2011*** as follows:

***“At this stage we must of course refrain from making any determination on the merits of the application or any defence to it. A decision on the merits or demerits of the case must await the substantive consideration of the facts and applicable law after full hearing of the Reference.”***

43. The court at the outset finds that the application for joinder of the intended 6<sup>th</sup> respondent was not granted by Nzioki wa Makau J. on 30<sup>th</sup> December 2020 nor did the Judge grant the sought amendment to petition 35 of 2020. The court declines the invitation by counsel for the applicant to find that the 6<sup>th</sup> respondent was impliedly joined to the suit. The court also declines the invitation to deem the proposed amendments to the petition to have been granted in the absence of an express order to that effect by Nzioki Wa Makau J. Therefore, the court finds that the petition as it stands today does not directly deal with the events that happened at the county Assembly on 3<sup>rd</sup> December 2020 long after the petition had been filed

44. On the present application, the law governing the removal of a governor is laid out under Article 181 of the Constitution which sets the threshold for the removal and section 33 of the County Governments Act on procedure of removal.

45. Article 181 of the Constitution provides:

*(1) A county governor may be removed from office on any of the following grounds—*

*(a) gross violation of this Constitution or any other law;*

*(b) where there are serious reasons for believing that the county governor has committed a crime under national or international law;*

*(c) abuse of office or gross misconduct; or*

*(d) physical or mental incapacity to perform the functions of office of county governor.*

*(2) Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds specified in clause (1).*

46. Section 33 of the County Governments Act provides:

*(1) A member of the county assembly may by notice to the speaker, supported by at least a third of all the members, move a motion for the removal of the governor under Article 181 of the Constitution.*

*(2) If a motion under subsection (1) is supported by at least two-thirds of all the members of the county assembly—*

*(3) the speaker of the county assembly shall inform the Speaker of the Senate of that resolution within two days; and*

*(b) the governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section.*

*(3) Within seven days after receiving notice of a resolution from the speaker of the county assembly—*

*(a) the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the governor; and*

*(b) the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.*

*(4) A special committee appointed under subsection (3)(b) shall—*

*(a) investigate the matter; and*

*(b) report to the Senate within ten days on whether it finds the particulars of the allegations against the governor to have been substantiated.*

*(5) The governor shall have the right to appear and be represented before the special committee during its investigations.*

*(6) If the special committee reports that the particulars of any allegation against the governor—*

*(a) have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or*

*(b) have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the impeachment charges.*

*(7) If a majority of all the members of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.*

*(8) If a vote in the Senate fails to result in the removal of the governor, the Speaker of the Senate shall notify the speaker of the concerned county assembly accordingly and the motion by the assembly for the removal of the governor on the same charges may only be re-introduced to the Senate on the expiry of three months from the date of such vote.*

(9) The procedure for the removal of the President on grounds of incapacity under Article 144 of the Constitution shall apply, with necessary modifications, to the removal of a governor.

(10) A vacancy in the office of the governor or deputy governor arising under this section shall be filled in the manner provided for by Article 182 of the Constitution.

47. Article 10 (1) of the Constitution provides that State organs, State officers, public officers and all persons are bound by the national values and principles under section 10 (2) which include *inter alia* patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.

48. Additionally, Article 93 of the Constitution provides that the National Assembly and Senate shall perform their functions in accordance with the Constitution and under Article 94 (4) of the Constitution the Parliament, which comprises the Senate, is to protect the Constitution and promote the democratic governance of the Republic.

49. Consequently, both the County Assembly and the Senate are mandated to ensure that provisions of the Constitution and all relevant legislation are adhered to.

50. The failure by these institutions to abide by the principles of the Constitution warrants the intervention of the Court under Article 159 (2) of the Constitution which provides:

**“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—**

**(e) the purpose and principles of this Constitution shall be protected and promoted.”**

51. However, in determining whether or not it is to intervene on either the threshold or procedure adopted in the removal process, the Court has to appreciate that there is a likelihood of interference with the functions of other state organs. In this regard, it has to take into account the doctrine of separation of powers and determine the objectivity of such interference. There is a plethora of decisions where Courts have pronounced themselves on doctrine of separation with respect to the legislature and the judiciary.

52. The Supreme Court in the Matter of the **Speaker of the Senate & another [2013] eKLR** held:

**Upon considering certain discrepancies in the cases cited, as regards the respective claims to legitimacy by the judicial power and the legislative policy – each of these claims harping on the separation-of-powers concept – we came to the conclusion that it is a debate with no answer; and this Court in addressing actual disputes of urgency, must begin from the terms and intent of the Constitution. Our perception of the separation-of-powers concept must take into account the context, design and purpose of the Constitution; the values and principles enshrined in the Constitution; the vision and ideals reflected in the Constitution...**

*The context and terms of the new Constitution, this Court believes, vests in us the mandate when called upon, to consider and pronounce ourselves upon the legality and propriety of all constitutional processes and functions of State organs. The effect, as we perceive it, is that the Supreme Court’s jurisdiction includes resolving any question touching on the mode of discharge of the legislative mandate.” [Emphasis Added]*

53. The Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** held:

**“It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other’s functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function...” [Emphasis Added]**

54. The Supreme Court in **Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] eKLR** set out the following principles to be applied by the Courts while observing the doctrine of separation of powers:

**“From the course of reasoning emerging from such cases, it is possible to formulate certain principles, as follows:**

**“(a) each arm of Government has an obligation to recognize the independence of other arms of Government;**

**(b) each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate;**

**(c) the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment;**

**(d) for the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case;**

**(e) in the performance of the respective functions, every arm of Government is subject to the law.”**

55. In deference to the bidding decision of the Supreme Court above in respect to the impeachment process, the Court finds that it may interfere with the impeachment process, pending before the County Assembly and the Senate in respect of the substantive threshold and procedure, where there is an actual violation or an impending violation of the Constitution or any other law including the Standing Orders. The court must however trend with utmost caution.

56. In **Anne Mumbi Waiguru v County Assembly of Kirinyaga [2020] Eklr**, the High Court in its Ruling granted the Applicant a conservatory order as her right to fair administrative action would have been violated should the Respondents have proceeded with the impeachment process during the Covid-19 pandemic.

57. In the Justus Kariuki Mate Case (supra), the Supreme Court further held:

***“Interpretation of the Constitution calls for a delicate balance in the respective mandates of the different arms of government...***

*No governmental agency should encumber another to stall the constitutional motions of the other. The best practices from the comparative lesson, signal that the judicial organ must practice the greatest care, in determining the merits of each case.” [Emphasis Mine]*

58. In the Anne Mumbi Waiguru case (supra) the Court further held:

***“Impeachment proceedings are in the nature of a trial by peers. If at the end of the trial the Assembly removes the Applicant, that decision will have to be confirmed by the Senate. In my opinion, the work of the Senate is like that of an appellate court. It will hear the Applicant and review the impeachment proceedings and materials in order to ensure that the constitutional and legal parameters have been met. The issue as to whether the constitutional threshold has been met will be considered by the Senate. The allegation by the Applicant that the impeachment motion has been brought in bad faith will also be addressed by the Senate which is duty-bound to consider the merits of the impeachment. I therefore do not find merit in the Applicant’s argument that the impeachment motion should be stopped because the threshold for impeachment has not been met or that the proceedings have been commenced in bad faith.”***

59. In addition, **High Court in Charity Kaluki Ngilu v County Assembly of Kitui & 2 others [2020] eKLR** held:

*“The Applicant is therefore correct that the respondents have a duty to comply with the Constitution, statutory provisions and the Standing Orders of the Assembly. Nevertheless, it is important to appreciate that the issue of impeachment of a governor is anchored in the Constitution. The organs mandated to drive that process are the county assemblies and the Senate. Although this Court is indeed mandated to intervene in the process where there is alleged denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights, the Court should only engage its powers where there is clear and imminent threat to the Constitution. It is important to note that impeachment is a tool used to oversight the county executive and a county assembly in carrying out its constitutional mandate in debating an impeachment motion.” [Emphasis Mine]*

60. In the Anne Mumbi Waiguru Case, (supra) the Court further held:

*“In my view, I will be contradicting the binding decision of the Supreme Court in the Justus Kariuki Mate case if I venture into determining whether the allegations placed before the Assembly meet the threshold for commencing an impeachment process. The issue of threshold forms the substance of the impeachment motion and the Assembly is best placed to determine it. While I agree with the decision of the Court of Appeal in Martin Nyaga Wambora (supra), I nevertheless hold the view that the supervisory jurisdiction of the High Court on the issue of threshold is best exercised after the fact.” [Emphasis Added]*

61. In the Charity Kaluki Ngilu (supra) case the Court also held:

*“Indeed there is good reason why this Court should be very slow in interfering with an impeachment process. This is because once the Senate has had its say, parties are at liberty to approach the Court on the question of the constitutionality of the impeachment. At this stage the Court is required to consider both the procedural and substantive aspects of the impeachment. The question whether the impeachment met the constitutional threshold is one of the issues to be addressed in such proceedings. It would therefore be proper to approach the Court after the conclusion of the impeachment process by the County Assembly and the Senate.”*

62. In the present case, upon careful regard to the entire exegesis in this ruling above, and whilst refraining from determining the facts of the petition on the merits, the court finds that the applicant has not satisfied the threshold for grant of conservatory orders in public law matters set out by the Supreme Court in the Gatirau Munya Case(supra).

63. Whereas the first criteria set out by the Supreme court of inherent merit of the case is discernible, the court entertains sufficient doubts to warrant the applicant to await full consideration of all facts and law applicable after the senate has concluded its mandated process. Public interest and the proportionate magnitudes, and priority levels attributable to the present case militate against grant of interim orders before conclusion of the impeachment process by the senate.

64. Accordingly, the application dated 30<sup>th</sup> November 2020 is dismissed in its entirety. Costs in the cause.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF DECEMBER 2020**

**NDERI NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of 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> March 2020, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MATHEWS N. NDUMA**

**JUDGE**

**APPEARANCES**

**Mr. Kinyanjui Harrison and Mr. Kwanga for Petitioner**

**Mr. Osundwa for 1st Respondent**

**Mr. Kokebe for 2<sup>nd</sup> Respondent**

**Mr. Milimo with Mr. Ngila for 3<sup>rd</sup> Respondent**

**Mr. Ashioya for 4<sup>th</sup> Respondent**

**Mr. Ndegwa Njiru with Mr. Ndegwa Mwangi and Mr. Okatch for 6<sup>th</sup> Respondent.**