REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome, CJ & P; Ibrahim, Wanjala, Lenaola & Ouko, SCJJ)

PETITION NO. E034 OF 2024

–BETWEEN–

HAMISI BWENI DZILA .....APPELLANT

-AND-

KWALE COUNTY ASSEMBLY SERVICE BOARD .....1ST RESPONDENT
COUNTY ASSEMBLY OF KWALE .....2ND RESPONDENT
SAMMY NYAMAWI RUWA..... 3RD RESPONDENT
OMAR KITENGELA..... 4TH RESPONDENT
ANTONY YAMA ..... 5TH RESPONDENT
MWAKABURI HAMISI ..... 6TH RESPONDENT
CELINE LUSWETI .....7TH RESPONDENT

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*(Being an appeal from the Judgment of the Court of Appeal (**Murgor, Laibuta & Odunga JJ. A.**) delivered on 26th July, 2024 in Civil Appeal No. E102 of 2022)*

Representation:

Mr. Yusuf Aboubakar for the appellant
(*Aboubakar, Mwanakitina & Co. Advocates*)

Mr. Kenneth Kibara for the 1st to 7th respondents
(*Muturi, Gakuo & Kibara Advocates)*

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This appeal concerns the administrative suspension of the appellant from his position as Clerk of the County Assembly of Kwale. Central to the matter is whether

the suspension, presented as a measure to facilitate investigations, was a veiled removal from office carried out without adherence to due process. The appellant alleges bias, bad faith, and procedural irregularities, including claims that the disciplinary process did not comply with the safeguards provided under Sections 22 and 23 of the County Assembly Service Act (CAS Act) as well as Articles 232 and 236 of the Constitution on the principles of public service. It is important to note that this appeal pertains only to the preliminary stages under Sections 22 and 23 of the CAS Act, which deals with suspension. The process of removal from office was yet to be conducted.

B. BACKGROUND

[2] The 2nd respondent, County Assembly of Kwale (County Assembly), employed the appellant as a Clerk of the County Assembly effective 1st August 2019 on permanent and pensionable terms. By virtue of being the Clerk, he was also the Secretary to the 1st respondent, Kwale County Assembly Public Service Board (the Board). According to his contract of service, he would serve on probation for 6 months. Subsequent to his employment, the appellant claimed that he was not allowed to take and sign Board minutes; that after appointment, he started receiving phone calls threatening him that there was a dossier against him from his previous employment, and despite asking for the dossier, it was not presented to him. He reported the matter to the police vide OB. No. 18/25/09/2019.

[3] During his probation period, the respondents observed and concluded that the appellant was not discharging his duties and responsibilities in accordance with the CAS Act. He was alleged to have caused the arrest of the County Assembly procurement officer by the Ethics and Anti-Corruption Commission (EACC) without referring the matter to the Board; that he would occasionally fail to implement the resolutions of the Board; that he was the source of ethnic divisions in the service; and that he refused to subject himself to the biometric register. Consequently, the Board noted that the appellant was still under probation and resolved not to confirm his appointment as the Clerk. This was communicated to

him. He was further advised that in line with Section 42 of the Employment Act, he would be paid 7 days' wages in lieu of notice to terminate his services.

[4] This prompted the appellant to file before the Employment and Labour Relations Court (ELRC), ***ELRC Cause 99 of 2019, Hamisi Bweni Dzila Vs. County Assembly of Kwale and Kwale County Assembly Service Board,*** challenging the termination of his service. In the suit he prayed, *inter alia*, that: a declaration be made that his termination was illegal as it contravened Section 12(5)(b) of the County Governments Act and Sections 22 and 23 of CAS Act; an order of reinstatement be issued; an order restraining the respondents from preventing him from carrying out his duties be granted; an award of general damages be made; and costs granted to him. By a Ruling dated 28th February 2020, the ELRC *(Rika, J.)* found that under the County Governments Act or CAS Act there was no provision requiring the clerk to serve on probation and that if the Board believed that the appellant was not suitable, his termination from service was to follow the provisions of Section 23 of CAS Act relating to removal of a clerk from office. As a result, the ELRC reinstated the appellant and ordered the respondents to pay his back salary from the date of termination up to the ruling date. Moreover, the respondents were ordered not to interfere with the appellant's discharge of his mandate. The learned Judge ordered that the ruling be adopted as a judgment of the court within 30 days and thereafter the file be closed.

[5] Pursuant to that decision, the appellant reported to work on 2nd March 2020. He averred that he was not allowed to enter the office as police had been deployed to prevent his entry. Instead, he was issued with a notice of administrative suspension pending investigation dated 2nd March 2020. He alleged that the Board had sat on Sunday, 1st March 2020 and decided that the notice be issued. The notice set out eight (8) allegations against him, constituting gross misconduct, thus:

a) Failed to exhaust internal disciplinary mechanism in handling allegations against an officer of the service and opted to explore external disciplinary mechanism without involving the Board.

b) Having refused or failed to implement several decisions or resolutions of the Board.

c) Having on various occasions undertaken programs without seeking the Board's approval.

d) Having written to sources external to the service seeking advice without the knowledge or approval of the Board.

e) Having authorised or approved payments from the Assembly's account without the approval of the Board and contrary to financial procedures and guidelines.

f) Having misrepresented information to the Board and presented minutes that do not capture the true deliberations and decisions of the Board.

g) Having been insubordinate to the Board.

h) Having refused or failed to subject himself to the attendance control systems set by the Assembly to check time-keeping and attendance.

[6] The effect of the notice of administrative suspension was that the appellant was suspended from the functions of his office with immediate effect for 60 days pursuant to Section 22 of the CAS Act. The notice clarified that the suspension was not disciplinary in nature but intended as part of the investigations into the allegations and to determine the appropriate action. It further stated that if investigations were not concluded within the 60-day period, the Board reserved the right to extend the suspension as necessary.

[7] Subsequently, the appellant received an undated notice to show cause signed by Hon. Sammy N. Ruwa, the 3rd respondent and Chairperson of the Board. The notice indicated that investigations had been concluded and outlined the allegations against the appellant, which largely mirrored the grounds previously

stated in the notice of administrative suspension. Shortly thereafter, on 11th March 2020, the appellant was arrested and charged with giving false information to a person employed in public service, contrary to Section 129(a) of the Penal Code.

[8] In response, the appellant, through his advocates' letter dated 23rd March 2020, addressed each allegation in detail. He maintained that the charges were driven by malice, authoritarianism, abuse of office, and a blatant disregard for the rule of law. According to him, the respondents had already resolved to terminate his employment and were merely engaging in procedural formalities to give the appearance of compliance with due process. These events precipitated a fresh round of litigation with the appellant instituting a new claim before the ELRC. It is this claim that has given rise to the present appeal.

C. LITIGATION HISTORY

i. Before the Employment & Labour Relations Court

[9] The appellant filed ***Mombasa ELRC No. 21 of 2020, Hamisi Bweni Dzila Vs Kwale County Assembly Service Board & 6 Others,*** praying for judgment against the 1st to 7th respondents jointly and severally for:

a. *A declaration that his suspension by the the 1st, 3rd, 4th, 5th, 6th and 7th respondents from office as a clerk of the Kwale County Assembly by the letter dated 2nd March 2020 is a violation of the values and principle of public office as provided for by Articles 232 and 236 of the Constitution.*

b. *A declaration that the undated notice to show cause why removal proceedings should not be commenced against the appellant, are also a violation of the values and principles of public office as provided for under Articles 232 and 236 of the Constitution.*

c. *An injunction against the 1st, 3rd, 4th, 5th, 6th, and 7th respondents restraining them from suspending the appellant from his office as a clerk of the County Assembly of Kwale on the basis of the issues raised in the proceedings.*

d. *An injunction against the 1st, 3rd, 4th, 5th ,6th and 7th respondents restraining them from proceeding with the notice to show cause why removal proceedings should not be commenced against the appellant on the basis of the issues raised in the proceedings.*

e. *An injunction against the 2nd respondent restraining it from receiving, discussing, debating and or resolving any motion brought to it by the 1st, 3rd, 4th, 5th, 6th and 7th respondents seeking the removal of the appellant from his office as a clerk of the County Assembly of Kwale on the basis of the issues raised in the proceedings.*

f. *An order that the 1st and or 2nd respondents do immediately pay the appellant his outstanding salary from December 2019 to the date of filing the claim or the date of the judgment.*

g. *Costs of the claim.*

[10] In support of his claim, the appellant contended that he was unfairly targeted and victimized by the 3rd to 7th respondents after he declined to authorize payment to a contractor whose project was under investigation by the EACC; that he acted lawfully by seeking guidance from the EACC before making any financial approvals and relied on correspondence to that effect, which was supported by both the County Assembly's Legal Department and the EACC; that his actions provoked hostility, particularly from the county procurement officer, who allegedly threatened his secretary; and that as a result of this discontent, steps were taken leading to his unlawful termination on 11th December 2019. He explained how he successfully challenged that decision in ***ELRC Cause No. 99 of 2019***. Despite the ruling, he was later suspended on 2nd March 2020 and issued with an undated notice to show cause after the Board's meeting held on a Sunday, 1st March 2020.

[11] He challenged the legality of that Board meeting, arguing that it violated Clause 3 of the Second Schedule to the CAS Act and demonstrated malice, bad faith, and abuse of office. He also believed that his arrest and subsequent criminal charges against him on 11th March 2020 for giving false information were

instigated by the 3rd to 7th respondents, who were displeased by his earlier complaints, which were still under investigation at the time. The appellant further stated that he was denied access to his office and subjected to a flawed disciplinary process, in contravention of Article 236 of the Constitution, which protected public officers from unfair administrative action.

[12] On their part, the respondents denied the allegations of victimization and procedural impropriety. They stated that the appellant was not denied access to his office and that he received the Board's decision on 3rd March 2020. They also denied involvement in his arrest, asserting that the police independently recommended charges against the appellant and his secretary for giving false information, contrary to Section 129(a) of the Penal Code.

[13] They argued that the suspension was in accordance with Sections 22, 23, and 27 of the CAS Act; and that the appellant was issued with a notice to show cause, to which he duly responded through his advocates on 23rd March 2020. Although he was to appear before the Board, COVID-19 restrictions delayed proceedings, and the process was as a result, suspended by a court order on 27th April 2020. The Board, for its part, resolved not to proceed further until the ELRC matter was concluded.

[14] On the issue of the meeting held on Sunday the 1st March 2020, the respondents maintained it was lawful, as it was convened by the Chairperson pursuant to Clauses 1 and 2 of the Second Schedule to the CAS Act. They clarified it was not a special meeting under Clause 3, as it had been scheduled during a prior Board meeting held on 28th February 2020.

[15] The respondents stated that while the appellant was free to consult the EACC, he did so without informing the Board, in breach of Section 4(3) of the CAS Act, and later denied the communication, contradicting his own evidence. They emphasized that the disciplinary process was still ongoing and had not been concluded on merit.

[16] Finally, the respondents invoked Section 42 of the CAS Act, which protected Board members from liability for actions taken in good faith. They also raised a *res judicata* objection, on the ground that the issues raised in the petition had already been determined in ***ELRC Cause No. 99 of 2019***, and that the claim against the 3rd to 7th respondents ought to be struck out with costs.

[17] Ruling on the application dated 31st March 2020 wherein the appellant had sought an order of injunction restraining the respondents from: suspending him; procceding with the notice to show cause; debating any motion for his removal and for payment of his outstanding salary, the ELRC *(Ongaya, J.)* held that the appellant had established specific claims against all the respondents. The court also found that the matter was not barred by the doctrine of *res judicata*, as it did not involve re-litigation of issues previously decided in ***ELRC Cause No. 99 of 2019***.

[18] Importantly, the court questioned the legality of the suspension under Section 22 of the CAS Act, finding that, in the absence of procedural safeguards, the power to suspend could effectively operate as a mechanism for removal. The court opined that such suspension, imposed without due process or adherence to the rules of natural justice, undermined the procedures set out in Section 23 of the Act, which provide for the removal of a Clerk. Consequently, the court viewed the purported suspension as being tantamount to removal and held that it could not stand unless the process under Section 23 was followed. In the end, the learned Judge issued an order of stay (even though the application sought for an injunction) of the suspension and the administrative disciplinary proceedings initiated by the respondents against the appellant. The respondents were ordered to pay the appellant the outstanding salary from December 2019 to the date of the Ruling and to continue paying him going forward. Finally, parties were directed to take steps towards the expeditious hearing and determination of the suit, or, to compromise the dispute.

[19] At the hearing, the parties recorded a consent that the issue of suspension had been conclusively addressed by the court's earlier Ruling. The appellant proceeded to pursue only some of the prayers in the claim, since the court in the aforesaid Ruling had determined most of the issues.

[20] In its judgment delivered on 25th February 2022, the court, *(Ongaya, J.)* at this stage now granted an order of injunction restraining the 1st, 3rd, 4th, 5th, 6th, and 7th respondents from suspending the appellant on the basis of the issues raised, unless the due process under Section 23 of the CAS Act was followed and the appellant was found culpable. The court further declared that the term "suspend" as used in Section 22 of the Act effectively meant "remove", and could not be construed as a preliminary or interlocutory measure pending investigations.

[21] While dismissing the appellant's claim that the notice to show cause violated constitutional principles under Articles 232 and 236, the court held that allegations of bias must be raised with specificity and first addressed before the disciplinary bodies, failing which they may be challenged through proper legal channels.

[22] The court ordered the Board to bear 50% of the appellant's costs, taking into account the partial success of the claim, consent orders previously entered, and the ongoing employment relationship.

ii. Before the Court of Appeal

[23] Aggrieved, the respondents challenged the judgment of the ELRC on grounds that the trial judge erred in his interpretation and application of the law: particularly regarding Sections 22 and 23 of the CAS Act; disregarded the doctrine of *stare decisis*; misapplied the principles of natural justice; and misunderstood the provisions of the Act. They argued that the learned Judge was wrong to hold that the appellant was entitled to a hearing before being administratively suspended, and that he misconstrued the legal framework around suspension and removal. The respondents also contested the learned Judge's decision to award half the costs to the appellant.

[24] The appellant, in turn, filed a cross-appeal, arguing that the learned judge failed to find that the undated notice to show cause violated constitutional values and principles under Articles 232 and 236 of the Constitution. He further claimed that the respondents were biased against him, rendering any intended disciplinary process inherently unfair. The appellant also took issue with the finding that the Board had statutory authority to discipline him and faulted the court for failing to apply Section 156 of the Public Finance Management Act. Additionally, the appellant argued that the trial court had misapplied the Supreme Court's decision in ***Shollei Vs Judicial Service Commission & another*** [2022] KESC 5 (KLR) ***(Shollei Case)***, pointing out that the facts of that case were materially different and thus inapplicable to his situation. Lastly, he also disagreed with the award of only half the costs instead of full costs.

[25] In its determination, the appellate court held that the trial Judge erred in equating suspension with removal under Sections 22 and 23 of the CAS Act. It found that Sections 22 and 23 of the Act are clear in their distinction: while Section 22 refers to both suspension and removal, only removal is governed by an express, detailed procedure under Section 23. The court emphasized that this legislative choice signifies that the two processes are distinct and not interchangeable. Consequently, the learned Judges concluded on this point that the trial judge was in error for equating "suspend" under Section 22 with "remove," and for concluding that suspension could not occur without the procedure outlined in Section 23 for removal being followed.

[26] The Court of Appeal further examined whether the suspension of the appellant, described as a holding suspension pending investigations, required observance of the rules of natural justice. It concluded that such a preliminary, administrative action does not amount to a disciplinary hearing. The court adopted the ELRC's decision in ***Luka Korir Vs Moi Teaching and Referral Hospital***, [2022] eKLR, finding that requiring a hearing at that early stage would be impractical. Since no procedure for suspension is outlined in the Act, the court

found that the suspension was lawful and that no breach of the rules of natural justice occurred at that point.

[27] Turning to the cross-appeal, the court addressed the appellant's claim of bias in the disciplinary process. The appellate court was not persuaded that there was bias as the appellant had failed to establish this; that there was no concrete evidence or an inference of bias in the conduct of the respondents as required in the ***Shollei Case***; that the appellant had not even appeared before the Board for removal hearings, and there was no indication that any of the individual members of the Board had prejudged the case. As a result, the court dismissed the claim of bias as unmeritorious, upholding the trial Judge's finding on this issue. Regarding the undated notice to show cause, the appellate court found once more that the appellant did not demonstrate how it contravened constitutional values or how it violated the due process.

[28] Regarding costs, the appellate court upheld the trial court's decision to award half the costs to the appellant. It reasoned that since both parties had partial success in the matter, the trial judge acted fairly in apportioning the costs accordingly.

[29] In conclusion, the appellate court allowed the respondents' appeal to the extent that it overturned the trial court's interpretation equating suspension with removal. It set aside the declaration that suspension could not occur without following the removal procedure under Section 23. The cross-appeal by the appellant was dismissed in its entirety for lack of merit. The court awarded the costs of both the appeal and the cross-appeal to the respondents.

iii. Before the Supreme Court

[30] Aggrieved by the decision of the Court of Appeal, the appellant filed the instant appeal dated 20th August 2024, raising the following grounds:

a. *The Court of Appeal erred in law in failing to declare that the undated notice to show cause was a violation of the values and principles of public*

office under Articles 232 and 236 of the Constitution despite overwhelming evidence tendered by the appellant.

b. The Court of Appeal erred in failing to find that the respondents had already made up their minds against the appellant and the intended disciplinary proceedings would not be fair as required under Article 50 of the Constitution.

c. The Court of Appeal misapprehended and misapplied the law in failing to hold that the ELRC was wrong in finding that the circumstances of the case the respondents were properly vested with the statutory authority to exercise disciplinary control over the appellant under Sections 22 and 23 of the County Assembly Service Act and failed to be guided by the provisions of Section 156 of the Public Finance and Management Act thereby occasioning a miscarriage of justice against the appellant.

d. Both the Court of Appeal and the ELRC misapplied the decision in ***Gladys Boss Shollei Vs Judicial Service Commission and 2 Others****, Petition No. 34 of 2014 as the facts in the authority were distinct and dissimilar to the facts in the case.*

e. The appellant asserts that the Court of Appeal erred in law in dismissing his appeal against the respondents.

[31] The appellant seeks the following reliefs;

i. *An order allowing the appeal and setting aside the Court of Appeal judgment dated 26th August 2024.*
ii. *Judgment be entered for the appellant against the respondents in terms of the prayers sought before the ELRC.*
iii. *Any other relief that this honourable Court may deem just and fair to grant to the appellant against the respondents under the circumstances of this case.*
iv. *Costs of this appeal, of the Court of Appeal and the ELRC.*

[32] In opposition to the petition, the respondents filed a Notice of Preliminary Objection dated 18th October 2024, contending that this Court lacks jurisdiction to entertain the petition under Article 163(4) of the Constitution. They argued that neither the Supreme Court nor the Court of Appeal has certified that the appeal involves a question of general public importance as required by Section 15B of the Supreme Court Act. Additionally, they assert that the dispute does not raise any matter involving constitutional interpretation or application that is linked to the decisions of the superior courts, particularly regarding the reference to Articles 232 and 236, which they argue were peripheral rather than central to the case's merits. They further emphasize that the mere citation of the Constitution by the Court of Appeal does not suffice to invoke the jurisdiction of the Supreme Court.

D. PARTIES' SUBMISSIONS

i. The appellant's submissions

[33] The appellant relies on his submissions dated 18th November 2024, asserting that the Supreme Court has jurisdiction to hear the petition. Citing the case of ***John Florence Maritime Services Limited Vs Cabinet Secretary for Transport and Infrastructure*** [2021] KESC 39 (KLR), the appellant argues that the interpretation and application of the Constitution can arise from various factors, not just specific provisions. He contends that he invited the ELRC to interpret Articles 232 and 236 of the Constitution in his statement of claim, which the ELRC and the Court of Appeal addressed in their judgments. Additionally, the appellant asserts that the superior courts' interpretation of the CAS Act, particularly regarding disciplinary procedures, is directly relevant to Articles 50, 232 and 236 of the Constitution. Therefore, the appellant maintains that the requirements under Article 163(4)(a) of the Constitution are met.

[34] On grounds one and two, he urges the Court to consider the proceedings in ***Hamisi Bweni Dzila Vs Kwale County Assembly Service Board, ELRC No. 99 of 2019***, highlighting the respondents' biased actions, including holding a meeting on a Sunday, his arrest based on false allegations, and the subsequent

letter from the Matuga Sub-County Investigation Officer informing the County Assembly of his arrest and arraignment in court. The appellant claims that these events demonstrate the respondents had already formed an opinion to dismiss him. He further submits that the disciplinary process, which he believes was fabricated, was a pretext to remove him from office due to his refusal to approve the 8th payment certificate for the Kwale County Assembly Complex. The appellant argues that his rights under Articles 30(2) and 41 of the Constitution were violated, as the respondents coerced him into approving an illegal payment, thereby breaching his constitutional rights, including those outlined in Articles 232 and 236, which guarantee professionalism, integrity, and protection from victimization for public officers.

[35] On grounds three and four, the appellant claims that the respondents violated Sections 15, 16, and 17 of the CAS Act and Section 156 of the Public Finance Management Act by manipulating board minutes to falsely assert that he had handed over his accounting duties. Lastly, the appellant argues that, in the ***Shollei Case,*** the issue of bias of the Judicial Service Commission against the appellant therein was not before the courts, the primary complaint was the lack of a fair hearing during the disciplinary hearing. In his opinion, it was wrong for the Court of Appeal to rely on the ***Shollei Case*** to dismiss his cross-appeal. He asserts that in any event, he proved that the respondents were, as a matter of fact, biased, unlike in the ***Shollei Case***.

ii. The respondents' submissions

[36] The respondents, in support of their preliminary objection, submit that it is upon the appellant to demonstrate how the superior courts erroneously interpreted and applied the provisions of the Constitution and the impact this had on the case. They argue that neither the ELRC nor the Court of Appeal was specifically or directly called upon to interpret, give meaning to, or determine the tenor and effect of Articles 232 and 236 of the Constitution. They contend that the core of the underlying dispute revolved around disciplinary proceedings, which

from the outset constituted a purely employer-employee dispute, rather than a matter necessitating constitutional interpretation by the courts. The appellant, they argue, has failed to establish how the case involves constitutional interpretation. In support of this position, they rely on the decisions of this Court in ***Aviation & Allied Workers Union of Kenya Vs Kenya Airways Limited & 3 others*** [2017] KESC 11 (KLR); ***Cordisons International (K) Limited Vs Chairman National Land Commission & 44 others*** [2020] KESC 50 (KLR); and ***Erad Suppliers & General Contractors Limited Vs National Cereals Board*** SC Petition No. 5 of 2012 [2012] eKLR.

[37] In the Replying Affidavit sworn by Seth Mwatela Kamanza, the current Speaker of the County Assembly, and in their submissions dated 11th November 2024, opposing the appeal, the respondents reiterate that the Supreme Court lacks jurisdiction to entertain the matter. They assert that disciplinary proceedings were initiated upon receiving a complaint from the 3rd respondent and were conducted strictly in accordance with the procedure laid out under Sections 22 and 23 of the CAS Act. The administrative suspension, they submit, was a procedural step aimed at preserving the integrity of the disciplinary process. According to their disciplinary mandate over the appellant, they proceeded in full compliance with the provisions of the Act. Consequently, the respondents maintain that the Court of Appeal was correct in faulting the trial Judge, who erred in construing the administrative suspension as a conclusive decision by the board to remove the appellant, while overlooking the prescribed three-tier removal process under Section 23 of the CAS Act.

[38] Finally, the respondents argue that the appellant is merely challenging the factual findings of the Court of Appeal. They posit that such factual findings do not fall within the scope of Article 163(4)(a) of the Constitution. In support of this position, they rely on the case of ***Kimani & 20 Others (On behalf of themselves and all members of Korogocho Owners Welfare Association) Vs Attorney General & 2 Others,*** [2020] KESC 9 (KLR).

E. ISSUES FOR DETERMINATION

[39] From our own evaluation of the foregoing arguments, the pleadings and the decisions of the two superior courts below, we consider the following to be the only issues falling for the determination of this appeal:

i. *Whether the Court has jurisdiction under Article 163(4)(a) to determine the appeal.*
ii. *Whether the disciplinary process by the respondents against the appellant was in violation of the Constitution.*

F. ANALYSIS AND DETERMINATION

i) Whether the Court has jurisdiction under Article 163(4)(a) of the Constitution, to determine the appeal.

[40] To determine whether this Court's jurisdiction under Article 163(4)(a) of the Constitution has been properly invoked, we must examine factors such as the nature of the pleadings, the proceedings, the reliefs sought, and the decisions of the superior courts below or, in some instances, all of these elements. A party seeking to rely on Article 163(4)(a), as is the case here, must go beyond merely stating that constitutional interpretation or application is involved. Such a party is required to clearly show that the grievance centres on the interpretation or application of the Constitution.

[41] To vest jurisdiction in the Supreme Court, the party must specifically identify the relevant constitutional provisions, explain how those provisions were at issue in the impugned decision, and demonstrate that the same constitutional question was the basis of both the High Court's and the Court of Appeal's decisions. If the judgment under appeal bears little or no relation to the interpretation or application of the Constitution, it does not qualify for appeal under Article 163(4)(a). This principle was clearly set out in ***Nduttu & 6000 others Vs Kenya Breweries Ltd & another*** [2012] KESC 9 (KLR). In short, the constitutional article in question must have been a consistent and pivotal issue

throughout the proceedings in the superior courts below. See also ***Opore Vs Independent Electoral and Boundaries Commission & 2 others***, [2018] KESC 5 (KLR). Finally, a matter will be said to involve the interpretation and application of the Constitution where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, but where the court's reasoning, and its conclusions leading to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application. See ***Peter Gatirau Munya Vs Dickson Mwenda Kithinji & Others*** SC Application No. 5 of 2014.

[42] We have outlined these principles to assess the objection raised by the respondents regarding our jurisdiction to entertain or determine this appeal. According to the respondent, this is a purely employer-employee dispute, and the reference to Articles 232 and 236 of the Constitution was peripheral.

[43] Having carefully reviewed the record, we make the following observations. Before the ELRC, in his statement of claim, the appellant asked the court to declare that his suspension was a violation of the values and principles of public office as provided for in Articles 232 and 236 of the Constitution of Kenya, 2010; that the undated notice to show cause also violated the values and principles of public office under Articles 232 and 236 of the Constitution of Kenya, 2010.

[44] In its judgment, the ELRC found that the appellant had failed to establish that the undated notice to show cause letter was a violation of the values and principles of public service under Articles 232 and 236 of the Constitution. Equally, the Court of Appeal in interpreting Article 236, upheld the findings of the ELRC, that the appellant failed to demonstrate how the provisions of the Constitution were violated, or how the respondents failed to follow due process.

[45] From this, it is evident that while the core of the dispute concerned disciplinary proceedings, the appellant raised claims that those proceedings contravened the Constitution and specifically cited Articles 232 and 236. There cannot therefore, be any doubt that apart from the two constitutional provisions

being pleaded, both courts below engaged with them, interpreting and applying them, and ultimately reaching the same conclusion, that the violation was not proved. For these reasons, we come to the conclusion that this Court's jurisdiction has been properly invoked.

ii) Whether the disciplinary process by the respondents against the appellant was in violation of the Constitution?

[46] The appellant took issue with the disciplinary process against him for the following reasons: first, that the suspension, purportedly imposed to facilitate investigations, was a veiled removal from office, executed without due process and in violation of the rules of natural justice; that there was bias, bad faith, and procedural impropriety, because he believed the respondents had predetermined the outcome of the disciplinary process and failed to observe the safeguards set out under Section 23 of the CAS Act. Lastly, that the undated notice to show cause was in contravention of the constitutional values and principles governing public service under Articles 232 and 236 of the Constitution. He sought a declaration that his suspension was a violation of the values and principles of public office as provided for by Articles 232 and 236 of the Constitution; and that the undated notice to show cause was likewise in contravention of the values and principles of public office under the two Articles of the Constitution.

Those values and principles include—

> **"(a) high standards of professional ethics;**
>
> **(b) efficient, effective and economic use of resources;**
>
> **(c) responsive, prompt, effective, impartial and equitable provision of services;**
>
> **(d) involvement of the people in the process of policy making;**
>
> **(e) accountability for administrative acts;**
>
> **(f) transparency and provision to the public of timely, accurate information;**

(g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;

(h) representation of Kenya's diverse communities; and

(i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—

(i) men and women;

(ii) the members of all ethnic groups; and

(iii) persons with disabilities.

(2) The values and principles of public service apply to public service in—

(a) all State organs in both levels of government; and

(b) all State corporations.

(3) Parliament shall enact legislation to give full effect to this Article.

[47] Article 236 of the Constitution, on the other hand, provides for the protection of public officers in the following manner:

"A public officer shall not be—

(a) victimised or discriminated against for having performed the functions of office in accordance with this 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."

[48] These provisions are the yardstick with which to ascertain whether the appellant's suspension or the undated notice to show cause contravened the Constitution. As we examine the question, we remain alive to the fact, and reiterate that the appellant approached the ELRC on two separate occasions: first, when the Board sought to terminate his services during his "probation period" on the basis that he was not discharging his duties and responsibilities in accordance with the

CAS Act. On that occasion, the ELRC found no provision in the County Governments Act or CAS Act that requires the clerk to serve on probation, and that the termination of his services was to follow the provisions of Section 23 of the CAS Act. The second instance was after the appellant resumed work, upon being reinstated. He was given a notice of administrative suspension pending investigation and subsequently issued with an undated notice to show cause.

[49] It is important to clarify at this point, that the entire time, the appellant had not been dismissed or removed from office. Only a notice of suspension had been given, and the process for removal from office under Section 23 of the CAS Act had not taken place. The appellant was, however, apprehensive that the respondents were biased and had already resolved to terminate his employment and were merely engaging in procedural formalities to sanitize the process. This apprehension is what led to the second proceedings before the ELRC and the judgment, the subject of this appeal.

[50] It will be recalled that in a Ruling delivered on 12th March 2021, ELRC *(Ongaya, J.)* questioned the legality of the appellant's suspension under Section 22 of the CAS Act. The court observed that, in the absence of procedural safeguards, the exercise of the suspension power could effectively result in removal. It held that a suspension imposed without due process and in disregard of the principles of natural justice undermines the procedural requirements set out under Section 23 of the Act, which specifically governs the removal of a clerk. As such, the ELRC concluded that the impugned suspension was, in effect, a removal and could not be sustained unless the proper procedure under Section 23 was followed.

[51] In reversing this decision, the Court of Appeal found that the determination was made in error and clarified that Sections 22 and 23 of the Act are clear in their distinction: that Section 22 allows for both suspension and removal, while Section 23 deals only with removal in a detailed procedure. The two processes are distinct and not interchangeable.

[52] The second issue the Court of Appeal examined was whether the suspension of the appellant, described as a holding suspension pending investigations, required observance of the rules of natural justice. Being a preliminary procedure, the court found, the suspension at this stage did not amount to a disciplinary hearing. In the court's view, to require a hearing at that early stage would be impractical. The appellate court observed that, without a procedure for suspension in the Act, the suspension was lawful and that the rules of natural justice were not breached.

[53] Section 22 of the CAS Act provides as follows for the suspension and removal of a Clerk of the County Assembly:

> **"22. The Board may suspend or remove from office, the Clerk for-**
>
> **a. inability to perform the functions of the office, whether arising from infirmity of body or mind;**
>
> **b. gross misconduct or misbehaviour;**
>
> **c. incompetence;**
>
> **d. bankruptcy;**
>
> **e. violation of the provisions of the Constitution, including Chapter Six of the Constitution; or**
>
> **f. violation of the provisions of this Act".**

[54] Section 23, on the other hand, provides for the procedure for the removal of the Clerk. Because of its importance, we reproduce it *in extenso*:

> **"1. Where the Board considers it necessary to remove the Clerk under section 20, the Board shall**
>
> **a. frame a charge or charges against the Clerk;**
>
> **b. forward the statement of the said charge or charges to the Clerk together with a brief statement of the allegations in support of the charges; invite the Clerk to respond to the**

allegations in writing setting out the grounds on which the Clerk relies to exculpate himself or herself; and invite the Clerk to appear before the Board, either personally or with an advocate as he or she may opt, on a day to be specified, to exculpate himself or herself.

2. If the Clerk does not furnish a reply to the charge or charges within the period specified, or if in the opinion of the Board the Clerk fails to exculpate himself or herself, the Board shall submit a notice of a motion to the Speaker seeking that the county assembly revokes the appointment of the Clerk.

3. A motion under subsection (1) shall specify

a. the grounds set out in section 21 in which the Clerk is in breach; and

b. the facts constituting that ground.

4. Upon notice of the motion under subsection (2), the Speaker shall refer the matter to a select committee of the assembly consisting of eleven members and established in accordance with the Standing Orders of the assembly to investigate the matter within ten days of receipt of the motion.

5. The select committee shall, within ten days, report to the assembly whether it finds the allegations against the Clerk to be substantiated.

6. The Clerk shall have the right to appear and be represented before the select committee during its investigations.

7. The assembly shall consider the report of the select committee and resolve whether to approve the motion.

8. If the assembly approves a motion filed under this section, the Clerk against whom the motion was filed shall be deemed

to have been removed from office from the date the motion was approved".

[55] With this background, we now turn to consider the question of whether the values and principles espoused in Articles 232 and 236 were violated by the Board issuing an undated notice to show cause to the appellant and suspending him. Although disciplinary proceedings are a continuous process, they nonetheless must, at every stage, comply with the principles of fairness, due process, and the rule of law.

[56] It is common ground that the Board took issue with the manner in which the appellant discharged his duties and that it had initially sought to terminate the employment, but was stopped by the court. Following the decision stopping them in ***ELRC Cause 99 of 2019***, it is apparent that the respondents became wiser and were duly guided on the due process of removal of the Clerk under Section 23 of the CAS Act. That perhaps explains why, as soon as the appellant returned to work, he was immediately issued first, with a notice of suspension pending investigations. The notice of suspension contained allegations of gross misconduct.

[57] Our plain reading of Sections 22 and 23, leaves no room for doubt that there is a clear distinction between the two processes under the Act. Section 22 is headed "*Suspension or removal of the Clerk*" but the content is on suspension, listing the grounds upon which the Board may suspend or remove from office, the Clerk. This means that the grounds for suspension and for removal are common. The key word in Section 22 is "or". Once a *prima facie* case has been presented disclosing any or some of the six (6) grounds under Section 22, the Clerk will be suspended. It is at this stage that Section 23 kicks in. It enumerates the steps to be taken, including investigations of the allegations by the Select Committee against the Clerk. The committee would then submit its report to the Assembly for consideration. If the Assembly approves the motion, the Clerk shall be deemed to have been removed from office from the date the motion for removal was approved. If not approved, the suspension is lifted and the Clerk resumes the functions of the office. This

procedure is not unique to the process of removal of a Clerk under the CAS Act. A similar procedure is prescribed under Section 12 of the Judicial Service Act for the "Suspension or removal of the Chief Registrar". But unlike the former, there are separate procedures for both suspension and removal of the Chief Registrar.

[58] We, with respect, agree with the position espoused by the Industrial Court (now ELRC) in ***Mary Chemweno Kiptui Vs Kenya Pipeline Company Limited*** [2014] eKLR, as follows:

> ***"A suspension therefore is ultimately a right due to an employer who on reasonable grounds suspects an employee to have been involved in misconduct, of poor performance or physical incapacity and wishes to remove such an employee from the work place to enable further investigation without subjecting the employee to further commission of more acts of misconduct, underperformance or the conditions leading to incapacity. The suspension period is a time available to an employer to control as the employee can be summoned back to work any time to undertake disciplinary proceedings or upon terms given by an employer."***

[59] This position is informed by the fact that, even in instances where an employee serves under permanent and pensionable terms, suspension or interdiction pending the outcome of investigations into alleged misconduct is generally recognized as a component of the broader disciplinary process. Considering the stage at which the disciplinary proceedings in the matter before us had reached, it was difficult to answer whether the values and principles in Articles 232 and 236 were violated. However, the trial court went ahead to hold that the suspension was, as it were, *fait accompli*, as it brought about a final outcome as if the appellant had been removed from the office; that that decision was arrived at without hearing the appellant. Is a suspension under Section 22

subject to the rules of natural justice? Asked differently, was the appellant entitled to be heard before his suspension? We find in the negative.

[60] Suspension is a preliminary step that may or may not end up with removal. It, therefore, does not necessitate a full disciplinary hearing entailing presentation of evidence, and the hearing of the clerk on the allegations. The main purpose of a suspension is merely to pave the way for investigations. Upon conclusion of the inquiry, as we have already noted, there can be two outcomes: the allegations may be found to be without basis and at that point the clerk may be exonerated; or if sufficient evidence disclosing facts constituting grounds for removal under Section 22, is presented, the clerk may be removed.

[61] By issuing the appellant with an undated notice to show cause, the Board was at that stage satisfied that there were, *prima facie,* grounds to remove the appellant from office. At this stage, the provisions of Section 23 on the removal of the appellant were inapplicable. Section 23(1)(a) only set in when the undated notice to show cause informed the appellant that the investigations were complete, communicating the charges against him, and invited him to respond to the charges. The appellant, through his advocates' letter dated 23rd March 2020, responded, addressing each allegation in detail. He maintained that the charges were driven by malice, authoritarianism, bias, abuse of office, and a blatant disregard for the rule of law.

[62] Following his response, the appellant was to appear before the Board for a hearing. However, COVID-19 restrictions delayed proceedings, and the process was later suspended by a court order on 27th April 2020. Thereafter, the Board resolved not to proceed further until the ELRC matter was concluded. From this evidence, it is clear that the disciplinary process under Section 23 of the CAS Act was never concluded. The appellant moved to court before the disciplinary hearing, alleging victimization and procedural impropriety on the part of the respondents. Until that point, in our considered view, the respondents were still strictly on track with the procedure of Section 23, and no material was presented to fault this.

[63] The grounds of the appellant's grievance included; alleged constitutional violations by the respondents through biased conduct, including convening a meeting on a Sunday, orchestrating his arrest on false allegations, and the issuance of a letter from the Matuga Sub-County Investigation Officer notifying the County Assembly of his arrest and arraignment. The appellant contends that these actions reveal a predetermined intent to remove him from office. He further claims the disciplinary process was a mere pretext, prompted by his refusal to approve the 8th payment certificate for the Kwale County Assembly Complex.

[64] We are in agreement with both the trial and appellate courts that these grounds could only be tried and tested at the disciplinary hearing, a stage that was yet to be reached; that from the pleadings and proceedings alone it was not possible to discern how the provisions of the Constitution were violated, or how the respondents failed to follow due process. Articles 232 and 236 of the Constitution have been invoked by the appellant without specifying how they were infringed. How, for instance, were the two Articles infringed by the appellant's suspension or by the issuance of the undated notice to show cause? The general or mere statement that the values and principles of public service were breached by the respondents, without more, is inadmissible. See ***Anarita Karimi Njeru Vs. Republic*** (1979) KLR 154.

[65] The appellant did not discharge the burden. This Court in ***Communications Commission of Kenya & 5 Others Vs Royal Media Services Limited & 5 Others*** [2014] KESC 53 (KLR) emphasized as follows on constitutional violations:

> ***"...Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High***

> ***Court decision in Anarita Karimi Njeru vs. Republic, (1979) KLR 154: <u>the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement</u>.*** (Our Emphasis)

[66] We find no material from which to conclude that the suspension, as undertaken by the respondents, and the undated notice to show cause violated the Constitution. The conclusion by the superior courts below that the appellant merely alleged victimization and bias, but failed to provide any evidence or attribute such conduct to any specific member of the Board are correct.

[67] Given the foregoing, ultimately, we find that the disciplinary process was in accordance with the Constitution and the CAS Act. We therefore find no merit in the appeal and dismiss it.

G. COSTS

[68] Costs follow the event but are in the discretion of the Court. We are guided by the principles on the award of costs enunciated in ***Rai & 3 others Vs. Rai & 4 others*** [2014] KESC 31 (KLR). Before the ELRC, the Board was ordered to bear 50% of the appellant's costs, taking into account the partial success of the claim, consent orders previously entered, and the ongoing employment relationship. The appellant was aggrieved by this 50% award of costs instead of full costs of 100%. For the reason that part of the appellant's and part of the respondent's claim was successful, we like the Court of Appeal, find no reason to interfere with this award of costs as it was proper and the reasons thereof were given. Before the Court of Appeal, the respondents' appeal succeeded whereas the appellant's cross-appeal was dismissed. Accordingly, costs were awarded to the respondents. Based on the principles in ***Rai & 3 others Vs. Rai Estate of & 4 others*** *(supra),* we direct that the appellant shall bear the costs of this appeal.

H. FINAL ORDERS

[69] Consequently, upon our conclusion above, we order that:

i) The Petition dated 20th August 2024 is hereby dismissed.

ii) The appellant shall bear the costs of this appeal.

iii) We hereby direct that the sum of Kshs. 6,000 deposited as security for costs upon lodging of this appeal, be refunded to the depositor.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **23rd** day of **May, 2025.**

.....

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

.....	.....
M.K. IBRAHIM	**S. C. WANJALA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
I. LENAOLA	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

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

REGISTRAR
SUPREME COURT OF KENYA