REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(*Coram: Ibrahim; Ojwang; Wanjala; Njoki Ndungu and Lenaola SCJJ*)

PETITION NO. 32 OF 2014

IN THE MATTER OF AN APPEAL FROM A FINDING OF CONTEMPT OF COURT FOR THE MAKING OF A RESOLUTION OF THE COUNTY ASSEMBLY OF EMBU

-AND-

IN THE MATTER OF ARTICLES 178, 185 (3) AND 196 (3) OF THE CONSTITUTION OF KENYA

-BETWEEN-

1. JUSTUS KARIUKI MATE

2. JIM G. KAUMA.....APPELLANTS

-AND-

1. HON. MARTIN NYAGA WAMBORA

2. THE COUNTY ASSEMBLY OF EMBU.....RESPONDENTS

(Appeal against the Judgment and Order of the Court of Appeal at Nyeri (Visram, Koome & Otieno Odek, JJA) delivered on 30th September, 2014 in Nyeri Civil Appeal No. 24 of 2014)

JUDGMENT

I. INTRODUCTION

[1] This appeal is based on Article 163(4)(a) of the Constitution, Section 15 (2) of the Supreme Court Act , and Rules 9 and 33 of the Supreme Court Rules, 2012. It is dated 2nd October, 2014 and supported by affidavits sworn by the Hon. Justus Kariuki Mate (1st appellant) and Jim G. Kauma (2nd appellant), of even date. The 1st and the 2nd appellants are the Speaker and Clerk of the County Assembly of Embu respectively. The High Court *found them liable for disobeying its Orders,* and they appealed to the Court of Appeal, unsuccessfully. They now come before this Court, seeking Orders that:

(i) the Conservatory Orders issued on 23rd January, 2014 by *Githua J* in ***Kerugoya Petition No. 3 of 2014*** (formerly ***Embu Petition No. 1 of 2014)*** be declared null and void;

(ii) the Judgement of the High Court in ***Kerugoya Petition No. 3 of 2014*** (formerly ***Petition No. 1 of 2014***), delivered on 16th April, 2014 in regard to ***Misc. Application No. 4 of 2014***, to the extent that the Court found the petitioners in contempt of the Court Order issued on 23rd January 2014, and directed the issuance and service of summons upon the petitioners to appear before the Court for further Orders, be set aside;

(iii) the Judgment and Order of the Court of Appeal rendered on 30th September, 2014 in ***Nyeri Civil Appeal No. 24 of 2014,*** be set aside;

(iv) costs of this appeal be awarded to the petitioners herein;

(v) any other Orders, such as this Court may deem fit to grant, be granted.

II. BACKGROUND

[2] On 16th January, 2014, a motion to remove the 1st respondent as the Governor of Embu County, by way of impeachment, was received by the 1st appellant and tabled before the County Assembly. The grounds tabled for the impeachment were: abuse of office; gross violation of the Public Procurement and Disposal Act, 2005, Public Finance Management Act, 2012, County Government Act, 2012, and the Constitution of Kenya. The County Assembly resolved to move the motion when it resumed sitting on *23rd January, 2014.* The 1st respondent, apprehensive that the County Assembly would pass a resolution to impeach him contrary to law and in violation of his fundamental rights, filed ***High Court Petition No. 1 of 2014***.

(a) The High Court

[3] The 1st respondent filed an application under certificate of urgency, in ***High Court Petition No. 1 of 2014***, seeking declaratory Orders that the County Assembly's motion for his impeachment was *contrary to the Constitution*. He also sought *ex parte* conservatory Orders pending the hearing of the petition. The petitioners in this matter were the Hon. Martin Nyaga Wambora and the County Government of Embu, and the 1st, 2nd and 3rd respondents were the Speaker of the County Assembly of Embu, the Clerk of the County Assembly of Embu, and the County Assembly of Embu respectively. On 23rd January, 2014, *Githua J*. certified the matter as urgent and made the following additional Orders:

(i) conservatory Orders be and are hereby granted restraining the 1st, 2nd, and 3rd respondents from holding any impeachment proceedings without first serving the applicant with a notice containing specific grounds/charges upon which the impeachment was being proposed, and without giving him an opportunity to be heard;

(ii) the Order will remain in force till 5th February, 2014 when the matter will be placed before the Resident Judge, Embu, for directions;

(iii) the petitioners to serve all the respondents with the petition and the application within the next 5 days, together with a mention notice for 5th February, 2014.

[4] These Orders were also published in the *Daily Nation* and the *Standard* newspapers on 26th and 27th January, 2014. The appellants, however, commenced the impeachment process on *28th January, 2014*;

and the County Assembly approved the impeachment motion.

[5] Consequently, the 1st respondent filed contempt proceedings in ***Misc. Application No. 4 of 2014.*** He was seeking leave to commit the appellants to civil jail for 6 months for contempt of the Court Orders, and an award of costs. In response to the application for contempt of Court Orders, the appellants denied being served with the Court Orders dated 23rd January, 2014 or being aware of the same. The appellants also denied having seen the Orders published in the newspapers. They made several contentions: that they were not parties to ***High Court Petition No. 1 of 2014***; they had no role in deciding the business of the County Assembly; and that the impeachment proceedings were privileged under the National Assembly (Powers and Privileges) Act (Chapter 6, Laws of Kenya), and did not attract civil or criminal liability.

[6] The High Court Judgement in ***Petition No. 3 of 2014*** (*Ong'undi, Githua and Olao JJ*), dated 16th April, 2014 was in respect of various consolidated causes: ***Petition No. 4 of 2014*** (formerly Petition No. 51 of 2014); Judicial Review No. 6 of 2014 (formerly ***Nairobi JR Misc. Applic. No. 17 of 2014***), and ***Misc. Application No. 4 of 2014 –*** all related to this matter. The consolidated petitions sought to challenge the constitutionality of the process leading to the removal of the 1st respondent as Governor of Embu County. They also sought an interpretation of Article 181 of the Constitution, relating to the threshold for removal of a County Governor from office.

[7] The amended petition consolidated all the issues raised in the several causes. Relevant to the instant appeal were three issues considered by the High Court: *(i) whether the High Court has jurisdiction to grant the reliefs sought; (ii) whether the appellants disobeyed the Court Orders dated 23rd January 2014; and (iii) whether the fundamental rights and freedoms of the 1st respondent in this case were violated in the process of his removal*.

[8] The High Court held that it had jurisdiction to entertain this matter, on the basis that no person or State organ is above the Constitution and the law; and that all organs created by the Constitution are subordinate to it and, should any of these organs take actions that are not within their constitutional powers, thus posing a threat of violation of the Constitution, the High Court would intervene, notwithstanding the doctrine of separation of powers.

[9] The Court observed that the 1st respondent was seeking a determination as to whether his impeachment was in accordance with the Constitution and the County Government Act, 2012 (Act No. 17 of 2012). The Court also noted that the 1st respondent had alleged a violation of his fundamental rights and freedoms, in the process of removal from office. And so the Court held, there was no doubt that the petition before it was justiciable.

