**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CONSTITUTIONAL PETITION NO. 8 OF 2014**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA ART. 1, ART. 2 (2) AND (5), ART. 3 (1) AND (2), ART. 4 (2), ART 10 ART. 19, ART. 20, ART. 21, ART. 22 (1) AND (2) (b) AND (c), ART. 23 (1), ART. 24 (1), ART. 33 (1) (a), ART. 35, ART. 38 (1),ART. 47 (1) AND (2), ART. 48, ART. 52, ART. 93, ART. 96, ART. 165 (3) (b) AND (d) (ii), ART. 73 (1) AND ART. 75 (1) (c), ART. 174, ART. 175, ART. 181, ART. 196 (1) (b), ART. 200, ART. 258, ART. 259 AND ART. 260**

**AND**

**IN THE MATTER OF SECTION 2 (a), 3 (b) AND (f) OF THE COUNTY GOVERNMENT ACT CAP. 17**

**AND**

**IN THE MATTER OF THE REMOVAL OF THE GOVERNOR OF EMBU COUNTY**

**AND**

**IN THE MATTER OF VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOM**

**BETWEEN**

**ANDREW IRERI NJERU…….…… 1ST PETITIONER**

**BENKANYENJI …… 2ND PETITIONER**

**ALOISE VICTOR NJAGI …….…….. 3RD PETITIONER**

**GERALD KINYUA MBOGO ……..…….. 4TH PETITIONER**

**SIRIAKA MURINGO NJUKI ……..…….. 5TH PETITIONER**

**LYDIA MBAKA NJERU ……..…… 6TH PETITIONER**

**FELIX NJIRU ……. 7TH PETITIONER**

**SICILI TIRA NGOCI ……. 8TH PETITIONER**

**NAMU NDEREVA ……. 9TH PETITIONER**

**JAMES KARIUKI NYAGA …….10TH PETITIONER**

**JACINTA IGOKI NYAGA …….. 11TH PETITIONER**

**FLORA MBURA ……. 12TH PETITIONER**

**FRIDA WANJIRA ……..…….. 13TH PETITIONER**

**VERONICA KIOKO ……..…….. 14TH PETITIONER**

**ROSE MUTURI ……..…….. 15TH PETITIONER**

**MONICAH MUTURI ……..……. 16TH PETITIONER**

**ALBINA WEVETI ……. 19TH PETITIONER**

**PETER NYAGA …… 20TH PETITIONER**

**GRACE WNAGUI KARANJA …….…..…….. 21ST PETITIONER**

**NANCY NDEGI …….. 22ND PETITIONER**

**JOSPHINE WAMBUGI ……. 23RD PETITIONER**

**DOMINIC NJERU ……..…….. 24TH PETITIONER**

**ROSEMARY MUNYAGA ……..……. 25TH PETITIONER**

**JOHN NAMU ……..……. 27TH PETITIONER**

**JAMES NYAGA ……..…… 28TH PETITIONER**

**AGABIO NJIRU ……. 29TH PETITIONER**

**ERICK KINYUA …….. 30TH PETITIONER**

**MUTHONI MUNENE …… 31ST PETITIONER**

**ALFRED NJERU ……..…….. 32ND PETITIONER**

**IRENE MUTHONI …… 33RD PETITIONER**

**SIMON NAMU …….. 34TH PETITIONER**

**JOHN NAMU …… 35TH PETITIONER**

**VERSUS**

**COUNTY ASSEMBLY OF EMBU …… 1ST RESPONDENT**

**THE SPEAKER OF THE COUNTY ASSEMBLY … 2ND RESPONDENT**

**THE SPEAKER OF THE COUNTY …….. 3RD RESPONDENT**

**THE SENATE …… 4TH RESPONDENT**

**RULING**

**Introduction**

1. This is an application by way of notice of motion filed under certificate of urgency on 30th April, 2014 in Embu. It was certified urgent by Ong'udi, J who directed that on 2nd May, 2014 that it be heard by me *inter-parties*, as she had disqualified herself having heard a previous petition and applications in relation to the impeachment of Hon. Governor, Martin Nyaga Wambora (hereinafter referred to as "*the Governor*."

