



**Okoti & 3 others v Attorney General & 2 others; County Assemblies' Forum (CAF) & 2 others
(Interested Parties) (Petition E419 of 2023) [2025] KEHC 9654 (KLR) (27 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9654 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

PETITION E419 OF 2023

EC MWITA, J

JUNE 27, 2025

BETWEEN

**OKIYA OMTATAH OKOITI 1ST PETITIONER
ELIUD KARANJA MATINDI 2ND PETITIONER
BENSON ODIWUOR OTIENO 3RD PETITIONER
BLAIR ANGIMA OIGORO 4TH PETITIONER**

AND

**THE ATTORNEY GENERAL 1ST RESPONDENT
THE NATIONAL ASSEMBLY 2ND RESPONDENT
THE SENATE 3RD RESPONDENT**

AND

**THE COUNTY ASSEMBLIES' FORUM (CAF) INTERESTED PARTY
THE COUNCIL OF COUNTY GOVERNORS (COG) INTERESTED PARTY
THE KENYA LAW REFORM COMMISSION INTERESTED PARTY**

JUDGMENT

Petitioner's Case

1. This petition challenges the constitutionality of sections 11(1) (c), (8), 11A (1) (b) and 33 (2-9A) of the County Government *Act, No. 17 of 2012* (the impugned provisions) which provide for the impeachment of Governors, Deputy Governors, county Assembly Speakers and Deputy Speakers.
2. The challenge to the impugned provisions is premised on the grounds that they contravene the principles of natural justice and do not provide for a fair trial before an independent tribunal in the



- removal of these county officers from public office thus, contrive articles 25(c), 50(1) & 2(d) and 236 of *the Constitution*.
3. The petitioners contended that whereas the impeachment of governors, their deputies and speakers and their deputies under the impugned provisions is modelled on the impeachment of the President, Deputy President and Cabinet Secretaries where *the Constitution* itself denies them a fair trial before an independent tribunal under articles 145, 150 and 152 (6-10) of *the Constitution*, once impeachment was imported into an ordinary legislation, it lost the immunity under article 2(3) of *the Constitution*.
 4. It was the petitioners' case, that *the Constitution* did not contemplate the removal of governors and speakers and their deputies by impeachment under articles 178(3) and 181(2) of *the Constitution* and, therefore, any law enacted by Parliament to actualize impeachment, must be in accord with articles 25(c), 50(1) and (2) and 236 of *the Constitution*.
 5. The petitioners were of the view, that where a county assembly impeaches a governor, a speaker, or their deputies, the law must allow for the formation of a tribunal appointed by the Chief Justice to conduct the trial, with the outcome subject to an appeal to the Supreme Court for final determination under articles 163 (3) (b) (ii) and 163 (7) of *the Constitution*. They were also of the view, that the current situation where accused officials can only appeal to the High Court after the event does not cure violations of articles 25(c), 50(1) & (2) (d) and 236 of *the Constitution*.
 6. The petitioners took issue with section 33 of the County Government Act for involving the Senate in the impeaching of governors and their deputies instead of the Members of County Assemblies. They argued that the 47 voting delegations in the Senate are composed of Senators elected from across the country, who are not part of the electoral constituency for a governor or deputy governor being impeached. Furthermore, the Senate being a political body, cannot meet the threshold for an impartial tribunal and article 96 of *the Constitution* does not envisage the Senate as having a role to play in the impeachment process.
 7. The petitioners asserted that the impeachment or recall of elected leaders constitutes a political process that hinges on the act of voting in accordance with article 1(3) (a) of *the Constitution*, hence it is logical that the individuals who have elected a representative participate in the impeachment motions.
 8. The petitioners maintained that the threshold for removing a county governor from office on grounds specified in article 181(1)(a-c) of *the Constitution* and removing speakers of county assemblies and their deputies under article 178(3) as read with section 11 and 11A of the *County Governments Act* must be objectively established by an impartial and independent body and conform with *the Constitution*, since it overturns the will of the people and extinguishes the affected person's political rights guaranteed article 38(3) (c) of *the Constitution*.
 9. The petitioners argued that where sovereign power is exercised under auspices of article 1(2) of *the Constitution*, any exercise of that mandate is only valid when undertaken in a process enjoying the same safeguards as apply to judicial processes. According to the petitioners, article 38 (3) (c) of *the Constitution* entrenches the right to hold office by a person who has been elected. This right is ring fenced by other rights under articles 25 (c), 27, 47 and 50(1) of *the Constitution* and can only be limited within the dictates of article 24 of *the Constitution*.
 10. The petitioners asserted that apart from article 131 (1) (b) of *the Constitution*, no other provision exclusively provides for legislators and not members of the public to both accuse public officials and adjudicate the process of investigating and substantiating the grounds for their removal from office. The removal of any other public officers must therefore involve a formal trial and a finding of culpability to the required standard, before an impartial and independent tribunal.



11. The petitioners stated that pursuant to article 236 (b) of *the Constitution*, the irreducible minimum of due process of law is to ensure that one is subjected to a fair trial before an impartial and independent tribunal. Since the impugned provisions are outside the bill of Rights, Parliament has no mechanism of limiting it. In that respect, the petitioners contended that by virtue of articles 1, 94(1), 3(1), 10, 20, 21, 24, 2(1-3), 93(2) and 94(4) and 2(4) of *the Constitution*, Parliament cannot extinguish rights of elected county governors, speakers and their deputies under article 38(3) (c), 25(c), 27, 50(1) & (2) and 236 by invoking article 24. Only *the Constitution* can abrogate those rights where it clearly extinguishes them.
12. It was the petitioners' position, that the impugned provisions limit the sovereign power of the people by not providing a removal process that meets the purposes, values and principles of *the Constitution*. The impugned provisions are further discriminatory against people who hold the office of the county governor; speaker or their deputies because they do not hand over the impeachment motion upheld by the assembly to an independent and impartial tribunal in the judiciary to hear and determine with finality the impeachment case against them.
13. The petitioners asserted that section 33(1-9A) of the *County Governments Act* is discriminatory when the threshold vote for removing a county governor in the Senate is compared to that for impeaching the President. Further, despite the fact that governors, members of parliament and members of the county assembly are all elected through the same process and despite the similarity in the grounds for their removal from office, the process for removal is different.
14. The petitioners contended that contrary to the provisions of sections 45 and 48 of the *Elections Act* (No. 24 of 2011), a governor/deputy governor does not enjoy the safeguard of a judicial process and can face impeachment by the county assembly as frequently as the assembly desires.
15. The petitioners argued that section 33(1-8) of the *County Governments Act* is void for vagueness as it does not clearly state what is meant by (a) gross violation of *the Constitution* or any other law; (b) where there are serious reasons for believing that the county governor has committed a crime under national or international law; (c) abuse of office or gross misconduct; or (d) physical or mental incapacity to perform the functions or office of county governor. Sections 11(1) (c), (8) and 11A (1) (b) of the *County Governments Act* are also void for the same reasons.
16. The petitioners posited that the impugned provisions lack adequate check and balances and permit members of county assemblies who form alliances and collaborate with likeminded senators to impeach and oust governors from office for personal/ political motivations. The provisions are not aligned with *the Constitution* thus, the court should quash.
17. According to the petitioners, a constitutional impeachment process envisaged under articles 178(3) and 181(2) should entail an impeachment motion for the removal of a county governor being tabled in a county assembly supported by at least one third of members of the assembly. If approved by at least two thirds of all members of the assembly, the motion should be transmitted to the Chief Justice to appoint an independent and impartial tribunal to investigate the matter expeditiously, report on the facts and make a binding recommendation to the President, who shall act on the recommendation.
18. The composition of the tribunal should be similar to that under articles 158, 168 and 251 of *the Constitution*. Upon appointment of the tribunal, the President should suspend the governor concerned on half pay until the tribunal makes its verdict.
19. The other option, the petitioners opined, is a law providing for the establishment of a tribunal appointed by the Chief Justice to oversee the trial of the governor, speaker, or deputies impeached by county assemblies. The verdict of this trial should be subject to appeal to the supreme Court for a final decision in line with articles 163(3) (b) (ii) and 163(7) of *the Constitution*.



20. Parliament could also enact legislation giving the Supreme Court the authority envisioned under article 163(3) (b) (ii) and (7) of *the Constitution* to hear and determine appeals arising from the tribunals established under such legislation.
21. The petitioner contended that county governors and speakers are public officers and therefore enjoy the immutable protection under article 236(b) of *the Constitution*. Their impeachment process should mirror that outlined in articles 158, 168 and 251 of *the Constitution*. Based on the above arguments, the petitioners sought the following relief:
- a. A declaration be and is hereby issued that it is unconstitutional for a county assembly to impeach (accuse) an official, put him/her on trial, convict the individual, and impose the penalty of disqualification.
 - b. A declaration be and is hereby issued that officials impeached by Kenya's unicameral county assemblies must be put on trial before an independent and impartial tribunal or body.
 - c. A declaration be and is hereby issued that sections 11(1)(c), (8), & 11A(1) (b), and 33(2-9A) of the *County Governments Act*, No. 17 of 2012 are unconstitutional and, therefore, invalid, null and void.
 - d. A declaration be and is hereby issued that by enacting sections 11(1)(c), (8), & 11A(1)(b), and 33(2-9A) of the *County Governments Act*, No. 17 of 2012 the National Assembly and the Senate violated *the Constitution* of Kenya, 2010.
 - e. A declaration be and is hereby issued that the role of the Senate under Article 96 of *the Constitution* does not include being the trial chamber for county officials impeached by county assemblies.
 - f. A declaration be and is hereby issued that the use of the Senate as the trial chamber for impeachments that are done by county assemblies is unconstitutional and, therefore, invalid, null and void.
 - g. A declaration be and is hereby issued that under *the Constitution* of Kenya, 2010, the Senate can only be used as a trial chamber for an impeached President or Deputy President.
 - h. A declaration be and is hereby issued that legislation for the removal of a county governor or speaker, or their deputies, must provide for adjudication before an impartial and independent tribunal of body under the judiciary.
 - i. An order be and is hereby issued quashing sections 11(1)(C), (8), & 11A(1) (b), and 33(2-9A) of the *County Governments Act*, No. 17 of 2012.
 - j. An order be and is hereby issued that each party bears their costs of this petition.
 - k. The Honourable Court be pleased to grant any other relief the court may deem just to grant.

1st respondents' case

22. The 1st respondent, (the Attorney General), opposed the petition through grounds of opposition. The Attorney General contends that the petition does not disclose how the impugned provisions are



inconsistent the Constitution; the petition seeks to usurp the mandate of legislature thus, and offends the doctrine of separation of powers.

23. According to the Attorney General, members of the county assembly represent the will of the people and being the creatures of the law, enjoy the presumption that they are committed to the rule of law. The petitioners' apprehension that the impugned sections are allegedly being abused or are likely to be abused ought to be addressed through the legal mechanisms on a case by case basis.

2nd respondent's case

24. The 2nd respondent (the National Assembly) opposed the petition through a replying affidavit sworn by Samuel Njoroge, the Clerk of the National Assembly on behalf of the National Assembly. The National Assembly contended through Mr. Njoroge, that the County Governments Act was enacted in line articles 1(3) (a), 94, 96, 178(3) and 181(2) of the Constitution. Members of the public were given an opportunity to make views with respect to the Act, including the impugned provisions, before the enactment of the County Governments (Amendment) Act, 2020.
25. The National Assembly took the view, that the 1st petitioner being a Senator, has an opportunity under article 109(5) of the Constitution to introduce legislation in Parliament and amend, repeal, or replace provisions of the County Governments Act, he seeks to have declared unconstitutional by the Court.
26. The National Assembly the allegation that the impugned provisions offend articles 25(c) and 50(1) of the Constitution because according to those provisions, an affected governor, speaker or the deputy is given an opportunity to respond to the charges contained in the impeachment motion before the county assembly, and the Senate and can challenge the impeachment proceedings in court.
27. The National Assembly asserted that according to the decision in James Wahome Ndegwa v Zachary Mwangi Njeru & 5 others [2021] eKLR, speakers and the deputy speakers of county governments when voted out by 75% of members of the assembly, it amounts to a vote of no confidence by majority of the members of the county assembly who represent 75% of the people in that particular county. They do not need a further tribunal to confirm that the county has lost confidence in the officers holding those offices.
28. It was the National Assembly's position that contrary to the petitioners' allegations the grounds for removal of county governors and speakers are clear and the definition of terms gross misconduct has been defined by Professor Yash Pal Ghai in his book. The court should be guided by the object and purposes of the Act in determining the constitutionality of the impugned provisions.
29. The National Assembly maintained that the petition is misleading the court into not only usurping but also dictating the powers of the legislature. Under articles 178(3) and 181 (2) of the Constitution Parliament is mandate to enact legislation providing for the procedure for the removal of a county governor and speaker of the county assembly.
30. The National Assembly also stated that members of the county assembly represent the will of the people and being the creatures of the law, enjoy the presumption that they are committed to the rule of law. As such, the petitioners' apprehension that the impugned provisions are allegedly being abused or are likely to be abused ought to be addressed through the legal mechanisms on a case by case basis.
31. In the National Assembly's view, the process of removing from office county governors, speakers or their deputies is not discriminatory and ought to be similar to that of the President and Deputy President as the respective office holders are either directly elected into office by the people or elected by representatives of the people whereas judges, ODPP and members of the Constitutional Commission are appointed by the President subject to approval by the National Assembly.



32. The National Assembly averred that the petition is res judicata to the extent that the constitutionality of section 33 of the *County Governments Act* has been challenged before and a decision rendered by the Court. Further that issues raised on the unconstitutionality of the sections on impeachment of county officials were raised in *Andrew Ombwayo v Clerk of the National Assembly* [2022] eKLR; *Martin Nyaga Wambora v County Assembly of Embu & 37 others* [2015] eKLR and *Martin Nyaga Wambora v Speaker of Senate & 6 others* [2014] eKLR.
33. The National Assembly cited article 106 of *the Constitution* for the position that the law as enacted is the same for both the Speakers of Parliament and those of the County Assemblies. It stated that by virtue of article 94(1) and (5) of *the Constitution*, only Parliament can amend or repeal existing legislations.

3rd respondent's case

34. The Senate (the 3rd respondent) opposed the petition through a replying affidavit sworn by Jeremiah Nyegenye, CBS, the Clerk of the Senate. The Senate also asserted that the petition is res judicata and urged the court to be guided by the decision in the *Martin Wambora Case* (supra).
35. The Senate reiterated that the *County Governments Act* was enacted in line with the provisions of articles 1(3) (a), 94, 96, 178(3), 181(2), 200(1) and (2) (c) of *the Constitution*; there was public participation during the enactment process; there is no violation of article 25 (c) and 50 (1) of *the Constitution* and an affected officer has an opportunity to respond to charges in the motion before the county assembly, senate and can appeal to the court.
36. The Senate urged the court to be guided by the holding in the *Mwangaza v County Assembly of Meru & another; Council of Governors (Interested Party)* [2023] KECA 1599 (KLR). According to the Senate, the process of removal of county officers is anchored in *the Constitution* is not discriminatory as it is similar to that of the President and Deputy President being elected officer. This is unlike the position regarding the DPP; judges and members of independent commissions.
37. The Senate posited that in enacting the *County Governments Act*, Parliament prescribed the role of removal of county officers to the county assembly and the Senate in order to give effect to Chapter Eleven of *the Constitution* and to ensure that the Senate performs its constitutional mandate as set out in article 96 of *the Constitution*. The test for determining whether the impugned sections are discriminatory has not been met.
38. The Senate relied on the decisions in *Institute of Social Accountability & Another v National Assembly & 4 others* [2015] eKLR and *Council of Governors & 3 others v The Senate & 53 others* [2015] eKLR in determining the constitutionality of the impugned provisions. According to the Senate, the object and purpose of the impugned provisions is to give effect to articles 178 and 181 of *the Constitution*; enhance accountability of elected state officers by dint of articles 178 and 180 of *the Constitution* and operationalize the procedure for removal of those state officers. Parliament exercised its mandate under articles 178(3), 181(2) and 200(2)(c) of *the Constitution* thus, the impugned sections are not unconstitutional.
39. The Senate urged the court to be guided by article 259 of *the Constitution* and the decisions in *Center for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR and *In the Matter of Kenya National Commission on Human Rights* [2014] eKLR on the interpretation of *the Constitution*.



40. The Senate contended it plays a role in protecting interests of governments and Parliament was within its constitutional mandate to confer on it the role of hearing and determining charges preferred against a county governor or deputy after an impeachment motion has been passed by the county assembly.
41. By virtue of articles 179(1) and 185(3) of *the Constitution*, the county assembly being the organ that exercises oversight over the county executive committee which the county governor and deputy governor are members of, Parliament was within its constitutional mandate to confer the role of impeachment of these officers on the county assemblies.
42. The Senate asserted that the impeachment process against county officers gives effect to the provisions of the article 10 of *the Constitution* on public participation. In that respect, the orders sought in the petition would violate the doctrine of separation of powers.

1st petitioner's rejoinder

43. The 1st petitioner filed supplementary affidavit sworn on 19th January 2024. He substantively reiterates the contents of the petition and faulted Parliament for acting against the intentions of the framers of *the Constitution* and beyond its powers when prescribing removal of county officials by impeachment to what was captured in the Final Report of the Committee of Experts on Constitutional Review, dated 11th October 2010 page 126.
44. The 1st petitioner stated that articles 1(1), 1(3), 2(2), 2(3),2(4), 93(2) and 94 (4) of *the Constitution* bar Parliament from enacting legislation outside the confines of *the Constitution*, however popular it may be with masses. Reliance was placed on the decision in *Katiba Institute & another v Attorney General & another* [2017] eKLR.
45. According to the petitioners. The 1st petitioner's political status does not preclude him from bringing this petition. Irrespective of how a public officer joined public service, once he becomes a public officer, *the Constitution* provides how all public officers should be treated, including removal from office, be it by a judicial/quasi-judicial process; recall; vote of no confidence or impeachment under articles 103 (1) (c) & (g), 158, 168, 178(3), 181(3), 236(b), 245 (7 & 8), 251, 104, 145, 150 and 152 (6-10).
46. The petitioners denied that the petition is res judicata because the grounds for challenging the constitutionality of the impugned sections are different and parties too are also different. A plea of res judicata should be supported by evidence.
47. The 1st petitioners maintained that being part of *the Constitution*, a motion of no confidence under article 106 (2) (c) is protected by article 2(3) of *the Constitution*. However, once the same is exported into a statute, it does not enjoy the protection and must stand up to the edict in article 2(4) as in this case.
48. The 1st petitioner deposes that unlike a motion of no confidence under article 106 (2) (c); section 11(1) (c) of the County Government Act as read together with section 11(2), an article of impeachment on any of the grounds in section 2(a) to 2(e) requires a finding by a county assembly that the impeached official has violated the law. And whereas the vote of no confidence simply removes a person from office and can still serve in the public service or assume the same office under different circumstances, an impeachment is an absolute bar to holding any public office again.
49. The petitioners asserted that the decision in the decision in *Mwangaza v County Assembly of Meru & another; Council of Governors (Interested Party)* (supra), the court was not called to determine the foundational issues herein, that is whether *the Constitution* reserves removals by impeachment only for



members of the national executive, being the President, the Deputy President and Cabinet Secretaries, among others.

50. The petitioners dismissed the argument that county officials are impeached because they are elected, yet Cabinet Secretaries are not elected but are impeached by the National Assembly. Removal of governors is discriminatory when compared to that of members of county assemblies, members of the National Assembly and senators.
51. According to the petitioners, the doctrine of separation of powers is not in issue in this petition. The court has been asked to determine whether the impugned sections are valid or void.

2nd petitioner's rejoinder

52. The 2nd petitioner also filed a supplementary affidavit asserting that the presumption of constitutionality of an Act of Parliament no longer applies when the impugned sections relate to the provisions of the Bill of rights. The impugned provisions bestow upon members of a county assembly the roles of the accuser, prosecutor and the judge in a process resulting in the removal from office a county governor, deputy governor, speaker or deputy speaker.
53. According to the 2nd petitioner, the allegation of res judicata has not been unsubstantiated. In any event the decision in the Martin Wambora cases (supra) were made before the County Governments (Amendment) Act, 2020 which amended sections 11 and introduced new sections 11 A (1) (b) and 33 (9A) of the [County Governments Act](#).
54. The 2nd petitioner maintained that unlike removal of the President and Deputy President from office by impeachment under article 145 and 150 of [the Constitution](#), a statutory provision for removal from office of a county governor and a deputy county governor, with the resulting adverse effects on the affected person's fundamental rights and freedoms under the Bill of Rights, cannot elevate itself to the same status as a constitutional provision.
55. It was the 2nd petitioner's position that unlike the removal of the Speaker and deputy speaker of the National Assembly and Senate from office through a vote of no confidence by members of Parliament under article 106 (2) (c), a speaker and deputy speaker of a county assembly cannot be removed from office by way of a statutory mandated vote of no confidence by members of the county assembly as this violates, among others, the right to a fair hearing before a court or another independent and impartial tribunal or body.
56. The interested parties did not file responses to the petition.

Submissions

57. This petition was disposed of through written submissions with oral highlights.

1st petitioner's submissions

58. The 1st petitioner filed written submissions which he briefly highlighted in support of their position on this petition. The 1st petitioner argued that the doctrine of res judicata does not apply in this case. He relied on the decisions in John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR); Public Service Commission & 4 others v Cheruiyot & 20 others [2022] KECA 15 (KLR); Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others (Interested Parties) [2020] eKLR and Okiya Omtatah Okoiti & another v Attorney General & 6 others [2014] eKLR.



59. The 1st petitioner also relied on the decisions in *United States v. Butler*, 297 U.S. 1(1936) and *Geoffrey Andare v Attorney General & 2 others* [2016] eKLR for the argument that the petition does not offend the doctrine of separation of powers because it challenges the constitutional validity of the impugned provisions.
60. The 1st petitioner argued that an impeachment cannot be anchored on statute even where the provisions providing for impeachment in *the Constitution* are exported into legislation. It can only be a constitutional remedy and not a statutory remedy. Article 2(3) of *the Constitution* does not protect legislation from being voided under article 2(4) for being inconsistent with *the Constitution*. The 1st petitioner relied on the decisions in *Tinyefuza v Attorney General of Uganda*, Constitutional Petition No. 1 of 1997 (1997 UGCC 3) and *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* [2015] eKLR.
61. It was the 1st petitioner's position that a fair hearing or trial cannot be achieved through an impeachment process because the process is not conducted through an impartial and independent forum. Impeachment of county officials not being anchored in *the Constitution* but in the statute, it is not immune from the requirement of article 2(4) of *the Constitution*.
62. The 1st petitioner maintained that impeachment of county officials is not provided for in *the Constitution* as is the case for President, Deputy President and Cabinet Secretaries. The Speakers of the two houses of parliament are removed through a simple vote of no confidence under article 106 (2) (c) while the DPP, judges of superior courts and members of constitutional commissions and holders of independent offices are removed through judicial processes before special independent tribunals.
63. The 1st petitioner argued that the petition challenges how Parliament exercised its mandate under articles 178(3), 181(2) and 200 (2) (c) of *the Constitution*. Exercise of legislative mandate should be in line with the provisions of articles 1(3), (2), 10, 19(1), 20(1), 21, 24, 93 (2), 94(4) and 259 (1). To the extent that the impugned sections do not provide for a fair hearing and due process before an independent and impartial tribunal or body, they violate articles 24 (2) & (3), 25(c), 50(1) & 2(d) and 236 (b) of *the Constitution*.
64. The 1st petitioner argued that Parliament cannot limit article 236(b) of *the Constitution* because it lies outside the Bill of rights and the Senate plays no role in the impeachment of county officials. Reliance was placed on the decision in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR and *Marbury v Madison*, 5 U.S. 137 (1803).
65. According to the 1st petitioner, it is not valid for an impeachment to be taken outside the electoral area. The electoral base of the Senate is national and totally different from the electoral base of a county assembly which is the county. For that reason, section 33 of the *County Governments Act* provides for an unnatural state of affairs where a county assembly impeaches its governor or deputy governor, then proceeds to put the official on trial through the national legislation.
66. The 1st petitioner asserted that any trial of impeached officials must be before an independent and impartial tribunal or body set up for that particular purpose with a right of appeal to the Supreme Court pursuant to article 163 (3) (ii). Reliance was placed on *Trop v Dulles*, 356 U.S. 86 (1958). The 1st petitioner maintained that the impugned sections violate article 1(2) of *the Constitution* and the principles of natural justice because they do not allow aggrieved members of the public to initiate a removal process, but the assembly which makes it the investigator, prosecutor, jury and judge.



67. The 1st petitioner argued that a vote of no confidence cannot be used to remove county officials from office under *the Constitution* because the removal of the speakers of the two Houses of Parliament through a vote of no confidence under article 106(2) is protected by article 2(3) of *the Constitution*.
68. The 1st petitioner contended that Parliament having enacted an unconstitutional law there was violation of *the Constitution*. He relied on article 23 (3) and the decisions in *Okoiti & 3 others v The Cabinet Secretary for the National Treasury and Planning & 10 others* [2023] KESC 69 (KLR); *Okoiti & 2 others v Attorney General & 14 others* [2023] KESC 31(KLR); *EWA & 2 others v Director of Immigration and Registration of Persons & another* [2018] eKLR and *Fose v Minister of Safety and Security (CCT 14/96) 1997, ZACC 6*, on grant of appropriate relief and for the position that each party should bears its own costs of the petition.

2nd petitioner's submissions

69. The 2nd petitioner also filed written submissions and relied on section 6 of the *Civil Procedure Act*, section 107, 108 and 109 of the *Evidence Act* and the decision in *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others* [2021] eKLR and *Okiya Omtatah Okoiti v Attorney General & another* [2022] eKLR, to argue that whether a suit is res judicata or not is a factual matter that requires to be proved to the required standard. The 2nd and 3rd respondents did not produce the decisions that would make the petition res judicata.
70. The 2nd petitioner further argued that the plea on res judicata does not apply because no court of competent jurisdiction has ever determined the constitutional validity of the impugned provisions with finality. The decisions cited were made before the amendments in the County Government Act. According to the 2nd petitioner, the High Court decision in *Obwayo v Clerk of and National Assembly & 3 others; Ministry of Devolution & 12 others (Interested Parties)* [2023] KEHC 21869 (KLR) was made per incurium. The plea of res judicata was raised by way of preliminary objection by the 1st and 2nd respondents in those proceedings which was contrary to the holding in *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others* (supra).
71. The 2nd petitioner maintained the position that the impugned provisions are unconstitutional and violate articles 10(2) (a-d), 25, 27, 47 and 50 (1) of *the Constitution*. The presumption of constitutionality does not arise when the breach complained of is on fundamental rights and freedoms.
72. The 2nd petitioner went on to submit that while article 178(3) of *the Constitution* mandates Parliament to enact legislation providing for election and removal from office of speakers of county assemblies, the legislation must comply with the provisions of *the Constitution*, including principles of constitutional supremacy, the national values and principles of governance and the Bill of rights.
73. The 2nd petitioners associated himself with the 1st petitioner's position that speakers of county assemblies cannot be removed by members of the assembly in a statutory vote of no confidence similar to the removal from office of speakers and deputy speakers of the National assembly and Senate which is a constitutional process under article 106 (2) (c) of *the Constitution*. In his view, article 181 of *the Constitution* provides grounds for removal from office of county governors which Parliament was obligated to legislate on.
74. The 2nd petitioner submitted that under articles 1(1), 3(c), 22, 50(1), 93, 94, 159 (1) and (2), 165 and 258 of *the Constitution*, the doctrine of separation of powers is fully incorporated in the functions given to the court. He relied on *Okoiti & 2 others v Attorney General & 14 others* [2023] KESC 31(KLR) and urged the court to allow the petition but parties bear their own costs.



3rd petitioner's submissions

75. The 3rd petitioner submitted that the impugned provisions violate article 236 (b) of *the Constitution* by establishing a different removal procedure for governors, deputy governors, or county assembly speakers from other public officers such as judges, DPP and holders of Constitutional offices in articles 158, 168 and 251 of *the Constitution*, leading to unfair discrimination.
76. The 3rd petitioner argued that the procedure established by the impugned provisions undermines the fundamental human dignity of the governors, deputy governors or county assembly speakers because it strips them of their rights enshrined in article 38 of *the Constitution*. Reliance was placed on the decisions in *SBM & another v Attorney General* [2022] KEHC 13920 (KLR) and *African Commission on Human and People's Rights v Kenya* (Application No. 006/ 2012 [2017] AfCHPR 2 (26 May 2017).
77. The 3rd petitioner again relied on the decisions in *Re Murchison*, 349 U.S. 133, 136 (1955); *Quebec Inc. v Quebec (Regie des permis d'alcool)*, 1996 CanLII 153 (SCC), [1996] 3 SCR 919; *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1910 (2016); *Lyness v. Commonwealth State Bd. of Medicine*, 529Pa. 535 (1992) and *Alnashir Popat & 7 others v Capital Markets Authority* [2020] eKLR (para 49) for the argument that the Senate's select committee, which at times investigates impeachment, has a stake in either acquitting or convicting a governor who has been impeached by the county assembly resembling a prosecutor's vested interest in securing a conviction. This is only permissible when it arises from a statute whose constitutionality is not in question.
78. The 3rd petitioner asserted that the grounds for removal of a governor from office under article 181 (1) of *the Constitution* encompass matters necessitating interpretations on whether such governor has violated *the Constitution*, committed a crime, or abused office. This is a legal inquiry requiring interpretation by a body possessing the necessary qualifications and legal expertise and requires that the trial of the person accused be conducted fairly and judiciously in line with article 159(1) and within the principles in articles 25 (c), 50 and 236 (b) of *the Constitution*.
79. It was the 3rd petitioner's position, that unlike impeachment of the President, Deputy President and Cabinet Secretaries, governors, their deputies, and speakers of county assemblies and their deputies when undergoing removal from office, have a right for fair and impartial trial by an independent body because impeachment and removal from office are totally different processes.
80. The 3rd petitioner maintained that article 236 lies outside the Bill of Rights and cannot be limited by Parliament; the Senate has no role to play in the impeachment of the county officers and the electorate should wield the sovereign authority to cast votes either in favor or against motions for recall or impeachment.
81. The 3rd petitioner asserted that by virtue of article 1 and 2 of *the Constitution*, any limitation of the mandate of elected members should only be considered valid if it follows a process with the same safeguards as those in judicial proceedings in line with article 159(1). Additionally, that removal of county officials is a political process that must be limited to an electoral constituency. The Senate cannot meet the threshold for an impartial tribunal in ensuring a fair trial under article 50(1) & (2) (d). The 3rd petitioner relied on the decisions in *Civil Appeal Nos. 823 – 827 of 2022- State of Manipur & Ors v Surjakumar Okram & Ors*; *Norton v. Shelby County* 118 US 425 (1886) and *Institute for Social Accountability & another v National Assembly & 3 others & 5 others* [2022] eKLR in urging the court to allow the petition.



Attorney General's submissions

82. The Attorney General submitted that the impugned provisions are clear, precise and unambiguous. They are constitutional and enjoy the presumption of constitutionality. Their objective was to give effect to articles 178(3) and 181(1) and (2) of *the Constitution* and the petitioners have not demonstrated otherwise. Reliance was placed on section 107 of the *Evidence Act* and the decisions in *Attorney General v Law Society of Kenya and Another* [2017] eKLR; *R v Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295 and *Ndyanabo v Attorney General* [2001] 2 EA 485.
83. The Attorney General denied that the impugned provisions infringe on the right to fair trial or curtail the constitutional protection every public officer is entitled to. The Attorney General further argued that removal of a county governor, deputy governor and speaker of the county assembly is a process whereby they are given an opportunity to defend themselves before the county assembly after which a vote is taken. The impugned provisions do not preclude an aggrieved party from challenging the decision from the impeachment in court.
84. The Attorney General contended that removal of a county governor of assembly speaker or their deputies through impeachment is a constitutional and political process. The court may only come in to confirm that the process has been done within the confines of *the Constitution*, the *County Governments Act* and other enabling statutes. Reliance was placed on *Sonko v County Assembly of Nairobi City & 11 others* [2022] KESC 76 (KLR); *Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others* [2014] eKLR; *Catherine Chepkemai Mukenyang v Evanson Pkemei Lomaduny & another* [2022] eKLR and *Tononoka Steels Limited v Eastern and Southern Africa Trade Development Bank* [1999] eKLR.
85. The Attorney General maintained that the petition offends the doctrine of separation of powers on the premise that the petitioners failed to demonstrate the unconstitutionality of the impugned provisions. The process of removing the county officers in question is textually and expressly delegated by *the Constitution* to the County Assembly and the Senate. The county assembly and the Senate have mandate to impeach governors, speakers and their deputies by virtue of respective county standing orders and proof of charges in the impeachment motion(s).
86. The Attorney General again submitted that the county assembly and the Senate are the only organs involved in impeachment hearing because of the role they play in the devolved governments. The court can only intervene if the two organs act ultra vires *the Constitution*, the *County Governments Act*, their respective standing orders or breach fundamental rights and freedoms. Reliance was placed on the decision in *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; *Mumo Matemu v Trusted society of Human Rights Alliance & 2 others* [2013] eKLR; *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2017] eKLR and *Speaker of the Senate & another v Attorney General & 4 others* [2013] eKLR, and urged that the petition be dismissed with costs.

Submissions by the National Assembly

87. The National Assembly reiterated its position that the impugned provisions were enacted in compliance with *the Constitution* and that the petition is res judicata. The National Assembly relied on section 7 of the *Civil Procedure Act* and the decision in *John Florence Maritime Services Limited & another v Cabinet Secretary for transport and Infrastructure & 3 others* (supra).
88. The National Assembly further asserted that the petition offends the doctrine of separation of powers because the petitioners are inviting the court to declare the impugned sections unconstitutional



without evidence. According to the National Assembly, the court can only intervene if there is an illegality in the process of enacting the Act and urged the court to exercise restraint. Reliance was placed on the decisions in *Justus Kariuki Mate & Another v Martin Nyaga Wambora & another* [2017] eKLR and *Pevans East Africa Limited & Another v Chairman, Betting Control & Licensing Board & 7 others* [2018] eKLR.

89. The National Assembly submitted that the enactment of the *County Governments Act* to confer on the county assemblies and the Senate the role of considering charges against county officers in impeachment motions was within the ambit of articles 96, 178 (3) and 181 (2) of *the Constitution*.
90. The National Assembly further relied on the decisions in *Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR and *Council of Governors & 3 others v The Senate & 53 others* [2015] eKLR to urge the court to dismiss the petition with costs.

Submissions by the Senate

91. The Senate also reiterated its position that Parliament complied with its mandate under articles 1(3) (a), 94, 96, 178(3) and 181(2) of *the Constitution* in enacting the impugned provisions. Further, that that the petition is res judicata and denied the argument that the decision in *Andrew Obwayo v Clerk of National Assembly* (supra) was made in error. The Senate relied on the decisions in *ET v Attorney General & another* [2012] eKLR; *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* (supra).
92. It was the Senate's argument that the impugned provisions were enacted in line with the provisions of articles 1, 94, 96, 178, 181 and 200 of *the Constitution*; do not offend articles 25(c), 27, 47 and 50(1) of *the Constitution* and the differentiation in the process of removal of the elected officers and those appointed is anchored in *the Constitution*. The Senate relied on the decision in *Law Society of Kenya v Attorney General & 2 others* [2013] eKLR; *Mwangaza v County Assembly of Meru & Another; Council of Governors (Interested party)* [2023] KECA 1599 (KLR) and *Mohammed Abduba Dida v Debate Media Limited & another* [2018] eKLR.
93. According to the Senate, under article 96 of *the Constitution*, being the House of Parliament that protects the interests of counties, Parliament was well within its constitutional mandate to confer on it the role to hear and determine charges preferred against a county governor and deputy governor after an impeachment motion has been passed by the county assembly.
94. The Senate submitted, therefore, that the relief sought in this petition violate the doctrine of separation of powers as articles 94, 96, 178, 181 and 200 of *the Constitution* mandate Parliament to enact legislation providing for the procedure for removal of county state officials from office. The Senate relied on the decisions in *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* (supra); *Pevans East Africa Limited & Another v Chairman, Betting Control & Licensing Board & 7 others* (supra) and *Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 others* [2013] eKLR and urged the court to dismiss the petition with costs.
95. The Interested parties did not take part in these proceedings.

Determination

96. Upon considering the petition, responses and arguments by parties, the issues for determination are whether the petition is res judicata and, depending on the answer to this issue, whether the impugned provisions are constitutionally infirm.



97. The respondents argued that the petition is res judicata as the issue had previously been determined. The petitioners denied that the petition is res judicata. In their view, the respondents did not provide evidential proof that would demonstrate that the issues in the petition had been conclusively determined by a court of competent jurisdiction.

Res judicata

98. Section 7 of the *Civil Procedure Act* provides that “No court shall try any suit or issue in which the matter directly in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or issue in which such issue has been subsequently raised, and has been heard and finally determined by such court.”
99. Res judicata is a bar to further litigation on issues that have been previously litigated between the same parties in a court of competent jurisdiction and the court has determined the issue with finality. The doctrine of res judicata protects finality in litigation over similar issues between the same parties in courts of competent jurisdiction.
100. In *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* (Motion No 42 of 2014) [2016] eKLR, the Court of Appeal stated as follows with regard to the essence of res judicata:
- Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights....[T]he doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights.
101. The Supreme Court of Kenya had occasion to deal with the issue of in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* (Petition 17 of 2015) [2021] KESC 39 (KLR). At para 57, the Supreme Court cited the words of Wigam V-C in *Henderson v Henderson* (1843) 67 ER 313 thus:

Where a given matter becomes the subject of litigation, in and adjudication by, a court of competent jurisdiction, the court requires the parties to the litigation to bring forward their whole case, and will not, (except under special circumstances), permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject litigation, and which parties, exercising reasonable diligence, might have brought forward at the time.

The Supreme Court then stated:

- (58) [W]henver the issue of res judicata is raised, the court will look at the decision claimed to have settled the issue in question; the entire pleadings and record of that previous case and the instant case to ascertain the issues determined in the previous case, and whether these are the same issues in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title, and whether the previous case was determined by a court of competent jurisdiction.



102. For the plea of res judicata to succeed, it is important that issues in the previous case and the new suit be similar; parties in the two cases be the same or litigating under the same title and issues in the former suit should have been finally determined by a court of competent jurisdiction. In making that determination, the court dealing with the plea of res judicata, should look at the pleadings and prayers sought in the two suits; the parties named in the former suit and the subsequent suit and the decision of the court in the previous suit to ascertain whether the matter was before a court of competent jurisdiction and the issues were indeed, determined with finality.
103. To prove res judicata, the respondents were required to adduce concrete evidence to demonstrate that the issues in this petition had been determined with finality in a previous matter. However, the respondent merely made reference to several decisions arguing that this petition is res judicata. The decisions included; Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2017] eKLR and Mwangaza v County Assembly of Meru & another; Council of Governors (Interested Party) (supra). Even by making reference to these decisions, the respondents did not point out which paragraph dealt with the issues that are in this petition to enable the court determine whether indeed, the petition is res judicata.
104. Although the cases referred to were on impeachment of governors, the respondents did not show that the issue of constitutional invalidity of the impugned provisions was at the core of those petitions as is the case here. It was for that reason that the petitioners maintained that the courts in the previous petitions were not called to determine the foundational issues that are in the present petition, namely; whether *the Constitution* reserves removals by impeachment for members of the national executive only, being the President, the Deputy President and Cabinet Secretaries and not governors or speakers of county assemblies.
105. A perusal of pleadings and decisions in the cases referred to, shows that the issues dealt with in those cases were different. The petitioners were also different although the respondents may have been the same to those in this petition. In the premise, the test for res judicata was not met. The objection that the petition is res judicata fails.

Constitutional invalidity

106. The petitioners took a uniform position that indeed, the impugned provisions are constitutionally invalid and violate the rights of an impeached county governor or deputy governor to fair hearing or trial. The respondents maintained that the provisions are constitutional; were enacted in compliance with *the Constitution* and do not violate fundamental rights and freedoms, including the right to fair hearing or trial.
107. Before responding to this issue, it is important to consider the established principles for purposes of determining constitutionality of a statute or its provision.
108. The court has to examine the purpose or effect of the statute or provision. The purpose of enacting legislation or the effect of implementing the legislation may lead to nullification of the statute or its provision if found to be inconsistent with, or in contravention of, *the constitution*. In Olum and another v Attorney General [2002] EA, the court stated;

To determine the constitutionality of a section of a statute or Act of parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by *the Constitution*, the Court has to go further and examine the effect of the implementation. If either its purpose or the effect of its



implementation infringes a right guaranteed by *the Constitution*, the impugned statute or section thereof shall be declared unconstitutional.

109. In *R v Big M. Drug Mart Ltd*, 1986 LRC (Const.) 332, [1985] 1 SCR 295, the Supreme Court of Canada also stated:

Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity.

110. It is also useful to bear in mind the words of the US Supreme Court in *US vs Butler* 297 US 1, [1936] that:

When an Act of congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of government has only one duty; to lay the article of *the constitution* which is invoked besides the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This Court neither approves nor condemns legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of *the constitution*; and having done that, its duty ends.

111. In *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR, the court observed that in determining whether a statute is constitutional or not, the court must determine the object and purpose of the impugned Act which should be discerned from the intention expressed in the Act itself.
112. The petitioners challenged the constitutionality of sections 11(1)(c), (8), & 11A(1)(b), and 33(2-9A) of the *County Governments Act*, No. 17 of 2012. They argued that those provisions are unconstitutional since they do not guarantee impeached officials the right to fair hearing or trial. According to the petitioners, impeached county officials are not subjected to an independent and impartial tribunal since they are impeached by county assemblies and tried by the Senate. In the petitioners' view, the county assembly is the accuser and prosecutor thus, the aspect of fair trial envisaged in article 25(c) of *the constitution* is compromised.
113. This view was contested by the respondents who maintained that the impugned sections are constitutional and that rights of impeached officials are protected. The officer has recourse to court in the event he/she considers his or her rights and fundamental freedoms to have been violated.
114. Article 178(1) provides that each county assembly shall have a speaker elected by the assembly from among persons who are not members of the assembly. (2) a sitting of the county assembly shall be presided over by- (a) the speaker of the assembly, or in the absence of the speaker, another member of the assembly elected by the assembly. Under clause (3), Parliament was to enact legislation providing for the election and removal from office of the speakers of the county assemblies.
115. Article 181 of *the Constitution*, on the other hand, provides for removal of a county governor. It states that a county governor may be removed from office on any of the following grounds; gross violation of



the Constitution or any other law; where there are serious reasons for believing that the county governor has committed a crime under national or international law; abuse of office or gross misconduct, or physical or mental incapacity to perform the functions of office of county governor. Sub article (2) provides that “Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds specified in clause (1).”

116. In keeping with articles 178(3) and 181(2), Parliament enacted the County Government Act, 2012, whose sections 11(1)(c), (8), 11A(1)(b), and 33(2-9A) have been impugned.
117. Section 11(1) provides that the office of the speaker shall become vacant: (c) “if the county assembly so resolves by a resolution supported by at least two thirds of all members of the county assembly.”
118. Removal of speaker of the county assembly is by resolution of the county assembly supported by not less than two thirds of all the members of the county assembly. A notice of the intention to move a motion for resolution to remove a speaker has to 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. The motion has to state the grounds for removal.
119. Under subsection (7), the speaker has the right to appear and be represented before the county assembly during its investigations. (8) “The county assembly shall consider the motion within 14 days and resolve whether to approve the motion.”
120. In so far as removal of a governor is concerned, section 33 provides as follows:
 1. A member of the county assembly may by notice to the speaker, supported by at least a third of all members of the assembly, move a motion for the removal of the Governor under article 181 of *the Constitution*.
 2. If a motion under subsection (1) is supported by at least two thirds of all the members of the county assembly-
 - (a). the speaker of the county assembly shall inform the speaker of the Senate of that resolution within two days; and (b) the Governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section.
 3. Within 7 days after receiving notice of a resolution from the speaker of the county assembly-
 - (a) the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the Governor; and-(b) the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.
 4. A special committee appointed under subsection (3)(b) shall- (a) investigate the matter; and (b) report to the Senate within ten days on whether it finds allegations made against the Governor to have been substantiated.
 5. The Governor shall have the right to appear and be represented before the special committee during its investigations.
 6. If the special committee reports that the particulars of any allegations against the Governor-
 - (a) have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or (b) have been substantiated, the Senate shall, after according the Governor “an opportunity to be heard,” vote on the impeachment charges.



7. If a majority of all county delegations of the Senate vote to uphold any impeachment charge, the Governor shall cease to hold office.
 8. If a vote in the Senate fails to result in the removal of the governor, the speaker of the Senate shall notify the speaker of the concerned county assembly accordingly and the motion by the assembly for the removal of the Governor on the same charges may only be re-introduced to the Senate on the expiry of three months from the date of such vote.
 9. The grounds for removal of the President on grounds of incapacity under Article 144 of *the Constitution* shall apply with necessary modification, to the removal of a Governor.
- (9A) Subsections 1 to 9 shall with necessary modification, apply to removal from office of a deputy Governor.
121. The petitioner faulted the provisions on the removal of both the speaker and governors arguing that the provisions are inconsistent with *the Constitution* and do not guarantee the impeached speaker or governor the right to fair trial thus, contravene article 25 (c) of *the Constitution*. The petitioners took the view, that after impeachment motion, it would be appropriate if the impeached Speaker or Governor was tried by an independent and impartial tribunal akin to that on judges and commissioners of constitutional commissions and those independent offices-(the Auditor general and Controller of Budget).
 122. As already seen, a statutory provision is unconstitutional if it is shown to be inconsistent with or in contravention of provisions of *the Constitution*. Inconsistency can be direct or through purpose or effect. That is, the purpose of enacting a legislation or the effect of implementing such legislation or its provision(s) may, If found to be inconsistent with, or in contravention of, *the Constitution* be invalidated. It is in that respect that article 2(4) decrees that “Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency.”
 123. Article 178(3) conferred on Parliament the mandate to enact legislation to provide for not only election but also removal of speakers of county assemblies. The long title to the Act shows that the *county Governments Act* is intended to give effect to Chapter eleven of *the Constitution* (Devolution), provide for county government powers, functions and responsibilities to deliver service and connected purposes.
 124. Section 11 of the Act is a normative derivative of Article 178 of *the Constitution*. The Article establishes the position of speaker of the county assembly and required Parliament to enact legislation to provide for election and removal of speakers of county assemblies from office. In that respect, the *County Governments Act* is derived from *the Constitution* as a constitutional legislation. Section 11 of the Act is a constitutional enactment to give effect to Article 178(3). That section must therefore be viewed as deriving force from article 178 of *the Constitution*
 125. Section 11(1) provides when the office of speaker should fall vacant. That office becomes vacant: (c) “if the county assembly so resolves by a resolution supported by at least two thirds of all members of the county assembly.” The law provides that it is the members of the assembly to decide whether to remove the speaker and the threshold is set at two thirds of all the members of the assembly. Section 11 not only provides how the motion is to be introduced in the assembly, including the threshold to be met in order to introduce the motion, but also the number of members required to pass such a resolution.
 126. It is also important to note that subsection (7), provides in mandatory terms that “the speaker shall have the right to appear and be represented before the county assembly during its investigations” before the county assembly considers the motion to resolve whether to approve the motion.”



127. The right to fair hearing is a non derogable right guaranteed under article 25(c) of *the Constitution*. Article 50(1) of *the Constitution* also provides that every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or, if appropriate, another independent tribunal or body.
128. In *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others*, (SC Petition No 18 of 2014 consolidated) [2014] eKLR, the Supreme Court discussed the right to fair hearing and trial under articles 50(1), (2) and 25(c) of *the Constitution* as a non derogable right, stating:
- (257) Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi alteram partem (hear the other side or no one is to be condemned unheard) and nemo iudex in causa sua (no man shall judge his own case) otherwise referred to as the rule against bias...the rules of natural justice generally refer to procedural fairness in decision making...it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated.
129. The articles require that a person should not be denied the opportunity to present his or her case effectively before a court, or other independent body. *The Constitution* behooves all those bestowed with the mandate to resolve disputes to do so in a manner that is fair and accord everyone an opportunity to present their case (to be heard) before decision making.
130. Indeed, in *Krishnadatt v State of M.P & another Civil Appeal No(s). 4806 of 2011 (consolidated with Civil Appeal No. 4807; 4808 and Civil Appeal No 4809.)* (on 29 January, 2025), the Supreme Court of India, appreciating the principle of fair hearing, stated that the right to be heard (audi alteram partem) “lies at the very heart of procedural fairness, ensuring that no one is condemned or adversely affected, without being given an opportunity to present their case.”
131. I have read the impugned sections visa vis articles 178 and 181 of *the Constitution* which are the source from which Parliament derived the mandate to legislate the impugned sections. Article 178(3) required Parliament to enact legislation providing for election and removal of speakers of county assemblies. Parliament indeed enacted the Impugned section 11(1) (c) providing that a speaker of a county assembly may only cease to hold office if the county assembly so resolves by a resolution supported by at least two thirds of all members of the county assembly.
132. The motion for a resolution to remove speaker has to be in writing, the affected speaker has to be given a notice and, most importantly, the speaker has the right to appear and be represented before the county assembly during its investigations. It is important to note that when the county assembly is dealing with the motion for a resolution to remove speaker, it is conducting investigations and after hearing the speaker takes a vote whether to remove the speaker or not. A resolution to remove speaker of the county assembly will only pass if it received support of “two thirds” of members of that county assembly. The speaker is accorded an opportunity to be heard and present his case as required by *the Constitution* and the law before a vote is taken.
133. If the affected speaker is of the view, that his rights were violated or that the county assembly violated *the Constitution* or the law, the speaker has a right to approach the court and the court will determine the dispute as the last arbiter. The right to be heard in this case is a two-tier process, first; before the county assembly and thereafter before a court if necessary.
134. Similarly, in the case of removal of a governor, Parliament enacted the impugned section 33, also a normative derivative of article 181(2) which provides that a member of the county assembly may by



notice to the speaker, supported by at least one third of all members of the assembly, move a motion for the removal of the Governor. For the motion to succeed, it must be supported by two thirds of all the members of that county assembly. Where the motion receives the required support of members of the county assembly, trial takes place in the Senate. Investigations can be done by a committee of the Senate or the Senate itself. The Governor has the right to appear and be represented before the special committee during its investigations.

135. If the special committee reports that the particulars of any allegations against the Governor have not been substantiated, no further proceedings is taken on the matter. If however, any allegations have been substantiated, the Senate “shall, after according the Governor an opportunity to be heard, vote on the impeachment charges.” a decision of the majority of the delegates in the Senate will prevail.
136. The affected governor is given an opportunity to be heard and if the governor feels his rights have been violated or there is violation of the Constitution and the law, that governor has a right to approach the court and the court will hear case.
137. In *Sonko v County Assembly of Nairobi & 11 others* [2022] KESC 76 (KLR), The Supreme Court stated
 109. [T]he removal proceedings for a county Governor are textually committed by the Constitution to the legislative branch of government, that is, the County Assembly and the Senate. The constitutional mandate and the process to impeach a Governor commences in the County Assembly and terminates in the Senate. The County Assembly and Senate are the only organs involved because of their special roles in devolved governments. The Senate, according to article 96 of the Constitution specifically “represents the counties, and serves to protect the interests of the counties and their governments”. The Assembly, on the other hand, is the legislative arm in the county governments. The respective roles of the two institutions are important because, one of the objects of devolution is to ‘promote’ democratic and accountable exercise of power. To achieve this, the Governor and all officials in the county governments are subject to oversight and scrutiny by both the County Assembly and the Senate.
 110. The Constitution commits to both institutions the exclusive power to remove the Governor subject only to procedural requirements set out in the County Governments Act and the respective Standing Orders of the County Assemblies and the Senate: and proof of the charges. From this, it seems fair to state that both institutions through their Standing Orders are at liberty to determine the procedures for receipt and consideration of evidence necessary to satisfy the duty to conduct an impeachment hearing.
138. The Supreme Court made it clear that proceedings for removal of a county Governor by constitutional text, is the mandate of the legislative branch of government. The constitutional mandate and the process to impeach a Governor has to commence in the County Assembly and terminate in the Senate. That is why section 33 of the County government Act provides for the procedure of commencing processing and passing a resolution to remove a governor after which, the process is committed to the Senate for trial and proof of the charges.
139. The petitioners argued that the hearing of charges against a governor should be before a tribunal such as the one in cases of removal of a judge or a commissioner of a Constitutional Commission or



Independent office. It is important to note here, that the process of removal occupiers of those offices is provided for by *the Constitution* itself and not an act of Parliament.

140. In *Justus Kariuki Mate & another v Martin Nyaga Wambora & another*,(supra) the Supreme Court stated that in the exercise of their “wide political powers, both the County Assembly and the Senate cannot act outside the confines of *the Constitution* and the law. For to do so would invariably invite the court’s intervention.” The Supreme Court made it clear that an impeached governor would have the right to approach the courts if the county assembly or the Senate acted outside *the Constitution* and the law thus, emphasizing that courts have the final say on whether an impeachment process complied with *the Constitution*, the law or both.
141. Flowing from the decision of the Supreme Court, the process of removing a governor must begin at the county assembly and conclude at the Senate, being the institutions mandated to oversight the executive at the devolved governments.
142. In the circumstances, the argument that the impugned sections are unconstitutional cannot be correct. The petitioners did not demonstrate to the satisfaction of this court that the sections are inconsistent with, or in contravention of, *the Constitution* to render them constitutionally infirm.
143. Consequently, and for the reasons given above, the petition fails and is dismissed. Costs being discretionary and this petition having been brought in the public interest, each party shall bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JUNE 2025

E C MWITA

JUDGE

