

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA AT NAIROBI**

*(Coram: M. Koome, CJ & P, P. Mwilu, DCJ & VP, Ibrahim, Wanjala, Njoki,  
Lenaola, & Ouko SCJJ)*

**PETITION NO.11 (E008) OF 2022**

**-BETWEEN-**

**HON. MIKE MBUVI SONKO..... APPELLANT**

**-AND-**

**THE CLERK,**

**COUNTY ASSEMBLY OF NAIROBI CITY .....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**

**THE CLERK OF THE SENATE OF KENYA.....4<sup>TH</sup> RESPONDENT**

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

**THE SENATE OF KENYA.....6<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....7<sup>TH</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION.....8<sup>TH</sup> RESPONDENT**

**THE ASSUMPTION OF THE OFFICE OF THE COUNTY**

**GOVERNOR COMMITTEE NAIROBI**

**CITY COUNTY.....9<sup>TH</sup> RESPONDENT**

**HON. BENSON MUTURA, THE ACTING GOVERNOR,**

**NAIROBI CITY COUNTY.....10<sup>TH</sup> RESPONDENT**

**ANN KANANU MWENDA, THE DEPUTY GOVERNOR,**

**NAIROBI CITY COUNTY.....11<sup>TH</sup> RESPONDENT**

*(Being an Appeal from the Judgment of the Court of Appeal in Civil Appeal E425 of 2021 at Nairobi delivered on 4<sup>th</sup> March, 2022 (Nambuye, Okwengu & Laibuta, JJ.A)*

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**JUDGMENT OF THE COURT**

*(Pursuant to Rule 28(2) of the Supreme Court Rules, 2020)*

*(Koome, CJ & P, Njoki, Lenaola, & Ouko, SCJJ; with Mwilu, DCJ & VP, Ibrahim & Wanjala, SCJJ, Concurring)*

**A. INTRODUCTION**

[1] The appellant, who until 17<sup>th</sup> December, 2020 was the Governor of the Nairobi City County, was removed from office on that date by way of an impeachment motion initiated by the 2<sup>nd</sup> respondent (the Assembly). The decision of the County Assembly was confirmed by the 6<sup>th</sup> respondent (the Senate) pursuant to Article 181 of the Constitution, Section 33 of the County Governments Act, Standing Order No. 67 of the Assembly and Standing Order No 75 of the Senate. Attempts by the appellant and the 12<sup>th</sup> respondent to overturn the decision through a challenge both in the High Court and the Court of Appeal were unsuccessful, precipitating this appeal.

[2] It is not lost to us that, given the fact that the general elections are due to be held in the next 24 days, the determination of this appeal will have a direct bearing on the preparations being undertaken by the 8<sup>th</sup> respondent, especially in respect of the appellant who has declared his intention to contest an elective seat. The appeal, for these reasons is, therefore a matter of urgency. In those circumstances, we considered it paramount to deliver this Judgment in this shortened version, to

be followed, on a date to be notified, by detailed reasons, pursuant to Rule 20(2) of the Supreme Court Rules, 2021.

**[3]** The judgment of the Court of Appeal dated 4<sup>th</sup> March, 2022 has been impugned on 24 grounds (listed as [a] to [x] in the Petition of Appeal but condensed in the appellant's written submissions and argued in seven (7) clusters, as follows;

- (a) whether due process was followed by the County Assembly in the removal of the appellant from the office of Governor;
- (b) whether the appellant was accorded adequate time and facility to respond to the charges against him both at the county assembly and in the Senate;
- (c) whether it was mandatory to verify the impeachment motion by affidavits or other statements on oath by members of the County Assembly who allegedly supported the motion;
- (d) whether public participation was undertaken;
- (e) whether the charges were substantiated to the prescribed standard warranting removal of the appellant from the office; and
- (f) whether the sovereignty of the people envisaged under Article 1 of the Constitution was respected and protected in the removal process.

## **B. THE ISSUES**

**[4]** After hearing the respective cases for the appellant and respondents hereto, and considering their written and oral submissions in support thereof; and cognizant of our duty to render determination on all the grounds in the appeal, we consider, for purposes of this abridged judgment, the seven grounds set out above sufficient to dispose of the appeal. We shall, in addition consider, in terms of the Notice of Preliminary objection filed by the 3<sup>rd</sup> respondent on 13<sup>th</sup> July 2022, whether the jurisdiction of this Court has been properly invoked by the appellant.

We however emphasise that not every issue that was before the superior courts and which has been raised in this appeal is open for this Court's determination in exercise of its Appellate jurisdiction. Matters of fact that touch on evidence without any constitutional underpinning are not open for this Court's review on appeal.

### **C. THE FINDINGS**

**[5]** It is quite clear to us that a constitutional mandate, which embodies the remit of impeachment, vests in the legislative branches of Government. In the instant case in the County Assembly and the Senate. It is in these two constitutional organs' exclusive spheres of jurisdiction, that the impeachment of a County Governor is reposed. In discharging this function, they must live by the edict of the Constitution. Where it is alleged that any of them has failed to act in accordance with the Constitution, then the courts are empowered by Article 165 (3)(d)(ii) to determine that allegation. Similarly, the Court may interfere where it has been demonstrated that there has been a failure to abide by the Standing Orders of either the County Assembly or the Senate, because these Standing Orders have a constitutional underpinning in Article 124.

**[6]** The impeachment architecture in the Constitution, the law and the standing orders leaves no doubt that removal of a Governor relates to accountability, political governance and personal responsibility and not necessarily about criminal responsibility. It follows that in so far as the process of removal of a Governor from office is concerned, the court's role is confined to deciding whether the Governor's constitutional rights and fundamental freedoms have been breached in the process and whether the procedures for removal from office have been followed, without the court constituting itself into any of the two constitutional organs in whose hands the power to remove is vested.

**[7]** Enough said by way of background and introduction. We turn to answer the specific issues we have set out in the preceding paragraph.

i. *On whether the Court's jurisdiction was properly invoked:*

[8] In *Nyarangi JA's* time-honoured words in the ***Owners of the Motor Vessel "Lillians" v. Caltex Oil Kenya Limited*** [1989] KLR 1, which were originally penned by the United States of America Supreme Court in 1915 in the case of ***McDonald v. Mabee***, 243 U.S. 90,91 (1915), without jurisdiction a court has no power and must drop tools in respect of the matter in question.

[9] The 3<sup>rd</sup> respondent has objected to the jurisdiction of the Court to entertain the appeal for the reasons that the Court was improperly moved by invocation of the wrong constitutional and/or statutory provisions that cloth it with jurisdiction; that the issues in the appeal do not concern any question involving interpretation or application of the Constitution within the meaning of Article 163(4)(a) of the Constitution and Sections 3 and 15 of the Supreme Court Act. Equally, the 7<sup>th</sup> respondent in its Grounds of Objection raised the issue of jurisdiction. It faulted the appellant for failing to specify the provisions under which he invokes this Court's jurisdiction; and further, that this being a second appeal, this Court is constrained to confine itself to matters of law.

[10] It is elementary knowledge on account of a legion of decisions of this Court that appeals from the Court of Appeal lie to this Court pursuant to Articles 163 (4) (a) or 163 (4) (b) of the Constitution; and that an appeal shall not lie to this Court, unless brought within the compass of either of the two jurisdictional limbs.

[11] It is not in contention that the appellant in his petition of appeal has expressly moved this Court under two Rules of this Court's, namely the repealed Rules, 9 and 33 [of 2012]. Properly cited, these two Rules relate to the contents of a petition of appeal and the timeframe for lodging an appeal as well as the documents that form the record of appeal. They clearly do not give jurisdiction to the Court. In view of the nature of its jurisdiction as far as appeals from the Court of Appeal are concerned, a party moving this Court must bear in mind the limits of its

jurisdiction and must decide either to seek a certification as a matter of general public importance (GPI) under Article 163 (4)(b) of the Constitution or come as a matter of right under Article 163 (4)(a) thereof. Even when a party invokes the latter, it is upon the party to identify and specify how the appeal concerns interpretation and application of the Constitution. It can never be the role of the Court to wander around in the maze of pleadings and averments in order to assume jurisdiction by way of elimination. That is what the Court has consistently cautioned in decisions such as ***Hermanus Phillipus Steyn v. Giovanni Gneccchi-Ruscione*** [2013]eKLR, ***Daniel Kimani Njehia v. Francis Mwangi Kimani & Another*** [2015] eKLR, ***Suleiman Mwamlole Warrakah & 2 others v. Mwamlole Tchappu Mbwana & 4 others*** [2018] eKLR, and ***National Rainbow Coalition Kenya (NARC Kenya) v. Independent Electoral & Boundaries Commission; Tharaka Nithi County Assembly & 5 others (Interested Party)***, SC Petition 1 of 2021; [2022] KESC 6 (KLR) (Civ) (17 February 2022).

[12] Of significance, it is incumbent upon the appellant to demonstrate, *in limine* as directed by the Court in ***Lawrence Nduttu & 6000 others v. Kenya Breweries Ltd & another*** [2012] eKLR, that the grievance he has presented to the Court concerns the application or interpretation of the Constitution which the Court of Appeal used to dispose of the matter in question before that court.

[13] In this matter the appellant has failed to do this. The preliminary objection, we find, meets the threshold in ***Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors ltd*** (1969) EA 696 and we sustain it.

[14] That conclusion would have been sufficient to dispose of this appeal in its entirety, as with it we would have been expected to down tools, but in view of the public interest nature of the dispute, the broad interests of both the parties, the need for due guidance to the judicial process and to the courts below and in terms of the Court's decision in ***Lemanken Aramat v. Harun Meitamei Lempaka***

**& 2 others** [2014] eKLR, we are minded, for the sake of posterity and development of jurisprudence to settle all the pertinent questions the appeal raises.

ii. *On whether due process was followed by the County Assembly in the removal of the appellant from the office of Governor:*

**[15]** Upon full deliberation and conscientious consideration of the material before us, submissions and the law, we are satisfied that the impeachment proceedings before the County Assembly and the Senate were properly conducted in accordance with Article 181 of the Constitution, Section 33 of the County Governments Act and Standing Orders of the Assembly and the Senate. There is no merit in this ground.

iii. *On whether the appellant was accorded adequate time and facility to respond to the charges against him both at the county assembly and in the Senate:*

**[16]** We answer this question in the affirmative considering the timelines stipulated in the law within which the Assembly and the Senate had to conclude their investigations and the prevailing Covid-19 Global Pandemic restrictions that were in place at the time of the impeachment proceedings. Just like the two superior courts, we are persuaded that, the appellant had adequate time and facility, because he was able to sufficiently respond to the charges brought against him.

iv. *On whether it was mandatory to verify the impeachment motion by affidavits or other statements on oath by members of the County Assembly who allegedly supported the motion:*

**[17]** Standing Order 67(1) of the Nairobi City County Assembly Standing Orders, requires that the motion for impeachment must be signed by the Member moving the motion who affirms that the particulars of allegations contained in the Motion

are true. In the same vein, each of the members constituting at least a third of all the members in support must “verify” that the allegations therein are true of their own knowledge and belief on the basis of their reading and appreciation of information pertinent thereto. Each of them is required to signify this by signing a verification form provided by the Clerk for that purpose.

**[18]** No material has been presented in this appeal to suggest that the Court of Appeal erred in its analysis and conclusion that the mover and all members in support signed the form and included the numbers of their identification cards against their names. That is the form of verification envisaged in the context of an impeachment motion and not an affidavit or any form of disposition. This ground, for these reasons must fail.

*v. On whether public participation was undertaken:*

**[19]** The two superior courts below in unanimity found uncontroverted evidence that the intended tabling before the Assembly of a motion for the impeachment of the appellant was not only advertised in a local daily newspaper with wide circulation, in response to which people submitted memoranda, but also a survey was conducted in the County in the form of questionnaires. The proceedings were in public. As a result, we find no fault in the analysis and conclusion reached by the Court of Appeal in this ground. It fails.

*vi. On whether the charges were substantiated to the prescribed standard warranting removal of the appellant from the office:*

**[20]** It has been observed at the beginning of the Judgment that impeachment proceedings, though *quasi-judicial* are not in the nature of criminal proceedings. It does not require criminal culpability to succeed. All that is required is that the allegations be substantiated. But as a constitutional remedy, impeachment serves

as an important check on the exercise of Executive power regarding violations of law and abuses of power.

[21] There were four counts of impeachable charges against the appellant. The County Assembly, the Senate and the two superior courts below were convinced that the charges were proved to the standard required in such circumstances. The proof of even a single charge would be sufficient. Nothing has been placed before us to warrant our departure from the conclusions by the two superior courts. We find no merit in this ground.

vii. *On whether the sovereignty of the people envisaged under Article 1 of the Constitution was respected and protected in the removal process:*

[22] Indeed, under Article 1 of the Constitution, all sovereign power belongs to the people of Kenya. That power can only be exercised in accordance with the Constitution. Further, the people may exercise that power either directly or through their democratically elected representatives. Specifically, sovereign power of the people is delegated to State organs such as Parliament and the Legislative Assemblies in the County governments.

[23] In the instant situation, the people exercised their power through the latter to uphold and defend Chapter Six of the Constitution. To that extent this ground also fails.

#### **D. DISPOSITION**

[24] From the record and submissions before this Court, we come to the irresistible conclusion that the impeachment of the appellant was in compliance with the Constitution and the law. We therefore find no merit in the Petition of Appeal.

[25] It bears mentioning in conclusion that Chapter Six of the Constitution was not enacted in vain or for cosmetic reasons. The authority assigned to a State officer is a public trust to be exercised in a manner that demonstrates respect for

the people; brings honour to the nation and dignity to the office; and promotes public confidence in the integrity of the office. It vests in the State officer the responsibility to serve the people, rather than the power to rule them.

[26] This appeal lacks merit. It is accordingly dismissed.

[27] *Mwilu, DCJ & VP, Ibrahim & Wanjala, SCJJ* concur with the majority in respect of the final orders and will render their concurring opinions at the time of issuance of the detailed Judgment.

#### **E. COSTS**

[28] No doubt the Petition raises substantive issues of law and of great public interest, and although costs follow the event, we think for these reasons, it is appropriate to order each party to meet its own costs.

#### **F. ORDERS**

***i) The Petition dated 1<sup>st</sup> April, 2022 is hereby dismissed;***

***ii) Each party to bear its own costs.***

It is so ordered.

**DATED and DELIVERED at NAIROBI this 15<sup>th</sup> day of July, 2022**

.....  
**M.K. KOOME**  
**CHIEF JUSTICE & PRESIDENT**  
**OF THE SUPREME COURT**

.....  
**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**

.....  
**W. OUKO**  
**JUSTICE OF THE SUPREME COURT**

**I certify that this is a true copy of the original**

**REGISTRAR**  
**SUPREME COURT OF KENYA**

