



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**PETITION NO. E045 OF 2021**

**IN THE MATTER OF ARTICLES 2, 3, 3(1), 10, 19, 22, 23, 33, 36, 38, 41, 47, 179 AND 232(1) OF THE CONSTITUTION  
OF KENYA**

**AND**

**IN THE MATTER OF THE EMPLOYMENT ACT, NO. 7 OF 2007**

**AND**

**IN THE MATTER OF COUNTY GOVERNMENTS ACT NO. 17 OF 2012**

**AND**

**IN THE MATTER OF THE STANDING ORDERS OF NYERI COUNTY ASSEMBLY**

**BETWEEN**

**HON. CAROLINE WANJIRU KARUGU.....PETITIONER/APPLICANT**

**VERSUS**

**NYERI COUNTY SECRETARY.....1<sup>ST</sup> RESPONDENT**

**NYERI COUNTY GOVERNOR.....2<sup>ND</sup> RESPONDENT**

**NYERI COUNTY ASSEMBLY.....3<sup>RD</sup> RESPONDENT**

**THE SPEAKER, NYERI COUNTY ASSEMBLY.....4<sup>TH</sup> RESPONDENT**

**THE CLERK, NYERI COUNTY ASSEMBLY.....5<sup>TH</sup> RESPONDENT**

**NYERI COUNTY GOVERNMENT.....6<sup>TH</sup> RESPONDENT**

**RULING**

1. The Petitioner/Applicant is the Deputy Governor of the 6<sup>th</sup> Respondent County numbered No. 19 in the Republic of Kenya. By her Notice of Motion dated 6<sup>th</sup> October 2021, the Claimant/Applicant seeks the following reliefs:

a. *Spent*

b. Pending the hearing and determination of this Notice of Motion, a restraining injunction Order do issue, prohibiting the 3<sup>rd</sup> Respondent, by its members, or by the 2<sup>nd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Respondents and/or any person acting under their behest and direction, from deliberating upon, debating, tabling for debate, making any decision upon, putting to a vote, passing any Resolution thereon, or otherwise howsoever determining a Motion for impeachment of Hon. Caroline Wanjiru Karugu, based on the undated Public Petition date stamped 22<sup>nd</sup> September 2021, purporting to be a Motion for the removal of the Claimant herein Hon. Caroline Wanjiru Karugu, as the Nyeri County Deputy Governor ostensibly under Article 181(1)(a), (b), and (c) of the Constitution of Kenya.

c. Pending the determination of the suit herein, Pending the hearing and determination of this Notice of Motion, a restraining injunction Order do issue, prohibiting the 3<sup>rd</sup> Respondent, by its members, or by the 2<sup>nd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Respondents and/or any person acting under their behest and direction, from deliberating upon, debating, tabling for debate, making any decision upon, putting to a vote, passing any Resolution thereon, or otherwise howsoever determining a Motion for impeachment of Hon. Caroline Wanjiru Karugu, based on the undated Public Petition date stamped 22<sup>nd</sup> September 2021, purporting to be a Motion for the removal of the Claimant herein Hon. Caroline Wanjiru Karugu, as the Nyeri County Deputy Governor ostensibly under Article 181(1)(a), (b), and (c) of the Constitution of Kenya.

2. In support of the said Motion, the Claimant relies on the averments set out her Supporting Affidavit sworn on the said 6<sup>th</sup> October 2021, as well as the grounds on the face of the said Notice of Motion. The Claimant submits that the following issues fall for determination given the applications before the Court

- 1) Whether this Honourable Court is vested with jurisdiction to grant the Claimant's relief set out in her Amended Claim.
- 2) Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have been sued in their personal capacities in these proceedings;
- 3) Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents should be struck out of these proceedings.
- 4) Whether the impeachment proceedings initiated against the Claimant by way of an undated Public Petition as complained of in the Motion dated 6<sup>th</sup> October 2021 by the Claimant interferes with the Claimant's rights to a fair trial in these proceedings under Article 25(c) of the Constitution of Kenya,
- 5) Whether the said undated Public Petition before the 3<sup>rd</sup> Respondent should be stayed pending the hearing and determination of the Amended Petition herein, on account of its implication on the Claimant's right to access Justice under Article 48 of the Constitution of Kenya.
- 6) Whether the Claimant's Notice of Motion dated 6<sup>th</sup> October 2021 should be granted.
- 7) Who is to bear the costs of the 2 applications.

3. It was submitted for the Claimant that it is not disputed that the 3<sup>rd</sup> Respondent has received an undated "Public Petition" seeking the removal of the Claimant by impeachment from the Constitutional office and position of Nyeri Deputy Governor which is date stamped as received at the Council of Governor's office on 22<sup>nd</sup> September 2021. The Claimant submits that as at the time the Claim was lodged, there was NO such Public Petition before the Nyeri County Assembly seeking the impeachment of the Claimant from her office as Nyeri County Deputy Governor and that it can only be surmised that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondent's entertaining of the said Public Petition against the Claimant herein and deciding the same, her right to seek justice under Article 48 of the Constitution will be impaired and ultimately curtailed. The Claimant submits that this is counter the objectives of the judicial policy set out in both Article 159(1) and 50(I) of the Constitution of Kenya. The Claimant submits that the Court ought to grant the reliefs sought in order to protect the integrity of these proceedings and preserve the *status quo*. She submits that there is jurisdiction to adjudicate on the Claimant's case as the Court's jurisdiction derives from the Constitution to adjudicate on all matters of employment and labour relations. The Claimant submits she is an employee of the people of Nyeri County under the Nyeri County Government and she does so under a paid salary, not on gratuitous terms. She cites the case of **International Centre for Insect Physiology and Ecology**

(ICIPE) v Nancy McNally [2018] eKLR where it was held as follows:

*“There cannot be any argument that the ELRC is clothed with jurisdiction to hear and determine such constitutional issues as and when they arise from employment and labour relations. Any doubts on that jurisdiction were settled in the case of United States International University (USIO) v Attorney General [2012] eKLR which was upheld by this Court in Daniel N. Mugendi Vs Kenyatta University & 3 Others [2013] KLR.”*

The Claimant submits that the constitutional and statutory underpinnings of her office none of which have been ousted, or challenged by the Respondents should be enforced by this Court. She submits that her employment is governed by the provisions of the Employment Act, 2007 where necessary. Further, she cites the case of **Okiya Omtatah Okoiti v The Hon. Attorney General; and Ambassador Francis Muthaura & Others (interested parties) [2019] eKLR** has held that when a dispute such as lodged by the Claimant herein relates to employment and/or labour relations, this is the *forums conveniens*, and not any other Court. The Court in the **Okiya Omtatah Okoiti v The Hon. Attorney General; and Ambassador Francis Muthaura & Others** case held:

*“The Court has held that public officers are servants of the people and are engaged or employed within a framework of constitutional and statutory provisions as well as lawful policies and practices. The Court finds that the dispute relates to employment of public officers as defined in the Constitution and further relates to applicable constitutional and statutory provisions or lawful policies and practices in that regard and the dispute is clearly within the Court's jurisdiction.”*

4. The Claimant has invoked Article 27(1) of the Constitution of Kenya to the protection of the law as she is lawfully entitled to her salary and benefits as the Nyeri County Deputy Governor, and as no process of impeachment has been lodged against her, there is no justifiable reason for the actions of the Respondents to withhold her salary. Under the Amended Statement of Claim, the Claimant raises the issue of her launched impeachment as the Nyeri Deputy Governor. She submits that such is plainly, and constitutes a disciplinary process for removal from office which in turn comprises a human resource function undertaken within the relevant Constitutional and Statutory provisions conferring jurisdiction on this Court to decide such a dispute as a labour relations dispute. The Claimant submits that these provisions invoked in the Public Petition before the 3<sup>rd</sup> Respondent herein deal with the removal of a Governor from office by way of impeachment. The Claimant asserts that removal from office is unquestionably cessation from employment. It directly implicates the labour relations of the Claimant as Nyeri County Deputy Governor. In a similarly raised objection, which was dismissed, this Court per Ongaya J. stated in the case of **Mike Sonko Mbuvi Gideon Kioko v Clerk, Nairobi City County Assembly & 4 Others [2020] eKLR**:

*“Article 260 of the Constitution states that “public office” means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament. Thus whereas under the Article, “public service” means the collectively of all individuals, other than state officers, performing a function in a state organ, by definition of public office, state officers equally hold a public office and qualify as public officers. Accordingly, the Court finds that the justiciability of the present petition alleging unconstitutional and illegal impeachment process is properly anchored on Article 236 of the Constitution on protection of public officers. The Article provides that a public officer shall not be:*

*a) victimised or discriminated against for having performed the functions of office in accordance with the Constitution or any other law; or*

*b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.*

*The Court considers that the petitioner's case is based on Article 236 (b) thereof and he was entitled to invoke the Court's jurisdiction. The Court further returns that as submitted for the petitioner, issues of constitutionality and legality of the impeachment process are justiciable and fall within the determination by the Court. While making that finding the Court considers that it should be obvious that where it is alleged that in the process of impeachment as prescribed in the Constitution, statutes and standing orders is proceeding unlawfully or unconstitutionally in any particular case, it should be possible for the aggrieved person to move the Court for appropriate remedies such as declarations and judicial review remedies.” [emphasis added]*

The Claimant submits that this Court's jurisdiction is residual for the judicial exercise of authority in protection of the law as a Constitutional right under Article 27(1) of the Constitution of Kenya. Reliance is placed in the case of **Council of County Governors v Lake Basin Development Authority & 6 Others [2017] eKLR**, where Mativo J. held while dismissing a similar preliminary objection thus:

*"26. On principle it seems to me that in general a Court is bound to entertain proceedings that fall within its jurisdiction. Put differently, a court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Jurisdiction is*

*determined on the basis of pleadings and not the substantive merits of the case."*

5. In a similar objection as well in the case of, **Beatrice Kedeveresia Elachi v Nairobi City County Assembly Service Board & Another [2019] eKLR** Onyango J. held:

*"This Court is a court established under section 4(1) of the Employment and Labour Relations Court Act pursuant to Article 162(2) of the Constitution, and has the same status as the High Court. Under Article 165(3)(b), the High Court has the jurisdiction to determine whether the question of a right or fundamental freedom has been denied, violated, infringed or threatened. Article 165(5) however restricts the jurisdiction of the High Court as set out under Article 165(3) where such matters fall within the jurisdiction of this court or the Environment and Land Court. Thus where a question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened in relation to employment and labour relations, this court has jurisdiction. In the case of United States International University (USIU) v Attorney General [2012] KLR, Majanja ) held:*

*"Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in section 12 of the Industrial Court Act, 2011 or to interpret the Constitution would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court."*

*However, this Court takes notice of the fact that the matter before it is not ordinary in nature as it regards an interrogation into the decision of another body of the government deemed to be independent and whose members enjoy parliamentary privilege and immunity. Going hand in hand with the doctrine of separation of powers is the doctrine of checks and balances by which the various arms of the government interrogate the operations of the other arms with the aim of ensuring that those organs operate within the ambit of the Constitution and the law. Consequently, judicial authority must be exercised cautiously, judiciously and on a case by case basis as was held in the case of Coalition for Reform and Democracy (CORD) & 2 Others Vs. Republic of Kenya & 10 [SUPRA].*

*I thus find that this Court has the jurisdiction to hear this matter as it involves an alleged gross violation of the Constitution and the Petitioner's rights to employment as a Speaker of the County Assembly of Nairobi. The Court cannot then turn a blind eye to these allegations while hiding under the justification of the doctrine of the separation of powers. The Petitioner has moved this Court vide the relevant constitutional provisions and in particular Article 22 which grants such an individual the power to move this Court where they claim their right or fundamental freedom has been infringed upon or is threatened. The violations in question go to the root of Article 50(2) of the Constitution which requires an individual to be given a fair hearing and Article 47 which provides for fair administrative action. Both rights are non-derogable. As such, this Court in exercising its judicial authority must only and intends to confine its jurisdiction to interrogating the Respondents' procedures and operations to the extent of their purported infringement of the Petitioner's rights vis-à-vis its constitutional and legislative mandate. This does not translate to a judicial repeal in my view." [emphasis added]*

The Claimant cited the decision of Mativo J. in the case of **Apollo Mboya v Attorney General & 2 Others [2018] eKLR** where the learned Judge held that the judiciary has a Constitutional role to intervene and arrest an unconstitutional and illegal action. He stated thus:

*"64. Under both constitutional and administrative law, the courts possess supervisory jurisdiction over the exercise of executive power and also has power to determine constitutionality of legislation and decisions made by Parliament. When carrying out judicial review of administrative action, the court scrutinizes the legality and not the substantive merits of an act, or decision made by a public authority under the three broad headings of illegality, irrationality and procedural impropriety. In jurisdictions which have written constitutions like ours, the courts also assess the constitutionality of legislation, executive actions and governmental policy. Therefore, part of the role of the judiciary is to ensure that public authorities act lawfully and to serve as a check and balance on the government's power." [emphasis added]*

The Claimant thus submitted that from the foregoing the grant of the relief sought should ensue with attendant dismissal of the Respondent's notice of motion as well as the preliminary objection raised herein.

6. In response to the application by the Claimant/Applicant, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed *inter alia* a notice of preliminary objection to the effect that:-

a. It is only the High Court sitting as an election court that has jurisdiction to hear and determine a case in respect of impeachment proceedings of a Deputy Governor.

b. This Honourable Court has no supervisory jurisdiction under Article 165(6) of the Constitution over County Assemblies.

c. The application is without merit, misconceived and is a gross abuse of the court process.

In support of the Notice of Preliminary Objection dated 18<sup>th</sup> October 2021, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' filed skeleton submissions. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the Claimant has unnecessarily dragged the Governor in these proceedings by purporting to seek an injunction to prohibit the County Assembly of Nyeri acting at the behest of the Governor from deliberating upon debating, tabling and making a decision on impeachment motion against her. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submit that this Motion is a gross abuse of the court process since the Claimant understands the Governor has no powers or authority under the law to direct the County Assembly on what to do. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submit that the Governor is not one of the persons who filed the public petition and clearly dragging him in these proceedings is an abuse of the court process which should not be countenanced. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submit that it is trite that court orders are not issued in vain. An order must be justified and must serve a useful purpose to be issued against any party. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submit that in terms of jurisdiction, it is only the High Court sitting as an election court that has powers to hear and determine a case in respect of impeachment proceedings of a Deputy Governor. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents assert these submissions find support in holding by Korir J. in **Charity Kaluki Ngilu v County Assembly of Kitui & 2 Others [2020] eKLR** as follows:

*"Before I issue the final orders, I wish to observe that impeachment of a governor is akin to an election petition. It would therefore be advisable that any person desirous of filing a court case in respect of an impeachment process should approach the High Court within the County in which the impeachment is taking place. Where there is no High Court in the county, then the nearest High Court should be approached. I say so because it is important for the residents of the affected county to have access to the Court where such proceedings are taking place."*

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submit that the Claimant therefore ought to file her case in respect of impeachment process before Nyeri High Court for hearing and determination as the Employment and Labour Relations Court has no jurisdiction to hear and determine disputes as the one presented before this court whose effect is to remove an elected deputy governor from a state office. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submit that the argument that the impeachment proceedings are meant to remove the Claimant from employment is not valid in light of the fact that NO impeachment proceedings have been commenced against the Claimant in terms of Section 33 of the County Governments Act and that it is therefore premature to move this court.

7. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents were joined to these proceedings by the Claimant by way of the application dated 6<sup>th</sup> October 2021 and which now seeks various interlocutory reliefs against them jointly and severally. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents assert that prayers 2 and 3 of the Notice of Motion dated 6<sup>th</sup> October 2021 seek a restraining injunction to issue prohibiting the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents from deliberating upon, tabling for debate, making any decision upon or in any way processing the public petition made to the County Assembly of Nyeri on the conduct of the Deputy Governor and seeking the assembly's investigation and discussion on the same, while prayer 4 seeks an injunction against any purported decision to impeach the Claimant from the office of Deputy Governor. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents opposed the application by way of the replying affidavit of Jenard Mwiggeh, the Clerk of the County Assembly of Nyeri and contend that the same has no merit and is liable for dismissal. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit that the application is speculative and devoid of any basis in the law and the available facts for reason that it anticipates a removal process of the Deputy Governor, which is non-existent and illusory. It proceeds from the premise that the County Assembly of Nyeri has commenced a removal process of the Claimant and which claim has no basis on the evidence submitted to the court. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit that this is an alarmist application that purports to impress urgency on the court's part by deliberately misrepresenting the factual basis upon which it is made and in this case, we submit that the court was misled to believe that the county assembly has initiated a petition for the removal of the petitioner, a claim that is both untrue and misleading. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit that this court has no jurisdiction to hear any claim against them by the Claimant. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit that Article 162 of the Constitution of Kenya empowered Parliament to establish Courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and environment and land and determine jurisdiction of those Courts. As a consequence, Parliament enacted the Employment and Labour Court Act (No. of 2012) where Section 12 thereof provides for the jurisdiction of that Court. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit that Section 12(1), provides

this court with jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of the Act or any other written law which extends jurisdiction to that Court relating to employment and labour relation including - disputes relating to or arising out of employment between an employer and an employee. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit that the Act defines an "employee" as a person employed for wages or salary, and an "employer" as a person, public body, firm corporation or company which has entered into a contract of service to employ an individual. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents assert that it is not in dispute in these proceedings that the Claimant is neither an employee nor a servant of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents and in fact, the Claimant makes no attempt at all in her depositions before court to establish basis under Section 12 of the Act of any relationship of an employer-employee character subsisting as between her and the Respondents herein and to this extent, this court has no jurisdiction to hear and determine any issues outside its constitutional and statutory jurisdictional competence, as it has been invited to by the Claimant. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit that it is admitted by the Claimant in her pleadings that the basis of her allegations and claims against the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents, is the public petition presented to the County Assembly by over 100 members of the public asking for an inquiry into the conduct of the Deputy Governor. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit this cannot be by any stretch of interpretation or argument construe to or constitute an employer employee relationship between the said parties as to clothe this court to hear and determine the issues and claims made by the Claimant against the said Respondents. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit that the Claimant attempts to link her employment dispute with the 5<sup>th</sup> Respondent to the public petition filed with the county assembly. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit save for speculative averments in her supporting affidavit to the application, the Claimant has not placed any evidence before court that the public petition subject of the application herein arises directly from her claim against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as well as the 5<sup>th</sup> Respondent. It is also misleading and presumptuous to suggest as the Claimant has repeatedly done that the public petition was originated and presented by the County Assembly. If the Claimant were sufficiently aggrieved by the said document, then she ought to have directed her claims and allegations against the promoters and publishers of the said petition. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit that at pages 30 to 36 of the Claimant's submissions, the court will see the said petition and whereat at page 35, it sets out the names of the petitioners therein including James Kahunyo Muringo, Agnes Wanjiku Wachira and Lilian Wambui Wangui. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit the Claimant ought to have joined them to these proceedings as Respondents instead of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents that merely received the said petition. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents that no cause of action under the jurisdiction of this court has been established as against the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents and the application and the prayers sought as against them should be declined and struck out. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents assert that the applicant has not established basis for grant of the conservatory orders sought. They cite the case of **Gatirau Peter Munya -v Dickson Mwenda Githinji & 2 Others [2014] eKLR**, where the Supreme Court set out the principles applicable in consideration of an application for grant of conservatory orders as sought herein by the applicant. The court stated that;

*"[86] "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."*

8. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit that the Claimant has not in this application established by evidence and submissions, the existence of the above factors and the application has no merit. In the first instance, the court will note that the application is based on a false narrative and presupposition that the 3<sup>rd</sup> to 5<sup>th</sup> Respondents have initiated a process for removal of the Claimant from her position. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents assert this is posterous and untrue for reasons that;

a. The public petition subject of the application herein was made by private persons who are quite separate and apart from the County Assembly of Nyeri which only received it as provided by law.

b. The removal process of a county governor and a deputy county governor cannot be initiated by way of a public petition as alleged and can only commence and progress under the process and procedure provided *in extenso* at Article 181 of the Constitution of Kenya and Section 33 of the County Governments Act, 2012, which provide exhaustively for the removal process applicable and which is originated by a notice to the Speaker by a Member of the County Assembly supported by at least a third of all the members, to move a motion for the removal of a County or Deputy Governor. No notice or motion for the purported removal of the claimant from her position has been exhibited by the claimant as proof of the existence of a removal process as alleged.

c. No motion has been presented to the County Assembly by a member thereof seeking to remove the Claimant from her office under Section 33(2) of the County Governments Act, 2012.

9. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents rely on the case of **Martin Nyaga Wambora v Speaker of Senate & 6 Others [2014] eKLR**, wherein the Court of Appeal in Nyeri set out the law and procedure applicable in the removal of a county or deputy governor, thus;

*"31. Our reading and interpretation of Article 181 of the Constitution as read with Section 33 of the County Governments Act shows that removal of a Governor is a constitutional and political process; it is a sui generis process that is quasi-judicial in nature and the rules of natural justice and fair administrative action must be observed. The impeachment architecture in Article 181 of the Constitution reveals that removal of a Governor is not about criminality or culpability but is about accountability, political governance as well as policy and political responsibility. Section 33 of the County Governments Act provides for the procedure of removal of an erring Governor. The organ vested with the mandate at first instance to move a motion for the removal of a County Governor is the County Assembly. Neither the Courts nor the Senate have the constitutional mandate to move a motion for the removal of a County Governor. The Senate's constitutional mandate to hear charges against a Governor is activated upon receipt of a resolution of the County Assembly to remove a Governor. Upon receipt of such a resolution, the Senate shall convene a meeting to hear the charges against the Governor and may appoint a Special Committee to investigate the matter. It is our considered view that the jurisdiction and process of removal of a Governor from office is hierarchical and sequential in nature. There are three sequential steps to be followed: first is initiation of a motion to remove the Governor by a member of the County Assembly; second there are consideration of the motion and a resolution by two thirds of all members of the County Assembly and third, the Speaker of the County Assembly is to forward the County Assembly's resolution to the Senate for hearing of the charges against the Governor"*

10. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit therefore that there is no subsisting removal process of the claimant as purported that is then liable to be stopped by way of the orders sought in this application. The application before court is therefore based on anticipation, speculation and conjecture and which is not sufficient basis for the grant of the orders sought. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit further submit that there is legal basis available to the citizens, to present public petitions to the County Government and the County Assembly on matters pertinent to the efficient working and running thereof, so as to ensure and promote delivery of public services in the scheme of the functions of these governments. Section 88 of the County Governments Act provides that; *"Section 88 (1) Citizens have a right to petition the county government on any matter under the responsibility of the county government.*

*(2) Citizen petitions shall be made in writing to the county government."*

Further, Standing Orders 193 to 197 of the County Assembly of Nyeri Standing Orders, provide for public petitions and the manner in which they should be processed by the County Assembly. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit that the Claimant has not demonstrated how she is aggrieved by the presentation of the public petition and how it has violated her rights as claimed. In any event, the standing orders clearly provide time and forum for her to be heard on the said petition and this application is merely pre-emptive of that process. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit the court has no jurisdiction to interfere with the processes of the county assembly unless a violation of the constitution is demonstrated. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit that the Petition to County Assemblies, provides for the process applicable in the making, hearing and determination of public petitions made to the County Assembly. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit that the Claimant/Applicant herein has neither pleaded nor shown that the County Assembly has failed to comply with the said statutory provisions or isolated any instance of illegality or irregularity inherent in the process or against her in the presentation of the impugned public petition. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit that the application herein is therefore based on mere apprehension of a violation of rights by the County Assembly and further on a theoretical correlation by the Claimant of a nexus between her employment dispute with the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Respondents and the public right to file petitions before the County Assembly which has been exercised in the manner and style of the petition now subject of these proceedings. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit that unless a distinct and specific violation of the Claimant's rights is isolated and demonstrated, then this court ought to defer to the process set out in the above cited applicable law and find that the application herein is not only premature but also wholly unmerited.

11. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit further in this regard that the jurisdiction of this court to stop the County Assembly from hearing the contested public petition, is expressly excluded by law in terms of Section 10 and 11 of the County Assemblies Powers and Privileges Act which provides for immunity from legal proceedings against any Member for words spoken before, or written in a report to a County Assembly or a Committee, or by reason of any matter or thing brought by him or her therein by a report, petition, Bill, resolution, motion or other document written to a County Assembly. Further, they submit that no civil suit shall be commenced against the Speaker, the leader of the majority party, the leader of the minority party, a chairperson of a committees or any member for any act done or ordered by them in the discharge of the functions of their office. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit that the Court should allow the County Assembly to finalise its processes then examine the decision or recommendation made for its legal, procedural and constitutional validity as at this stage, there is no decision made by the County Assembly capable of review by this Court and the Claimant has not even exhibited any decision, recommendation or proceedings by the County Assembly upon

which her complaints are made. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents cite the decision in **Margaret Lorna Kariuki & Another v County Assembly of Embu & Another; National Forum for County Assemblies (Interested Party) [2019] eKLR**, where the court in striking out a similar petition challenging ongoing proceedings before a county assembly, stated that;

*“20. The Supreme Court in **Speaker of the Senate & Another v. Attorney General & 4 Others, Reference No. 2 of 2013; [2013] eKLR** 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:*

*“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.”*

21. The Court went on to state as follows:

*“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.”*

22. The Supreme Court, however, cautioned against undue interference with running processes in other arms of Government. The Court thus pronounced itself: -

*“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”*

12. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit that it is only after a resolution has been made by the Assembly that it may be challenged in court. As the matter stands, the county assembly has not made any resolution on the matter which would provide this court with material to interrogate as to its compliance with the Constitution. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit that Article 165(3) of the Constitution confers to this court jurisdiction to interpret the constitution including the determination of the question whether anything said to be under the authority of the Constitution or any law is in inconsistent with or in contravention of the Constitution. County Assemblies are obligated to operate in compliance with the Constitution and where a violation occurs, this court has powers to assert its authority and the supremacy of the Constitution. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit that accordingly, and in consideration of the factual position obtaining in this matter as more particularly averred to in the respective affidavits of the parties, the present application and the entire proceedings herein, are premature and not ripe for this court to admit jurisdiction and hear the same. The court has variously advised by way of its pronouncements that as long as matter is under consideration by the constitutionally and statutorily mandated body, then the same is not ripe for consideration by the court on a challenge for violation of rights or howsoever. In this case, the court is called to stop a matter that is under the active processing by the County Assembly as provided by law and any irregularity or unlawfulness that would ensue is subject to the review jurisdiction of this honourable court. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit that the Court should not interfere with removal proceedings by way of impeachment of a county governor or deputy governor unless the process is completed and clear basis of unconstitutionality shown. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit that the Supreme Court of Kenya in the case of **Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another [2017]eKLR** considered the role of the County Assembly in removal of a Governor and/or a Deputy Governor and found that the process is initiated and heard in the first instance at the County Assembly and that the court ought not to interfere with the same until its conclusion and either party aggrieved then seeks review or nullification thereof on the basis of violation of rights or otherwise. The court stated that;



*“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.*

13. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents submit that the net effect and implication of the orders sought by the claimant is that the County Assembly of Nyeri, a constitutional organ mandate to represent the people of Nyeri, should not at all discuss the conduct of the County Governor of Nyeri, who is a public officer and a member of the county executive and thereby amenable to the oversight authority of the County Assembly. Likewise, the claimant seeks to use this court, to gag and stifle any public discussion on her conduct and consideration thereof in the framework of a public petition or generally. This is not only untenable, disproportionate and unreasonable but also a gross abuse of the processes of this honourable court.

14. I have considered the rival arguments and the cases cited as well as the law in arriving at this lengthy decision. I have reproduced the parts of the decisions highlighted by parties to cast their cases better and having due regard to the issues before me, the question of jurisdiction is the most important to determine as it will illuminate whether there is basis for this Court to hear the 2 notice of motion applications herein. The Respondents assert that this Court is devoid of jurisdiction to hear the matter as the impeachment process of a Governor or Deputy is a matter for the High Court and that the dispute before the Court is not yet ripe. It is trite law that jurisdiction is everything. Without it, a court has no business dealing with the matter before it as there would be no basis for a continuation of proceedings. This is because a Court would be required to down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. These sentiments were ably stated by Nyanrangi JA in the *locus classicus* on jurisdiction - **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1**. As the jurisdictional question has arisen, it will precede the determination of the Notice of Motion Application dated 6<sup>th</sup> October 2021 as well as the Respondents notice of motion application filed in answer to the Claimant’s motion and claim. The removal of the Governor or Deputy Governor is not yet provided for in statute. The Impeachment Procedure Bill, 2018 and its counterpart the Impeachment Procedure Bill (Senate Bill No. 15 of 2018) were not passed. To date, the law applicable is what flows from Article 181 of the Constitution and this applies *mutatis mutandi* in respect of a Deputy Governor. The High Court and the Employment Court have made determinations on this question. Ongaya J. held in **Mike Sonko Mbuvi Gideon Kioko v Clerk, Nairobi City County Assembly & 4 Others (supra)** thus:-

*First, there is no doubt that a state officer like the petitioner who is a Governor is in employment of the state. He is clearly an employee within the definition of an employee under the Employment Act, 2007 because he is paid a salary. As submitted for the petitioner his employment is governed by the relevant constitutional and statutory provisions and where necessary, the provisions of the Employment Act, 2007. The Court upholds its holding in **Richard Bwogo Birir –Versus- Narok County Government & 2 others [2014] eKLR** and **Shadrack Wangómbe Mubea –Versus- County Government of Nyeri & Another [2015] eKLR** respectively.*

.....

*The Court finds that the impeachment is clearly a disciplinary process for removal of the petitioner from office. Disciplinary process is obviously a human resource function being undertaken within the relevant constitutional and statutory provisions and the Court returns that the dispute is within its constitutional and statutory jurisdiction to decide disputes about employment and labour relations.*

.....

*Third, the Court finds that by entertaining the petition it is not undermining the delicate balance on institutional comity between the three arms of government and the supervising the workings of Parliament or even the County Assembly. The Court further finds that by entertaining the petition it is not thereby intruding in the political realm of things. As submitted for the petitioner, the Court enjoys the jurisdiction and it is justiciable for the Court to intervene where it is shown that the impeachment proceedings are going on in contravention of the relevant constitutional and statutory provisions or standing orders.*

15. The Court agrees that there is scope for the determination of the matter before me in terms of the persuasive determinations by Judges of this Court and the High Court which in one instance transferred the dispute relating to the removal of the Governor of Nairobi County to the Employment & Labour Relations Court at Nairobi in recognition of this power. The Claimant is NOT an elected official as a Deputy Governor rides on the ticket for the candidate for Governor. In the case of the Claimant she was picked for the position by the Governor of Nyeri. She therefore is employed in the words of Ongaya J. by the people of Nyeri to act as their Deputy Governor her selection by the Governor notwithstanding. The Claimant is therefore before the correct Court in my view.

16. However, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent raise the issue that the Claimant is NOT being impeached as yet as only a petition has been filed by a member of the public and the same has not been deliberated upon or steps taken therein. The framing of the claim impels the Court to consider whether there is justification to have the claim in Court as there is the matter of ripeness to contemplate. Put another way, is the dispute between parties ripe for the Court to validly entertain" It bears repeating that the doctrine of ripeness prevents plaintiffs from seeking judicial relief while a threatened harm is merely conjectural or anticipated. In my considered view, the application herein is ergo based on mere apprehension of a violation of rights by the County Assembly and further on a theoretical correlation by the Claimant of a nexus between her employment dispute as articulated in the matter. In this case, no evidence has been shown that there is indeed a Petition for Removal that has been acted upon by the Respondents or one that has been initiated in terms of Article 181 of the Constitution. In the absence of proof, the conjecture by the Claimant disentitles her from seeking relief as there is bar under the rubric of ripeness since there is only a threatened harm that is conjectural. The cause of action in respect of her impeachment has not accrued yet and in the premises, this Court is inclined to agree with the Respondents that the jurisdiction of this Court in respect to impeachment has not been invoked appropriately as the matter is not ripe with the result that the motion by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents succeeds to the extent that the suit in respect of the impeachment is struck out albeit with no order as to costs. Directions will follow in respect of the balance of the claim.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER 2021**

**NZIOKI WA MAKAU**

**JUDGE**



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