



Sonko v County Assembly of Nairobi City & 11 others (Petition 11 (E008) of 2022) [2022] KESC 76 (KLR) (5 December 2022) (Reasons)

Neutral citation: [2022] KESC 76 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

PETITION 11 (E008) OF 2022

**MK KOOME, CJ & P, PM MWILU, DCJ & VP, MK IBRAHIM,
SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ**

DECEMBER 5, 2022

BETWEEN

MIKE MBUVI SONKO APPELLANT

AND

COUNTY ASSEMBLY OF NAIROBI CITY 1ST RESPONDENT

SPEAKER, NAIROBI CITY COUNTY ASSEMBLY 2ND RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY 3RD RESPONDENT

CLERK OF THE SENATE OF KENYA 4TH RESPONDENT

SPEAKER OF THE SENATE OF KENYA 5TH RESPONDENT

SENATE OF KENYA 6TH RESPONDENT

ATTORNEY GENERAL 7TH RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 8TH
RESPONDENT**

**ASSUMPTION OF THE OFFICE OF THE COUNTY GOVERNOR COMMITTEE
NAIROBI CITY COUNTY 9TH RESPONDENT**

**BENSON MUTURA, THE ACTING GOVERNOR, NAIROBI CITY
COUNTY 10TH RESPONDENT**

**ANN KANANU MWENDA, THE DEPUTY GOVERNOR, NAIROBI CITY
COUNTY 11TH RESPONDENT**

OKIYA OKOITI OMTATAH 12TH RESPONDENT

(Being an Appeal from the Judgment of the Court of Appeal (Nambuye, Okwengu & Laibuta, JJ.A.) in Civil Appeal No. E425 of 2021 at Nairobi delivered on 4th March, 2022)



Jurisdiction of the Supreme Court to determine an appeal that did not specify the ground of appeal it was based under article 163(4) of the Constitution

Reported by John Ribia

Jurisdiction – jurisdiction of the Supreme Court – appellate jurisdiction – where a party did not specify the main ground upon which their appeal was based – whether the Supreme Court had the jurisdiction to determine an appeal which did not specify which of the two grounds of appeal under article 163(4) of the Constitution the appeal was based – Constitution of Kenya, 2010 article 163(4).

Advocates – duty of advocates – duty of advocates in preparation and presentation of cases - what was the duty of counsel in preparation and presentation of cases before the Supreme Court?

Devolution – county governors – impeachment of county governors – process of impeachment of county governors - whether due process was followed by the County Assembly in the removal of the County Governor of Nairobi – whether the County Governor of Nairobi was given adequate time to prepare his defence against impeachment charges leveled at the county assembly and at the Senate – whether it was mandatory to verify the impeachment motion by affidavits or other statements on oath by members of the County Assembly who allegedly supported the motion – Constitution of Kenya, 2010 articles 75, 76, 77, 104, 146, and 150; Leadership and Integrity Act (cap 185C) sections 11 and 13.

Devolution – county governors – impeachment of county governors – impeachment charges – whether the charges to impeach the County Governor of Nairobi were substantiated to the prescribed standard to warrant impeachment – Constitution of Kenya, 2010 articles 75, 76, 77, 104, 146 and 150; Leadership and Integrity Act (cap 185C) sections 11 and 13.

Constitutional Law – sovereignty of the people – integrity - process of devolution vis-à-vis the sovereignty of the people - whether the process of impeachment of the County Governor of Nairobi contravened the sovereignty of the constituents that elected him.

Constitutional Law – national values and principles – public participation – whether public participation was a requirement in the process of impeachment of a county governor—whether public participation was undertaken in the impeachment of the county governor of Nairobi County – Constitution of Kenya, 2010 articles 10(2)(a), 118(1), and 196; County Governments Act (cap 265) sections 94, 95, 100 and 101.

Civil Practice and Procedure – appeals – jurisdiction of second appellate courts – duty of second appellate court not to disturb findings of facts of evidence but to act on matters of strict interpretation of the law – circumstances in which a second appellate court could review evidence and facts - Constitution of Kenya, 2010 163(4)(a); Supreme Court Act (cap 9B) sections 3 and 15.

Brief facts

The appellant, the former County Governor of Nairobi, had filed a petition challenging his impeachment. His petition at the High Court was dismissed, and so was his subsequent appeal. Aggrieved, the appellant filed an appeal before the Supreme Court where he challenged the impeachment on grounds that it was unconstitutional as it violated the sovereignty of his constituents and undermined the vote at the ballot box, on grounds that the impeachment was done without due process and that he was not accorded a fair trial.

The respondents filed a preliminary objection on grounds that the Supreme Court did not have the jurisdiction to determine the appeal owing to failure to cite which provision the appeal was based on.

Issues

- i. Whether the Supreme Court had jurisdiction to consider an appeal which did not specify the grounds of appeal under article 163(4) of the Constitution.
- ii. What was the duty of counsel in the preparation and presentation of cases before the Supreme Court?
- iii. Whether due process was followed in the impeachment of the County Governor of Nairobi.
- iv. Whether the appellant’s constitutional right to due process was compromised.



- v. Whether the appellant was accorded adequate time and facility to respond to the charges against him both at the County Assembly and in the Senate.
- vi. Whether it was mandatory to verify the impeachment motion by affidavits or other statements on oath by members of the County Assembly who allegedly supported the motion.
- vii. Whether the impeachment charges were substantiated to the prescribed standard to warrant the appellant's impeachment.
- viii. Whether public participation was undertaken in the impeachment of the Governor of Nairobi County.
- ix. Under what circumstances could the Supreme Court disturb the concurrent findings of fact and evidence by the High Court and the Court of Appeal?
- x. Whether the process of impeachment of the County Governor of Nairobi contravened the sovereignty of the constituents that elected him.

Held

1. Without jurisdiction, a court had no power and had to down tools in respect of the matter under review. Appeals from the Court of Appeal lay to the Supreme Court pursuant to articles 163(4)(a) or 163(4)(b) of the Constitution as a matter of right or upon certification that a matter of general public importance was involved; and that an appeal could not lie at the Supreme Court unless brought within the compass of either of the two jurisdictional limbs.
2. The appeal was filed pursuant to two repealed rules. Rules 9 and 33 of the Supreme Court Rules, 2012 (repealed) essentially dealt with the contents of a petition and institution of appeals. Rules 9 and 33 of the 2020 Rules, on the other hand related to sealing of court documents and applications for certification, respectively. All those provisions could not be the basis for invoking the Supreme Court's jurisdiction. A party appealing to the Supreme Court from the Court of Appeal had to bear in mind the limits of its jurisdiction and had to decide, either to seek certification as a matter of general public importance under article 163(4)(b) of the Constitution or come as a matter of right under article 163(4)(a) thereof. Even when a party invoked the latter, it was upon that party to identify and specify how the appeal concerned the interpretation and application of the Constitution.
3. It could never be the role of the Supreme Court to wander around in the maze of pleadings and averments to ascertain by way of elimination which of the two limbs of article 163(4) of the Constitution a party intended to rely on. Such impetuous presentation of pleadings was discouraged. An appeal to the Supreme Court would not lie, unless convincingly preferred within the confines of either of the two jurisdictional limbs of article 163(4). It was paramount for any party moving it for any relief under article 163(4) to identify which one of the two limbs was being invoked.
4. The applicable considerations and principles for each of the limbs were different. In Kenya's adversarial system, the rules of pleading also served to ensure that parties defined succinctly the issues for determination so as not to take the rest of the parties by surprise. On the other hand, courts adjudicated upon the specific matters in dispute, which the parties themselves had raised by their pleadings. Failure to align an appeal to the guidelines of article 163(4) of the Constitution would lead to the dismissal of the petition.
5. Counsel intending to represent parties before the Supreme Court had to recognize that, like any appearance before any apex court in the world, practice of law before the Supreme Court as Kenya's court of last resort had to truly represent and reflect strict standards of professional responsibility. As an officer of the court upon whose shoulders rest, in part, the responsibility for the administration of justice, counsel had to, before bringing an action to the Supreme Court, identify the elementary legal foundation and ascertain as a minimum, whether the Supreme Court had jurisdiction, because as a general proposition, the relief available to a party depended not only on the pleadings but more significantly on the jurisdiction.



6. As a matter of practice, the pleadings had to always carry, at the very top, reference to the relevant provisions of the Constitution, the law and rules relied upon and specify at the end, the relief claimed. Counsel was required to be fully abreast with the jurisprudence of the Supreme Court.
7. At the apex court, there was no room for an indolent and lackadaisical approach to the preparation and presentation of cases. The Supreme Court expected nothing but precision, diligence, and above all, professionalism. The Supreme Court cautioned against sloppiness in the invocation of the Court's jurisdiction.
8. The appellant had failed to demonstrate how the appeal involved the application or interpretation of the Constitution and the manner in which the Court of Appeal erred in determining those very questions.
9. The preliminary objection was sustained. It would have been sufficient to dispose of the instant appeal in its entirety, and the Supreme Court would have to down tools. However, in view of the public interest and nature of the dispute, the broad interests of the parties, the need for due guidance to the judicial process and to the courts below; for the sake of posterity and development of jurisprudence, the right course was for the Supreme Court to determine all the pertinent questions raised in the appeal.
10. By the very nature of its position in the hierarchy of courts, the Supreme Court had a constitutional obligation to develop jurisprudence and guide the courts below it on matters of general public interest, as well as on those involving the interpretation and application of the Constitution. That duty could not be curtailed by a decision of any court, just the way Justices of the Supreme Court could not be rendered superfluous, or their work made perfunctory and mechanical. The function of the Supreme Court in resolving questions of interpretation and application of the Constitution was to remove any doubts and ambiguities in the law; mitigating hardships and correcting wrongs and not avoiding them.
11. The generally accepted position and widely applied that jurisdiction was everything, and that a court lacking jurisdiction had to down its tools, held good and retained validity. As far as the Supreme Court was concerned, in appropriate cases and only the instant final court, would rise to the occasion and not down tools, to resolve disputes that related to its constitutional mandate. Even where it declined jurisdiction to entertain any particular questions, the court could wish to achieve quality jurisprudence and also to resolve specific issues raised in the particular matter, to draw the whole dispute to a meaningful conclusion and to settle the law. It was not in all situations.
12. The approach taken by the court was not a departure from *Owners of the Motor Vessel "Lillian S" v. Caltex Oil Kenya Limited [1989] KLR 1* but an extended horizon to cater for the Supreme Court, with its specialized and wider jurisdiction than would have been contemplated at the time the decision in *Owners of the Motor Vessel "Lillian S" v. Caltex Oil Kenya Limited [1989] KLR 1* was made.
13. The Supreme Court was fortified in its decision to consider the appeal because whether the court down tools at the instant stage or go to the end, the inevitable result was that the decision of the Court of Appeal stood upheld. There were exceptional circumstances and proper justification not to down tools but to consider and determine the main grounds before the Supreme Court.
14. Not all the six grounds of appeal involved the interpretation or application of the Constitution or were matters of general public importance, the two permanent and defined coordinates of the Court's jurisdiction in respect of appeals arising from the decisions of the Court of Appeal. Matters of fact that touched on evidence without any constitutional underpinning were not open for the Supreme Court's review on appeal. Some of the grounds of appeal though framed partly as matters of law, were not constitutional or matters of law but of fact.
15. The duty to re-evaluate evidence was the function of a first appellate court. A first appellate court should accord deference to the trial court's conclusions of fact and only interfere with those conclusions if it appeared to it, either that the trial court had failed to take into account any relevant facts or circumstances or based the conclusions on no evidence at all, or misapprehended the



- evidence, or acted on wrong principles in reaching the conclusions. Only cardinal issues of law or of jurisprudential moment would deserve the further input of the Supreme Court.
16. The removal proceedings for a county Governor were textually committed by the County Assembly and the Senate. The constitutional mandate and the process to impeach a Governor commenced in the County Assembly and terminated in the Senate. The County Assembly and Senate were the only organs involved because of their special roles in devolved governments.
 17. The Senate specifically represented the counties and served to protect the interests of the counties and their governments. The Assembly, on the other hand, was the legislative arm of the county governments. The respective roles of the two institutions were important because one of the objects of devolution was to promote a democratic and accountable exercise of power. The governor and all officials in the county governments were subject to oversight and scrutiny by both the County Assembly and the Senate
 18. The Constitution committed to both institutions the exclusive power to remove the Governor, subject only to procedural requirements set out in the County Governments Act and the respective Standing Orders of the County Assemblies and the Senate: and proof of the charges. Both institutions, through their Standing Orders, were at liberty to determine the procedures for receipt and consideration of evidence necessary to satisfy the duty to conduct an impeachment hearing.
 19. In considering applications to review decisions of the other branches of Government, courts should strive to achieve a balance between their role as guardians of the Constitution and of the rule of law, including an obligation to respect what Parliament was constitutionally required to fulfill. In other words, where the Constitution required Parliament to determine a matter in the first place as part of its constitutional mandate, Parliament would have the discretion and power to regulate its own affairs and the courts would be slow to interfere with the exercise of that discretion.
 20. The Supreme Court would be reluctant to question parliamentary procedures as long as they did not breach the Constitution; and the mandate of the courts was restricted by the doctrine of separation of powers to deciding on matters of individual rights and fundamental freedoms and not to enquire into how the County Assembly and Senate perform duties in which they alone had discretion or to review the merit of the decision by the County Assembly and Senate to impeach a Governor.
 21. Both the County Assembly and the Senate could not act outside the confines of the Constitution and the law. To do so would invariably invite the court's intervention. Courts were permitted to intervene where matters of constitutional violations arose.
 22. The *audi alteram partem* rule required that those who were likely to be directly affected by the outcome of a decision should be given prior notification of the action proposed to be taken, of the time and place of any hearing that was to be conducted, and of the charge or case they would be called upon to meet. They had to be given an opportunity to be heard, to call witnesses, to be represented by counsel, to be availed adequate time and facilities to prepare, and if the accusations were proved, to be given the reasons for the decision. They were also entitled to challenge the decision, if against them, before a higher tribunal or court.
 23. In the process of the removal of a county governor, the right to fair administrative action under article 47 and the right to a fair hearing under article 50 of the Constitution all accrued to the Governor before a decision to remove him or her from office was reached. An unfair removal as one which went against the principles of natural justice; which implied that no adequate notice was given; that there was bias and where the hearing was not fair. Though a political process, impeachment was sanctioned by the Constitution and the law and was not a platform to settle political scores. The standing orders were designed to achieve accountability, political governance and personal responsibility and were not aimed necessarily at finding criminal responsibility.
 24. The Standing Orders of the two Houses of Parliament and of the County Assemblies played a critical role in guiding the orderly proceedings in those houses because of their constitutional underpinning



- in article 124 of the Constitution. The Nairobi City County Assembly Standing Orders provided for the steps for the removal of a Governor.
25. The process was sequential based on two stages. In the first stage, a Member of the County Assembly initiated the process by filing a notice of the motion for removal with the Speaker. The notice had to be supported by at least a third of all the members. It was only if the motion was supported and passed by at least two-thirds of all the MCAs that the Speaker of the County Assembly informed the Speaker of the Senate of that resolution within two days. Up to that point, the Governor continued to perform the functions of the office pending the outcome of the proceedings in the Senate, because that was where the impeachment proceedings were conducted.
 26. The court had not been shown any form of misdirection on material issues or instances where conclusions were based on no evidence, or where the conclusions were not supported by the established facts or evidence on record, so as to qualify those matters of fact as matters of law. There was no reason to depart from the concurrent conclusions of fact by the High Court and Court of Appeal. Due process was followed to remove the appellant from office.
 27. The Senate's role in impeachment did not include re-assessing the procedure before the County Assembly. It was not an appellate process. Once a resolution had been passed by the County Assembly to confirm the charges for the removal of a Governor, the Speaker of the County Assembly's role was to notify the Speaker of the Senate, who in turn was required to summon the Senate to consider the motion.
 28. There was no fault in the manner the Speaker of the Senate treated the objection. He could not be accused of having failed and/or ignored altogether to consider the appellant's preliminary objection when he in fact allowed the appellant's counsel to submit the objection at length, and adjourned the sitting to consider the arguments before rendering the ruling. He properly directed his mind to the relevant procedural laws and judiciously exercised his discretion. Despite the voluminous documents containing the charges and proceedings before the County Assembly, the appellant had sufficient time and did prepare well to defend himself.
 29. There was no basis to depart from the findings of the Court of Appeal, especially considering that the proceedings took place during the Covid-19 season and given tight timelines set by Orders 75 and 76 of the Senate Standing Orders. The procedure under these Standing Orders appeared to have been meticulously followed by the Senate. The motion was properly moved; adequate notice was given to the appellant; he was aware of the allegations facing him; he was allowed to defend himself; to adduce and challenge evidence; the hearing was in public; and the proceedings began and concluded without unreasonable delay.
 30. No step was taken outside the timelines set out in orders 72 and 75 of the Senate Standing Orders. Both the Court of Appeal and the High Court were convinced that the appellant had sufficient time within which to prepare and present his response.
 31. The multi-stage nature of the process of removal from office, and the attendant litigation that followed had produced in the recent past a worrying trend that amounted to abuse of court process by parties. Parties employed all delay tactics in the book in order to avoid the consequences of the lustration provisions in Chapter Six of the Constitution that disqualified an individual from holding a State or public office since such disqualification was dependent on all possibilities of appeal or review of the relevant sentence or decision being exhausted.
 32. If the phenomenon of parking appeals were to be allowed as the norm, the result would be to forget the constitutional aspirations of good governance and integrity in public service. In such a context, courts were not helpless. To begin with, the mandate of interpretation and application of the Constitution was vested in the courts.
 33. The courts could not sit back and helplessly watch as the constitutional and national values and principles were being subverted by deliberate acts of the parties. Parties who were appealing or applying



- for review of decisions that made them ineligible for public or state office pursuant to Chapter Six of the Constitution had a singular obligation to diligently prosecute such cases. Justice had to be done and was also to be seen to be done. That had to be the overriding objective of every party, counsel and the court.
34. The appellant was accorded a fair hearing within the meaning of article 50 and fair administrative action in terms of article 47 of the Constitution, and under the standing orders.
 35. The Motion for the removal from office of Governor Nairobi County was duly verified in accordance with Order 67(1) of the Nairobi City County Assembly Standing Orders; and that the verification was not in the form of an affidavit or any other forms of deposition.
 36. Whereas public participation was a major pillar and bedrock of Kenyan democracy and good governance, proving public participation was not dependent upon proof by evidence. On account of the restrictions placed on physical and personal public interactions due to the Covid- 19 pandemic, all the foregoing avenues satisfied the requirements of public participation.
 37. Impeachment or removal proceedings, though quasi-judicial were not in the nature of criminal proceedings. They did not necessarily require or depend on criminal culpability to succeed. All that was required was that the allegations be substantiated. But as a constitutional remedy, impeachment served as an important check on the exercise of executive power. The purpose of impeachment was generally to protect public interest and to preserve constitutional norms, while at the same time observing the rules of natural justice throughout the process. Both interests had to be balanced.
 38. The High Court received and evaluated the evidence presented to it in support and in rebuttal of the four charges. The Court of Appeal re-evaluated that evidence before coming to its independent determination. The two courts came to a common conclusion that articles 47 and 50 of the Constitution were adhered to by both the County Assembly and the Senate; that the process was, in the circumstances, expeditious, lawful and procedurally fair.
 39. The Supreme Court could not substitute itself into the High Court and Court of Appeal and take up their roles by re-analyzing the evidence afresh for the third time. The Supreme Court could only disturb the concurrent factual conclusions. If those conclusions were based on no evidence or not supported by the facts or evidence on record, or that the conclusions were so perverse or so illegal, no reasonable court would have arrived at the same. The four charges against the appellant were, no doubt weighty, but they were not vague. They contained detailed particulars of the alleged violations of the Constitution and the law, specifying with precision the provisions of the Constitution and the law that were alleged to have been contravened.
 40. Before the question of impeachment was escalated to the two courts, both the County Assembly and the Senate had equally and independently found merit in the charges. Though there was no obligation in impeachment charges to prove each and every charge, in that instance all the organs involved, from the County Assembly to the Court of Appeal, found proof of all the charges. Nothing had been placed before the Supreme Court to warrant interference with those conclusions by the two superior courts.
 41. Under article 1 of the Constitution, all sovereign power belonged to the people of Kenya. That power could only be exercised in accordance with the Constitution itself. Further, the people may exercise that power either directly or through their democratically elected representatives. Specifically, in the instant case, sovereign power of the people was delegated to State organs such as Parliament at the national level and the county assemblies in the devolved governments. Delegated power was to be exercised solely for the benefit of the people.
 42. To completely lock out the electorate from being heard in a matter as important as the removal of their governor would be against the spirit of article 1(2) of the Constitution. There having been meaningful public participation, the people participated directly and also exercised their power through their elected representatives, at both national and county levels to uphold and defend chapter six of the Constitution.



43. The removal from office of the appellant was in compliance with the Constitution and the law.
Per P.M Mwilu, DCJ and VP; and SC Wanjala, SCJJ (Concurring)
44. The appeal had been rightly dismissed for lack of merit. However, the concurring court would have struck out the appeal at the instant stage without more.
45. A party had to properly and specifically invoke the Supreme Court’s appellate jurisdiction under article 163(4)(a) or 163 (4)(b) of the Constitution. Failure to do so would lead to the intended appeal being struck out. The concurring court would have downed its tools.
Per MK Ibrahim, SCJ (Concurring)
46. The Supreme Court, as the Court of final judicial authority in Kenya, was bestowed with jurisdiction and mandate pursuant to section 3 of the Supreme Court Act, No. 7 of 2011, to settle constitutional questions with finality. The Supreme Court should be ready to pronounce itself on the interpretation of constitutional issues.
47. The instant case warranted the Supreme Court to depart from the long-held decision in *Owners of the Motor Vessel “Lillian S” v. Caltex Oil Kenya Limited [1989] KLR 1*. That was not an endorsement for departure from the principles in the *Owners of the Motor Vessel “Lillian S” v. Caltex Oil Kenya Limited [1989] KLR 1* decision, rather a singular exemption for the Supreme Court due to its specialised mandate pursuant to the Constitution and the Supreme Court Act.
48. The authority assigned to a State officer was a public trust that vested the responsibility to serve the people, rather than the power to rule them. To take up a State Office, whether it be by election or appointment, required commitment to good governance, transparency and accountability. That commitment had to be espoused in both the words and deeds of the officeholder in both public and official lives as well as their private lives. In every association, that commitment had to, at all times, be consistent with the purposes and objects of the Constitution, demonstrate honour for the people of Kenya, bring honour to the nation and dignity to the office as well as promote public confidence in the integrity of the office. Chapter Six codifies the guardrails against the autocratic exercise of power by the leaders.
49. The context of the instant case presented an opportunity for the Supreme Court to settle fundamental questions of law surrounding impeachment proceedings in the framework of the Constitution of Kenya, 2010. Impeachment being a remedy for breaching the public trust entrusted to State officers. The instant case was an opportunity to provide high-yielding interpretive guidance on the Constitution that the court had an obligation and duty to seize.
50. The concurring court fully supported the principles and the final orders of the majority court.

Petition of appeal dismissed.

Orders

Each party was to bear their own costs.

Citations

Cases

Kenya

1. *Aramat, Lemanken v Harun Meitamei Lempaka & 2 others* Petition 5 of 2014; [2014] KESC 21 (KLR) - (Explained)
2. *Attorney-General & 2 others v Ndiu & 79 others; Rosalind Dixon & 7 others (Amicus Curiae)* Petition 12, 11 & 13 of 2021 (Consolidated); [2022] KESC 8 (KLR) - (Explained)
3. *Commission for the Implementation of the Constitution v National Assembly of Kenya, Senate of the Republic of Kenya & Attorney General* Constitutional Petition 496 of 2013; [2013] KEHC 6919 (KLR) - (Applied)
4. *David Njilithia Mberia v Republic* Anti-Corruption and Economic Crimes Appeal E005 of 2021; [2021] KEHC 7402 (KLR) - (Explained)



5. *Ibren v Independent Electoral and Boundaries Commission & 2 others* Petition 19 of 2018; [2018] KESC 75 (KLR) - (Explained)
6. *Jobo & another v Shabbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR); [2014] 1 KLR 111 - (Explained)
7. *Karua, Martha Wangari v Independent Electoral and Boundaries Commission & 3 others* Petition 3 of 2019; [2019] KESC 26 (KLR) - (Explained)
8. *Kimani, Paul Mungai & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney-General & 2 others* Petition 45 of 2018; [2020] KESC 9 (KLR) - (Explained)
9. *Lisamula v Independent Electoral & Boundaries Commission & 3 others* [2014] 4 KLR 361 - (Explained)
10. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR) - (Explained)
11. *Mate, Justus Kariuki & another v Martin Nyaga Wambora & another* Petition 32 of 2014; [2017] KESC 1 (KLR) - (Explained)
12. *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* Petition 3 of 2018; [2021] KESC 34 (KLR) - (Explained)
13. *National Rainbow Coalition Kenya (NARC Kenya) v Independent Electoral & Boundaries Commission; Tharaka Nithi County Assembly & 5 others (Interested Party)* Petition 1 of 2021; [2022] KESC 6 (KLR) - (Explained)
14. *Ndii & 4 others v Attorney General & 3 others; Kenya Human Rights Commission & 2 others (Intended Amicus Curiae)* Petition E282 of 2020; [2020] KEHC 738 (KLR) - (Applied)
15. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR); [2012] 2 KLR 804 - (Explained)
16. *Ngoge v Kaparo & 5 others* Petition 2 of 2012; [2012] KESC 7 (KLR) - (Explained)
17. *Njibia, Daniel Kimani v Francis Mwangi Kimani & another* Civil Application 3 of 2014 - (Applied)
18. *Nkube v Nyamuro* [1983] KLR 403 - (Explained)
19. *Owners of the Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR); [1989] KLR 1 - (Explained)
20. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR); [2014] 2 KLR 253 - (Explained)
21. *Republic v Registrar of Societies & 5 others ex parte Kenyatta & 6 others* Miscellaneous Civil Application 747 of 2006 - (Applied)
22. *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR) - (Explained)
23. *Steyn v Gnecchi-Ruscone* [2013] 3 KLR 391 - (Explained)
24. *Wambora & 3 others v Speaker of the Senate & 6 others* [2014] 4 KLR 559 - (Explained)
25. *Warrakah & 2 others v Mbwana & 5 others* Petition 12 of 2018; [2018] KESC 76 (KLR) - (Explained)

South Africa

Doctors for Life International v Speaker of the National Assembly and others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (1399); 2006 (6) SA 416 (CC) - (Explained)

United States

1. *Kinsella v Jaekle* 475 A 2D 243, 253 (Conn 1984) - (Applied)
2. *McDonald v Mabee* 243 US 90 (1915) - (Explained)
3. *Nixon v United States* 506 US 224 (1993) - (Explained)

Regional Court

1. *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 - (Explained)
2. *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 - (Explained)



Statutes

Kenya

1. Assumption of the Office of Governor Act (cap 265A) In general - (Cited)
2. Constitution of Kenya articles 1, 10(2)(a); 23; 25; 27; 47; 48; 50; 73; 75(2); 76; 77; 104(1); 118(1); 144; 159; 163(4)(1)(a)(b); 181; 182(4)(5); 193(3); 196(1); 258; 259(1)(c); 260- (Interpreted)
3. County Governments Act (cap 265) section 33(1); 87; 91; 94; 95; 100; 101; 115 - (Interpreted)
4. Evidence Act (cap 80) section 109- (Interpreted)
- 5.
6. Leadership and Integrity Act (cap 185C) sections 11, 13- (Interpreted)
7. Supreme Court Act (cap 9B) sections 3, 15- (Interpreted)
8. Supreme Court Rules, 2012 (Repealed) (cap 9B Sub Leg) rules 9, 13, 33- (Unconstitutional)
9. Supreme Court Rules, 2020 (Repealed) (cap 9B Sub Leg) rule 28(2)- (Interpreted)

Advocates

None mentioned

REASONS

A. Introduction

1. Impeachment or removal from public office in the context of the *Constitution of Kenya, 2010* is about integrity in leadership. To understand the past is to prepare for the future because lessons from human history are full of insights into the nature of human experience and the culture of man. History does not have to repeat itself, but it will, if we fail to learn from it.
2. Based on the facts and circumstances of this case, there are lessons to be drawn from great leaders in the days of old who quickly ascended to leadership with such promise of exceptional success, only to disastrously fall into eternal disgrace. King Saul, who was technically Israel's first King, has been described as a tragic figure. Based on his reign of power, he has been given as a perfect example of how leadership can destroy a person who, by his or her character, has not been prepared for it. Though he was wealthy and charismatic, King Saul did not have integrity, humility, and a servant's heart.
3. The story of Solomon is another such powerful story that demonstrates that even the wisest among us can lose their way as leaders; that leadership should never be about the quest for wealth, unbridled fame and power. From these and many other examples in history, it should be obvious that there exists a relationship between leadership, accountability, and integrity.
4. On July 15, 2022, when the court delivered its Judgment in this appeal, it reiterated the terms of chapter six of the *Constitution* to the effect, it was not enacted in vain or for cosmetic reasons; that the authority assigned to a state officer is a public trust to be exercised in a manner that demonstrates respect for the people; brings honour to the nation and dignity to the office; and promotes public confidence in the integrity of the office. It vests in the State officer the responsibility to serve the people, rather than the power to rule them. The standard for leadership is premised on the foundation that only those who, by their words and deeds, have demonstrated commitment to good governance, transparency and accountability should be accorded the honour to lead and serve the people.



5. The Constitution creates a distinctive category of members of society called State officers, who are regarded and idolized as special pedigree of leaders in the society; and to whom much is given, and therefore much is required and expected. They include;
 - a. President;
 - b. Deputy President;
 - c. Cabinet Secretary;
 - d. Member of Parliament;
 - e. Judges and Magistrates;
 - f. Member of a commission to which chapter fifteen applies;
 - h. Member of a county assembly, Governor or Deputy Governor of a county, or other member of the executive committee of a county government;
 - i. Attorney-General;
 - j. Director of Public Prosecutions;
 - k. Secretary to the Cabinet;
 - l. Principal Secretary;
 - m. Chief of the Kenya Defence Forces;
 - n. Commander of a service of the Kenya Defence Forces;
 - o. Director-General of the National Intelligence Service;
 - p. Inspector-General, and the Deputy Inspectors-General, of the National Police Service. See article 260 of the *Constitution*.
6. To emphasize the critical space occupied by State officers, the *Constitution* makes special requirements for them to embody the spirit and values of the *Constitution*. For instance, they must conduct themselves with integrity, whether in public or official life, in private life, or in association with other persons. They must behave in a manner that avoids conflict between personal interests and public or official duties and, must never do anything that demeans the office. See article 75 of the *Constitution*.
7. On financial probity, the *Constitution* restricts what a State officer can receive as a gift or donation. Similarly, a State officer cannot maintain a bank account outside Kenya unless permitted by law; seek or accept a personal loan or benefit in circumstances that are likely to compromise their integrity. A full-time State officer cannot participate in any other gainful employment, while an appointed State officer cannot hold office in a political party.
8. Some of these restrictions on State officers follow them into retirement. For instance, a retired State officer, who is receiving a pension from public funds, cannot hold more than two concurrent remunerative positions in a company owned or controlled by the State; or in a State organ. See articles 76 and 77.
9. To demonstrate the seriousness with which these basic leadership restrictions are to be taken, article 75(2) of the *Constitution* provides that the contravention of those terms by a State officer will attract disciplinary proceedings, including dismissal or removal from office. Further, a person who has been dismissed or otherwise removed from office “is disqualified from holding any other State office”.



10. As a further commitment to ensuring integrity in leadership, the *Constitution* also creates an Ethics and Anti- Corruption Commission to enforce the above provisions. It commands the enactment of legislation on leadership and integrity, the *Leadership and Integrity Act, 2012*, which was enacted for the effective administration of chapter six of the *Constitution*. It obliges a State officer to respect the values and principles of the *Constitution*. The Act establishes the General Leadership and Integrity Code, which is a code of conduct applicable to all State officers. In addition to the said Code, the Act requires each public entity to prescribe a specific leadership and integrity code for the State officers in those entities.
11. Before assuming office, a State officer must, by article 74, take and subscribe the oath or affirmation of office, and swear or affirm before God, and the people, to obey, preserve, protect and defend the *Constitution* and all other laws of the Republic; and to “protect and uphold the sovereignty, integrity and dignity of the people of Kenya”. Specific to this case, the *Assumption of the Office of Governor Act, 2019* requires the Governor and the Deputy Governor to commit in an oath or affirmation to diligently discharge the duties of the office and perform the functions in the said offices without fear, favour, affection or ill-will. The oaths to which State officers subscribe are sacred and not mere formalities. The words written in them bind the officers to be accountable to the people and to uphold the *Constitution*.
12. One is disqualified for election as member of Parliament or member of County Assembly under articles 99 and 193; respectively, if one is an undischarged bankrupt; is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election; or is found, in accordance with any law, to have misused or abused a State office or public office or in any way to have contravened chapter six.
13. The foregoing explanation, we believe, is a demonstration of painstaking efforts by the framers to entrench in the supreme law integrity in leadership; because citizens are entitled to expect that public officials, both elected and non- elected, ought to behave according to the highest standards of ethical behaviour.
14. “Impeachment”, “recall” and “removal” are therefore the *Constitution's* final answer, a safety valve, to a State officer or a public servant who mistakes himself for a monarch. As they say, power corrupts, and the framers of the *Constitution* being cognizant of this fact, built guardrails against autocratic exercise of power by the leaders.
15. Ethics of resignation from or vacation of office is a rare trait in leadership in our society. Leaders “would rather die” than take responsibility. This is in contrast with, for example, the United Kingdom or Japan, where public resignation is relatively common and where the political culture celebrates the ethical independence of public servants. Resigning from office or what is famously referred to in this country as “stepping aside” is a critical ethical but personal decision; an exhibition of personal courage. Yet, resignation or stepping aside, where there are credible reasons for a public officer to take ministerial or personal responsibility, remains one of the basic moral resources of integrity because it buttresses responsibility and supports accountability.
16. Although the *Constitution* uses the term “impeachment” to describe the process of removal of the President and Deputy President under articles 146 and 150, and the term “removed” or “removal” for a county Governor and other State officers, we do not think the word “impeachment” is a term of art. Whether one is removed or impeached, the outcome is the same, though the process may not be exactly the same. In this appeal, therefore, we shall use “removal” or “remove” or “impeachment” or “impeach” interchangeably. The other constitutional remedy to address misconduct in the public office is article 104(1), which gives the electorate the right to “recall”, before the end of the term, their member of any of the two Houses of Parliament.



17. The removal process of a Governor is, therefore, part of the oversight mandate of County Assembly and the Senate. The process is intended to serve as a reminder to the holders of office of Governor that the immense power vested in that office is to be exercised for the benefit of the people and is not a license for lawlessness.
18. It must, however, be stressed for avoidance of doubt, that the power of impeachment, removal or recall is not one expected to be in constant or frequent exercise. It is only in the face of credible evidence of extraordinary wrongdoing, that the conduct of a State officer will be investigated and even then, only upon sufficient proof of the allegations that impeachment, removal or a recall would be warranted.
19. Chapter six, in our view, is the soul of the *Constitution of Kenya*. Without integrity in leadership, the *Constitution* itself will be in utmost peril. The people, through the *Constitution*, have ordained integrity as a value and principle of governance, dedicating to it a whole chapter in the *Constitution* and, at the same time, they have determined what level of integrity is needed in leadership. A State officer may be impeached or removed from office for, among other transgressions, gross violation of the *Constitution* or of any other law; commission of a crime; abuse of office; gross misconduct; and violation of the *Constitution* or any other law.
20. It is perhaps out of this realization that the appellant's impeachment motion was founded; the need to enforce chapter six and article 10 of the *Constitution*. More specifically, the Motion drew attention to the fact that;

“...Whereas chapter six of the *Constitution*, the *Leadership and Integrity Act, 2012* and the Public Officer Ethics Act provide for, primarily, the conduct of State and Public Officers, and the accountable exercise of power and responsibility assigned to State and public officers;

and whereas article 10 as read together with article 73 of the *Constitution* and section 3 of the *Leadership and Integrity Act, 2012* provides for the respect of the rule of law, good governance, accountability and transparency of State Officers for decisions and actions as key guiding principles of leadership; ...”

B. Background

21. The appellant was elected the Governor of Nairobi City County during the general election held on August 8, 2017. A motion to remove him from office was presented and moved before the 3rd respondent (the County Assembly) on November 25, 2020 by Hon Michael Okumu Ogada, the Member of the County Assembly for Embakasi Ward. In the Motion, the Member alleged that the appellant had grossly violated the *Constitution* and other laws, namely, the *County Governments Act, 2012*, Public Procurement and Disposal Act, 2015 and the Public Finance Management Act, 2012. Secondly, that the appellant had abused the office of Governor by violating article 75 of the *Constitution* as read with sections 11 and 13 of the *Leadership and Integrity Act*. Thirdly, it was alleged that the appellant was guilty of gross misconduct for violating article 73 of the *Constitution* by engaging in conducts that do not bring honour to the nation and dignity to the office. Finally, the member was convinced that there were serious reasons to believe that the appellant had committed various crimes under the Anti- Corruption and Economic Crimes Act in light of the criminal charges he was facing at the Anti-Corruption Court.
22. The Speaker of the County Assembly, being satisfied that the procedure for initiating the removal of the appellant was proper, served the appellant with the Motion and invited him to file a response and



also to appear before the County Assembly on December 3, 2020 when the Motion was scheduled for consideration by the Assembly.

C. Litigation History And Proceedings Leading To Removal

i. Before the Employment and Labour Relations Court

23. The appellant first approached the Employment and Labour Relations Court in Petition No 35 of 2020; *HE Governor Mike Mbuvi v Nairobi City County Assembly & 6 others* (ELRC No 35 of 2020) to challenge the constitutionality and validity of the Motion. In the meantime, he applied for conservatory orders to stop the County Assembly from considering the Motion. Nzioki wa Makau, J issued conservatory orders on November 30, 2020 in terms of the application until the determination of the interlocutory application on December 3, 2020.

ii. Before the County Assembly

24. Despite this order, and for the reasons we shall return to, on the same date, December 3, 2020 the Motion was considered by the County Assembly and supported by 88 Members of the County Assembly (MCAs) out of the total of 122. The two thirds threshold required by Standing Order 75(5) of the County Assembly Standing Orders and section 33(1) of the *County Governments Act* was thereby attained. As a result, on December 4, 2020 the Speaker of the County Assembly informed the Speaker of the Senate of the resolution by the County Assembly to remove the appellant.

iii. Before the Senate

25. In turn, the Speaker of the Senate summoned the Senate which was on recess for a special sitting to consider the Motion. Despite the Senate initially appointing a Select Committee on December 9, 2020 to investigate the proposed removal, the said Select Committee recommended that the Motion be heard by the whole Senate in plenary pursuant to Standing Order 75 of the Senate Standing Orders. A special sitting of the Senate was, as a consequence, scheduled for two days, 16th and December 17, 2020. Before that date, on December 10, 2020, the Clerk of the Senate sent an invitation to both the appellant and the County Assembly to appear before the Senate on December 16, 2020. By that communication, they were also directed to file necessary responses or documents by December 15, 2020.

26. Apart from filing a response to the allegations against him, the appellant also raised a preliminary objection to the effect that there was no evidence to support the allegations as none was presented to the County Assembly; that contrary to Standing Order 67(1) of the Nairobi City County Assembly Standing Orders, the mover of the Motion had not affirmed by way of affidavit that the charges and particulars therein were true within his knowledge; and that the MCAs who allegedly appended their signatures in support of the Motion had similarly failed to depose on oath that they did so to confirm the correctness of the charges; that the allegations before the County Assembly were also in court, and were therefore sub-judice; that there were conservatory orders issued in ELRC Petition No 35 of 2020 prohibiting the County Assembly and the Senate from proceeding with any Motion for removal from office against the appellant; and that there was no evidence of public participation prior to the removal hearing on December 3, 2020.

27. Upon considering, in limine, the arguments advanced with regard to the preliminary objection, the Speaker of the Senate directed that the same be subsumed and determined within the Motion.

28. Thereafter, the Senate on December 17, 2020, after a full debate and voting, resolved to remove the appellant from office and issued a gazette notice to that effect. On December 21, 2020, the Speaker of



the County Assembly was sworn in as the Acting Governor of Nairobi City County, as the county had for some time been without a deputy Governor.

iv. Before the High Court

29. Dissatisfied by his removal, the appellant filed High Court Petition No E425 of 2020, *Hon Mike Mbuvi Sonko v The Clerk County Assembly of Nairobi & 7 others* while Okiya Okiya Omtatah (the 12th respondent) filed Nairobi High Court Petition No E014 of 2021, *Okiya Omtatah Okiya*

v. Nairobi City County Assembly & 5 others, both of which were subsequently consolidated.

30. Their grievances were that the Clerk and the Speaker of the County Assembly violated articles 1, 10, 23, 25, 27, 47, 48, 50, 159 and 258 and 259 of the Constitution, together with section 14 of the *County Governments Act* as well as Standing Order No 67 of County Assembly Standing Orders by approving the Motion which was not verified by evidence or sworn affidavits of the MCAs in support of the same; that the County Assembly did not undertake public participation as required by articles 10(2) (a), 118(1) and 196 of the *Constitution* and sections 94, 95, 100 and 101 of the *County Governments Act*, and as a result, denied the residents of Nairobi County the opportunity to participate in the appellant's removal as their Governor; that the appellant was not served with sufficient particulars to enable him prepare a reasonable defence; that the County Assembly considered and deliberated on the Motion whilst the conservatory orders in ELRC Petition No 35 of 2020 were still in force; and that, on December 3, 2020 the appellant's counsel, Mr Ondieki, was denied access into the County Assembly Chambers during the hearing thereby denying the appellant the right to representation and to be heard.
31. Further, the appellant complained that the requisite quorum had not been met during the hearing and voting on December 3, 2020 as a total of 57 MCAs had travelled to Kwale County and therefore, could not have been physically present during the hearing and voting; that the voting was marred with fraud and illegalities as evinced by affidavits of the 57 MCAs, who maintained that they had not voted in support of the Motion; that contrary to assertions by the Clerk of the County Assembly, voting could not have been conducted both physically and virtually as the Standing Orders did not allow virtual proceedings or even electronic voting.
32. Concerning the proceedings before the Senate, the appellant complained that before accepting the impeachment resolution from the County Assembly, the Senate ought to have evaluated the Assembly proceedings in order to satisfy itself that the law was complied with; that the appellant's preliminary objection was improperly dismissed; that the County Assembly was allowed to introduce new evidence before the Senate at the eleventh hour; that the Senate served the appellant with voluminous evidence on the evening of December 15, 2020 yet he was expected to defend himself the following day, thereby violating his right to fair hearing; that the Senate was biased against him and had a pre-determined outcome; that the Senate violated the *Constitution* and the law by finding that he was in breach of procurement procedures when he was not an accounting officer and passing a resolution to remove him based on evidence that did not link him with the acts, omissions and commissions complained of; and that the appellant was neither given the reasons for the impeachment nor a report of the outcome of the proceedings by the Senate.
33. Without a valid Motion, the lack of quorum in the County Assembly, there being no specific charges and the Speaker of the Senate having failed to establish whether the resolution by the County Assembly was in accordance with the law, and the proceedings being sub judice, the appellant asked the High Court to find that the entire proceedings and the process of his removal were a nullity and of no effect.



34. The Clerk of the County Assembly, Mr Edward Ombwori Gichana, responded to these averments insisting that the appellant had the option of attending the proceedings physically, through his duly appointed advocate or virtually but opted instead to take a vacation at the coast; that there was no evidence that the advocate allegedly sent to the County Assembly by the appellant had instructions from him; that the conservatory orders issued on November 30, 2020 in ELRC 35 of 2020 had lapsed at 11:30 am for want of extension at the time the Motion before the Assembly was considered on December 3, 2020 at 3:00 pm.; that due to the Covid-19 pandemic, the County Assembly had amended its Standing Orders on June 2, 2020 and introduced Order 231D to allow for virtual proceedings to complement the usual physical proceedings; that some of the MCAs alleged to have deposed that they did not take part in the hearing and voting, swore further affidavits reneging their earlier positions; and that public participation was conducted between November 30, 2020 and December 3, 2020 and questionnaires were manually distributed across the County through the County Assembly ward offices. In any case, the Clerk argued, the removal proceedings of a Governor lay squarely on the County Assembly and the Senate, and by dint of the doctrine of separation of powers, the court lacked jurisdiction to entertain the suit.
35. The Clerk of the Senate, Speaker of the Senate and the Senate jointly in response to these averments asserted that both the appellant and the County Assembly were invited to appear before the Senate plenary on December 16, 2020; that the appellant was given ample time to respond to the documentation and was accorded a fair hearing as reported in the Hansard; that there was public participation in the impeachment proceedings by virtue of the fact that the proceedings were open to the public; that the appellant was allowed to canvass his Preliminary Objection at length and a ruling was rendered; and that there was quorum and the voting was procedural. Accordingly, they maintained that the Senate voted and accordingly resolved to remove the appellant from office within the law.
36. The 7th and 10th respondents similarly maintained that the impeachment process fully complied with the Constitutional and statutory requirements. Whilst the 8th respondent asserted that IEBC discharged its obligations in accordance with the *Constitution*, the enabling statutes and regulations by issuing a Notice of a By- Election for Governor, Nairobi City County which was to be held on February 18, 2021.
37. In the end, the High Court, after evaluating these arguments, framed three key issues as falling for its determination; whether the court had jurisdiction to determine the petitions; whether the appellant was accorded fair administrative action during the removal proceedings; and whether the appellant's impeachment met the constitutional threshold. By a unanimous judgment delivered on June 24, 2021 (Chitembwe, Korir & Okwany, JJ) found that the removal of the appellant fully complied with the constitutional and statutory requirements. The court proceeded to dismiss the consolidated petitions for lack of merit, finding on the issue of jurisdiction, that the doctrine of separation of powers did not inhibit the court's constitutional power to examine and interrogate the removal proceedings before the County Assembly and the Senate, especially where a party alleges that there was violation of the *Constitution* and the law.
38. On whether the appellant was accorded fair administrative action during the proceedings, the court found that the right to fair administrative action applies in both judicial/quasi-judicial or any administrative proceedings that affect the rights of an individual. In this case, the court was satisfied that the appellant was notified of the charges against him through the Speaker's letter of November 26, 2020, which also brought to his attention the existence of the Motion detailing the charges against him and a list of the MCAs who supported the Motion. These, in the court's view, were instances confirming that the appellant was accorded adequate opportunity to respond to charges against him.



39. On whether the impeachment of the appellant met the constitutional threshold, the court expressed satisfaction that the charges were fully substantiated. According to the court, the appellant merely denied, intimidating, harassing, or molesting any member of the County Executive Committee but never denied the allegation of high turnover of senior staff in his government. Likewise, the appellant did not deny using abusive, embarrassing, inappropriate, and unprintable language which undermined the office of Governor. It was further satisfied that the Speaker of the Senate properly dealt with the preliminary objection; that in voting on the impeachment Motion, the Senators made a decision on all the issues touching on the proceedings before them, including the lawfulness of the impeachment; that no new evidence or charges were presented before the Senate because what was contained in the Motion was the same information that was presented before the County Assembly; that the late service of voluminous documents did not impinge on the appellant's right to fair administrative action and hearing as he had until December 17, 2020 to defend himself; that the Senate's Hansard report does not indicate that the Senators had previously met and reached a decision to impeach the appellant so as to justify his claim that the vote was predetermined; and that the Senate's Hansard report contains the entire impeachment proceedings which include the reasons thereof.

vi. Before the Court of Appeal

40. The appellant took his grievance to the Court of Appeal, seeking that the decision of the High Court be overturned and the appeal be allowed; that the resolution of the Nairobi City County Assembly dated December 3, 2020 and those of the Senate of December 17, 2020 be quashed; that an order be issued declaring that the High Court had no power to extend or reduce timelines contemplated by article 182(4) and (5) of the *Constitution*; and that the appellant be awarded costs both in the High Court and in the Court of Appeal.

41. The combined effect of the 58 grounds of appeal was that:

- a. The process adopted by the County Assembly and the Senate leading to the removal of the appellant from the office of Governor of Nairobi City County was flawed;
- b. There was no public participation; and
- c. The allegations brought against him were not substantiated or substantiated to the required standard.

42. For its consideration, the Court of Appeal identified the following issues: whether the procedure adopted by the County Assembly in the removal of the appellant was in accordance with the *Constitution*, the *County Governments Act*, and the Standing Orders of the Nairobi City County Assembly and of the Senate; whether there was quorum in the County Assembly to pass a resolution for the impeachment of the appellant; whether there was adequate public participation in the impeachment process; whether there was in force a court order given on November 25, 2020 in ELRC Petition No 35 of 2020 barring debate on the Notice of Motion for removal from office of the appellant; whether the proceedings at the County Assembly and the Senate were procedurally fair, or whether appellant's right to fair hearing was violated; whether the charges leveled against the appellant were substantiated to the required standard; whether the 8th respondent (IEBC) complied with the relevant statutory requirements in publishing Gazette Notice No 232/10914 of 2020 declaring its intention to hold a by-election for County Governor, Nairobi City County on the 18th day of February 2021; whether the timelines set in article 182(4) and (5) of the *Constitution* for the conduct of a by-election for the office of County Governor may be shortened or extended by order of the court; and costs.



43. By a judgment dated March 4, 2022, the Court of Appeal dismissed the appeal, being persuaded, like the High Court, that there was nothing to suggest that the appellant was not accorded a fair hearing as there was evidence to the contrary; that the appellant instead chose not to participate in the proceedings before the County Assembly; that he had the right to legal representation, but failed to formally instruct counsel; that he was informed of the charges and given the opportunity to prepare his defence, adduce evidence and to rebut the charges; that he was presented with the report or resolution of the County Assembly to enable him prepare his response before the Senate; and that the hearing and determination of the Motion for removal was executed without delay.
44. Again, upholding the High Court, the Court of Appeal found no requirement in law for the impeachment Motion to be verified by affidavit. It was satisfied that, in accordance with Order 67(1) of the Nairobi City County Assembly Standing Orders, all that is required in order to verify the contents of the Motion were the signatures of at least one-third of MCAs in support thereof.
45. The Court of Appeal thus came to the conclusion, on the question of the requisite quorum in the County Assembly, that the trial court correctly found that the appellant had failed to prove that the requisite statutory quorum for a resolution to remove a Governor had not been met. The court also found as a fact that the Hansard report, which is the official record of the County Assembly showed that 90 MCAs (out of 122, constituting more than 2/3 of the membership) voted on the Motion.
46. Upholding the High Court's finding that the appellant was not by any means denied a fair hearing in the County Assembly, the Court of Appeal, in addition, accepted that the removal process complied with the constitutional and statutory requirements and standards for a fair hearing.
47. The court, after confirming the centrality of public participation in the impeachment process, found that there was proof that sufficient public participation was carried out by both the County Assembly and the Senate; and there was nothing to the contrary to warrant interference with the trial court's finding.
48. The Court of Appeal was equally persuaded that the interlocutory orders issued on November 30, 2020 in ELRC Petition No 35 of 2020 barring debate on the Motion for the appellant's impeachment had lapsed on December 3, 2020 at 11:30 am while the impeachment Motion was moved and considered at 3:00 pm.
49. On the question whether the proceedings at the County Assembly and the Senate were procedurally fair, the court found; that the appellant had 7 days (between 10th to 16th December, 2020 - both days inclusive) to prepare a response. Furthermore, the court noted, nothing prevented the appellant from cross-examining members of the County Assembly on the contents of the impugned evidence. As such, the Court of Appeal agreed with the trial court that the alleged late service did not infringe on the appellant's right to fair administrative action and hearing.
50. On whether any new evidence was introduced during the hearing before the Senate, the court found that besides the evidence contained in the Motion for removal moved by Hon Ogada in the County Assembly, no other evidence was relied on.
51. Finally, once more agreeing with the High Court, the court found that the charges were substantiated to the required standard; that the outcome of the Motion was not pre-determined by the Senators nor was their voting influenced by bias; that the Senate fully evaluated the proceedings before the County Assembly; and that, in voting on the impeachment Motion, the Senators made a decision on each of the issues presented to them.



vii. Before the Supreme Court

52. To challenge the Court of Appeal's decision, the appellant filed the instant appeal specifically anchoring it on rules 9 and 33 of the *Supreme Court Rules, 2012* (which Rules, as a matter of fact have been repealed). The appeal seeks that;
- i. The petition be allowed and the judgment of the Court of Appeal delivered on March 4, 2022 be set aside.
 - ii. The resolution of the Senate passed on December 17, 2020 for the removal of the appellant from the office of the Governor be quashed and/or declared unconstitutional null and void;
 - iii. Costs be awarded to the appellant.
53. The appeal has been brought on 24 grounds, listed as [a] to [x] in the petition of appeal but condensed in the appellant's written submissions and argued in seven (7) clusters including the ground raised in the preliminary objection on this court's jurisdiction as follows:
- i. whether the court's jurisdiction was properly invoked;
 - ii. whether due process was followed by the County Assembly in the removal of the appellant from the office of Governor;
 - iii. whether the appellant was accorded adequate time and facility to respond to the charges against him both at the County Assembly and in the Senate;
 - iv. whether it was mandatory to verify the Motion for removal by affidavits or other statements on oath by MCAs who allegedly supported the Motion;
 - v. whether public participation was undertaken;
 - vi. whether the charges were substantiated to the prescribed standard warranting removal of the appellant from the office; and
 - vii. whether the sovereignty of the people envisaged under article 1 of the *Constitution* was respected and protected in the removal process.
54. Save for the 12th respondent, (Okiya Okioti Omtatah) the rest, or most of the respondents have challenged the jurisdiction of the court to entertain this appeal. The County Assembly, for instance, filed a notice of preliminary objection dated July 12, 2022 to that effect and in which it contends that the petition does not raise any question involving the interpretation or application of the *Constitution*. The 1st, 2nd, 10th, 4th 5th 6th respondents are of a similar view.
55. The 7th respondent (the Attorney General), has on his part filed grounds of objection dated July 12, 2022 to argue, like the parties in paragraph 54 above that the jurisdiction of the court has not been properly invoked; that the appellant has not specified the jurisdiction of the court under article 163(4) under which he has brought the appeal; that the grounds of appeal do not challenge any specific finding of the Court of Appeal in respect of which the petition is filed; and that the appeal does not raise any issues involving the interpretation and application of the *Constitution*.
56. Before the appeal could be set down for hearing, the 1st respondent filed a notice of motion dated June 16, 2022 seeking to strike out the notice of appeal for failure to file the main appeal within 30 days of the delivery of the judgment appealed from. The 2nd and 10th respondents followed suit and by a notice of preliminary objection dated June 15, 2022 applied for the striking out of the appeal, for being



filed out of time. The court, upon considering these challenges rendered its ruling of July 11, 2022 dismissing the application and overruling the preliminary objection at the same time, paving way for the hearing of the appeal.

57. At the commencement of the hearing, Mr Nyamu, who was appearing together with Dr Khaminwa, made a two-pronged oral application: for adjournment and for recusal of the President of the court, who was presiding. These applications were opposed by the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 11th respondents. Upon consideration, the court issued an ex tempore ruling dismissing both applications and subsequently giving detailed reasons for doing so on July 18, 2022.
58. Regarding the notice of preliminary objection and the grounds of objection alluded to in paragraphs 54 and 55 above, the court directed that the whole question of jurisdiction of the court be considered and determined in the appeal.

D. Parties' Submissions

i. The appellant

59. The appellant submitted that he had complained that due process was not followed both at the County Assembly and in the Senate during the proceedings for his impeachment and yet the appellate court only considered the process at the Senate and disregarded that at the County Assembly. The appellant also averred that he was not accorded adequate time and facility to respond to the charges against him in both the County Assembly and the Senate, a fact the appellate court ignored; and that during the proceedings before the Senate, he was presented with evidence against him on December 15, 2020 at 6.00 pm when the hearing was scheduled to commence the next day on December 16, 2020, availing him no opportunity to prepare his response.
60. Furthermore, the appellant contended that there was no public participation during his removal and that the charges against him were not published for the public to react and indeed, no evidence of public participation was adduced before court. This omission, according to the appellant, went against the holding in the persuasive authority of the South Africa Constitutional Court in the case of *Doctors for Life International v Speaker of the National Assembly and others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (1399); 2006 (6) SA 416 (CC).
61. The appellant faulted the impugned judgment for failure to take into consideration the fact that the County Assembly was allowed to introduce evidence for the first time during the Senate proceedings, thereby denying him the opportunity to adequately respond to that evidence contrary to articles 47 and 50 of the *Constitution*; that the charges brought against him were not substantiated; that the appellate court ought to have found that it was improper in law for the Senate to entertain the impeachment proceedings in light of the evidence that there were live criminal proceedings pending before the Anti-Corruption Court, thereby breaching the sub-judice rule; that the learned Judges of appeal also erred in failing to appreciate that the role of the Senate in the removal of a Governor from office is quasi-judicial and not legislative, and as such they were bound by the provisions of article 47 of the *Constitution* as well as those of the Fair Administrative Action Act. As a consequence, the appellant has urged the court to allow the appeal, set aside the judgment of the Court of Appeal and quash and declare as null and void the resolution of the Senate passed on December 17, 2020 to remove him from office.

ii. 12th Respondent's Submissions

62. The 12th respondent, Okiya Okiiti Omtata, who supported the appeal, did not file any submissions but indicated during the hearing that he fully associated himself with the appellant's submissions.



iii. The Clerk of Nairobi City County Assembly's (1st Respondent) submissions

63. The Clerk to the County Assembly (1st respondent) submitted on two issues. First, that this court lacked jurisdiction to determine this appeal for the reason that it was filed pursuant to rule 9 and 33 of the repealed *Supreme Court Rules*, 2012 which rules do not vest jurisdiction in the court; and that it did not specify at all any constitutional provision, leave alone article 163(4) of the *Constitution* or which limb of that article it was anchored. For these infractions by the appellant, the 1st respondent sought to persuade us to strike out the appeal by applying the *ratio decidendi* in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others*, SC Application No 2 of 2011; [2012] eKLR; *Suleiman Mwamlole Warrakah & 2 others v Mwamlole Tchappu Mbwana & 4 others*, SC Petition No 12 of 2018; [2018] eKLR, *Daniel Kimani Njibia v Francis Mwangi Kimani & another*, SC Application No 3 of 2014; [2015] eKLR; *Peter Oduor Ngoge v Francis Ole Kaparo & 5 others*, SC Petition No 2 of 2021; [2021] eKLR and *Martha Wangari Karua v. Independent Electoral and Boundaries Commission & 3 others*, SC Petition No 3 of 2019; [2019] eKLR.
64. Secondly, the 1st respondent has contended that the appeal did not raise any issues involving the interpretation or application of the *Constitution* and that the appellant has not faulted the Court of Appeal on the basis of the manner it interpreted or applied any provision of the *Constitution*. Further, it has posited that, this being a second appeal, where only points of law are to be entertained, the appeal is incompetent for pleading mainly factual issues.
65. In conclusion, the 1st respondent has urged us to uphold the judgment of the High Court that the impeachment proceedings were legal, procedural and constitutional, undertaken in strict compliance with the provisions of article 181 of the *Constitution* as read with section 33 of the *County Governments Act* and the Standing Orders of both the County Assembly and the Senate.

iv. The Speaker, Nairobi City County Assembly (2nd and 10th respondent's) Submissions

66. The Speaker, Nairobi City County Assembly and Hon Benson Mutura, the then Acting Governor of Nairobi City County Assembly (2nd and 10th respondent's, respectively), fully associated themselves with the submissions by the 1st respondent, but added that, not only was the removal process carried out in accordance with the law but also that it was above the requisite bar. They explained that the notice of impeachment was lodged with the Clerk of the County Assembly on November 25, 2020. The Clerk upon being satisfied that the Motion itself was in compliance with section 33 of the *County Governments Act*, allowed the Mover to table it; that the Motion was debated, voted and passed in the Assembly, after which the Clerk accordingly informed the Speaker of the Senate; and that at least two-thirds of all the MCAs had resolved to remove the appellant from office in terms of article 181(1).
67. On public participation, the two respondents submitted that section 2 of the *County Governments Act* enjoins every state entity at national or county levels to conduct public participation before adopting, passing or signing into law any policy because all State officers derive their authority from the people. Further, that article 196(1) of the *Constitution*, as well as sections 87, 91 and 115 of the *County Governments Act* contemplate reasonable participation by the public. Specifically, in response to the appellant's complaint, the respondents argued that public participation was invoked by a notice of impeachment of the appellant being issued to residents of Nairobi City County and a comprehensive report dated December 3, 2020 prepared to confirm the participation of the people. In addition to these efforts, the Clerk published a notice of the impending impeachment Motion in the Daily Nation Newspaper of 2 November 7, 2020, calling on the residents of the county to deliver their representations to the Assembly either physically or by post. Furthermore, the County Assembly also posted on its website, the impeachment Motion giving public notice of the Assembly's intention



to remove the appellant from office. Over and above these undertakings, the proceedings before the County Assembly were conducted in public.

68. These respondents have also posited that the proceedings in the Senate were procedurally fair; the appellant was served with a notice to appear to which was annexed the Motion as well as the resolution of the County Assembly. The appellant was equally given sufficient opportunity to prepare before appearing to present his defence according to article 50 of the *Constitution*.
69. Finally, the respondents have contended that the charges against the appellant for gross misconduct were substantiated to the required standard; and that, as observed in *Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others*, Nyeri Civil Appeal No 21 of 2014; [2014] eKLR, whether a matter amounts to gross misconduct or not will depend on the peculiar facts and the circumstances of each case. In this instance, it was their opinion that allegations of using abusive, embarrassing, inappropriate and unprintable language, publishing abusive and unbecoming words on the social media platforms were all proved. With that proof, the inescapable conclusion, according to the respondents, was that the appellant had undermined and demeaned the office of Governor.

v. County Assembly's (3rd respondent) Submissions

70. The three issues isolated by the County Assembly (3rd respondent) for our determination were whether the court has been properly moved by invoking the correct constitutional or statutory provisions that clothes it with jurisdiction; whether the appeal raises any question(s) involving the interpretation or application of the *Constitution* within the meaning of article 163(4)(a) of the *Constitution* and sections 3 and 15 of the *Supreme Court Act*; and whether, based on the first two questions, the court had the necessary jurisdiction to entertain the appeal.
71. In the opinion of the County Assembly, the appeal as drawn appears to have been inviting the court to assume jurisdiction by elimination contrary to the settled jurisprudence in *Suleiman Mwamlole Warrakah & 2 others v Mwamlole Tchappu Mbwana & 4 others [supra]* and *Daniel Kimani Njibia v Francis Mwangi Kimani & another [supra]*, among others. In addition, the County Assembly argued that the court has consistently and resolutely stated in numerous decisions that it can only be moved by invocation of the correct provisions, either limb (a) or (b) of article 163(4) of the *Constitution*. Moreover, rules 9 and 13 of the *Supreme Court Rules, 2012* (repealed), which the appellant relied on, do not clothe the court with jurisdiction. Consequently, to them, the appeal was incompetent and subject only to one fate, dismissal.
72. On the second question, the County Assembly has contended that since the appellate jurisdiction of the court can only be invoked in two instances cited in the previous paragraph, namely upon certification, which was not sought by the appellant or as of right, it would appear, by elimination that the appellant's intention must have been to bring the appeal as of right. If that be the case, it was incumbent upon the appellant to fault the Court of Appeal's decision on the basis of its interpretation or application of the *Constitution*. That has not been done.
73. With these conclusions, the County Assembly has prayed for the declaration that the court lacks jurisdiction to entertain the appeal and to dismiss it with costs.

vi. The Clerk of the Senate, Speaker of Senate & the Senate (4th, 5th & 6th Respondents

74. These three respondents have submitted that the allegations of bias and breach of principles of natural justice were made without providing any particulars or evidence in support; that the Speaker properly directed himself on the hearing of the preliminary objection alongside the impeachment proceedings;



and similarly, the Speaker correctly applied the law in the same ruling rejecting an attempt by the County Assembly to introduce new evidence at the hearing.

75. The respondents refuted the appellant's claim that he was denied an opportunity to file supplementary documents; that the decision was taken in compliance with the rules of procedure in the fifth schedule to the Senate Standing Orders, which set out the process and timelines for filing and exchange of documents. It was further submitted that the Senate gave the appellant seven (7) days from December 10, 2020 to December 16, 2020 to file the requisite documents in response to the charges. The Senate had the requisite quorum of fifteen (15) members to conduct the removal proceedings and that it was the appellant's burden to prove that it did not meet the quorum envisaged in the Constitution and the law.
76. In conclusion, they have pleaded that we bear in mind that its decision to confirm the impeachment of the appellant was strictly carried out in accordance with article 181 of the *Constitution*; that it was a merit-based decision anchored on the principle of separation of powers; that the process was the exclusive reserve of the County Assembly and the Senate and therefore, the court should be slow to engage in review of the merits of the decision because the powers to impeach lies, not with the courts, but the two legislative bodies, with the court's role being confined only to the interrogation of the question whether due procedure was followed in the impeachment process, as was decided in *Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 others* [2013] eKLR, *Kinsella v Jackle*, 475 A 2D 243, 253 (Conn 1984), and *Republic v Registrar of Societies & 5 others ex parte Kenyatta & 6 others*, Misc Civil Appl 747 of 2006; [2007] eKLR.
77. In the result, the County Assembly has pleaded for a determination upholding the decision of Court of Appeal that the removal of the appellant from office was procedural and the appeal lacks merit.

vii. Attorney General's (7th respondent) Submissions

78. The Attorney General fully associated with the submissions by the 1st and 3rd respondents, only reiterating that a party preferring an appeal to this court from the Court of Appeal must specify the constitutional provisions under which they seek to move this court and that the appeal had failed on this requirement.
79. But even if this court were to find that its jurisdiction has been properly invoked, he maintained the view that the court lacked the ability to determine the appeal as framed because being a second appeal, only matters of law fall for its consideration and determination. That the court cannot sit as a court of second appeal to re-evaluate the evidence and reach a different finding on evidence from those of the High Court and Court of Appeal; the grounds of appeal as structured are generally on points facts and not of law; and do not concern application or interpretation of the *Constitution*. Furthermore, that the appellant's interest in this appeal was merely to re-argue his petition as filed in the High Court in total disregard of the constitutional restrictions to this court's jurisdiction, the Attorney-General submits in conclusion.

viii. IEBC's (8th Respondent) Submissions

80. IEBC endorsed the submissions by the 1st, 3rd and 7th respondents and only answered the question whether it was justified in law to issue Gazette Notice No 232/10914 of 2020 in which the notice of the By-Election for Governor, Nairobi City County Government was published. IEBC relied on the determination of this question by the Court of Appeal to the effect that there was no fault and further, that the notice in question had been overtaken by events following the order issued by the High Court



in Constitutional Petition No E425 of 2020, where parties by consent suspended the gazette notice. This finding, it maintained, remained unchallenged in this appeal.

81. In its oral highlights before the court, IEBC drew our attention to the timelines for the conduct of the general elections and the need for us to consider giving a near date for our decision in this appeal as the process of printing of ballot papers for the position of Governor of the County of Mombasa (where the appellant has expressed the interest to contest) may be affected.

The Judgment of the Court without Reasons of July 15, 2022

82. We reiterate, that upon considering all the arguments, this court dismissed the appeal in a judgment delivered on July 15, 2022 where it held that:
- i. The court lacks jurisdiction to determine the appeal;
 - ii. The proceedings to remove the appellant from office of Governor were conducted in accordance with the *Constitution* and the law;
 - iii. The appellant was accorded adequate time and facility to respond to the charges against him both at the County Assembly and in the Senate;
 - iv. The form of verification envisaged in the context of an impeachment Motion is a signed copy of the Motion by the mover and verified by the signatures of at least a third of the Members of the County Assembly in support of the Motion and not an affidavit or any other form of deposition;
 - v. There was sufficient public participation;
 - vi. The County Assembly, the Senate and the two superior courts below were convinced that the charges were proved to the standard required in such circumstances. No error for their analysis and conclusion has been presented; and
 - vii. The people exercised their sovereign power through their democratically elected representatives to uphold and defend chapter six of the *Constitution*.
83. Pursuant to rule 28(2) of the [Supreme Court Rules 2020](#), we now give hereunder the reasons for these conclusions.

E. Analysis and Determination

84. There were four counts of impeachable charges brought against the appellant as follows;
- i. Gross violation of the *Constitution* and law,
 - ii. abuse of office,
 - iii. gross misconduct, and
 - iv. committing crimes under national law.
85. Having carefully re-evaluated the arguments in this appeal, the pleadings and the unanimous decisions of the two superior courts below, we answer each of the seven framed issues and set out in paragraph 53 sequentially as follows;



i. whether the court's jurisdiction was properly invoked

86. In Nyarangi JA's time-honoured words in the *Owners of the Motor Vessel "Lillian S" v Caltex Oil Kenya Limited* [1989] KLR 1, which were themselves originally penned by the United States of America Supreme Court in 1915 in the case of *McDonald v Mabee*, 243 US 90,91 (1915); without jurisdiction, a court has no power and must down tools in respect of the matter under review.
87. The County Assembly and the Attorney-General have objected to the jurisdiction of the court to entertain the appeal on the grounds that the court was improperly moved by invocation of the wrong constitutional and/or statutory provisions that do not clothe it with jurisdiction; and that the issues in the appeal did not involve any question of interpretation or application of the *Constitution* within the meaning of article 163(4)(a) of the *Constitution* and sections 3 and 15 of the *Supreme Court Act*. Further, they have contended that this being a second appeal, the court was constrained to confine itself to matters of law, yet the appeal was replete with questions of fact. These objections were supported by the 1st, 2nd, 4th, 5th, 6th and 10th respondents.
88. It is elementary knowledge on account of a legion of decisions of this court that appeals from the Court of Appeal lie to this court pursuant to articles 163(4) or 163(4)(b) of the *Constitution* as a matter of right or upon certification that a matter of General public importance (GPI) is involved; and that an appeal shall not lie to this Court, unless brought within the compass of either of the two jurisdictional limbs.
89. We can confirm from the onset that the petition of appeal dated April 1, 2022 but filed on May 20, 2022 is expressed to be brought pursuant to two repealed rules, 9 and 33 of the *Supreme Court Rules*, 2012, which essentially dealt with contents of a petition and institution of appeals. Rules 9 and 33 of the 2020 Rules, on the other hand relate to "sealing of court documents" and "application for certification", respectively. All these provisions clearly cannot be the basis for invoking the court's jurisdiction. As far as appeals from the Court of Appeal are concerned, a party moving this court must bear in mind the limits of its jurisdiction and must decide, either to seek a certification as a matter of general public importance under article 163(4)(b) of the *Constitution* or come as a matter of right under article 163(4)(a) thereof. Even when a party invokes the latter, it is upon that party to identify and specify how the appeal concerns interpretation and application of the *Constitution*.
90. It can never be the role of the court to wander around in the maze of pleadings and averments to ascertain by way of elimination which of the two limbs of article 163(4) a party intends to rely on. The court has consistently discouraged this kind of impetuous presentation of pleadings before it. For example, in *Suleiman Mwamlole Warrakah & 2 others v. Mwamlole Tchappu Mbwana & 4 others*, [supra], the court restated the frontiers of its appellate jurisdiction and emphasized that an appeal to it shall not lie, unless convincingly preferred within the confines of either of the two jurisdictional limbs of article 163(4) of the *Constitution*. The court said;

"(53) In this appeal, what counsel for the petitioners is asking us to do is to assume jurisdiction by way of elimination. This court is being called upon to hold that, because certification was not sought by the intending appellant, then it must follow that the said appellant, is invoking the court's jurisdiction as of right, under article 163(4)(a) of the *Constitution*, even without demonstrating that, such right obtains in the first place. This we cannot do, as it would make a mockery of our past pronouncements on the matter..."



91. To this clear articulation, we can only add that, given the strict limit of jurisdiction of the Supreme Court under article 163(4) of the *Constitution*, it is paramount for any party moving it for any relief under that article to identify which one of the two limbs, (a) or (b) is being invoked. These prerequisites were recapitulated in *Nasra Ibrahim Ibren v Independent Electoral Boundaries & 2 others*, SC Petition No 19 of 2018; [2018] eKLR, as follows:
43. ... parties seeking to appeal to the Supreme Court have a duty to outrightly state the particular jurisdiction of the court that they invoke. Jurisdiction is thus so fundamental that it should not be left to conjecture. The court, and other parties in a matter, should not be left agonizing under what appellate jurisdiction a matter is filed. Consequently, we are surprised by the appellant's approach to this court and fault her for not having outrightly disclosed under which appellate jurisdiction she moved this court. She left this fundamental indicator far late in the day during her submissions when she mentions that this court has jurisdiction to hear this appeal under article 163(4)(a) of the *Constitution*".
92. The justification behind the requirement of specifying the limb of article 163(4) should be obvious, but one of them is that the applicable considerations and principles for each of the limbs are different. In an adversarial system like ours, rules of pleading also serve to ensure that parties define succinctly the issues for determination so as not to take the rest of the parties by surprise. On the other hand, courts adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings.
93. There has been sufficient guidance from the court on the need to specify the jurisdiction being invoked and we hoped that the infractions identified in this appeal would not be encountered ever in this court. We were wrong. What is constant, however, so far as the court is concerned, is that each failure to align an appeal to those guidelines, will meet the ultimate fate suffered by the appellants in *Suleiman Mwamlole Warrakah & 2 others [supra]*, *Nasra Ibrahim Ibren v Independent Electoral Boundaries & 2 others [supra]* and *Daniel Kimani Njibia v Francis Mwangi Kimani & another [supra]*, in a long line of others.
94. We will not stop there. counsel intending to represent parties before the court must recognize that, like any appearance before any apex court in the world, practice of law before this court as Kenya's court of last resort must truly represent and reflect strict standards of professional responsibility. As an officer of the court upon whose shoulders rest, in part, the responsibility for the administration of justice, counsel must, before bringing an action to the court, identify the elementary legal foundation and ascertain as a minimum, whether the court has jurisdiction, because as a general proposition, the relief available to a party depends not only on the pleadings but more significantly on the jurisdiction. That is why, as a matter of practice, the pleadings must always carry, at the very top, reference to the relevant provisions of the *Constitution*, the law and rules relied upon and specify at the end, the relief claimed. In addition, it cannot be stressed enough that, counsel is expected, indeed, required to be fully abreast with the jurisprudence of the court.
95. In an apex court, there is no room for indolent and lackadaisical approach to preparation and presentation of cases. We expect nothing but precision, diligence and above all, professionalism. It is for these reasons that the court has repeatedly cautioned in several decisions such as *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscione*, SC Applic No, 4 of 2012; [2013] eKLR, *Daniel Kimani Njibia v Francis Mwangi Kimani & another [supra]*, *Suleiman Mwamlole Warrakah & 2 others v Mwamlole Tchappu Mbwana & 4 others [supra]*, and *National Rainbow Coalition Kenya (NARC*



Kenya) Independent Electoral & Boundaries Commission; Tharaka Nithi County Assembly & 5 others (Interested Party), SC Petition 1 of 2021; [2022] KESC 6 (KLR) (Civ) (17 February 2022), against sloppiness in the invocation of the court’s jurisdiction.

96. In any case, the appellant has failed to demonstrate as directed by the court in Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another, SC Petition No 3 of 2012; [2012] eKLR, how the appeal involved application or interpretation of the *Constitution* and the manner in which the Court of Appeal erred in determining those very questions. We can do no better now than we did in Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney- General & 2 others, SC Petition No 45 of 2018; [2020] eKLR, but to re-state the jurisprudence around article 163(4)(a) of the *Constitution* with these words:

“(62) We cannot over-emphasize the specialized nature of article 163(4)(a)’s appellate jurisdiction of this court. That jurisdiction is not just another level of appeal. Thus, even if the original suit in the High Court or lower court invoked specific constitutional provisions, that fact alone is not enough for one to invoke and sustain an appeal before this court. A party has to steer his appeal in the direction of constitutional interpretation and application. He/she should directly point to the specific instances where the Court of Appeal erred in its interpretation and application of the *Constitution*”.

It explained further that;

“The jurisdiction is discretionary in nature at the instance of the court. It does not guarantee a blanket route to appeal. A party has to categorically state to the satisfaction of the court and with precision those aspects/issues of his matter which in his opinion falls for determination on appeal in the Supreme Court as of right. It is not enough for one to generally plead that his case involves issues of *Constitution* interpretation and application.”

97. We find, for these reasons, that the preliminary objection meets the threshold in Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (1969) EA 696 and sustain it.
98. That conclusion would, in strict application of Owners of the Motor Vessel “Lillian S” v Caltex Oil Kenya Limited [*supra*], have been sufficient to dispose of this appeal in its entirety, and the Court would have to down tools. However, in view of the public interest and nature of the dispute, the broad interests of the parties, the need for due guidance to the judicial process and to the courts below; for the sake of posterity and development of jurisprudence and in terms of the court’s decisions in, among other cases, Jasbir Singh Rai & 3 others v Tarlochan Singh Rai and 4 others, SC Petition No 4 of 2012; [2013] eKLR, In the Speaker of the Senate & another v Attorney- General & 4 others, SC Advisory Opinion No 2 of 2013; [2013] eKLR (paragraph 156), Hassan Ali Joho & another v Suleiman Said Shabbal & 2 others, SC Petition No 10 of 2013; [2014] eKLR, (paragraph 52), Anami Silverse Lisamula v Independent Electoral & Boundaries Commission & 3 others, SC Petition No 9 of 2014; [2014] eKLR and Lemanken Aramat v Harun Meitamei Lempaka & 2 others, SC Petition No 5 of 2014; [2014] eKLR, we are of the considered view that the right course is for us to determine all the pertinent questions raised in the appeal. It is not the first time we are doing this as should be evident in the number of times it has been done in the above decisions.
99. By the very nature of its position in the hierarchy of courts, the Supreme Court has a constitutional obligation to develop jurisprudence and guide the courts below it on matters of general public interest, as well as on those involving the interpretation and application of the *Constitution*. This duty cannot be curtailed by a decision of any court, just the way Justices of this court cannot be rendered superfluous, or their work made perfunctory and mechanical. The function of the court in resolving questions of



interpretation and application of the *Constitution* is to remove any doubts and ambiguities in the law; mitigating hardships and correcting wrongs and not avoiding them. This was succinctly expressed in the following passage in the concurrent decision of Mutunga, CJ & President of the court, *In re the Speaker of the Senate & another v Attorney-General & four others* [*Supra*] (paragraph 156):

“Each matter that comes [up] before the court must be seized upon as an opportunity to provide high-yielding interpretive guidance on the *Constitution*; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents [Constitution- making] does not end with its promulgation; it continues with its interpretation. It is the duty of the court to illuminate legal penumbras that Constitutions borne out of long-drawn compromises, such as ours, tend to create.”

The following passage drawn from the court’s judgment in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others*, [*supra*] is equally instructive;

“The immediate pragmatic purpose of such an orientation of the judicial process is to ensure predictability, certainty, uniformity and stability in the application of law. Such institutionalization of the play of the law gives scope for regularity in the governance of commercial and contractual transactions in particular, though the same scheme marks also other spheres of social and economic relations. Going forward it will be good practice for this court to take every opportunity a matter affords it to pronounce on the interpretation of a constitutional issue that is argued either substantively or tangentially by the parties before it.” [our emphasis]

See also *David Ndi & others v Attorney General & others* [2021] eKLR BBI Case) per Njoki Ndungu, SCJ.

100. It must be emphasized, however, that the generally accepted position and widely applied ratio expressed in the wise words of Nyarangi, JA in the *Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [*supra*] that “jurisdiction is everything”, and that a court lacking jurisdiction “must down its tools”, holds good and retains validity. All we have expressed here is that, as far as this court, the final court, is concerned, in appropriate cases; we repeat, in appropriate cases and only this final court, will rise to the occasion and not down tools, to resolve disputes that relate to its constitutional mandate. Even where it declines jurisdiction to entertain any particular questions, the court may wish to achieve quality jurisprudence and also to resolve specific issues raised in the particular matter, in order to draw the whole dispute to a meaningful conclusion and to settle the law. It is not in all situations.
101. This approach is, therefore, not a departure from *The Owners of the Motor Vessel “Lillian S” v Caltex Oil Kenya Limited* [*supra*] but an extended horizon to cater for the [new] Supreme Court, with its specialized and wider jurisdiction than would have been contemplated at the time the decision in “*Lillian S*,” was made.
102. In *Lemanken Aramat v Harun Meitamei Lempaka & 2 others* [*supra*], the court justified this route by explaining that;

“

“[101] We would make it clear in the instant case that, it is a responsibility vested in the Supreme Court to interpret the *Constitution* with finality: and this remit entails that this court determines appropriately those situations in which it ought to resolve questions coming up before it, in particular, where these have a direct bearing on the interpretation and application of the



Constitution. Besides, as the Supreme Court carries the overall responsibility [The *Constitution* of Kenya, 2010, article 163(7)] for providing guidance on matters of law for the State’s judicial branch, it follows that its jurisdiction is an enlarged one, enabling it in all situations in which it has been duly moved, to settle the law for the guidance of other courts.

.....

[106] Quite clearly, the foregoing provisions affirm that the Supreme Court, as the guardian of the *Constitution*, and the final arbiter on constitutional dispute-situations, has been entrusted with the mandate to ensure the effectiveness of the binding constitutional norm.

[107] The Supreme Court’s special jurisdiction merits express recognition. The *Constitution*’s paradigm of democratic governance entrusts to this court the charge of assuring sanctity to its declared principles. The court’s mandate in respect of such principles cannot, by its inherent character, be defined in restrictive terms. Thus, such questions as come up in the course of dispute settlement (which, itself, is a constitutional phenomenon), especially those related to governance, are intrinsically issues importing the obligation to interpret or apply the *Constitution* – and consequently, issues falling squarely within the Supreme Court’s mandate under article 163(4)(1)(a), as well as within the juridical mandate of the court as prescribed in article 259(1)(c) of the *Constitution*, and in section 3(c) of the *Supreme Court Act*, 2011 (Act No 7 of 2011)

...

[111] From the principles thus stated, it is clear to us that this court ought to maintain constant interest in the scheme and the quality of jurisprudence that it propounds over time, even where it is constrained to decline the jurisdiction to deal with any particular questions. Whatever option it takes, however, this court ought always to undertake a methodical analysis of any issues it is seized of, and ought always to draw the whole dispute to a meaningful conclusion, bearing directions and final orders, in the broad interests of both the parties, and of due guidance to the judicial process and to the courts below.” [our emphasis]

103. But above all, we are fortified in our decision to consider the remaining six grounds in this appeal by the fact that, whether we down tools at this stage or go to the end, the inevitable result is that the decision of the Court of Appeal stands upheld. For these reasons, there are exceptional circumstances and proper justification not to down tools but to consider and determine the main grounds before the court.
104. In view of the position we have adopted in the foregoing paragraphs, we emphasize that, not all the six grounds involve the interpretation or application of the *Constitution* or are matters of general public importance, the two permanent and defined coordinates of the court’s jurisdiction in respect of appeals arising from the decisions of the Court of Appeal. Matters of fact that touch on evidence without any constitutional underpinning are not open for this court’s review on appeal. See *Paul Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney- General & 2 others [supra]* and *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] KESC 34 (KLR).



In the latter decision, the court stressed that;

“It is to be recalled that the appellants herein, had already been evicted from their settlements, in an operation they contend was not only illegal, but which violated their right to housing and dignity. This court has no jurisdiction to revisit the factual findings of either the High Court or Court of Appeal on this issue. We have already answered the four critical questions in exercise of our jurisdiction under article 163(4)(b) of the *Constitution*... We may however not delve into the factual findings of the Trial Court and Court of Appeal...

Challenges of findings or conclusions on matters of fact by the trial court of competent jurisdiction after receiving, testing and evaluation of evidence does not bring up an appeal within the ambit of article 163(4)(a)”

105. Of the twenty-four (24) grounds of appeal alluded to in paragraph 53, twenty (20) urge us to find that the learned Judges of the Court of Appeal “erred in law and fact” in arriving at the impugned judgment. All these grounds, though framed partly as matters of law, are not constitutional or matters of law but of fact, as we intend to demonstrate shortly.

106. The duty to re-evaluate evidence is the function of a first appellate court as enunciated in the celebrated case of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123. A first appellate court should accord deference to the trial Judge’s conclusions of fact and only interfere with those conclusions if it appears to it, either that the trial judge has failed to take into account any relevant facts or circumstances or based the conclusions on no evidence at all, or misapprehended the evidence, or acted on wrong principles in reaching the conclusions. (See also *Nkube v Nyamuro* [1983] KLR, 403-415, AT 403).

107. Jurisdiction, we repeat, reverses judicial hierarchy so that

“the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law” or we may add, matters of fact; “and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court”.

See *Peter Oduor Ngoge v Francis Ole Kaparo & 5 others* [*supra*].

We shall bear in mind these qualifications of the court’s jurisdiction as we consider each of the remaining six grounds.

ii. Whether due process was followed by the County Assembly in the removal of the appellant from office of Governor

108. The complaint under this ground is directed at the proceedings before the County Assembly, while a similar complaint is raised in the third (iii) ground jointly against the Senate and County Assembly. Here, it is the appellant’s contention that, due process was not observed in the proceedings before the County Assembly; that there was no proper Motion for his removal before the County Assembly; that he was not properly served with the Motion; that he was denied legal representation and the right to be heard when his counsel, Mr Evans Ondieki, was denied access to the County Assembly Chamber; that the County Assembly lacked the quorum to transact the debate and vote on the impeachment Motion; and that there was no requisite quorum to pass a resolution to impeach him.

109. We start with the observation that the removal proceedings for a county Governor are textually committed by the *Constitution* to the legislative branch of government, that is, the County Assembly and the Senate. The constitutional mandate and the process to impeach a Governor commences in



the County Assembly and terminates in the Senate. The County Assembly and Senate are the only organs involved because of their special roles in devolved governments. The Senate, according to article 96 of the *Constitution* specifically “represents the counties, and serves to protect the interests of the counties and their governments”. The Assembly, on the other hand, is the legislative arm in the county governments. The respective roles of the two institutions are important because, one of the objects of devolution is to ‘promote’ democratic and accountable exercise of power. To achieve this, the Governor and all officials in the county governments are subject to oversight and scrutiny by both the County Assembly and the Senate.

110. The *Constitution* commits to both institutions the exclusive power to remove the Governor subject only to procedural requirements set out in the *County Governments Act* and the respective Standing Orders of the County Assemblies and the Senate: and proof of the charges. From this, it seems fair to state that both institutions through their Standing Orders are at liberty to determine the procedures for receipt and consideration of evidence necessary to satisfy the duty to conduct an impeachment hearing.
111. It has been emphasized in accordance with the principle of separation of powers that in considering applications to review decisions of the other branches of Government, “courts should strive to achieve a balance between their role as guardians of the *Constitution* and of the rule of law, including an obligation to respect what Parliament is constitutionally required to fulfill”. In other words, where the *Constitution* requires Parliament to determine a matter in the first place as part of its constitutional mandate, Parliament will have the discretion and power to regulate its own affairs and the courts will be slow to interfere with the exercise of that discretion. See the decision of the Constitutional Court of South Africa in *Doctors for Life International v Speaker of the National Assembly and others* [*supra*], which has widely been approved by the courts in this country.
112. Likewise, in *Justus Kariuki Mate & another v Martin Nyaga Wambora & another*, SC Petition No 32 of 2014; [2017] eKLR this court signaled that it would be reluctant to question parliamentary procedures as long as they did not breach the *Constitution*; and that the mandate of the courts is restricted by the doctrine of separation of powers to deciding on matters of individual rights and fundamental freedoms and not to enquire into how the County Assembly and Senate perform duties in which they alone have discretion or to review the merit of the decision by the County Assembly and Senate to impeach a Governor.
113. In that sense, and in the exercise of these wide political powers, both the County Assembly and the Senate cannot act outside the confines of the *Constitution* and the law. For to do so would invariably invite the court’s intervention. To borrow the example given by the United States Supreme Court in *Nixon v United States*, 506 US 224 (1993);

“[i]f the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin-toss, or upon a summary determination that an officer of the United States was simply a “bad guy” ... judicial interference might well be appropriated. In such circumstances, the Senate’s action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence”.

Courts are thus permitted to intervene where matters of constitutional violations arise.

114. To the question whether due process was followed in the removal of the appellant, the audi alteram partem rule requires that those who are likely to be directly affected by the outcome of a decision should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. They must be given an



opportunity to be heard, to call witnesses, to be represented by counsel, to be availed adequate time and facilities to prepare, and if the accusations are proved, to be given the reasons for the decision. Of course, beyond here, they are also entitled to challenge the decision, if against them, before a higher tribunal or court.

115. Article 47 of the *Constitution* enshrines the right of every person to fair administrative action. The manner of actualization of those rights have been enacted in the [Fair Administrative Action Act, 2015](#).
116. In the process of removal of a county Governor, the right to fair administrative action under article 47 and the right to fair hearing under article 50 of the *Constitution* all accrue to the Governor before a decision to remove him or her from office is reached. An unfair removal is one which goes against the principles of natural justice; which implies that no adequate notice was given; that there was bias and where the hearing was not fair. Though a political process, impeachment is sanctioned by the *Constitution* and the law and is not a platform to settle political scores. Bearing in mind that the removal architecture in the *Constitution*, the law and the Standing Orders are designed to achieve accountability, political governance and personal responsibility and are not aimed necessarily to find criminal responsibility.
117. The question to which we now must turn, after laying down these principles, is whether the appellant's constitutional right to due process was compromised. We do this without the court constituting itself into any of the two constitutional organs in whose hands the power to remove the appellant is reposed. Article 181 of the *Constitution* is the starting point. It provides that:

“ 181. Removal of a county governor

1. A county governor may be removed from office on any of the following grounds
 - a. gross violation of this Constitution or any other law;
 - b. where there are serious reasons for believing that the county governor has committed a crime under national or international law;
 - c. abuse of office or gross misconduct; or
 - d. physical or mental incapacity to perform the functions of office of county governor.
2. Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds mentioned in clause (1).”

118. In accordance with article 181(2) aforesaid, Parliament enacted the *County Governments Act*. Section 33 thereof provides the following procedure, from the County Assembly to the Senate, for the removal of a county Governor:

“ 33. Removal of a governor

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



2. If a motion under subsection (1) is supported by at least two-thirds of all the members of the county assembly—
 - a. the speaker of the county assembly shall inform the Speaker of the Senate of that resolution within two days; and
 - b. the governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section.
3. Within seven days after receiving notice of a resolution from the speaker of the county assembly—
 - a. the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the governor; and
 - b. the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.
4. A special committee appointed under subsection (3)(b) shall—
 - a. investigate the matter; and
 - b. report to the Senate within ten days on whether it finds the particulars of the allegations against the governor to have been substantiated.
5. The governor shall have the right to appear and be represented before the special committee during its investigations.
6. If the special committee reports that the particulars of any allegation against the governor—
 - a. have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or
 - b. have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the impeachment charges.
7. If a majority of all the members of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.
8. If a vote in the Senate fails to result in the removal of the governor, the Speaker of the Senate shall notify the speaker of the concerned county assembly accordingly and the motion by the assembly for the removal of the governor on the same charges may only be re-introduced to the Senate on the expiry of three months from the date of such vote.



9. The procedure for the removal of the President on grounds of incapacity under article 144 of the *Constitution* shall apply, with necessary modifications, to the removal of a governor.
 10. A vacancy in the office of the governor or deputy governor arising under this section shall be filled in the manner provided for by article 182 of the *Constitution*". [our emphasis]
119. Further, the Standing Orders of the two Houses of Parliament and of the County Assemblies play a critical role in guiding the orderly proceedings in those houses because of their constitutional underpinning in article 124. For the purpose of this appeal, the Nairobi City County Assembly Standing Orders provides for the steps for the removal of a Governor.
 120. The process is sequential based on two-stages. In the first stage, a Member of the County Assembly initiates the process by filing a notice of the Motion for removal with the Speaker. The notice must be supported by at least a third of all the members. It is only if the Motion is supported and passed by at least two-thirds of all the MCAs that the Speaker of the County Assembly informs the Speaker of the Senate of that resolution within two days. Up to this point, the Governor continues to perform the functions of the office pending the outcome of the proceedings in the Senate, because that is where the impeachment proceedings are conducted.
 121. Though under paragraph 108 above, we have set out the appellant's main grievance, it bears repeating here that he complains that there was no proper Notice of Motion for his removal before the County Assembly; that he was not properly served with the Motion; that he was denied legal representation and the right to be heard; and that the County Assembly lacked the quorum to transact the debate and vote on the Motion for removal.
 122. The question whether the appellant was notified of the charges, is strictly speaking one of fact. Both the High Court and the Court of Appeal made concurrent factual findings that the appellant was notified of the charges through the Speaker's letter dated November 26, 2020; that to the letter was annexed a copy of the Motion with the details of the charges together with the list of MCAs who had expressed their support for the Motion. The two courts explained that they arrived at this conclusion based on the fact that the appellant in his own affidavit swore that upon being served with the Motion and charges he instructed his advocate to proceed to the Assembly and respond to the charges; that the appellant submitted bundles of documents to counter the charges; and that out of personal choice the appellant skipped the hearing even after being asked to attend in person, join virtually through a video link or by counsel duly appointed by him.
 123. Similarly, the question whether the appellant was denied legal representation is one that turned on evidence; whether Mr Ondieki, Advocate was instructed by the appellant and whether he was denied access. Both the County Assembly and the Clerk of the County Assembly maintain that by order 237(1) of the Standing Orders, no person, other than a Member or the Clerk or other officers of the County Assembly discharging their duties in the service of the County Assembly can be admitted into any part of the Chamber appropriated to the exclusive use of Members of the County Assembly when the County Assembly or the Committee of the whole County Assembly is sitting; that by the provisions of their Standing Orders, therefore "strangers" are not permitted in the chamber, to address members unless, like in this case, counsel had express written instructions from the appellant to represent him. On the basis of these factors both courts were in agreement that the appellant was not by any means denied a fair hearing at the County Assembly as Mr Ondieki did not prove that he had written instructions to represent the appellant.



124. Finally, on this ground both courts were unanimous too that, from the Hansard record, the County Assembly had the requisite quorum to transact impeachment proceedings; that the Standing Orders had been amended on June 2, 2020 to introduce Standing Order 231D to allow virtual proceedings, including electronic voting due to the Covid-19 pandemic; that the allegation that 54 MCAs did not vote was rebutted by 24 of them who swore affidavits retracting the earlier averments on the ground that the affidavits were forged; and that at least three of the remaining affidavits were unsigned, undated and bore the wrong identity card numbers of the deponents, leaving only 27 members on the appellant's side. Relying on the Hansard, the official record of the County Assembly, the Court of Appeal was satisfied that 90 MCAs were present and voted in respect of the Motion, virtually and in person; and that 88 voted for the appellant's impeachment while only 2 voted against it, thereby attaining the threshold necessary to pass the Motion. These again are findings on matters of evidence.
125. In conclusion therefore, we have not been shown any form of misdirection, or a total lack of direction on material issues or instances where conclusions were based on 'no evidence', or where the conclusions were not supported by the established facts or evidence on record, so as to qualify those matters of fact as matters of law. See *Peter Gatirau Munya v IEBC & 2 others*, SC Petition No 2B of 2014, [2014] eKLR for the distinction between a question of law and a question of fact. We find no reason to depart from these concurrent conclusions of fact by the two courts below.
126. Based on these reasons and in answer to the question posed in this ground, we are satisfied that due process was followed to remove the appellant from office. There is no merit in this ground.

iii. Whether the appellant was accorded adequate time and facility to respond to the charges against him both at the County Assembly and in the Senate;

127. Both the right to fair hearing in article 50 and the right to fair administrative action under article 47 of the *Constitution* guarantee individuals the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as well as the right to have any dispute decided in a fair and public hearing before a court or any other independent and impartial tribunal or body.
128. In the preceding paragraphs we have expressed our satisfaction with the re- evaluation of the facts, application of the law and the conclusion arrived at by the Court of Appeal regarding the procedure and due process before the County Assembly. We find no compelling purpose to reconsider them here one more time.
129. In the previous ground (ii) above - we categorized the process of removing a Governor into two stages. This is the second stage. From subsection (3) of section 33 of the *County Governments Act*, the process moves to the Senate from the County Assembly. Within seven days after receiving notice of a resolution from the speaker of the County Assembly confirming the passage of the impeachment Motion, the Speaker of the Senate must convene a meeting of the Senate to hear charges against the Governor. The charges can be heard in the Senate plenary or in a forum of a special committee of the Senate that reports to the full Senate. In either case, the Governor is entitled to attend and to be represented by counsel during the investigations. It is only when sufficient evidence is presented to substantiate the claims that the Senate will, after according the Governor an opportunity to be heard, vote on each of the charges. If a majority of all the members of the Senate vote to uphold any of the charges, the Governor shall cease to hold office. We reiterate that proof of even a single charge will suffice for purposes of article 181 of the *Constitution*. But should the vote for removal fail, that will bring the proceedings to an end.
130. Regarding the procedure adopted by the Senate, the appellant has complained that the Senate failed to ascertain whether the proceedings at the County Assembly were conducted in accordance with the law; that the Speaker of the Senate failed and/or ignored to consider the appellant's preliminary objection;



that the Senate voted to impeach the appellant without interrogating the charges leveled against him and evaluating the evidence to ascertain whether those charges were substantiated; that the outcome of the proceedings before the Senate were pre-determined by members whose utterances left no doubt of their intention to remove him from office, with or without evidence and; that he was served with evidence on short notice, without being given adequate time to go through the same and to prepare a comprehensive response.

131. From the steps enumerated above, the Senate’s role clearly does not include re-assessing the procedure before the County Assembly. It is not an appellate process. Once a resolution has been passed by the County Assembly to confirm the charges for the removal of a Governor, the Speaker of the County Assembly’s role is to notify the Speaker of the Senate, who in turn is required to summon the Senate to consider the Motion. In this particular instance, the Senate initially appointed a Select Committee but the Select Committee instead recommended that the inquiry be conducted by the whole Senate pursuant to Standing Order 75. It is common ground that a special sitting of the Senate was called and business transacted on 16th and 17th December, 2020. Six days before this, on December 10, 2020 the Clerk of the Senate had sent out invitations to both the appellant and the County Assembly to appear before the plenary on December 16, 2020. They were directed to file necessary responses or any documents they wished to rely on by December 15, 2020.
132. At the beginning of the hearing, the appellant raised a preliminary objection to the effect that the issues before the Senate were sub-judice as they were also the subject of some four active court cases; that there was a conservatory order issued in ELRC Petition No 35 of 2020 prohibiting the County Assembly and the Senate from proceeding with any Motion for the removal of the appellant from office; and that the threshold for removal of a Governor was not met.
133. The Speaker, in a reasoned ruling, directed that the objection be brought as part of the evidence to be presented during the proceedings in the plenary. Specifically, in answer to the question of sub judice, the Speaker ruled that *sub judice* is not an absolute rule; that Standing Order No 98(5) of the Senate Standing Orders provides that, notwithstanding that Standing Order, “the Speaker may allow reference to any matter before the Senate or a Committee of the Senate”; that the competence and jurisdiction of the Senate to hear and determine the question of removal of a governor from office is a constitutional mandate vested in the Senate independent of the Judiciary or any other organ.
134. With that background, like the Court of Appeal, we cannot find any fault in the manner the Speaker of the Senate treated the objection. He cannot, in the least, be accused of having failed and/or ignored altogether to consider the appellant’s Preliminary Objection when he in fact allowed the appellant’s counsel to submit on the objection at length, adjourned the sitting to consider the arguments before rendering the ruling. He properly directed his mind to the relevant procedural laws and judiciously exercised his discretion. The Court of Appeal was also satisfied that despite the voluminous documents containing the charges and proceedings before the County Assembly, the appellant had sufficient time and indeed did prepare well to defend himself. In view of these findings, we have no basis to depart from them, especially considering that the proceedings took place during Covid-19 season and in view of tight timelines set by Orders 75 and 76 of the Senate Standing Orders. The procedure under these Standing Orders appears to us to have been meticulously followed by the Senate. The Motion was properly moved; adequate notice was given to the appellant; he was aware of the allegations facing him; he was given an opportunity to defend himself; to adduce and challenge evidence; the hearing was in public; and the proceedings began and concluded without unreasonable delay. He filed a whooping 118-paged written response to the allegations, together with numerous annexures in support of his case
135. His complaint that the process was expedited can be answered simply with reference to Order 75 of the Senate Standing Orders as well as Order 72 of the Nairobi City County Assembly Standing Orders,



both of which set the timelines within which each step must be taken. No step was taken outside those timelines. Both the Court of Appeal and the High Court were convinced that the appellant had sufficient time within which to prepare and present his response.

136. While still on this question, it is important to observe that the multi-stage nature of the process of removal from office, and the attendant litigation that follows have produced in the recent past a worrying trend that, in our view, amounts to abuse of court process by parties. Parties employ all delay tactics in the book in order to avoid the consequences of the lustration provisions in Chapter Six of the *Constitution* that disqualifies an individual from holding a State or public office since such disqualification is dependent on all possibilities of appeal or review of the relevant sentence or decision being exhausted. This threat to judicial process was very recently deprecated by the Court of Appeal (Karanja, M’Inoti, and Mohammed, JJA) in *David Njilithia Mberia v Republic*, Nairobi Criminal Application No E011 of 2021, where that court censured the appellant for not diligently prosecuting the appeal in order to claim that he was still eligible for State or public office because of a pending appeal touching on the violations of chapter six of the *Constitution*. The Court of Appeal issued this caution;

“We have no illusion that article 193(3) is not intended to enable applicants to “park” in court appeals which they do not intend to prosecute so as to obtain cover for continuing in office simply because the “parked” appeal is pending. A pending appeal under article 193(3) is not a bogeyman. It is a serious matter to be pursued expeditiously in order to urgently settle salient public law questions and give effect and meaning to other provisions of the *Constitution*. In the context of this application, reading the *Constitution* holistically and purposively demands that we give substance and meaning, in addition to article 193(3), also to article 10(2)(c) of the *Constitution* which demands integrity and accountability as national values and principles of government, article 73(2)(c) which declares selfless service based solely on the public interest as a guiding principle of leadership and integrity, article 193(2)(g) which demands lustration of those found to have misused or abused a State or public office or to have contravened chapter 6 of the *Constitution*, and article 159(2) (b) which demands that justice shall not be delayed. No court should allow these other provisions to be imperiled or held in abeyance by a deliberately “parked” appeal which is intended, not to vindicate an applicant’s rights, but merely to facilitate his continuance in an office that a valid judgment has otherwise found him not deserving to hold.”

137. To this, we add that if this phenomenon of “parking” appeals were to be allowed as the norm, the result would be to forget the constitutional aspirations of good governance and integrity in public service. In such a context, courts are not helpless. To begin with, the mandate of interpretation and application of the *Constitution* is vested in the courts. Judicial authority by article 159 is derived from the people and vests in, and shall be exercised by, the courts. In exercising this authority, the courts are to be guided by the principles, that;

- “(a) justice shall be done to all, irrespective of status;
- (b) justice shall not be delayed;
-
- (d) justice shall be administered without undue regard to procedural technicalities; and
- (e) the purpose and principles of this Constitution shall be protected and promoted”.



138. The courts cannot sit back and helplessly watch as these constitutional and national values and principles are being subverted by deliberate acts of the parties. Parties who are appealing or applying for review of decisions that make them ineligible for public or state office pursuant to chapter six of the *Constitution*, have a singular obligation to diligently prosecute such cases. Justice must be done and must also be seen to be done. This must be the overriding objective of every party, counsel and the court.
139. Returning to the question whether the appellant was accorded adequate time and facility to respond to the charges against him by the County Assembly and the Senate, for our part, and from the foregoing, we respectfully are equally persuaded that the appellant was accorded a fair hearing within the meaning of article 50 and fair administrative action in terms of article 47 of the *Constitution*, and under the Standing Orders.

iv. Whether it was mandatory to verify the impeachment Motion by affidavits or other statements on oath by members of the County Assembly who allegedly supported the Motion;

140. The appellant has maintained that it is a mandatory requirement in law for the impeachment Motion to be verified under Order 67 of the Nairobi City County Standing Orders; that the Motion served upon him was not accompanied by affirmations and supporting documents; there was no communication of confirmation from the 1st respondent on any verification forms filled by the MCAs supporting the Motion. According to the appellant, apart from the signatures of MCAs supporting the Motion, each MCA was required but failed to verify individually by way of a deposition that indeed they were in support of the Motion. In his view, the term ‘verify’ denotes to confirm or substantiate by oath or affidavit as to the truth. The appellant further contends that under section 109 of the *Evidence Act*, it was the burden of the parties alleging that the affidavits attributed to them were forged to provide proof.
141. Order 67(1) of the County Assembly Standing Orders upon which these arguments are based provides that:
- “Before giving notice of Motion under section 33 of the *County Governments Act*, 2012, the member shall deliver to the Clerk a copy of the proposed Motion in writing stating the grounds and particulars upon which the proposal is made, for the impeachment of the Governor on the ground of a gross violation of a provision of the *Constitution* or of any other law; where there are serious reasons for believing that the Governor has committed a crime under national or international law; or for gross misconduct or abuse of office. The notice of Motion shall be signed by the Member who affirms that the particulars of allegations contained in the Motion are true to his or her own knowledge and the same verified by each of the members constituting at least a third of all the members and that the allegations therein are true of their own knowledge and belief on the basis of their reading and appreciation of information pertinent thereto and each of them sign a verification form provided by the Clerk for that purpose.” [our emphasis].
142. According to the County Assembly, the verification envisaged by this Order is when each of the more than two-thirds of the MCAs append their signatures to the Motion; and in particular, for this case, they did so on a document headed: “Signatures in support of a Motion for the Removal of Governor by Impeachment”; that they did so with the full knowledge of its purpose and specifically to verify the correctness of its contents. The source of the “verification forms”, according to the Standing Order is the Clerk of the Assembly. The Assembly itself confirmed having supplied the document in question to MCAs. Again, with respect, the Court of Appeal correctly construed the meaning of “verification”



in the context of the above Standing Order. The use of the above document has not been shown to have occasioned a miscarriage of justice or caused any prejudice to the appellant. If the intention was to have members who were in support of the impeachment motion swear affidavits or make other statements on oath to authenticate the Motion, the County Assembly would have, in promulgating the Standing Order, expressly made that provision.

143. We conclude from these factors that the Motion for the removal from office of Governor Nairobi County was duly verified in accordance with order 67(1) of the Nairobi City County Assembly Standing Orders; and that the verification is not in the form of an affidavit or any other forms of deposition. This ground, for these reasons must fail.

v. Whether public participation was undertaken;

144. The appellant has contended that the Court of Appeal erred in failing to find that there was no evidence of public participation prior to his impeachment as required by articles 10(2)(a), 118(1) and 196 of the *Constitution* and sections 94, 95, 100 and 101 of the *County Governments Act*; and that the residents of Nairobi were denied the opportunity to participate in the proceedings.
145. Both the High Court and the Court of Appeal, relying on the evidence of the 2nd and 10th respondents were convinced that there was public participation based on a notice issued to residents of Nairobi City County of the impending removal of the Governor from office and a comprehensive report dated December 3, 2020 prepared to this effect. They also found proof of public participation in the form of an advertisement in a newspaper with wide circulation, the Daily Nation Newspaper of November 27, 2020. In that publication, the attention of the general public was drawn to the pending Motion for the impeachment of the Governor. It called upon the residents of the county and the public to make their representations by delivering written memoranda to the Assembly either physically or by post. The courts were persuaded by counsel representing the appellant, that in response to this advertisement, over 40,000 submissions were made. Both courts also relied on a survey in the form of questionnaires conducted in the County whose outcome was published in a report dated December 3, 2020. According to the report, majority of Kenyans were aware of the Motion and the reasons for the intended removal of the Governor and supported it. Over and above all these, the superior courts were further satisfied that the County Assembly had posted the Motion on its website quite apart from the fact that the hearing was held in public.
146. While we agree that;

“[320] ...Public participation is a major pillar, and bedrock of our democracy and good governance....so that the citizens have a major voice and impact on the equitable distribution of political power and resources and the participation of the people in governance will make the State, its organs and institutions accountable, thus making the country more progressive and stable.”

(Per Chief Justice Willy Mutunga - Concurring) in, In the Matter of the National Land Commission, Advisory Opinion Reference No. 2 of 2014; [2015] eKLR, the answer to this question depends upon proof by evidence; proof whether or not public participation was conducted. While the appellant merely asserted that there was no evidence of public participation, the 2nd and 10th respondents were categorical that the requirement of public participation was fulfilled. Both superior courts below agreed with them, having evaluated and re- analyzed the evidence. The courts also observed that, on account of the restrictions placed on physical and personal public interactions due to the Covid- 19 pandemic, all the foregoing avenues satisfied the requirements of public participation.



147. We have not been shown how the above concurrent conclusions amount to a misdirection or conclusions based on ‘no evidence’, for us to treat them as matters of law. We find, for this reason, no justification to depart from these concurrent findings of fact and dismiss this ground.

vi. Whether the charges were substantiated to the prescribed standard to warrant the appellant’s impeachment;

148. It has been observed at the beginning of the Judgment that impeachment or removal proceedings, though quasi-judicial are not in the nature of criminal proceedings. They do not necessarily require or depend on criminal culpability to succeed. All that is required is that the allegations be substantiated. But as a constitutional remedy, impeachment serves as an important check on the exercise of executive power. The purpose of impeachment is generally to protect public interest and to preserve constitutional norms, while at the same time observing the rules of natural justice throughout the process. Both interests must be balanced.

149. As to the standard of proof in impeachable charges, the Court of Appeal in its judgment in *Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others*, Civil Appeal No 21 of 2014; [2014] eKLR, found that, to impeach a Governor requires a high threshold but;

“... that standard is neither beyond reasonable doubt nor on a balance of probability. Noting that the threshold for removal of a governor involves “gross violation of the *Constitution*”, we hold that the standard of proof required for removal of Governor is above a balance of probability but below reasonable doubt.”

The Court of Appeal in the above case also affirmed the elements identified by High Court as constituting proof of the charges of gross violation of the *Constitution* or written law as follows;

- i. the allegations must be serious, substantial and weighty.
 - ii. There must be a nexus between the Governor and the alleged gross violations of the *Constitution* or any other written law.
 - iii. The charges framed against the Governor and the particulars thereof must disclose a gross violation of the *Constitution* or any other written law.
 - iv. The charges as framed must state with degree of precision the article(s) or even sub-article(s) of the *Constitution* or the provisions of any other written law that have been alleged to be grossly violated.
150. It is the appellant’s case that the Court of Appeal failed to appreciate that the Senate plenary did not adhere to the obligation under articles 47 and 50 of the *Constitution* in conducting the impeachment proceedings; that the Senate relied on allegations and material contained in the Anti-corruption Court case as a basis for his impeachment in disregard of the principle of presumption of innocence; and that that court failed to appreciate that the threshold for impeachment had not been met in the appellant’s case, hence the charges were not substantiated.
151. In the impeachment Motion, the MCA for Embakasi Ward, sought the removal of the appellant under article 181 and Section 33 of the *County Governments Act* on four counts of impeachable charges, that firstly, pursuant to article 181(1)(a) he had grossly violated the *Constitution* and other laws (the *County Governments Act*, Public Procurement and Disposal Act, 2015 and the Public Finance Management Act, 2012). Secondly, that he had abused office by violating article 75 of the *Constitution* as read with sections 11 and 13 of the *Leadership and Integrity Act*. Thirdly, that he was guilty of gross misconduct



having violated article 73 of the *Constitution* by failing to promote public integrity in the office of the Governor. Lastly, that there were serious reasons to believe that he had committed various crimes under the Anti-Corruption and Economic Crimes Act in light of the charges he was facing at the Anti-corruption court.

152. We maintain that the High Court received and evaluated the evidence presented to it in support and in rebuttal of the four charges. The Court of Appeal re-evaluated that evidence before coming to its own independent determination. The two courts came to a common conclusion that articles 47 and 50 of the *Constitution* were adhered to by both the County Assembly and the Senate; that the process was, in the circumstances, expeditious, lawful and procedurally fair. We cannot substitute ourselves into the two courts and take up their roles by re-analyzing the evidence afresh for the third time. We can only disturb the concurrent factual conclusions, as we have repeatedly said in this judgment, if those conclusions were based on no evidence or not supported by the established facts or evidence on record, or that the conclusions were ‘so perverse’, or so illegal, that no reasonable court would have arrived at the same. The four charges against the appellant were, no doubt weighty, but they were not vague. They contained detailed particulars of the alleged violations of the *Constitution* and the law, specifying with precision the provisions of the *Constitution* and the law that were alleged to have been contravened.
153. Before the question of impeachment was escalated to the two courts, both the County Assembly and the Senate had equally and independently found merit in the charges. Though there is no obligation in impeachment charges to prove each and every charge, in this instance all the organs involved, from the County Assembly to the Court of Appeal, found proof of all the charges. Nothing has been placed before us to warrant our interference with those conclusions by the two superior courts. We find no merit in this ground.

vii. Whether the sovereignty of the people envisaged under article 1 of the *Constitution* was respected and protected in the removal process

154. Article 1 of the *Constitution* provides:

“Article 1. Sovereignty of the people

1. All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.
2. The people may exercise their sovereign power either directly or through their democratically elected representatives.
3. Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—
 - a. Parliament and the legislative assemblies in the county governments;
 - b. the national executive and the executive structures in the county governments; and
 - c. the Judiciary and independent tribunals.
4. The sovereign power of the people is exercised at—
 - a. the national level; and



b. the county level.”

155. Indeed, under article 1, all sovereign power belongs to the people of Kenya. That power can only be exercised in accordance with the *Constitution* itself. Further, the people may exercise that power either directly or through their democratically elected representatives. Specifically, in the instant case, sovereign power of the people is delegated to State organs such as Parliament at the national level and the County Assemblies in the devolved governments.
156. By virtue of the People (Wanjiku) delegating this sovereign power, it is exercised on their behalf and must reflect their will. Delegated power is therefore to be exercised solely for the benefit of the people.
157. In *Attorney General & 2 others v David Ndi & 79 others*, SC Petition 12 of 2021 consolidated with Petition 11 & 13 of 2021, Njoki, SCJ expounding on article 1 as follows:

“

“[1192] In addition, article 1 of the *Constitution* of Kenya elaborates the tenets of a functioning Republic anchored by the concept of *libertas populi* which defines the characteristics of a functioning Republic. It envisions a system that has responsible citizens who exercise their rights democratically and consciously. A free *res publica* is the highest value for all citizens. This Article preserves the exercise of the actual legal authority or power which is exercised by the people directly or through their democratically elected representatives.

...

[1194] Furthermore, it is a fundamental right of the Kenyan people to elect their representatives and that those so elected speak on their behalf. To limit the ability of an elected representative to speak, to act, to work on behalf of his or her electorate is in itself a limitation of people’s political rights under article 38 of the Constitution. Such a proposition would amount to Limited Republicanism limiting the extent to which people exercise their powers either directly or through their elected representatives.

More poignantly, limiting the powers of the people donated to their representatives reorganizes the architecture of the Constitution’s order of delegated governance.” [our emphasis]

158. Therefore, to completely lock out the electorate from being heard in a matter as important as the removal of their Governor, would be against the spirit of article 1(2) of the *Constitution*. However, having found in this appeal that there was meaningful public participation, we hold that the people participated directly and also exercised their power through their elected representatives, at both national and county levels to uphold and defend chapter six of the *Constitution*. To that extent, this ground also fails.

F. Conclusion

159. In conclusion, article 10(1) of the *Constitution* binds all State organs, State officers, public officers and all persons to abide by national values and principles of governance, which include integrity, transparency and accountability. The entire chapter six of the *Constitution*, comprising eight articles is dedicated to Leadership and Integrity of State officers, signifying the importance of the State office



they occupy. In essence, article 181 is intended to function as a vital instrument for ensuring that the constitutional ethos of integrity, discipline and the proper exercise of public power are maintained.

160. Impeachment and removal from office of State officers are constitutional remedies to gross violations of the *Constitution*, the law, abuse of office and gross misconduct. The consequences of impeachment are grave and may include disqualifications from engaging in any elective public position or to hold a public office.
161. The principles governing the process of impeachment or removal of a county Governor that flow from this decision may be summarized as follows;
- i. All sovereign power belongs to the people of Kenya to be exercised directly or through their elected representatives at the national and county levels, and State organs.
 - ii. The spheres of jurisdiction of the removal of a County Governor is exclusively reposed in two legislative organs, the County Assembly and the Senate, the representatives of the people.
 - iii. Where it is alleged that any of the two organs has failed to act in accordance with the *Constitution*, or in conformity with the law and principles of natural justice, the courts are bound to review their decisions.
 - iv. The removal of a Governor is both a constitutional and political process. The mandate of the courts is restricted by the doctrine of separation of powers to determine whether individual's rights, dignity and fundamental freedoms have been preserved and protected in the process without usurping the powers and functions of the legislative branch of Government.
 - v. During the process of removal, the right to fair administrative action under article 47 and the right to fair hearing under article 50 of the *Constitution* all accrue to the Governor.
 - vi. Public participation is an integral element of the process of removal of a State officer from office.
 - vii. The removal of a Governor relates to accountability, political governance and personal responsibility and is not necessarily about criminal responsibility or culpability.
 - viii. The grounds for impeachment and removal from office must be substantiated. The standard of proof is intermediate, that is, above a balance of probability but below all reasonable doubt, and the proof of any one of the charges is sufficient to discharge the burden of proof.
 - ix. The courts must be involved in active case management to ensure efficient and expeditious yet fair determination of questions arising from Chapter Six of the *Constitution*.
162. In the end, and on the basis of the opinions expressed in this judgment, we come to the ultimate conclusion that the removal from office of the appellant, Mike Mbuvi Sonko, was in compliance with the *Constitution* and the law.

We find no merit in this appeal and accordingly dismiss it.

G. Reasons for the Concurring Judgment of PM Mwilu; DCJ & VP & SC Wanjala, SCJ

163. We have read the majority Judgment and the reasons thereof. We agree that this appeal has been rightly dismissed for lack of merit. However, having determined that the appellant has not properly invoked this court's jurisdiction under article 163(4) of the *Constitution*, and having sustained the preliminary objection; we would have struck out the appeal at this stage without more. Such action on our part, would have been in keeping with this court's decision in *Suleiman Mwamlole Warrakah & 2 others v*



Mwambole Tchappu Mbwana & 4 others [2018] eKLR. In that case, we were categorical that a party must properly and specifically invoke the court’s appellate jurisdiction under article 163(4)(a) or 163(4)(b) of the *Constitution*. Failure to do so, we held, would lead to the intended appeal being struck out. We would therefore, have downed our tools as indeed we did in the case under reference.

164. Notwithstanding our misgivings about the majority’s determination of the merits of the appeal, we concur with the final disposition and orders.

H. Reasons for the concurring judgment of MK Ibrahim, SCJ

165. I have keenly and carefully read and considered the Judgment of the majority. The factual rendition of the facts and relevant laws are meticulously considered therein. I am in agreement with the conclusion of the majority. However, I write separately to address the question of jurisdiction.

166. It is crucial to point out that in matters jurisdiction, I dissented in *Lemanken Aramat v Harun Meitamei Lempaka & 2 others*, SC Petition No 5 of 2014; [2014] eKLR. I had agreed with the majority in that case that the proceedings in the High Court were a nullity ab initio having been premised on a petition filed out of time. However, my point of divergence was on the basis of the locus classicus on jurisdiction, the celebrated case of the *Owners of the Motor Vessel “Lillian S” v Caltex Oil Kenya Ltd*, (1989) KLR 1. It was my considered opinion that the Court should have downed its tools and not delve into any other question on their merits.

167. It was, and still is, my considered opinion that the Supreme Court as the court of final judicial authority in Kenya, is bestowed with jurisdiction and mandate pursuant to section 3 of the *Supreme Court Act*, No 7 of 2011, to settle constitutional questions with finality. It is for this reason that I agree with the sentiments of Mutunga, CJ & P in the *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, Sup Ct Petition No 4 of 2012 [*supra*] that the Supreme Court should be ready to pronounce itself on the interpretation of constitutional issues. He expressed himself thus:

“[I]t will be good practice for this court to take every opportunity a matter affords it, to pronounce [itself] on the interpretation of a constitutional issue that is argued either substantively or tangentially by parties before it.”

168. It was my humble view that the context of the Aramat case did not give rise to a constitutional moment for the court to depart from the principle in Lillian “S”, seize and go into any other issues on merit.

169. However, in the present case, I am persuaded and indeed convicted in my principles, that this is one such case that warrants the court to depart from the long-held decision in Lillian “S”. I reiterate the words of the concurring opinion of Mutunga, CJ & P *In the Matter of the Speaker of the Senate & another* [*supra*] where he stated as follows:

“[156] The Supreme Court of Kenya, in the exercise of the powers vested in it by the *Constitution*, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that lower courts and other institutions can rely on, when they are called upon to interpret the *Constitution*. Each matter that comes before the court must be seized upon as an opportunity to provide high-yielding interpretive guidance on the *Constitution*; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the courts that the country turns, in order to resolve these contradictions; clarify draftsmanship-gaps; and settle constitutional



disputes. In other words, constitution- making does not end with its promulgation; it continues with its interpretation.

170. I fully endorse the characterisation of chapter six of the *Constitution* as the soul of the Constitution}} of Kenya. I can do no more than to echo the words of the majority decision, that the authority assigned to a State officer is a public trust that vests the responsibility to serve the people, rather than the power to rule them. To take up a State Office, whether it be by election or appointment, requires commitment to good governance, transparency and accountability. This commitment must be espoused in both the words and deeds of the office holder in both public and official lives as well as their private lives. Indeed, in every association, this commitment must, at all times, be consistent with the purposes and objects of this Constitution, demonstrate honour for the people of Kenya, bring honour to the nation and dignity to the office as well as promote public confidence in the integrity of the office. Chapter six codifies the guardrails against autocratic exercise of power by the leaders.
171. Accordingly, it is the reason why the context of the present case presents an opportunity for this court to settle fundamental questions of law surrounding impeachment proceedings in the framework of the *Constitution of Kenya, 2010*. Impeachment being a remedy for breaching the public trust entrusted to State Officers. It is my considered view that this was an opportunity to provide high- yielding interpretive guidance on the *Constitution* that the court had an obligation and duty to seize.
172. Taking that into consideration, I emphatically support the principles set out at the tail end of the decision as well as the final orders as enunciated by the majority.
173. Be that as it may, just as the majority have done, I too render a clarification, that this is not an endorsement for departure from the principles in the *Lillian “S”* decision, rather a singular exemption for the Supreme Court due to its specialised mandate pursuant to the *Constitution* and the *Supreme Court Act*.

I. Costs

174. Costs follow the event but are in the discretion of the court. We are guided by the principles on the award of costs enunciated in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others*; SC Petition 4 of 2012; [2013] eKLR. Without doubt, the Petition raises substantive issues of law and of great public interest, we think for these reasons, it is appropriate to order parties to meet their own costs.

I. Final orders

- i. The petition of appeal dated April 1, 2022 is hereby dismissed;
- ii. Parties to bear their own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF DECEMBER, 2022.

.....

M.K. KOOME

CHIEF JUSTICE & PRESIDENT

OF THE SUPREME COURT

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P.M. MWILU
DEPUTY CHIEF JUSTICE & VICE
PRESIDENT OF THE SUPREME COURT

.....

M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA
JUSTICE OF THE SUPREME COURT

.....

W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original.

REGISTRAR,
SUPREME COURT OF KENYA.