2. The Petitioners were ordered to serve the parties prior to *inter-partes* hearing, and did so. An affidavit of service sworn by Patrick Mwendwa was filed, in which he deponed that he had served the Speaker of the Senate at County Hall but was referred to the Parliamentary Director of Legal Services at Protection House, Nairobi. There he served process on 2nd May, 2014, and it was received and stamped as such on behalf of the Speaker/Clerk of the National Assembly/Parliamentary Service Commission. The Senate and the Speaker of the Senate did not, however, appear.

3. The Embu County Assembly and the Speaker of the County Assembly of Embu were served, and were represented by counsel at the hearing for directions on 7th May, 2014, when the hearing date was fixed for 13th May, 2014.

**Parties**

4. The Applicants/Petitioners are described in the petition at paragraph 6 as follows:

> ***"The Petitioners are citizens of the Republic of Kenya, who resides, votes and works (sic) for gain within Embu County who is vested with a constitutional duty to respect uphold and defend the Constitution of Kenya as enacted (sic).***

5. At paragraph 7 of the petition they state their authority to sue which is:

> ***"… by virtue of Article 1 (2), Article 10 and Article 196 (1) he (sic) is entitled to fully and sufficiently participate both in legislative and any other business of the 1st and 2nd Respondents."***

They are referred to, hereinafter, as "*the Applicants*", and there are thirty five of them. They are represented by Mr. Ndegwa and Mr. Kirathe.

6. The 1st and 2nd Respondents are the Speaker of the Embu County Assembly and the County Assembly. They are represented by Mr. Njenga. The 3rd and 4th Respondents, the Senate and the Speaker of the Senate, are not represented.

**Background**

7. Impeachment proceedings in relation to the Governor of Embu have been in the public domain since January 2014. Several petitions in relation to a prior resolution of the Embu County Assembly (hereinafter *"the County Assembly")* for removal of the Governor were consolidated and heard in Kerugoya High Court, by a three Judge bench. Their judgment was rendered on 16th April, 2014. Two matters that were not consolidated but also heard by the same bench were determined on the same date.

8. Because the impeachment of Governor Wambora is the first of its type under the **Constitution, 2010**, it has understandably attracted huge public interest and notoriety and gained a high profile. High stakes and unprecedented political interests have been at play. Viewed from almost any perspective the matter is one of great public interest.

9. Following the judgment of the three Judge bench in Kerugoya which nullified the removal resolution in the County Assembly and the impeachment by the Senate, the County Assembly again passed another removal resolution on 29th April, 2014. The resolution was forwarded to the Speaker of the Senate and Senate impeachment proceedings were commenced.

**Notice of Motion**

10. The motion herein was precipitated by the second removal proceedings before the County Assembly and the anticipated Senate impeachment proceedings. The motion is stated to be brought under ***section 19*** of the **Sixth Schedule** of the **Constitution** and ***Rule 19*** of the **Constitution of Kenya** (**Protection of Rights and Fundamental Freedoms**) **Practice and Procedure Rules**, usually referred to as the **"*Mutunga Rules***". In oral submissions, Mr. Ndegwa stated that the application was brought under, inter alia, **Article 22** of the **Constitution.**

11. The motion seeks the following *inter-partes* orders:

> ***"1. Pending hearing of the petition this honourable court be pleased to grant conservatory orders restraining the Speaker of the Senate from convening, introducing the debate of the removal of the Embu County Governor based on the resolution passed by the County Assembly of Embu on 29th April, 2014 and/or discussing the impeachment of the Embu County Governor.***
>
> ***2. [Worded in the same terms as 1 above]***
>
> ***3. Costs be provided for."***

12. Although there was a raft of grounds in support of the motion, it was conceded by Mr. Ndegwa that most grounds had been overtaken by this court's ruling of 12th May, 2014 in **Petition No. 7 of 2014 (Embu)**, **Martin Nyaga Wambora v. Speaker of the County Assembly of Embu & Others**, which was heard before me. Accordingly, by consent, counsel argued only the grounds relating to alleged violations of the Constitution under **Articles 10** and **196** relating to the County Assembly's failure to allow or provide for public participation in the process of removal of the Governor; and under **Article 35** on the citizens right to access to information.

13. The relevant grounds are at paragraphs 16 (a) – (f) of the motion, as supported by paragraphs 10 – 14 of the supporting affidavit of Andrew Ireri Njeru, the 1st Applicant/Petitioner.

14. The Applicants contend that the Speaker of the County Assembly and the County Assembly failed to notify them as voters and citizens, of the commencement of the impeachment process in violation of their fundamental rights under **Article 35 (3)** of the Constitution. They argue that the County Assembly in acting to remove a Governor is bound to follow the Constitution to the letter by ensuring that they publish and publicise any important information affecting the nation.

15. Counsel for the Applicants submitted that **Article 35** on access to information must be read together with **Article 196 (1) (b)** of the Constitution which requires that a County Assembly shall facilitate public participation and involvement in the legislative and other business of the assembly and its committees. It was contended that the process of removal of the Governor was part of the other, non-legislative, business of the County Assembly and there was a mandatory obligation on it to enjoin the applicants by way of public participation and involvement in that process.

16. It was further contended that under the **Constitution 2010**, Kenya is a participatory democracy as underpinned by **Article 10 (1) (b)** of the Constitution under which all State organs, State officers, Public officers and persons are obliged and indeed bound to observe national values and principles of good governance. Counsel added that the County Assembly and the Speaker of the County Assembly of Embu were required to apply or interpret the Constitution or any other law or public policy decision including any relating to removal of the Governor, taking into account the principles of the rule of law, democracy and public participation, human rights, good governance, integrity transparency and accountability under **Article 10 (2) (a) (b**) and **(c).**

17. Counsel referred to **Article (1)** and **(2)** on the sovereign power of the people of Kenya highlighting the fact that they may exercise such power directly or through their representatives. This is delegated democracy and such representatives are always open to question in the exercise of their delegated power. Accordingly, the Constitution has an over-arching theme of transparency, accountability and public participation.

18. The Applicants referred to the following cases: **Gatirau Peter Munya v. Dickson Mwenda Kithinji**, Supreme Court Application No. 5 of 2014 [2014] eKLR at paragraphs 86 – 88 on the principles under which conservancy orders may be granted, highlighting the need to take into account the public interest. The case of Doctors for **Life International v. The Speaker of the National Assembly and Others, CCT. 12/05** reported in 2006 (12 BCLR 1399 (CC) (S. Afr), was cited in which the Constitutional Court of South Africa interpreted the meaning of facilitation of public involvement and held that it was an essential constitutional obligation in the law-making process under the South African Constitution.

19. Counsel therefore urged the Court to grant the orders sought in order to protect Wanjiku, or the citizens, in whom sovereign power rests when serious actions of the County Assembly

may affect them in a situation where relevant information has neither been availed them nor has public participation been facilitated for their benefit.

**1st and 2nd Respondents submissions**

20. Mr. Njenga for the County Assembly and its Speaker opposed the application. He relied on the Replying Affidavit of Hon. Justus Kariuki Mate, the Speaker of the County Assembly. In essence, the Speaker depones, inter alia, that it is the role of the County Assembly to exercise oversight over the County Executive and ensure accountability and transparency in execution of their functions under **Article 185** and **section 8** of the **County Assembly Act** (the CGA); that the roles of members of the County Assembly are to maintain close contact with and consult the electorate on issues under discussion in the assembly, and to present various opinions and proposals of the electorate to the County Assembly, and provide a linkage between the County Assembly and the electorate on public service delivery.

21. Further, it is deponed that the **County Government Act** has not been declared unconstitutional; that the County Assembly in exercise of its constitutional and statutory functions formed committees which inquired into various complaints of citizens regarding the execution by the Governor and County Executive of their various functions; that such committees carried out public inquiries into the various allegations which were the basis of the charges against the Governor; that the Ethics and Anti-Corruption Commission undertook investigations thereon and its report is yet to be availed to the County Assembly; that subsequently a motion was tabled in the County Assembly seeking the removal of the Governor.

22. The Speaker further depones that he approved the motion tabled after he had confirmed, *inter alia,* that there was no restraining court order, or judgment of the court barring the motion or any resolution thereunder; that the Governor would be given time to respond to and defend himself against the charges raised; that the process of removal of a Governor is constitutional in nature and the County Assembly did not breach any law; and that the present application is intended to shield the Governor from investigation under the guise of breach of constitutional rights.

23. As I understood his oral submissions, Mr. Njenga also contended that public participation under **Article 196** includes all the processes under which committees of inquiry

and investigation by the County Assembly exercised their functions which under the Standing Orders are open to the public. In addition, the members of the County Assembly themselves, as democratically elected representatives of the people, were conducting their public function under the Constitution and the law by way of public participation when they conducted inquiries in committee or in the removal process.

24. Counsel added that it was not alleged that the Committee stages were done in private and in particular as deponed in paragraphs 17 – 19 of the Replying Affidavit, that it was the recommendations from investigations by the said County Assembly Committees that precipitated the charges against the Governor. Further, it was contended that it was incumbent on the Applicants to show that they had been denied an opportunity to participate, which was not pleaded.

25. Finally counsel asserted that Parliament represents the will of the people as provided in **Article 94 (2)** and there is therefore a presumption that a statute was a manifestation of the will of the people and that, in this case the County Assembly complied with the **County Governments Act,** a statute that was not impugned.

**Determination**

26. After carefully listening to the parties' counsel, and considering the material before me, I take the view that the main issue for determination herein is whether the Applicants have established a *prima facie* case showing that they have a constitutional right under **Article 196 (1) (b)** to public participation in the removal process of the Governor and if so, whether *prima facie*, it was violated.

**The linkage between the right of access to public information and the removal process of the Governor under Article 196 (1) (b).**

27. Before I discuss the main issue of the right to public participation in the removal process of the Governor under **Article 196 (1) (b),** it is necessary, in my view, to clarify whether there is a linkage between this right and the alleged violation of the fundamental right of access to information under **Article 35 (3)** as alleged by the Petitioners. **Article 35 (3)** provides as follows:

***"(3) The State shall publish and publicise any important information affecting the nation."***

28. The Petitioners assert that this fundamental right must be read into and be incorporated in the constitutional expression of the theme of public participation. In terms of definition, the state must be taken to mean the collectivity of offices, organs and public officials who form government in terms of the interpretation provision in ***Article 260***, and includes the County Assembly and its Speaker.

29. The only Kenyan case I have come across that deals with **Article 35** is **Nairobi Law Monthly v. Kenya Electricity Generating Company & 2 Others, Petition No. 278 of 2011 [2013] eKLR**, where Mumbi, J was dealing with **Article 35 (1) (a)** and **(b)** but not **sub-article (3**). In that case, the learned Judge held that the 1st Respondent had an obligation on the request of a citizen to provide access to information under **Article 35 (1) (a).**

30. Assuming that the County Assembly and the Speaker were obliged to publish and publicise certain important information affecting the nation, the question that naturally arises is what is the nature of information to be published and publicised, and does a motion tabled in a County Assembly for removal of a Governor fit the characterisation of an important matter that warrants publication and publicisation in terms of **Article 35 (3)?**

31. I have not come across any other authorities that have dealt with the provision of **Article 35 (3).** I have, however, seen a report of the Global Information Society Watch (GIS Watch), a web based community that engages in collaborative monitoring of implementation of international and national commitments made by governments towards the creation of an inclusive information society. It focuses on monitoring progress made towards implementing the World Summit on the Information Society (WSIS) action agenda, and publishes reports (the GIS Watch Reports annually (see http://giswatch.org).

32. The GIS Report for Kenya of 2011 states, among other things, that:

***"The Constitution provides the right to access information held by the state and information held by another person required for the exercise or***

***protection of any right or fundamental freedom. The values and principles of the right to state held information include transparency and the provision to the public of timely, accurate information. The government has made huge steps in implementing this aspect of the Constitution having launched an open data portal in 2011 making Kenya the first African country to release government data to the public through a single online platform. The portal aggregates government held information on budget spending, allocation of funds for constituency development, parliamentary proceedings and other detailed statistics on service delivery and demographics." [Emphasis added].***

33. I quote this report in an attempt to exemplify the type of information which the state could be obliged to publish and publicise. From **Article 35 (3)** it is clear that the obligation to publish relates to information "***affecting the nation***"; that is, information of a national character that affects the welfare of the nation as a whole. In my view the kind of information that would attract the sanction of this right could be classified into at least two general categories. Information of a nature that directly and substantially affects any of the Bill of rights or their enforcement as contained in **Chapter Four** of the **Constitution**; and secondly, information which a provision of the Constitution itself requires to be published – such as statues and gazettes and also reports required to be published by independent offices or commissions. This list is, of course, not exhaustive.

34. An act seeking to remove a person from elective office when viewed from the perspective of the fundamental right to hold elective office upon due election under the **Article 38** political rights, would in my view also be the sort of matter that would attract the obligation under **Article 35 (3)** for the state to publish and publicise that information. This is not unusual as in any event under the **Elections Act**, vacancies in various political offices such as that of a Governor require to be published and publicised generally.

35. Although there is no definition in the Constitution that defines the word nation, its import may be implied from the definition of "*national legislation"* which is defined in **Article 260** as follows:

***"National legislation" means an Act of Parliament or law made under the authority conferred by an Act of Parliament."***

And "nation" is defined in the Collins Complete and Unabridged English Dictionary as:

***"an aggregation of peoples of one or more cultures, races etc. organised into a single state."***

So that the information that would properly fall under **Article 35 (3)** for publication would be that which has or relates to or characteristically affects and is necessary to be brought to notice of the people of Kenya generally.

36. From this perspective, it seems clear, and I am satisfied on a *prima facie* basis, that the state – meaning the organ of state known as the County Assembly constituted as one amongst the many offices of state within the definition in **Article 260** – was obliged in this case to publish and publicise the information relating to the removal motion of the Governor.

**The right to Public Participation in the removal process of the Governor under Article 196 (1) (b)**

37. I now discuss the Petitioners' alleged right to participation under **Article 196 (1) (b)** and **Article 10**. The meat of the Petitioners' contention was that the County Assembly and the Speaker were under obligation to notify the Petitioners of the motion filed by the mover and facilitate the participation of the public, including the Petitioners' in the proceedings.

38. **Article 196 (1) (b)** which is alleged to have been contravened provides as follows:

***"(1) A County Assembly shall –***

a. **…**

b. ***Facilitate public participation and involvement in the legislative and other business of the assembly and its committees." (Emphasis added).***

**Article 196** is under the title "*Public Participation*" and county assembly powers, privileges and immunities.

39. That Article is worded in almost the same terms as ***section 59*** of the South African Constitution (SAC) which falls under the title "*Public access to and involvement in the National Assembly*" ***section 59 (1)(a)*** of the SAC provides as follows:

***"(1) The National Assembly must –***

a. ***Facilitate public involvement in the legislative and other processes of the Assembly and its committees."(Emphasis added).***

This provision has been the subject of litigation in South Africa. The equivalent Kenyan provision has only been considered in a court in Kenya in respect of public participation in the legislative business of the Assembly. Later in this ruling I will make reference to a leading South African case dealing with the matter.

40. At the National level, the principle of public participation is enshrined as one of the values and principles of governance which the people of Kenya bequeathed to themselves under **Article 10** of the Constitution.

**Article 10 (1)** provides that:

***"The national values and principles of governance in this Article shall bind all state organs, state officers and public officers whenever any of them -***

a. ***Applies or interprets this Constitution***

b. ***Enacts, applies or interprets any law , or***

c. ***Makes or implements public policy decisions."***

The national values and principles of governance include, **under Article 10 (2) (a)** and (c) the rule of law, democracy and participation of the people and good governance transparency and accountability.

41. Again at national level, there is a requirement for public participation in Parliament under **Article 118 (1) (b)** which is in similar terms as the provision for public participation in the county assembly.

**Article 118 (1)** provides that:

"***Parliament shall –***

b. ***Facilitate public participation and involvement in the legislative and other business of Parliament and its committees."***

42. The people of Kenya also bequeathed to themselves various objects and principles at the level of devolved government, where county assemblies operate. These are contained in Chapter 11 of the Constitution. In particular **Article 174 (c)** provides as follows:

> ***"The objects of the devolution of government are –***
>
> ***(c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them." [Emphasis added]***

43. From all the above provisions, it is clear that the expectation of public participation is a fair and legitimate requirement in the conduct of affairs of state at both the national level and at the devolved level. The principles are enumerated clearly and unambiguously at all levels of life in Kenya.

44. The provision for removal of a Governor under **Article 181** of the **Constitution** also requires at **sub-article 181(2)** that Parliament "shall enact legislation providing for the procedure for such removal. The **CGA** contains such procedure at **Section 33.** I have carefully perused that section and the **Embu County Government Standing Orders, Part X11- Procedure for removal from office**. I have not seen in the **CGA** or the **Standing Orders** any provisions that allow for public participation or involvement in terms of the requirements of the various provisions of the Constitution which I have discussed.

45. This is notwithstanding the fact that under **Section 87** of the **CGA**, Parliament did provide for citizen participation in county government matters, as follows:

> ***"87. Citizen participation in county governments shall be based upon the following principles—***
>
> ***(a) timely access to information, data, documents, and other information relevant or related to policy formulation and implementation;***

***(b) reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards;***

***(c) protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information;***

***(d)legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities;***

***(e) reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes to promote shared responsibility and partnership, and to provide complementary authority and oversight;***

***(f) promotion of public-private partnerships, such as joint committees, technical teams, and citizen commissions, to encourage direct dialogue and concerted action on sustainable development; and***

***(g) recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight."*** [ emphasis added]

46. As I have already pointed out these citizen participation principles do not seem to have found a home in the removal provisions or Standing orders of the County Assembly.

47. How then, in light of all the foregoing, is **Article 196** of the **Constitution** to be dealt with? In the case of **Robert W. Gakuru & Others v The Governor Kiambu County and 3 others, Petition No. 532 of 2013 (Consolidated with ) Petition Nos. 12, 35, 36, 42 & 74 of 2014,** this court, Odunga, J had occasion to consider **Article 196** of the **Constitution**, in respect of an allegation that there had been no public participation when the Kiambu County Assembly enacted the Finance Bill. The court found that, in fact, although newspaper advertisements had been published and a number of persons had been consulted, the effort was insufficient to amount to public participation terms of **Article 196 (1) (b)**.

48. In his judgment in the **Robert Gakuru Case** (supra) Odunga, J stated at paragraph 75 as follows:

> ***"75. In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply "tweet" messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action. Article 196(1)(b) just like the South African position requires just that."***

49. In his said judgment, the learned Judge then cited at great length, and with approval, the case of **Doctors for life International** (supra). There the Constitutional Court of South Africa in its landmark decision, defined "*facilitation of public involvement*" as follows:

> ***"The phrase "facilitate public involvement" is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are "facilitate" and "involvement". To "facilitate" means to "make easy or easier", "promote" or "help forward". The phrase "public involvement" is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of "involve" includes to "bring a person into a matter" while participation is defined as "[a] taking part with others (in an action or matter); . . . the active involvement of members of a community or organization in decisions which affect them". According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative***

***process, therefore, means taking steps to ensure that the public participate in the legislative process. That is the plain meaning of section 72(1)(a). This construction of section 72(1)(a) is consistent with the participative nature of our democracy. As this Court held in*** *New Clicks****, "[t]he Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies." The democratic government that is contemplated in the Constitution is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process."[Emphasis added].***

50. In the present case, as in the **Robert Gakuru Case** (supra), it was argued that since the electorate had delegated the deliberative and other tasks to the members of the County Assembly, the actions taken by the members of the County Assembly constitute or reflect the will of the people. This cannot be an acceptable argument in light of the clear and explicit constitutional provision requiring public participation and involvement in the legislative and other processes in the assembly.

51. In the case of **Matatiele Municipality and Others v President of the Republic of South Africa and Others (2) (CCT 73/05A) [2006]ZACC 12; 2007 (1) BCLR 47(CC)** as cited in the **Robert Gakuru case Ngcobo, J,** held that**:**

***"….the provincial legislatures have broad discretion to choose the mechanisms that, in their view, would best facilitate public involvement in their processes. This may include providing transportation to and from hearings or hosting radio programs in multiple languages on an important bill, and may well go beyond any formulaic requirement of notice or hearing. In addition, the nature of the legislation and its effect on the provinces undoubtedly plays a role in determining the degree of facilitation that is reasonable and the mechanisms that are most appropriate to achieve public involvement. Thus, contrary to the submission by the government, it is not enough to point to standing rules of the legislature that provide generally for public involvement as evidence that public involvement took place; what matters is that the legislature acted reasonably in the manner that it facilitated public involvement in the particular circumstances of a given case. The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors.***

***These include the nature and the importance of the legislation and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say. In addition, in evaluating the reasonableness of the conduct of the provincial legislatures, the Court will have regard to what the legislatures themselves considered to be appropriate in fulfilling the obligation to facilitate public participation in the light of the content, importance and urgency of the legislation……The purpose of permitting public participation in the lawmaking process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning…"***

52. Ngcobo, J, further said:

***"Our constitutional democracy has essential elements which constitute its foundation; it is partly representative and partly participative. These two elements reflect the basic and fundamental objective of our constitutional democracy. The provisions of the Constitution must be construed in a manner that is compatible with these principles of our democracy. Our system of government requires that the people elect representatives who make laws on their behalf and contemplates that people will be given the opportunity to participate in the law-making process in certain circumstances. The law-making process will then produce a dialogue between the elected representatives of the people and the people themselves. The representative and participative elements of our democracy should not be seen as being in tension with each other…….What our constitutional scheme requires is "the achievement of a balanced relationship between representative and participatory elements in our democracy." The public involvement provisions of the Constitution address this symbolic relationship, and they lie at the heart of the legislative function. The Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process……To uphold the government's submission would therefore be contrary to the conception of our democracy, which contemplates an additional and more direct role for the people***

***of the provinces in the functioning of their provincial legislatures than simply through the electoral process. The government's argument that the provisions of section 118(1)(a) are met by having a proposed constitutional amendment considered only by elected representatives must therefore be rejected…..Before leaving this topic, it is necessary to stress two points. First, the preamble of the Constitution sets as a goal the establishment of "a society based on democratic values[and] social justice" and declares that the Constitution lays down "the foundations for a democratic and open society in which government is based on the will of the people." The founding values of our constitutional democracy include human dignity and "a multi-party system of democratic government to ensure accountability, responsiveness and openness." And it is apparent from the provisions of the Constitution that the democratic government that is contemplated is partly representative and partly participatory, accountable, transparent and makes provision for public participation in the making of laws by legislative bodies. Consistent with our constitutional commitment to human dignity and self respect, section 118(1)(a) contemplates that members of the public will often be given an opportunity to participate in the making of laws that affect them. As has been observed, a "commitment to a right to . . . public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self respect."***

53. In addition, the 1st and 2nd Respondents contended that there was public participation in the impeachment of the Governor by virtue of the fact that the County Assembly established inquiry committees which, in accordance with the **County Assembly Standing Orders**, were held in public and involved receiving complaints from members of the County Executive.

54. This is perhaps best responded to by stating that the extent and scope of public participation should be broader than conducting an inquiry and questioning a number of County Executives. In the **Robert Gakuru case**, Odunga, J, stated at paragraphs 76 and 79 of his judgment:

***"76. In my view to huddle a few people in a 5 star hotel on one day cannot by any stretch of imagination be termed as public participation for the purposes of meeting constitutional and legislative threshold. Whereas the***

***magnitude of the publicity required may depend from one action to another a one day newspaper advertisement in a country such as ours where a majority of the populace survive on less than a dollar per day and to whom newspapers are a luxury leave alone the level of illiteracy in some parts of this country may not suffice for the purposes of seeking public views and public participation……***

***79. In support of their position that there was public participation, the Respondents have exhibited an advertisement in the Daily Nation of 17th August, 2013. However, a careful perusal of the said advert reveals that apart from the mention of the Finance Bill in the title of the advert and the mention of the Bill in passing, there was not much mention of the said Bill. In other words there was no attempt to exhort the public to participate in the process of the enactment of the Bill. In my view there was no "facilitation". That the Finance Bill was an important Bill cannot be doubted. Its effect on the people of Kiambu in terms of ordering their way of life was bound to be far reaching. It was therefore crucial that the information going out to the public be clear and ought not to have admitted any ambiguity. The other document relied upon were list of certain persons. However, the said lists only referred to County Integrated Development Plan and not the Finance Bill. There is no evidence at all that at the said meetings the participants were invited to comment on the said Bill let alone that the contents of the same were availed to them."***

55. In the end, Odunga. J, came to the conclusion that there was no public participation, and as there were no alleged interests that had been acquired that would militate against immediate nullification of the Finance Act, he proceeded to nullify the same.

56. I am alert to the fact that the discussion held so far in the cases reviewed relates to public participation in the legislative process. As such it may be argued that when it comes to other business of the County Assembly and in particular in respect of impeachment of an important office holder, that the level of public participation and involvement cannot be expected to be so detailed otherwise it would be impossible to effect an impeachment. Whilst that is an important consideration to keep in mind, the opposite is also true. The greater the impact of the office the more rigorous the participatory scrutiny should be. It must also be remembered that Odunga J was indeed dealing with and interpreting **Article 196(1)**, in respect of legislative business, that has more long-term public effect and that the interpretation of any provision of law must in any event always be consistent.

57. From the principles that are disclosed in the foregoing discussion, I have come to the conclusion that on the basis of the material presently before me, a *prima facie* case has been established for a finding that there was scant public participation in respect of the removal of the Governor and that the Petitioners' rights were violated.

**Whether the Court can issue Conservancy Orders**

58. On this point I reiterate what I said in my Ruling of 12th May, 2014 in **Petition No 7 of 2014 Martin Nyaga Wambora v The Speaker of the County Assembly and Others**, at paragraphs 59-63 which was as follows:

> ***"59. In determining whether or not to grant conservancy orders, several principles have been established by the courts. The first is that:***
>
> ***"….[an applicant] must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution"***
>
> ***This was the holding in the case of Centre for Rights Education and Awareness (CREAW) and 7 Others v Attorney General and Others Petition No 16 of 2011, Nairobi.***
>
> ***60. To those erudite words I would only highlight the importance of demonstration of "real danger". The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention.***
>
> ***61. The second principle, which naturally follows the first, is whether if a conservancy order is not granted, the matter will be rendered nugatory.***
>
> ***62. The third principle is one recently enunciated by the Supreme Court in the election petition case of Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others SCK Petition No 2 of 2013. The principle is that the public interest must be considered before grant of a conservatory order. Ojwang and Wanjala JJSC stated that:***
>
> ***"[86] „conservancy orders? bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as „the prospects of irreparable harm? occurring during the pendency of a case; or „high probability of success? in the supplicant?s case for orders of stay.***

> ***Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes"***
>
> ***63. Thus, where a conservancy order is sought against a public agency like a legislative assembly that is mandated to carry out certain functions in the normal course of its business, it is only to be granted with due caution. The interruption of the lawful functions of the legislative body should take into account the need to allow for their ordered functioning in the public interest."***

59. I need add nothing what I then stated.

**Disposition**

60. As earlier indicated, the remedy sought by the Petitioners is a conservatory order in the following terms:

> "***Pending hearing of the petition this honourable court be pleased to grant conservatory orders restraining the Speaker of the Senate from convening, introducing the debate of the removal of the Embu County Governor based on the resolution passed by the County Assembly of Embu on 29th April, 2014 and/or discussing the impeachment of the Embu County Governor."***

61. It is in the public domain that the resolution of the County Assembly has in fact been discussed in the Senate, that a special committee was formed by the Senate to investigate the charges against the Governor, that the committee reported to the Senate, and that the Governor was in fact impeached. All that remains is implementation of **Article 182.** The specific order sought is therefore unavailable to the Petitioners as it has been overtaken by events.

62. I have anxiously agonised over the remedy to which the Petitioners herein should be entitled. The Court has an array of remedies under **Article 23** of the **Constitution** in its inherent discretion, which it can grant pending the hearing of the substantive merits of the case. I am of the view that in the interests of justice, a conservatory order is the proper remedy at this stage to protect the public interest pending the hearing of the petition.

63. Accordingly, the motion succeeds and I do hereby issue a conservatory order forthwith restraining the County Government of Embu, the Speaker of the County Assembly of Embu, the Senate and the Speaker of the Senate and any other person acting in their behalf from or in any way acting upon or effecting any decision arising from the resolution of the County Assembly and or the impeachment determination of Governor Martin Nyaga Wambora and replacing or commencing any arrangements to replace him as Governor pursuant to **Article 182** of the **Constitution**, pending the hearing and determination of the Petition herein.

64. As this litigation was commenced by public spirited members of the public in the public interest, I make no order as to costs.

Orders accordingly.

**Dated, Delivered and Signed at Nairobi this 14th day of May, 2014.**

**RICHARD MWONGO**

**JUDGE**

In the presence of:

1. Mr. Ndegwa Njiru & Daniel Kirathe, Counsel for the Petitioner

2. Mr. Njenga, Counsel for the 1st and 2nd Respondents