REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

PETITION NO.15 OF 2015

GEORGE MAINA KAMAU.....PETITIONER

VERSUS

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

THE SPEAKER, THE COUNTY ASSEMBLY OF MURANG'A.....2ND RESPONDENT

THE GOVERNOR, MURANG'A COUNTY.....3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 11th March, 2016)

JUDGMENT

After hearing the parties' submissions on 15.12.2015, the court ordered that the judgment would be delivered on Friday 11.03.2016. On 07.03.2016 parties filed consent in court thus:

1. The County Assembly of Murang'a does hereby withdraw and remove its resolution made on the 7th September 2015, together with all the other consequential processes, seeking the removal of the petitioner, George Maina Kamau, from the position of County Executive Committee Member, Finance. IT and Planning, Murang'a County.
2. There be no orders as to costs.
3. This petition be and is hereby marked as settled on the above terms.

It is obvious that the order that judgment would be delivered has not been varied or set aside. The court has considered the matters of great public interest involved including the contempt application together with the consent as filed in court. It is the opinion of the court that the consent does not settle all the matters in dispute and for which the court is required to render judgment. In the circumstances, this judgment is being delivered while taking into account the parties' consent in so far as they desire to resolve the dispute as expressed in the consent.

The petitioner George Maina Kamau filed the petition on 21.09.2015 through Muchoki Kangata Njenga & Company Advocates. The petition was brought in the matter of Articles 2, 3, 10, 41, 47, 174, 179, 185, 224, 226 and 236 of the Constitution of Kenya, 2010; in the matter of right to a fair administrative action and a fair hearing provided under Articles 47 and 50 of the Constitution of Kenya; in the matter of the unconstitutionality of section 40 of the County Governments Act, 2012; and in the matter of the unfair,

unprocedural and unlawful process of removal from office of the County Executive Member for Finance, IT and Planning, Murang'a County. The petitioner prayed for judgment as against the respondents for:

a. A declaration that the 1st respondent's actions in passing a motion on 7th September 2015, under provisions of section 40(2) of the County Government Act, seeking for the removal of the petitioner from his position and employment as the CEC Member, Finance, IT, and planning, Muranga County, is unconstitutional in and thereby null and void *ab initio*.
b. A declaration that the 1st respondent's actions on the 15th September 2015, in appointing a Select Committee to investigate the allegations made out against the petitioner as provided under section 40(3) of the County Governments Act, 2012 is unconstitutional and thereby null and void *ab initio*.
c. A declaration that the entire process, processes, resolutions and report conducted and intended to be made by the Select Committee of the 1st respondent appointed on the 15th September 2015 and for purposes of investigating the allegations and grounds made out against the petitioner in the motion passed by the 1st respondent on the 7th September 2015, is unconstitutional and thereby null and void *ab inition*.
d. An order of certiorari to remove to this honourable court and quash the resolutions of the 1st respondent made on the 7th September 2015 passing a motion for the removal of the petitioner from his position and employment as the CEC Member, Finance, IT and Planning, Murang'a County and further the resolution made on the 15th September 2015 appointing a Select Committee of the 1st respondent to investigate the petitioner on the grounds proposed for his removal.
e. An order of certiorari to remove to this honourable court and quash the entire process, proceedings and resolutions or report of the select committee of the 1st respondent appointed on the 15th September, 2015.
f. An order of prohibition to restrain the 1st respondent from receiving, debating, discussing, implementing or in any way acting on a report of its Select Committee appointed on the 15th September, 2015 or at all with regard to investigations into the grounds proposed for the removal of the petitioner from his position and employment as the CEC Member, Finance, IT an Planning, Murang'a County.
g. An order of Prohibition to restrain the 2nd respondent from forwarding to the Governor, Murang'a County, any resolution of the 1st respondent seeking for the removal of the petitioner from his position and employment as the CEC Member, Finance, IT and Planning, Muranga County, based on the provisions of section 40 of the County Governments Act, 2012 and on the motion passed by the 1st respondent on the 7th September 2015 and on a report of the Select Committee appointed by the 1st respondent on the 15th September, 2015.
h. An order of prohibition to restrain the 3rd respondent from receiving from the office of the Speaker of the County Assembly of Murang'a and acting upon or implementing in any way, any resolution of the 1st respondent seeking for the removal of the petitioner from his position and employment as the CEC Member, Finance, IT and Planning, Murang'a County, based on the provisions of section 40 of the County Governments Act, 2012 and on the motion passed by the 1st respondent on the 7th September, 2015 and on a report of the Select Committee appointed by the 1st respondent on the 15th September 2015.
i. General damages.
j. Costs of the suit.

The petition was supported by the petitioner's affidavit also filed on 21.09.2015 together with the exhibits attached on the affidavit. The petitioner also filed a supplementary affidavit on 28.10.2015 to further support the petition.

The 1st and 2nd respondents opposed the petition by filing on 13.10.2015 the replying affidavit of Chris Kinyanjui Kamau, the clerk to the County Assembly of Murang'a.

The petition was filed together with the notice of motion under a certificate of urgency and brought under Articles 22, 23, and 165 of the Constitution of Kenya, Rules 3, 4, 13, 19 and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The court heard the application ex-parte on 22.09.2015 and made orders as follows:

1. That the notice of motion filed 21.09.2015 is certified urgent to be served upon the respondents by close of today for inter-partes hearing or further orders on Thursday 24.09.2015.
2. That pending the inter-partes hearing or further orders by the court, the proceedings by the 1st and 2nd respondent initiated under section 40 of the County Government Act, 2012 for removal of the Applicant as the Executive Committee Member for Finance, Murang'a County Government, is hereby stayed.
3. That pending the inter-partes hearing or further orders by the Court, the 3rd respondent is hereby prohibited from acting or implementing any resolution by the 1st respondent for removal of the applicant as the Executive Committee Member for Finance, Murang'a County Government.
4. That costs shall be in the cause.

The respondents appointed Gathenji & Company Advocates to act for them in the petition and subsequently the 3rd respondent pulled out from that representation by appointing Mbugua Ng'ang'a & Company Advocates to exclusively act for the 3rd respondent.

On 13.10.2015, the petitioner filed a notice of motion pursuant to the leave of court granted on 1.10.2015 and brought under Order 52 Rule 2 of the Rules of the Supreme Court of England, Section 5 of the Judicature Act, Cap 8, Section 1A, 3A and 63 of the Civil Procedure Act, Cap 21, Laws of Kenya, and other enabling provisions of the laws of Kenya. The petitioner prayed for orders:

1. That this honourable court be pleased to find that L. Nduati Kariuki, the Hon. Speaker of the County Assembly of Murang'a and being the 2nd respondent herein, in contempt of court for his willful disobedience of the order of the court made herein on 22.09.2015.
2. That this honourable court be pleased to find that Chris Kinyanjui Kamau, the Clerk of the County Assembly of Murang'a, the 1st respondent herein, in contempt of court for his willful disobedience of the order of the court made herein on 22.09.2015.
3. That this honourable court be pleased to commit the said L. Nduati Kariuki, the Hon. Speaker of the County Assembly of Murang'a and Chris Kinyanjui Kamau, the Clerk of the County Assembly of Murang'a, to civil jail for a period of not less than 6 months or such terms as this court may deem just in the circumstances.
4. That this honourable court be pleased to otherwise impose such punishment as would be appropriate in the circumstances against the said L. Nduati Kariuki, the Hon. Speaker of the County Assembly of Murang'a and Chris Kinyanjui Kamau, the Clerk of the County Assembly of Murang'a.
5. That this honourable court be pleased to make such other directions as may be necessary in the circumstances.

The application was based on the grounds stated therein and upon the supporting affidavit of the petitioner attached on the application and the exhibits annexed on the affidavit. The petitioner further filed on 18.11.2015 the supplementary affidavit in further support of the application.

The application was opposed by the affidavit of Chris Kinyanjui Kamau together with the attached exhibits and the grounds of opposition all filed on 26.10.2015.

The parties agreed that the application and the petition be heard and determined together. All the parties filed their respective submissions as directed by the court and the oral submissions on the application and the petition were heard on 15.12.2015.

The court has considered all the material on record and proceeds to consider the application then the petition as follows.

In support of the application for contempt, it has been urged and submitted for the petitioner as follows:

a. The court made orders on 22.09.2015 being the orders as set out earlier in this judgment.
b. The orders were duly served upon the respondents by a licensed court process server one Patrick Kinyua and the relevant affidavit of service was filed in court.
c. The 1st and 2nd respondents having been served and having knowledge of the order of the court, they blatantly disobeyed the orders as given by the court because on 24.09.2015 they proceeded to receive and facilitate debate and discussion, the report of the Select Committee of the County Assembly that had been constituted for purposes of investigating the petitioner herein on whether he should be removed from his position and employment under provisions of section 40 of the County Governments Act, 2012. In support of the case for disobedience of the court orders, the petitioner has exhibited a copy of the County Assembly proceedings of 24.09.2012 which the petitioner says show that the report of the Select Committee investigating the allegations against the petitioner was tabled at the Assembly on 24.09.2012 despite there being express order of stay of that process.
d. The 1st and 2nd respondents have at paragraph 5(1) of their replying affidavit admitted to the disobedience of the court order.
e. The 1st and 2nd respondents should therefore be punished for contempt in view of their disobedience of the court order.

In opposition to the application for contempt, it has been urged and submitted for the cited respondents as follows:

a. The order dated 22.09.2015 did not carry the mandatory penal notice and that omission is fatal to the application as the order cannot be invoked for purposes of contempt proceedings.
b. The order ought to have been served upon the person subject of the contempt proceedings and the affidavit of service did not state the persons named and served with the order.
c. The process server one Patrick Kinyua was not duly licensed as such and the alleged service of the court order were therefore incompetent.
d. The respondents have not admitted the alleged disobedience of the court order in paragraph 5 (1) of the replying affidavit of Chris Kinyanjui Kamau sworn on 22.09.2015.
e. There was no disobedience of the court order of 22.09.2015 because the County Assembly did not debate on 24.09.2015 the said report of the Select Committee. That exhibit GMK3 is the order paper issued on 15.09.2015 confirming the business that was to take place on 24.09.2015 and which was issue long before the filing of the petition and the orders given by the court on 22.09.2015. Thus, the minutes of the County Assembly House Business Committee Meeting held on Tuesday September 15, 2015 in the assembly board room at 10.00 am clearly showed that the committee discussed and approved the order papers for the period 22nd to 24th September 2015; and with respect to the order paper for 24.09.2015, the committee included the tabling of the motion to adopt the report of the Select Committee on removal of the petitioner.
f. The report of the Select Committee had not been debated or discussed.
g. The application for contempt was bad in law, incompetent, fatally defective both in procedure and substance.

The court has considered the parties' respective grounds and submissions and makes finding as follows:

First, the respondents have relied on **Shimmers Plaza Limited –Versus- National Bank of Kenya Limited [2015]eKLR** for the opinion that there must be service of the order with a penal notice for valid contempt proceedings where it is alleged that a court order has been disobeyed. It was submitted for the respondents that a penal notice is necessary for all judgments or orders to do or not to do the act in question, that disobedience to the order would be contempt of court punishable by imprisonment, a fine or sequestration of assets; the penal notice must be prominently displayed, on the front of the copy of the judgment or order served; and the judgment or court order and the penal notice must be served simultaneously. The 1st and 2nd respondents further cited **Sam Nyamweya & 3 Others –Versus- Kenya Premier League Limited & 2 Others [2015]eKLR** that it is mandatory by way of a penal notice to warn

the person required to do or not to do the act in question that disobedience to the court order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets. It is not deniable that the order was not endorsed with the penal notice and the penal notice was not otherwise served but, the respondents do not say that they were not aware of the court order. The court follows the submissions as made for the petitioner that personal service was not mandatory in contempt proceedings and that it was sufficient that the respondents were aware of or had knowledge of the court orders. Thus in **Justus Wanjala Kisiangani and 2 Others[2008]eKLR** it was held that it is trite law that any party who is aware of a court order is required to obey the same. Further, in **Kenya Tourist Development Corporation – Versus- Kenya National Capital Corporation & Another, High Court Civil Appeal No. 6776 of 1992,** Akiwumi J. held that notice of a restraining order may be given by telephone, telegram or otherwise and that suffices for purposes of enforcing the order. Akiwumi J (as he then was) followed **Halsbury's Laws of England, 4th Edition Vol.9** thus, **"Where an order requires a person to abstain from doing an act, it may be enforced notwithstanding that service of a duly endorsed copy of the order has not been served, if the court is satisfied that, pending such service, the person against whom enforcement is sought has notice of the terms of the order either by being present when the order was made or by being notified of the terms of the order whether by telephone, telegram, or otherwise."**

Secondly, the court has considered the material on record especially the facts relied upon to establish the alleged contempt of court. The court finds that the order paper for the business of the County Assembly held on 24.09.2015 was prepared on 15.09.2015 long before the court gave the orders of 22.09.2015. Further on 24.09.2015 the Assembly did not debate and discuss the motion on the removal of the petitioner from office. As the order paper was prepared prior to the giving of the court order and there being no established authority under which the cited persons would have restrained the tabling of the report of the Select Committee on 24.09.2015, the court finds that the cited persons were not in contempt as was alleged for the petitioner.

In view of the foregoing finding, the court need not go into the other matters as urged for the parties about the contempt application as the court returns that the application shall fail.

The court now turns to the main petition. In support of the petition, it has been urged and submitted for the petitioner as follows:

a. At all material times the petitioner is the duly appointed Executive Committee Member for Finance, IT, and Planning in the County Government of Murang'a and effective 4.06.2013.
b. The petitioner's case is that from the date of his appointment and during the subsistence of his term, he has executed his statutory responsibilities in the manner provided for by the law and has overseen the formulation and implementation of the county budgets for the financial years 2013-2014; 2014-2015; and further ensured that public funds are applied prudently and efficiently for the benefit of the people of Murang'a County and the general public.
c. On 30.04.2015 the petitioner submitted to the 1st respondent the county budget estimates for 2015-2016 for approval. The budget estimates were program based and premised on the approved County Fiscal Strategy Paper and highlighted the key principles in its formulation.
d. The petitioner's case is that without any basis in law the 1st respondent by its committees and by its full house rejected the budget estimates for 2015-2016 as prepared by the petitioner and instead irregularly and unlawfully prepared a separate budget for the county under which the members of the 1st respondent allocated for their own benefit and for political expendency, a ward development fund of Kshs. 700 Million and which was proposed to be disbursed to each ward in the sum of Kshs. 20 Million for each ward.
e. The petitioner taking into account his constitutional and statutory role of overseeing the implementation of the county budget formally wrote to the 1st respondent the letter dated 30.06.2015. The letter conveyed to the 1st respondent that the 1st respondent had completely distorted the submitted budget estimates and created an entirely new budget. Thus the county executive was unable to approve the new budget emanating from the 1st respondent. The letter noted that under code 71300 the 1st respondent had introduced an entirely new item with an

allocation of Kshs. 700 Million which was a huge allocation but not itemized as required by the budgeting principles contained in the Public Finance Management Act. The letter further noted that the key priority area of road development program had been allocated a paltry of Kshs. 115 Million and which compared most unfavorably to the allocation of Kshs. 250 Million to provide for car and mortgage loans to members of the County Assembly. The letter concluded thus, **"Kindly relook at those issues, do the necessary adjustments and revert."**

f. The petitioner's case was that the decision of the County Executive Committee not to implement the budget as formulated and passed by the 1st respondent without regard to the executive's budget as submitted for consideration and approval on 30.04.2015 was informed by the opinion of the office of the Controller of Budget submitted on 6.08.2015 stating, among other things, that the proposed ward development fund was unconstitutional and that it was to be established in accordance with the principles of separation of powers set out in Article 174 (i) of the Constitution and that the proposed amount ought to be allocated to specific development budgets for various departments within the County Executive. The advisory by the office of the Controller of Budget had been conveyed to the Governor Murang'a County by the letter dated 6.08.2015 and exhibited in court in these proceedings.

g. By the letter dated 1.07.2015 and in view of the cited irregularities, the Governor Murang'a County, declined to assent to the Appropriation Bill passed by the 1st respondent. Despite the Governor's failure to assent to the Bill as required in section 24 of the County Governments Act, 2012, the 1st respondent through the 2nd respondent forwarded the Appropriations Bill for publication. The Act as published contained the irregular and offensive ward development fund of Kshs. 700 Million.

h. The petitioner's case is that in such circumstances and turn of events, the 1st respondent on 7.09.2015 resolved through a motion that the 3rd respondent, the Governor, dismisses the petitioner from the position of the County Executive Member for Finance, IT and Planning upon grounds set out in the motion which was moved and passed by the 1st respondent's members on 7.07.2015. the motion proposed that the petitioner be removed from office in accordance with the provisions of section 40 of the County Governments Act, 2012.

i. The petitioner's case is that section 40 of the County Governments Act, 2012 provides for unconstitutional procedure, it is inherently unconstitutional and therefore incapable of founding legitimate proceedings for the removal of the petitioner as was proposed by the 1st respondent. The petitioner submitted that the provisions of the section violated Article 50 (1) of the Constitution which states that every person has the right to have any dispute that can be resolved by application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

j. The power of the county assembly under section 40 is one such power that is sovereign power vested in the people and delegated by the people to the county assembly under Article 1(3) of the Constitution.

k. It was submitted for the petitioner that the petitioner's right to a fair trial could not be limited as provided for in Article 25 (c) of the Constitution.

l. In particular it was submitted that section 40 provides for a process that constitutes the county assembly to be the complainant, investigator, prosecutor, adjudicator and executor. The Select Committee that investigates the allegations, it was submitted, was not independent because it was composed of the members of the county assembly. Thus the committee was not an independent tribunal envisaged in Article 50(1) of the Constitution. It was submitted that under the **Black's Law Dictionary, 9th Edition, at 838 and 820** **"independent"** means not subject to the control or influence of another, not associated with another (often larger) entity; not dependent or contingent on something else, and, **"impartial"** meant unbiased or disinterested. It was submitted that the mover of the motion under section 40 (3) of the Act was not disinterested in the success of the motion and the full house of the county assembly was not independent of the mover. It was submitted that despite the lack of merits in the allegations, the 1st respondent had already made a decision to remove the petitioner from the office he held as the county executive member for finance.

m. The petitioner cited **Stephen Nendela –Versus- County Assembly of Bungoma & 4 Others [2014]eKLR** where the High Court at Bungoma held that section 40(3) of the County

Governments Act, 2012 was unconstitutional. In that case, the court stated that under section 40(3) of the Act, the procedure for removal of the county executive committee member commences with the county assembly, by way of an allegation being laid before it in the form of a motion, if passed, a select committee, whose membership is drawn from the assembly, is formed to carry out the investigations, the committee reports to the house and, the house votes on the report. In the view of the court in that case, the section was a perfect example of the complainant or accuser being the investigator, the prosecutor and the judge. The court stated thus, **"….All the members of the assembly are interested in the outcome of the proceedings in that, having passed the motion to investigate the County Executive Committee Member, it is difficult to disabuse their minds when carrying out their investigations as to the intention of the assembly. To my mind, the Select Committee cannot be independent and impartial body or tribunal envisaged by Article 50 (1) of the Constitution. The Select Committee is not only part of the assembly that sanctions the motion for investigation, but its members are part of the assembly that will vote for or against the recommendations for removal of the County Executive Community Committee Member."** Accordingly, the court in that case proceeded to hold thus, **"….Constitutionally, no County Assembly can purport to remove a county executive committee member pursuant to Section 40(3) of the CGA. That provision negates the principle of independence and impartiality stipulated by Article 50(1) of the Constitution and is null and void to that extent. Parliament should enact a law that provides for a separate, independent, impartial and unbiased body that will be charged with the jurisdiction of carrying out investigations once a motion is passed by a County Assembly under Section 40(2). It is that separate and independent body that should carry out investigations and report to the Assembly on its findings for the latter to vote on. To the extent that no such independent and impartial body exists, County Assemblies cannot purport to remove a member of the County Executive Committee under Section 40 of the CGA. That will be unconstitutional."** The petitioner adopted the opinion as set out in the cited case, in its entirety, and submitted that the respondents could not constitutionally remove him from the office he held pursuant to section 40 of the Act because the court, in the cited case, had found that the section was unconstitutional.

n. It was submitted for the petitioner that the High Court having declared section 40 of the Act unconstitutional as per the cited case, the provisions of that section were not available to any of the 47 County Assemblies in Kenya as the basis for removal of county executive committee members. Thus the respondents' actions in the instant case to remove the petitioner under 40 of the Act were unconstitutional, null and void. The petitioner cited Suleiman Said **Shabhai- Versus- Independent Electoral & Boundaries Commission and 3 Others [2014]eKLR,** where it was held that under the doctrine of supremacy of the constitution, a law that is inconsistent with the provisions of the constitution is not a mere irregularity but a nullity.
o. The petitioner further lamented that the grounds cited for his removal lacked merits. The petitioner stated that grounds demonstrated manifest vendetta, victimization for actions done in legitimate performance of his duties as a public officer and the respondents' actions breached the petitioner's right to fair labour practices under Article 41 of the Constitution and further, that the petitioner's protection against victimization and removal except by due process under Article 236 of the Constitution had been contravened. The court will not enumerate the details as submitted for the petitioner as the court will revert to consider the submission later in the judgment.

The 3rd respondent submitted that he could not act upon the resolution of the 1st respondent to remove the petitioner from office in accordance with section 40 of the County Governments Act, 2012, because the court had declared the section a nullity in the case of **Stephen Nendela –Versus- County Assembly of Bungoma & 4 Others [2014]eKLR.** The 3rd respondent urged the court to follow that decided case.

For the 1st and 2nd respondent, the petition was opposed and submissions were made as follows:

a. The grounds for removal of the petitioner from office were full of merit as stated in the motion annexed to the letter dated 7.09.2015 addressed to the petitioner by the 1st respondent.
b. The jurisdiction of the court in this petition is to the extent that the procedure for removal of the petitioner is lawful, as per the relevant constitutional and statutory provisions; and not the merits

of the grounds for the removal. The 1st and 2nd respondents cited **Martin Nyaga Wambora & 3 Others –Versus- Speaker of the Senate & 6 Others[2014]eKLR** thus, **"Our reading of Article 165(6) of the Constitution reveals that the role of the High Court for purposes of removal of a Governor from office is inter alia supervisory in nature to ensure that the procedure and threshold provided for in the Constitution and the County Governments Act are followed."** For the 1st and 2nd respondents, it was submitted that the jurisdiction of the court was limited to procedure for the removal of the petitioner from office and not the merits of the grounds for the removal which was essentially ther function and proper province of the 1st respondent, the county assembly.

c. It was submitted that the decision in **Stephen Nendela –Versus- County Assembly of Bungoma & 4 Others [2014]eKLR** delivered on 07.10.2014 was not binding upon the court. It was further submitted that the decision should not be followed by the court in the present case as establishing the jurisprudence on the interpretation relevant law, statutes and role of select committees so that it had no persuasive power in deciding the present petition. In particular, it was submitted that the Court of Appeal had not confirmed that cited case and Article 195 of the Constitution provides that the county assembly or any of its committees has power to summon any person to appear before it for the purpose of giving evidence or providing information; and for that purpose, an assembly has the same powers as the High Court to enforce the attendance of witnesses and examining them on oath, affirmation or otherwise; compel the production of documents; and issue a commission or request to examine witnesses abroad. Accordingly, it was submitted that the 1st and 2nd respondents had authority to proceed under section 40 of the County Governments Act, 2012 which was in line with the said Article 195. It was submitted that questioning the constitutionality of section 40 amounted to questioning the validity of Article 195 which allowed the 1st respondent to summon any person to appear before the 1st respondent.

d. The 1st and 2nd respondent further cited Court of Appeal in the judgment delivered on 18.03.2015 in **County Government of Nyeri & Another –Versus- Cecilia Wangechi Ndungu [2015]eKLR** thus **"From the language adopted by the legislator in enacting Section 40 & 31(a) we discern two methods through which a member of a County Executive Committee can be dismissed. Firstly, under section 40 a Governor can dismiss a County Executive Member on any of the aforementioned grounds following a resolution by the County Assembly for such dismissal. In that case the dismissal is initiated by the County Assembly. Secondly, under section 31(a) a governor can dismiss a County Executive Member on his own motion at any time if he considers it appropriate and necessary to do so. It is this second mode that appears to vest an element of discretion on the part of the Governor and which is the subject of interpretation in this appeal."** It was then submitted for the 1st and 2nd respondents that the Court of Appeal in that case recognized that section 40 of the County Governments Act, 2012 is alive, kicking, therefore constitutional and available for the county assemblies to apply like in the present case - that was the position despite the decision on unconstitutionality in **Stephen Nendela –Versus- County Assembly of Bungoma & 4 Others [2014]eKLR** delivered on 07.10.2014. Thus, the Court of Appeal decision which came later in time overrides the **Nendela case** in no uncertain manner under the doctrine of precedence.

e. The 1st and 2nd respondents submitted that the wording of section 40 of the Act was in similar terms as Article 152 (7) of the Constitution and finding that section 40 of the Act was unconstitutional would run afoul Article 152 (7) of the Constitution. Article 152(7) of the Constitution permits the National Assembly to consider removal of a cabinet secretary in the like manner or procedure the county assembly is to consider removal of the county executive committee member and arguments of unconstitutionality of section 40 of the Act were not justifiable.

f. It was submitted that Section 40 of the Act by providing for a select committee which afforded the petitioner the opportunity to be heard and to put his case provided for sufficient due process and the section did not therefore offend Article 50(1) on fair trial before independent and impartial tribunal or body. Indeed, it was submitted that section 40 (4) of the Act provides that the county executive member has the right to appear and be represented before the select committee during its investigations. Thus section 40 of the Act upholds the right to a fair hearing.

The **1st and main issue** for determination is whether section 40 of the County Governments Act, 2012 is unconstitutional. The court has considered the submissions as made for the parties. As submitted for the 1st and 2nd respondents, on 18.03.2015 in **County Government of Nyeri & Another –Versus- Cecilia Wangechi Ndungu [2015]eKLR** the Court of Appeal recognized that section 40 of the County Government Act, 2012 was one of the available legal provisions for the removal of a county executive committee member from office. That decision came after **Stephen Nendela –Versus- County Assembly of Bungoma & 4 Others [2014]eKLR** delivered on 07.10.2014. In a much later decision by the Court of Appeal on 17.12.2015 in **Narok County Government & Another –Versus- Richard Bwongo Birir & Another[2015]eKLR (Waki JA, Nambuye JA and Kiage JA)**, in recognizing that section 40 of the County Governments Act was available and constitutional, the Court of Appeal in that case at paragraph 48 of the judgment stated that the County Governments Act, 2012 was enacted pursuant to Article 200 of the Constitution to give effect to Chapter 11 of the Constitution which provides for devolved Government. The court further stated that in particular and with regard to the members of the County Executive Committee, sections 30(a) and 40 of the County Governments Act were enacted to give effect to Article 200(2) which provides the manner of election or appointment of persons to, and their removal from offices in the county governments. The Court of Appeal in that case reproduced section 40 of the Act and held that the section should be interpreted in its context as part of the Act because the cardinal rule for construction of a statute is that a statute should be construed according to the intention expressed in the statute. The Court of Appeal in that case proceeded to concur with its earlier decision of 18.03.2015(court differently constituted) in **County Government of Nyeri & Another –Versus- Cecilia Wangechi Ndungu [2015]eKLR(Visram JA, Koome JA and Otieno-Odek JA)** on the construction of sections 31(a) and section 40 of the Act and as submitted for the 1st and 2nd respondents, thus, **"From the language adopted by the legislator in enacting Section 40 & 31(a) we discern two methods through which a member of a County Executive Committee can be dismissed. Firstly, under section 40 a Governor can dismiss a County Executive Member on any of the aforementioned grounds following a resolution by the County Assembly for such dismissal. In that case the dismissal is initiated by the County Assembly. Secondly, under section 31(a) a governor can dismiss a County Executive Member on his own motion at any time if he considers it appropriate and necessary to do so. It is this second mode that appears to vest an element of discretion on the part of the Governor and which is the subject of interpretation in this appeal."**

This Court agrees with the Court of Appeal's opinion and holding in the cited cases and further, this court is equally bound by the opinion and holding of the Court of Appeal, that the County Government Act, 2012 including section 40 of the Act was enacted pursuant to section 200 of the Constitution, the statutory provisions must be construed according to the intention expressed in the statute and county assemblies are entitled to invoke the provisions of section 40 of the Act within the legitimate intention as expressed in the statute. As held by the Court of Appeal, there are two possible methods for removal of a member of the county executive committee from office, under section 31 (a) or section 40 of the County Government Act, 2012.

The two sections provide as follows:

"31. Powers of the governor

The governor -

a. **may, despite section 40, dismiss a county executive committee member at any time, if the governor considers that it is appropriate or necessary to do so;"**

And:

"40. Removal of member of executive committee

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

(a) incompetence;

(b) abuse of office;

(c) gross misconduct;

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

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

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

(2) A member of the county assembly, supported by at least one-third of all the members of the county assembly, may propose a motion requiring the governor to dismiss a county executive committee member on any of the grounds set out in subsection (1).

(3) If a motion under subsection (2) is supported by at least one-third of the members of the county assembly-

(a) the county assembly shall appoint a select committee comprising five of its members to investigate the matter; and

(b) the select committee shall report, within ten days, to the county assembly whether it finds the allegations against the county executive committee member to be substantiated.

(4) The county executive committee member has the right to appear and be represented before the select committee during its investigations.

(5) If the select committee reports that it finds the allegations-

(a) unsubstantiated, no further proceedings shall be taken; or

(b) substantiated, the county assembly shall vote whether to approve the resolution requiring the county executive committee member to be dismissed.

(6) If a resolution under subsection (5) (b) is supported by a majority of the members of the county assembly-

(a) the speaker of the county assembly shall promptly deliver the resolution to the governor; and

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

As to the application of the two sections the court upholds its opinion in **Richard Bwogo Birir –Versus- Narok County Government and 2 Others [2014] eKLR** thus, **"The court has considered the provisions of the two sections and is of the opinion that both sections prescribe a disciplinary action in a due process that may conclude into imposition of the punishment of dismissal. Under section 31, the procedure is initiated by the governor and concluded by the governor as an in-house executive process. Under section 40, the process is initiated by a member of the county assembly.**

In the opinion of the court, the mischief is obvious; there may be instances of adverse circumstances against a given county executive committee member and the governor fails to invoke the executive disciplinary process under section 31(a) and in which event a county assembly member may invoke

the oversight jurisdiction of the county assembly under section 40 to deal with the mischief. In the considered opinion of the court, that is where the difference in the provisions of the two sections ends. Otherwise they are both disciplinary proceedings that demand due process of law. The governor's executive disciplinary process under section 31(a) and the county assembly's process under section 40 of the Act must comply with the established rules of natural justice; the due process of law."

The court further considers that public service is governed by constitutional and statutory provisions whose purpose is to protect the good delivery of the service and the rights and obligations of the individual public officer or state officer. The court upholds its opinion in **Richard Bwogo Birir –Versus- Narok County Government and 2 Others [2014] eKLR** thus **"Prior to the new Republic, the relationship that accrues when a person is engaged in the public service in Kenya's circumstances was considered in the case of Mburugu Muguna Geoffrey – Vs- Attorney General Civil case No. 3472 of 1994 at Nairobi *Ojwang J* stated that employment in the public service both provides a machinery of serving the public interest and benefits the individual employee who is compensated by approved methods, for work done. The employee thus acquires an interest that evolves into a legal right, within the terms of employment. That it is in the interest both of the public, to whom services are rendered and the employee, who has a personal relationship with the working arrangements, that the governing law affecting continued productivity in public office be fulfilled. In that case, the court stated that the law will be in the form of statutory enactments, subsidiary legislation, judicial precedents and administrative practices. Further, purpose of the law was to ensure a correct delivery of a good public service. In that case, the court found that it would be a distortion of the quality of public service when self-interested individuals, purportedly in the name of public interest, jettison the law to the four winds and impose their subjective inclinations to the delivery process. "**

The court follows that opinion and finds that section 40 of the Act was enacted in furtherance of Article 200 of the Constitution and it does not derogate from the safeguards in the public service framework that protects public officers from victimization or discrimination for having performed the functions of office in accordance with the Constitution or any other law; or dismissal, removal from office, demotion in rank or otherwise subjected to disciplinary action without due process, and, as envisaged in Article 236 of the Constitution. The court finds that the section when invoked in proper cases is capable of being applied constitutionally as it has its roots in the Constitution and it is devoid of inherently unconstitutional content.

In particular the court has revisited section 40 of the County Governments Act, 2012. The court finds that the select committee that investigates the allegations is a strategic arms-length establishment, away from the full county assembly; and the committee undertakes the investigations in a process that, under section 40(4), the county executive member has the right to appear and be represented before the select committee during its investigations. If the select committee finds that the allegations have been substantiated, the decision to dismiss is not made by the committee but by the resolution of the full county assembly under section 40(5) which resolution must be supported by a majority of the members of the assembly per section 40(6). The court considers that the select committee as the investigator of the allegations is designed to operate at arms'-length from the full assembly under a framework that upholds due process. Further the requirement under the section that the majority of the members of the house supporting a removal decision provides a clear safeguard to ensure that the members of the committee do not appear to, and do not, carry the resolution in event of their returning to the assembly a report that the allegations as levelled against the county executive member have been substantiated. In the opinion of the court, the procedure under section 40 does not therefore fall short of a fair removal process.

The court further finds that section 40 of the Act merely repeats a well established committee system that over the years has been invoked and perfected in running of organisational business in both public and private sectors all over the civilised commonwealth. In that system, evidence would have to be provided to establish lack of independence and impartiality on case by case basis but the committee system by itself, in the opinion of the court, is not inherently an unfair system.

Following the opinion in **Stephen Nendela –Versus- County Assembly of Bungoma & 4 Others [2014]eKLR** that the procedure under section 40 of the County Governments Act, 2012 is not fair because the members of the select committee and the county assembly would have an interest in the matter, it was submitted for the petitioner that the assembly or its select committee would not be independent and impartial because the whole process as prescribed under section 40 of the Act is controlled by members of the assembly. The court has carefully considered that line of submission and the court in its inquiry has led itself to considered the provisions of section 12 of the Public Officer Ethics Act, 2003 which provides thus,

"12. (1) A public officer shall use his best to efforts to avoid being in a position in which his personal interests conflict with his official duties.

(2) Without limiting the generality of subsection (1), a public officer shall not hold shares or have any other interest in a corporation, partnership of other body, directly or through another person, if holding those shares or having that interest would result in the public officer's personal interests conflicting with his official duties.

(3) A public officer whose personal interests conflict with his official duties shall-

(*a*) declare the personal interests to his superior or other appropriate body and comply with any directions to avoid the conflict; and

(*b*) refrain from participating in any deliberations with respect to the matter.

(4) Notwithstanding any directions to the contrary under subsection (3)(*a*), a public officer shall not award a contract, or influence the award of a contract, to-

(*a*) himself;

(*b*) a spouse or relative;

(*c*) a business associate; or

(*d*) a corporation, partnership or other body in which the officer has an interest.

(5) The regulations may govern when the personal interests of a public officer conflict with his official duties for the purposes of this section.

(6) In this section, "personal interest" includes the interest of a spouse, relative or business associate."

Pursuant to subsection 12 (5) above, regulation 11 of the Public Officer Ethics Regulations, 2003, provides thus,

"11.The personal interests of a public officer do not conflict with the official duties with respect to a matter, for purposes of section 12 of the Act, if the following are satisfied-

a. **the personal interests of the public officer are not specific to the public officer but arise from the public officer being a member of a class of persons who all have personal interests in the matter;**
b. **it would be impractical for the public officer and all other public officers who have personal interests in the matter to refrain from participating in deliberations with respect to the matter; and**
c. **either the personal interests of the public officer are obvious or the public officer declares his personal interests to his superior or other appropriate body or person."**

The court is guided by the provisions of the cited regulations and finds that as long as the select committee or the county assembly in undertaking its mandate under section 40 of the County Government Act, 2012 has satisfied the conditions as set out in the regulation, it cannot be said that the decisions of the select committee or the county assembly would be defeated for want of independence or impartiality as was submitted for the petitioner. In this case it was not shown by the petitioner that the enumerated regulatory conditions had not been satisfied. The court considers that the provisions of the regulation on when conflict of interest does not exist are crucial because it would otherwise be impossible to make governmental decisions on account that the authority or person making the decision, would many times than not, be an interested party. The court considers that the members of the county assembly or select committee under section 40 would hold interest in the removal proceedings under the section by reason of their being members of the assembly and their interest would not be any better than that of ordinary citizens who, under Article 1(2) of the Constitution, have delegated their sovereign power to the county assembly and which must exercise that delegated power in accordance with the Constitution. Thus, any alleged offensive interest against any one member of the assembly, beyond that held by county assembly members generally, would have to be established by way of evidence for section 40 to be said to have been applied unfairly in any particular case. That was not established to be the position in the present petition and the court finds that the petitioner has not established that the section had been applied to him unfairly or unconstitutionally.

In view of the foregoing findings, to answer the **1st and main issue** for determination, the court returns that in its considered opinion and being bound by the cited holdings by the Court of Appeal, section 40 of the County Governments Act, 2012 is not unconstitutional.

The **2nd issue** for determination is whether the court enjoys the jurisdiction by way of judicial review or otherwise, to look into the merits of the alleged grounds for removal of the petitioner under section 40 of the County Government Act. The court finds that as submitted for the 1st and 2nd respondents, in absence of alleged illegality the respondents were proceeding under section 40 of the County Governments Act, 2012 and in line with the doctrine of justiciability, the court returns that it would not look into the merits of the alleged grounds for removal of the petitioner under the said section 40. Returning to this point as earlier highlighted by the court in this judgment, the court will not therefore delve into the details of the particulars of the allegations made against the petitioner in the process undertaken by the 1st respondent under section 40 of the Act. While making that finding the court upholds its opinion in **Abdikadir Suleiman –Versus- County Government of Isiolo [2015]eKLR** ruling of 31.07.2015 thus,

> **"….This court's holding is that while making its primary decisions or decisions on appeals, the Commission like any other state organ or person under Article 10 of the Constitution must care and ask itself whether the decision is lawful or legitimate in view of relevant constitutional and statutory provisions but the original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions rests with the court as vested with the appropriate jurisdiction under Article 162 (2) (a) as read with Article 165(5) and (6) of the Constitution; Article 22(1), and section 12 of the Employment and Labour Relations Act, 2011."**

And further,

"The court says it in other words as follows. The Constitution or legislation may provide that a person or public body or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions or powers as vested in the person or authority or public body by the Constitution or legislation. The Constitution or legislation may also vest in a person or authority or public body the power or function to consider or entertain given disputes or matters as of first instance or on appeal and to render decisions in that regard in accordance with the prescribed procedures. In the opinion of this court, such constitutional and legislative provisions shall not be construed as precluding a court from exercising the relevant jurisdiction in relation to any question whether that person or authority or public body has exercised the powers or functions in accordance with the Constitution or any other law. The court holds that such provisions do not oust or extinguish or adjourn the court's jurisdiction to hear and determine a dispute about the legality or the manner of the exercise of the constitutional or statutory powers

and functions by the relevant person, public body or authority as may have been vested in the person, public body or authority under the Constitution or statute."

As the petitioner has not made out a case for the court to consider as envisaged in the cited opinion, the court returns in favour of the 1st and 2nd respondents that the court cannot inquire into the merits of the alleged grounds for removal of the petitioner from office.

Nevertheless, the court is not setting a hard rule that its jurisdiction is limited to only an inquiry into procedural matters. The rule the court is setting is that it will consider all cases where illegality is alleged both in matters of substance and procedure. The court says that it would have to look into merits of the grounds for removal in an appropriate case where a petitioner may seek to show illegality founded upon the county assembly moving against the petitioner under the said section 40 upon illegal grounds; such that illegality would be founded upon the principle of unreasonableness per Lord Greene in **Associated Provincial Picture Houses Limited –Versus- Wednesbury Corporation (1947) 2ALL ER 680 at 682-683** thus, **"It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word 'unreasonableness' in a rather comprehensive sense. It is frequently used as general description of the things that must not be done. For instance, a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey these rules he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J., I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head."**

In the current case it was submitted for the petitioner that the respondents had moved against him under the said section 40 and targeted him for removal for having performed the functions of the office he held in accordance with the law and policies on public financial management. It was submitted that the removal proceedings were therefore founded upon grounds that offended Article 236 of the Constitution that protected the petitioner from victimisation or removal for having performed his duties in accordance with the law.

The court has perused the scope of the allegations as conveyed to the petitioner in exhibit GM6 including the original and amended motion dated 07.09.2015 as attached on the affidavit in support of the petition. The allegations range from failing to comply with the provisions of the Public Finance Management Act, 2012; gross incompetence; inability to advice the governor; non-disclosure of debts; irregularities in the budgetary processes; irregularities in implementation of the budget; refusal to respond to money motions; and other grounds set out in the motion. The court finds that on their face, the allegations do not pass for violation of the provisions of Article 236 of the Constitution as was submitted for the petitioner and in such circumstances the court finds that the petitioner has not established illegality founded on the principle of unreasonableness.

The **3rd issue** for determination is whether the judgment and the orders in **Stephen Nendela –Versus- County Assembly of Bungoma & 4 Others [2014]eKLR** delivered on 07.10.2014 were binding upon the parties to this suit. In considering this issue the court has taken caution that it is not sitting on a review or appeal in view of that decided case but that in the circumstances of this case, the issue for determination is pertinent and substantive as it goes to the root of the dispute in the present petition. This may be particularly a difficult issue for this court to determine especially that in that judgment in order (a) the court declared that section 40(3) of the County Government Act, 2012 was inconsistent with Article 50(1) of the Constitution of Kenya and vide Article 2(4) of the Constitution, section 40(3) of the County Government Act was void to the extent of such inconsistency; and in order (b), that the select committee of Bungoma County Assembly as was constituted under section 40 (3) (a) of the County Government Act, 2012 to investigate Stephen Peter Nendela violated and was inconsistent with the imperative of Article

50(1) and (2) of the Constitution and its actions, decisions and outcome reports were null and void. This court has considered the Court of Appeal decisions cited in this judgement and coming after **Stephen Nendela –Versus- County Assembly of Bungoma & 4 Others [2014]eKLR.** The court has further considered how the court in order (b) in **Stephen Nendela –Versus- County Assembly of Bungoma & 4 Others [2014]eKLR** was coined as to bind specifically the parties in that case. This court is therefore inclined to find that the decision in **Stephen Nendela –Versus- County Assembly of Bungoma & 4 Others [2014]eKLR** was specifically binding and was directed to bind the parties therein as opposed to the parties in the present dispute and who, in the opinion of this court, would now get bound by the orders that would emanate from this judgment. In making that finding the court has considered that order (b) in **Stephen Nendela –Versus- County Assembly of Bungoma & 4 Others [2014]eKLR** suggests that the said section 40 was unconstitutional as was applied in that particular case. It could be that order (a) in **Stephen Nendela –Versus- County Assembly of Bungoma & 4 Others [2014]eKLR** could have genuinely been interpreted by a public officer, as the petitioner did, that the order applied to all future circumstances and this court will revisit that point when considering the remedies available in this petition.

While addressing the 3rd issue for determination, the court is alert that in considering a case, a litigant may show that a provision of a statute as applied to that litigant is unconstitutional and if the court finds as much, the decision would apply to the parties to such litigation, such decision binds only the parties and the matter ends there. In the opinion of the court, in such cases, the statute does not thereby become unconstitutional generally and it remains good law to be applied constitutionally in future circumstances. However, if a statutory provision contains unconstitutional prescription or rule and the court finds as much, then the statute would not apply to any future circumstances as is a nullity as against every person. Such a statute or statutory provision would be incapable of ever being applied constitutionally. In such cases, where a statute is unconstitutional because it inherently contains a prescription or rule that is unconstitutional, it is the opinion of the court that the legislature should move with speed to repeal the statute so that the offensive provision does not remain on the statute book. In the opinion of the court, that is more so because by promptly repealing the unconstitutional statute or the offending unconstitutional provision, public officers and the general users of the statute or statutory provision would not be misled to apply it for the time it persists to exist on the statute book.

The duty to promptly repeal statutes or legislative provisions that the courts have declared unconstitutional because they contain unconstitutional rule or prescription should be taken up as of constitutional duty by the relevant legislative authority as aided by relevant authorities such as the office of the Attorney General, the line government department and the Kenya Law Reform Commission. Nevertheless, there may exist some pertinent and complex questions which may necessitate legislative intervention on next steps where the court has declared the statute or statutory provision unconstitutional on account of a content that is inherently an unconstitutional prescription or rule. Such questions may include, thus:

a. If a statute or part of its provision is declared unconstitutional and such declaration is not stayed by the court pending appeal or other reasons, what would befall the implementation of the statute or the provision pending the repeal of the statute or the provision by the relevant legislative authority?
b. If a statute or part of its provision is declared unconstitutional, null and therefore void *ab initio*, what befalls decisions that were made prior to the court's declaration?
c. What interventions are open to the public officers and persons directly or indirectly affected by a statute or part of its provision that has been declared by the court unconstitutional *ab initio* but for the time being, the relevant legislative authority has not taken steps to repeal the statute book or the provision?

In the court's opinion, these are questions that may require specific policy and legislative intervention and for which reason, the court considers that this judgment would be forwarded to the Attorney General for appropriate consideration.

In the present case it has been shown that the said section 40 brings into operation the provisions of

Article 200 of the Constitution, the section therefore has a place for application that is constitutional and it is irresistible, in the opinion of this court, to find that the challenge founded upon unconstitutionality of the section by a litigant could only be a challenge about whether the section has been applied constitutionally in any particular case; in which event, the decision of the court could only be binding upon the parties to the litigation and not persons not being parties to the litigation because the court would have arrived at the finding of unconstitutionality in the application of the section only after making findings of fact about the application of the statute in that particular case. Thus the court returns that the said section 40 did not inherently contain a rule or a prescription that was unconstitutional and the court returns that the section as worded is capable of being applied constitutionally in line with the guiding principles of interpretation as pronounced by the Court of Appeal in the referred cases of **County Government of Nyeri & Another –Versus- Cecilia Wangechi Ndungu [2015]eKLR** and **Narok County Government & Another –Versus- Richard Bwongo Birir & Another[2015]eKLR.**

In the present case the court has found that the petitioner has not established the facts that show that section 40 of the Act was applied to him unconstitutionally and the orders in **Stephen Nendela –Versus- County Assembly of Bungoma & 4 Others [2014]eKLR** which in the opinion of this court were specific to the parties in that case, would not apply to the parties in the present petition.

The **4th and final issue** for determination is whether the court should grant the remedies as prayed for in the petition. As the court has found that section 40 by its rules or prescriptions was not unconstitutional and by the manner it was applied in the petitioner's case was not unconstitutional, the court returns that the petitioner would not be entitled to the remedies as prayed for. Further, the court finds that as the petitioner's rights and fundamental freedoms have not been shown to have been violated as was alleged, the prayers in that regard would fail.

Nevertheless, the court has earlier considered in this judgment that it could be that order (a) in **Stephen Nendela –Versus- County Assembly of Bungoma & 4 Others [2014]eKLR** could have genuinely been interpreted by a public officer, as the petitioner did, to mean that the order applied to all future circumstances and this court now revisits that point. In view of that genuine view taken by the petitioner and the special circumstances of the case, it is the view of the court that the petitioner did not enjoy, avail and take up all the safeguards as provided for in the section. In particular the court has carefully reflected upon exhibit CKKII on the replying affidavit of Chris Kinyanjui Kamau filed on 26.10.2015 and being the minutes of the 1st respondent's house business committee meeting held on Tuesday, 15.09.2015. In deliberating the order paper for 24.09.2015, upon perusing the draft order paper on the motion on the removal of the petitioner, it is recorded that the members made the following observation:

a. **That the select committee has ten days to hear all evidence and table its findings to the Assembly.**
b. **That as regards the Motion to dismiss the County Executive Committee Member for Finance, IT, and Economic Planning, Members to be aware of the ruling made for Bungoma County as the Court found section 40 of the County Government Act 2012 unconstitutional.**
c. **That as an option to safeguard against the court following the same precedent on Bungoma ruling, the report of the select committee on the dismissal of the County Executive Committee Member for Finance, IT and Economic Planning be sent to the Senate for Consideration.**

The court finds that the 1st and 2nd respondents had cautioned themselves not to proceed with deliberations on the report of the select committee except after the Senate had received and considered the same in view of the decision in **Stephen Nendela –Versus- County Assembly of Bungoma & 4 Others [2014]eKLR.** In view of the parties' well considered positions to reflect upon the effect of that court decision, it is the opinion of the court that all the parties involved had a legitimate expectation that unless guidance, like the one being made by the court in this decision was provided, the earlier court's decision was a sufficient bar to any further steps in the matter as taken out under the said section 40 of the Act. It is the further opinion of the court that it would therefore be just and in the best interest of all the involved parties to set a level playing ground if the said section 40 of the Act is to be invoked against the petitioner as was desired to be done on the part of the 1st and 2nd respondents.

Accordingly, the court finds that the petitioner would be entitled to setting aside of all the proceedings by the respondents undertaken against the petitioner under section 40 of the County Governments Act, 2012 with the liberty of the respondents recommencing the process in accordance with the law and affording the petitioner all the safeguards as prescribed in the said section 40 of the Act. The court in making that finding considers that public officers were better encouraged to strictly observe judgments and orders made by the courts and in so doing the courts will always take measures to foster such obedience by conferring the officers such protection as is necessary. Where there is doubt in the effect and scope of the court orders, it is the court's opinion that justice will be best served by the affected persons stopping and moving to seek the courts' clarifications and in which event the party who moves the court in such circumstances should not suffer prejudice for moving the courts to obtain such necessary clarifications. In the instant case, there is no reason to doubt that the petitioner acted as he did in furtherance of the due process of justice and in view of the earlier court's decision in **Stephen Nendela –Versus- County Assembly of Bungoma & 4 Others [2014]eKLR**.

The court has considered the role the petition and the submissions made for the parties have served towards the advancement of jurisprudence in the emergent area of the devolved system of government established under the Constitution of Kenya 2010 and returns that parties will bear their own respective costs of the petition and the application for contempt.

In any event, while the court drew this judgment, the parties negotiated the consent filed in court on 07.03.2016 and the court considers that the consent effectively settles the petition as between the parties to the petition.

In conclusion, judgment is hereby entered for the parties on the notice of motion filed on 13.10.2015 and the petition filed on 21.09.2015, for orders by consent of the parties, thus:

1. The County Assembly of Murang'a does hereby withdraw and remove its resolution made on the 7th September 2015, together with all the other consequential processes, seeking the removal of the petitioner, George Maina Kamau, from the position of County Executive Committee Member, Finance. IT and Planning, Murang'a County.

2. There be no orders as to costs.

3. The petition be and is hereby marked as settled on the above terms.

Signed, dated and delivered in court at Nyeri this Friday, 11th March, 2016.

BYRAM ONGAYA

JUDGE