

REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI  
PETITION NO. 35 OF 2020

HON. MIKE SONKO MBUVI GIDION KIOKO.....PETITIONER

-VERSUS-

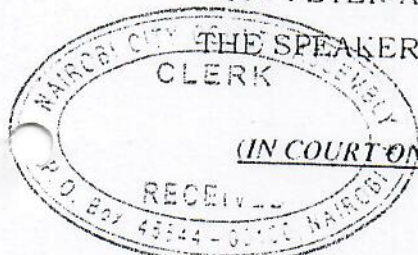
THE CLERK, NAIROBI CITY COUNTY ASSEMBLY..... 1<sup>ST</sup> RESPONDENT

THE SPEAKER, NAIROBI CITY COUNTY ASSEMBLY.....2<sup>ND</sup> RESPONDENT

THE NAIROBI CITY COUNTY ASSEMBLY.....3<sup>RD</sup> RESPONDENT

HON PETER ANYULE IMWATOK.....4<sup>TH</sup> RESPONDENT

THE SPEAKER, SENATE OF KENYA.....5<sup>TH</sup> RESPONDENT



(IN COURT ON 28<sup>TH</sup> FEBRUARY, 2020 BEFORE HON. JUSTICE BYRAM ONGAYA)

ORDER

UPON READING the Application presented to this Court on 28<sup>th</sup> February, 2020 under certificate of urgency by the Applicant dated 27<sup>th</sup> February, 2020 AND UPON reading the Supporting Affidavit of HON. MIKE MBUVI SONKO MBUVI GIDION KIOKO sworn on 27<sup>th</sup> February, 2020 and the annexures thereto AND UPON HEARING the Applicant exparte;

IT IS HEREBY ORDERED

1. THAT application is hereby certified urgent to be served today for interpartes hearing or further orders and directions on Monday 2<sup>nd</sup> March, 2020 at 10.00am or soon thereafter as will be called out in court.
2. THAT pending interpartes hearing or further directions by the court the Respondents by themselves or by their duly authorized officers or agents, or representatives to file and serve a replying affidavit demonstrating and showing compliance with the provisions of standing orders Nos. 67 and 72 of the County Government of Nairobi (Nairobi City County Assembly) as relates to and respects to proposed removal of the Governor of the Government of Nairobi City County as scheduled in Notice paper 1 on Tentative Business for Tuesday 3<sup>rd</sup> March, 2020 in a motion by Hon. Peter A. Imwatok MCA – minority whip on the Proposed impeachment of the Governor.
3. THAT pending interpartes hearing or further orders and directions by the Court, the Respondents by themselves or by their duly authorized agents to file and serve a replying affidavit establishing the existence and service upon applicant of documents referred to as Annexure 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and Annexure 18 all referred to in the proposed motion by Hon. Peter Anyule Imwatok, MCA, Minority Chief Whip, the Nairobi City County Assembly for proposed

impeachment of the Governor as referred to in Exhibit MKM 8 Of the supporting affidavit herein.

4. THAT costs in the cause.

GIVEN under my Hand and Seal of the Honourable Court this 28<sup>th</sup> day of February, 2020.

ISSUED at Nairobi this 28<sup>th</sup> day of February 2020

~~DEPUTY~~ REGISTRAR  
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI



28/2/20

MIKE

REPUBLIC OF KENYA  
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA, NAIROBI  
PETITION NO. 154 OF 2020

IN MATTER OF SENATOR MBUMI GIDION KIOKO.....PETITIONER  
VERSUS  
THE CLERK, NAIROBI CITY COUNTY ASSEMBLY..... 1<sup>ST</sup> RESPONDENT  
THE SPEAKER, NAIROBI CITY COUNTY ASSEMBLY..... 2<sup>ND</sup> RESPONDENT  
THE NAIROBI CITY COUNTY ASSEMBLY..... 3<sup>RD</sup> RESPONDENT  
HON. PETER ANYULE IMWATOR..... 4<sup>TH</sup> RESPONDENT  
THE SPEAKER, SENATE OF KENYA..... 5<sup>TH</sup> RESPONDENT

(IN COURT ON 2<sup>ND</sup> MARCH 2020 BEFORE HON. JUSTICE BYRAM ONGAYA)

ORDER

THIS MATTER COMING FOR inter partes hearing of application under s. 47 of the Constitution, 2010 before Hon. Justice Byram Ongaya on 2<sup>nd</sup> March, 2020, AND UPON Hearing Counsel for the Petitioner and Respondent;

IT IS HEREBY ORDERED

1. THAT the respondents to file and serve their respective replying affidavit by close of 4<sup>th</sup> March, 2020 and Petitioner and 1<sup>st</sup> Respondent may file further supporting affidavits by close of 6<sup>th</sup> March, 2020.
2. THAT pending the inter partes hearing of the application or further orders by the court the proposed motion by the 4<sup>th</sup> Respondent herein for the proposed impeachment of the petitioner herein as scheduled in Notice Paper 1 on Tentative Business of the 3<sup>rd</sup> Respondent on Tuesday 3<sup>rd</sup> March 2020 or as may be adjourned to another date and time shall not proceed except in strict compliance with the provisions of standing order Nos. 67 and 72 of the 3<sup>rd</sup> respondent.
3. THAT mention on 9<sup>th</sup> March, 2020 at 9:00am or soon thereafter as will be called out in court.
4. THAT today's costs in the cause

GIVEN under my Hand and Seal of the Honorable Court this 2<sup>nd</sup> day of March, 2020.

