



**In the Matter of Speaker, County Assembly of Embu (Reference 1 of 2015)  
[2018] KESC 49 (KLR) (Civ) (9 March 2018) (Advisory Opinion)**

*In re Speaker, County Assembly of Embu [2018] eKLR*

Neutral citation: [2018] KESC 49 (KLR)

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

**CIVIL**

**REFERENCE 1 OF 2015**

**MK IBRAHIM, JB OJWANG, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ**

**MARCH 9, 2018**

**IN THE MATTER OF  
THE SPEAKER, COUNTY ASSEMBLY OF EMBU ..... APPLICANT**

**How a vacancy in the Office of Deputy Governor would be filled.**

Reported by Beryl A Ikamari

***Jurisdiction** - jurisdiction of the Supreme Court - advisory opinion jurisdiction - threshold to be met for the exercise of advisory opinion jurisdiction by the Supreme Court - where an advisory opinion was sought concerning the assumption to office by a Deputy Governor after the occurrence of a vacancy in the Office of the Governor, with respect to the oath to be administered, the new vacancy that would arise in the Office of the Deputy Governor and the timelines applicable to the filling of the vacancy and assumption of office - Constitution of Kenya articles 163(6) and 182(2).*

***Constitutional Law** - interpretation of the provisions of the Constitution - County Government - Office of Governor-vacancy in the Office of Governor-assumption of the Office of Governor by the Deputy Governor where there was a vacancy in the Office of the Governor - timelines applicable to that assumption of office and the nature of the oath that was to be administered in order to assume office as Governor - Constitution of Kenya articles 259, 149, 182 and 74; County Government Act (cap 265) section 30(1).*

***Constitutional Law** - interpretation of the provisions of the Constitution - County Government - Office of Deputy Governor - vacancy in the Office of Deputy Governor - manner of dealing with a vacancy in the Office of the Deputy Governor-analogy between the Office of Deputy President and the Office of Deputy Governor - whether the Office of the Deputy Governor would remain vacant until the next general election where a vacancy arose after the Deputy Governor assumed office as a County Governor - Constitution of Kenya articles 259, 149, 182, 179(1), 179(4), 179(5), 180(5) and 180(6); County Government Act (cap 265) section 32.*

**Brief facts**

On January 28, 2014, the Embu County Assembly approved an impeachment motion against the Embu Governor and forwarded the resolution to the Senate for approval. The Governor successfully challenged the



impeachment proceedings and obtained a judgment from the High Court which was affirmed at the Court of Appeal. The judgment did not bar the County Assembly or Senate from conducting future impeachment proceedings provided that those proceedings were conducted in accordance with the law.

In April 2014, fresh impeachment proceedings were commenced against the Governor. On May 13, 2014, the Speaker of the Senate published Gazette Notice No. 3222 of 2014, which contained the Senate's decision to impeach the Governor. The impeached Governor went to the High Court to challenge the constitutionality of his impeachment.

The applicant, the Speaker of the County Assembly of Embu, sought advice on the assumption of Office of Governor by the Deputy Governor after the impeachment of the Governor, how the oath for assumption of office would be administered, the filling of the vacancy in the Office of the Deputy Governor after the Deputy Governor assumed the Office of Governor and the timelines applicable to the assumption of the Office of Governor after the impeachment of the Governor. After unsuccessfully seeking advice from the Independent Electoral and Boundaries Commission and the Attorney General, the applicant filed a reference seeking the Supreme Court's advisory opinion.

### Issues

- i. Whether the Office of Deputy Governor would remain vacant upon assumption of Office of Governor by the Deputy Governor in situations where the Office of Governor had become vacant.
- ii. In what manner would a vacancy in the Office of the Deputy Governor be filled?
- iii. Which oath would be administered where a Deputy Governor was assuming the Office of Governor after a vacancy arose in the Office of Governor?
- iv. What timelines were applicable to the filling of vacancies in the Office of Governor and Deputy Governor, where the Deputy Governor was required to assume office as Governor?
- v. When would the Supreme Court exercise its advisory opinion jurisdiction?

### Held

1. The reference met the constitutional threshold for the exercise of the Supreme Court's advisory opinion jurisdiction under article 163(6) of the Constitution. It was a matter concerning County Government, the Applicant, being the Speaker of Embu County, was a state organ under article 178 of the Constitution, the issues raised were not subject to proceedings in a lower Court and the applicant sought an opinion from the Attorney General unsuccessfully. The reference raised issues of great public importance, considering that the country had held a recent general election.
2. Article 182(2) of the Constitution provided for the terms applicable to filling a vacancy in the Office of the County Governor. The provision contemplated certain scenarios where a vacancy in the Office of the Governor could occur, namely;
  - a. where the Office of the Governor fell vacant, the Deputy Governor would assume that office;
  - b. where there was a vacancy in both the Office of County Governor and that of Deputy Governor, the Speaker of the County Assembly would assume office as Governor for a period of 60 days, within which an election to that office would be held; and,
  - c. where there was a vacancy in the Office of Governor and the Deputy Governor was unable to hold office in an acting capacity, the Speaker of the County Assembly would assume office and act as Governor for a period of 60 days within which an election to the Office of Governor would be held.
3. Article 182(2) of the Constitution created a pecking order. It provided that where a vacancy in the Office of Governor occurred, the first to take over was the Deputy Governor and in his absence, the Speaker of the County Assembly would take up the position for a limited period of 60 days, pending the conduct of an election.
4. The Constitution was silent on how to fill the position of Deputy Governor in the event of the occurrence of a vacancy. There was a *lacuna* in law with respect to filling such a vacancy.



