

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

REFERENCE NO. 1 OF 2020

– BETWEEN –

**THE HONOURABLE SPEAKER,
NAIROBI CITY COUNTY ASSEMBLY.....1ST APPLICANT**

THE CLERK, NAIROBI CITY COUNTY ASSEMBLY.....2ND APPLICANT

– AND –

THE HON. ATTORNEY GENERAL.....1ST INTERESTED PARTY

GOVERNOR, NAIROBI CITY COUNTY.....2ND INTERESTED PARTY

**THE COUNTY GOVERNMENT
OF NAIROBI CITY.....3RD INTERESTED PARTY**

**THE CHAIRMAN, INDEPENDENT ELECTORAL
AND BOUNDARIES COMMISSION (IEBC).....4TH INTERESTED PARTY**

ADVISORY OPINION

A. INTRODUCTION

[1] This Reference was moved by the Hon. Speaker of Nairobi City County Assembly and the Clerk of Nairobi County Assembly for an Advisory Opinion under Article 163(6) of the Constitution. The Applicants, by their Reference dated 7th January 2020 and filed on even date, raise the following issues:

- (i) *Whether the pronouncement of courts in various rulings is a declaration of vacancy in the respective offices and more specifically the County of Nairobi City?*
- (ii) *Whether the Governor of Nairobi can appoint a Deputy Governor even after being barred by a court from accessing his office?*
- (iii) *Whether in the absence of both the Governor and the Deputy Governor, the Speaker Nairobi City County can assume the office of Governor?*
- (iv) *What happens when the Speaker Nairobi County Assembly declines to assume the office of Governor County of Nairobi City?*
- (v) *What is the legal position regarding the absence of gazetting the resignation of Deputy Governor County of Nairobi City?*

B. BACKGROUND

[2] On 9th March 2018, in *Re Speaker, County Assembly of Embu*, SC. Reference 1 of 2015; [2018] eKLR, this Court pronounced itself on the procedure for administration of the oath of office for a Deputy Governor who assumes office: under Article 182(2) of the Constitution in the event of impeachment of a County Governor, the criteria for filling the vacancy that occurs in the office of the Deputy County Governor, where the originally elected Deputy Governor assumes office as Governor after the impeachment of the Elected Governor; and the timeline within which the Deputy Governor assuming office should assume office. The Applicants contended, however, that the Court did not pronounce itself on how the office of the Governor would be filled where there is *no* Deputy Governor. It is on this basis the Applicants seek the advice of the Court.

[3] On 6th December 2019, the former Nairobi City County Governor was arrested by the Ethics and Anti-Corruption Commission and subsequently arraigned in court to answer charges of Economic Crimes and abuse of office. This arraignment

resulted in his suspension from office. As at that time, there was no substantive Deputy Governor in office, as the holder of the said office had resigned.

C. PRELIMINARY ISSUES

[4] Before this Court can render any opinion in relation to a Reference for an advisory opinion, it must first dispose of a number of preliminary issues that have been raised regarding, *inter alia*, jurisdiction, locus of parties, the Opinion of the Attorney General and the place of related matters before other superior courts. The questions for determination therefore are:

- (i) *Whether this Court has jurisdiction to render an advisory opinion?*
- (ii) *If yes, whether the Court should exercise its discretion to give an advisory opinion in this matter?*

D. ANALYSIS

- (i) *Whether this Court has jurisdiction to render an advisory opinion?***

[5] The Applicants urged that the Court has jurisdiction to entertain the Reference and issue an advisory opinion according to Article 163(6) of the Constitution for the reason that the Applicant is a holder of an office under Article 260 of the Constitution; the matter entails the filling of a vacancy of a governor with no Deputy Governor; and also, that the Attorney General did not give an opinion despite a request to do so. Contrarywise, the Attorney General submitted that this Reference fails to lay a factual basis for its institution; lacks a supporting affidavit; his opinion has not been sought; the 2nd Applicant lacks *locus standi* to seek an

advisory opinion from the Court; matters are pending in the courts below raising similar issues; and that some issues are explicitly provided for in the Constitution.

[6] This Court’s jurisdiction to issue advisory opinions is anchored in the Constitution under Article 163(6) which stipulates as follows:

“The Supreme Court may issue an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government”.

[7] Further, on this Court’s jurisdiction to offer advisory opinions, Section 13 of the Supreme Court Act, 2011 provides as follows:

“An advisory opinion by the Supreme Court under Article 163(6) of the Constitution shall contain the reasons for the opinion and any judges who differ with the opinion of the majority shall give their opinions and their respective reasons”.

[8] Likewise, the Supreme Court Rules, 2020 also provide for the exercise of this jurisdiction in similar terms under Rule 50(1).

[9] The criteria for determining whether a matter is proper before this Court was also set by this Court in *Re Matter of the Interim Independent Electoral Commission*, SC. Constitutional Application No. 2 of 2011; [2011] eKLR(*Re Matter of the Interim Independent Electoral Commission*) in which we rendered ourselves as follows:

“[83] With the benefit of the submissions of learned counsel, and of the comparative assessments recorded herein, we are in a position to set out certain broad guidelines for the exercise of the Supreme Court’s Advisory-Opinion jurisdiction:

(i) For a reference to qualify for the Supreme Court's Advisory-Opinion discretion, it must fall within the four corners of Article 163(6): it must be "a matter concerning county government." The question as to whether a matter is one "concerning county government", will be determined by the Court on a case-by-case basis.

(ii) The only parties that can make a request for an Advisory Opinion are the national government, a State organ, or county government. Any other person or institution may only be enjoined in the proceedings with leave of the Court, either as an intervener (interested party) or as amicus curiae.

(iii) The Court will be hesitant to exercise its discretion to render an Advisory Opinion where the matter in respect of which the reference has been made is a subject of proceedings in a lower Court. However, where the Court proceedings in question have been instituted after a request has been made to this Court for an Advisory Opinion, the Court may if satisfied that it is in the public interest to do so, proceed and render an Advisory Opinion.

(iv) Where a reference has been made to the Court the subject matter of which is also pending in a lower Court, the Court may nonetheless render an Advisory Opinion if the Applicant can demonstrate that the

Issue is of great public importance is of great public importance and requiring urgent resolution through an Advisory Opinion. In addition, the Applicant may be required to demonstrate that the matter in question

would not be amenable to expeditious resolution through adversarial Court process.

“[84] The foregoing guidelines coincide with our conviction that the plain terms of the Constitution should be read in the broader context of its spirit and philosophy; and on that basis, applications seeking Advisory Opinion shall be resolved as necessitated by the merits of each case. In view of the practical and legal constraints attendant on Advisory Opinions, this Court will, in principle, exercise that jurisdiction with appropriate restraint”.

[10] Furthermore, in the ***Re the Matter of the Principle of Gender Representation in the National Assembly and the Senate***, SC. Advisory Opinion No. 2 of 2012; [2012] eKLR, at paragraph [17] and [18], we have emphasized that the exercise of this Court’s jurisdiction under Article 163(6) of the Constitution is *discretionary* and only deserving matters will justify the exercise of such jurisdiction.

[11] From the Reference before us, it is obvious that the Applicant seeks an advisory opinion regarding the process of filling the position of a Governor and Deputy Governor upon a double vacancy, following a court order barring a County Governor from accessing office, and in the absence of a substantive Deputy Governor following a resignation; the procedure for filling the two vacancies should a Speaker decline to assume the office of Governor, and lastly the legal position regarding the absence of gazetting the resignation of a Deputy Governor. From the foregoing issues, there is no doubt that this Reference concerns matters relating to County Government.

[12] We take note that one of the Applicants is the Speaker of the County Assembly of Nairobi, an office established under Article 178 of the Constitution. Therefore, he is a proper Applicant as provided for in Article 163(6) of the Constitution. However, the other Applicant, the Clerk of the County Assembly, unlike the Speaker, does not have the *locus standi* to bring a request for an advisory opinion before this Court. Consequently, the 2nd Applicant is hereby struck out of the Reference at this stage.

[13] We now come to the next question, *are the issues raised herein subject of proceedings in a lower court?* Although none of the participants supplied us with a list of matters pending determination before lower courts, we took it upon ourselves to go through some of the matters pending the courts below and found as follows:

- (i) The first issue, *whether the pronouncement of the courts in various rulings is a declaration of vacancy in the respective offices and more specifically the County of Nairobi City*, is pending determination before this Court in ***Petition 2 of 2020, Ferdinand Waititu Vs. Republic*** and in the High Court ***Petition No. E 312 OF 2020***. Furthermore, we found that the Court of Appeal has also pronounced itself on this issue in ***Moses Kasaine Lenolkul vs. Republic***, Criminal Appeal No. 109 of 2019, [2019] eKLR.
- (ii) The second issue, *whether the Governor can appoint a Deputy Governor even after being barred by a court from accessing his office*, is pending determination at the High Court in ACEC Petition No. 1 of 2020.

[14] In ***Re Matter of the Interim Independent Electoral Commission***, this Court underlined the circumstances under which it can offer an advisory opinion *concerning a matter pending before a lower court*. This Court made it

clear that an Applicant must demonstrate that the issue is of great public importance and requiring urgent resolution through an Advisory Opinion. In addition, the Applicant may be required to demonstrate that the matter in question would not be amenable to expeditious resolution through adversarial court process. The word “*and*” is used to link the two elements, meaning that the issue pending before a court below must meet both elements. Although the Reference meets the element of “general public interest,” the two issues highlighted above do not, in our opinion, meet the second criteria, that of urgency. Consequently, we decline to exercise our discretion to entertain the two issues. The same should reach us through the normal appellate mechanism set out in the Constitution.

[15] On the third issue, *whether in the absence of both the Governor and Deputy Governor, the Speaker City County Assembly can assume the office of Governor?* Article 182(4) of the Constitution provides that in the absence of a County Governor and that of a Deputy Governor, the Speaker of the County Assembly shall act as County Governor. Furthermore, in ***Re Speaker, County Assembly of Embu***, SC. Reference No. 1 of 2015; [2018] eKLR, at paragraph 61, this Court held in part as follows:

“...Where a vacancy occurs in *both* the offices of County Governor and Deputy County Governor at the same time, *the office of the Deputy County Governor shall remain vacant until the election of a new Governor*. The new Governor *shall nominate a person to fill the vacancy within fourteen days after assuming office*. The County Assembly *shall vote on the nomination within sixty days after receiving it*. For the avoidance of doubt, we hereby state that this holding shall obtain in all circumstances pursuant to which the Office of the

Deputy Governor may become vacant as contemplated by the Constitution, i.e., death, resignation or impeachment.”

Consequently, given the foregoing constitutional provisions and our decision above, we see no justification for us to issue further advice on the same.

[16] On the fourth issue, *what happens when the speaker of Nairobi City County Assembly declines to assume the office of Governor County of Nairobi City?* We are inclined to agree with the submissions by the Attorney General that this question is hypothetical as it is yet to occur. In ***Re Matter of the Interim Independent Electoral Commission***, this Court at paragraph [84] emphasized that given the practical and legal constraints attendant on Advisory Opinions, this Court will, in principle, exercise that jurisdiction with appropriate restraint. We shall not, therefore, exercise our jurisdiction in hypothetical situations.

[17] On the fifth issue, *what is the legal position regarding the absence of gazetting the resignation of Deputy Governor of Nairobi City?* It is our finding that this question can be dealt with through the advice of the Attorney General or by the courts below to reach us through the normal appellate mechanism.

E. DISPOSITION

[18] Ultimately, based on our finding above, we decline to exercise our discretion in rendering an opinion in this matter.

DATED and DELIVERED at NAIROBI this 16th Day of July, 2021.

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P. M. MWILU
DEPUTY CHIEF JUSTICE &
VICE-PRESIDENT
OF THE SUPREME COURT

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA

