



**In re Speakers of the 47 County Assemblies (Advisory Opinion  
Reference 3 of 2014) [2016] KESC 7 (KLR) (20 April 2016) (Ruling)**

*In the Matter of the Speakers of the 47 County Assemblies [2016] eKLR*

Neutral citation: [2016] KESC 7 (KLR)

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

**ADVISORY OPINION REFERENCE 3 OF 2014**

**KH RAWAL, DCJ & VP, MK IBRAHIM, JB OJWANG, SC WANJALA & N NDUNGU, SCJJ**

**APRIL 20, 2016**

**BETWEEN**

**THE SPEAKERS OF THE 47 COUNTY ASSEMBLIES ..... APPLICANT**

**AND**

**COMMISSION ON IMPLEMENTATION OF THE CONSTITUTION .... 1<sup>ST</sup>  
INTERESTED PARTY**

**ETHICS AND ANTI-CORRUPTION COMMISSION . 2<sup>ND</sup> INTERESTED PARTY**

**SALARIES AND REMUNERATION COMMISSION .. 3<sup>RD</sup> INTERESTED PARTY**

**Legal considerations relating to the exercise of advisory opinion jurisdiction by the Supreme Court**

Reported by Beryl A Ikamari

***Jurisdiction**-jurisdiction of the Supreme Court-advisory opinion jurisdiction-advisory opinion sought to challenge the constitutionality of a statute and the actions of a Constitutional Commission-the effect of allegations that matters which formed the subject of the advisory opinion were also matters which formed the subject of Court proceedings at the High Court-Constitution of Kenya 2010, article 163(6)*

**Brief facts**

On June 21, 2013, the Salaries and Remuneration Commission (SRC) issued a circular limiting the number of sittings of committees of County Assemblies to eight in one week. The Speakers' opinion was that the circulars were an interference with their independence which was contrary to article 189(1) of the Constitution. Furthermore, the Applicants apprehended that the Ethics and Anti-Corruption Commission (the 2<sup>nd</sup> Interested Party) was in the process of imposing regulations on the operations of County Assemblies. Initially, the Applicants unsuccessfully sought legal advice from the Attorney General in relation to the circular. Thereafter, Applicants sought an Advisory Opinion from the Supreme Court pursuant to the provisions of article 163(6) of the Constitution. The issues concerning which they sought the opinion included questions on whether a Constitutional Commission or an Independent Office could, through a Circular, regulate the



internal affairs of a County Assembly, such as the sittings of the Assembly or a County Government organ. The other issues for which an opinion was sought were on the nature, if any, of immunity enjoyed by a member of the County Assembly with respect to proceedings and speech at the County Assembly and on what would constitute valid grounds for the removal of a Speaker of a County Assembly.

The Applicants stated that the procedure for the removal of a County Assembly Speaker under section 11 of the County Assembly Act, No. 17 of 2012, was in conflict with the provisions of article 47(1) & 47(2) of the Constitution. The removal of the Isiolo County Assembly Speaker from office was cited as a case of a groundless decision which was of relevance to the conflict between the statute and the Constitution.

In response, the Respondent filed a Preliminary Objection stating that the Court lacked jurisdiction to render an Advisory Opinion. The Respondent said that the Supreme Court's jurisdiction was not to be exercised because the issues raised called for an interpretation of the law and were matters that could be determined through litigation at the High Court and some issues were already the subject of such litigation or had been decided on.

### **Issues**

- i. Circumstances under which the Supreme Court would exercise its advisory opinion jurisdiction.

### **Relevant provisions of the Law**

#### **Constitution of Kenya 2010, article 163(6);**

(6) The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government.

### **Held**

1. A Preliminary Objection was capable of being raised only with respect to a pure question of law. A Preliminary Objection would not relate to a contest on the facts which it concerns. Questions which related to the jurisdiction of the Court were questions which raised a pure point of law. The instant Preliminary Objection was about the jurisdiction of the Supreme Court and it was on a pure point of law. There was no contest relating to the issuance of the circular by the Salaries and Remuneration Commission and also to the attempts at removing the Isiolo County Assembly Speaker.
2. The jurisdiction of the Supreme Court to render an advisory opinion was provided for in article 163(6) of the Constitution. Under that provision, the Supreme Court had the discretion to give an advisory opinion at the request of the National Government, any State organ, or any County Government with respect to any matter concerning County Government.
3. The Supreme Court issued guidelines on the exercise of its advisory opinion jurisdiction. Those guidelines included the following; a) The matter concerning which an advisory opinion was sought had to be a matter concerning County Government. Whether a matter concerned County Government was a question to be determined on a case by case basis. b) The only parties that could request for an advisory opinion were the National Government, a State organ, or County Government. Other parties could be joined to the proceedings with leave of Court as an Interested Party or *amicus curiae*. c) The Supreme Court would be hesitant to render an advisory opinion over matters which were the subject of Court proceedings at a lower Court. However, despite the existence of such proceedings, the Supreme Court would render advisory opinion, if it was satisfied that it was in public interest to do so. d) Despite the existence of Court proceedings over a matter for which an advisory opinion was sought, the Supreme Court would render an advisory opinion if the Applicant demonstrated that the issue was of great public importance and required urgent resolution through an advisory opinion. Additionally, such an Applicant would have to demonstrate that the issue in question would not be amenable to expeditious resolution through adversarial Court process.
4. The instant Application concerned questions relating to the operation of County Governments and specifically the operations of County Assemblies. Additionally, it was brought by the Speakers of County Assemblies. Therefore, in accordance with the guiding principles relating to the advisory



- opinion jurisdiction of the Supreme Court, the Application revolved around a matter concerning a County Government.
5. The Salaries and Remuneration Commission under article 230 of the Constitution was mandated to set and regularly review the remuneration and benefits of all State Officers. The Applicant's argument was that the mandate of the Salaries and Remuneration Commission did not allow it to regulate the internal affairs of Counties. Rendering an advisory opinion would mean that the Supreme Court would either declare the circular unconstitutional, or affirm the actions by the SRC as valid under article 230 (4) of the Constitution. However, such a determination would not serve the purpose for which the advisory opinion jurisdiction was sought. The issue being canvassed was clearly justiciable and raised no novel constitutional questions that would merit the Court's intervention.
  6. The Applicants also asked the Court to develop jurisprudence by way of guidelines, as to the appropriate procedure for the removal of a County Speaker under the County Government Act but such matters on the removal of a County Assembly Speaker had been canvassed by the High Court. Having been canvassed by the High Court, the question on the appropriate procedure for impeaching a County Assembly Speaker was not a proper subject for an advisory opinion reference.

*Preliminary Objection upheld.*

### **Orders**

- i. *Preliminary Objection upheld*
- ii. *Reference for an advisory opinion dismissed.*

### **Citations**

#### ***East Africa,***

1. *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 others* Application No 50 of 2014 – (Explained)
2. *County Secretary, Isiolo v Speaker, Isiolo County Assembly Mohammed Tubi* Petition 418 of 2014 – (Mentioned)
3. *Gacheche, Jeanne W & 6 others v Judges and Magistrate's Vetting Board & 2 others* Judicial review Nos 295, 11 433, 434, 438 of 2012 (Consolidated) – (Mentioned)
4. *In re Application by the Kenya National Commission on Human Rights* Reference No 2 of 2012 – (Explained)
5. *In re Independent Electoral Commission* Application No 2 of 2011 – (Mentioned)
6. *In re National Land Commission* Advisory Opinion No 2 of 2014 – (Explained)
7. *In re the Interim Independent Electoral Commission (IIEC)* Advisory opinion No 2 of 2011 – (Explained)
8. *In re the National Gender and Equality Commission* Reference 1 of 2013 – (Mentioned)
9. *In the re the Principle of Gender Representation in the National Assembly and the Senate* Application No 2 of 2012 – (Explained)
10. *Independent Elections and Boundaries Commission v Jane Chepenger & 2 others* Civil Application No 36 of 2014 – (Explained)
11. *Judicial Service Commission v Speaker of the National Assembly & 8 others* Petition 518 of 2013 – (Mentioned)
12. *Macharia, Samuel Kamau v Kenya Commercial Bank & 2 others* Application No 2 of 2011 – (Mentioned)
13. *Mukisa Biscuit Manufacturing Ltd v West End Distributors Ltd* (1996) EA 696 – (Mentioned)
14. *Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Limited* (1989) KLR 1 – (Mentioned)
15. *Speaker Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 others* Petition No 368 of 2014 – (Mentioned)
16. *Speaker of Senate & another v Attorney General & 4 others* Advisory Opinion No 2 of 2013 – (Explained)



17. *Wambora, Martin Nyaga v Speaker County Assembly of Embu & 5 others* Petition No 3 of 2014 – (Mentioned)

### **India**

1. *Asif Hameed & others v State of Jammu & Kashmir & others* (1989) AIR 1899, 1989 SCR (3) 19 – (Mentioned)

### **Statutes**

#### **East Africa**

1. Constitution of Kenya, 2010 article 15,47(1)(2); 163(6); 165(3)(d); 176(1); 178(1),(3); 189(1); 230(4) - (Interpreted)
2. County Assembly Act, 2012 (No 17 of 2012) section 11- (Interpreted)
3. Supreme Court Act, 2011 (Act No 7 of 2011) section 3(c) - (Interpreted)

