

URGENT

*DLS
urgently deal
09/12/20*

① Clerk

J. HARRISON KINYANJUI
& CO. ADVOCATES

THE SENATE
RECEIVED
09 DEC 2020
CLERK'S OFFICE

J. Harrison Kinyanjui
LLB (NBO) Dip. In Law (KSL)

*Deal
JH*

ST. ELLIS HOUSE
(FORMERLY MITCHELL COTTIS HOUSE)

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8/12/20

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Our Ref: JHK/NCC/5900/2020

Your Ref: NOT YET ADVISED

Date:

DECEMBER 7TH, 2020

HON. KENNETH LUSAKA, EGH,
THE SPEAKER,
THE SENATE
PARLIAMENT BUILDINGS
P.O. BOX 41842 - 00100
NAIROBI

THE SENATE
RECEIVED
- 7 DEC 2020
SPEAKER'S OFFICE

Dear Sir,

**RE: BREACH OF STANDING ORDER NO. 98(3)(c) OF THE SENATE
STANDING ORDERS BARRING DEBATE ON *sub judice* MATTERS
&
HIGH COURT INJUNCTION ORDER IN NAIROBI ELRC PETITION
NO. 35 OF 2020 STOPPING UNLAWFUL PROCESS OF
IMPEACHMENT OF HON. MIKE SONKO MBUVI AS NAIROBI CITY
COUNTY GOVERNOR
&
PURPORTED "RESOLUTION" DATED 3RD DECEMBER 2020 BY
NAIROBI CITY COUNTY ASSEMBLY FOR THE REMOVAL BY
"IMPEACHMENT" OF HON. MIKE SONKO MBUVI KIOKO**

We refer to the above, and advise that we act for Hon. Mike Sonko Mbuvi, with instructions to correspond with you as herein below stated in regard to the contents of the letter dated 4th December 2020 by the Hon. Speaker, of the Nairobi City County Assembly addressed to you.

When Replying to this Mail Please cite our Reference

*DLS
Please deal
Date 11/12/2020*

THE SENATE
RECEIVED
10 DEC 2020
DEPUTY CLERK

By the said letter, the said County Assembly's Speaker purported to invoke the Assembly's **Standing Order No. 67(7)** to ostensibly forward to you a purported "Resolution" dated 3rd December 2020 to "impeach" H. E. Mike Sonko Mbuvi as the Nairobi City County Governor, yet he was fully aware that at all material times, (antecedent, current, and subsequent to the impugned "Resolution" on December 3rd 2020), the said process was barred by a Judicial Order.

Consequent upon the threat to impeach Hon. Mike Sonko as Nairobi City County Governor initially mounted by a Motion dated **February 20th, 2020** by Hon. Peter Imwatok, MCA, the threatened grave violations of the law and the Constitution precipitated by the said purported impeachment of Hon. Mike Mbuvi Sonko Gidion Kioko, the Governor moved with speed on **February 27th 2020** to invoke Judicial intervention vide Nairobi Employment & Labour Relations Court vide Petition No. 35 of 2020 (**Hon. Mike Sonko Mbuvi Kioko VS. The Clerk, Nairobi City County Assembly, & 5 Others**) for interim relief.

In protection and defense of the Governor's rights, Hon. Justice Byrum Ongaya of the ELRC Court in the cited Petition issued an Order on **March 2nd, 2020** stopping the impeachment proceedings before the County Assembly. A copy of the said Order is enclosed for your records and ease of reference. It was NOT appealed against, nor has it been set aside to date.

During the subsistence of the said Order, and within the currency of the cited Motion of "impeachment" of the Governor mounted by Hon. Imwatok, on **November 26th 2020** the Speaker of the Nairobi City County Assembly purported to receive a fresh Motion dated **November 25th 2020** by Hon. Michael Ogada Okumu, MCA.

It is clear that as at **November 25th 2020** when Hon. Michael Ogada purported to lodge a fresh "impeachment" Motion against the Governor the subsisting Motion by Hon. Imwatok dated February 20th 2020 subsisted and subsists to date, which rendered the Motion dated **November 25th 2020** inconsequential, null and void **ab initio**.

Following this illegality, by an urgent application dated **November 30th, 2020** Hon. Mike Sonko Mbuvi moved back to Court within the stated Judicial proceedings - **Nairobi Employment & Labour Relations Court vide Petition No. 35 of 2020 (Hon. Mike Sonko Mbuvi Kioko VS. The Clerk, Nairobi City County Assembly, & 5 Others)** for interim relief.

Indeed, Hon. Mr. Justice Nzioki wa Makau issued an Order on the said **November 30th 2020** stopping the fresh attempt to impeach Hon. Mike Sonko, and the said Order was brought to the attention of ALL the parties before the Assembly, as well as Hon. Michael Ogada himself. A copy of the said Order is enclosed for your records, and ease of reference.

With the leave of the Court in the cited Petition, a copy of the said Order was equally published in the **Standard** newspaper of December 3rd, 2020, hence all and sundry were deemed to have

had sight of it, and were fully aware of the judicial intervention to STOP the "impeachment" proceedings against Hon. Mike Sonko on December 3rd, 2020. A copy of the said newspaper advert is enclosed.

Notwithstanding these notifications of the pendency of the valid Court Order stopping the purported impeachment proceedings before the Nairobi City County Assembly against Hon. Mike Sonko, the Speaker elected to contumaciously ignore and close his eyes to it, well aware that he was so acting with impunity and in Contempt of Court. The purported "voting" in support of the said Motion on December 3rd, 2020 is equally judicially contested.

In the result, a purported "Resolution" (which is now under contestation before the cited ELRC Court proceedings) for Hon. Mike Sonko's purported "impeachment" was made, and the Speaker of the Nairobi City County Assembly has thence written to you vide the letter dated 4th December 2020 subject of this correspondence.

With the imminent proceedings now anticipated before the Senate triggered by the said communication from the Speaker of the Nairobi City County Assembly, it is apparent that any proceedings before the Senate thereon will precipitate an unlawful truncation of the Hon. Mike Sonko's Constitutional right under Article 48 of the Constitution of Kenya to access Justice.

As was held in similar circumstances in the case of Martin Nyaga Wambora & 30 others v County Assembly of Embu & 4 others [2015] eKLR,:-

"Where the decision of the impeaching organs is contrary to common logic, then this Court can quash such a decision for being unreasonable."

The afore-cited judicial proceedings by Hon. Mike Sonko have consistently been served upon you as the Speaker of the Senate of Kenya, cited as the 5th Respondent therein.

The said Petition (Nairobi Employment & Labour Relations Court vide Petition No. 35 of 2020 (Hon. Mike Sonko Mbuvi Kioko VS. The Clerk, Nairobi City County Assembly, & 5 Others)) is a live proceeding, and pending before the Nairobi Employment and Labour Relations Court, relating to the matters subject of the letter dated 4th December 2020, and it has a return date of December 11th 2020, as can readily be verified from the Court records.

With respect, pursuant to Standing Order No. 98(3)(c) of the Senate Standing Orders (adopted by the Senate on 14th June, 2017 pursuant to Article 124 of the Constitution of Kenya, read together with Standing Order 248 and 249 of the Senate Standing Orders and which were amended on 14th December, 2017 and 9th August, 2018), the discussion of a matter brought before the Senate that is sub judice is forbidden.

The said Standing Order specifies that such a matter as is cited above must be active. It is expressed in the following terms:-

“civil proceedings shall be deemed to be active when arrangements for hearing, such as setting down a case for trial, have been made, until the proceedings are ended by judgment or discontinuance;”

As already noted above that the cited Petition is active (with a return date of December 11th, 2020 before the Employment and Labour Relations Court for issuance of Directions on the Hearing of the Petition and Motion dated 27th February 2020 – now amended), the Hon. Mike Sonko would not wish to violate the Senate’s stated **Standing Order No. 98(3)(c)**, and it is his ***legitimate expectation*** that the Senate will be guided by the said **Standing Order** so far as the stated “Resolution” by the Nairobi City County Assembly purporting to “impeach” him as purportedly done on December 3rd, 2020 is concerned.

Again, and with respect, were this Standing Order to be blinked at, the risk of prejudicing the said judicial process is grave, which is a mischief obviously and apparently directed in the mind of the Senate’s stated Standing Order.

Article 25(c) of the Constitution of Kenya cannot be abrogated or otherwise abridged, and it is apparent that by his actions stated above, the Speaker of the Nairobi City County Assembly is abrogating Hon. Mike Sonko’s said Constitutional right.

Article 96(1) of the Constitution of Kenya stipulates the role of the Senate, which is to represent the Counties, **and protect the interests of the counties and their governments.**

The Hon. Mike Sonko has lodged the said Judicial proceedings demonstrating that the County Assembly’s purported impeachment process against him has not met the basic requirements of the County Assembly’s Standing Orders, let alone the ***fairness*** and ***due process*** imposed, and demanded of such a grave process pursuant to **Article 47(1) of the Constitution of Kenya** or the **Fair Administration Act**.

Additionally, there are subsisting Court Orders in the stated ELRC Petition No. 35 of 2020 stopping the impeachment of H. E. Hon. Sonko as the Nairobi City County Governor.

Specifically, the Hon. Mr. Justice Byrum Ongaya issued an Order on **March 2nd 2020**, in the presence of all the parties, which forbade the purported impeachment of Hon. Mike Sonko absent due process and a strict adherence of the Standing Orders of the County Assembly was enjoined. A copy of this Order is enclosed.

By the same token, when confirming the Jurisdiction of the Court to adjudicate on the above cited Court proceeding on **October 23rd 2020**, the Hon. Mr. Justice Byrum Ongaya equally restated

*the fact that the Nairobi City County Assembly is bound to conduct any impeachment proceedings against the Hon. Mike Sonko in strict compliance with, and adherence to the Assembly's Standing Orders 62 and 72, as read with **Article 47 of the Constitution of Kenya.***

*The provisions of the **Fair Administrative Action Act** in particular **Section 4** thereof bear weighty significance in the arising circumstances buttressing our request herein stated.*

We enclose a copy of the said Court Ruling, for your records and ease of reference, the gist of which being that the Nairobi City County Assembly herein failed to meet the threshold of fair administrative action in purported impeachment of H. E. Hon. Mike Sonko.

*Since this Honourable Senate's Standing Orders direct and guide on the manner to proceed when the same matter is (on all fours) pending adjudication before the Nairobi ELR Court, we defer to **Article 10(2)(a) of the Constitution of Kenya** espousing the Rule of Law that circumscribes the Senate's handling of the matter, and we equally defer to the Senate's stated **Standing Order No. 98(3)(c)**, and invoke the finding in the English case of **Reg vs. Secretary of State for the Home Department ex-parte Doody [1994] 1 AC 531** where it was stated that:-*

"The rule of law in its wider sense has procedural and substantive effect ... Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural."

*Moreover, the subject of the very purported "impeachment" process by the Nairobi City County Assembly on December 3rd 2020 against H. E. Governor Sonko is under JUDICIAL inquiry within the said ELRC Petition 35 of 2020, wherein Governor Mike Sonko has protested **inter alia**:-*

- a) THAT the entire proceedings of the Nairobi City County Assembly on December 3rd 2020 were in violation of the said Assembly's **Standing Order No.94(2),(3)(c)**; to wit, that the issues were, and are **sub judice** by dint of a live proceeding - ELRC Petition 35 of 2020 and Nairobi Constitution Petition No. E348 of 2020;
- b) THAT on December 3rd 2020 the County Assembly conducted its entire "impeachment" proceedings purporting to impeach Hon. Mike Sonko as Governor, Nairobi City County well aware that **a valid Court Order** issued on November 30th 2020 by Hon. Nzioki wa Makau existed, stopping the said proceedings, a fact which was brought to the attention of every Hon. Member of the County Assembly vide a full page **Standard** newspaper advert on the very said December 3rd 2020;

- c) THAT the Hon. Mike Sonko Mbuvi had by a letter dated November 27th 2020 addressed to the Speaker of the Nairobi City County Assembly, invoking Article 35(1) (b) of the **Constitution of Kenya specifically** requested for the evidence in support of the purported Motion by Hon. Michael Ogada to impeach him as prescribed within the Assembly's own standing Orders. This was NEVER responded to;
- d) THAT on December 3rd 2020 (and the foregoing notwithstanding), the Nairobi City County Assembly purported to pass a "Resolution" to impeach Hon. Mike Sonko Mbuvi as the Governor, Nairobi City County WITHOUT the statutory threshold of the membership of hon. MCAs to so do. There is NO evidence that 88 Hon. Members of the said County Assembly ACTUALLY voted to impeach the Governor.
- e) Hon. Members of the Assembly purported to be in support of the impugned "Resolution" logged in twice, or thrice or more in the same Session on December 3rd, 2020, hence there was NO credible vote to impeach H. E. Mike Sonko as Nairobi City County Governor.
- f) THAT Over 52 Hon. MCAs have sworn depositions in the cited Judicial proceedings that they did NOT log online on December 3rd 2020 to participate in, vote on, or otherwise engage in the debate of the Motion dated 25th November 2020 by Hon. Michael Ogada Okumu on the purported "impeachment" of Hon. Mike Sonko;
- g) THAT the entire process of the purported "impeachment" of H. E. Mike Sonko on December 3rd 2020 was in breach of **Section 33 of the County Governments Act**, and there was therefore no lawful impeachment Resolution capable of triggering lawful proceedings before the Senate as now moved by the letter dated December 4th 2020 by the County Assembly Speaker.

These issues are LIVE before the ELRC Court vide Petition No. 35 of 2020 cited above, and therefore (with great respect), commencing and processing the anticipated proceedings before the Senate would be a violation of the **Senate's Standing Order No. 98(3)(c)**.

Should this Honourable Senate therefore determine to proceed with the hearing of submissions on the "impeachment" Resolution of December 3rd, 2020 against H. E. Mike Sonko, we shall raise a **Preliminary Objection** on the matters being **sub judice**, and which proceedings would constitute to an express violation of the Senate's stated **Standing Order No. 98(3)(c)**, which we are confident your good office will not permit to be trampled upon or breached.

For the foregoing reasons, the Hon. Mike Sonko implores your good office to withhold any intended or further action on the matter of the tabling, debate on, or determination of the

purported Resolution dated December 3rd 2020 by the Nairobi City County Assembly purporting to impeach H. Mike Sonko as such Governor, and to place the same in abeyance until the dispute subject of his purported impeachment as the Governor of Nairobi City County is resolved by the Nairobi ELR Court in the cited case, and/or the purported "Resolution" dated 3rd December 2020 by the Nairobi City County Assembly is revoked, reviewed and/or recalled in its entirety by the County Assembly.

Should any matter from the foregoing arise for clarification, we shall expeditiously avail the same at the very earliest convenience. Thank you.

Very Sincerely,



J. HARRISON KINYANJUI & CO. ADVOCATES

c.c

H.E. Governor Hon. Mike Sonko Mbuvi

The Clerk, Senate of Kenya

The Speaker, Nairobi City County Assembly

(Enclosures)

MKSI

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

(IN COURT ON 2ND MARCH, 2020 BEFORE HON. JUSTICE BYRAM ONGAYA)

ORDER

THIS MATTER COMING FOR interpartes hearing of application dated 27th February, 2020 before Hon. Justice Byram Ongaya, on 2nd March, 2020, **AND UPON** Hearing Counsels for the Petitioner and Respondent;

IT IS HEREBY ORDERED

1. THAT the respondents to file and serve their respective replying affidavit by close of 4th March, 2020 and Petitioner and 1st Respondent may file further supporting affidavits by close of 6th March, 2020.
2. THAT pending the interpartes hearing of the application or further orders by the court the proposed motion by the 4th Respondent herein for the proposed impeachment of the petitioner herein as scheduled in Notice Paper 1 on Tentative Business of the 3rd Respondent on Tuesday 3rd 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 3rd respondent.
3. THAT mention on 9th 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 Honourable Court this 2nd day of March, 2020.

ISSUED at Nairobi this 2nd day of March 2020

DEPUTY REGISTRAR
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

[Handwritten signature]

"MKSI"

70

This is the exhibit marked.....
 1. annexed to the affidavit of *HON. MIKE SONKO MBUVI KIOKO*
 sworn on the day of *20th Nov 2020*
 at Nairobi in the Republic of Kenya
 Before Me
 commissioner for Oaths



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.....1ST RESPONDENT

THE SPEAKER, NAIROBI CITY COUNTY ASSEMBLY.....2ND RESPONDENT

THE NAIROBI CITY COUNTY ASSEMBLY.....3RD RESPONDENT

HON. PETER ANYULE IMWATOK.....4TH RESPONDENT

THE SPEAKER, SENATE OF KENYA.....5TH RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 23rd 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 1st 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 4th respondent herein for the proposed impeachment of the petitioner herein as scheduled in Notice Paper 1 on Tentative Business of the 3rd respondent on Tuesday 3rd 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 3rd 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 2nd 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 2nd 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 2nd 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 2nd 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 3rd respondent filed the submissions dated 14.07.2020 through Ngira Advocates LLP. The 3rd respondent's submissions are that there exists no employer-employee relationship between the 3rd respondent and the petitioner within the definition of employee and employer under section 2 of the Employment Act, 2007. The 3rd respondent referred to section 12 of the Employment and Labour Relations Court Act, 2011 and like the 2nd 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 3rd 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 2nd 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 2nd 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 Wangombe 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 3rd 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 Kedeveresja 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 Wangómbe Mubea –Versus- County Government of Nyeri & Another [2015]eKLR respectively.

Further, the Court follows its opinion in Okiya Omtatah Okoiti -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 Okoiti –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 2nd respondent is hereby dismissed with orders:

- 1) The 2nd 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 23rd October, 2020.

BYRAM ONGAYA

JUDGE



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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..... 1ST RESPONDENT

THE SPEAKER, NAIROBI CITY COUNTY ASSEMBLY..... 2ND RESPONDENT

THE NAIROBI CITY COUNTY ASSEMBLY 3RD RESPONDENT

HON. PETER ANYULE IMWATOK 4TH RESPONDENT

THE SPEAKER, SENATE OF KENYA..... 5TH RESPONDENT

HON. MICHAEL OGADA OKUMU..... 6TH RESPONDENT

*(IN CHAMBERS ON 30TH NOVEMBER, 2020 BEFORE THE HON. JUSTICE NZIOKI WA
MAKAU)*

ORDER

Application for orders

1. This application be certified as urgent, and service thereof on the Respondents be dispensed with in the first instance on the bases of its extreme urgency.

2. Pursuant to Rules 5(e) and 18 of Legal Notice No. I 17 of 2013 (Mutunga Rules), leave be granted to the Petitioner, to forthwith enjoin the 6th Respondent, HON. MICHAEL OGADA OKUMU as a necessary and relevant party to these proceedings, and the Petitioner's Amended Petition herewith filed as exhibit "MKS 12" annexed to the Petitioner's Supporting Affidavit herein sworn on

November 30th, 2020 be deemed as properly filed, and service thereof on the Respondents be forthwith effected.

3. Pending the hearing and determination of this Notice of Motion, a Conservatory Order do issue, prohibiting the 3rd Respondent, by its members, or by the 1st and 2nd Respondents and/or any person acting under their behest and direction, from deliberating upon, debating, tabling for debate, making any decision upon, putting to a vote, passing any Resolution thereon, or otherwise howsoever determining the Motion by the 6th Respondent, HON. MICHAEL OGADAOKUMU dated 25/1 1/2020, purporting to be a Motion for the removal of the Petitioner herein HON. MIKE SONKO MBUVI GIDION KIOKO as the Nairobi City County Governor ostensibly under Article 181(1)(a), (b), and (c) of the Constitution of Kenya.
4. Pending the determination of the Petition herein, a Conservatory Order do issue, a Conservatory Order do issue, prohibiting the 3rd Respondent, by its members, or by the 1st and 2nd Respondents and/or any person acting under their behest and direction, from deliberating upon, debating, tabling for debate, making any decision upon, putting to a vote, passing any Resolution thereon, or otherwise howsoever determining the Motion by the 6th Respondent, HON. MICHAEL OGADA OKUMU dated 25/1 1/2020 purporting to be a Motion for the removal of the Petitioner herein HON. MIKE SONKO MBUVI GIDION KIOKO as the Nairobi City County Governor ostensibly under Article 181 (I) (a), (b), and (c) of the Constitution of Kenya.
5. Pending the hearing and determination of this Notice of Motion, a Conservatory Order do issue, prohibiting the 2nd Respondent, (THE SPEAKER, NAIROBI CITY COUNTY ASSEMBLY, or any person acting under her behest and/or direction), from presiding over any session of the Nairobi City County Assembly to debate, deliberate upon, pass any Resolution in respect of, or concerning the Motion by the 6th Respondent herein, HON. MICHAEL OGADA OKUMU

dated 25/1 1/2020 , purporting to be a Motion for the removal of the Petitioner herein HON. MIKE SONKO MBUVI GIDION KIOKO as the Nairobi City County Governor ostensibly under Article 181 (I)(a), (b), and (c) of the Constitution of Kenya.

6. Pending the hearing and determination of the Petition herein, a Conservatory Order do issue, prohibiting the 5th Respondent, (THE SPEAKER, SENATE OF KENYA, or any person acting under his behest and/or direction), from receiving, accepting, or endorsing for debate before the Senate of Kenya any Resolution purported to emanate from the 2nd Respondent, Speaker of the Nairobi City County Assembly in respect of, or concerning the Motion by the 6th Respondent herein, HON. MICHAEL OGADA OKUMU dated 25/1 1/2020, purporting to be a Motion for the removal of the Petitioner herein HON. MIKE SONKO MBUVI GIDION KIOKO as the Nairobi City County Governor ostensibly under Article 181 (I)(a), (b), and (c) of the Constitution of Kenya.

7. Pending the hearing and determination of the Petition herein, a Conservatory Order do issue, prohibiting the 5th Respondent, (THE SPEAKER, SENATE OF KENYA, or any person acting under his behest and/or direction), from receiving, accepting, or endorsing for debate before the Senate of Kenya any Resolution purported to emanate from the 2nd Respondent, Speaker of the Nairobi City County Assembly in respect of, or concerning the Motion by the 6th Respondent herein, HON. MICHAEL OGADA OKUMU dated 25/1 1/2020, purporting to be a Motion for the removal of the Petitioner herein HON. MIKE SONKO MBUVI GIDION KIOKO as the Nairobi City County Governor ostensibly under Article 181 (I)(a), (b), and (c) of the Constitution of Kenya.

8. Pending the hearing and determination of the Petition herein, a Conservatory Order do issue, prohibiting the 5th Respondent, (THE SPEAKER, SENATE OF KENYA, or any person acting under his behest and/or direction), from receiving, accepting, or endorsing for debate before the Senate of Kenya any Resolution

purported to emanate from the 2nd Respondent, Speaker of the Nairobi City County Assembly in respect of, or concerning the Motion by the 6th Respondent herein, HON. MICHAEL OGADA OKUMU dated 25/1 1/2020, purporting to be a Motion for the removal of the Petitioner herein HON. MIKE SONKO MBUVI GIDION KIOKO as the Nairobi City County Governor ostensibly under Article 181 (I)(a), (b), and (c) of the Constitution of Kenya.

9. Any purported decision to impeach the Petitioner as such Governor of the Nairobi City County purportedly executed by the 6th Respondent herein, HON. MICHAEL OGADA OKUMU dated 25/1 1/2020, be stayed pending the determination of the Petition herein.
10. The costs of the Petition be to the Petitioner/Applicant in any event.

THIS MATTER coming up for directions on 30th, November 2020 before Hon Justice Nzioki Wa Makau presented to this Court on 30th November, 2020 under certificate of urgency by the Applicant dated 30th November, 2020, under article 22, 23(3)(b) &(c), 25(c), 47(1), & 50(1), of the Constitution of Kenya Rule 3, 4, 5(E), 8(1), 9(1), 10, 18, 21, & 23 Of The Constitution Of Kenya (Protection Of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013, Legal Notice No. I 17 Of 2013 & Section 12 & 74 Of The Employment & Labour Relations Court Act of the Constitution of Kenya 2010, and all the enabling provisions of the law) **AND UPON** reading the Supporting Affidavit of Hon. Mike Sonko Mbuvi Gidion Kioko sworn on 30th November, 2020 and the annexures thereto in absence of Counsel for Petitioner and Counsel for the Respondents;

IT IS HEREBY ORDERED

- 1) **THAT** the application is certified as urgent
- 2) **THAT** a Conservatory Order is hereby granted prohibiting the 3rd Respondent, by its members, or by the 1st and 2nd Respondents and/or any person acting under their behest and direction, from deliberating upon, debating, tabling for debate, making any decision upon, putting to a vote, passing any Resolution thereon, or otherwise howsoever determining the Motion by the 6th Respondent, HON. MICHAEL OGADAOKUMU dated 25/1 1/2020, purporting to be a Motion for the removal of the Petitioner herein HON. MIKE SONKO MBUVI GIDION KIOKO as the Nairobi City County Governor ostensibly under Article 181(1)(a), (b), and (c) of the Constitution of Kenya pending

hearing of the motion on 3rd December 2020 .

3) THAT service upon the intended 6th Respondent be affected forthwith.

GIVEN under my Hand and Seal of the Honourable Court this 30th day of November, 2020.

ISSUED at Nairobi this1ST..... day ofDecember..... 2020.

..... copy of the Original
.....
..... Registrar Employment and
..... Relations Court
..... 1/12/2020



DEPUTY REGISTRAR
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

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

(IN CHAMBERS ON 30TH, NOVEMBER, 2020 BEFORE THE HON. JUSTICE NZIOKI WA MAKAU)

ORDER

APPLICATION FOR ORDERS

1. This application be certified as urgent, and service thereof on the Respondents be dispensed with in the first instance on the bases of its extreme urgency.
2. Pursuant to Rules 5(e) and 18 of Legal Notice No. 117 of 2013 (Mutunga Rules), leave be granted to the Petitioner, to forthwith enjoin the 6th Respondent, HON. MICHAEL OGADA OKUMU as a necessary and relevant party to these proceedings, and the Petitioner's Amended Petition herewith filed as exhibit "MKS/2" annexed to the Petitioner's Supporting Affidavit herein sworn on November 30th, 2020 be deemed as properly filed, and service thereof on the Respondents be forthwith effected.
3. Pending the hearing and determination of this Notice of Motion, a Conservatory Order do issue, prohibiting the 3rd Respondent, by its members, or by the 1st and 2nd Respondents and/or any person acting under their behest and direction, from deliberating upon, debating, tabling for debate, making any decision upon, putting to a vote, passing any Resolution thereon, or otherwise howsoever determining the Motion by the 6th Respondent, HON. MICHAEL OGADAOKUMU dated 25/11/2020, purporting to be a Motion for the removal of the Petitioner herein HON. MIKE SONKO MBUVI GIDION KIOKO as the Nairobi City County Governor ostensibly under Article 181 (l)(a), (b), and (c) of the Constitution of Kenya.
4. Pending the determination of the Petition herein, a Conservatory Order do issue, prohibiting the 3rd Respondent, by its members, or by the 1st and 2nd Respondents and/or any person acting under their behest and direction, from deliberating upon, debating, tabling for debate, making any decision upon, putting to a vote, passing any Resolution thereon, or otherwise howsoever determining the Motion by the 6th Respondent, HON. MICHAEL OGADA OKUMU dated 25/11/2020 purporting to be a Motion for the removal of the Petitioner herein HON. MIKE SONKO MBUVI GIDION KIOKO as the Nairobi City County Governor ostensibly under Article 181 (l) (a), (b), and (c) of the Constitution of Kenya.
5. Pending the hearing and determination of this Notice of Motion, a Conservatory Order do issue, prohibiting the 2nd Respondent, (THE SPEAK, NAIROBI CITY COUNTY ASSEMBLY, or any person acting under her behest and/or direction), from presiding over any session of the Nairobi City County Assembly to debate, deliberate upon, pass any Resolution in respect of, or concerning the Motion by the 6th Respondent herein, HON. MICHAEL OGADA OKUMU dated 25/11/2020, purporting to be a Motion for the removal of the Petitioner herein HON. MIKE SONKO MBUVI GIDION KIOKO as the Nairobi City County Governor ostensibly under Article 181 (l) (a), (b), and (c) of the Constitution of Kenya.
6. Pending the hearing and determination of the Petition herein, a Conservatory Order do issue, prohibiting the 5th Respondent, (THE SPEAKER, SENATE OF KENYA, or any person acting under his behest and/or direction), from receiving, accepting, or endorsing for debate before the Senate of Kenya any Resolution purported to emanate from the 2nd Respondent, Speaker of the Nairobi City County Assembly in respect of, or concerning the Motion by the 6th Respondent herein, HON. MICHAEL OGADA OKUMU dated 25/11/2020, purporting to be a Motion for the removal of the Petitioner herein HON. MIKE SONKO MBUVI GIDION KIOKO as the Nairobi City County Governor ostensibly under Article 181 (l)(a), (b), and (c) of the Constitution of Kenya.
7. Pending the hearing and determination of the Petition herein, a Conservatory Order do issue, prohibiting the 5th Respondent, (THE SPEAKER, SENATE OF KENYA, or any person acting under his behest and/or direction), from receiving, accepting, or endorsing for debate before the Senate of Kenya any Resolution purported to emanate from the 2nd Respondent, Speaker of the Nairobi City County Assembly in respect of, or concerning the Motion by the 6th Respondent herein, HON. MICHAEL OGADA OKUMU dated 25/11/2020, purporting to be a Motion for the removal of the Petitioner herein HON. MIKE SONKO MBUVI GIDION KIOKO as the Nairobi City County Governor ostensibly under Article 181 (l)(a), (b), and (c) of the Constitution of Kenya.
8. Pending the hearing and determination of the Petition herein, a Conservatory Order do issue, prohibiting the 5th Respondent, (THE SPEAKER, SENATE OF KENYA, or any person acting under his behest and/or direction), from receiving, accepting, or endorsing for debate before the Senate of Kenya any Resolution purported to emanate from the 2nd Respondent, Speaker of the Nairobi City County Assembly in respect of, or concerning the Motion by the 6th Respondent herein, HON. MICHAEL OGADA OKUMU dated 25/11/2020, purporting to be a Motion for the removal of the Petitioner herein HON. MIKE SONKO MBUVI GIDION KIOKO as the Nairobi City County Governor ostensibly under Article 181 (l) (a), (b), and (c) of the Constitution of Kenya.
9. Any purported decision to impeach the Petitioner as such Governor of the Nairobi City County purportedly executed by the 6th Respondent herein, HON. MICHAEL OGADA OICUMU dated 25/11/2020, be stayed pending the determination of the Petition herein.
10. The costs of the Petition be to the Petitioner/Applicant in any event.

THIS MATTER coming up for directions on 30th, November 2020 before Hon Justice Nzioki Wa Makau presented to this Court on 30th November, 2020 under certificate of urgency by the Applicant dated 30th November, 2020, under article 22, 23(b) & (c), 25(c), 47(1), & 50(1), of the Constitution of Kenya Rule 3, 4, 5(E), 8(1), 9(1), 10, 18, 21, & 23 Of The Constitution Of Kenya (Protection Of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013, Legal Notice No. 117 Of 2013 & Section 12 & 74 Of The Employment & Labour Relations Court Act of the Constitution of Kenya 2010, and all the enabling provisions of the law **AND UPON** reading the Supporting Affidavit of Hon. Mike Sonko Mbuvi Gidion Kioko sworn on 30th November, 2020 and the annexures thereto in absence of Counsel for Petitioner and Counsel for the Respondents;

IT IS HEREBY ORDERED

- 1) **THAT** the application is certified as urgent
- 2) **THAT** a Conservatory Order is hereby granted prohibiting the 3rd Respondent, by its members, or by the 1st and 2nd Respondents and/or any person acting under their behest and direction, from deliberating upon, debating, tabling for debate, making any, decision upon, putting to a vote, passing any Resolution thereon, or otherwise howsoever determining Motion by the 6th Respondent, HON. MICHAEL OGADA OKUMU dated 25/11/2020, purporting to be a Motion for the removal of the Petitioner herein HON. MIKE SONKO MBUVI GIDION KIOKO as the Nairobi City County Governor ostensibly under Article 181 (l)(a), (b), and (c) of the Constitution of Kenya pending hearing of the motion on 3rd December 2020.
- 3) **THAT** service upon the intended 6th Respondent be affected forthwith.

GIVEN under my Hand and Seal of the Honourable Court this 30th day of November, 2020.

ISSUED at Nairobi this 1st day of December 2020.

[Signature]
DEPUTY REGISTRAR

[Signature]
DEPUTY REGISTRAR

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI