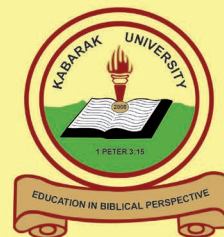


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# Kenya's Gubernatorial Impeachments: Superior Courts as Guardians against Abuse of Power

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## Abstract

The Constitution of Kenya, the County Governments Act and the Standing Orders of the respective County Assemblies and Senate provide for the scope of the constitutional grounds and the actual procedure for removal of county governors. A transparent procedure for the removal of governors is vital to avoid unnecessary political uncertainties and controversies. The removal process is quasi-judicial with two political bodies: respective County Assemblies and Senate playing an active role. The significance of the role of the superior courts in the removal process cannot be overemphasised. Superior courts have jurisdiction to interpret the Constitution and other laws, check whether the grounds for impeachment have been substantiated and the procedure for removal rightly followed while protecting the rights of persons subjected to a removal process. The Kenyan experience has shown that the impeachment processes are prone to political uncertainties and controversies, and abuses by both the respective County Assemblies and Senate. Most of the impeachment proceedings, so far, have breached the laid down procedure and have been based on unsubstantiated charges. In certain instances, superior courts have been called upon to correct the abuse of powers by the political bodies. To what extent have the superior courts been effective in their supervisory role of checking against abuse of power in this regard? This article unpacks the *sui generis* (political, constitutional, and quasi-judicial) nature of the impeachment process, and demystifies the role of superior courts as the guardians against abuse of powers by the respective County Assemblies and the Senate.

**Key words:** Impeachment, Governors, Deputy Governors, County Assemblies, Senate, Abuse of Powers, Superior Courts

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## 1. Introduction

The Constitution of Kenya 2010 introduced a devolved government system that establishes two levels of government: national and county.<sup>1</sup> At the county level, the County Executive Committees and County Assemblies of the 47 county governments exercise the people's sovereign power. The executive authority of each county is vested in and exercised by the respective County Executive Committees.<sup>2</sup> The head of the County Executive Committee is the county governor, who is the chief executive of the county while the Deputy County Governor is the deputy chief executive.<sup>3</sup> In this case, the title, chief executive only identifies the governor as the political head of the county but does not connote the concept from a management context.<sup>4</sup>

The governor is sworn into office upon being elected by a majority of voters in the county during general elections,<sup>5</sup> with the deputy governor as the running mate.<sup>6</sup> Both the governor and his or her deputy must be qualified for election as members of the respective County Assembly.<sup>7</sup>

The Constitution provides for the circumstances where the governor's office may fall vacant before he or she completes the constitutionally prescribed five-year term. These circumstances can be broadly classified into two categories: (a) vacation from office; and (b) removal from office. The difference between the two categories is that, while vacation from office is compulsory once the relevant circumstances are identified, removal from office is unrestricted because article 181(1) of the Constitution uses the phrase 'may be removed'.<sup>8</sup>

Concerning vacation from office, the legal regime regulating the process is provided for under article 182(2)(1)(a) to (d). The circumstances when vacation from office occurs are resignation; death; ceasing to be qualified for election as governor under article 180(2); and imprisonment for a term of at least twelve

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<sup>1</sup> Article 1(4) of the Constitution.

<sup>2</sup> Article 179(1) of the Constitution.

<sup>3</sup> Article 179(4) of the Constitution.

<sup>4</sup> John Mutakha Kangu, *Constitutional Law of Kenya on Devolution* (Strathmore University Press 2015) 158.

<sup>5</sup> Article 180(1) of the Constitution.

<sup>6</sup> Article 180(5) of the Constitution.

<sup>7</sup> Articles 180(2) and 193 of the Constitution. The qualifications include being a registered voter and satisfying the educational and ethical conditions required by the County Governments Act. The disqualifications include undischarged bankruptcy, unsound mind, and being found guilty of the violation of Chapter six of the Constitution on leadership and integrity.

<sup>8</sup> Kangu (n 4) 160.

months. On the other hand, removal from office is also referred to as impeachment. A governor may be impeached from office on the grounds of gross violation of the Constitution or any other law; serious reasons for believing the commission of any crime under international or national law; gross misconduct or abuse of office; and mental or physical incapacity to perform the governor's functions.<sup>9</sup>

Kenya has experienced a good number of gubernatorial impeachment proceedings since 2014, and several questions have been raised including the scope of and the threshold for the constitutional grounds of impeachment and the applicable standard of proof; the actual process of removal; incorporation of public participation in the removal process; and role of superior courts in the removal process. Most of the impeachment proceedings have breached the removal procedure and were based on unsubstantiated grounds. Both the respective County Assemblies and Senate have abused the removal process by using it as a political tool to intimidate and criticise how governors run counties. Superior courts have been pivotal in checking against such abuse of powers. However, as it shall be seen in later sections, superior courts have, to some extent, abrogated their supervisory role in ensuring that the impeachment processes abide by both substantive and procedural laws.

This article adopts both a descriptive and analytical approach in discussing the grounds for the impeachment of governors. The impeachment process is political, constitutional, and quasi-judicial because it involves the respective County Assemblies and the Senate. The process is prone to abuse by politicians and there is need to appreciate the role of superior courts in rectifying such potential political interference. Comparative jurisprudence from other jurisdictions such as Nigeria shall provide instructive lessons on how the impeachment process of governors can be carried out to meet the democratic principle of removing elected representatives for non-performance before their term of office ends.

## 2. Relevance of Impeachment

Montesquieu argued that there would be an end of everything if the same person exercised the powers of implementing public decisions, enacting laws, and deciding cases.<sup>10</sup> In line with this argument, it has become a norm for democratic

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<sup>9</sup> Article 181(1) of the Constitution.

<sup>10</sup> Baron de Montesquieu, *The Spirit of the Laws* (Thomas Nugent tr, Hafner 1949) 152.

states to separate powers into three branches of government: executive, legislature, and judiciary. It follows that not only powers must be separated, but also checks and balances should be in place to prevent abuse because experience has shown that every person who is given power is likely to abuse it and carry his or her authority as far as it would go.<sup>11</sup>

The Kenyan Constitution has adhered to the principle of separation of powers right from article 1(3) which delegates power to parliament and legislative structures at the counties, national executive and executive structures at the counties, and the judiciary. It has also provided for checks and balances between the state organs at both levels of government. For example, in addition to the legislative function of the County Assemblies and the Senate, they also have oversight tools to check the County Executive Committees in several ways, including impeachment of governors and their deputies.<sup>12</sup> These officers exercise public powers in trust for the electorates per the principle of sovereignty of the people which means that they must maintain high standards of integrity and leadership and exercise powers diligently for the benefit and welfare of the people.

The powers of removal are vital because they provide an alternative means of subjecting governors and their deputies to the law. Governors do not enjoy immunity against criminal or civil proceedings.<sup>13</sup> Denying immunity to governors and their deputies is a unique feature of the Constitution. It is commendable that the drafters considered the fact that the removal process is political, constitutional, and quasi-judicial and could proceed concurrently with civil or criminal proceedings. As contrasted to Nigeria, governors, deputy governors, presidents and vice-presidents enjoy immunity against civil or criminal proceedings when holding office, which means that such proceedings can only be brought against them after they have been successfully impeached.<sup>14</sup>

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<sup>11</sup> Ibid, 150. Montesquieu's assertion is akin to Lord Acton's often quoted assertion that 'power tends to corrupt and absolute power corrupts absolutely'. See also Robert Payne, *The Corrupt Society: From Ancient Greece to Present-day America* (Praeger 1975) 179.

<sup>12</sup> Valarie Nangidi, 'County Governance: Political and Institutional Structures and their Effectiveness' in Bosire M Conrad and Wanjiru Gikonyo (eds), *Animating Devolution in Kenya: The Role of the Judiciary (Commentary and Analysis on Kenya's Emerging Devolution Jurisprudence under the New Constitution)* (IDLO, Judiciary Training Institute, and Katiba Institute 2015) 84, 86.

<sup>13</sup> Article 143 of the Constitution. In Kenya, it is only the president and deputy president who enjoy immunity against criminal or civil proceedings.

<sup>14</sup> Constitution of the Federal Republic of Nigeria 1999, s 308.

The powers of impeachment of governors and their deputies are vested in the respective County Assemblies<sup>15</sup> and the Senate.<sup>16</sup> These powers are appropriate for checking executive powers at the county level of government as one of the tools of ensuring good governance. Impeachment serves as a means of 'trying' the governors and their deputies for 'offences' that they may perpetrate while in office. Subjecting these officers to the removal process ensures that equality before the law is upheld. The Constitution provides for the national principles and values of governance under article 10(2) including the rule of law, equality, good governance, human rights, transparency, accountability, and integrity. Both governors and their deputies must exercise the people's sovereign power per the values and principles set out under the Constitution. It follows that governors and their deputies can be subjected to the removal process just as ordinary citizens face legal proceedings before courts.

Given that governors and their deputies do not enjoy immunity against criminal or civil proceedings, impeachment is an additional sanction for wrongdoing. This is commendable because these public officers are required to maintain high standards of integrity while in office. The County Assemblies should not hesitate to instigate impeachment process where grounds can be proved. Impeachment is appropriate because it is political, constitutional, and quasi-judicial and can be completed within a reasonable period compared to civil or criminal proceedings which are prone to delays due to procedural technicalities and case backlogs in courts.

### **3. Grounds for Impeachment**

Article 182(1)(e) of the Constitution provides that the office of the governor becomes vacant if the officeholder is impeached under the Constitution. As stated above, the grounds for impeachment are provided for under article 181(1). As per article 181(2), the impeachment process is to be provided for by an Act of parliament. The impeachment process is provided for under the County Government Act and the Standing Orders of the respective County Assemblies and the Senate.

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<sup>15</sup> These are unicameral legislative structures at the county level.

<sup>16</sup> The Senate is one of the Houses of the bicameral Parliament at the National level. The other House is the National Assembly. Senate plays an active role in the impeachment of Governors. The Senate functions include representing counties and protecting their interests as per article 96(1) of the Constitution.

### 3.1 *Gross Violation of the Constitution or any other Law*

This ground is provided for under article 181(1)(a) of the Constitution. Not every violation of the Constitution or any other law falls under this ground, but only those violations which are 'gross'. The question is, what is the meaning of the term 'gross' and what amounts to 'gross violation'? The term 'gross' has not been defined by the Constitution or County Government Act. The meaning of the term 'gross' and what amounts to 'gross violation' is left to be determined by the County Assemblies, Senate, and superior courts.

Hatchard argues that the use of the word 'gross', 'grave', 'serious' or 'wilful' in Anglophonic African Constitutions attempts to limit the scope of the grounds because it could not have been the intention of the framers of such Constitutions to defeat the will of voters by providing for impeachment from office for rather trivial acts or omissions.<sup>17</sup> For example, the South African Constitution uses the phrase 'serious violation of the Constitution or the law'.<sup>18</sup> Duru correctly explains that the word 'gross' means glaringly noticeable because of inexcusable badness, or objectionableness or conduct in breach of the Constitution, and it is not every misconduct that will attract impeachment.<sup>19</sup>

The Senate has stated that 'gross violation' must be a flagrant violation, a glaring error, nasty, unpleasant, vulgar or crass, and severe transgression of the Constitution or a law.<sup>20</sup> The Senate has adopted several considerations that the threshold for impeachment should take into account as follows:

- (i) The allegations must be serious, substantial, and weighty;
- (ii) The violation must be flagrant and glaring;
- (iii) There must be a nexus between the violation and the Governor;
- (iv) The violation must have led to harm, loss or damage to society; and
- (v) The violation must have led to a loss of dignity in the office held and loss of confidence or trust in the person holding office to carry out the functions of that office with integrity and accountability.<sup>21</sup>

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<sup>17</sup> John Hatchard, 'Presidential Removal: Unzipping the Constitutional Provisions' (2000) 44(1) *Journal of African Law* 1, 3.

<sup>18</sup> Constitution of the Republic of South Africa 1996, art. 130(3)(a).

<sup>19</sup> Onyekachi Duru, 'Impeachment Under Nigerian Law: A Journey Through the Cases' (30 September 2012) *SSRN* 4 available at <<http://dx.doi.org/10.2139/ssrn.2154695>> accessed on 22nd March 2020.

<sup>20</sup> Report of the Special Committee on the Proposed Removal from Office, by Impeachment, of Honourable Anne Mumbi Waiguru, the Governor for Kirinyaga County Dated 26 June 2020 para 215.

<sup>21</sup> *Ibid*, para 218.

The High Court has already given scope and meaning to the term 'gross' and what amounts to 'gross violation'. In the case of *Martin Nyaga Wambora & 4 Others v Speaker of the Senate & 6 Others (Wambora 1)*,<sup>22</sup> the High Court began by looking at the plain, natural, and ordinary meaning of the word from the Concise Oxford English Dictionary, which defines the word to mean 'blatantly wrong or unacceptable'.<sup>23</sup> The court then proceeded to adopt the definition of 'gross' given by the Supreme Court of Nigeria in the case of *Hon. Muyiwa Inakoju & 17 Others v Hon. Abraham Adeolu Adeleke & 3 Others*<sup>24</sup> in which the term 'gross' is described in the following words:

The word "gross" .... means generally in the context of atrocious, colossal, deplorable, disgusting, dreadful, enormous, gigantic, grave, heinous, outrageous, odious, and shocking. All these words express some extreme negative conduct. Therefore, misconduct, which is the opposite of the above, cannot constitute gross misconduct. Whether conduct is gross or not will depend on the matter as exposed by the facts. It cannot be determined in vacuo or a vacuum, but in relation to the facts of the case and the law policing the facts.<sup>25</sup>

About what constitutes 'gross violation', the High Court also referred to what the Supreme Court of Nigeria stated as follows:

The following... constitute grave violation or breach of the Constitution: (a) Interference with the constitutional functions of the Legislature and the Judiciary by an exhibition of overt unconstitutional executive power, (b) Abuse of the fiscal provisions of the Constitution, (c) Abuse of the Code of Conduct for Public Officers, (d) Disregard and breach of Chapter IV of the Constitution on fundamental rights, (e) Interference with Local Government funds and stealing from the funds or pilfering of the funds including monthly subventions for personal gains or the comfort and advantage of the State Government, (f) Instigation of military rule and military government, (g) Any other subversive conduct which is directly or indirectly inimical to the implementation of some other major sectors of the Constitution.<sup>26</sup>

The High Court then concluded that gross violation would 'depend on the facts of each case' and 'not every violation of the Constitution or written law can lead to the removal of a Governor, it has to be a gross violation'.<sup>27</sup>

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<sup>22</sup> (2014) eKLR.

<sup>23</sup> Ibid, [250].

<sup>24</sup> (2007) 1 NILR 121.

<sup>25</sup> *Wambora 1* (n 22) [251].

<sup>26</sup> Ibid.

<sup>27</sup> *Wambora 1* (n 22) [252].



On appeal, the Court of Appeal adopted most of the findings of the High Court and added that 'gross violation' included:

Violation of the values and principles enshrined under Article 10 of the Constitution and violation of Chapter six (Leadership & Integrity) of the Constitution; or intentional or persistent violation of any Article of the Constitution; or intentional and blatant or persistent violation of the provisions of any other law.<sup>28</sup>

Just like the Nigerian Supreme Court, the Kenyan Court of Appeal listed examples of constitutional provisions whose violation amount to grave violation including chapter one on the sovereignty of the people and supremacy of the Constitution; chapter two, especially article 4 that establishes Kenya as a sovereign multiparty republic and article 6 that establishes devolution and access to services; and chapter 4 on the Bill of Rights.<sup>29</sup> It is important to understand that this list is not exhaustive because any article of the Constitution can be grossly violated. The Court of Appeal also emphasised that the motion and particulars of the charge must explicitly state the alleged gross violation.<sup>30</sup>

The Court of Appeal also agreed with the finding of the High Court that the concept of collective responsibility could not be a basis for the impeachment of a governor. The court added that Kenya's legal system is 'premised on the concept of individual and personal liability or responsibility'<sup>31</sup> and that there 'must be a nexus between the alleged gross violation and the conduct of a Governor'.<sup>32</sup> Therefore, for a governor to be impeached under this ground, the alleged violation of the Constitution or any other law must be gross and based on individual or personal liability or responsibility as opposed to mere allegations of violation of the Constitution or any other law which are collective. For instance, both the Kiambu County Assembly and Senate successfully impeached governor, Ferdinand Waititu on the ground of serious violation of the Constitution, the County Government Act, the Public Finance Management Act and the Public Procurement and Disposal Act; crimes under national law; and abuse of office or gross misconduct.<sup>33</sup> Specifically, the governor was charged with violating article 201(e) of the Constitution and section 107(2)(e) of the Public Finance Management Act. The governor had failed

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<sup>28</sup> *Martin Nyaga Wambora & 3 Others v Speaker of the Senate and 6 Others* (2014) eKLR [46] (Wambora 2).

<sup>29</sup> *Ibid.*

<sup>30</sup> *Wambora 2* (n 28) [44].

<sup>31</sup> *Wambora 2* (n 28) [40].

<sup>32</sup> *Wambora 2* (n 28) [41].

<sup>33</sup> Kenya Gazette, Vol. CXXII-No. 19, Gazette Notice No. 672, Nairobi, 29 January 2020.

to disclose unsustainable debts and other pending obligations in the County Fiscal Strategy Paper 2019 to the tune of Kshs. 4 billion.<sup>34</sup> The above grounds amounted to lack of transparency and accountability in the management of county resources. Furthermore, the Kiambu County Executive Committee under the leadership of the governor had intentionally failed to draft the Medium Term Debt Management Strategy for the Financial Year 2018/2019, in contravention of section 123 of Public Finance Management Act.<sup>35</sup>

### **3.2 *Serious reasons for believing the Commission of a Crime under National or International law***

This ground is provided for under article 181(1)(b) of the Constitution. Two elements can be said to constitute this ground. First, this ground implies that for the belief to justify the impeachment of the governor from office, it must be based on weighty reasons. Therefore, any person who initiates the process of impeachment of the governor must state the facts of the alleged crime in precise terms and the admissible evidence proving those facts to bring out the serious reasons in support of the belief. Serious reasons are usually severe, substantial, weighty, gross, important, wilful, grave, critical, or momentous as opposed to trivial ones.<sup>36</sup> Second, the crime believed to have been perpetrated by the governor must be recognised under international or national law as leading to imprisonment upon conviction. Article 181(1)(b) must be read together with article 182(2)(1)(d). Imprisonment of the governor for less than twelve months does not warrant his or her removal from office. The Constitution is silent if the governor is imprisoned for at least twelve months with the option of a fine. Both article 181(1)(d) and 182(2)(1)(d) should be interpreted generously so that the impeachment of the governor can only be effected where the governor is imprisoned for at least twelve months without the option of a fine.

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<sup>34</sup> Parliament of Kenya, The Senate, *The Hansard* (Tuesday, 28 January 2020 at 9.00 am- Special sitting) 6.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Wambora I* (n 22) [253]; *Kangu* (n 4) 164.

### 3.3 *Gross Misconduct or Abuse of Office*

This ground is provided for under article 181(1)(c) of the Constitution. The Constitution does not define what amounts to abuse of office. In the removal of Kirinyaga county governor, Anne Waiguru, the Special Committee of the Senate relied on section 101(1) of the Penal Code and section 46 of the Anti-Corruption and Economic Crimes Act to reach to the conclusion that the statutory provisions criminalise abuse of office and anticipate it only occurring where impropriety leads to the conferment of a benefit to a person.<sup>37</sup> Abuse of the office of the governor is to use such an office wrongly, improperly, corruptly, incorrectly, or to abuse or misuse of the governor's authority or privileges in a manner that is inconsistent with the Constitution.<sup>38</sup>

The term 'gross' as defined by the High Court in the case of *Wambora 1*, also applies on this ground. The term 'misconduct' can be defined as imprudent or illegitimate conduct and immoral behaviour by an officer regarding his or her office. Conduct should be given a full and broad interpretation. Misconduct in both private life and public office could suffice, but only grave misconduct would form the basis for impeachment of the governor from office.<sup>39</sup>

The framers of the Constitution ought to have provided for gross misconduct that occurred before the incumbent assuming office but comes to light during his or her term as governor. The Constitution of Malawi provides explicitly for the grounds of severe violation of the Constitution or written laws that either occurred or came to light during the term of office.<sup>40</sup> Although this provision relates to the president, it can be modified to apply to the governor concerning the constitutional grounds provided for under article 181(1)(a) to (c) of the Constitution.

### 3.4 *Mental or Physical Incapacity to Perform Functions of the Office*

This ground is provided for under article 181(1)(d) of the Constitution. A party wishing to rely on this ground must prove that the physical or mental incapacity on the part of the governor makes it impractical for him or her to perform the functions of the office. It is only those conditions, whether physical or mental, that incapacitate the governor, making him or her unable to perform gubernatorial

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<sup>37</sup> Kirinyaga Governor Senate Special Committee Report (n 20) paras 175 & 176.

<sup>38</sup> Kangu (n 4) 164.

<sup>39</sup> Ibid 165.

<sup>40</sup> Constitution of the Republic of Malawi 1994, art. 86(2)(a).

functions that fall under this ground. Therefore, conditions that incapacitate the governor but do not make him or her unable to perform the governor's functions may not suffice.

It is important to note that emphasis ought to be on the nature of the incapacity that renders the governor incapable of performing the gubernatorial functions. Even in this case, a qualified medical doctor should give an expert opinion on the incapacity and necessary support services should be tried where possible. The impeachment of a governor from office through mental or physical incapacity carries with it no stigma because there is no question of any loss of pension or terminal benefits.<sup>41</sup>

#### 4. The Removal Process

The Constitution, the County Government Act and the Standing Orders of the respective County Assemblies and Senate provide for a strict, precise, and transparent procedure for the impeachment of governors. Notably, the removal process of governors applies to deputy governors.<sup>42</sup> A transparent process is crucial to guard against abuse and ensure that public officers are accorded a right to a hearing before they are impeached from office. The impeachment proceedings of governors and their deputies are the sole responsibility of their County Assemblies and the Senate. These are legislative bodies at the county and national levels of government. The decision to initiate the process reflects the role of the members of such bodies as representatives of the electorates and ensures that constitutional duties are performed per the Constitution and other laws.<sup>43</sup>

The foregoing approach is not without its difficulties. The members of both the respective County Assemblies and the Senate have abused the removal process by making it a political tool and criticism device against the governors' conduct of county governments when prompted by malice, vendettas, and purely selfish or partisan interests.<sup>44</sup> For instance, there have been allegations that member of

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<sup>41</sup> Hatchard (n 17) 16.

<sup>42</sup> See *Bernard Muia Tom Kiala v Speaker of the County Assembly of Machakos & 4 Others* [2014] eKLR.

<sup>43</sup> Hatchard (n 17) 5-6.

<sup>44</sup> Selina Nelima Muchungi, 'Impeachment in the Kenyan Legal Context' (LLM thesis, University of Nairobi 2018) 23; Petronella K Mukaindo, 'Kenya's Devolution Implementation: Emerging Issues in the Relationship between Senate and County Governments' (LLM thesis, University of the Western Cape 2014) 48-50.

County Assemblies have been demanding bribes from governors to drop removal motions.<sup>45</sup> Paradoxically, impeachment charges against governors that could probably be justified have been dropped after intervention by political party leaders or the national executive.<sup>46</sup> The experience in Nigeria is that the federal executive and its political allies have attempted to undermine sub-national governments in various ways, including 'stage-managed impeachments or dismissals of governors considered to be partisan or factional "opponents and non-loyalists" of the President'.<sup>47</sup> Both situations carry a real threat to constitutionalism and throw doubt on the representative role of both County Assemblies and the Senate. The Constitution and County Governments Act have mitigated these threats by making the removal procedure as precise and transparent as possible, but it is debatable whether this has translated on the ground. Superior courts have a supervisory role that ensures that the procedural law is not violated by the County Assemblies and the Senate in arriving at their resolutions to remove or not remove a governor. Furthermore, nothing prevents the governor from being charged for crimes or civil wrongs simultaneously with the removal process, which is another safeguard against abuse of powers in the removal process by County Assemblies and the Senate.

Parliament is empowered by article 181(2) of the Constitution to enact legislation providing for the process of impeachment of a governor on any of the grounds listed in article 181(1). The Kenyan parliament has given effect to this provision through the enactment of County Governments Act. The County Government Act and the Standing Orders of the respective County Assemblies and the Senate have laid down detailed procedures to avoid any unnecessary delays and confusion during the impeachment process. The removal procedure must adhere to several guiding principles. These principles include setting out particulars of the charges in detail; supporting the charges with any necessary documents; allowing the governor or deputy governor to be heard; holding the removal proceedings in public; and setting definite and sufficient time frames to allow all parties to

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<sup>45</sup> Report of the Special Committee on the Proposed Removal from Office of Prof Paul Kiprono Chepkwony, the Governor of Kericho County (3 June 2014) para 41.

<sup>46</sup> A good example was when the impeachment charges against the Nairobi Governor Mike Sonko were dropped by the Members of County Assembly (MCAs) after Jubilee Party leader Uhuru Kenyatta intervened by 'summoning' the MCAs.

<sup>47</sup> Rotimi T Suberu, 'The Supreme Court of Nigeria: An Embattled Judiciary More Centralist Than Federalist' in Nicholas Aroney and John Kincaid (eds), *Courts in Federal Countries: Federalists or Unitarists?* (University of Toronto Press 2017) 290, 318 & 322; Mamman Lawan, 'Abuse of Powers of Impeachment in Nigeria' (2010) 48(2) *Journal of Modern African Studies* 311, 333.

prepare their cases. These guiding principles promote transparency and provide crucial public support for the members of the County Assemblies and the Senate.

The process of impeachment of the governor is political, constitutional, and quasi-judicial, and two political bodies undertake it, that is, the respective County Assemblies and the Senate. The respective County Assemblies commence the process by bringing charges against the governor, and the Senate carries out investigations and makes findings. The removal process can be described as a two-phase procedure: the initiation stage, and the inquiry and determination stage.

#### **4.1 Initiation Stage**

The impeachment process is provided for under section 33 of County Governments Act. This process is instigated by way of a notice of motion by a member given to the speaker of the County Assembly. Such a motion is endorsed by at least one-third of all members of the assembly setting out the charges and proposing that they be investigated.<sup>48</sup> The motion must set the charges and their particulars in precise and clear terms bringing out the grounds for removal. The speaker is then required to cause the motion to be debated by the County Assembly.

In consideration of the motion, the governor or deputy governor must be served with the notice of motion and allowed to defend himself or herself. In a similar context, in *Peter Obi & Another v Balonwu & Others*,<sup>49</sup> the Nigerian Supreme Court while interpreting a similar provision held that the issue of proper service of the charges personally on the governor or deputy governor is a *sine qua non* to correctly complete the removal process as contemplated under section 188(1) and (2)(b) of the Nigerian Constitution. The motion is passed if approved by least two-thirds of all members of the assembly. The County Assembly speaker is obliged to notify his or her Senate counterpart within two days of passing the motion.<sup>50</sup>

#### **4.2 Investigation and Determination Stage**

The speaker is required to convene a Senate meeting within seven days to find out the charges framed against the governor.<sup>51</sup> It is at such a meeting that the Senate can decide to appoint a Select Committee comprising of eleven of its

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<sup>48</sup> Section 33(1) of the County Governments Act.

<sup>49</sup> (2007) 5 NWLR (Pt) 494.

<sup>50</sup> Section 33(2)(a) of the County Governments Act.

<sup>51</sup> Section 33(3)(a) of the County Governments Act.

members to carry investigations on the charges.<sup>52</sup> Section 33(3)(b) of County Governments Act uses the word ‘may’, which implies that it is not compulsory for the Senate to appoint such a Committee. The investigative role of the Senate ensures that the impeachment process is self-correcting to detect errors that may have occurred at the County Assembly level.<sup>53</sup> In *Mwangi Wa Iria & Others v Speaker of Murang’a County Assembly & Others*,<sup>54</sup> the High Court correctly made the finding that the Senate is expected to not only investigate the nexus of the allegations to the governor but also interrogate the entire process as it scurried through the County Assembly.<sup>55</sup> This means that the Senate can make a verdict that the removal process at the County Assembly was not conducted as detailed under the Constitution or any law.

In the recent past, the investigative role of the Senate has been questioned. For instance, in the removal of Kirinyaga county governor, Ann Waiguru, the Special Committee of the Senate wrongly concluded that the Committee’s ‘operational context is adversarial rather than inquisitorial in its orientation’<sup>56</sup> and can only rely on evidence that is availed by the parties. This is a clear misinterpretation of the investigative role of the Senate as envisaged under section 33(4) of the County Government Act. It is submitted that the Senate must be alive to its investigative role and there is a need to allocate more time and resources for carrying out the investigations on the part of the Senate to allow a substantive consideration of the alleged charges.

When the Senate resolves to appoint the Committee, such a Committee must independently carry out investigations on the charges and report its findings within ten days.<sup>57</sup> In the course of the inquiry, the governor has the right to be heard before the Committee.<sup>58</sup> If the Committee reports that the charges made against the governor have not been substantiated, that would be the end of the removal proceedings.<sup>59</sup> Nevertheless, if the Committee reports that the charges have been substantiated, the governor must be allowed to be heard before the Senate votes to uphold any removal charges.<sup>60</sup> The requirement that the governor

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<sup>52</sup> Section 33(3)(b) of the County Governments Act..

<sup>53</sup> *Wambora 1* (n 22) [236].

<sup>54</sup> [2015] eKLR.

<sup>55</sup> *Ibid*, [92].

<sup>56</sup> Kirinyaga Governor Senate Special Committee Report (n 20) para 228.

<sup>57</sup> Section 33(4) of the County Governments Act.

<sup>58</sup> Section 33(5) of the County Governments Act.

<sup>59</sup> Section 33(6)(a) of the County Governments Act.

<sup>60</sup> Section 33(6)(b) of the County Governments Act.

must be allowed to be heard in both the respective County Assemblies and Senate is in tandem with the rules of natural justice as provided under article 47 of the Constitution on the right to fair administrative action.

If a majority of county delegations of the Senate vote to uphold any removal charges, the governor ceases to hold office.<sup>61</sup> However, if the Senate fails to secure a majority of county delegations, the governor continues to be in the office, and a removal motion can only be reintroduced in the House after three months have elapsed from the day the motion failed.<sup>62</sup> Impeachment of a governor affects a county government. Such a resolution is passed if supported by a majority of county delegations.<sup>63</sup> Therefore, at least twenty four-county delegations must support the motion by voting to uphold the impeachment charges.

Whereas the impeachment process as explained above is fairly satisfactory, there is a need for a serious review on several issues as captured in the Impeachment Procedure Bill (Senate Bill No. 15 of 2018) including public participation and strict timelines. At the time of writing, the Bill had already been passed by the Senate. The Bill was also deliberated on by the National Assembly's Departmental Committee on Justice and Legal Affairs which resolved to invite key stakeholders to submit any representations (comments and recommendations) on the Bill. It is expected that the Bill will be passed in time as there is an upsurge in removal motions which is an indication that County Assemblies have become more assertive in their representation and oversight roles at the county level.

## **5. Abuse of Powers of Impeachment**

The removal process, as explained above, is fairly satisfactory to ensure the instigation, examination, and determination of the pleaded grounds of impeachment per the principles of natural justice. Furthermore, the experience of Nigeria as far as what amounts to each ground of impeachment and the removal process provides instructive lessons on the interpretation of the Kenyan provisions.

As shown below, most of the impeachment proceedings that have taken place in Kenya have breached the procedure and were based on unsubstantiated grounds. The respective County Assemblies and the Senate have abused the removal process by using it as a tool to threaten, intimidate, and criticise how governors run

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<sup>61</sup> Section 33(7) of the County Governments Act.

<sup>62</sup> Section 33(8) of the County Governments Act.

<sup>63</sup> Article 123(4) of the Constitution.



counties for their partisan and selfish interests.<sup>64</sup> As already stated, with political party leaders' intervention and national executive lobbying, charges with higher chances of being substantiated have been dropped by County Assemblies in unclear circumstances. The abuse of powers of impeachment has manifested in the following ways: disobedience of lawful court orders; breaches of the removal procedure; and instigation of the removal process based on defective charges.

### 5.1 Disobedience of Lawful Court Orders

In the first removal of Embu county governor, the disobedience of lawful court orders by both the County Assembly and Senate was evident in a clear abuse of their powers. The Embu County Assembly defied a court order by Githua J that restrained it from holding removal proceedings without serving the governor and allowing him to be heard.<sup>65</sup> In the same removal proceedings, the Senate also disobeyed the court order by Majanja J, which restrained the Speaker of the Senate from introducing and debating the removal of Wambora based on the resolution that was made by the Embu County Assembly.<sup>66</sup>

Despite the court orders, both the Embu County Assembly and the Senate went on with the removal proceedings and passed resolutions to remove the governor from office. Lawful court orders are not suggestions for the parties to interpret or choose whether to obey or not. The High Court in *Wambora 1* was persuaded by the reasoning of English decisions<sup>67</sup> and held that actions done in disobedience of lawful court orders are null and void *ab initio* and a nullity in law.<sup>68</sup> The effect of this finding was that the resolutions passed by both the Embu County Assembly and the Senate to remove the governor from office were invalid.

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<sup>64</sup> James Thuo Gathii and Harrison Mbori Otieno, 'Assessing Kenya's Cooperative Model of Devolution: A Situation-Specific Analysis' (2018) 46 *Federal Law Review* 595, 607 available at <<https://ssrn.com/abstract=3319553>> accessed on 22nd June 2020; Nangidi (n 12) 92; Peter Wanyande, 'Devolution, Politics and the Judiciary in Kenya' in Bosire M Conrad and Wanjiru Gikonyo (eds), *Animating Devolution in Kenya: The Role of the Judiciary (Commentary and Analysis on Kenya's Emerging Devolution Jurisprudence under the New Constitution)* (IDLO, Judiciary Training Institute and Katiba Institute 2015) 58, 65.

<sup>65</sup> *Martin Nyaga Wambora & Another v Speaker, County Assembly of Embu & 4 Others*, Embu HC Petition No. 1 of 2014, Order dated 23 January 2014.

<sup>66</sup> *Martin Nyaga Wambora and the County Government of Embu v Speaker of the Senate and Attorney General*, Nairobi HC Petition No. 51 of 2014, Order dated 3 February 2014.

<sup>67</sup> *Hadkinson v Hadkinson* (1952) 2 ALL ER 211; *Clarke and Others v Chadburn & Others* (1985) 1 ALL ER (PC) 211.

<sup>68</sup> *Wambora 1* (n 22) [282].

Even though the Supreme Court later annulled the conservatory orders issued on 23 January 2014 in *Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another*<sup>69</sup> on 15 December 2017, such annulment did not overturn the High Court order in *Wambora 1* that quashed the resolutions of impeachment from the office of the governor by the Embu County Assembly and the Senate. The appellants in *Justus Kariuki Mate* wanted the conservatory orders to be annulled after being convicted of contempt of court by both the High Court in and the Court of Appeal.<sup>70</sup> In annulling the conservatory orders, the Supreme Court made a finding that the Embu County Assembly was operating within its constitutional scheme of devolution and separation of powers that was 'quite legitimately outside the path of the ordinary motions of the judicial arm of State' and that 'there would have been hardly any scope for the deployment of the Court's conservatory orders—more particularly without first hearing the petitioners'.<sup>71</sup>

The High Court invalidated the resolutions of impeachment from the office of the governor because both the Embu County Assembly and Senate carried out removal proceedings in violation of lawful court orders. Therefore, in carrying out the removal process, the legislative bodies must obey all lawful court orders. At the same time, courts should exercise restraint in issuing conservatory orders where legislative bodies are exercising their constitutional mandates without first hearing all the parties. However, courts should not hesitate to intervene where there is disobedience of lawful court orders to defend the Constitution and build public confidence in the rule of law.

## 5.2 Non-compliance with the Removal Procedure

Breaches of the due process were also evident in the *Wambora 1* case. A governor is entitled to be served with a notice specifying the constitutional grounds, charges, and particulars upon which the removal is being proposed<sup>72</sup> and allowed to be heard by the County Assembly. Therefore, failure of the Embu County Assembly to serve the governor with the notice and not allowing him to be heard amounted to a violation of the right to fair administrative action.<sup>73</sup>

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<sup>69</sup> [2017] eKLR (SC of Kenya Petition 32 of 2014).

<sup>70</sup> *Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another* [2014] eKLR.

<sup>71</sup> *Justus Kariuki Mate* (n 69) [94].

<sup>72</sup> *Wambora 2* (n 28) [44].

<sup>73</sup> Article 47 of the Constitution.

Although section 33(1) of the County Government Act is silent on allowing the governor to be heard, removal proceedings have adverse effects not only on his or her political right to hold an elective office but also on the electorates. The High Court in *Wambora 1* made a finding that a governor being taken through the removal process must be guaranteed a right to a hearing when the County Assembly is debating the impeachment motion.<sup>74</sup> As a result, the County Assembly had violated the right to fair administrative action of governor Wambora in a clear abuse of its powers of impeachment. The Court of Appeal in *Wambora 2*, made a finding that the removal process of a governor is *sui generis* (constitutional, political, and quasi-judicial) in nature and the right to fair administrative action and rules of natural justice must be strictly observed.<sup>75</sup>

There is also the need to incorporate public participation in the impeachment process of a governor. The Court of Appeal in *Martin Nyaga Wambora v County Assembly of Embu & 37 Others*<sup>76</sup> made a finding that the people of the respective county should be afforded a reasonable opportunity by the County Assembly to participate in the impeachment process of the governor.<sup>77</sup> The public can participate in the removal process through submission of written memoranda on the charges against the governor within a specified period.

It is proposed that to avoid the political uncertainties and controversies that surround the removal process, grounding the process under the Constitution could be a good move. This would create predictability, uniformity, and certainty in the application of the removal process by both the respective County Assemblies and the Senate.

### **5.3 *Instigation of the Removal Process based on Unsubstantiated Charges***

The grounds of impeachment of the governor set very high standards because the process is a very serious. The charges and particulars must specify the articles of the Constitution or provisions of any other law being pleaded to be gravely violated by the governor. Proper framing of the charges is crucial because of a high standard of proof required for the impeachment of the governor that is above a balance of probabilities but below beyond any reasonable doubt.<sup>78</sup>

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<sup>74</sup> *Wambora 1* (n 22) [307].

<sup>75</sup> *Wambora 2* (n 28) [31].

<sup>76</sup> [2015] eKLR (Wambora 3).

<sup>77</sup> *Ibid*, [46] (Okwengu J), [30]- [32] (Kariuki J).

<sup>78</sup> *Wambora 2* (n 28) [42].

Furthermore, the charges must set out particulars of allegations in detail and support such allegations with any necessary documentation. In *Wambora 2*, the Court of Appeal emphasised on the need to explicitly indicate the words 'gross, grave, serious or wilful violation' in the charge sheet, and specify the particulars of the pleaded grave violation.<sup>79</sup> In *Wambora 3*, the Court of Appeal made a finding that the respondents (Embu County Assembly and the Senate) had failed to place before the High Court admissible evidence to enable the court to establish whether the facts had a nexus with the governor's alleged gross misconduct and whether article 181 threshold had been met.<sup>80</sup>

In the first impeachment of Wambora, the charges were defectively drawn by the Embu County Assembly. The High Court failed in its duty to interrogate the facts to establish a nexus between the governor's conduct, and the pleaded gross violation. The County Assembly abused its powers by drawing defective charges, and the High Court failed in its duty to determine whether a nexus had been established based on the facts of the case.

On the second impeachment of Wambora, the Embu County Assembly and the Senate did not place any material before the High Court to enable it to conduct a substantive inquiry of the charges, particulars, and evidence leading to the impeachment to make any intervention that was substantial and lawful in the circumstances.<sup>81</sup> Both the Embu County Assembly and the Senate failed in their duties. There were also elements of bias on the part of the Senate because the same Special Committee investigated both the first and second impeachment charges.<sup>82</sup>

Several County Assemblies have also initiated the removal processes for governors based on unsubstantiated charges. Governors Paul Chepkwony (Kericho), Mwangi wa Iria (Murang'a), the late Nderitu Gachagua (Nyeri), Granton Samboja (Taita Taveta), Anne Waiguru (Kirinyaga), and deputy governors Dorothy Nditi (Embu) and Bernard Kiala (Machakos) were all removed from office by their respective County Assemblies. However, the Senate resolved that the charges and particulars of allegations failed to meet the constitutional threshold for removal from office. On the one hand, members of County Assemblies initiated some of these removal processes due to ill-will, vendetta, and malice on their part since the motions were moved due to political rivalry and turf wars and as a tool to

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<sup>79</sup> *Wambora 2* (n 28) [44].

<sup>80</sup> *Wambora 2* (n 28) [41]; *Wambora 3* (n 76) [51] (Okwengu J).

<sup>81</sup> *Wambora 3* (n 76) [49] (Okwengu J), [29] (Kariuki J).

<sup>82</sup> *Ibid*, [58] (Okwengu J).

intimidate governors in a clear abuse of their impeachment powers. Additionally, the Senate failed in its duty to conduct an inquiry on the charges levelled against the governors and their deputies to arrive at a sound decision on whether the charges had been substantiated or not in a clear abuse of their impeachment powers.

## 6. Role of Superior Courts

According to article 181(2) of the Constitution and section 33 of County Governments Act, the impeachment of governors is the exclusive responsibility of the respective County Assemblies and the Senate. The question that follows then is whether the impeachment process is justiciable? The correct answer is in the affirmative. The Kenyan superior courts have taken a permissive approach to the 'political questions' doctrine<sup>83</sup> by adopting a liberal interpretation of what is justiciable and assuming jurisdiction in gubernatorial impeachment matters.

The fact that the impeachment process is carried out by political bodies (respective County Assemblies and the Senate) cannot oust the jurisdiction of the High Court to interpret the Constitution or other laws, protect against violation of rights, and the exercise of its supervisory jurisdiction.<sup>84</sup> In the case of *Wambora I*, the jurisdiction of the HC was attacked on two significant grounds. First, on the ground that the impeachment process was subject to the doctrine of separation of powers, which requires the High Court not to intervene in the constitutional mandate of impeachment, which was a preserve of the County Assemblies and the Senate. Second, the impeachment process was political, hence, not justiciable.

In establishing its jurisdiction, the High Court relied on article 1 and 2 on the sovereign power of the people and supremacy of the Constitution and article 10 on national values and principles of governance and held that when the organs

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<sup>83</sup> WO Egbewole and AO Olugbenga, 'Justiciability Theory versus Political Question Doctrine: Challenges of the Nigerian Judiciary in the Determination of Electoral and Other Related Cases' (2012) 14 *The Journal Jurisprudence* 117, 120-121 explain that the 'political questions' doctrine must make cognizance to the following essential ingredients: (a) discretionary power of the Court to rule that a matter involves political questions; (b) the constitutionally or statutorily allocating of a matter to any of the other arms of government; (c) inappropriateness of the trial process; and (d) the Court's inability to ensure enforcement of its decision once the matter is decided. For the Kenyan case, see WO Khobe, 'A Rebel Without a Cause? Justice Njoki Ndung'u's Legacy of Dissent and the Doctrine of Separation of Powers' (3 March 2019) *The Platform* available at <[www.theplatform.co.ke/rebel-without-a-cause-justice-njoki-ndungus-legacy-of-dissent-and-the-doctrine-of-separation-of-powers-2/](http://www.theplatform.co.ke/rebel-without-a-cause-justice-njoki-ndungus-legacy-of-dissent-and-the-doctrine-of-separation-of-powers-2/)> accessed on 2nd April 2020 where the author argues that the 'political questions' doctrine does not apply to Kenya.

<sup>84</sup> Article 165 of the Constitution.

of the state step outside their area of operation, the High Court would not hesitate to intervene.<sup>85</sup> The High Court relied on several Supreme Court decisions to conclude that the doctrine of separation of powers recognises that the courts have the constitutional duty of determining the legality of the actions of other state organs.<sup>86</sup>

The High Court made the finding that as the only arm of government vested with authority to interpret and safeguard the Constitution, it must intervene in actions of other state organs where it is demonstrated or alleged that the Constitution had been violated.<sup>87</sup> The petitioner had alleged violation of the Constitution and constitutional rights concerning his removal from office. The High Court made a finding that the doctrine of separation of powers cannot oust the jurisdiction of the court to address the grievances raised by the petitioner.<sup>88</sup>

The other issue is whether the impeachment process is a political question, hence, non-justiciable, thereby making the court unable to intervene. The High Court also addressed this issue in the case of *Wambora 1*. The High Court examined the United States' case of *Nixon v United States*<sup>89</sup> where Stevens J aptly defined the 'political questions' doctrine as follows:

Of course the issue in the political question doctrine is not whether the constitutional text commits exclusive responsibility for a particular governmental function to one of the political branches. There are numerous instances of this sort of textual commitment, and it is not thought that disputes implicating these provisions are non-justiciable. Rather, the issue is whether the Constitution has given one of the political branches final responsibility for interpreting the scope and nature of such a power.<sup>90</sup>

The High Court made the finding that the court was the guardian of the Constitution and must determine whether any act or power has been exercised

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<sup>85</sup> *Wambora 1* (n 22) [195].

<sup>86</sup> The HC relied on the SC decisions of *Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No. 2 of 2011* and *Speaker of National Assembly v Attorney General and 3 others* (2013) eKLR where the doctrine of separation of powers was discussed. The Court also relied on the explanation of the CA in the case of *Mumo Matemu v Trusted Society of Human Rights Alliances & others* (2004) eKLR. The Court was also persuaded by the decision of the South African Constitutional Court in the case of *Doctors for Life International v Speaker of the National Assembly and others* (CCT 12/05) [2006] ZACC 11 where the Court emphasised on the duty of the Court to defend the Constitution by ensuring that all branches of government act within the law and fulfil their constitutional obligations.

<sup>87</sup> *Wambora 1* (n 22) [199].

<sup>88</sup> *Ibid*, [200].

<sup>89</sup> *Nixon v United States* 506 US 224 (1993).

<sup>90</sup> *Wambora 1* (n 22) [204].

per the Constitution or law. The High Court held that it had a role to perform in the impeachment process if either the County Assembly or the Senate violated the Constitution or the law in the removal of a governor and that the court would intervene by granting appropriate reliefs.<sup>91</sup>

The court can also intervene in the impeachment process where there are no accusations about the constitutional grounds of removal of a governor. For instance, in the case of *Wambora 1*, the governor was removed from office by the Senate on the grounds of violation of the Public Procurement and Disposal Act and Regulations, Public Finance Management Act and the Constitution.<sup>92</sup> In the case of *Wambora 1*, the court was of the view that the charges and particulars framed against the governor must disclose a gross violation of the stated article(s) or sub-articles of the Constitution or provisions of any written law that have been pleaded to be grossly violated.<sup>93</sup>

Superior courts can also intervene in the removal process on grounds of lack of due procedure. The removal process, as stated above, is political, constitutional, and quasi-judicial and subject to the constitutional conditions of due process. A court of law can inquire into the removal process if it is pleaded that the County Assembly or the Senate was in breach of the Constitution's due process requirements. As a result, the Senate and the County Assembly must observe and respect the constitutional requirements of due process.<sup>94</sup> In *Wambora 1*, the High Court made the finding that for the removal process of a governor from office to be valid, both substantive and procedural law contained in article 181 of the Constitution and section 33 of County Governments Act respectively, must strictly be adhered to.<sup>95</sup>

The Court of Appeal agreed with the finding of the High Court. The Court of Appeal concluded that the court's role is to determine the rights of the parties being subjected to the impeachment process. The Court of Appeal was persuaded by the decision of the Supreme Court of the United States in the case of *Marbury v Madison*<sup>96</sup> and held that the 'role of the court is solely to decide on the rights of individuals and not to enquire how the County Assembly and Senate perform duties in which they have discretion'.<sup>97</sup>

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<sup>91</sup> *Wambora 1* (n 22) [207].

<sup>92</sup> *Wambora 1* (n 22) [229].

<sup>93</sup> *Wambora 1* (n 22) [253].

<sup>94</sup> Kangu (n 4) 168.

<sup>95</sup> *Wambora 1* (n 22) [233].

<sup>96</sup> *Marbury v Madison* 5 US 137 (1803).

<sup>97</sup> *Wambora 2* (n 28) [32].

Superior courts have a crucial role to play in the impeachment process in interpreting the Constitution and other laws, check whether the grounds have substantiated, and due process has been followed, and decide on the rights of those being taken through the process. Judges of superior courts have been given a role to review the constitutionality of the actions of both the legislature and executive. Thus, the 'political questions' doctrine that limits judicial review does not apply to Kenya.

Although superior courts have assumed jurisdiction in impeachment matters, they have to some extent not been effective in their carrying out their duty of interpreting the Constitution and other laws, protecting the rights of persons being taken through the removal process, and exercising their supervisory role. Both the High Court in *Wambora 1* and the Court of Appeal in *Wambora 2* correctly interpreted the constitutional and legal provisions on removal of governors and made the finding that disobedience of lawful court orders rendered the impeachment process null and void *ab initio*. However, both courts failed to interrogate the context in which the court orders were issued, considering that both the County Assembly and the Senate were not heard. In *Wambora 3*, the Court of Appeal found that the High Court had failed in its duty to interrogate whether the facts had a nexus with the governor's conduct. The High Court attributed the failure in its duty to the failure of both the County Assembly and the Senate to place before the court the relevant evidence to enable it to carry out its judicial function effectively.

A trend that runs through the jurisprudence emerging from the superior courts on gubernatorial impeachment is that courts have exercised restraint in their rulings and judgments. It is submitted that superior courts should not only assume jurisdiction in impeachment matters but also pull up their socks and occupy their central place as neutral arbiters in performing their supervisory role in the process.

## **7. Implications of the Resolution to Impeach**

Once a governor has been removed, his or her office becomes vacant. The deputy governor is required to assume office as governor for the rest of the five-year term of the now ex-governor.<sup>98</sup> Such a deputy governor is deemed to have governed a complete five-year term as governor only if more than two and a half years remain between the date he or she assumed office and the next general elections.<sup>99</sup>

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<sup>98</sup> Article 182(2) of the Constitution.

<sup>99</sup> Article 182(3)(a) and (b) of the Constitution.



The effect of removal on terminal or pension benefits and future political ambitions of the now ex-governor is not apparent in Kenya. Both the Constitution and County Government Act are silent on the fate of an impeached governor in terms of retirement benefits and holding state office in future. The South African Constitution explicitly provides that ex-premiers may not receive benefits or serve in any public office<sup>100</sup> if removed from office on grounds of a severe encroachment of the Constitution or the law or grave misconduct. Nigeria's Constitution also explicitly provides that a House of Assembly may make a law to provide for pension or gratuity benefits to ex-governors or deputy ex-governors who were not impeached from office.<sup>101</sup>

The drafters of the Constitution ought to have included a provision that ex-governors impeached from office on grounds of grave violation of the Constitution or any other law, gross misconduct or misuse of office, and serious reasons to believe the commission of international or national crimes may not receive retirement benefits or hold public office in future. Even though the Constitution is silent, it empowers the Salaries and Remuneration Commission to set and review gubernatorial benefits for only officeholders who have completed their five-year term.<sup>102</sup> The ex-governors removed from office are not entitled to retirement benefits and should be barred from holding public office in future. For instance, Waititu should not be entitled to any retirement benefits and must be barred from holding public office in the future.

## 8. Concluding Remarks

The office of the governor is essential in Kenya's devolved system of government. The governor is the premier of the executive branch of a county government and the chief executive officer of the county. Given the functions performed by governors, taking them through the impeachment process requires proof of the alleged grounds. Mere allegations with no basis should not suffice as grounds for taking governors through the removal process.

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<sup>100</sup> Constitution of the Republic of South Africa 1996, art. 130(4).

<sup>101</sup> Constitution of the Federal Republic of Nigeria 1999, s 124(5).

<sup>102</sup> Article 230(4)(a) of the Constitution; Kenya Gazette, Vol. CXIX-No. 89, *Gazette Notice No. 6518*, Nairobi, 7 July 2017. According to the Gazette Notice, State Officers serving or appointed to a fixed term of office shall be paid a service gratuity at the rate of 31% of the basic remuneration package for the term served.

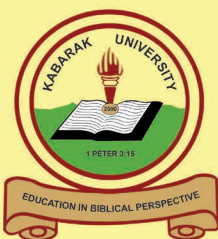
However, if the requisite grounds for impeachment can be proved, a County Assembly should not hesitate to initiate the impeachment process because this is in line with the values of a sovereign republic.<sup>103</sup> In a sovereign republic, the people elect representatives to exercise sovereign authority on their behalf, and such representatives can be recalled before their term in office ends for misuse of the sovereign power.

Article 181(1) of the Constitution and section 33 of the County Government Act provide for the grounds and procedure for removal of governors. The respective County Assemblies and the Senate must abide by the substantive and procedural law as required by the Constitution, the County Government Act and their Standing Orders. Superior courts should not hesitate to intervene in the removal process because it is justiciable. As a result, the doctrine of 'political questions' cannot oust the High Court's jurisdiction to interpret the Constitution and other laws, protect against violation of rights, and exercise supervisory jurisdiction. The Constitution has given superior courts the final responsibility of interpreting the Constitution, and as a result, they can intervene in the impeachment process to find out whether or not the process was constitutional.

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<sup>103</sup> Article 4(1) of the Constitution; MK Mbondenyi and JO Ambani, *The New Constitutional Law of Kenya: Principles, Government and Human Rights* (Law Africa 2013) 17 explain that in a Republic the people play a central role in governance because it is they who emanate the authority which the leaders exercise on their behalf and the government is meant to serve their welfare.





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