## **RULING**

### **A. Introduction**

1. This Reference was moved by the Speakers of the 47 County Assemblies as established under Article 178(1) of *the Constitution* of Kenya, 2010. The mandate of the Speakers is to preside over the sittings of the various County Assemblies.
2. The applicant, by its Reference dated 6<sup>th</sup> August 2014 (filed on 7<sup>th</sup> August, 2014), seeks an Advisory Opinion, pursuant to Article 163(6) of *the Constitution*. The issues raised are as follows:
  - i. whether a Constitutional Commission or an Independent Office can, by way of a Circular, regulate the internal affairs of a County Assembly, such as sittings of such an Assembly, or a County Government organ established under Article 176(1) of *the Constitution* of Kenya;
  - ii. whether a member of a County Assembly enjoys immunity from civil or criminal proceedings for words spoken before, or matter brought against him/her in the National County Assembly?
  - iii. what constitutes valid grounds for removal of a Speaker of a County Assembly?

### **B. Background**

#### Preliminary

3. The issue arises from a circular issued on 21<sup>st</sup> June, 2013 by the Salaries and Remuneration Commission (SRC), limiting the number of sittings of committees of County Assemblies to eight in a week.
4. This circular led to apprehensions among the applicants that the Ethics and Anti-Corruption Commission (2<sup>nd</sup> interested party) is in the process of imposing regulations as to the operations of the County Assemblies. The Speakers are of the view that the said circular amounts to interference with their independence, contrary to the terms of Article 189(1) of *the Constitution*.
5. The applicants, besides, believe that the procedures for removal of a County Assembly Speaker under Section 11 of the County Assembly *Act, 2012 (No. 17 of 2012)*, is in conflict with the provisions of Article 47(1) and 47(2) of *the Constitution*. As a relevant case, they cite a decision which they consider groundless, of 13<sup>th</sup> June, 2014 by members of the Isiolo County Assembly, to remove their Speaker from office.



6. Arising from the two incidents, the applicants (by their letter dated 3<sup>rd</sup> July, 2014) sought the Attorney-General's legal advice; but they received no response. They now invoke this Court's jurisdiction, as contemplated under Article 163(6) of *the Constitution*.
  - b. Proceedings in the Supreme Court
7. Upon filing the Reference, the applicants served the same upon the Attorney-General; the Commission for Implementation of *the Constitution* (CIC); the Transition Authority; and the Ethics and Anti-Corruption Commission (EACC)<sup>3/4</sup>as interested parties. The Commission for Implementation of *the Constitution*, and the Ethics and Anti-Corruption Commission entered appearance in the said capacity.
8. Subsequently, the Salaries and Remuneration Commission (SRC) filed an application (dated 2<sup>nd</sup> December, 2014) seeking joinder as an interested party. On the 19<sup>th</sup> of August, 2015, the applicants, CIC and EACC appeared before Lady Justice Rawal, DCJ and consented to the admission of SRC as an interested party.
9. Upon being admitted as an interested party, the SRC on the 22<sup>nd</sup> of September, 2015 filed a notice of preliminary objection, on the claim that this Court lacks jurisdiction to render the Advisory Opinion sought. The grounds of the preliminary objection were as follows:
  - i. the application raises justiciable questions as to whether an act considered done under the authority of *the Constitution*, is in breach of the Constitution<sup>3/4</sup>and so it was not properly before this Court;
  - ii. the application contests the constitutionality of decisions made by constitutional bodies; and the determination of the question calls for interpretation of different provisions of *the Constitution*, which is reserved by Article 165(3) (d) to the High Court;
  - iii. the issues raised in the application are the subject of litigation before the High Court, and are therefore not ripe for the advisory jurisdiction of this Court;
  - iv. the application is calling upon the Supreme Court to usurp a role reserved to County Assemblies, by Section 11 of the *County Governments Act*, which itself rests upon Article 178(3) of the Constitution<sup>3/4</sup>contrary to the principle of separation of powers.

### C. Parties' Submissions

- a. The Salaries and Remuneration Commission
10. Mr. Nyamodi, learned counsel for SRC, submitted that this Court lacks jurisdiction to render the Advisory Opinion sought. He urged that the Court should first deal with the issue of jurisdiction, as without it, the entire process and the resulting Orders would be a nullity. Counsel invoked several cases: *The Owners of Motor Vessel "Lilian S" v. Caltex Oil Kenya Limited* (1989) eKLR 1; *In the Matter of the National Gender and Equality Commission* Sup. Ct. Reference 1 of 2013; *Samuel Kamau Macharia v. Kenya Commercial Bank and 2 Others* Sup. Ct. Appl. No 2 of 2011, urging that jurisdiction flows from either *the Constitution* or legislation, or both, and a Court of law can only exercise jurisdiction as duly conferred upon it. It was counsel's submission that the exercise of the advisory-opinion jurisdiction is discretionary in nature, and has to be exercised judiciously, and only where the applicant has made a case of merit. Counsel cited the case of *Re the Matter of Independent Electoral Commission* Sup. Ct. Applic. No. 2 of 2011, where the Court had set out guidelines for the exercise of this jurisdiction. He also relied upon the dissenting opinion of Lady Justice Njoki Ndungu



in the case of Speaker of the Senate and Another v. the Attorney General & Others Sup. Ct. Reference No. 2 of 2013.

11. Counsel urged that the effect of the application was to question the constitutionality of decisions and actions of constitutional bodies as well as that of legislation, and of the circular by SRC, limiting the number of sittings of committees of county assemblies; and to contest the legality and constitutionality of the draft regulations by EACC, and the constitutionality of Section 11 of the *County Governments Act*.
12. Learned counsel submitted that the determination of this matter calls for interpretation of different provisions of *the Constitution*, a task reserved to the High Court. He urged the court to rely on its decision in In the Matter of the Interim Independent Electoral Commission (IIEC) Advisory opinion No. 2 of 2011, where it was held that the request must be one seeking a plain opinion statement, and not necessarily the correct interpretation of a particular provision being cited. Counsel submitted that the intent of the application is to obtain declarations and Orders, the effect of which would be to nullify the circular dated 21<sup>st</sup> June, 2013 issued by SRC; the draft regulations by EACC; and Section 11 of the *County Governments Act*.
13. Counsel submitted that the circular in question does not regulate the number of sittings for County Assemblies, but only limits the number of meetings in respect of which the County Assembly members are entitled to be paid allowances. He submitted that the circular was a quite proper instrument, agreed upon at a joint meeting of SRC and the County Assembly Speakers' Forum, and that in the circumstances, there arose justiciable issues of law and fact which called for a normal judicial process.
14. Learned counsel submitted that the issue of removal of Speaker related specifically to the Isiolo County Assembly, and rests with the High Court, being Secretary of Isiolo County & 2 Others v. Speaker of Isiolo County Nairobi Petition No. 418 of 2014 and Meru Petition 15 of 2014, a contest to the manner in which the Speaker of the Isiolo County Assembly had been impeached by the Assembly; and the High Court was being asked to determine the legality of the procedure used to remove the speaker. He submitted that these cases raise issues similar to those in the Advisory-Opinion matter. He urged that the High Court should be allowed to duly discharge its constitutional mandate; and that this Court should be hesitant to exercise its discretion in favour of giving an advisory opinion.
15. Learned counsel submitted that some of the issues raised in the request for advisory opinion have already been the subject of litigation and determination by the High Court in Speaker Nakuru County and 46 Others v. Commission for Revenue Allocation and Others (2015) eKLR, which concerned the legality of circulars issued by constitutional commissions, and the harmony between such circulars, and the legislative mandate of the County Assemblies.
16. Learned counsel urged the Court to decline to exercise a discretion to render an Advisory Opinion, on the ground that some of the issues forming the substance of the request, are already the subject of litigation, while others had already been determined by the High Court.
17. Counsel submitted that the applicants are asking the Court to perform a role reserved to the County Assembly; for, by Article 15 of *the Constitution*, the legislative arm of the County Governments is empowered to determine the procedure for removal of the Speaker of County Assembly.
18. Counsel urged the Court to give fulfillment to the concept of separation of powers, which requires different arms of Government to refrain from interfering with the functions of each other. He sought reliance on several past decisions; In the Matter of the Interim Independent Electoral Commission Advisory opinion No. 2 of 2011; Judicial Service Commission v. Speaker of the National Assembly and 8 Others (2014) eKLR; the dissenting opinion of Lady Justice Njoki Ndungu in the Speaker of the



Senate and Another v. the Attorney General & Others Sup. Ct. Reference No. 2 of 2013; the Supreme Court of India in Asif Hameed & Others v. State of Jammu & Kashmir & Others (1989) AIR 1899, 1989 SCR (3) 19; and Shaban Mohamud Hassan and 2 Others v. Shaban Mohamud Hassan and 3 Others(2013) eKLR.

19. Counsel urged the Court to allow the preliminary objection, and to dismiss the reference for Advisory Opinion.

b. The Ethics and Anti-Corruption Commission

20. Learned counsel for EACC, Mr. Ruto and Mr. Owiny, supported the preliminary objection, and associated themselves with the arguments raised by the 3<sup>rd</sup> interested party (SRC). Counsel submitted that the Advisory Opinion was brought prematurely, as the issues raised by the applicant are justiciable, and can be exhaustively resolved by way of litigation, and by interpretation in the High Court, by virtue of Article 165(3)(d) of *the Constitution*.

21. Counsel urged that no cause of action had been lodged against the EACC, despite them being enjoined as parties. Counsel submitted that the applicant has relied upon mere allegations, that are not supported by any material fact to assist the Court in making a determination regarding the possible contravention of any law.

22. Counsel urged the Court to dismiss the reference.

c. The Commission for the Implementation of *the Constitution*

23. Mr. Weloba, learned counsel for the Commission for the Implementation of *the Constitution* (CIC), supported the preliminary objection, and associated himself with the submissions for SRC.

24. Counsel submitted that the issues in respect of which the Advisory Opinion was being sought had arisen out of an agreement between the SRC and the County Assemblies, after consultative meetings. He urged that this matter is justiciable and, if the Court is to give an opinion, it would be reviewing an agreement which had already addressed any possible grievances between the parties. According to counsel, this matter would be best canvassed at the High Court, by way of reviewing the decision arrived at before the release of the circular in question.

25. Counsel submitted that the question whether County Assemblies, as independent State organs, should be directed by an independent commission, is similar in nature and content to the issue canvassed at the High Court, in *The Speaker Nakuru County Assembly and 46 Others v. Commission on Revenue Allocation and Others* Petition No. 368 of 2014, and which was dismissed by Lenaola J on 20<sup>th</sup> February 2015.

26. It was counsel's submission that the reference for Advisory Opinion is misplaced, and amounted to an abuse of Court process. Counsel urged the Court to deal with the issue of jurisdiction on this occasion, as it would dispose of the Reference.

d. The Applicant

27. Learned counsel for the applicants, Ms. Ilham holding brief for learned Senior Counsel, Prof. Ojienda, contested the preliminary objection on the basis of submissions and grounds of opposition dated 30<sup>th</sup> of September, 2015, and the list of authorities dated 2<sup>nd</sup> of October, 2015. She submitted that the preliminary objection lacks merit, as it touches on questions of fact, rather than purely questions of law. She urged that the preliminary objection was inconsistent with the established principle in *Mukisa Biscuit Manufacturing Ltd. v. West End Distributors Ltd.*(1996)EA 696—that a preliminary objection is to be raised only on pure matters of law.



28. Counsel submitted that justiciable questions cannot be dispensed with at the preliminary stage of a suit, as they are the defining matters of law which have to be resolved by way of a full hearing on merits. She further submitted that the fact of the question now pending before the High Court, is a factual matter in respect of which both parties have to present evidence, bearing upon their conflicting positions. Counsel submitted that the case, *The County Secretary, Isiolo v. the Speaker, Isiolo County Assembly Mohammed Tubi Petition 418 of 2014*, was already settled by the parties themselves, in Court, on 17<sup>th</sup> September, 2015.
29. It was counsel's submission that the proposed Advisory Opinion touches on matters of County Government, but it is not asking the Court for a constitutional interpretation under Article 165(3) of *the Constitution* as contended in the preliminary objection. Counsel urged that the Reference is seeking an opinion regarding the alignment of Section 11 of the County Government Act to *the Constitution*, in terms of the right to fair administrative action as provided for under Article 47, and the rules of natural justice.
30. Counsel submitted that this matter transcends the justiciable issues of individual rights; rather, it raises pertinent issues that require the Supreme Court to give an opinion, on the conduct of specific aspects of County Government; it does not seek interpretation, but rather, guidelines.
31. Counsel submitted that the issues raised in the Reference are not justiciable, as the regulation of the internal affairs of the County Assemblies by SRC is not an adjudicatory question entailing the enforcement of individual rights. Making reference to past decisions, specifically to *Martin Nyaga Wambora v. Speaker County Assembly of Embu & 5 Others Petition No. 3 of 2014 [2014] eKLR.*, and *Jeanne W. Gacheche & 6 Others v. the Judges and Magistrate's Vetting Board & 2 Others Judicial review No. 295, 11 433, 434, 438 of 2012 (Consolidated)*, counsel urged the court to develop relevant applicable jurisprudence on the subject, as mandated by Section 3(c) of the *Supreme Court Act* No. 7 of 2011.
32. In response to the contention that the rendering of an Advisory Opinion would involve a usurpation of Assembly functions, counsel submitted that already, uncertainty in the law under Section 11 of the County Government Act, has led to improper exercises of power. Counsel urged this Court to render an Advisory Opinion setting out the grounds to be considered as a basis for the removal of a Speaker under Section 11 of the *County Governments Act*. She submitted that the County Government Act, while it provides for the removal of the Speaker, does not lay down the applicable procedure, in a manner that is aligned to *the Constitution*. Counsel urged the Court to give an Advisory Opinion on the proper relationship between a Speaker of the County Assembly and the County Assembly itself.
33. Counsel urged this Court to dismiss the preliminary objection with costs.

#### **D. Issue For Determination**

##### SUBDIVISION - i. The Basis of Preliminary Objections

34. From the submissions of the parties, the main issue for determination is, whether this Court should exercise its jurisdiction to render the Advisory Opinion sought.
35. This Court, in the case of *Independent Elections and Boundaries Commission v. Jane Chepenger and 2 Others Sup Ct. Civil Application No. 36 of 2014*, thus pronounced itself, as regards preliminary objection (paragraph 16, 17):

It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion:



that the facts are incompatible with that point of law (see Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others, Civil Application No. 14 of 2014, [2014] eKLR).

“On that basis, two questions emerge for this Court’s consideration: what pure point of law has the 1<sup>st</sup> respondent raised in her preliminary objection? Are the facts in issue, settled?”

36. On the same issue, this Court thus stated, in *Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd. & 3 Others*, Sup. Application No. 50 of 2014, [2015] eKLR [paragraph 15]:

Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

37. The preliminary objection dated 21<sup>st</sup> September 2015 is worded as follows:

- i. The application raises justiciable questions relating to whether an act done under the authority of *the Constitution* is in breach of *the Constitution* and is therefore not proper before this Court.
- “ii. The application challenges the constitutionality of decisions made by constitutional bodies. The determination of this challenge calls for the interpretation of different provisions of *the Constitution* which is reserved by Article 165(3)(d) of *the Constitution* to the High Court.
- “iii. The issues raised in the application are the subject of litigation before the High Court and therefore not proper for this Court to exercise advisory opinion jurisdiction.
- “iv. The application is requesting the Court to usurp a role reserved for the County Assemblies by Section 11 of the County Government Act which derives from Article 178(3) of *the Constitution* contrary to the principle of separation of powers.”

38. Counsel for the 3<sup>rd</sup> interested party submitted that the Advisory Opinion would raise justiciable questions relating to, firstly, whether an act done under the authority of *the Constitution* is in breach of *the Constitution*; and so, the application for Advisory Opinion contests the constitutionality of decisions made by constitutional bodies—issues which are the subject of litigation before the High Court, and therefore not properly before this court for Advisory Opinion.

39. Counsel urged, secondly, that the application is asking this Court to usurp a role reserved to the County Assemblies, by dint of Section 11 of the County Government Act, which derives from Article 178(3) of *the Constitution*. This argument was adopted by the 1<sup>st</sup> and 2<sup>nd</sup> interested parties, who urged the Court to dismiss the Reference.

40. This Court has held consistently that a motion that disputes the jurisdiction of a Court of law is to be regarded as raising a “pure point of law”. We believe that the instant preliminary objection does fall within such a category.

41. The second issue for determination is whether the facts in issue have been settled. From the records before this Court, the Advisory Opinion Reference emanates from a circular issued on the 21<sup>st</sup> of June, 2013, by the Salaries and Remuneration Commission (SRC), capping the sittings of committees of the County Assemblies at a maximum of eight sittings in a week.

42. It is also not in dispute that the reference for an Advisory Opinion flowed from the acts of the members of Isiolo County Assembly, who were on the verge of removing their Speaker from his position on the 13<sup>th</sup> June, 2014. We thus find that there is a consensus on the facts in issue; and so, the preliminary objection meets the set principles.



- (ii) Does this Court have Jurisdiction to give an Advisory Opinion?
43. The applicant invokes this Court’s jurisdiction pursuant to Article 163(6) of *the Constitution*, which stipulates that:
- The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government.”
44. This Court, in the case of *Re the Matter of the Interim Independent Electoral Commission Sup. Ct. Application No. 2 of 2011; [2011] eKLR*, had set out the guiding principles for the exercise of its Advisory Opinion Jurisdiction, its guidelines reading as follows [paragraph 83]:
- i. For a reference to qualify for the Supreme Court’s Advisory-Opinion discretion, it must fall within the four corners of Article 163(6): it must be “a matter concerning county government.” The question as to whether a matter is one “concerning county government”, will be determined by the Court on a case-by-case basis.
  - ii. The only parties that can make a request for an Advisory Opinion are the national government, a State organ, or county government. Any other person or institution may only be enjoined in the proceedings with leave of the Court, either as an intervener (interested party) or as *amicus curiae*.
  - iii. The Court will be hesitant to exercise its discretion to render an Advisory Opinion where the matter in respect of which the reference has been made is a subject of proceedings in a lower Court. However, where the Court proceedings in question have been instituted after a request has been made to this Court for an Advisory Opinion, the Court may if satisfied that it is in the public interest to do so, proceed and render an Advisory Opinion.
  - iv. Where a reference has been made to the Court the subject matter of which is also pending in a lower Court, the Court may nonetheless render an Advisory Opinion if the applicant can demonstrate that the issue is of great public importance and requiring urgent resolution through an Advisory Opinion. In addition, the applicant may be required to demonstrate that the matter in question would not be amenable to expeditious resolution through adversarial Court process.”
45. Flowing from the foregoing principles, it is not in doubt that the issues raised in the Reference before the Court revolve around the operation of County Government—more specifically, the workings of County Assemblies. The Reference is brought by the Speakers of the County Assemblies—an office established under Article 178 of *the Constitution*. This Reference, therefore, revolves around “a matter concerning County Government”, within the guiding principles of this Court.
46. This leaves us with only two questions to resolve. Firstly, whether the reference contests the constitutionality of actions of constitutional bodies, and if it does, whether this Court is the proper forum in which to canvass the matter. Can the Supreme Court pronounce upon such an issue by rendering an Advisory Opinion? Secondly, does the question in this Reference relate to matters that are already the subject of proceedings in the High Court?
- iii. Does the Reference contest the constitutionality of actions of Constitutional Bodies?
47. As already noted, the background of the Advisory-Opinion Reference revolves around two occurrences: firstly, the issuance of a circular by the SRC limiting the number of sittings by a County Assembly. This circular then raised the question as to whether a Constitutional Commission, or an



Independent Office, can by way of a circular, regulate the internal affairs of a County Assembly, such as sittings of a County Assembly, or the working of a County Government Organ established under Article 176 (1) of *the Constitution*. This is one of the questions in the Reference, seeking this Court's Advisory Opinion.

48. The second issue is the impeachment of the Speaker of the County Assembly of Isiolo. It was submitted that a suit contesting the legality of the procedure followed to remove the Speaker by the County Assembly had been filed in the High Court (*Secretary of Isiolo County and 2 Others v. Speaker of Isiolo County*, High Court Petition No. 418 of 2015). However, counsel for the applicant submitted that the said matter was withdrawn by consent of the parties, and that the issues raised in that petition remain unresolved. Counsel also argued that the Reference for Advisory Opinion does not seek an interpretation of *the Constitution*, but rather, guidelines on mode of removal from office, of a Speaker.
49. Counsel for all the interested parties submitted that the issue before court is a justiciable one, to be originated at the High Court, which is mandated to hear questions relating to the interpretation and application of *the Constitution*, under Article 165(3) (d).
50. Counsel contended that the issue as to whether a constitutional or independent body can regulate the internal affairs of County Assemblies, on matters such as the number of sittings, requires the determination of specific facts, as adduced by the respective parties. Such a dispute, counsel submitted, is not amenable to the Advisory Opinion jurisdiction of the Supreme Court; and if the Court were to exercise its Advisory Opinion jurisdiction in the matter at hand, this would be tantamount to usurping the powers reserved to County Government, under Section 11 of the County Government Act, which thus provides:

(1 A speaker of a county assembly may be removed from office by the county assembly through a resolution supported by not less than seventy five percent of all the members of the county assembly. "(2) A notice of the intention to move a motion for a resolution to remove the speaker shall be given in writing to the clerk of the county assembly, signed by at least one third of all the members of the county assembly stating the grounds for removal. "(3) A motion for a resolution to remove the speaker shall be presided over by a member of the county assembly. "(4) Before the debate and voting on a motion under subsection (3), the speaker shall be accorded an opportunity to respond to the allegations on the floor of the county assembly."

51. Can the Supreme Court adjudicate such an issue by rendering an Advisory Opinion? The answer to this question emerges from the established precedents of this Court, which depict the mode of exercise of the Advisory-Opinion jurisdiction.
52. In *Re The Matter of Interim Independent Electoral Commission (Sup. Ct. No. 2 of 2011) eKLR*, this Court made the following statements of principle regarding the nature of its Advisory-Opinion jurisdiction (paragraphs 44, 45):

It follows that the Supreme Court may, indeed, while rendering an Advisory Opinion under Article 163(6) of *the Constitution*, undertake any necessary interpretation of *the Constitution*.

"(45) In this instance similar questions, entailing constitutional interpretation, have been brought simultaneously before the High Court and the Supreme Court; and, as already noted, such a move by parties is apt to precipitate contretemps in resolving the question of jurisdiction. In principle, the Supreme Court commits itself to order and efficacy in the administration of justice, and to that end it may require that the process of litigation



commenced in the High Court, and entailing constitutional interpretation, be exhausted and if need be, followed by appellate procedures. In such circumstances, this Court will be cautious in considering a request for an opinion, to ensure the two jurisdictions do not come into conflict; and each case will be carefully considered on its merits.”

53. Further, In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Sup. Ct. Appl. No. 2 of 2012 is another instance of this Court’s statement of principle [paragraph 19]:

The Court recognizes, however, that its Advisory Opinion is an important avenue for settling matters of great public importance which may not be suitable for conventional mechanisms of justiciability. Such novel situations have clear evidence under the new Constitution, which has come with far-reaching innovations, such as those reflected in the institutions of county government. The realization of such a devolved governance scheme raises a variety of structural, management and operational challenges unbeknown to traditional dispute settlement. This is the typical situation in which the Supreme Court’s Advisory-Opinion jurisdiction will be most propitious; and where such is the case, an obligation rests on the Court to render an Opinion in accordance with *the Constitution*.”

54. The said principles are re-affirmed by this Court in, In the Matter of National Land Commission, Advisory Opinion No. 2 of 2014, and may now be recognized as the Court’s template on the merits of any request for an Advisory Opinion.

55. The Advisory-Opinion Reference in this instance centres on Article 230 of *the Constitution*, which establishes the Salaries and Remuneration Commission (SRC). Under Article 230(4), the powers and functions of the SRC are stipulated as being to<sup>3/4</sup>

- a. “set and regularly review the remuneration and benefits of all State Officers; and
- b. “advise the national and county governments on the remuneration and benefits of all other public officers.”

56. Pursuant to these constitutional provisions, the SRC issued a circular in which it limited the number of sittings of County Assemblies, over specified time-spans. In taking such a measure, the SRC was acting on the perception that it was exercising its powers and functions under *the Constitution*. The applicants, on the other hand, regard the action by the SRC as of doubtful constitutional validity. It is the applicants’ perception that the powers and functions of the SRC, as set out in Article 230 (4) of *the Constitution*, are limited to setting and regularly reviewing the remuneration and benefits of all State Officers, as well as advising the national and county governments, on the remuneration and benefits, for all public officers; and they consider that *the Constitution* does not empower the SRC to regulate the internal affairs of Counties.

57. It is this circular that is the bone of contention between the applicants and SRC. If this Court were to resolve this difference through an Advisory Opinion as sought by the applicants, it would either declare the circular unconstitutional, or affirm the actions by the SRC as valid under Article 230 (4) of *the Constitution*. Yet, such is not the purpose for which the framers of *the Constitution* devised the Advisory Opinion jurisdiction. The precedents established by this Court leave no doubt that the Advisory-Opinion jurisdiction is both limited and discretionary. It is a jurisdiction to be invoked only sparingly, and in truly compelling circumstances.



58. This is clear from the Supreme Court decision, Matter of an Application by the Kenya National Commission on Human Rights, Ref. No. 2 of 2012, in which a Reference for an Advisory Opinion was declined:

Is the applicant really seeking an Advisory Opinion? In our view, the applicant is not seeking an Advisory Opinion within the meaning of Article 163 (6) of *the Constitution*.... On the face of it, it is clear to us that, what the applicant seeks is not an Advisory Opinion, but a declaration that Rule 41 (1) of the Supreme Court Rules of 2012 is unconstitutional. The main objective of the applicant is to elicit a declaration from this Court regarding the constitutionality or otherwise of Rule 41 (1)”

59. It is our opinion that the issue being canvassed as an Advisory-Opinion cause, is clearly justiciable, and raises no novel constitutional question such as would merit this Court’s intervention, at this stage. We feel certain that the issue being raised by the applicants as one for an Advisory Opinion, is eminently suited for determination as a contested question, by the High Court and, thereafter if necessary, through the regular appellate processes.

60. We recall a caution which we had sounded in Speaker of Senate and Another v. The Attorney General and 4 Others, Advisory Opinion No. 2 of 2013 eKLR, as follows (paragraph 18):

The Supreme Court must guard against improper transformation of normal dispute issues for ordinary litigation into Advisory Opinion causes, as the Court must be disinclined to take a position in discord with the core principles of *the Constitution*.”

61. This leaves us with the second limb of the Reference, which calls upon this Court to develop jurisprudence by way of guidelines, as to the appropriate procedure for the removal of a County Speaker under the County Government Act. As already noted, this matter was first canvassed at the High Court. On one side, it was submitted that the dispute in question had been settled by consent; but on the other side, it was contended that the same had been dismissed by the High Court. Be that as it may, we would take the position that the question as to the appropriate procedure for impeaching a County Speaker, having been first canvassed at the High Court, ill-suits elevation to this Court by way of Advisory- Opinion Reference. Whichever way this issue may have been disposed of, the logical step for reviving it would be by way of an appeal to the Court of Appeal.

## **E. Orders**

62. The foregoing summary of relevant facts, documentation, learned submissions, and analytical perspectives, lead us to the conclusion that the following Orders are apposite:

- a. The Preliminary Objection is hereby upheld.
- b. The Reference for an Advisory Opinion is hereby dismissed.
- c. The parties shall bear their own respective costs.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF APRIL, 2016.**

.....  
**K.H. RAWAL M. K. IBRAHIM**

**DEPUTY CHIEF JUSTICE & JUSTICE OF THE SUPREME COURT**

**VICE-PRESIDENT**



**OF THE SUPREME COURT**

.....  
**J. B. OJWANG S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT**

.....  
**S. N. NDUNGU**

**JUSTICE OF THE SUPREME COURT**