SIGNED, at Nairobi this 2<sup>nd</sup> day of March, 2020

DEPUTY REGISTRAR  
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA, NAIROBI

is the exhibit marked MIKE  
attached to the affidavit of HON. MIKE  
SENATOR MBUMI GIDION KIOKO  
sworn at the city of Nairobi on 20th March 2020  
at Nairobi in the Republic of Kenya  
Before me



# THE JUDICIARY



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI CITY

COURT NAME: MILIMANI COMMERCIAL

CASE NUMBER: ELRCPET/35/2020

CITATION: HON. MIKE SONKO MBUVI VS THE CLERK NAIROBI CITY COUNTY ASSEMBLY & 4 OTHERS

ORDERS(COURT DOCUMENT)

Further mention for directions on hearing of petition on 11th November 2020 in Court 6.

The 3rd Respondent to serve mention notice. Interim orders extended.

GIVEN under my hand and seal of the Honourable Court on this 28th day of October 2020.

SIGNED BY: HON. LADY JUSTICE MAUREEN ONYANGO



THE JUDICIARY OF KENYA.  
NAIROBI EMPLOYMENT AND LABOUR RELATIONS COURT  
EMPLOYMENT AND LABOUR RELATIONS COURT  
DATE: 2020-10-28 03:10:40+03





# THE JUDICIARY



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI CITY

COURT NAME: MILIMANI COMMERCIAL

CASE NUMBER: ELRCPET/35/2020

CITATION: HON. MIKE SONKO MBUVI VS THE CLERK NAIROBI CITY COUNTY ASSEMBLY & 4 OTHERS

## ORDERS(COURT DOCUMENT)

THIS MATTER coming up on 30th November 2020 for directions on the Notice of Motion dated ..... before Honourable Mr. Justice Nzioki wa Makau UPON HEARING the Counsel for the Plaintiff/Applicant and the Counsel for the Defendant/Respondent;

IT IS HEREBY ORDERED:

1. THAT the application be certified urgent.
  2. THAT conservatory orders be granted in terms of prayer 3 pending hearing of the motion on 3rd December 2020
  3. THAT service upon the intended 6th Respondent be effected forthwith
- GIVEN under my hand and seal of the Honourable court this 30th November 2020

SIGNED BY: HON. JUSTICE NZIOKI WA MAKAU



THE JUDICIARY OF KENYA.  
 NAIROBI EMPLOYMENT AND LABOUR RELATIONS COURT  
 EMPLOYMENT AND LABOUR RELATIONS COURT  
 DATE: 2020-11-30 06:11:13+03

This is the exhibit marked "SRK"  
 annexed to the affidavit of  
 KINYANJUI  
 sworn on the day of 1<sup>ST</sup> DEC 2020  
 at Nairobi in the Republic of Kenya  
 Before Me   
 Commissioner for Oaths

12





# THE JUDICIARY



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI CITY

COURT NAME: MILIMANI COMMERCIAL

CASE NUMBER: ELRCPET/35/2020

CITATION: HON. MIKE SONKO MBUVI VS THE CLERK NAIROBI CITY COUNTY ASSEMBLY & 4  
OTHERS

## ORDERS(COURT DOCUMENT)

THIS MATTER coming up on 2nd December 2020 for directions on the Notice of Motion dated 1st December 2020 before Honourable Mr. Justice Nzioki wa Makau UPON HEARING the Counsel for the Applicant in the absence of Counsel for the Respondent;

IT IS HEREBY ORDERED:

1. THAT the application be certified urgent.
2. THAT the orders be served by substituted service as sought in prayer 2.
3. THAT costs do abide the outcome of the Petition.

GIVEN under my hand and seal of the Honourable Court this 2nd December 2020

SIGNED BY: HON. JUSTICE NZIOKI WA MAKAU



THE JUDICIARY OF KENYA.  
NAIROBI EMPLOYMENT AND LABOUR RELATIONS COURT  
EMPLOYMENT AND LABOUR RELATIONS COURT

DATE: 2020-12-02 04:12:41+03



REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI  
PETITION NO. 35 OF 2020

IN THE MATTER OF THE CONTRAVENTION & THREATENED CONTRAVENTION OF  
ARTICLES 1, 2,3,6,10, 27(1), 28, 35(1)(b), 41(1), 47,165 (3)(a), (b), (4), 175,176,181,195, 232,236,  
& 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA IN SO FAR AS THE CONSTITUTION  
HAS BEEN, AND STANDS TO BE VIOLATED

AND

IN THE MATTER OF SECTION 33 OF THE COUNTY GOVERNMENTS ACT

AND

IN THE MATTER OF STANDING ORDERS 67 AND 72 OF THE NAIROBI CITY COUNTY  
STANDING ORDERS

AND

IN THE MATTER OF THE CHALLENGE OF THE ULTRA VIRES, UNCONSTITUTIONAL,  
UNLAWFUL AND THREATENED IMPEACHMENT OF

THE PETITIONER & UNLAWFUL REMOVAL FROM THE OFFICE OF GOVERNOR,  
NAIROBI CITY COUNTY

AND

IN THE MATTER OF A CONSTITUTIONAL PETITION BY

HON. MIKE SONKO MBUVI GIDION KIOKO ..... PETITIONER/APPLICANT  
VERSUS

THE CLERK, NAIROBI CITY COUNTY ASSEMBLY ..... 1<sup>ST</sup> RESPONDENT  
THE SPEAKER, NAIROBI CITY COUNTY ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT  
THE NAIROBI CITY COUNTY ASSEMBLY ..... 3<sup>RD</sup> RESPONDENT  
HON. PETER ANYULE IMWATOK ..... 4<sup>TH</sup> RESPONDENT  
THE SPEAKER, SENATE OF KENYA ..... 5<sup>TH</sup> RESPONDENT  
HON. MICHAEL OGADA OKUMU ..... 6<sup>TH</sup> RESPONDENT

ORDER

THIS MATTER coming up for hearing of applications dated 30/11/2020 and 1<sup>st</sup> December, 2020 before Hon Justice James Rika on 3<sup>rd</sup>, December 2020 and UPON HEARING Counsel for the Petitioner, Counsel for the Respondents;

IT IS HEREBY ORDERED

- 1) THAT the court shall peruse the file and give a ruling and/or further directions at 11.30a.m.
- 2) THAT the order made earlier is stayed with fresh direction to issue in open court at 10.30a.m in the presence of all advocates.
- 3) THAT the application by the petitioner seeking adjournment of today's hearing is declined.
- 4) THAT the hearing of the application to go on as ordered by the court on 30<sup>th</sup> November, 2020.

5) THAT the court shall defer the issue of extending the conservatory orders until today's hearing is complete.

FURTHER ORDERS

6) THAT Mr. Kinyanjui is not ready to prosecute the application as advised by this court.

7) THAT hearing of the application is stood over generally.

8) THAT the Judge recuses himself from further hearing of the petition.

9) THAT the file is returned to the Principal Judge for re assignment.

10) THAT leave to appeal be and is hereby granted.

GIVEN under my Hand and Seal of the Honourable Court this 3<sup>rd</sup> day of December, 2020.

ISSUED at Nairobi this 3<sup>rd</sup> day of December 2020.

Original  


  
DEPUTY REGISTRAR

3<sup>rd</sup> 15<sup>th</sup> December, 2020  
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI





# THE JUDICIARY



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI CITY

COURT NAME: MILIMANI COMMERCIAL

CASE NUMBER: ELRCPET/35/2020

CITATION: HON. MIKE SONKO MBUVI VS THE CLERK NAIROBI CITY COUNTY ASSEMBLY & 4 OTHERS

ORDERS(COURT DOCUMENT)

**THIS MATTER** coming up on 7th December 2020 for directions on the Notice of Motion dated 30th November 2020 before Honourable Lady Justice Maureen Onyango.

In view of the recusal of the Duty Judge from handling this matter, the file is fixed for hearing of the application dated 30th November 2020 before Nzioki Wa Makau J. in Court No. 4 on 8th Decembers 2020.

The Applicant to serve notice by email.

GIVEN under my hand and seal of the Honourable Court on this 7th day of December 2020.

SIGNED BY: HON. LADY JUSTICE MAUREEN ONYANGO



THE JUDICIARY OF KENYA.  
NAIROBI EMPLOYMENT AND LABOUR RELATIONS COURT  
EMPLOYMENT AND LABOUR RELATIONS COURT

DATE: 2020-12-07 04:12:04+03





# THE JUDICIARY



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI CITY

COURT NAME: MILIMANI COMMERCIAL

CASE NUMBER: ELRCPET/35/2020

CITATION: HON. MIKE SONKO MBUVI VS THE CLERK NAIROBI CITY COUNTY ASSEMBLY & 4  
OTHERS

ORDERS(COURT DOCUMENT)

THIS MATTER coming up on 9th December 2020 for directions on the Notice of Motion dated 30th November 2020 before Honourable Lady Justice Maureen Onyango.

Parties to be heard before Nduma J. in Court No. 5 at 9.00 am on 10th December 2020.

GIVEN under my hand and seal of the Honourable Court on this 9th day of December 2020.

SIGNED BY: HON. LADY JUSTICE MAUREEN ONYANGO



THE JUDICIARY OF KENYA,  
NAIROBI EMPLOYMENT AND LABOUR RELATIONS COURT  
EMPLOYMENT AND LABOUR RELATIONS COURT  
DATE: 2020-12-09 03:12:07+03



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION  
PETITION NO E 405 OF 2020.

IN THE MATTER OF: ARTICLES 3(1), 22(1) & (2)(c), 23, 48, 50(1), AND 258(1) & (2)(c)  
OF THE CONSTITUTION OF KENYA 2010.

IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION OF  
ARTICLES 1, 2, 3(1), 4(2), 10, 20, 73, 181, 200, AND 259(1) OF THE  
CONSTITUTION OF KENYA, 2010.

IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION OF  
SECTIONS 6A, 7(B)(2), AND 33(2) OF THE COUNTY  
GOVERNMENTS ACT, NO. 17 OF 2012; AND ORDER 67(7), 74,  
75, 77(2) AND 78 OF THE NAIROBI CITY COUNTY ASSEMBLY  
STANDING ORDERS.

IN THE MATTER OF: THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE  
NAIROBI CITY COUNTY ASSEMBLY'S PURPORTED  
IMPEACHMENT OF ITS GOVERNOR AT A MEETING HELD  
VIRTUALLY OVER THE INTERNET ON 3<sup>RD</sup> DECEMBER 2020  
USING ZOOM AND OTHER ONLINE TECHNOLOGIES  
UNKNOWN IN LAW.

IN THE MATTER OF: DUE PROCESS AND THE DOCTRINE OF LEGITIMATE  
EXPECTATION.

BETWEEN

OKIYA OMTATAH OKOITI ..... PETITIONER

VERSUS

THE SPEAKER NAIROBI CITY COUNTY ASSEMBLY..... 1<sup>ST</sup> RESPONDENT

THE NAIROBI CITY COUNTY ASSEMBLY.....2<sup>ND</sup> RESPONDENT

THE SPEAKER OF THE SENATE .....3<sup>RD</sup> RESPONDENT

THE SENATE..... 4<sup>TH</sup> RESPONDENT

AND

HON. GOVERNOR MIKE MBUVI SONKO .....INTERESTED PARTY

IN CHAMBERS ON 9<sup>TH</sup> DECEMBER, 2020.

BEFORE HON.MR. JUSTICE A.C. MRIMA.

(DUTY JUDGE).

ORDER


UPON READING the Notice of Motion dated 7<sup>th</sup> December, 2020 and filed in court on 9<sup>th</sup> December 2020 by the Petitioner (*Under articles 20, 22, 50(1), 23(3), 159(2)(d), 165, and 258 of the Constitution of Kenya 2010, Sections 19 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, and all other enabling provisions of the Law*) AND UPON READING the Supporting Affidavit of OKIYA OMTATAH OKOITI sworn on the 7<sup>th</sup> December, 2020, and the annexures thereto AND WHEREAS THIS MATTER is coming in chambers Ex-parte.

IT IS HEREBY ORDERED

1. THAT since the matter deals with the impeachment process of the Interested Party and the same process is the subject matter in Nairobi Employment and Labour Relations Constitutional Petition Number 35 of 2020, and further given that the impeachment process relates to the employment and labour issues, then the High court is not seized of the jurisdiction over this matter. The constitutional issues raised in the Petition herein shall be competently dealt with by the Employment and Labour Relations Court. Consequently, the matter is hereby transferred to the Employment and Labor Relations Court forthwith.
2. THAT Deputy Registrar of this Court to urgently transmit the file to the Deputy Registrar of the Employment and Labour Relations Court who will in turn place this matter before the Presiding Judge of the Employment and Labour Relations Court or the Duty Judge for consideration of the Notice of Motion dated 7<sup>th</sup> December, 2020 which is filed under certificate of urgency.
3. THAT orders accordingly.

GIVEN under my hand and seal of this Honourable court this 9<sup>th</sup> day of December, 2020.

ISSUED at Nairobi this..... 7<sup>th</sup>..... day of..... December..... 2020.

  
DEPUTY REGISTRAR

CONSTITUTIONAL HUMAN RIGHTS DIVISION

HIGH COURT OF KENYA, NAIROBI

*Handwritten notes:*  
R. Ombaka  
5/10/2020

*Handwritten notes:*  
1/10/2020



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 35 OF 2020**

**IN THE MATTER OF THE CONTRAVENTION & THREATENED CONTRAVENTION OF**

**ARTICLES 1,2, 3,6,10,27(1), 28,35(1) (b), 41(1), 47, 165 (3) (a), (b), (4), 175, 176, 181,**

**195, 232, 236 & 258 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF THE CONSTITUTION OF KENYA IN SO FAR AS THE**

**CONSTITUTION HAS BEEN, AND STANDS TO BE VIOLATED**

**IN THE MATTER OF SECTION 33 OF THE COUNTY GOVERNMENT ACT**

**IN THE MATTER OF STANDING ORDERS 67 AND 72 OF THE**

**NAIROBI CITY COUNTY STANDING ORDERS**

**IN THE MATTER OF THE CHALLENGE OF THE ULTRA VIRES,**

**UNCONSTITUTIONAL, UNLAWFUL AND THREATENED**

**IMPEACHMENT OF THE PETITIONER & UNLAWFUL REMOVAL**

**FROM THE OFFICE OF GOVERNOR, NAIROBI CITY COUNTY**

**AND**

**IN THE MATTER OF A CONSTITUTIONAL PETITION**

**BETWEEN**

**HON. MIKE SONKO MBUVI GIDION KIOKO.....PETITIONER**

**VERSUS**

THE CLERK, NAIROBI CITY COUNTY ASSEMBLY.....1<sup>ST</sup> RESPONDENT  
THE SPEAKER, NAIROBI CITY COUNTY ASSEMBLY.....2<sup>ND</sup> RESPONDENT  
THE NAIROBI CITY COUNTY ASSEMBLY.....3<sup>RD</sup> RESPONDENT  
HON. PETER ANYULE IMWATOK.....4<sup>TH</sup> RESPONDENT  
THE SPEAKER, SENATE OF KENYA.....5<sup>TH</sup> RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 23<sup>rd</sup> October, 2020)

### RULING

The petitioner filed the petition and an urgent application on 28.02.2020 through J. Harrison Kinyanjui & Company Advocates. The petitioner is challenging the impeachment proceedings that have been initiated against him with the aim of his being removed from the office of Governor for the Nairobi City County Government. Upon listening to counsel for the parties present on 02.03.2020 the Court ordered:

- 1) That the respondents to file and serve their respective replying affidavit by close of 04.03.2020 and petitioner and 1<sup>st</sup> respondent may file further supporting affidavits by close of 06.03.2020.
- 2) That pending the interpartes hearing of the application or further orders by the court the proposed motion by the 4<sup>th</sup> respondent herein for the proposed impeachment of the petitioner herein as scheduled in Notice Paper 1 on Tentative Business of the 3<sup>rd</sup> respondent on Tuesday 3<sup>rd</sup> March 2020 or as may be adjourned to another date and time shall not proceed except in strict compliance with the provisions of standing order Nos. 67 and 72 of the 3<sup>rd</sup> respondent.
- 3) That mention on 09.03.2020 at 9.00am or soon thereafter as will be called out in court.
- 4) That today's costs in the cause.

The 2<sup>nd</sup> respondent filed on 04.03.2020 a notice of preliminary objection through Diro Advocates LLP. The preliminary objection states that at the hearing of the petition and motion dated 27.02.2020 the 2<sup>nd</sup> respondent will raise a preliminary objection and shall pray that the same be struck out with costs on the grounds that:

- 1) The jurisdiction of the Court is strictly limited to the jurisdiction conferred to it through the Constitution and the Employment and Labour Relations Court Act together with the Employment and Labour Relations Court (Procedure) Rules.
- 2) The petitioner has not established an employer-employee relationship to invoke the jurisdiction of the Honourable Court.
- 3) The application contravenes a fundamental principle of law that maintains that all three organs of government remain separate and should not encroach upon each other.
- 4) The application is totally misconceived, bad in law and an abuse of Court process.

Parties consented and the Court directed that the preliminary objection be heard in priority to the petitioner's application. The interim orders have continued to be extended in that regard. This ruling is on the preliminary objection.

The 2<sup>nd</sup> respondent filed the submissions on the preliminary objection on 10.03.2020. It was submitted as follows:

1) The jurisdiction of the Court is as provided for in Article 162(2) of the Constitution and section 12 of the Employment and Labour Relations Court Act, 2011. The Court's jurisdiction relates to employment and labour relations- disputes relating to or arising out of employment between an employer and an employee. Under section 12 of the Act the dispute must be between an employer and employee. The Act defines employee as a person employed for wage or salary and employer as a person, public body, firm, corporation or company which has entered into a contract of service to employ an individual. Further rule 7 (1) of the Employment and Labour Relations Court (Procedure) Rules 2016 provides that a petition may be filed in the Court but it must be predicated on a contract of service. There exists no employer-employee relationship between the petitioner and the respondents and the Court's jurisdiction cannot be invoked in that regard. The 2<sup>nd</sup> respondent relies on Re The Matter of Interim Independent Electoral and Boundaries Commission [2011] eKLR where the Supreme Court stated thus, "Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent...jurisdiction flows from the law, and the recipient court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours...." Again in Samuel Kamau Macharia-Versus- Kenya Commercial Bank Limited & 2 Others[2012]eKLR, the Supreme Court stated, "A Court's jurisdiction flows from either the constitution, or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred on it by law. It cannot arrogate to itself jurisdiction exceeding that, which is conferred upon it by law...where the constitution exhaustively provides for jurisdiction of a Court of law, it must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation...."

2) It is submitted that the Court must preserve the delicate balance on institutional comity between the three arms of government and the Court should not supervise the workings of Parliament or even the County Assembly. 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 and should there arise a necessity to warrant the intrusion, then the same should be a preserve of the Apex Court as was held by the Supreme Court in In the Matter of the Speaker of the Senate & Another [2013]eKLR citing the South African case, The President of the Republic of South Africa & Others -Versus- South African Rugby Football Union & Others (CCT16/98) 1998 ZACC 21. It was submitted that the Court should preserve the delicate balance and not to be seen to be intruding into political sphere by downing its tools for there exists no cause of action of which the Court can be called upon to invoke its exclusive jurisdiction. The petition being misconceived it should be struck out.

The 3<sup>rd</sup> respondent filed the submissions dated 14.07.2020 through Ngira Advocates LLP. The 3<sup>rd</sup> respondent's submissions are that there exists no employer-employee relationship between the 3<sup>rd</sup> respondent and the petitioner within the definition of employee and employer under section 2 of the Employment Act, 2007. The 3<sup>rd</sup> respondent referred to section 12 of the Employment and Labour Relations Court Act, 2011 and like the 2<sup>nd</sup> respondent submitted that there being no employer-employee relationship, the Court lacked jurisdiction. It was further submitted that a Governor like the petitioner was a state officer and not a person in public service (which under Article 260 definition excludes a state officer) and therefore, the petitioner could not claim employer-employee relationship. The 3<sup>rd</sup> respondent therefore supported the preliminary objection.

The petitioner filed the submissions on 21.07.2020. it is submitted for the petitioner as follows:

1) It is clear from the pleadings in the petition and the application that the jurisdiction of the Honourable Court is properly invoked because the petitioner's complaints implicating labour relations as between the petitioner and the constitutional persons mandated to interfere with the said labour relations are subject of adjudication in the suit. The petitioner's labour rights are under threat and the proper place to vindicate his concerns in in the Court as moved. The petitioner relies on Council of County Governors -Versus- Lake Basin Development Authority & 6 Others [2017]eKLR (Mativo J) 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." Thus to determine if the Court has jurisdiction, the pleadings have to be looked at.

2) The issue in the petition is impeachment of the petitioner in a process purportedly invoking Article 181(1) (a), (b) and (c) of the Constitution as read with section 33 of the County Government Act, 2012 and standing order No. 67 of the Nairobi City County Assembly Standing Orders, implicating the cited respondents. The provisions deal with removal of the Governor from office by way of impeachment. The removal from office is invariably cessation from employment and which implicates the petitioner's labour rights.

3) The Court enjoys jurisdiction per Article 165(2) (b) of the Constitution to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened as read with Articles 165(5) (b) and 162(2) (a) on the

jurisdiction of the Court over employment and labour relations disputes and to grant the reliefs as per Articles 22 and 258 of the Constitution of Kenya 2010.

4) Accordingly, the 2<sup>nd</sup> respondent has failed to raise a preliminary objection on the standards established in Mukisa Biscuits Manufacturing Co. Ltd –Versus- West End Distributors [1969] EA 696 which held that a preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct and, it cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The declarations prayed for in the petition fall within the Court's discretion to grant and the preliminary objection must fail.

5) The 2<sup>nd</sup> respondent concedes and submits that section 12 of the Employment and Labour Relations Court Act, 2011 does not state what kind of dispute it must be as long as it is a dispute between an employer and an employee relating to employment. The petitioner has invoked Article 41 of the Constitution in seeking to vindicate his labour rights as envisaged under Article 27(1) of the Constitution of Kenya.

6) The petitioner relies on Richard Bwogo Birir –Versus- Narok County Government & 2 others [2014]eKLR thus, "The engagement of public and state officers in the new Republic does not rest and revolve upon the private consent of persons who are involved to conclude the employment contract. The Court holds that the persons involved conclude the contract for and on behalf of the people of Kenya within the stipulated constitutional and statutory safe-guards and the persons have no private consents that override the safe-guards. The conclusion of the arrangements that constitute the contract of public service is a public rather than a private action. Thus, if only for the dichotomy of private right and public law, the court has arrived at the compelling finding that in the new Republic, public and state officers are employed upon a framework beyond the private consents but predetermined and regulated by constitutional and statutory prescriptions; essentially, largely public and remotely private realms." And further, in the same case, thus, "The Court holds that the subjective judgments of individual government persons should not be allowed to override the objective criteria set in the Constitution and relevant statutes for the good delivery of our public and state service. Where such subjective judgments of individual government persons infringe on others constitutional and statutory rights and protections like in the present case, it is the opinion of the Court that a proper remedy would be available to vanquish the offensive decision."

7) The petitioner further relies on Shadrack Wang'ombe Mubea –Versus- County Government of Nyeri & Another [2015]eKLR thus, "Needless to state, provisions in Article 41 of the Constitution conferring the fundamental right to fair labour practices are universal as they apply to all employees including public and state officers as employees of the people and the Article applies to public and state officers subject only to such qualifications or limitations that may be enacted as provided for in Article 24 and 25 of the Constitution. To the extent that the Employment Act, 2007 implements the right to fair labour practices as enshrined in Article 41 of the Constitution, in absence of an express relevant constitutional or legislative provision or qualification, in the opinion of this court, there would be no justification to bar public and state officers from enjoying the minimum terms and conditions of employment as provided for in the Act." The petitioner is the Governor of the Nairobi City County and is a state officer under Article 260(h) of the Constitution of Kenya. As a state officer and service thereof he receives remuneration as set by the Salaries and Remuneration Commission and now seeks the protection of the Court as per Articles 41 (1) and 27(1) of the Constitution. The petitioner meets the definition of an employee and the *forums conveniens* for the dispute is the Court which has the relevant jurisdiction.

8) The Court is entitled to intervene whenever standing orders of a county assembly such as the 3<sup>rd</sup> respondent is violated or disobeyed. The Court's jurisdiction cannot be ousted from investing the legality and constitutionality of the process of impeachment of the petitioner. The petitioner relies on Beatrice Kedeveresia Elachi –versus- Nairobi City County Assembly Service Board & Another [2018]eKLR where Radido J held that an inquiry can only be conducted after giving all the concerned parties an opportunity to bring forth all attendant facts and law, a scenario which the objections raised in that case attempted to suppress.

9) As per the opinion in Justus Kariuki Mate & Another –Versus- Martin Nyaga Wambora & Another, Supreme Court Petition No. 32 of 2014, the Court will be reluctant to question parliamentary procedures as long as they did not breach the Constitution. In the instant case, the petitioner has clearly pointed out that there was no compliance with standing orders of the Nairobi City County Assembly in processing the impeachment motion seeking the ouster of the petitioner and the Court is entitled to entertain the claim.

The Court has considered the submissions and the preliminary objection and makes findings as follows.



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 Wangombe Mubea –Versus- County Government of Nyeri & Another [2015]eKLR respectively.

Further, the Court follows its opinion in Okiya Omtatah Okioti -versus- The Hon. Attorney General; and Ambassador Francis Muthaura and Others (interested parties) [2019]eKLR thus, “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.” In the instant case the matter relates to impeachment process with respect to the petitioner’s service as a Governor. 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.

Second, the Court follows its opinion in in Abdikadir Suleiman –Versus-County Government of Isiolo and Another [2015]eKLR thus:

“As stated by the court earlier in this judgment, the original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions in disputes between employers and employees rests with this court as vested with the appropriate jurisdiction under Articles 159(1), 162 (2) (a) as read with Article 165(5) and (6) of the Constitution; Articles 22(1) and 258(1) of the Constitution, and the provisions of the Employment and Labour Relations Act, 2011. The court holds that the jurisdiction spreads to all issues in the employment relationship and related matters including the enforcement of the fundamental rights and freedoms under Article 22 of the Constitution and enforcement of the Constitution under Article 258 as far as the issues in dispute are, evolve, revolve or relate to employment and labour relations. The court holds that the compass or golden test for the court’s jurisdiction is the subject matter in the dispute namely disputes relating to employment and labour relations as provided for Article 162 (a) of the Constitution and as amplified in the Employment and Labour Relations Court Act, 2011 and not the remedies sought or the procedure of moving the court or the situ of the applicable law or any other extraneous considerations as may be advanced by or for a litigant.”

Again the Court follows the opinion in its recent ruling delivered on 12.04.2019 in Okiya Omtatah Okioti –Versus- The National Executive of the Republic and 6 Others [2019]eKLR, thus,

“The Court has also held that in the public service under the Constitution of Kenya 2010, there are no masters and servants so that in public service in the new Republic, the test of master – servant does not obtain towards establishing existence of employment. In Paul Nyadewo Onyango –Versus- Parliamentary Service Commission and Another [2018]eKLR the Court stated, “In the present case, the Court will not therefore place emphasis on the relationships between individual public or state officers. None was a servant or master of the other. What is paramount, in the opinion of the Court, is that the officers interrelate and work together within the lawful prescription of the standards of a good public service delivery. They have no private treaties binding one officer to the other but only the constitutional, statutory and lawful policies or practices that are applicable to the public service and incorporated in the individual officer’s contract of service.”

Again in Richard Bwogo Birir –Versus- Narok County Government and 2 Others [2014] eKLR the Court stated “The court has carefully considered the enumerated constitutional provisions and holds that all persons holding public or state office in Kenya in the executive, the legislature, the judiciary or any other public body and in national or county government are servants of the people of Kenya. The court holds that despite the level of rank of state or public office as may be held, no public or state officer is a servant of the other but all are servants of the people. Thus, the court holds that the idea of servants of the crown is substituted with the doctrine of servants of the people under the new Republic as nurtured in the Constitution of Kenya, 2010. The hierarchy of state and public officers can be complex, detailed and conceivably very long vertically and horizontally but despite the rank or position held, the court holds that they are each a servant of the people and not of each other as state or public officers. They are all the servants of the people. The court holds that there are no masters and servants within the hierarchies of the ranks of state and public officers in our new Republic.”

Thus to answer the preliminary issue the Court returns that it has jurisdiction to entertain the present petition. The Court adds that whether it is about employment law or policy or about individual public officer's grievances, the jurisdiction of the Court would properly be available in that regard.

**Third**, parties are in agreement that the Court's jurisdiction flows from Article 162(2) (a), Article 165 (5) (b) and the provisions of the Employment and Labour Relations Court Act, 2011. There is no doubt that the dispute is about whether the initiated impeachment proceedings are continuing in accordance with the relevant provisions of the standing orders and the Constitution. The Court has already found that impeachment is in the nature of a disciplinary process that may lead to the petitioner's removal from office as is clearly a human resource function that squarely falls under the jurisdiction of the Court and the Court enjoys the relevant jurisdiction. Section 12(1) of the Employment and Labour Relations Court Act, 2011 is clear that the Court has exclusive original and appellate jurisdiction to hear and determine disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of the Act or any other written law. Section 12 (2) of the Act (which the parties appear to have failed to refer to) further provides that an application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose – and by that provision, it is clear that in the instant petition the petitioner (as an employee) has by way of the petition lodged a complaint against the respondents. The Court further holds that by reason of section 12(2) of the Act the proceedings are not limited to parties listed in section 12(1) of the Act but the jurisdiction spreads to disputes about employment even by and against persons not being employees or employers or parties to the contract of service. The Court finds that to be the case especially in view of Article 162(2) as read with Article 165 (5) (b) of the Constitution.

**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. 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. Thus the Court upholds and follows its opinion in the ruling in Abdikadir Suleiman –Versus- County Government of Isiolo [2015]eKLR thus, “**The court says it in other words as follows. The Constitution or legislation may provide that a person or public body or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions or powers as vested in the person or authority or public body by the Constitution or legislation. The Constitution or legislation may also vest in a person or authority or public body the power or function to consider or entertain given disputes or matters as of first instance or on appeal and to render decisions in that regard in accordance with the prescribed procedures. In the opinion of this court, such constitutional and legislative provisions shall not be construed as precluding a court from exercising the relevant jurisdiction in relation to any question whether that person or authority or public body has exercised the powers or functions in accordance with the Constitution or any other law. The court holds that such provisions do not oust or extinguish or adjourn the court's jurisdiction to hear and determine a dispute about the legality or the manner of the exercise of the constitutional or statutory powers and functions by the relevant person, public body or authority as may have been vested in the person, public body or authority under the Constitution or statute.**”

The court is alert that under Article 159(2) (b) justice shall not be delayed and under Article 159 (2) (e) the court is guided that in exercise of judicial authority, the purpose and principles of the Constitution shall be protected and promoted. Under Article 159 (1) judicial authority is vested in the judiciary and it is the opinion of the court that issues of legality of actions or omissions is the immediate and proper primary or original province and jurisdiction of the court and is not the penultimate or initially ceded jurisdiction of persons, public bodies and authorities outside the judiciary. In the opinion of the court, it would amount to delayed justice to tell the claimant thus, “ The court knows your alleged case is that an illegality has taken place; you challenge the alleged illegality; on merits of the challenged decision you ought to appeal to the Commission; the Commission has no jurisdiction to consider issues of illegality as you have alleged in your case but it might consider it and may rule in your favour; and therefore, though this court has the primary jurisdiction to consider the issue of illegality as you have alleged, you ought to have gone to the Commission in the first instance just to see if the Commission might have considered the issue of illegality before you moved this court and your case is dismissed accordingly for failure to give the Commission chance to exercise the speculative and hopeful jurisdiction on that issue of alleged illegality. While....” Thus, the Court finds that as submitted for the petitioner, he needs not wait for his rights and fundamental freedoms to be violated and thereafter move the Court but he is entitled to arrest the alleged threatened violation as is purportedly done in the instant petition and application accompanying the petition.

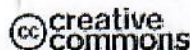
In conclusion the preliminary objection dated and filed on 04.03.2020 for the 2<sup>nd</sup> respondent is hereby dismissed with orders:

- 1) The 2<sup>nd</sup> respondent to pay the petitioner’s costs of the preliminary objection.
- 2) The interim orders herein given on 02.03.2020 as extended are hereby extended until further orders by the Court or until the next mention date.
- 3) Parties to take steps for the expeditious hearing and determination of the petitioner’s application dated 27.02.2020 as well as the petition and for that purpose mention on 27.10.2020 as will be listed and called out for relevant and further directions.

Signed, dated and delivered by the court at Nairobi by video-link this Friday 23<sup>rd</sup> October, 2020.

BYRAM ONGAYA

JUDGE



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