5. The Supreme Court had the mandate to interpret the Constitution, under article 259 of the Constitution, in a manner that promoted the Constitution's purposes, values and principles, advanced the rule of law, permitted the development of the law and contributed to good governance.
6. The relevant question in the given context was whether the Constitution contemplated that the Office of Deputy Governor would remain vacant upon the assumption of Office of Governor by the Deputy Governor. The provisions of article 180(5) and 180(6) of the Constitution were to the effect that upon the election of the Governor, the IEBC would declare that the elected Governor's nominee for the post of Deputy Governor as the Deputy Governor. The Office of Deputy Governor depended on the election of the Governor and there was no independent election for a Deputy Governor. Therefore, the Constitution did not contemplate the filling of a vacancy in the Office of a Deputy Governor through a direct election to that office.
7. Under the provisions of article 179(1), 179(4) and 179(5) of the Constitution, as read together with section 32 of the County Government Act, the Deputy County Governor would serve as the Deputy Chief Executive of the County, a member of the County Executive Committee, and would act as the County Governor, in the absence of the Governor. Those roles were crucial to the operations of a County Government. It was inconceivable that, constitutionally, they could remain fallow until the next cycle of a general election. Therefore the Office of Deputy County Governor ought not to remain vacant until the next general election upon the assumption of the Office of Governor by the Deputy Governor.
8. An analogy between the Office of the Deputy Governor and the Office of Deputy President could be drawn. The Deputy President would be a nominee of a successful presidential candidate as provided for under article 148 of the Constitution. Article 149 of the Constitution provided for the mode of filling a vacancy in the position of Deputy President. Within 14 days after the occurrence of the vacancy, the President would nominate a person to fill the vacancy, and the National Assembly would vote on the nomination within sixty days after receiving it.
9. Article 259 of the Constitution provided that every provision of the Constitution had to be construed according to the doctrine that the law was always speaking. The principle would require a reading of article 182 of the Constitution alongside article 149 of the Constitution. Where there was a vacancy in the Office of Deputy County Governor, within 14 days the Governor would nominate a person to fill such a vacancy and the County Assembly would vote on the nomination within 60 days after receiving it. Where there was a vacancy in both the offices of County Governor and Deputy County Governor at the same time, the Office of the Deputy County Governor would remain vacant until the election of a new Governor. The new Governor would nominate a person to fill the vacancy within fourteen days after assuming office. The County Assembly would vote on the nomination within sixty days after receiving it. That position would be applicable in situations where the Office of Deputy Governor became vacant as contemplated by the Constitution; death, resignation or impeachment.
10. The provisions of article 74 of the Constitution and section 30 of the County Government Act, were applicable to a Deputy County Governor who assumed the Office of Governor under article 182(2) of the Constitution. The new Governor would take and subscribe to the oath or affirmation set out in the Schedule to the County Government Act before assuming office.

## Citations

### Cases

#### *Kenya*

1. *In the Matter of the National Land Commission Advisory Opinion Reference 2 of 2014*; [2015] KESC 3 (KLR) - (Explained)
2. *In the Matter of Interim Independent Electoral Commission Constitutional Application 2 of 2011*; [2011] KESC 3 (KLR) - (Explained)



3. *In the Matter of Kenya National Commission on Human Rights Reference No. 1 of 2012*, [2014] eKLR - (Explained)
4. *In the Matter of the Interim Independent Electoral Commission (Applicant) Constitutional Application 2 of 2011*; [2011] KESC 1 (KLR) - (Explained)
5. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate Advisory Opinion Application 2 of 2012*; [2012] KESC 5 (KLR) - (Explained)
6. *Kenya Commercial Bank Ltd & another v Kenya Hotels Limited Nai 40 of 2004* (UR 24/2004) - (Explained)
7. *Obado v Oyugi & 2 others* Civil Application 7 of 2014; [2014] KESC 25 (KLR) - (Mentioned)
8. *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) - (Mentioned)

### **United Kingdom**

*R v Big M Drug Mart Ltd* [1985] SCR 295 - (Explained)

### **Statutes**

#### **Kenya**

1. Constitution of Kenya articles 159(2); 163(6); 174; 178(2); 180(5)(6); 182(2); 259(1)(b) - (Interpreted)
2. County Government Act (cap 265) sections 30(1); 32(1); 33; Schedule 1 - (Interpreted)
3. Intergovernmental Relations Act (cap 265F) section 4(f) - (Interpreted)
4. Oaths and Statutory Declarations Act (cap 15) section 4 - (Interpreted)
5. Supreme Court Act (cap 9B) sections 3, 13 - (Interpreted)
6. Supreme Court Rules, 2012 (cap 9B Sub Leg) rule 42 - (Interpreted)

#### **Nigeria**

Constitution of Nigeria - (Interpreted) article 191(3)

### **Advocates**

1. *Prof. Ojienda*, Senior Counsel, for the applicant
2. *Mr. Onyiso*, Senior Principal State Counsel, for the Attorney-General
3. *Mr. Muhoro* for the Independent Electoral and Boundaries Commission

## **ADVISORY OPINION**

(Under article 163(6), 159(2), 182(1)(e), 182(2) and 260 of the [Constitution of Kenya](#), 2010; sections 3 and 13 of the [Supreme Court Act](#) (Cap 9A, Laws of Kenya) and rule 42 of the [Supreme Court Rules, 2012](#), the inherent powers of the Court, and all other enabling provisions)

### **Advisory Opinion**

#### **A. Introduction**

1. This Reference was filed by the Speaker of the County Assembly of Embu. The mandate of a Speaker of a County Assembly is as stipulated under article 178(2) of the [Constitution](#): to preside over the sittings of the County Assembly.
2. The applicant, by his Reference dated February 11, 2015 and filed on February 13, 2015, seeks an Advisory Opinion, pursuant to article 163(6) of the [Constitution](#), on the following issues:
  - a. the procedure for administration of oath of office, in accordance with article 74, for a Deputy Governor who assumes office under article 182(2) of the [Constitution](#), in the event of impeachment of a County Governor;



- b. the criteria for filling the vacancy that occurs in the Office of the Deputy County Governor, where the originally-elected Deputy Governor assumes office as Governor, after impeachment of the elected County Governor;
- c. the timeline within which the Deputy Governor assuming office of Governor under article 182(2) of the Constitution, should assume office.

## **B. Background**

- 3 In January 2014, the County Assembly of Embu (the County Assembly), pursuant to article 181 of the Constitution, section 33 of the County Government Act (No. 17 of 2012) [County Government Act], and Standing Order No. 60 of the Standing Orders of the Assembly, initiated the process of removal of the Governor.
- 4 Proceeding with this process, the County Assembly approved the impeachment motion, and on January 28, 2014, it forwarded the resolution to the Senate for further approval.
- 5 The Governor of Embu was dissatisfied with the impeachment proceedings, and contested it in the High Court at Embu in *Martin Nyaga Wambora & another v. The Speaker of the Senate & 4 others*, HC Petition No. 1 of 2014. He obtained temporary Orders restraining the Senate from proceeding with any motion for his removal. This Petition was later transferred to the High Court at Kerugoya (High Court Petition No. 3 of 2014, *Martin Nyaga Wambora & another v. The Speaker of the Senate & 4 others*), where it was heard and determined. The Court delivered its Judgment on April 16, 2014, granting the petition in favour of the Governor. The Court indicated that its Judgment did not bar the County Assembly and the Senate from conducting any future proceedings for the removal of the Governor from office, as long as the removal process was conducted in accordance with the law.
6. Aggrieved by part of the High Court Judgment, the Governor filed an appeal at the Court of Appeal? *Martin Nyaga Wambora & 3 Others v. The Speaker of the Senate & 6 others*, Civil Appeal No. 21 of 2014. The Court of Appeal heard the Governor's appeal and, in a Judgment delivered on September 30, 2014, affirmed the High Court decision.
7. During the pendency of the appeal, between April 23, 2014 and April 29, 2014, the County Assembly of Embu initiated a fresh impeachment process against the Governor, in terms of section 33(1) of the County Governments Act. The County Assembly approved the removal motion, forwarding the same to the Senate for approval, on April 29, 2014. Subsequently, on May 13, 2014, the Speaker of the Senate published Gazette Notice No. 3222 of 2014, which contained its decision impeaching the Governor. In a letter dated May 14, 2014, the Senate communicated its decision to the applicant, as well as the Speaker of the County Assembly. On the same day, the Speaker wrote a letter to the chairperson of the Independent Electoral and Boundaries Commission (IEBC), informing him of the impeachment of the Governor.
- (8) In response, the IEBC, by its letter dated May 29, 2014, disclaimed all responsibility for the swearing-in of the Deputy Governor. In a letter dated June 16, 2014, the applicant herein responded, urging the IEBC to review its decision, and provide guidance to Embu County, in view of the fact that both the Constitution and the County Governments Act are silent on two vital matters, namely:
- (a) the procedure for the administration of the oath of office to State Officers, in the event of impeachment of a County Governor; and
  - (b) the criteria for filling the vacancy that occurs in the office of the Deputy County Governor, after he/she assumes office as a County Governor upon impeachment of the serving Governor.



This request, as the applicant avers, did not elicit any response from the IEBC.