[10] The Court also considered the provisions of Sections 12 and 29 of the National Assembly (Powers and Privileges) Act, which exclude the jurisdiction of the Court, in relation to acts of the Speaker and officers of the National Assembly. The Judges held that the Court could not ignore any *breaches of the Constitution* on account of parliamentary privilege: and it held that it had the jurisdiction to determine whether the impeachment was conducted in accordance with the Constitution. The Court held that it was its duty, under Article 159 (2) (e) of the Constitution, to ensure that the purpose and principles of the Constitution are protected and promoted.

[11] The Court held the contempt-of-Court application to be competent. It was convinced that the appellants knew of the Court Orders, but deliberately disobeyed them. The Court held that the Speaker of the County Assembly, in accordance with the County Assembly of Embu Standing Orders, was the person in a position to ensure that the Court Order was obeyed, yet he *allowed the motion proposing the*

removal of the Governor from Office to be debated and passed on 28th January, 2014. As such, both appellants were found to have acted in disobedience of the Court Orders, and to be guilty of contempt of Court. Thus, consequent resolutions made in disobedience of the Court Order were, in effect, void *ab initio,* and a nullity in law. The Court ordered that summons be issued and served upon the Speaker and the Clerk of the County Assembly. They were required to appear before the Court on 15th May, 2014 for further Orders.

(b) Court of Appeal

[12] Aggrieved by the High Court's finding as regards the charge of contempt of its Orders, the appellants filed ***Civil Appeal No. 24 of 2014*** in the Court of Appeal. The 11 grounds of appeal mostly related to the issue of *service of the Court Orders, and immunity of the appellants from civil and criminal liability*. In sum, they urged that the contempt proceedings filed by the respondents were incompetent, as they were contrary to Order 52 of the Rules of the Supreme Court of England of 2009, which applied under Kenyan law: the effect being that the respondents ought to have given notice to the Attorney-General, of intention to commence the said proceedings; but they failed to do so.

[13] The appellants also contended that there was no evidence of *actual service of the Court Orders* issued on 23rd January, 2014. They urged that "knowledge of service" was a question of fact, whereas "actual service" was a question of law. They submitted that, as there was no proof of service in the manner prescribed by law, a finding of contempt could not be made.

[14] The appellants urged, furthermore, that the County Assembly enjoys *immunity under Article 197 of the Constitution*, and was exempt from civil or criminal liability bearing upon its sittings and deliberations. They prayed for:

(i) an Order dismissing the respondents' application calling for a finding of contempt of Court on the part of the appellants, in Kerugoya High Court Misc. Application No. 4 of 2014, ***Hon. Martin Wambora v. Hon. Justus Kariuki Mate and Another;***

(ii) an Order setting aside the conviction of the appellants in Kerugoya High Court Misc. Application No. 4 of 2014, ***Hon. Martin Wambora v. Hon. Justus Kariuki Mate and Another,*** *as contained in the Judgment in Kerugoya Petition 3 of 2014, for alleged contempt of Court by disobedience of the Order of the Court made on 23rd January, 2014;*

(iii) such other Orders as the Court may deem just and expedient.

[15] In its Judgment dated 30th September, 2014, the Appellate Court identified three issues for determination: *(i) was the contempt application competently before the Court; (ii) was the Order dated 23rd January, 2014, served upon the appellants; and (iii) did the trial Court err in citing the appellants for contempt"*

[16] On the first issue, the Appellate Court held that Section 5 of the Judicature Act bears the applicable law in contempt proceedings in Kenya: and this was the law applicable in the High Court of Justice in England at the time the application for contempt was filed in 2014 – a position reflected in an earlier decision***, In the matter of an Application by Gubaresh Singh & Sons Ltd., Misc. Civil Case No. 50 of 1983***. The Court also cited its decision in contempt of Court matters, in ***Christine Wangari Gachege v. Elizabeth Wanjiru Evans & 11 Others***, Civil Application No. 233 of 2007. It found that the law in England with regard to contempt proceedings had changed, and there was no longer a need to notify the Crown Office (Attorney-General), prior to the filing of contempt proceedings. The Appellate Court was

persuaded that the contempt application had been properly made.

[17] On the second issue, the Court of Appeal held that the offices of the Speaker and of the County Assembly were public offices, served by public officers and employees, in the name of the County Assembly: and that, consequently, service upon Boniface Ireri, the Legal Clerk or Officer attached to the County Assembly, could be deemed as proper service upon *the Speaker* and *Clerk* of the County Assembly of Embu. The Appellate Court was unconvinced that the appellants were *unaware* of the Court Orders.

[18] The Appellate Court affirmed the trial-Court finding that, knowledge of a Court Order was sufficient for the purposes of contempt proceedings. It held that the respondents were not at fault, for advertising the Orders in the newspapers, as there was no time to seek leave, and as personal service had been attempted. The Court held that the advertisement in the newspapers had been meant to notify everybody including the appellants; and also that the lack of the Court's authority to publish its Orders, was of no more than mere technical materiality.

[19] On the third issue, the Appellate Court found that the appellants were in contempt of Court, and that the jurisdiction of the trial Court under Article 165 (1) (d) (ii) of the Constitution had been activated, when the 1st respondent filed ***Constitutional Petition No. 1 of 2014;*** and it was pursuant to that jurisdiction that the High Court issued the conservatory Orders. The Court held that the appellants, who prepared the County Assembly's order paper and presided over the impeachment proceedings, could not claim immunity, as they had not obeyed the law. The Court did not accept the appellants' argument that they could not have disobeyed the Court Order, as *they* neither moved nor voted on the motion.

[20] The Appellate Court made several findings of immanent novelty: that it is the responsibility of the 1st appellant, by the terms of Article 178(2)(a) of the Constitution, and by the County Assembly Standing Orders No. 24 and 36, to preside over the business of the Assembly, and he ought not to have *allowed debate* on the motion; and that, as for the 2nd appellant, since he is responsible for preparing the order paper, and having had prior knowledge of the Court Orders, he ought not to have *included the debate of the motion in the order paper.* So the Court concluded that the appellants had wilfully disobeyed of the Court Order. The Appellate Court dismissed the appeal, and ordered the petitioners to appear before the High Court at Kerugoya on 6th October, 2014 for further Orders. This is the genesis of the cause before us.

[21] However, before the matter could proceed, the respondents raised a preliminary objection to the appeal dated 18th February, 2014. The grounds advanced were, firstly, that this Court has no jurisdiction to entertain an appeal that stems from contempt proceedings in the High Court, and that does not involve the *interpretation or application of the Constitution.* Secondly, it was urged that the appeal has been brought without certification as required under Article 163 (4) (b) of the Constitution.

III. PARTIES' SUBMISSIONS

(a) Appellants

[22] Senior Counsel Prof. Tom Ojienda, for the appellants, contested the preliminary objection, questioning the contention that the Court is not properly moved under Article 163 (4) (a) of the Constitution. He submitted that the issues in controversy in the appeal have already been addressed by the Appellate Court, and are not pending before any other Court.

[23] Counsel submitted that the appeal raises weighty matters of interpretation of the Constitution, and in

relation to the doctrine of separation of powers under the devolved system of government, and to the law of contempt of Court. Such matters, Prof. Ojienda urged, called for the further input, and final pronouncement of this Court. He submitted that this Court is duly seized of jurisdiction to hear and determine this appeal, citing relevant past decisions of the Court: ***Hassan Ali Joho & Another v. Suleiman Said Shahbal and 2 Others***, Sup. Ct. Petition No. 10 of 2013; [2014] eKLR; and ***Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board,*** Sup. Ct. Petition No. 5 of 2012; [2012] eKLR.

[24] It was the appellants' case that this Court has a responsibility under Section 3 of the Supreme Court Act, to provide authoritative and impartial interpretation of the Constitution, as was stated in the case of ***The Kenya Section of the International Commission of Jurists v. the Attorney-General & 2 Others***, Criminal Appeal No. 1 of 2012; [2012] eKLR.

[25] Counsel submitted that the appeal encompassed more than just the questioning of contempt of Court proceedings, and entailed the interpretation and application of various provisions of the Constitution, which were directly and materially in issue, and which had been misinterpreted in both superior Courts.

[26] He urged that when contempt Orders infringe upon the rights of the parties, and on the liberty of the Speaker, then they bear implications for fundamental rights and freedoms enshrined in Chapter 4 of the Constitution, and in other constitutional provisions. He invoked in this context, the doctrine of separation of powers, citing Articles 177 (1) (d) and 196 (3) of the Constitution as read with Section 17 of the County Government Act, and Sections 12 and 29 of the National Assembly (Privileges and Immunities) Act; and Articles 177 and 178 of the Constitution as read with the provisions of the Civil Procedure Act, (Cap.21, Laws of Kenya), in relation to the service of personal Orders.

[27] Learned counsel submitted that the appellants would be seeking an interpretation by this Court of Articles 159 (2) (e), 174, 175, 177, 178 and 196 of the Constitution, as well as the County Governments Act, and National Assembly (Privileges and Immunities) Act: and that, consequently, this matter falls under Article 163 (4) (a), and required no certification under Article 163 (4)(b) of the Constitution. Counsel urged this Court to dismiss the preliminary objection with costs.

[28] On the main appeal, counsel submitted that the Order issued on 23rd January, 2014 offended Articles 159, 174 and 175 of Constitution, which relate to the doctrine of *separation of powers*. He urged that whereas the High Court has power under Article 165 of the Constitution to exercise supervisory jurisdiction over the actions of State organs, the same does not extend to interfering with the *ongoing processes before such State organs.*

[29] Counsel submitted that the High Court can only interfere upon the conclusion *before such State organs*, of a process, and may then question the constitutionality of the outcome, or examine whether due process was followed; and to do otherwise would go contrary to the doctrine of separation of powers. The appellants invoked several judicial and related decisions, in aid of this proposition: ***Mumo Matemu v. Trusted Society of Human Rights Alliance,*** Civil Appeal No. 290 of 2012; ***Doctors for life international v. Speaker of the National Assembly and Others*** [2006] ZACC 11; ***National Coalition for Gay and Lesbian Equality & 13 Others v. Minister for Home Affairs and 2 Others*** [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39**; *Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial independence*** *(adopted on 19th June 1998 at a meeting of the Representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates and Judges Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association), at part III on Preserving the Independence of Parliamentarians;* and

the ***Commonwealth Principles on the accountability of and the Relationship between the Three branches of Government*** *(As agreed by the Law Ministers and endorsed by the Commonwealth Heads of Government Meeting, Abuja, Nigeria, 2003)*.

[30] Learned Counsel urged this Court to affirm the High Court decision in ***Okiya Omtatah Okoiti & 3 Others v. Attorney General & 5 Others*** [2014] eKLR, insofar as it supported the appellants' case herein; and submitted that the Court's intervention through conservatory Orders was premature, and violated the principle of separation of powers.

[31] It was the appellants' case that when the trial Judge gave Orders to stop impeachment proceedings already begun, she had not paid due attention to the *constitutional principles and objects of devolution* set out in Articles 174 and 175 of the Constitution. Learned counsel submitted that the learned Judge ought to have recognised that the Speaker of the County Assembly was merely performing the second level of a process, as mandated by Section 15 of the County Government Act: once the motion has been staged, the next step *must be carried out within seven days.*

[32] The appellants urged that the trial Court ought to have noted the legitimate dilemma facing the Speaker of the County Assembly, who was subject to constitutional timelines, yet was faced with a Court Order stopping the process. It was urged that in this instance, the Speaker complied with the Constitution, in a context in which the question of the constitutional obligation, on the one hand, and the burden of knowledge of the Court Order on the other hand, were conjoined with the question of *service;* and in this instance, the Speaker of the County Assembly submitted that he had not been served. He submitted that the Speaker of the County Assembly, in the terms of Article 179 of the Constitution, is an agent of the members of the County Assembly, and must act within the rules and procedures of the Assembly. Counsel asked the Court to clarify to what extent parties would be in violation of legal requirement, with mutually-opposed calls bearing upon them.

[33] On the question of the point at which the Judiciary can interfere in the functions of Parliament, counsel submitted that Courts must wait for Parliament to complete its processes, before intervening and testing the constitutionality of a legislative body's actions or omissions.

[34] On the question of service, learned counsel submitted that Order 48 of the Civil Procedure Rules applied, and required personal service; and as the Speaker was not duly served, he had not been aware of the contempt Order until the process in the Assembly had been concluded.

[35] Counsel for the appellants submitted that the learned Judges of both the High Court and Court of Appeal had not taken due account of the terms of Articles 177 (1) (d) and 196 (3) of the Constitution, as read with Section 17 of the County Government Act, and Sections 12 and 29 of the National Assembly (Privileges and Immunities) Act, when they held the appellants liable for contempt of the Order of the High Court issued on 23rd January, 2014. Counsel contested the findings by the Appellate Court that: (i) the law of contempt in Kenya changed, in view of the changes made in the law of contempt in England, as regards the requirement of notifying the Crown before instituting contempt proceedings; (ii) the contempt-of-Court Orders application was competent, and excluded the requirement for personal service of the Court Order of 23rd January 2014; and (iii) the appellants were liable for contempt of the Court Order.

[36] It is the appellants' case that a statute ought to be interpreted in the context of prevailing circumstances at any given time; they relied on the decisions in ***Martha Karua v. Radio Africa Ltd T/A Kiss FM Station and 2 Others,*** Nairobi HCCC No.288 of 2004, and the Ugandan case, ***Kigula and Others v. The Attorney-General*** **[2005]** AHRLR 197 (UgCC 2005). They submitted that it could not

have been the intention of the legislature that the law of contempt in Kenya would change, so as to reflect every change made in England.

[37] The appellants submitted that service upon the secretary and the legal clerk of the Assembly had not been properly done, and that, by the terms of Order 48 of the Civil Procedure Rules, 2010, it ought to have been done on the persons concerned. They submitted that there would be no basis in law for attaching personal liability to them, for acts done in good faith, and in exercise of their proper powers or duties.

[38] Counsel submitted that the Appellate Court was in error, in holding that the appellants had failed to apply the Assembly Standing Orders to curtail debate: for the law expressly vests the power to determine the import and the application of standing orders in the Speaker; and the Speaker exercises this in line with the doctrine of separation of powers. Counsel asked that the petition be allowed with costs, in this Court and the Court below.

(b) Respondents

[39] Learned counsel, Mr. Mansour for the respondents, submitted that the application in the High Court had not been brought under Article 163(5) of the Constitution, nor had the grounds of appeal involved the interpretation or application of the Constitution. He urged, on that basis, that the matter herein does not meet the threshold of Article 163(4)(a) as perceived in earlier decisions: ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd*** & ***Another,*** Sup. Ct. Petition No. 3 of 2012; [2012] eKLR and ***Samuel Macharia &Another v. Kenya Commercial Bank Limited & Others*****,** Supreme Court Application No. 2 of 2011; [2012] eKLR.

[40] It was the respondents' case that the subject matter in the appeal is a mere collateral matter, and that the Court should decline jurisdiction, as it did in ***Erad Suppliers & General Contractors Ltd. v. National Cereals and Produce Board*** [2012] eKLR. Counsel contended that the appellants ought to have applied for certification as required under Article 163 (4) (b) of the Constitution, as a basis for filing an appeal; and that, insofar as, this was not done, this Court ought to dismiss this appeal, and discharge the interlocutory Orders granted on 29th December, 2014, for want of jurisdiction. He sought reliance on this Court's decision in ***Peter Oduor Ngoge v. Francis Ole Kaparo,*** Sup. Ct. Petition No.2 of [2012]; eKLR.

[41] Without prejudice to such a stand on jurisdiction, the respondents contested the appeal, submitting that the appellants were served with the Court Orders dated 24th January, 2014, but they deliberately disobeyed. They submitted that it was an abuse of Court process for the appellants to now ask this Court to legitimize their act of contempt. Counsel submitted that the appellants should have challenged the Court Orders, rather than disobey them.

[42] Learned counsel submitted that the questions as to the jurisdiction of the High Court in granting *ex parte* Orders, and the principle of separation of powers, were neither pleaded nor argued in the High Court or Court of Appeal, and so they should not be determined by this Court in a second appeal.

[43] Counsel urged that the separation of powers between the Legislature, the Executive and the Judiciary is a subject falling to the supervisory jurisdiction of the Court, and that the High Court acted within its jurisdiction in issuing the conservatory orders. In aid of this submission, counsel cited several judicial decisions: ***In Re the Matter of the Interim Independent Electoral Commission,*** Sup. Ct. Const. Appl. No.2 of 2011 [2011] eKLR; ***Speaker of the Senate & Another v. Attorney-General & 4 Others*** [2013] eKLR; the Constitutional Court of South Africa case in ***Doctors for Life International v.***

Speaker of the National Assembly and Others (CCT 12/05) [2006] ZACC 11; and the Supreme Court of Canada case of ***Amax Potash Ltd. v. Government of Saskatchewan*** [1977] 2 S.C.R. 576.

[44] Mr. Mansour submitted that the alleged breach of Articles 177 (1) (d) and 196 (3) of the Constitution, Section 17 of the County Governments Act, and Section 29 of the National Assembly (Privileges and Immunities) Act was neither argued nor pleaded in the High Court and the Court of Appeal, and so should not be determined by this Court. He cited several cases: ***Commercial Bank of Africa v Ndirangu*** [1990-1994] EA 69; ***Refrigerator and Kitchen Utensils Ltd v Gulabchand Popatlal Shah & Others***, Nairobi Civil Appeal No. 39 0f 1990; as well as the South African Court of Appeal Case of ***Speaker of the National Assembly v. Patricia De Lile MP and Another,*** Case No. 297/98 (ZASCA 50) – in support of the statement that it is a fundamental rule of law that Court Orders are to be obeyed. He submitted that if the appellants were aggrieved by the Court Orders, they should have moved the High Court to set them aside, rather than proceed in a manner inconsistent with these Orders.

[45] On the alleged breach of Articles 177 and 178 of the Constitution, the respondents contended that, in issue at the High Court and Court of Appeal, were the County Assembly Standing Orders 24 and 36, and the National Assembly (Privileges and Immunities) Act; and there was no basis for a Supreme Court appeal founded upon those Articles.

[46] On the specific issue of service, counsel submitted that both the High Court and the Court of Appeal had found that the two parties were aware of the Court Order, and had disobeyed it. He urged that this established the certainty that they were indeed in contempt of Court.

[47] The respondents urged this Court to vindicate the rule of law, and dismiss the petition of appeal with costs, for being an abuse of the Court process.

IV. ISSUES FOR DETERMINATION

[48] After careful consideration of the pleadings and submissions (oral and written) of the parties, we have identified the following issues for determination:

(a) whether this Court has the jurisdiction under Article 163(4)(a) of the Constitution to determine this appeal;

(b) whether the Court can interfere with Parliamentary processes which are in actual progress;

(c) whether the Court can interfere with constitutional timelines;

(d) what are the requisite Orders in this case"

(a) *The Supreme Court: The Jurisdictional Threshold under Article 163(4)(a) of the Constitution*

[49] The question of jurisdiction has come up before this Court on a number of occasions: for instance in ***Justus Kariuki Mate & Another v. Martin Nyaga Wambora & Another*** [2014] eKLR; Application No. 37 of 2014, where the Court (*Tunoi & Njoki SCJJ*) had to solve it before delving into the merit of the substantive application, which was for stay of execution of the Judgment and Order of the Court of Appeal in *Civil Appeal No. 24 of 2014*. After reviewing the issues before the Court, and being mindful of the terms of Article 163(4)(a) of the Constitution, the Court found that the matter was properly before it, as it met the basic jurisdictional threshold. The following passages in the decision are relevant (paragraph 55; 56):

"Did the Courts exceed their jurisdiction by finding the applicants to be in contempt of a Court Order" ***The determination of this question calls for the interpretation and application of the Constitution, which is the criterion of jurisdiction, by the terms of Article 163(4)(a) of the Constitution.***

"We would agree with the applicants' argument, that indeed, ***the issues have transcended the parties as individuals, and crystallized into a conflict involving the interpretation and application of the Constitution, thus falling within the jurisdiction of this Court"*** [emphasis supplied].

[50] Such an expansive scope to the concept of "interpretation and application of the Constitution", thus, *readily grasps different issues of law – such as contempt Orders.* In the present case, too, the law of contempt of Court can hardly be screened from the grasp of "interpretation and application of the Constitution."

(e) Legislative Bodies, and Motions in Progress

[51] To illuminate questions bearing upon the actions of legislative agencies that are still running their course, it is necessary to consider two elements: (i) the scope of the *doctrine of separation of powers*; and (ii) the functioning of the *privileges and immunities of the legislative bodies.*

(i) Separation of Powers

[52] In ***Judicial Service Commission v. Speaker of the National Assembly & 8 Others*** [2014] eKLR, this Court signalled that, by the doctrine of separation of powers, the limits on judicial authority, and the Constitution's design of entrusting certain issues to *other* organs of Government, are vital principles. The Court thus remarked [paragraph 121]:

"The Constitution disperses powers among various constitutional organs. Where it is alleged that any of these organs has failed to act in accordance with the Constitution, then ***the Courts are empowered by Article 165 (3)(d)(ii) to determine whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution"*** [emphasis supplied].

[53] The High Court case, ***Republic v. National Assembly Committee of Privileges & 2 Others*** *ex-parte* ***Ababu Namwamba,*** JR Case No. 129 of 2015, [2016] eKLR, concerned an alleged violation of the Standing Order of the National Assembly, and whether such violation called forth the *Judicial Review jurisdiction* of the Court. *Korir, J.* being satisfied that the actions taken by the National Assembly were procedural and lawful, declined to assume jurisdiction in the matter, holding that *the responsibility devolved to the National Assembly to proceed as it did,* free of any direction from the Court.

[54] Of contrasting profile is another High Court decision, ***James Opiyo Wandayi v. Kenya National Assembly & 2 Others,*** [2016] eKLR, in which the issue was whether the actions of the Speaker, in disciplining the Member of Parliament for Ugunja Constituency, met the threshold of fairness and proportionality, as well as of the discharge of general administrative powers under Article 47 of the Constitution. *Odunga, J.* stayed the decision of the Speaker of the National Assembly, which had *suspended the parliamentarian for the remainder of the session.* He held that the doctrine of separation of powers does not avail, where it *is alleged that the Constitution has been violated*. The applicant's case was that the provisions of the relevant Standing Orders were unconstitutional, to the extent that they did not *meet the threshold of fairness and proportionality* provided for under Article 47 of the

Constitution.

[55] In *Coalition for Reform and Democracy (CORD) & 2 Others v. Republic of Kenya & 10 Others* [2015] eKLR, the High Court examined the extent to which a Court may inquire into the conduct of *parliamentary proceedings.* The Court held that, as Article 165(3)(d) clothed it with powers to *determine the constitutionality of a given act,* the doctrine of separation of powers *does not preclude it from examining acts of the Legislature or the Executive*. The Court thus observed [paragraph 172]:

***"[I]n a jurisdiction such as ours in which the Constitution is Supreme, the Court has jurisdiction to intervene where there has been a failure to abide by Standing Orders which have been given Constitutional underpinning under the said Article. However, the Court must exercise restraint and only intervene in appropriate instances, bearing in mind the specific circumstances of each case"* [emphasis supplied].**

[56] The same principle is reflected in the case of ***Okiya Omtatah & 3 Others v. Attorney General & 3 Others*** [2014] eKLR, in which the High Court thus held [Paragraph 54]:

"Our view is that all organs created by the Constitution must live by the edict of the Constitution."

[57] The Court of Appeal, in the case of *Mumo Matemu v. Trusted Society of Human Rights Alliance & 2 Others,* Civil Appeal No 290 of 2012, [2013] eKLR, adopted the High Court's dicta, in the following terms:

"[Separation of powers] must mean that ***the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy*** *as well as* ***accord the Executive sufficient latitude to implement legislative intent****. Yet, as the respondents also concede,* ***the Courts have an interpretive role – including the last word in determining the constitutionality of all governmental actions..."*** *[emphasis supplied].*

[58] The Supreme Court has also pronounced itself on this issue. In, ***In Re the Matter of the Interim Independent Electoral Commission*** [2011] eKLR, the Court observed [paragraph 54]:

"The effect of the Constitution's detailed provision for the rule of law in the processes of governance, is that ***the legality of executive or administrative actions is to be determined by the Courts, which are independent of the Executive branch.*** *The essence of separation of powers, in this context, is that* ***the totality of governance-powers is shared out among different organs of government,*** *and that* ***these organs play mutually-countervailing roles.*** *In this set-up, it is to be recognized that none of the several governmental organs functions in splendid isolation"* [emphases supplied].

[59] Also quite relevant is this Court's decision in ***Speaker of the Senate & Another v. Attorney General & 4 Others,*** Reference No. 2 of 2013; [2013] eKLR. The Court, in that case, signalled that it would be reluctant to question parliamentary procedures, *as long as they did not breach the Constitution.* In reference to Article 109 of the Constitution, which recognizes that Parliament is guided by *both* the *Constitution* and the *Standing Orders* in its legislative process, the Court thus held [paragraphs 49 and 55]:

"Upon considering certain discrepancies in the cases cited, as regards the respective claims to legitimacy by the judicial power and the legislative policy – each of these claims harping on the separation-of-powers concept – we came to the conclusion that it is a debate with no answer;

and this Court in addressing actual disputes of urgency, must begin from the terms and intent of the Constitution. Our perception of the separation-of-powers concept must take into account the context, design and purpose of the Constitution; the values and principles enshrined in the Constitution; the vision and ideals reflected in the Constitution…

"It is clear to us that it would be illogical to contend that as the Standing Orders are recognized by the Constitution, this Court, which has the mandate to authoritatively interpret the Constitution itself, is precluded from considering their constitutionality merely because the Standing Orders are an element in the 'internal procedures' of Parliament. We would state, as a legal and constitutional principle, that Courts have the competence to pronounce on the compliance of a legislative body, with the processes prescribed for the passing of legislation."

[60] The Court went on to state as follows [paragraph 60]:

"It makes practical sense that the scope for the Court's intervention in the course of a running legislative process, should be left to the discretion of the Court, exercised on the basis of the exigency of each case. The relevant considerations may be factors such as: the likelihood of the resulting statute being valid or invalid; the harm that may be occasioned by an invalid statute; the prospects of securing remedy, where invalidity is the outcome; the risk that may attend a possible violation of the Constitution."

[61] The Supreme Court, however, *cautioned against undue interference with running processes in other arms of Government*. The Court thus pronounced itself [paragraph 61]:

"This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. ***The institutional comity between the three arms of government must not be endangered*** *by the unwarranted intrusions into the workings of one arm by another*" [emphases supplied].

[62] A clear inference to be drawn is that, it was the Supreme Court's stand that no arm of Government is above the law. This being a constitutional democracy, the Constitution is the guiding light for the operations of all State Organs. The Court's mandate, where it applies, is for the purpose of *averting any real danger of constitutional violation.*

[63] From the course of reasoning emerging from such cases, it is possible to formulate certain principles, as follows:

(a) each arm of Government has an obligation to recognize the independence of other arms of Government;

(b) each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate;

(c) the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment;

(d) for the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case;

(e) in the performance of the respective functions, every arm of Government is subject to the law.

(ii) Legislative Bodies: Privileges and Immunities

[64] It lends live context to the foregoing propositions to recall the candid perception of a distinguished justice of the Supreme Court of the United States, Ruth Bader Ginsburg [in her article, "Speaking in a Judicial Voice," in ***New York University Law Review,*** Vol. 67 (1992), 1185, at p. 1186]:

"…the effective judge, I believe… strives to persuade, and not to pontificate. She speaks in 'a moderate and restrained' voice, engaging in a dialogue with, not a diatribe against, co-equal departments of government, state authorities, and even her own colleagues."

[65] Article 196 of the Constitution requires Parliament to enact legislation to provide for the privileges and immunities of County Assemblies, their committees and members. Pursuant to this provision, Section 17 of the County Governments Act, 2012 (Act No. 17 of 2012) thus provides:

"The national law regulating the powers and privileges of Parliament shall, with the necessary modifications, apply to a county assembly."

[66] The National Assembly (Powers and Privileges) Act (Cap. 6, Laws of Kenya) (now repealed, pursuant to the enactment of Parliamentary Powers and Privileges Act, 2017 (Act No. 29 of 2017) which came into force on 16th August, 2017) provided under Section 4 (now Section 12 of the Act) for immunity of Members of Parliament from legal proceedings, in the following terms:

"No civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to, the Assembly or a committee, or by reason of any matter or thing brought by him therein by petition, Bill, resolution, motion or otherwise."

[67] Section 12 of the same Act provided, in relation to the questioning of Parliamentary proceedings in a Court of law, as follows:

"No proceedings or decision of the Assembly or the Committee of Privileges acting in accordance with this Act shall be questioned in any court."

[68] Further protection was conferred upon the Speaker and the officers of the Assembly, under Section 29 of the National Assembly (Privileges and Immunities) Act, in the following terms:

"Neither the Speaker nor any officer of the Assembly shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on, or vested in the Speaker or such officer by, or under this Act or the Standing Orders."

[69] Similarly, under the current regime, Section 12 of the Act thus provides:

"(2) No civil suit shall be commenced against the Speaker, the leader of majority party, the leader of minority party, chairpersons of committees and members for any act done or ordered by them in the discharge of the functions of their office.

"(3) The Clerk or other members of staff shall not be liable to be sued in a civil court or joined in any civil proceedings for an act done or ordered by them in the discharge of their functions relating to proceedings of either House or committee of Parliament."

[70] In ***Canada (House of Commons) v. Vaid,*** [2005] 1 S.C.R. 667; 2005 SCC 30, the Canadian Supreme Court thus observed, with respect to Parliamentary privileges:

"Within categories of privilege, Parliament is the judge of the occasion and manner of its exercise and such exercise is not reviewable by the courts. A finding that a particular area of parliamentary activity is covered by privilege therefore has very significant legal consequences for Members who claim to be injured by parliamentary conduct."

The Court observed further as follows:

"[I]t was a good principle that the Courts and Parliament strive to respect each other's role in the conduct of public affairs. Parliament, for its part, refrains from commenting on matters before the courts under the *sub judice* ***rule. The courts, for their part, are careful not to interfere with the workings of Parliament."***

[71] Such insight from comparative case law is amplified in Guy F. Sinclair's work of scholarship ["Parliamentary Privilege and the Polarization of Constitutional Discourse in New Zealand", in ***Waikato Law Review***, Vol.14], as follows:

"[T]he dominant principle with respect to parliamentary privilege is that certain matters fall within Parliament's exclusive sphere of jurisdiction, and that the courts should exercise restraint to ensure that their proceedings do not stray into that sphere. This principle of 'exclusive cognizance' is widely supported. The UK Joint Committee describes freedom of speech as only 'one facet of the broader principle that what happens within Parliament is a matter for control by Parliament alone', and states that the courts have 'a legal and constitutional duty to protect freedom of speech and Parliament's recognised rights and immunities' but no 'power to regulate and control how Parliament shall conduct its business'."

[72] Another relevant example from comparative jurisprudence is ***Harvey v. New Brunswick (Attorney General),*** [1996] 2 S.C.R. 876. The appellant who had been expelled from the Legislature, on account of having been convicted of an election offence, challenged the requirement that he should vacate his seat. The Supreme Court of Canada, in dismissing the appeal, thus held:

"The courts may review an act or ruling of the legislature to determine whether it properly falls within the domain of parliamentary privilege. If it does not, they may proceed with Charter review. If it does, they must leave the matter to the legislature.

"Expulsion from the legislature of members deemed unfit is a proper exercise of parliamentary privilege. It is clear that had the New Brunswick legislature simply expelled the appellant, that decision would fall squarely within its parliamentary privilege and the courts would have no power to review it."

(iii) The Law and the Facts

[73] On 16th January, 2014, the Speaker of the County Assembly of Embu received a motion from one of the members of the County Assembly who was seeking the removal of Governor, Martin Nyaga Wambora, from office on grounds of alleged violations of the relevant laws, and abuse of office. *The members of the County Assembly were notified of the said motion on the same day, and thereafter the motion was published on the Order paper after expiry of the requisite period, in terms of the Standing Orders; and it was allocated for discussion on 23rd January, 2014.* Being *apprehensive* that the process

would not be fair, Governor Wambora moved the Court under certificate of urgency, seeking *conservatory Orders to stop the impending impeachment proceedings*. He sought the following Orders:

(a) a declaration that the notice of motion for the removal of him and the Deputy Governor from office, scheduled to be debated on 23rd January, 2014, was in contravention of Articles 10, 35, 47, 50 and 196 of the Constitution;

(b) issuance of Orders of certiorari, to quash any resolution such as may be made by the 1st, 2nd and 3rd respondents, in relation to the removal of the 1st petitioner and the Deputy Governor from office, under the motion tabled in the County Assembly on 16th January, 2014 or thereabouts;

(c) issuance of an Order prohibiting the 4th respondent from convening the Senate to hear charges against the 1st petitioner and the Deputy Governor, as called for by the motion tabled in the County Assembly on 16th January, 2014;

(d) a declaration that the 1st, 2nd and 3rd respondents (the appellants herein), and the Attorney-General, are in violation of the principles of natural justice, and of the separation of powers, in relation to the 1st petitioner and the Deputy Governor;

(e) a declaration that any such motion as may be passed, relating to the removal of the 1st petitioner and the Deputy Governor, on the basis of the motion tabled on the 16th January, 2014, was null and void.

[74] The matter came up before *Githua, J.* on 23rd January, 2014, with *ex parte* conservatory Orders being granted, restraining the Speaker of the County Assembly and the County Clerk, from conducting any impeachment proceedings without first serving the applicant with notice of specific grounds/charges upon which the impeachment was being proposed, and without giving him an opportunity to be heard.

[75] Notwithstanding the conservatory Order, the County Assembly proceeded with its sittings as scheduled, and on 28th January, 2014, approved a motion impeaching the Governor and Deputy Governor. Thereafter, Martin Nyaga Wambora filed *Misc. Application No. 4 of 2014,* against ***Justus Kariuki Mate*** and ***Jim G. Kauma,*** seeking that they be held to have been in contempt of Court, *for allowing the impeachment motion to proceed*.

[76] The constitutional mandate to impeach a Governor is duly assigned to the *County Assembly* and the *Senate.* Article 181 defines the circumstances under which a county Governor may be removed from office, as follows:

"(***1) A county governor may be removed from office on any of the following grounds""***

(a) gross violation of this Constitution or any other law;

(b) where there are serious reasons for believing that the county governor has committed a crime under national or international law;

(c) abuse of office or gross misconduct; or

(d) physical or mental incapacity to perform the functions of office of county governor.

"(2) Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds specified in clause (1)".

[77] In line with the terms of Article 181(2) above, Parliament duly enacted the County Governments Act, 2012 (Act No. 17 of 2012), which lays down the procedure for removal of a Governor. Section 33 of that enactment thus provides:

"Removal of a governor

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

" (2) If a motion under subsection (1) is supported by at least two-thirds of all the members of the county assembly—

(a) the speaker of the county assembly shall inform the Speaker of the Senate of that resolution within two days; and

(b) the governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section.

"(3) Within seven days after receiving notice of a resolution from the speaker of the county assembly—

(a) the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the governor; and

(b) the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.

"(4) A special committee appointed under subsection (3)(b) shall—

(a) investigate the matter; and

(b) report to the Senate within ten days on whether it finds the particulars of the allegations against the governor to have been substantiated.

"(5) The governor shall have the right to appear and be represented before the special committee during its investigations.

"(6) If the special committee reports that the particulars of any allegation against the governor—

(a) have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or

(b) have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the impeachment charges.

"(7) If a majority of all the members of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.

"(8) If a vote in the Senate fails to result in the removal of the governor, the Speaker of the Senate shall notify the speaker of the concerned county assembly accordingly and the motion by the assembly for the removal of the governor on the same charges may only be re-introduced to the Senate on the expiry of

three months from the date of such vote.

"(9) The procedure for the removal of the President on grounds of incapacity under Article 144 of the Constitution shall apply, with necessary modifications, to the removal of a governor.

"(10) A vacancy in the office of the governor or deputy governor arising under this section shall be filled in the manner provided for by Article 182 of the Constitution" [emphases supplied].

[78] The detailed mode of discharge of County Assembly business is not defined in the foregoing provisions, but in the Standing Orders. We have examined the content of the County Assembly of Embu Standing Orders, so as to apprehend the particulars of the design of impeachment proceedings. Particularly relevant in this regard is Standing Order No. 61, which provides as follows:

"Procedure for removal of Governor by impeachment

"*(1) Before giving notice of motion under section 33 of the County Governments Act, No. 17 of 2012* ***the member shall deliver to the Clerk a copy of the proposed Motion in writing stating the grounds and particulars upon which the proposal is made,*** *for the impeachment of the Governor on the ground of a gross violation of a provision of the Constitution or of any other law; where there are serious reasons for believing that the Governor has committed a crime under national or international law; or for gross misconduct or abuse of office. The notice of Motion shall be signed by the Member who affirms that the particulars of allegations contained in the motion are true to his or her own knowledge and the same verified by each of the members constituting at least a third of all the members and that the allegations therein are true of their own knowledge and belief on the basis of their reading and appreciation of information pertinent thereto and each of them sign a verification form provided by the Clerk for that purpose.*

"(2) The Clerk shall submit the proposed Motion to the Speaker for approval.

"(3) A member who has obtained the approval of the Speaker to move a Motion under paragraph (1) shall give a seven (7) days notice calling for impeachment of the Governor.

"(4) Upon the expiry of seven (7) days, after notice given, the Motion shall be placed on the Order Paper and shall be disposed of within three days; *Provided that if the County Assembly is not then sitting, the Speaker shall summon the Assembly to meet on and cause the Motion to be considered at that meeting after notice has been given.*

"(5) When the Order for the Motion is read, the Speaker shall refuse to allow the member to move the motion, unless the Speaker is satisfied that the member is supported by at least a third of all Members of the County Assembly to move the motion; Provided that within the seven days' notice, the Clerk shall cause to be prepared and deposited in his office a list of all Members of the County Assembly with an open space against each name for purposes of appending signatures, which list shall be entitled "SIGNATURES IN SUPPORT OF A MOTION FOR REMOVAL OF GOVERNOR BY IMPEACHMENT".

"(6) Any signature appended to the list as provided under paragraph (5) shall not be withdrawn.

"(7) When the Motion has been passed by two-thirds of all members of the County Assembly, the Speaker shall inform the Speaker of the Senate of that resolution within two days" [emphases added].

[79] It is quite clear that a constitutional mandate, *which embodies the remit of impeachment,* vests in a

County Assembly. From the facts of this case, it has not been represented that the Speaker or the Clerk of the County *Assembly bypassed any of the procedural steps applicable to impeachment proceedings*. It is a fact that a motion for impeachment of the Embu Governor was moved on 16th January, 2014. Now once this was done, in accordance with Standing Order No. 61, discussion upon the motion was to take place upon the expiry of seven days, the matter being disposed of within three days. It is noteworthy that the relevant Standing Orders are silent, on notification to the Governor of such a call for impeachment (though there are provisions for an impeached Governor to be heard in Senate). The said Standing Orders bear no provision on how the Governor should participate in the process, or defend himself before the County Assembly. Such a procedural setting, however, was not challenged, even though a conservatory Order was issued *stopping a County Assembly from performing its prescribed constitutional mandate*. Over and above the conservatory Order, the Speaker and the Clerk of the Assembly were held to be in contempt, the High Court thus proclaiming [paragraph 279]:

"We therefore find that the Speaker of County Assembly of Embu…was the person in a position to ensure that the Court Order was obeyed, given his role in the County Assembly. We have found that he allowed the motion, proposing the removal of the Governor from office to be debated and passed on 28th January, 2014, without complying with the Court Order. Accordingly, we find that the 5th respondent, Mr. Julius [sic] Kariuki Mate and the Clerk of the County Assembly of Embu Mr. Jim Kauma acted in disobedience of Court Orders and are therefore guilty of contempt of court."

[80] Be it restated that the Court's word is the people's solemn edict calling for obedience; but it is precisely the sanctity of that word, that dictates utmost care, focus and assiduity, in the Judge's undertaking. The context is set out in the Judgment of *Romer LJ* in ***Hadkinson v. Hadkinson*** [1952] 2 All ER 567:

"It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."

[81] To the same effect, the Judicial Committee of the Privy Council, in ***Isaacs v. Robertson*** [1984] 3 All ER 140 remarked that, in no case had it been held that *"any order of a court of unlimited jurisdiction [falls] in a category of court orders that can simply be ignored because they are void* ***ipso facto*** *without there being any need for proceedings to have them set aside."*

[82] Comparative judicial experience gives yet another classic pronouncement of the same point: ***M v. Home Office and Another*** [1992] 4 All ER 97 in the following terms:

"An order which is made by a court with unlimited jurisdiction is binding unless and until it is set aside. Common sense suggests that this must be so. Were it otherwise court orders would be consistently ignored in the belief, sometimes justified, that at some time in the future they would be set aside. This would be a recipe for chaos."

[83] While bearing in mind such precious caution for sustaining judicial authority, we have addressed our minds to the uniqueness of the instant case, which is embodied in the express terms of a comprehensive, newly-formulated constitutional document: especially the fact that it bears express terms on the separation of powers. Interpretation of the Constitution calls for a delicate balance in the respective mandates of the different arms of government. While such refinements in the reserved governmental mandates had not elicited focussed assessment at the High Court, *ex parte* conservatory Orders were made: the effect being to hamstring the due performance of the constitutional mandate of

the County Assembly. Notwithstanding the conventional judicial perception of ultimacy in judicial Orders, a question remains: what is the tenability of such Orders that directly abrogate the discharge of commanded legislative-agency process"

[84] From the facts of this case, it is clear to us that the integrity of Court Orders stands to be evaluated in terms of their inner restraint, where the express terms of the Constitution allocate specific mandates and functions to designated agencies of the State. Such restraint, in the context of express mandate-allocation under the Constitution, is essential, as a scheme for circumventing conflict and crisis, in the discharge of governmental responsibility. No governmental agency should encumber another to stall the constitutional motions of the other. The best practices from the comparative lesson, signal that the judicial organ must practice the greatest care, in determining the merits of each case.

(f) Constitutional Timelines: Are these amenable to Court Changes"

[85] It was the petitioners' case that it was not tenable under the Constitution for a Court to vary the sequential flow of a legislative process that was already defined in its time-frame. They urged that the removal process for a Governor in office has to be conducted within laid-down timelines, and that the High Court had not been guided by the principles and objects of devolution, as provided for in Articles 174 and 175 of the Constitution. Exactly *seven days* from the date of filing a motion for impeachment of the Governor, the County Assembly Speaker was required to take the next step. The petitioner submitted that the Speaker had been torn between his *obligation under the Constitution*, on the one hand, and the terms of the *High Court Order,* on the other hand – a situation of dilemma.

[86] The petitioners relied on *past decisions*, including those of the comparative experience: ***Mumo Matemu v. Trusted Society of Human Rights Alliance,*** Civil Appeal No. 290 of 2012; ***Doctors for Life International v. Speaker of the National Assembly and Others,*** CCT 12/05, [2006] ZACC11; ***National Coalition for Gay & Lesbian Equality & 13 Others v. Minister for Home Affairs and 2 Others,*** CCT 10/99 – urging that Parliament's functions and processes must be allowed to run through to completion, before the jurisdiction of the Courts can be properly invoked.

[87] The respondents took the reverse stand: urging that, in any society founded upon the rule of law*, Court Orders are to be obeyed*. They submitted that the petitioners ought to have moved the Court to set aside the relevant Order, if they perceived it as unconstitutional.

[88] This Court had the opportunity, in ***Raila Odinga and 5 Others v. Independent Electoral and Boundaries Commission and 3 Others***, [2013] eKLR, to consider the question of *constitutional timelines*. The Court held that timelines of the Constitution were of mandatory character, *even where Court process itself was the subject* [paragraph 209]:

"The Supreme Court's jurisdiction is also limited in time-span. A petition contesting the election of a President does not set off an open-ended course of litigation without time-frames. The applicable time-frame, within which any challenge to the election must be filed, served, heard and determined, is prescribed in the Constitution…."

[89] The Court of Appeal affirmed the status of constitutional timelines in ***Ferdinand Waititu v. Independent Electoral and Boundaries Commission (IEBC) & Others,*** Civil Appeal No. 137 of 2013 *(Mwera, Musinga and Kiage JJA)* in the following terms:

"*These timelines set by the Constitution and the Elections Act are neither negotiable* ***nor can they be extended by any Court for whatever reason.*** *It is indeed the tyranny of time, if we may call it so. That*

means a trial Court must manage the allocated time very well so as to complete a hearing and determine an election petition timeously" [emphasis supplied].

[90] All the indications, from the stand of the superior Courts, are that *expressly-prescribed constitutional time-frames are binding on the governance processes in place.* Even though our specific examples are drawn only from the Constitution's scheme of *electoral justice*, they nonetheless bear a wider signal, regarding *time,* as it must direct the various agencies of the State.

[91] Such a time-perception, therefore, has a clear relevance to the instant matter. A seven-day time-frame is provided for in Standing Order No. 61 of the County Assembly of Embu Standing Orders, which defines the *'procedure for removing the Governor by impeachment',* in these terms:

"(3) A member who has obtained the approval of the Speaker to move a Motion under paragraph (1) shall give a seven days' notice calling for impeachment of the Governor.

"(4) Upon the expiry of seven days, after notice is given, the Motion shall be placed on the Order Paper and shall be disposed of within three days; *Provided that if the County Assembly is not then sitting, the Speaker shall summon the assembly to meet… and cause the Motion to be considered at that meeting after notice has been given…."* [emphasis supplied].

[92] 'Standing Orders', all by themselves, by no means rest at the direct level of the Constitution, or indeed, the statute law. Even though Standing Orders certainly guide the *constitutional functioning of the legislature*, we still find it necessary to consider their constitutionality or otherwise. A relevant example is this Court's decision in the Senate matter, in which the following passage appears:

"It is clear to us that it would be illogical to contend that [though] the Standing Orders are recognized by the Constitution, this Court, which has the mandate to authoritatively interpret the Constitution itself, is precluded from considering their constitutionality merely because the Standing Orders are an element in the 'internal procedures' of Parliament. *We would state, as a legal and constitutional principle, that Courts have the competence to pronounce on the compliance of a legislative body, with the processes prescribed for the passing of legislation"* [emphasis supplied].

[93] However, the Standing Orders, the individual merits of which were not contested, may be said to be properly coalesced in the constitutional scheme of *legislative functions*, and thus, to constitute an organic framework for the legislative agency's operations, on the basis of all available information.

[94] The effect is that, a methodical and conscientious inquiry would show the County Assembly to have been operating quite properly, within the constitutional scheme of devolution, and running its legislative processes within the ordinary safeguards of the separation of powers – and consequently, quite legitimately *outside the path of the ordinary motions of the judicial arm of State.* On that basis, there would have been hardly any scope for the deployment of the Court's *conservatory Orders* – more particularly without *first hearing the petitioners*.

[95] It is our understanding that the *exceptional circumstance* of this case, with a complex scenario of justiciabilities from contrasted standpoints, would lend justification to the non-effectuation of contempt Orders at the beginning; and consequently, we would accommodate the reality of there not having been immediate compliance, as would otherwise be required.

V. ORDERS

[96] Consequently, our Orders shall be as follows:

(a) ***The petition of appeal dated 2nd October, 2014 is hereby upheld.***

(b) ***The Conservatory Orders issued on 23rd January, 2014 in Kerugoya Petition No. 3 of 2014 (formerly Embu Petition No. 1 of 2014), are hereby annulled.***

(c) ***The Judgment and Order of the Court of Appeal delivered on 30th September, 2014 in*** Civil Appeal No. 24 of 2014 ***is hereby set aside.***

(d) ***Each party to bear own cost.***

DATED and **DELIVERED** at **NAIROBI** this 15th day of **December,** 2017.

…….. ……..

M. K. IBRAHIM **J. B. OJWANG**

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

…….. ……..

S. C. WANJALA **NJOKI NDUNGU**

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

……..

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA