



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 92 OF 2018**

**IN THE MATTER OF AN APPLICATION UNDER ARTICLE 165 (3)(a), (b), (4)**

**AND**

**IN THE MATTER OF THE CONTRAVENTION AND THREATENED CONTRAVENTION OF ARTICLE 2, 3, 10 (2)(a), (c), 27 (1), (2), 28, 41 (1), 47, 50, 73 AND 232 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA IN SO FAR AS THE CONSTITUTION HAS BEEN AND STANDS TO BE VIOLATED**

**AND**

**IN THE MATTER OF THE CHALLENGE OF THE UNLAWFUL DISMISSAL OF THE PETITIONER FROM THE EMPLOYMENT OF THE RESPONDENT**

**AND**

**IN THE MATTER OF A CONSTITUTIONAL PETITION BY**

**HON BEATRICE KEDEVERESIA ELACHI.....PETITIONER/APPLICANT**

**VERSUS**

**NAIROBI CITY COUNTY ASSEMBLY SERVICE BOARD....1<sup>ST</sup> RESPONDENT**

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

**JUDGMENT**

The petitioner was until 7<sup>th</sup> September 2018, the Speaker of the County Assembly, Nairobi County having been appointed to the position on 10<sup>th</sup> September 2017. On 6<sup>th</sup> September 2018 while attending a Devolution Seminar at Malindi a motion to dismiss the Petitioner was passed thereby resulting in her impeachment. Consequently, she filed the Applications dated 7<sup>th</sup> September 2018 and 6<sup>th</sup> September 2018 respectively and a subsequent Petition.

The Petitioner seeks the following orders in her Petition:

1. A declaration do issue, that the 2<sup>nd</sup> Respondent Nairobi City County Assembly sitting as a Whole House Committee in purporting to impeach the Petitioner herein of her position as the Speaker of Nairobi City County Assembly in the afternoon of 6<sup>th</sup> September 2018 constitutes a breach of the Petitioner's Constitutional rights under Article 27(1), 27(2), 27(3), 28, 41, 47(1), and 50 of the Constitution of Kenya.

2. A declaration do issue, that by its purported Committee of the Whole House, convened in the afternoon of September 6<sup>th</sup> 2018, the 2nd Respondent has no power to constitute offices in the Nairobi City County Assembly Service, or to appoint any person in lieu of the Petitioner absent due process (sic).

3. A declaration do issue, that the purported Committee of the Whole House of the 2<sup>nd</sup> Respondent sitting on the afternoon of 6<sup>th</sup> September 2018 had no powers and/or jurisdiction to impeach the Petitioner as Speaker of the Nairobi City County Assembly absent due process (sic) accorded to her.
4. A declaration that the purported appointment of any party as Acting Speaker in lieu of the Petitioner herein, by either the purported Committee of the Whole House of the 2<sup>nd</sup> Respondent and/or the County Secretary of the Nairobi City County, is unconstitutional, illegal, null and void and is a violation of the law.
5. An order quashing the said purported appointment of any party as Acting Speaker in lieu of the Petitioner herein in consequence of the proceedings of purported Committee of the Whole House of the 2<sup>nd</sup> Respondent sitting on the afternoon of 6<sup>th</sup> September 2018.
6. An Order of injunction and prohibition do issue as against the 2<sup>nd</sup> Respondent, restraining its members and/or any person under its behest from entertaining and/or debating any Motion to remove the Petitioner through a process in violation of fair administration and without due process accorded to the Petitioner and in breach of the right to a hearing vested in the Petitioner.
7. An order do forthwith issue, quashing and nullifying the said decision of the 2<sup>nd</sup> Respondent, Nairobi City County Assembly sitting as a Whole House Committee in purporting to impeach the Petitioner herein of her position as the Speaker of Nairobi City County Assembly made on the afternoon of 6<sup>th</sup> September 2018.
8. An order of Judicial Review, in the nature of Certiorari do issue to forthwith bring to this Court the decision of the 2<sup>nd</sup> Respondent, dated 6<sup>th</sup> September 2018 impeaching the Petitioner as the Speaker, Nairobi City County Assembly, and the same be quashed forthwith.
9. An order of Judicial Review, in the nature of Prohibition, do issue forthwith to prohibit the 1<sup>st</sup> and 2<sup>nd</sup> Respondent either by themselves, agents, servants and/or employees carrying out a process to remove the Petitioner without complying with the law, the Constitution, due process, according the Petitioner a hearing and without following the 2<sup>nd</sup> Respondent's applicable Standing orders.
10. An order do forthwith issue, quashing and nullifying the said decision of the 2<sup>nd</sup> Respondent Nairobi City County Assembly sitting as a Whole House Committee in purporting to amend the Standing Orders of the Nairobi City County Assembly made on the afternoon of 6<sup>th</sup> September 2018.
11. The 1<sup>st</sup> Respondent be restrained from interfering with the terms of employment of the Petitioner as the Speaker of Nairobi City County Assembly in consequence of the unlawful act of purported impeachment of the Petitioner on the afternoon of 6<sup>th</sup> September 2018.
12. Costs of this Claim.
13. Any other relief amenable in the circumstances.

It is the Petitioner's averment that since her appointment as the Speaker of the

Nairobi City County Assembly, she has diligently executed the mandate of the 2<sup>nd</sup> Respondent and no complaint has ever been made against her by the EACC. Nevertheless, under Standing Order No. 72 a party facing any adverse action before the 2<sup>nd</sup> Respondent must be accorded a fair hearing and an opportunity to be heard thus the Petitioner was entitled to a fair hearing as envisioned in Article 47 of the Constitution.

Vide a letter dated 6<sup>th</sup> September 2018, the Petitioner was summoned by the 2<sup>nd</sup> Respondent to appear before the Committee of the Whole House that very day at 3.10 pm. The letter was delivered to the Petitioner's chamber at 1:30 pm. However, it was not possible for the Petitioner to appear before the Committee because she was attending the County Assemblies Forum in Malindi which was to take place on 4<sup>th</sup> September 2018, a fact which was within the knowledge of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. She could not secure an emergency flight from Malindi to Nairobi to honour the summons and defend herself in respect of the impeachment in view of the short notice.. Unfortunately, a vote to impeach her was made during the proceedings depriving her of the opportunity to defend herself.

The Petitioner posits that her rights have been arbitrarily violated without any lawful justification. She avers that her impeachment violates Article 232(1)(g) because it is her view that it was for political expediency and was done in a manner that was contrary to the law. She further avers that Article 259(1) was violated because the procedure for the impeachment did not comply with the basic tenets of fairness.

The Petitioner avers that Standing Order No. 65(9) stipulates and contemplates that an ad hoc committee will be constituted to investigate the claims made against the speaker before the full committee can pass such verdict of impeachment. By impeaching her, the 2<sup>nd</sup> Respondent purported to amend the Order with the Order Paper of 6<sup>th</sup> September 2018. It is her position that any Order Paper for consideration before the House must be circulated at least 12 hours prior to the sitting of the county assembly. In the present case the Order Paper was circulated during the session.

The Petitioner sought the following prayers in her Application:

1. That the application be certified as urgent and heard ex parte in the first instance owing to its extreme and demonstrated urgency.

2. That the court be pleased to accept in the first instance the inception of these constitutional proceedings by way of this Motion as the originating process under Article 22(3)(b) of the Constitution owing to extreme urgency and emergency rising and thereafter regularization of the proceedings be made.

3. Pending the hearing and determination of this Application, a conservatory order do issue, prohibiting the Respondents, their members, or any person acting under their behest and direction, from removing the Petitioner as the Nairobi City County Speaker, appointing any new nominee for approval by the Nairobi City County Assembly for appointment to the office of the Speaker, Nairobi City County Assembly whether in a temporary or acting capacity.

4. Pending the determination of the Petition herein, a conservatory order do issue, prohibiting the Respondents, their members, or any person acting under their behest and direction, from removing the Petitioner as the Nairobi City County Speaker, appointing any new nominee for approval by the Nairobi City County Assembly for appointment to the office of the Speaker, Nairobi City County Assembly whether in a temporary or acting capacity.

5. Pending the hearing and determination of this Application, a conservatory order do issue, prohibiting the Respondents, their members, or any person acting under their behest and direction, from interfering with the execution of the Petitioner's current duties as the Nairobi City County Speaker, or otherwise howsoever debating, deliberating upon or removing from office the Petitioner as the office of the Speaker, Nairobi City County Assembly

6. Pending the hearing and determination of this Petition, a Conservatory Order do issue, prohibiting the Respondents, their members, or any person acting under their behest and direction, from interfering with the execution of the Petitioner's current duties as the Nairobi City County Speaker, or otherwise howsoever debating, deliberating upon or removing from office the Petitioner as the office of the Speaker, Nairobi City County Assembly.

7. Any purported decision to impeach the Petitioner as such Nairobi City County Speaker executed by the 2nd Respondent on 6<sup>th</sup> September 2018 be stayed pending the determination of the Petition herein.

8. The costs of this Motion be to the Petitioner/Applicant in any event.

The grounds on which the Application is based, are similar to the averments made in the Petition. As such, the same will not be replicated. Further, the Petitioner avers that failure to issue the restraining conservatory order, the Petition will be an academic exercise and the proceedings rendered nugatory yet the Petitioner sought the Court's intervention timeously. Moreover she posits, the Respondent will suffer no prejudice if the Orders are issued. Rather, the Petitioner will have no other recourse is the Orders sought are not granted.

The Application is supported by the Affidavit of James Macharia Mwangi, the Petitioner's Personal Assistant, sworn on 6<sup>th</sup> September 2018. The Affiant avers that the office of the Petitioner was served at 1:30 pm on 6<sup>th</sup> September 2018, with an even dated letter summoning her to appear before the Assembly at 3:10 pm for impeachment proceedings.

The 2<sup>nd</sup> Respondent filed its Notice of Preliminary Objection on 10<sup>th</sup> September 2018 while the 1<sup>st</sup> Respondent filed another notice of preliminary objection on 11<sup>th</sup> September 2018. They both objected to the Application challenging the Court's jurisdiction to hear the Application and the competency of the said Application. Parties made oral arguments and the Court delivered a Ruling on 14<sup>th</sup> September 2018 wherein the preliminary objection was dismissed.

The 2<sup>nd</sup> Respondent opposed the Application dated 6<sup>th</sup> September 2018 vide the Replying Affidavit of Romeo Gavin Castro sworn on 10<sup>th</sup> September 2018.

The 2<sup>nd</sup> Respondent avers that the 2<sup>nd</sup> Schedule of the County Government Act outlines the matters which county governments are permitted to provide for in their standing orders. Consequently, the Nairobi City County formulated its Standing Orders which were adopted during the 1<sup>st</sup> Session of the 1<sup>st</sup> Assembly. However, the standing orders were amended to make them compliant with the Act and the Constitution.

Castro deposes that the Petitioner underwent the process enumerated in Standing Orders 5 -13 and thereafter sworn in as the Speaker of the 2<sup>nd</sup> Respondent. He deposes that a Speaker of the National Assembly can indeed be removed from office through the process provided for in the County Assembly's Standing Orders.

Castro deposes that on 4<sup>th</sup> September 2018, the Petitioner's office received a request for a special sitting of the County Assembly by the leader of the minority party, Hon. Elias Otieno and pursuant to Standing Order 30, a motion for impeachment of the Petitioner was annexed. The motion was made by Hon. Anthony Kiragu Karanja and was supported by signatures of 112 members of the County Assembly. The Petitioner approved the request for the special sitting, to be held on 6<sup>th</sup> September 2018 at 2:30 pm. Thereafter, the Petitioner placed a notice regarding the sitting, in the Kenya gazette special issue number 9024.

On 5<sup>th</sup> September 2018, a formal notice of motion by Hon. Anthony Kiragu Karanja for removal of the Petitioner from office was submitted to the office of the clerk. The motion was supported by signatures of 112 members of the 2<sup>nd</sup> Respondent. Documentary evidence in support of the grounds of the motion were annexed. The grounds were: conflict of interest, undermining the authority of the 1<sup>st</sup> Respondent, abuse of office or gross misconduct and failure to show leadership. The motion, its annexures and a letter dated 5<sup>th</sup> September 2018 inviting the Petitioner to appear before the Assembly plenary, were duly served upon the Petitioner that very day.

He deposes that on 6<sup>th</sup> September 2018, the County Assembly Business Committee held a meeting at 10:00 am to determine, approve and

prioritize the business to be discussed in the special sitting. A resolution was passed and the office of the clerk drafted the order paper and the same was approved by the chairperson of the committee. Pursuant to the agendas set out in the paper, a letter dated 6<sup>th</sup> September 2018 was served upon the Petitioner requiring her to appear for the sitting.

The special meeting was held at 2:30 pm and all the business outlined in the order paper dispensed with. The motion for the Petitioner's impeachment was voted for and approved, with 103 members voting for her removal.

It is the deponent's position that the entire process met the legislative and constitutional expectations, that the Petitioner was accorded due process as she was given two chances to explain herself before the Assembly plenary, as contemplated under Article 178 (3) of the Constitution, section 11 of the County Government Act and Standing Order 65 of the 2<sup>nd</sup> Respondent. That the Petitioner refused to honour the invitations.

The 2<sup>nd</sup> Respondent contends that the Petitioner did not attend the devolution meeting held in Malindi between 4<sup>th</sup> and 6<sup>th</sup> September 2018. It avers that on 4<sup>th</sup> September 2018, the Petitioner approved the request for a special sitting and thereafter gazetted it on 5<sup>th</sup> September 2018.

The 2<sup>nd</sup> Respondent further contends that it is not in the interest of the public or that of the Petitioner, to fight to be retained in her position. It is their assertion that the issuance of the conservatory orders offended the doctrine of separation of powers. The 2<sup>nd</sup> Respondent further posits that an Application for a conservatory order under the Constitution should be based on a plaint, petition or judicial review in the least, however defective they may be. Accordingly, such an Application totally uproots the established principles or precedents requiring courts to exercise their discretion devoid of whim and caprice.

The Petitioner filed a rejoinder to the 2<sup>nd</sup> Respondent's averments vide her Supplementary Affidavit sworn on 21<sup>st</sup> September 2018. She confirmed the veracity of the Affidavit of Mr. James Macharia and deposes that he had the authority and consent to depone the same on her behalf. She also challenged the 2<sup>nd</sup> Respondent's assertions that due process was followed and posits that the affiant was biased as he had presided over the impugned decision.

The Petitioner avers that the Order Paper referred to in the 2<sup>nd</sup> Respondent's Affidavit is the one dated 5<sup>th</sup> September 2018 and not 6<sup>th</sup> September 2018. However, the Assembly's sitting was on 6<sup>th</sup> September 2018 yet the gazette notice referred to by the affiant is for 5<sup>th</sup> September 2018. No supplementary order was done to correct the error. It is her position that once a special sitting was gazetted, only the contents of the Order Paper would be debated.

The Petitioner further avers that her impeachment was not referenced in the Order Paper and neither was the time specified. Since the time frame for normal business of the Assembly was from 2:30 pm to 5:00 pm, the notice needed to specify time where it fell outside the ordinary time.

It is the Petitioner's case she received an invite to attend the Malindi Seminar from Hon. Eric W. Mwangi, the Secretary General, County Assemblies Forum. She then wrote a memo to the Clerk of the 2<sup>nd</sup> Respondent, confirming her attendance. She maintains that she was in Malindi at all times material to this Petition. She points out that no evidence was tendered to prove that she had been notified of her impeachment before she received an invite. She also notes that no evidence was tendered by the 2<sup>nd</sup> Respondent that her attendance to the seminar was stopped, upon receipt of her memo.

It is her position that the summons to attend the special meeting at 3:10 pm was served at her office at 1:30 pm on 6<sup>th</sup> September 2018 yet it was known that she had attended the seminar. She maintains that it was impossible for her to secure an emergency flight back for the special sitting.

It is her position that she was denied a right to fair hearing because she was absent at the special sitting and had not been given ample time to organize her defence. She further posits that it was her legitimate expectation that she would be accorded a fair hearing because Standing Order 65(9) contemplated the constitution of an *ad hoc* committee to investigate the claims made against her, before an impeachment verdict could be passed by the whole committee of the full house. Further, no inquiry was made regarding the claims made against the Petitioner.

The Petitioner avers that no evidence has been adduced to demonstrate that electronic voting took place and there was no explanation why Standing Order 76 was not complied with.

It is her position that since it is the 1<sup>st</sup> and not the 2<sup>nd</sup> Respondent that employed her, her removal from office should follow due process of the law.

The 1<sup>st</sup> Respondent opposed the Application and the Petition vide the Replying Affidavit of Nancy Mutai sworn on 25<sup>th</sup> September 2018. In the Affidavit, the 1<sup>st</sup> Respondent avers that this Court does not have jurisdiction to entertain the Application and the Petition because the issues raised therein are non-justiciable having been constitutionally committed to a political arm of the government and that the petition offends the doctrine of separation of powers. Further, that courts have no jurisdiction to supervise, injunct or interfere with the internal workings, rules, procedures and conventions of legislative bodies.

The 1<sup>st</sup> Respondent posits that granting the interim reliefs sought in the Application and the Petition will establish a dangerous judicial precedent tantamount to a judicial repeal of the constitutional provisions relating to impeachment, and undermine the ordered functioning of the Nairobi City County Assembly.

It is the 1<sup>st</sup> Respondent's averment that the proceedings herein are fatally incompetent and incurably defective having been filed by a person

who is legally precluded from meddling in political controversies and lacks an appreciable interest in the matter.

The 1<sup>st</sup> Respondent's averments regarding the events that led to the Petitioner's impeachment echo and reiterate the 2<sup>nd</sup> Respondent's account of the same. Additionally, the 1<sup>st</sup> Respondent avers that on 5<sup>th</sup> September 2018, Hon. Moses Ogeto, with the support of two other members of the County Assembly, proposed that Standing Order 65 be deleted in its entirety and be replaced with provisions of section 11 of the County Government Act. A County Assembly Procedure and Rules Committee was not yet constituted so the request was tabled before the Select Committee on Assembly Business.

The 1<sup>st</sup> Respondent maintained that due process to impeach the Petitioner. It is their position that the Application should be dismissed because the reliefs sought are in the nature of final orders, the Petitioner has concealed material facts and that the Application together with the Petition do not disclose any cause of action on the Respondent's part.

The Petitioner's allegations that she lacked knowledge of the special sitting, that she attended the Devolution Seminar on the date of the special sitting, that there was an unlawful amendment of Standing Order 65 and that she was not notified of the reasons for the removal from office; are false and unfounded in law and in fact.

It is the 1<sup>st</sup> Respondent position that the Petitioner has not met the threshold for the grant of JR orders of certiorari and prohibition. The 1<sup>st</sup> respondent maintains that the impugned decision of the members of the Assembly to impeach the Petitioner is not tainted with any illegality, procedural impropriety or irrationality.

### **Submissions by the Parties**

In her submissions dated 25<sup>th</sup> September 2018, the Petitioner submits that the letter of 5<sup>th</sup> September 2018 purported to have been served upon her by the 2<sup>nd</sup> Respondent has not been adduced as an exhibit and the 2<sup>nd</sup> Respondent's reference to exhibits that have not been adduced or marked as annexures is tantamount to an abuse of the Court process.

The Petitioner has called upon this Court to take judicial notice of the fact that Kilifi is 5 hours away on-air travel from Nairobi, according to air transfer times, at the very fastest speed of connecting flights.

The Petitioner submits that this court has the jurisdiction to hear and determine the Petition. She argues that the Respondents failed to pin point a specific ouster clause on the Constitution that precludes the jurisdiction of this Court. Further, Articles 22(1) and 165(3)(b) of the Constitution accords this Court the jurisdiction on matters involving an allegation of violation of the Constitution and fundamental rights and freedoms.

She relies on the case of *Martin Nyaga Wambora vs. County Assembly of Embu & 37 Others [2015] eKLR* in submitting that the Court has jurisdiction under Article 165 (3)(d)(iii) of the Constitution to interpret whether the impeachment process met the Constitutional threshold. In the petition the Court held as follows:

*“Article 165(3)(d)(iii) of the Constitution gives the High Court jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of any matter relating to constitutional powers or state organs in respect of County Governments and any matter relating to the constitutional levels relating to the constitutional relationships between the levels of government.”*

The Petitioner submits she had the legitimate expectation that she will be accorded a fair hearing since the procedure for removal of a Speaker was contemplated in the standing orders; which procedure was not followed. She further submits that the 2<sup>nd</sup> Respondent infringed on her right under Article 47 by denying her the opportunity to be heard. She relies on the case of *Walid Khalid vs. County Assembly of Mombasa & 2 Others [2018] eKLR* where the Court held that any person in authority who contemplates removing a public officer from office must follow the tenets of a fair process.

It is the Petitioner's position that her right under Article 50 of the Constitution was violated when she was denied a chance to adequately respond to the allegations made against her or prepare her defence. To buttress this position, she has relied on the case of *Stephen Nendela vs. County Assembly of Bungoma & 4 Others [2014] eKLR*.

The Petitioner submits that Article 10 (2) (b) was violated because the public did not participate in the impeachment process. No evidence was adduced to prove that there had been public participation. She relies on the case of *Martin Nyaga Wambora vs. County Assembly of Embu [SUPRA]* where the Court of Appeal stated:

*“... While I am mindful of the fact that what was before the County Assembly was not a legislative process, the removal of the Governor was not just any other business of the County Assembly, but a matter in which the electorate in the County Assembly were deeply interested, the Governor having been directly elected by the electorate. The matter was weighty and of great interest to the people of Embu whose only opportunity to participate effectively in the removal process, was from the time of communication of the motion to the Speaker of the County Assembly to the time the motion was debated in the County Assembly.”*

The Petitioner submits that a public officer cannot be removed from office without due process being followed. As such Article 236 (b) of the Constitution was violated.

It is the Petitioner's submissions that the 1<sup>st</sup> Respondent is estopped from raising issues previously raised in its preliminary objection since the same was fully canvassed and thereafter dismissed. It is her position that this Court's ruling on the matter renders the objection *res*

*judicata*. She relies on the case of **Silas Make Otuke vs. Attorney General & 3 Others [2014] eKLR** and which forms her submissions. In this case, the Court relied on the case by the Supreme Court of India: **Daryao & Others vs. The State of UP and Others [1961] 1SCR 574, 582-3**; to hold that it is in the interest of the public at large that a finality should attach to be binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation.

The Petitioner is of the opinion that the 2<sup>nd</sup> Respondent and its agents owed her the duty of care to protect her dignity and integrity as envisaged in Article 28 of the Constitution. She relies on the case of **A.N.N. vs. Attorney General [2013] eKLR** where the Court held that subjecting an individual to ridicule amounted to violation of the right under Article 28. The Petitioner submits that the 2<sup>nd</sup> Respondent acted in violation of her right to fair labour practices as encapsulated in Article 41(1) of the Constitution by purporting to impeach and constructively dismiss her from her employ. She further submits that by being discriminated against and denied protection of the law, her rights under Article 27(1) have been violated.

The Petitioner posits that in the absence of a lawful declaration of the vacancy of her position as required under Article 231(1)(g), the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are estopped from declaring her position vacant.

The Petitioner submits that Standing Orders 65(9) and 65(11) envisage time being accorded to the *ad hoc* committee and the Speaker to inquire into claims giving rise to impeachment proceedings. Amendment of the Standing Orders, violated Standing Order 247(2)(c). It is her position that her impeachment was tantamount to amending Standing Orders. Further, in denying members the opportunity to interrogate the claims made against the Petitioner, the 2<sup>nd</sup> Respondent deprived her of fairness thereby violating Part XXVII of the Standing Orders.

The 1<sup>st</sup> Respondent has submitted to this Court vide its written submissions dated 25<sup>th</sup> September 2018. The 1<sup>st</sup> Respondent begins by submitting that the Petitioner has not adduced evidence proving her attendance of the Seminar. It is its submission that the Petitioner's assertion that she had no knowledge of the impeachment is false. It is the 1<sup>st</sup> respondent's position that the petitioner had sufficient prior notice of the proceedings and was granted reasonable opportunity to respond to the allegations.

The 1<sup>st</sup> Respondent then submits that this Court lack the jurisdiction to entertain the instant proceedings because the issues raised are non-justiciable having been constitutionally committed to a political arm of the government for the reasons canvassed in the 1<sup>st</sup> and 2 Respondents' Replying Affidavits. The 1<sup>st</sup> Respondent has relied on the case of **Justus Kariuki Mate & Another vs. Martin Nyaga Wambora & Another, Supreme Court Petition No. 32 of 2014** where it was held that courts should respect limits on judicial authority and the Constitution's design of entrusting certain matters to other organs of the government. Further, they rely on the High Court decision of **R vs. National Assembly of Privileges & 2 Others ex parte Ababu Namwamba [2016] eKLR** where the court declined to assume jurisdiction and interfere with the internal workings of the National Assembly in suspending the Parliamentary Accounts Committee. The 1<sup>st</sup> Respondent also relies on the case of **Trusted Society of Human Rights vs. the Attorney General and Others Petition No. 229 of 2012** where the court was of the opinion that the doctrine of separation of powers mandates that where a matter is textually committed to one of the co-ordinate arms of government, the courts must defer the decisions made by such arms of the government. Lastly, they rely on the case of **Patrick Ouma Onyango & 12 Others vs. the Attorney General & 2 Others [2008] KLR** where the High Court held that processes of a political nature are inherently non-justiciable under the political question doctrine.

It is the 1<sup>st</sup> Respondent's submissions that the removal of the Petitioner from office was in accordance with the procedures prescribed in the Constitution, the County Government Act and the County Assembly's Standing Orders. It is their position that Standing Order 65 was amended in accordance with Standing Order 247 in an attempt to make it compliant with section 11 of the County Government Act. Further, the Petitioner's impeachment was endorsed by 85% of the members, she was sufficiently informed of the allegations, given time to respond but failed to do so thereby resulting in her ultimate impeachment by 91% of the members.

The 1<sup>st</sup> Respondent submits that the Court should not grant the orders sought in the proceedings in light of public interest, prudence, the need for comity and orderly functioning of the County Government of Nairobi. They invite this Court to consider the pivotal position occupied by the Speaker and the political nature of her office, the overwhelming vote in support of her impeachment and the likelihood of plunging the County Assembly into a political and administrative crisis should the orders be granted.

They further submit that granting the reliefs sought will amount to a judicial repeal of the express provisions of sections 10 and 11 of the County Assemblies Powers and Privileges Act. It is their assertion that parliamentary immunity and privilege aids them in carrying out their functions effectively and without them, they will be hindered in performing their duties. They posit that this Court's supervisory jurisdiction is limited to challenging the constitutionality of the 2<sup>nd</sup> Respondent's decisions.

It is the 1<sup>st</sup> Respondent's submissions that these proceedings are fatally incompetent and incurably defective having been filed on behalf of the Petitioner by a civil servant legally precluded from meddling in political controversies under the provisions of sections 4(4) and 5(2) of the County Assemblies Services Act, 2017.

Lastly, the 1<sup>st</sup> Respondent submits that the Petitioner has not met the threshold required for the granting of the judicial review orders because the impugned decision was not tainted by an illegality, procedural impropriety or irrationality.

The 2<sup>nd</sup> Respondent filed its submissions dated 27<sup>th</sup> September 2018 wherein they reiterate their submissions regarding their preliminary objection as well as the 1<sup>st</sup> Respondent's submissions regarding the Petition and instant Application. In submitting that the orders sought were irregular, they relied on the case of **Gladys Boss Shollei vs. Judicial Service Commission [2013] eKLR** where the Court was of the opinion that reinstatement of an employee was a substantive remedy which should be issued upon the full hearing of both parties.

The 2<sup>nd</sup> Respondent submits that the impeachment of the Petitioner followed due process and met the constitutional and legislative threshold set out in Article 178 (3) of the Constitution, Standing Order 65 of the County Assembly Standing Orders and the 2<sup>nd</sup> Schedule of the County

Governments Act which is instructive that the process of the Speaker must be specifically provided for under the County Assembly Standing Orders. They rely on the case of **Republic vs. Clerk County Assembly of Baringo ex parte William Kassait Kamket [2015] eKLR** where the Court held that:

*“The County Governments Act and various Standing Orders of County Assemblies have explicit procedures to be followed in the event the Assembly intends to remove the Speaker.”*

The 2<sup>nd</sup> Respondent submits that the Application is defective, bad in law and cannot be veiled to have qualified under Article 22 (3) (b) of the Constitution. In its view, the certification of the motion was wrong, unlawful and a departure from the spirit and intent of the said Article. Such a motion must be based on a petition, plaint or judicial review however defective they may be. It relies on the case of **Michael Osundwa Sakwa vs. Chief Justice and President of the Supreme Court of Kenya & Another [2016] eKLR** where the Court was of the view that the spirit of Article 22 (3) (b) under which proceedings may even be commenced on the basis of informal documentation is not to say that the Court ought to encourage and condone sloppy and carelessly drafted petitions. In the 2<sup>nd</sup> Respondent’s view, these grounds alone are sufficient to strike out the Application and consequent orders.

The 2<sup>nd</sup> Respondent submits that the Court can interfere with a legitimate legislative process but must exercise restraint and only intervene in appropriate instances based on a specific circumstance of each case as held in the case of **Coalition for Reform and Democracy (CORD) & 2 Others Vs. Republic of Kenya & 10 Others [2015] eKLR**. They further rely on the case of **Speaker of the Senate & Another Vs. Attorney General & 4 Others [2013] eKLR** where the Court held that:

*“It makes sense that the scope for the Court’s intervention in the course of running legislative process, should be left to the discretion of the Court exercised on the basis of the exigency of each case. The relevant considerations may be factors such as; the likelihood of the resulting statute being valid or invalid; the harm that may be occasioned by an invalid statute; the prospects of securing remedy, where invalidity is the outcome; the risk that may attend a possible violation of the Constitution.”*

The 2<sup>nd</sup> Respondent urges this Court to vacate the conservatory orders and the Application struck out. They submit that the presence of the Petitioner in the Assembly will cause constant conflict which will then paralyze the County’s business. The 2<sup>nd</sup> Respondent is of the view that should the Petitioner proceed with the Petition and the Court finds that there was a violation of her rights, the only reliefs available to her are in the Employment Act.

The 2<sup>nd</sup> Respondent submits that the Petitioner has not made out a *prima facie* case and relies on the case of **Gladys Boss Shollei vs. Judicial Service Commission [2013] eKLR** which set out the requirements for granting interim orders. The 2<sup>nd</sup> Respondent submits that there are various ways in which the Petitioner could have responded to the allegations in the motion for removal. They further submit that compensation by way of damages will be sufficient where the Court arrives at a finding that the Petitioner’s employment rights were violated. This is because, reinstating the Petitioner to her former position will render the office non-functional and any orders preventing the 2<sup>nd</sup> Respondent from filling the office will be contrary to Article 178 of the Constitution. They rely on the case of **Gladys Boss Shollei vs. Judicial Service Commission [SUPRA]**.

#### **Determination**

From the pleadings filed by the parties herein, the evidence adduced in support thereof and the submissions made, the following are the issues for determination –

1. Whether the Court has the jurisdiction to hear and determine the matter before it.
2. Whether the proceedings are fatally and incurably defective.
3. Whether the Petitioner’s constitutional rights were violated by the respondents
4. Whether the Petitioner is entitled to the Orders sought.

#### **Whether this Court has the jurisdiction to hear and determine the matter before it**

This court will first determine the question of jurisdiction because as it was rightly observed by Nyarangi JA in the case of **Owners of Motor Vessels ‘Lillians’ Vs Caltex Oil Ltd (1989) eKLR**:

*“...Jurisdiction is everything. Without it a Court has no power to make one more step.”*

This Court is a court established under section 4(1) of the Employment and Labour Relations Court Act pursuant to Article 162(2) of the Constitution, and has the same status as the High Court. Under Article 165(3)(b), the High Court has the jurisdiction to determine whether the question of a right or fundamental freedom has been denied, violated, infringed or threatened. Article 165(5) however restricts the jurisdiction of the High Court as set out under Article 165(3) where such matters fall within the jurisdiction of this court or the Environment and Land Court. Thus where a question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened in relation to employment and labour relations, this court has jurisdiction. In the case of **United States International University (USIU) v Attorney General [2012] eKLR**, Majanja J held:

*“Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in section 12 of the Industrial Court Act, 2011 or to interpret the Constitution would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court.”*

However, this Court takes notice of the fact that the matter before it is not ordinary in nature as it regards an interrogation into the decision of another body of the government deemed to be independent and whose members enjoy parliamentary privilege and immunity. Going hand in hand with the doctrine of separation of powers is the doctrine of checks and balances by which the various arms of the government interrogate the operations of the other arms with the aim of ensuring that those organs operate within the ambit of the Constitution and the law. Consequently, judicial authority must be exercised cautiously, judiciously and on a case by case basis as was held in the case of ***Coalition for Reform and Democracy (CORD) & 2 Others Vs. Republic of Kenya & 10 [SUPRA]***.

I thus find that this Court has the jurisdiction to hear this matter as it involves an alleged gross violation of the Constitution and the Petitioner’s rights to employment as a Speaker of the County Assembly of Nairobi. The Court cannot then turn a blind eye to these allegations while hiding under the justification of the doctrine of the separation of powers. The Petitioner has moved this Court vide the relevant constitutional provisions and in particular Article 22 which grants such an individual the power to move this Court where they claim their right or fundamental freedom has been infringed upon or is threatened. The violations in question go to the root of Article 50(2) of the Constitution which requires an individual to be given a fair hearing and Article 47 which provides for fair administrative action. Both rights are non-derogable. As such, this Court in exercising its judicial authority must only and intends to confine its jurisdiction to interrogating the Respondents’ procedures and operations to the extent of their purported infringement of the Petitioner’s rights vis-à-vis its constitutional and legislative mandate. This does not translate to a judicial repeal in my view.

Nevertheless, the issue of jurisdiction was settled by Justice Radido when the Respondents moved this Court to make a determination on the competency of the Application and its jurisdiction to hear this matter and as such, the same is settled. I therefore need not interrogate the issue any further as the decision of Radido J. is still holding and has not been contested.

### **Whether the proceedings are incompetent and incurably defective**

#### **THE APPLICATION DATED 6<sup>TH</sup> SEPTEMBER 2018**

The question of competency, legality and validity of the petitioner’s application was the subject of the Ruling of Radido J. delivered on 14<sup>th</sup> September 2018 in these proceedings. The Respondents objected to the competency of the Application and prayed that the same be dismissed. However, the learned Justice was of the view that issues raised in the preliminary objection should be addressed during hearing of the Petitioner’s Application on the merits and not through the avenue of preliminary objection.

The Respondents have submitted that the Application before this court is fatally defective and incompetent because the affiant of the Petitioner’s Supporting Affidavit is legally precluded from meddling into controversies and lacks the appreciable interest in the matter. In particular, the 1<sup>st</sup> Respondent submitted that the proceedings were incompetent because they were filed a civil servant legally precluded from meddling in disputes of a nature like the dispute before this court under the provisions of sections 4 (4) and 5(2)(b) of the County Assembly Services Act. The section 4 (4) reads as follows:

*“Every member of a county assembly shall respect the non-partisan and apolitical character of the Service and shall not seek to influence employees of the Service in the discharge of their functions.”*

Similarly, section 5(2)(b) of the Act provides as follows:

*“In addition to the national values and principles of governance set out in Article 10 of the Constitution and the values and principles of public service set out in Article 232(1) of the Constitution, the Service shall uphold ... the provision of non-partisan and impartial advice and services to the county assembly, its committees and its members;”*

My understanding of the provisions is that section 4 precludes the members of the County Assembly from influencing the employees of the 1<sup>st</sup> Respondent in discharging their functions while section 5 requires the 1<sup>st</sup> Respondent to provide independent advice and services. In my view, the deposition of the impugned Affidavit by the Petitioner’s personal assistant is not tantamount to influencing his performance or being partisan in terms of Section 4 and 5 of the County Assembly Services Act. Further, the same does not hinder the 1<sup>st</sup> Respondent from providing independent advice and services. In my understanding, the duty of a personal assistant is to provide services that relieve his employer from the stress of tasks that are associated with managing one’s personal and business life. Further, the circumstances that led to the Affiant’s deposition of the impugned Affidavit should be considered.

The Petitioner was allegedly away on official duty in Malindi and was not in a position to swear the disputed Affidavit. The invitation to attend the conference and the approval of her attendance were annexed to the Application. Although she did not adduce her air ticket as evidence of her actual attendance to the conference despite the claims by the Respondents that she never attended the Seminar and she used the seminar as an excuse to evade the impeachment proceedings against her, the respondent did not submit any evidence to prove that she was not at Malindi for the conference.

Further, in her Supplementary Affidavit, the Petitioner deposed that she had authorized and consented to having the Affidavit sworn on her behalf. Under Rule 10(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedural Rules, 2013 the Petition can be signed by the Petitioner or her Advocate. This Petition was filed by her Advocate. Further, the provision under sub-rule (3) that the court may accept any form of application regarding the violation of an individual’s human rights is a clear indication that the Court is not supposed to disregard the provisions of Article 159(2)(d). Therefore, this defect alone cannot defeat the Application.

In response to the averment by the respondents that these proceedings were originated by an application by way of notice of motion, I invite the parties to the orders made on 6<sup>th</sup> September 2018 which admitted the motion as an originating process under Article 22(3)(b) in view of the demonstrated urgency.

### **Conservatory Orders**

The Respondents submitted that the Petitioner did not establish a *prima facie*

case to warrant the issuance of the interlocutory orders. Further, that granting the said orders would be tantamount to judicial repeal of the express provisions of sections 10 and 11 of the County Assembly Powers and Privileges Act; which will hinder the effective performance their duties. The principles for granting injunctions were set out in the case of ***Giella vs. Cassman Brown [1970] EA 358*** and are now trite law. Further, section 12 (3) of the Employment and Labour Relations Act and Article 23 (3) of the Constitution gives this Court the powers to make the following orders:

- i. Interim preservation orders including injunctions in cases of urgency;***
- ii. A prohibitory order;***
- iii. A declaratory order;***
- iv. An order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law;***
- v. Any other appropriate relief as the Court may deem fit to grant.***

I concur with the Ruling of Radido J. in his rationale that at the time the conservatory orders were issued, the Petitioner had demonstrated a *prima facie* case. However, the instant Application and the Petition are consolidated and being determined simultaneously. As such, I do not see the need of dwelling on an Application which seeks the issuance of orders which are synonymous to the reliefs sought in the Petition.

### **Whether the Petitioner is entitled to the Orders sought**

As earlier established, this court has the jurisdiction to hear and determine this Petition and it is properly brought before this Court by meeting the requirements set out in Rule 10(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedural Rules. As such, the proceedings herein are proper and competent before this Court.

The Petitioner instituted these proceedings due to the alleged infringement of her rights by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent. She has submitted that her rights under the Constitution under Articles 10, 27, 28, 41, 47, 50, 73 and 232 have been infringed by the Respondents.

### **Declaration of the Infringement of the Petitioner's Rights**

The Petitioner adduced evidence to the effect that the request served upon her and later gazetted, did not indicate that the sitting was about her impeachment. She further averred that Standing Order 65 was illegally amended for the purpose of impeaching her. I have looked at the request and concur with the Petitioner that the request for a special sitting did not indicate that same was for the purpose of impeaching her. The request by Hon. Elias Otieno was to discuss ***“the worrying socio-economic and political status of the County government of Nairobi City”***. This position was reflected in the Gazette Notice. The Respondents made averments and submitted that the motion to impeach the Speaker were annexed to the request. There was no reference in the request that it contained an attachment and this court is unable to find that the same was indeed attached.

The Respondents have submitted that the Standing Order 65 was amended in accordance with Standing Order 247. It was a requirement under the Respondent's Standing Order 247 that a request for an amendment be lodged with Speaker. It was supposed to be in writing and the reasons for the justification provided.

Additionally, Standing Order 65 before amendment required a member desirous of the removal of the Speaker to deliver a copy of the motion to the clerk, thereafter the motion would be presented to the speaker for approval who was required to dispose of the motion within 7 days. Within 3 days upon approval, the member was required to give 3 days' notice of the intention to move such a motion and state the particulars of claim. Thereafter, an ad hoc committee would be formed to investigate the claims by according the Speaker an opportunity to appear before it and if the claims are found to be substantive, a motion for her removal would be debated wherein she would again be accorded the opportunity to be heard. However, after the amendment of Standing Order 65 there was no requirement as to time or the formulation of an ad hoc committee to investigate the impeachment claims.

Any rational person considering the conduct of the 1<sup>st</sup> respondent would be able to detect the mischief aimed to deny the Petitioner the right to a fair hearing. The movers of the motions for impeachment and amendment of the Standing Orders did not demonstrate that they made a request to the Petitioner or her office. The motion was brought at a time when she was away. The amended Standing Order 65 was crafted in such a manner that the Petitioner would not have been accorded the right to a fair hearing even if she were present for the sitting. Further, the Request for amendment of the Standing Orders was adopted by the Select Committee on Assembly Business for adoption instead of the County Assembly Procedure and Rules Committee as required by Standing Order 247. This in itself was a breach of the Standing Orders.

Even going by Section 11 of the County Governments Act, the petitioner would still be entitled to a hearing and the process adopted by the 1<sup>st</sup> respondent would be unlawful. Section 11 provides as follows –

### 11. Removal of speaker from office

- (1) A speaker of a county assembly may be removed from office by the county assembly through a resolution supported by not less than seventy five percent of all the members of the county assembly.
- (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 county assembly, signed by at least one third of all the members of the county assembly stating the grounds for removal.
- (3) A motion for a resolution to remove the speaker shall be presided over by a member of the county assembly elected under section 9(4).
- (4) Before the debate and voting on a motion under subsection (3), the speaker shall be accorded an opportunity to respond to the allegations on the floor of the county assembly.

Section 33(4) expressly provides for the Speaker to be accorded an opportunity to respond to the allegations on the floor of the County Assembly.

The respondents do not deny that the summons to the Petitioner were served upon her at 1.30 pm requiring her to appear in the floor of the Assembly at 3.10 pm. Even had she been present in her office and had been personally served with the summons, this period from 1.30 pm to 3.10 pm would not qualify as sufficient opportunity to respond to the charges against her which constituted four charges covering six pages and which were merely referring to provisions of the law without particulars of the acts alleged to constitute the charges. They are follows –

- a) *“Conflict of interest- Gross Violation of the constitution of Kenya 2010; the County government Act 2012; Public Procurement and assets Disposal Act and the Leadership and integrity Act 2012.*
- b) *Undermining the authority of the County Assembly service board- Gross Violation of the constitution of Kenya 2010; the County Assembly Service Act 2017, the Public Officers Ethics Act; and the Leadership and integrity Act 2012.*
- c) *Abuse of office/Gross misconduct- violation of the Constitution of Kenya, 2010; Leadership and Integrity Act, 2012; the County Assembly Power and Privilege Act, 2017.*
- d) *Failure to show leadership- violation of the Constitution of Kenya, 2010; Leadership and Integrity Act, 2012; the Standing Orders.”*

Further Article 236 protects public officers from removal from office without being subjected to due process of the law. Under Article 260 of the Constitution, the Office of the Speaker is a public office. The petitioner was thus also protected from arbitrary removal from office.

The Petitioner has submitted that she had the legitimate expectation that she would be accorded a fair hearing. The principle is elaborated in the case of **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi [2007] eKLR** where the Court held that:

*“...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way... Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised.”*

The legitimate expectation of the Petitioner is valid as it is based on constitutional and statutory provisions.

### Judicial Review

The Petitioner seeks to have the decision to impeach her quashed and the Respondents prohibited from carrying out a process to impeach without complying with the provisions of the law and without following due process.

Initially, for orders of judicial review to be granted, the Applicant had to prove that the decision or act complained of was tainted with illegality, irrationality and procedural impropriety. However, the Court of Appeal in the case of **Eunice Khalwali Miima v Independent Electoral and Boundaries Commission & another [2018] eKLR** cited, with favour, the case of **Ernst & Young LLP vs Capital Markets Authority & Another [2017] eKLR** where the Court was of the opinion that judicial review continued to expand so as to meet the changing conditions and demands affecting administrative decisions. The Court stated:

*“...Judicial review is available as relief to a claim of violation of the rights and freedoms guaranteed in the Constitution. The*

*Constitution has expressly granted the High Court jurisdiction over any person, body or authority exercising a quasi-judicial function. The point of focus is no longer whether the function was public or private or by a statutory body, but whether the function was judicial or quasi-judicial and affected constitutional rights including the right to fair administrative action under Article 47, or the right to natural justice under Article 50.”*

Further, the Constitution under Article 23 confers on this Court powers to grant an order for judicial review where an applicant alleges infringement of their rights.

The Respondents violated Article 10(2) regarding principles and values of good governance and Article 47(1) regarding the Petitioner’s right to an efficient, lawful and procedurally fair administrative action in her impeachment. The 2<sup>nd</sup> Respondent was aware that she could not make it in time for the proceedings. Section 4(3) of the Fair Administrative Action Act provides that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision:

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
- (b) an opportunity to be heard and to make representations in that regard;
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

Further under sub-section (4) the Administrator is required to accord the person against whom administrative action is taken an opportunity to:

- (a) attend proceedings, in person or in the company of an expert of his choice;
- (b) be heard;
- (c) cross-examine persons who give adverse evidence against him;

Section 7 of the Act sets out the purview within which a Court may review an administrative action. They include failure to comply with a mandatory and material procedure or condition prescribed by an empowering provision, the action or decision was materially influenced by an error of law, the decision was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant and the administrative action or decision was made in bad faith, just to name but a few.

Taking into account the forgoing, I make a finding that the Petitioner has proved that her rights to a fair administration as provided under Article 47 and Section 4 of the Fair Administrative Actions Act as well as her right to fair hearing under Article 50 of the Constitution have been violated by the respondents. She has demonstrated that the 1<sup>st</sup> respondent deliberately set out to unconditionally and unlawfully remove her from office by amending the Standing orders to deny her the right to appear and respond to the charges against her.

The respondents have raised the issues of judicial repeal of express provisions of Sections 10 and 11 of the County Assemblies Powers and Privileges Act. They have further argued that the courts must respect the doctrine of separation of powers and the question whether the court may interfere with

legitimate legislative process by issuance of conservatory orders.

In the case of ***Justus Kariuki Mate and Another v Martin Nyaga Wambora and Another [2017] eKLR***, the court made the following remarks with regards to the doctrine of separation of powers the court affirmed the finding in ***Coalition for Reform and Democracy (CORD) & 2 Others v. Republic of Kenya & 10 Others [2015] eKLR***, where the court had found that;

*“In a jurisdiction such as ours in which the Constitution is Supreme, the Court has jurisdiction to intervene where there has been a failure to abide by Standing Orders which have been given Constitutional underpinning under the said Article. However, the Court must exercise restraint and only intervene in appropriate instances, bearing in mind the specific circumstances of each case”.*

*With regards to whether the courts may issue a conservatory orders to interfere with a legislative process, the court affirmed the decision in *Speaker of the Senate & Another v. Attorney General & 4 Others, Reference No. 2 of 2013; [2013] eKLR*. The Court, in that case, signaled that it would be reluctant to question parliamentary procedures...that in reference to Article 109 of the Constitution, which recognizes that Parliament is guided by both the Constitution and the Standing Orders in its legislative process, the Court thus held;*

*“It makes practical sense that the scope for the Court’s intervention in the course of a running legislative process, should be left to the discretion of the Court, exercised on the basis of the exigency of each case. The relevant considerations may be factors such as: the likelihood of the resulting statute being valid or invalid; the harm that may be occasioned by an invalid statute; the prospects of securing remedy, where invalidity is the outcome; the risk that may attend a possible violation of the Constitution.”*

*The court when ahead to formalize principles that should guide the judicial conduct in grant of conservatory orders against a*

legislative process.

“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.”

It is my finding that the conduct of the 1<sup>st</sup> respondent calls for intervention of the court as it deliberately set out to overthrow the protections in its Standing Orders with the ulterior motive of removing the petitioner from office without compliance with constitutional and statutory provisions.

The 2<sup>nd</sup> respondent abused the powers bestowed upon them with impunity. As was stated in the case of **Paul Ssemogerere and Another –V- Attorney General (2004) 2 E.A** by Justice Kanyaihamba (JSC) –

“[t]hat if Parliament is to claim and protect its powers and internal procedures, it must act in accordance with constitutional provisions which determine its composition and the manner in which it must perform its functions”

Article 2(1) and (3) of the Constitution provide that –

**(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.**

**(3) The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.**

The respondents are bound by these provisions and under Article 23 of the Constitution this court is under a duty to intervene where it is called upon, to defend the constitution.

The respondent cannot call to its defence the provisions of the very constitution it has, with abandon, violated.

The respondents urged the court to consider awarding damages instead of the

orders sought by the petitioner should it find in her on the grounds that her position is a public office and the relationship between the petitioner and MCAs has been irretrievably broken, that the acrimony and standoff is not in the public interest, and also by reference to the events that took place after the filing of this petition. It has urged that this is a case in which a remedy of damages is appropriate. He refers to the decision of this court in **Petition No. 17 of 2015 Josephat Alusiola Musambayi –V- Vihiga County Assembly**.

I have considered these arguments. They will however not be valid in this case because interim presevatory order have been in place from the very date of the impugned impeachment and as far as the court is concerned, the petitioner is still in office. Awarding her damages would be tantamount to the court removing her from office or condoning and allowing the respondents to get away with a disobedience of a court order. As was stated in the case of **Hadkinson –V- Hadkinson -**

*‘It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believed it to be irregular or even void.’*

Having found that the 2<sup>nd</sup> respondent violated the petitioner’s rights under Article 47(1) and (2), Article 50(1) and Section 4 of the Fair Administrative Actions Act, further that the 1<sup>st</sup> respondent violated the provisions of Article 10, I make the following orders –

1. A declaration do and is hereby issued that the 2nd Respondent Nairobi City County Assembly sitting as a Whole House Committee in purporting to impeach the Petitioner herein of her position as the Speaker of Nairobi City County Assembly in the afternoon of 6<sup>th</sup> September 2018 constitutes a breach of the Petitioner's Constitutional rights under Article 27(1), 27(2), 27(3), 41,47(1), and 50 of the Constitution of Kenya.

2. A declaration do and is hereby issued that the purported Committee of the Whole House of the 2<sup>nd</sup> Respondent sitting on the afternoon of 6<sup>th</sup> September 2018 had no powers and/or jurisdiction to impeach the Petitioner as Speaker of the Nairobi City County Assembly without due process accorded to her.

3. An Order of injunction and prohibition do and is hereby issued as against the 2<sup>nd</sup> Respondent, restraining its members and/or any person under its behest from entertaining and or debating any Motion to remove the Petitioner through a process in violation of fair administration and without due process accorded to the Petitioner and in breach of the right to a hearing vested in the Petitioner.

4. An order do forthwith issue, quashing and nullifying the said decision of the 2<sup>nd</sup> Respondent Nairobi City County Assembly sitting as a Whole House Committee in purporting to impeach the Petitioner herein of her position as the Speaker of Nairobi City County Assembly made on the afternoon of 6<sup>th</sup> September 2018.

5. An order of Judicial Review, in the nature of Certiorari do and is hereby issued to forthwith bring to from this Court the decision of the 2<sup>nd</sup> Respondent, dated 6<sup>th</sup> September 2018 impeaching the Petitioner as the Speaker, Nairobi City County Assembly, and the same be quashed forthwith.

6. An order of Judicial Review, in the nature of Prohibition, do and is hereby issued forthwith to prohibit the 1<sup>st</sup> and 2<sup>nd</sup> Respondent either by themselves, agents, servants and/or employees carrying out a process to remove the Petitioner without complying with the law, the Constitution, due process, a according the Petitioner a hearing and without following the 2<sup>nd</sup> Respondent's applicable Standing orders.

7. An order do forthwith issue, quashing and nullifying the said decision of the 2<sup>nd</sup> Respondent Nairobi City County Assembly sitting as a Whole House Committee in purporting to amend the Standing Orders of the Nairobi City County Assembly made on the afternoon of 6<sup>th</sup> September 2018.

8. The 1<sup>st</sup> Respondent be restrained from interfering with the terms of employment of the Petitioner as the Speaker of Nairobi City County Assembly in consequence of the unlawful act of purported impeachment of the Petitioner on the afternoon of 6<sup>th</sup> September 2018.

The 2<sup>nd</sup> respondent shall pay the petitioner's costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7<sup>TH</sup> DAY OF MAY 2019**

**MAUREEN ONYANGO**

**JUDGE**