



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Kandie v Attorney General & 2 others; Central Bank of Kenya & another (Interested Parties) (Petition E036 of 2023) [2023] KEHC 20898 (KLR) (26 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20898 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E036 OF 2023**

OA SEWE, J

JULY 26, 2023

**IN THE MATTER OF: ARTICLES 20, 22, 27, 40, 43, 47, 48,
50, 68 AND 159 OF THE CONSTITUTION OF KENYA 2010**

-AND-

IN THE MATTER OF: SECTIONS 90, 96, 97 AND 98 OF THE LAND ACT, 2012

-AND-

**IN THE MATTER OF: SECTIONS 77 AND 78 OF
THE REGISTERED LAND ACT, 1989 (REPEALED)**

-AND-

**IN THE MATTER OF: SECTIONS 69, 69A, 69B, 69C AND 69D OF
THE INDIAN TRANSFER OF PROPERTY ACT, 1882 (REPEALED)**

-AND-

**IN THE MATTER OF: BANKS AND FINANCIAL INSTITUTIONS ILLEGALLY EXERCISING
THEIR STATUTORY POWER OF SALE UNDER SECTION 96 OF THE LAND ACT
WITHOUT PRIOR JUSTIFICATION ON THE AMOUNT DUE FROM BORROWERS**

-AND-

**IN THE MATTER OF: WHETHER SECTIONS 90, 96, 97 AND 98 OF THE LAND ACT,
1989 (REPEALED) AND SECTIONS 69, 69A, 69B, 69C AND 69D OF THE INDIAN
TRANSFER OF PROPERTY ACT, 1882 (REPEALED) STAND IN CONFLICT WITH
ARTICLES 27, 40, 43, 47, 48, 50 AND 159 OF THE CONSTITUTION OF KENYA, 2010.**

BETWEEN

ANDREW KIPLIMO KANDIE PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT



COOPERATIVE BANK OF KENYA 2ND RESPONDENT
KENYA BANKERS ASSOCIATION 3RD RESPONDENT

AND

CENTRAL BANK OF KENYA INTERESTED PARTY
KENYA LAW REFORM COMMISSION INTERESTED PARTY

RULING

1. The Notice of Motion dated June 22, 2023 was filed herein by Andrew Kiplimo Kandie, the petitioner, under Article 165(4) of the Constitution of Kenya 2010 and Rules 19, 23(1) & (2) and 24(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, and the inherent jurisdiction of the Court, for orders that:
 - a Spent.
 - b The Court be pleased to certify that the Petition herein raises substantial constitutional questions of general public importance and therefore refer the Petition to her ladyship, the Chief Justice, for appointment of a bench of an uneven number of judges being not less than three (3) pursuant to Article 165(4) of the Constitution of Kenya, 2010.
 - c The Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders if granted.
 - d The costs of the application be provided for.
2. The application was premised on the grounds that the Petition raises weighty and complex constitutional questions of law concerning the interpretation and application of the provisions of Articles 27, 47, 48 and 50 of the Constitution of Kenya, 2010; and particularly the fact that banking institutions as lenders exercise their statutory power of sale pursuant to Sections 90, 96, 97 and 98 of the Land Act, 2012, Sections 77 and 78 of the Registered Land Act, 1989 (Repealed) and Sections 69, 69A, 69B, 69C and 69D of the Indian Transfer of Property Act, 1882 (Repealed) without having to seek the intervention of the courts of law in instances where the quantum of the liability is contested.
3. It was therefore the contention of the petitioner that, by dint of the aforementioned provisions of law governing the banks' exercise of their statutory power of sale, the banks thereby become the accuser, witness and judge in their own cause. In his view, this is an issue of general public importance, given the manner in which several borrowers have fallen prey to the exercise of the statutory power of sale by lenders in situations where the facility charges and interest rates are disputed; which actions have rendered several citizens homeless, destitute and without reprieve from the law in the name of exercise of statutory powers.
4. The petitioner further raised the issue of interpretation of Article 40 of the Constitution which he asserted is on the verge of being violated in his case by the impugned actions of the 2nd respondent. In his postulation, the intention of the 2nd respondent is to wrongfully deprive him of his constitutional right to property without a decree from a court of law. He also relied on Article 47 of the Constitution and submitted that an obligation ought to be placed on the 2nd respondent's to first invite him for discussions with a view to an amicable settlement of the issue of liability and quantum; failing which



- there ought to be due process and a decision thereon by a court of law before the charged property can be put up for sale.
5. The application was supported by the affidavit sworn on June 22, 2023 by Mr. Gikandi Ngibuini, Advocate, in which he reiterated the stance that the Petition raises weighty and complex constitutional questions of law concerning the interpretation and application of the provisions of Articles 27, 40, 47, 48 and 50 of the *Constitution* and the question whether banking institutions should be allowed to conduct their statutory power of sale in the light of the full and glaring objections by the borrowers. In his view, the Petition raises issues of general public importance; and therefore it is in the interest of justice that it be referred to the Chief Justice to constitute a bench of an uneven number of judges for hearing and determination.
 6. While Ms Lang'at indicated, on July 6, 2023, that Mr Makuto, counsel for the 1st respondent, was not opposed to the application, the 2nd and third respondents objected thereto. On behalf of the 2nd respondent, Mr Kongere filed Grounds of Opposition dated July 5, 2023, contending that;
 - a. The Petition does not raise any substantial question of law meriting the empanelment of an enlarged bench because;
 - i. The question is important but not complex beyond the various other constitutional challenges that the Court encounters daily.
 - ii. The question may have attracted public attention but that alone is no ground to empanel an enlarged bench.
 - iii. Single judge benches have considered the constitutionality of other provisions of the *Land Act*, 2012 and *Land Registration Act*, 2012, dealing with the statutory power of sale.
 - b. It would negate the constitutional principle in Article 159(2)(b) of the *Constitution* if an enlarged bench was to be ordered.
 - c. The constitutional issue in the Petition could have been raised and decided within the context of the commercial dispute that the petitioner and the 2nd respondent are litigating in the Commercial Division of the High Court.
 7. The parties thereafter filed their written submissions pursuant to the directions given herein on July 6, 2023. Accordingly, Mr Gikandi relied on his written submissions dated July 11, 2023. On the authority of *Okiya Omtatah Okoiti & Another v Anne Waiguru – Cabinet Secretary, Devolution and Planning & 3 Others [2017] eKLR* and *Luo Council of Elders & 7 Others v Cabinet Secretary, Water & Irrigation & 12 Others [2017] eKLR*, counsel urged the Court to find that the petition has met the threshold for certification as one involving a substantial point of law. He added that the Petition has a significant bearing on public interest as it seeks to enable lenders to be cured of what he referred to as 'the preying nature of financial institutions'. He also made reference to *Kenya Anti-Corruption Commission v Deepak Chamanlal Kamani & 4 Others [2014] eKLR* and *Thakur Bahadur Singh & Another v Government of Andhra Pradesh [1998] (6) ALD 101* as to what amounts to 'public interest'. Thus, Mr Gikandi concluded his submissions by stating that, in view of the scope and acute sensitivity of this matter, it would be just to shield the Court from undue pressure by having the Petition heard by a bench of three judges as opposed to a single judge; and that no prejudice will be suffered by any of the parties.
 8. On behalf of the 2nd respondent, Mr Kongere relied on his written submissions dated July 11, 2023. He made reference to *Okiya Omtatah Okoiti & Another v Anne Waiguru, Cabinet Secretary, Devolution*



- and Planning & 3 Others [2017] eKLR and [Muranga County Government v Kenya Tea Development Agency \[2020\] eKLR](#) as to the applicable principles in an application of this nature. He added that reference to the Chief Justice should be the exception rather than the rule; and that a higher burden is cast on the party who applies to the Court to certify a matter for such reference.
9. Mr Kongere pointed out, and correctly so in my view, that every single judge is eminent, distinguished and equipped to tackle and resolve difficult constitutional questions. On that account he submitted that the questions posed in the Petition do not raise novel or substantial questions of law that cannot be handled by a single judge. He added that the mere fact that the question, if resolved either way, will affect the public at large, does not transcend a matter above a single judge jurisdiction. He made reference in this regard to Magare Gikenye J *Benjamin v Salaries and Remuneration Commission & 146 Others, Senate & 9 Others (Interested Parties) [2021] eKLR* and [Lambert Lwanga Ochochi & 6 Others v Ponangipali Venkata Ramana Rao & 8 Others \[2022\] eKLR](#) to underscore his arguments.
 10. At paragraphs 11 to 13 of his written submissions, counsel made reference to some of the decisions by single judges touching on the constitutionality of the statutory power of sale. He also alluded to instances where single judges have declared entire Acts unconstitutional; and added that there is no hindrance in a single judge doing so here if that is warranted. Mr Kongere also drew the attention of the Court to the logistical challenges that enlarged benches come with; including the financial cost to the public coffers. He discounted Mr Gikandi's argument that an enlarged bench would shield a single judge from undue pressure; correcting pointing out that that has never been a relevant consideration.
 11. On his part, Mr Ohaga, SC, proposed one issue for determination; namely, whether the issues raised in the Petition are so substantial as to warrant the empanelment of a multiple judge bench. He cited Article 165(4) of the [Constitution](#) and the case of [Martin Nyaga & Others v Speaker County Assembly of Embu & 4 Others & Amicus Curiae \[2014\] eKLR](#) to buttress his argument that the decision whether or not to empanel a bench of more than one judge ought to be made only where it is absolutely necessary. He added, on the authority of [Wycliffe Ambetsa Oparanya & 2 Others v Director of Public Prosecutions & Another \[2016\] eKLR](#) that there must be cardinal issues of law or of jurisprudential moment for consideration for certification to be made.
 12. Mr Ohaga further submitted that the mere fact that a matter is of great public interest does not necessarily convert it into a substantial question of law. He likewise gave several examples of suits in which sections or entire Acts have been declared unconstitutional by a single judge. He accordingly urged the Court to find that the Petition raises no novel issues that cannot be effectively determined by a single judge bench, and to dismiss the Notice of Motion dated June 22, 2023.
 13. Counsel were thereafter given an opportunity to highlight their written submissions; whereupon Dr Khaminwa, SC, drew the Court's attention to the preamble of the Petition; particularly its reference to banks and financial institutions. He therefore surmised that the Petition is a weighty one whose outcome will affect all banks and financial institutions in the country in terms of policy formulation. He accordingly urged the Court to find that, in the circumstances, the Petition calls for the empanelment of a multiple bench for hearing and determination.
 14. I have given careful consideration to the application, the grounds relied on by the Petitioner and the averments made in the Supporting Affidavit sworn on June 22, 2023. I have similarly taken



into consideration the written and oral submissions made by learned counsel. Article 165(4) of the Constitution ant to which the application has been brought states thus:

' Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.'

15. It is now settled that an order for empanelment of a multiple bench is one to be given with circumspection. Thus, I am in full agreement with the position taken in *Martin Nyaga Wambora* case (supra), that:

' The decision whether or not to empanel a bench of more than one judge ought to be made only where it is absolutely necessary and in strict compliance with the relevant constitutional and statutory provisions. In this country we still do not have the luxury of granting such orders at the whims of parties. Judicial resources in terms of judicial officers in this country are very scarce. Empanelling such a bench usually has the consequences of delaying the cases which are already in the queue hence worsening the problem of backlogs in this country.'

16. Similarly, in *Muranga County Government v Kenya Tea Development Agency Limited* (supra), it was held:

' reference to the Chief Justice should be the exception rather than the rule and a higher burden is cast on the party who applies to the court to certify the matter.'

17. Accordingly, the key issue that presents itself for consideration in the instant application is the question whether the issues raised in the Petition are so substantial as to warrant the empanelment of a multiple judge bench. I therefore agree entirely with the submissions of counsel for the 2nd and 3rd respondents that every judge is eminent, distinguished and well equipped to tackle and resolve all questions arising in connection with the exercise of the jurisdiction conferred by Article 165(3)(b) and (d), which provision states:

' Subject to clause (5), the High Court shall have-

- b Jurisdiction to determine the question whenever a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- d Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-
 - i The question whether any law is inconsistent with or in contravention of this Constitution.'

18. As was pointed out by learned counsel for the respondents, authorities abound to demonstrate that single judge benches have handled various constitutional issues that resulted in the annulment of various provisions of statute, including entire statues. A case in point is *Kenya Human Rights Commission v Attorney General & Another [2018] eKLR* in which a single judge declared the *Contempt of Court Act* to be unconstitutional. Nevertheless, it not in vain that the drafters of the *Constitution* deemed it fit to include Article 165(4) in the Charter; and therefore each application for certification must turn on its own peculiar circumstances. In this regard, I am in full agreement with the position



taken by Hon. Lenaola, J (as he then was) in *Okiya Omtatah Okoiti and Another v President Uhuru Muigai Kenyatta and 4 others, Petition No 531 of 2015*, that:

' The different approaches taken by the High Court as shown above would make it clear that whether a substantive question of law arises under 165(4) is dependent on the circumstances of a particular case. Furthermore, that the list of relevant factors is not exhaustive and that the presence or absence of one is not necessarily decisive in a particular case. Ultimately, the presiding judge has to exercise his or her discretion on whether, on his or her appraisal of the factual and legal matrix, a substantial question of law arises.'

19. Similarly, in *Okiya Omtatah Okoiti & Another v Anne Waiguru (supra)*, the Court of Appeal held:

' There are, in our view, parallels to be drawn between certification for purposes of Article 163(4)(b) of the Constitution and certification for purposes of Article 165(4) notwithstanding that the drafters of the Constitution, in providing for certification of matters for purposes of appeal to the Supreme Court under Article 163(4)(b) stipulated that a matter should be of 'general public importance'. The word, 'substantial' in its ordinary meaning, means 'of considerable importance'. There is therefore wisdom to be gained from the pronouncements of the Supreme Court of Kenya respecting interpretation of Article 163(4)(b). In Hermanus Phillipus Steyn v Giovani Gnechi-ruscone [2013] eKLR the Supreme Court of Kenya pronounced governing principles for purposes of certification under Article 163(4)(b) some of which are relevant in the context of certification under Article 165(4). Drawing therefrom, we adopt, with modification, the following principles:

- i. For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;
- ii. The applicant must show that there is a state of uncertainty in the law;
- iii. The matter to be certified must fall within the terms of Article 165(3)(b) or (d) of the Constitution;
- iv. The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.'

20. Hence, the first question to pose is whether the petitioner has identified and concisely set out the specific substantial question or questions of law raised in the Petition for which certification is sought. The petitioner essentially seeks that Sections 90, 96, 97 and 98 of the Land Act, 2012 be declared null and void, contending that they are inconsistent with Articles 27, 40, 48, 49, 50 and 159 of the Constitution. The petitioner also prayed for a declaration that lenders be obliged by law to file a suit in a court of law to obtain a decree before the commencement of the process of sale of security.

21. The attention of the Court was drawn to *Barclays Bank of Kenya Ltd v Attorney General & Another (supra)* by Mr Kongere. He submitted that in that matter, the court had occasion to determine the



constitutionality of Sections 78, 90 and 96 of the Land Act; and therefore that the issue is not novel. I have perused the case and noted that the issue as framed for determination was as hereunder:

' The issue for determination by the court is whether section 78(1) has a retrospective application to charges created before the coming into force of the Land Act and if so whether section 79(3), 90(1), and 96(2) of the Act equally apply retrospectively.'

22. Accordingly, the ultimate determination of the Court (Hon Mutungi, J) was thus:

I hold that section 78(1) applies Part VII of the Land Act 2012 retrospectively subject to section 162 of the Land Act which I hold exempts prior charges where rights had accrued before the coming into force of the Land Act from the provisions of Part VII of the Land Act. I further hold that section 79(3) of the Land Act cannot apply to prior charges taken prior to the coming into force of the Land Act 2012 and a chargee of a matrimonial property under a prior charge will be taken to have accrued a right over the charged property without the requirement of spousal consent and would in terms of section 162 of the Land Act 2012 be entitled to have the benefit of the rights and interest conferred by the prior charge notwithstanding the absence/lack of spousal consent as envisaged under section 79(3) of the Land Act 2012.

In the premises and for the above reasons I decline to grant the declarations sought in the petition. In the result the petition is ordered dismissed but considering the issues that were submitted for determination were no doubt of public interest I direct that each party shall bear their own costs of the petition.'

23. It is manifest then that the instant Petition raises totally different issues from the ones raised in *Barclays Bank of Kenya Ltd v Attorney General & Another*; and while it is true that there are numerous instances in which the constitutionality of certain provisions of the Land Act have been challenged, *Overseas Private Investment Corporation & 2 Others v Attorney General* (supra) being one such instance, it is significant that the petitioner's assertion that the angle he has taken herein is novel has not been refuted. None of the authorities cited by counsel was on point in that regard. I therefore find considerable merit in the petitioner's contention that, to that extent, there is uncertainty in the law as it stands; particularly on whether it is an affront to our constitutional architecture for banks and financial institutions to be the sole determinants of the sums due from borrowers for purposes of the exercise of their statutory power of sale.

24. I am therefore satisfied that this petition affects not only the parties thereto, but transcends the realm of the Petition in so far as it has a significant bearing on the public interest at large. Indeed, in the Indian case of *Chunilal v Mehta v Century Spinning and Manufacturing Co AIR 1962 SC 1314*, which has been cited with approval in our jurisdiction, it was held:

' A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.'

25. Needless to say too that the issue falls within the terms of Article 165(3)(b) or (d) of the Constitution and is therefore a fit and proper subject for consideration by a multiple bench. Thus, I am convinced



that the petitioner has met the prerequisites for certification for purposes of Article 165(4) of the Constitution.

26. In the premises, I find merit in the application dated June 22, 2023. The same is hereby allowed and orders granted as hereunder:

- a It is certified that this Petition raises substantial constitutional questions of general public importance and is therefore hereby referred to her ladyship, the Honourable the Chief Justice, for the empanelment of a bench of an uneven number of judges to hear and determine it pursuant to Article 165(4) of the Constitution of Kenya, 2010.
- b The costs of the application be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 26TH DAY OF JULY 2023

OLGA SEWE

JUDGE