9. In the meantime, the Governor filed a petition at the High Court in Embu, *Martin Nyaga Wambora v. the Speaker of the County Assembly of Embu & 3 others*, HC Petition No. 7 of 2014. He was contesting the constitutionality of the impeachment proceedings of April 29, 2014 and the subsequent proceedings of the Senate, of May 13, 2014, that endorsed his impeachment. The applicant submitted that the instant matter does not replicate the High Court petition; and that all it does is to seek guidance on specific grey areas in the law, for the purpose of guiding the functioning of the constitutional sphere of devolved government.
10. It is averred that his request for the Attorney-General's advice, by way of a letter dated November 21, 2014, had not been accorded the courtesy of a response. Consequently, the applicant filed this Reference, seeking the Supreme Court's advisory opinion on the issues specified therein.
11. On May 14, 2015 this Court granted leave to the applicant, the Attorney-General, the Transition Authority, and IEBC, to file an agreed set of issues for determination. Right away, the parties agreed on the very issues raised in the Reference. The Transitional Authority, however, did not file any submission.

### C. Submissions

#### (i) Applicant

12. Learned Senior Counsel, Prof. Ojienda, for the applicant, submitted that article 182 of the [Constitution](#), and section 33 of the [County Government Act](#), are silent on the procedure to be followed in filling a vacancy created in the office of the Deputy Governor, when a Governor is impeached, and the Deputy Governor assumes office as the substantive Governor. He urged the Court to issue an advisory opinion with an indication of timelines within which a Deputy Governor should fill the seat of the Governor, in the event the Governor is impeached, and within which the vacant position of Deputy Governor should be filled.
13. Counsel submitted that there is no legal provision specifying the destiny of the position of Deputy Governor, where the current Deputy Governor takes the position of Governor, in the terms of article 182(2) of the [Constitution](#) and section 33 of the [County Government Act](#). He urged that this is an area of law that calls for amplification, citing this Court's decision in, [In the Matter of the Principle of Gender Representation in the National Assembly and the Senate](#), Sup. Ct. Advisory Opinion No. 2 of 2012, as an example where the Court rendered an opinion following a Reference by the Attorney-General, on the basis that the [Constitution](#) bore a lacuna.
14. Counsel submitted that the applicant has *locus standi* under article 163(6) of the Constitution, to file this Reference. It was urged, firstly, that the applicant (the Speaker of the County Assembly) holds the office established under article 178, which is and a 'State organ' under article 260 of the [Constitution](#). Secondly, counsel submitted that this is a matter touching directly on the procedure for filling a vacancy in the seat of Deputy Governor: thus, it is a matter that relates to County Government. Thirdly, the applicant attributed his motion to the failure of the Attorney-General to tender any advice, notwithstanding the request formally made on November 21, 2014. Furthermore, counsel urged, the applicant had communicated with the IEBC chairperson, who was not able to offer any advice.
15. In aid of the applicant's case, counsel cited this Court's advisory opinion in [Speaker of the Senate & another v. Attorney-General & 3 others](#), Advisory Opinion No. 2 of 2013, in which it was held that a matter is one of County Government if the Constitution or statute law provides as such.



16. Learned counsel urged that the instant reference seeks answers on novel matters, that have not yet arisen, or have not been adjudicated upon in a Court of law. He submitted, further, that this matter is one of general public importance, as it affects not just one County, but all counties in the country, where a County Governor may be impeached.
17. Counsel submitted that it also remained an open question, as to when and how a person who assumes the office of Governor by virtue of article 182(2) of the *Constitution*, should take the oath of office. He submitted that it was not clear whether the procedure for administration of oath of the office for Governor, as stipulated in article 74 of the *Constitution* and section 30(1) and 32(1) of the *County Governments Act*, applies exclusively to newly-elected Governors and Deputy Governors. Counsel also urged that a person who assumes the office of Governor, by virtue of article 182(2) of the *Constitution*, will not be deemed to have taken office, unless he takes an oath of office; and so, as long as the Deputy Governor has not taken an oath of office as the new Governor, he cannot be deemed to have assumed the office of Governor. In sustenance of this argument, counsel cited this Court's decision in *Zachariah Okoth Obado v Edward Akong'o Oyugi*, Sup. Ct. Civil Application No. 7 of 2014, in which the Court held that a Speaker only assumes office after taking the mandatory oath of office.
18. Counsel submitted in addition that article 182(2) of the *Constitution* as read with section 33 of the Act, is silent as to the time-span within which a vacancy in the office of Deputy Governor must be filled. Such a lacuna, it was urged, is prejudicial to the smooth running of counties: for by the terms of the Act, accountability for the management and use of county resources vests in the Governor. It follows that a prolonged vacancy in the office of Governor denies the people the right to equitable sharing of national and local resources, contrary to the terms of article 174(g) of the *Constitution*. He thus urged the Court to adopt the South African model, wherein the *Constitution* sets timelines within which an election is to be conducted, for the purpose of filling a vacancy.
19. Drawing on comparative experience, counsel made reference to practices in several States of the United States of America, such as Ohio, indicating that vacancies in the Deputy Governor's office, occasioned by the elevation of the current office holder to the position of Governor, are filled through nomination by the new Governor. He also referred to the practice in Nigeria, where a vacancy in the office of Deputy Governor is filled through nomination.
20. It was counsel's other submission that the *Constitution* does not provide for separate elections for the office of Deputy Governor; and that on this account, the pragmatic approach is that of nomination, subject to approval by the County Assembly.
21. Learned counsel further submitted that article 174 of the *Constitution* states as one of the objects of devolution, "to ensure equitable sharing of national and local resources throughout", and that on this account, denying a county the services of a Deputy Governor would stand in conflict with the principle of sharing. He further urged that regard be paid to section 4(f) of the *Intergovernmental Relations Act* (cap. 5G, Laws of Kenya), which carries the principle of intergovernmental relations that promotes equality and equity in service delivery; and that where the residents of a county have no Governor or Deputy Governor, the goals of equality and equity in service delivery will be impeded.
22. In the alternative, counsel submitted, the seat of Deputy Governor should be left vacant: because a reading of article 180(5) and 180(6) of the *Constitution* does not contemplate the conduct of elections for Deputy Governor; so it was a plausible interpretation that the drafters of the *Constitution* did not intend a fresh election to occur, in the event of a vacancy arising.
23. He urged at the same time, however, that where the Deputy Governor's seat is left vacant, there must be officers who have the charge of conducting the functions of that office.



24. Counsel concluded by urging this Court to adopt three elements in the drift of its advisory opinion:
- a. in case of a vacancy, the oath of office is to be taken within a stipulated period before assumption of office;
  - b. a vacancy in the office of the Deputy Governor be filled through nomination, subject to approval of the respective County Assembly;
  - c. a timeline within which a vacancy is to be filled be provided for, not being later than two months after a vacancy arises in the office of the Governor.

### **(ii) Attorney-General**

25. Learned Senior Principal State Counsel, Mr. Onyiso, appearing for the Attorney-General, submitted that, under article 260 of the Constitution, the Deputy Governor is a state officer and, therefore, like other state officers, he or she ought to take the oath of office, as prescribed under article 74 of the Constitution, and section 32(1) of the governing statute.
26. He urged that the procedure governing the taking of the oath is to be found in the Oaths and Statutory Declaration Act (cap. 15, Laws of Kenya), noting that section 4 of that Act gives the Commissioner for Oaths the power to administer any oath. He submitted that a Deputy Governor should take the oath as prescribed in the first schedule to the County Government Act, before a commissioner for oaths, who should indicate in the jurat or attestation page, the applicable place and the date of the oath-taking.
27. Counsel further submitted that a commissioner for oaths will be a practising advocate, as illustrated in case law; notably *Kenya Commercial Bank Ltd. and another v. Kenya Hotels Limited*, Nai 40 of 2004 (UR 24/2004), was quoted with approval and in which the Court held that being a practising advocate is a condition precedent to being appointed a commissioner for oaths.
28. As regards the filling of vacancy of a Deputy Governor who assumes the office of an impeached Governor, Mr. Onyiso submitted that it would be unconstitutional to fill such a vacancy: and that the County stands to be governed without a Deputy Governor, for the remainder of the term of the original Governor. He thus contended that the Constitution does not provide for the replacement of a Deputy Governor, and that the in-coming Governor has no power to nominate or appoint a Deputy, and that no other person holds such a power. He lodged this argument within the terms of article 2(2) of the Constitution, that no person may claim or exercise state authority except as authorized in the Constitution.
29. On the basis of article 259(8) of the Constitution, learned counsel finally submitted that the Deputy Governor should assume office within a reasonable time, following the removal of the Governor, upon impeachment.

### **(iii) Independent Electoral and Boundaries Commission**

30. Learned counsel, Muhoro, for IEBC, submitted that the reference for an advisory opinion properly falls within the jurisdiction of this court. He invoked the guidelines for the exercise of the advisory jurisdiction by virtue of article 163(6) of the Constitution, as set out in the case, *In The Matter of Interim Independent Electoral and Boundaries Commission* [2011] eKLR; and urged that this Court should render such opinion, this having been requested by a State organ established under article 260 of the Constitution. He submitted that such an opinion would relate to matters concerning County Government, apart from raising questions of constitutional interpretation regarding an existing lacuna



in the law - consequently a matter of great public importance, and one which directly affects the composition of the Embu County Government.

31. Counsel referred to article 259(1) of the Constitution and urged the court to adopt a purposive approach in the interpretation of the Constitution, in aid of which principle he relied on in the case of R v. Big M Drug Mart Limited [1985] SCR 295, which was quoted by this court with approval in, In the Matter of The Principle of Gender Representation [2012] eKLR.
32. Counsel urged the court to render an advisory opinion with the object of filling the lacuna in both the law and the Constitution, by interpreting the Constitution holistically, taking into account its declared principles. He was making a case for the court assuring effectiveness in the functioning of those state organs that have primary responsibility for effectuating process that crystalize enforceable rights.
33. It was counsel's other submission that whereas there is a procedure for filling a vacancy in the office of Governor under article 182(2) of the Constitution, the Constitution is silent on the timelines within which such a vacancy is to be filled, and the manner in which the vacant position of Deputy Governor may be filled. He added that section 33(10) of the County Government Act, which gives effect to article 182(2) of the Constitution, is also silent on the question before this court. He called for a purposive interpretation of the Constitution, in addressing this lacuna in both the Constitution and the statute law.
34. Learned counsel further submitted that the Deputy County Governor, upon acceding to the office of Governor, will be assuming a state office, and must take an oath, pursuant to article 74 of the Constitution, and as prescribed under section 30(1) of the County Government Act.
35. Counsel in addition submitted that the election of a Governor and Deputy Governor are so intricately intertwined, in the scheme of the elective mandate, that the Deputy Governor must be considered to derive his authority directly from the electorate. Counsel thus submitted that this common intent flows from article 182(2) of the Constitution, which provides that once a vacancy occurs in the office of County Governor, the Deputy Governor assumes responsibility for the remainder of the term.
36. It was also counsel's standpoint that the vacancy in the Governor's office should be filled in conditions of legitimacy, in terms of the electorate's will: and so, the Deputy County Governor should be nominated by the newly appointed Governor, with the approval of the County Assembly<sup>3/4</sup> which is the duly elected organ of the people. In that regard, learned counsel commended the terms of article 191(3) of the Constitution of Nigeria, which thus provides:

“When the office of Deputy Governor becomes vacant (a) by reason of death, resignation, impeachment, permanent incapacity or removal in accordance with article 188 or 189 of the Constitution; (b) by his assumption of the office of Governor of a State in accordance with sub-section 1 of this section; or (c) for any other reason, the Governor shall nominate with approval of the House of Assembly of the State, appoint a Deputy Governor.”
37. With regard to timelines, counsel submitted that the Deputy Governor should assume office of the Governor immediately upon the vacancy taking effect, to ensure that there is no vacuum in that office; and thereafter, the in-coming Governor should nominate a Deputy Governor, subject to the approval of the County Assembly. He proposed that the Deputy Governor thus nominated, should assume office within 60 days of the occurrence of the vacancy in that office. Counsel's rationale for such a time-frame was drawn by analogy from article 182(4) and (5) of the Constitution, which provide that, where a vacancy occurs in the office of Deputy Governor and that of Governor, the Speaker of the County Assembly shall act as Governor for a period of sixty days, during which an election will be conducted.



## D. Analysis

38. The applicant seeks an advisory opinion regarding the process of filling the position of Deputy Governor, upon a vacancy arising as a result of the removal of a County Governor through impeachment proceedings. The parties herein are in agreement that, indeed, there is a lacuna in law. In addition, the applicant urges this Court to set the timelines within which the Deputy Governor should assume office, pursuant to article 182(2) of the Constitution. The applicant also calls for a clarification of the procedure of administering an oath of office, for such a Deputy Governor.
39. From the submissions of the parties herein, it is clear to us that this Reference meets the constitutional threshold for the exercise of the Supreme Court’s Advisory-Opinion jurisdiction under article 163(6) of the Constitution. Firstly, it is a matter concerning a County Government; secondly, the applicant being the Speaker of Embu County, his office is a state organ under article 178 of the Constitution; thirdly, the issues raised are not a subject of proceedings in a lower Court; and fourthly, the applicant had sought an opinion from the Office of Attorney-General, but to no avail. The issues raised in the Reference are also of great public importance, especially at this time when the Country has recently held a general election.
40. In the above context, article 182(2) of the Constitution prescribes the applicable terms in filling a vacancy in the office of the County Governor. It thus provides:
- “(1) The office of the County Governor shall become vacant if the holder of the office?
- (a) a) dies;
  - (b) resigns, in writing, addressed to the speaker of the county assembly;
  - (c) ceases to be eligible to be elected County Governor under article 180 (2);
  - (d) is convicted of an offence punishable by imprisonment for at least twelve months; or
  - (e) is removed from office under this Constitution.
- (2) If a vacancy occurs in the office of County Governor, the Deputy County Governor shall assume office as County Governor for the remainder of the term of the County Governor.
- (3) If a person assumes office as County Governor under clause (2), the person shall be deemed for the purposes of article 180 (7)—
- (a) to have served a full term as County Governor if, at the date on which the person assumed office, more than two and a half years remain before the date of the next regularly scheduled election under article 180 (1); or
  - (b) not to have served a term of office as County Governor, in any other case.



- (4) If a vacancy occurs in the office of County Governor and that of Deputy County Governor, or if the Deputy County Governor is unable to act, the Speaker of the County Assembly shall act as County Governor.
- (5) If a vacancy occurs in the circumstances contemplated by clause (4), an election to the office of County Governor shall be held within sixty days after the Speaker assumes the office of County Governor.
- (6) A person who assumes the office of County Governor under this article shall, unless otherwise removed from office under this Constitution, hold office until the newly elected County Governor assumes office following the next election held under article 180(1).”

- 41 Counsel for the applicant proposed two approaches in interpreting the Constitution, in relation to filling the position of a Deputy Governor once the current Deputy Governor takes up the position of Governor. First, he urged the Court to adopt a common practice in other countries, whereby such a vacancy is filled through nomination of a Deputy Governor by the in-coming Governor. This is the practice in Nigeria where article 191(3) of the *Nigerian Constitution* mandates the newly appointed Governor to appoint a Deputy Governor, with the approval of the House of Assembly of the State. This position was also subscribed to by counsel for the Independent Electoral and Boundaries Commission (IEBC).
42. Counsel for the applicant urged the Court, further, to find that, as the Constitution does not provide for separate elections for the position of Deputy Governor, it made good sense that the serving Governor should nominate a candidate for the office of Deputy Governor, subject to approval by the County Assembly.
43. Learned counsel made the alternative proposition that the Deputy Governor’s position be allowed to remain unoccupied. His reasoning was that article 180(5) and (6) of the *Constitution* does not contemplate a separate election for a Deputy Governor, and as the Constitution is silent, it may be interpreted as indicating that the drafters of the Constitution did not intend to have a re-election, upon a vacancy arising. This position was supported by the Attorney-General, who submitted that filling such a vacancy would be unconstitutional, and consequently, affected County should be governed without a Deputy Governor, for the remainder of the period.
44. Our consideration of article 182 shows that the Constitution has contemplated certain scenarios, when a vacancy in the office of the Governor may occur: first, where the office of the Governor falls vacant, and the Deputy Governor assumes that office; secondly, where a vacancy occurs in both the office of County Governor and that of Deputy Governor, and the Speaker of the County Assembly assumes office as Governor for a period of 60 days, within which an election to that office is to be held; thirdly, where a vacancy occurs in the office of the Governor, and the Deputy Governor is unable to hold that office in an acting capacity. In such an eventuality, the Speaker of the County Assembly assumes office and acts as Governor for a period of 60 days, during which time an election to the office of Governor is to be held.
45. It emerges that article 182(2) of the *Constitution* creates a ‘pecking order’ whereby, if a vacancy in the office of the Governor occurs, the first to take over is the Deputy Governor, and in his absence, the Speaker of the County Assembly takes up the position for a limited period of 60 days, pending the conduct of an election. It is indeed the case, that the Constitution is silent on how to fill the position of the Deputy Governor, in the event of a vacancy occurring.



46. We further note that article 180(6) of the Constitution provides as follows:

“The Independent Electoral and Boundaries Commission shall not conduct a separate election for the Deputy Governor but shall declare the candidate nominated by the person who is elected County Governor to have been elected as the Deputy Governor.”

47. It is beyond dispute that there exists a lacuna in law, with regard to the filling of a vacancy in the office of Deputy Governor. The Constitution is silent on what happens to that office, should a vacancy occur in terms of article 182(2).

48. The Constitution, of which it is the Supreme Court’s first duty to give effect, is inadvertently reticent on the manner in which it is to be given effect, on a vital question of governance<sup>3/4</sup>namely, the uninterrupted occupancy of the office of Deputy County Governor. Yet the Constitution is ever to bear intent, purpose and direction. The ultimate task of interpreting the Constitution falls to this Court, which bears the mandate to do so in a manner that “promotes its purposes, values and principles” (article 259(1)(a)); that “advances the rule of law...” (article 259 (1) (b)); that “permits the development of the law” (article 259 (1) (c)); and that “contributes to good governance” (article 259 (1) (d)).

49. This court has rendered several advisory opinions in the past, in which it addressed itself to certain vital questions bearing upon the task of interpreting the Constitution. In Re the Matter of the Interim Independent Electoral Commission, Sup. Ct. Const. Appl. No.2 of 2011; [2012] eKLR, the court, while interpreting the Constitution, thus held [paragraph 86]:

“The Rules of constitutional interpretation do not favour formalistic or positivistic approaches (articles 20 (4) and 259 (1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction... The values and principles articulated in the Preamble, in article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the courts.”

50. In the National Land Commission, Supreme Court Advisory Opinion Reference No. 2 of 2014, the Court reaffirmed its earlier position in, In the Matter of Gender Representation in the National Assembly and the Senate, Supreme Court Advisory Opinion No. 2 of 2012, which had been thus stated [paragraph 83]:

“We would state that the Supreme Court, as a custodian of the integrity of the Constitution as the country’s charter of governance, is inclined to interpret the same holistically, taking into account its declared principles, and to ensure that other organs bearing the primary responsibility for effecting operations that crystallize enforceable rights, are enabled to discharge their obligations, as a basis for sustaining the design and purpose of the Constitution.”



51. In, *In the Matter of Kenya National Commission on Human Rights*, Sup. Ct. Reference No. 1 of 2012, [2014] eKLR, the Supreme Court considered the meaning of the phrase, “a holistic interpretation of the Constitution,” as follows (paragraph 26):
- “But what is meant by a ‘holistic interpretation of the Constitution’? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.”
52. The progressive elements of Kenya’s Constitution of 2010 revolve around sets of safeguards for the people’s social, economic and political rights, that incorporate the mechanisms of devolved government conducted through the stewardship of County Governors and Deputy County Governors. It is a relevant question in that context, whether the Constitution contemplates that the position of Deputy Governor should remain vacant, upon the current Deputy Governor assuming the substantive office of County Governor, pursuant to article 182(2) of the *Constitution*.
53. It is the position, under the Constitution, that an incoming Deputy Governor is nominated by a person vying for the position of County Governor; and upon the candidate for Governor being elected in that position, the IEBC declares the nominee as Deputy Governor, in accordance with the provisions of article 180(5) and (6).
54. The Office of Governor and that of Deputy Governor are therefore so intimately linked, that the latter is dependent upon the election of Governor. The Constitution also expressly dispenses with the detached election for a Deputy Governor who assumes office upon the election of the Governor that nominated him or her. Hence the supposition that, the Constitution does not contemplate the filling of a vacancy in the office of Deputy Governor through a direct election to that office.
55. Further, upon a vacancy occurring in the office of Governor, article 182(2) provides that the Deputy Governor shall assume office as County Governor, for the remainder of the term of the County Governor. The only time when an election can be held for the position of County Governor is where a vacancy occurs in the office of County Governor and that of Deputy County Governor simultaneously, or if the Deputy County Governor is unable to serve in an acting capacity (article 182(4)). In such an eventuality, the Speaker of the County Assembly shall act as County Governor for a period of sixty days, during which time an election to the office of County Governor shall be held.
56. Does the Constitution contemplate a situation in which the office of Deputy County Governor would remain vacant indefinitely, as suggested by learned counsel, Mr. Onyiso? From the position that the Constitution accords priority to the Deputy County Governor as the candidate to assume the office of Governor, in the event of a vacancy in the Governor’s office, would the same Constitution be contemplating a vacuum in such a vital office in the governance structure of County Government?
57. Under the provisions of article 179(1), (4) and (5) of the *Constitution*, as read together with Section 32 of the County Government Act, the Deputy County Governor is the Deputy Chief Executive of the County; is a member of the County Executive Committee; and acts as the County Governor, in the absence of the Governor. So crucial are these roles to the operations of County Government, it is inconceivable that, constitutionally, they could remain fallow until the next cycle of a general election. We are, therefore, of the definite opinion that the office of Deputy County Governor ought not to remain vacant until the next general election as submitted by Mr. Onyiso. A differing interpretation,



in our perception would be inconsistent with the vital objects of the Constitution, which we have to uphold.

58 It is apposite to draw an analogy with the provisions of the Constitution relating to the office of Deputy President, as principal assistant to the President. article 180(5) thus provides:

“Each candidate for election as County Governor shall nominate a person who is qualified for nomination for election as County Governor as a candidate for Deputy Governor.”

Likewise article 148. (1) of the Constitution provides that:

“Each candidate in a presidential election shall nominate a person who is qualified for nomination for election as President, as a candidate for Deputy President.”

59 The Constitution is explicit on the mode of filling the position of Deputy President. article 149 thus provides:

“(1) Within fourteen days after a vacancy in the office of Deputy President arises, the President shall nominate a person to fill the vacancy, and the National Assembly shall vote on the nomination within sixty days after receiving it.”

60. We would adopt the observations of this Court in earlier advisory opinions, regarding the requisite approach to constitutional interpretation, in view of the provisions of article 259 of the Constitution. Article 259 (3) provides that:

“Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking...”

61. The foregoing principle calls for a reading of article 182 of the Constitution alongside article 149, which makes provision for the procedure and timelines for filling a vacancy in the Office of the Deputy President. From the signal embodied in article 149 of the Constitution, and in the absence of any applicable legislative provision, we hold that, where a vacancy occurs in the Office of the Deputy County Governor, the Governor shall within fourteen days, nominate a person to fill such vacancy. The County Assembly shall vote on the nomination within sixty days after receiving it. Where a vacancy occurs in both the offices of County Governor and Deputy County Governor at the same time, the office of the Deputy County Governor shall remain vacant until the election of a new Governor. The new Governor shall nominate a person to fill the vacancy within fourteen days after assuming office. The County Assembly shall vote on the nomination within sixty days after receiving it. For the avoidance of doubt, we hereby state that this holding shall obtain in all circumstances pursuant to which the Office of the Deputy Governor may become vacant as contemplated by the Constitution, i.e death, resignation or impeachment.

62. As regards the administration of the oath of office to a Deputy County Governor who assumes office under article 182(2) of the Constitution, we perceive no difficulty, in view of the provisions of article 74 of the Constitution. That article provides as follows:

“Before assuming a State office, acting in a State office, or performing any functions of a State office, a person shall take and subscribe the oath or affirmation of office, in the manner and form prescribed by the Third Schedule or under an Act of Parliament.”



63. Section 30(1) of the *County Government Act* is relevant, in that context. It provides as follows:

“The Governor shall take and subscribe to the oath or affirmation as set out in the Schedule to this Act before assuming office.”

64. The provisions of article 74 of the *Constitution*, and of section 30 of the *County Government Act*, apply to a Deputy County Governor who assumes the office of Governor under article 182(2) of the *Constitution*.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF MARCH, 2018.**

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**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

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**J. B. OJWANG**

**JUSTICE OF THE SUPREME COURT**

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**S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

.....

**S. N. NDUNGU**

**JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR**

**SUPREME COURT OF KENYA**

