



REPUBLIC OF KENYA



**Njiru & 11 others v Kenya Kwanza Coalition & 18 others; Azimio La Umoja One
Kenya Coalition & 6 others (Interested Parties) (Constitutional Petition 202 of 2023)
[2023] KEHC 22704 (KLR) (Constitutional and Human Rights) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22704 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION 202 OF 2023

LN MUGAMBI, J

SEPTEMBER 29, 2023

**IN THE MATTER OF ARTICLES 1, 2, 3, 90, 91, 94, 95, 97,
101, 103, 107, 122 AND 259 OF THE CONSTITUTION OF
KENYA, 2010**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLES 1, 4, 10, 27, 38 AND 50 OF THE CONSTITUTION
OF KENYA**

AND

**IN THE MATTER OF THE LEGALITY OF THE ELECTION OF
HON, MOSES WETANGULA AS THE SPEAKER OF THE
NATIONAL ASSEMBLY**

AND

**IN THE MATTER OF THE RULING/DETERMINATION
CONTAINED IN THE COMMUNICATION FROM THE
SPEAKER OF THE NATIONAL ASSEMBLY MADE ON THE 6TH
OCTOBER, 2022 DECLARING INTER ALIA, THE KENYA
KWANZA ALLIANCE AS THE MAJORITY PARTY IN THE
HOUSE**

AND



IN THE MATTER OF THE ALLEGED SUBVERSION,
COMPROMISE AND NEGATION OF MULTI PARTY
DEMOCRACY IN KENYA BY THE KENYA KWANZA
ALLIANCE THE SPEAKER OF THE NATIONAL ASSEMBLY,
THE REGISTRAR OF POLITICAL PARTIES AND THE
INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION

AND

CONSTITUTIONAL PETITION NO. 202 OF 2023 – RULING PAGE 1 OF 18
IN THE MATTER OF LEGALITY OF THE IMPENDING FINANCE
ACT, 2023 AND APPROPRIATION ACT, 2023 AND THE
ENFORCEMENT OF THE INDIVIDUAL AND COLLECTIVE
RIGHTS OF CITIZENS TO REPRESENTATION AS THE
CONDITION PRECEDENT TO PAYMENT OF DIRECT TAXES
TO THE NATIONAL GOVERNMENT

BETWEEN

KENNETH NJAGI NJIRU 1ST PETITIONER
MESHACK SUBA CHURCHILL 2ND PETITIONER
LEMPAA SUYINKA 3RD PETITIONER
TEDDY M. MUTURI 4TH PETITIONER
AMOS WANJALA 5TH PETITIONER
STEVEN KIHONJE NDUNG’U 6TH PETITIONER
SOPHIE DOLA 7TH PETITIONER
WINNIE THUO 8TH PETITIONER
ENG. VICTOR NG’ANG’A 9TH PETITIONER
SIMON LOKOM 10TH PETITIONER
CAROLINE MOGAKA 11TH PETITIONER
FRANCIS KENYA MWANGI 12TH PETITIONER

AND

KENYA KWANZA COALITION 1ST RESPONDENT
THE NATIONAL ASSEMBLY OF KENYA 2ND RESPONDENT
SPEAKER OF THE NATIONAL ASSEMBLY 3RD RESPONDENT



HON. MOSES M. WETANGULA	4 TH RESPONDENT
REGISTRAR OF POLITICAL PARTIES	5 TH RESPONDENT
HON. KIMANI ICHUNG'WA	6 TH RESPONDENT
HON. OWEN BAYA	7 TH RESPONDENT
HON. SYLVANUS OSORO	8 TH RESPONDENT
HON. NAOMI JILLO WAKO	9 TH RESPONDENT
HON. SABINA CHEGE	10 TH RESPONDENT
INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (IEBC)	11 TH RESPONDENT
THE HON. ATTORNEY GENERAL	12 TH RESPONDENT
HON. KANINI KEGA	13 TH RESPONDENT
ANNE NDERITU	14 TH RESPONDENT
KENYA REVENUE AUTHORITY	15 TH RESPONDENT
CABINET SECRETARY THE NATIONAL TREASURY AND ECONOMIC PLANNING	16 TH RESPONDENT
UNITED DEMOCRATIC ALLIANCE	17 TH RESPONDENT
AMANI NATIONAL CONGRESS	18 TH RESPONDENT
FORD KENYA	19 TH RESPONDENT

AND

AZIMIO LA UMOJA ONE KENYA COALITION	INTERESTED PARTY
JUBILEE PARTY OF KENYA	INTERESTED PARTY
LAW SOCIETY OF KENYA	INTERESTED PARTY
HON. OPIYO WANDAYI	INTERESTED PARTY
HON. ROBERT MBUI	INTERESTED PARTY
HON. JUNET MOHAMED	INTERESTED PARTY
KATIBA INSTITUTE	INTERESTED PARTY

RULING

1. This is a ruling in respect of the application dated June 17, 2023 where the Petitioners pray for the following reliefs:
 - a. Spent;
 - b. That this Honourable Court be pleased to stay Ruling/determination of the 3rd Respondent contained in the communication from the Chair made on October 6, 2022 to the extent that



he declared Kenya Kwanza Alliance-the 1st Respondent herein-as the majority party in the National Assembly in the 13th Parliament;

- c. That pending inter-partes hearing of this Application/Petition this Honourable Court be placed to stay the 13th Respondent's Notice dated June 13, 2023 seeking to withdraw Jubilee Party from the Deed of Agreement for Azimio la Umoja One Kenya Coalition;
 - d. That pending hearing and determination of this Application/Petition this Honourable to withdraw Jubilee Party from the Deed of Agreement for Azimio la Umoja One Kenya Coalition;
 - e. That pending hearing and determination of this Application/Petition to suspend or otherwise stay the obligation of Kenyan Citizens, who are members and/or supporters of Azimio Coalition to pay taxes 50 per cent of direct taxes unless and until the status, rights and privileges of the Azimio la Umoja Kenya One Coalition as the majority party in the National Assembly in the 13th Parliament are restored by this Honourable Court;
 - f. That pending hearing and determination of this Application/Petition this Honourable Court be pleased to issue a conservatory order of injunction to restrain the 6th, 7th, 8th and 9th Respondents from performing the functions and duties of Leader of Majority, Deputy Leader of Majority, Majority Chief Whip and Deputy Majority Chief Whip in the 13th Parliament;
 - g. That pending hearing and determination of this Application/Petition, the Hon. Speaker Moses Wetangula – the 4th Respondent- be prohibited from attending political rallies and meetings of the Kenya Kwanza Alliance;
 - h. That pending hearing and determination of this Petition, an order of mandatory injunction be issued pursuant to section 34(f) of the [Political Parties Act, 2011](#) to compel the Registrar of Political Parties – the 5th Respondent herein- to notify the 11th Respondent- the Independent Electoral and Boundaries Commission- that is the 10th and 13th Respondents have ceased to be members of the Jubilee Party;
 - i. That pending hearing and determination of this Petition, an order of injunction be issued restrain the Registrar of Political Parties from condoning, acquiescing in, aiding and abetting the scheme, actions and omissions of the Kenya Kwanza Alliance-1st Respondent herein- of soliciting, sponsoring or encouraging the defection and revolt by elected leaders of the Azimio Coalition and its Constituent parties;
 - j. That the Honourable Court be pleased to suspend the implementation of the impending [Finance Act 2023](#) and the [Appropriation Act, 2023](#) until the Petition herein is heard and determined;
 - k. That the Honourable Court be pleased to issue such directions and orders that will ensure that this petition is heard and determined as a matter of the highest public importance;
 - l. That the Honourable Court be pleased to certify that this Petition raises substantial questions of law and refer the same to the Hon Chief Justice for empanelment of a bench of at least five judges to hear and determine this case;
 - m. That costs of this application be borne by the Respondents.
2. The Application relied on the multiple grounds in the notice of motion and the supporting affidavit of the 1st Petitioner who swore the said affidavit was on his behalf and that of his co-petitioners.



The Respondents' Responses

3. In their replying affidavit dated July 3, 2023, and deponed by one Wafula Wakoko, the 5th and 14th Respondents contend that the 5th Respondent effectively carried out its duties as per the [Political Parties Act](#) especially the regulation of political parties and ensuring their compliance with the law. They listed the steps they undertook to deal with the matter including correspondences with the Speaker of the National Assembly, and the Azimio Coalition. That vide their letter dated June 7, 2023 which was a response to Azimio's letter, the only party that had legally exited the coalition was the Devolution Empowerment Party. That this meant that all other parties as gazetted on the 14th of April, 2022 remain constituent parties of the 1st Interested Party.
4. The Respondents, in particular the 5th Respondent, contend that it has fully discharged its mandate in accordance with the [Political Parties Act](#), 2011 and that the Petitioners have failed to avail evidence to the contrary. They termed the petition as frivolous and lacking in substance because it did not disclose with precision, the Petitioners' rights that had been infringed.
5. The 6th, 7th, 8th and 9th Respondents filed their joint affidavit dated June 30, 2023. Hon Kimani Ichung'wa deponed the affidavit on behalf of the other Respondents. The Respondents defended the Speaker's actions and stated that his ruling dated October 6, 2022 was based on sound legal principles and supported by evidence placed before the Speaker. It was submitted that the Speaker took into account the various coalition agreements that had been presented before him before arriving to the decision that Kenya Kwanza was the majority in the house. He faulted the Petitioners for rushing to court yet the minority leader, had after the Speaker's ruling, informed the Speaker that they would move him to review his ruling which he did not.
6. Like the 1st and 14th Respondents, the Respondents herein stated that the instant application was misconceived and fatally defective because; this Court is deprived of jurisdiction as the same is donated to the Political Parties Tribunal under section 40 of the [Political Parties Act](#), 2011. Secondly, that the National Assembly Leaders enjoy immunity as provided under Article 117 of the [Constitution](#) and section 12 of the [Parliamentary Powers and Privileges Act](#) which entitles the holder of leadership offices in Parliament immunity from proceedings for acts done in good faith during the discharge of their duties. That there is no evidence that the said Respondents acted illegally or out of malice.
7. The third ground the Respondents rely on is that Article 38(2) of the [Constitution](#) provides for the right to form and join a political party and that the Kenya Kwanza Coalition exercised this right by seeking a coalition with political parties which share common interests. That the political parties that are part of the Kenya Kwanza Coalition have majority representation in the House having 179 members while the Azimio la Umoja has 157 members. That pursuant to Article 108 of the [Constitution](#), the 6th, 7th, 8th and 9th Respondents are legitimately and legally in office having been validly nominated by their Coalition.
8. That it is from these political rights that MCCP, MDG, PAA and UDM severed their political allegiance and association with the Azimio la Umoja Kenya One Alliance Party and they have since deposited their cessation documents with the Registrar of Political Parties and their leaders distanced themselves from the said coalition.
9. The fourth ground they are placing their reliance on is that Kenya Kwanza is the majority party in the National Assembly and as provided under Article 108 of the [Constitution](#), the leader of majority shall be the person who is the leader of the National Assembly of the largest coalition of parties. They negated the Petitioners' assertions that the leader of majority should be decided by Kenyans at the ballot and stated that this would seek to push into oblivion independent members in the National Assembly.



10. The Respondents continued to state that Standing Order 19 provides for the establishment of the offices of the leader of the majority party and the deputy leader if the majority party to be elected largest party coalition of parties in the National Assembly while Standing Order 2 provides for both majority and minority party whips as members designated by a parliamentary party as its party' whip for the purposes of the transaction of the business in the House and include the Majority Whip and the Minority Whip. That following the Speaker's Ruling on the 6th of October, 2022, the members of the National Assembly designated the majority and minority leaders and the leaders took their respective offices. That this application is belated and the Petitioners should not benefit from their tardiness.
11. With regards to the issue of the Finance Bill, 2023 and the Appropriation Bill, 2023, the said Respondents stated that Article 95 of the Constitution empowers the National Assembly to enact legislation and that the said process is cumulative on all members of parliament and not on the majority or minority leaders. Further, Article 209 and 210 of the Constitution empowers the National Assembly to imposes a tax and formulate legislation on taxation and that this Court lacks the jurisdiction to make decisions on tax waivers or tax variance because that power has only been imposed on the National Assembly. The Respondents urged this Court to dismiss the application and not to entertain the petition, but instead refer the dispute to the Political Parties Tribunal.
12. The 6th, 7th, 8th and 9th Respondents' opposed the Petitioners' application to have the petition referred to the Chief Justice for the purposes of empanelling a bench of an uneven number to hear the petition, on the grounds filed on the 8th of August, 2023. They stated that the issues raised in the Petition do not raise any substantial Constitutional question which would warrant determination by a bench. They stated further that each high court judge has authority under Article 165 of the Constitution and as such the decision of the High Court whether from a single judge or from a bench have no qualitative distinction.

Analysis and Determination

13. The main issue for consideration in the application is referral of this petition to the Chief Justice for the empanelment of a bench of an uneven number of judges to hear it.

Article 165 (4) of the Constitution provides:

“ 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.

14. On the other hand, Article 165 (3) (b) and (d) provide that:
 3. “Subject to clause (5), the High Court shall have:
 - b) jurisdiction to determine the question whether 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 of whether any law is inconsistent with or in contravention of this Constitution;



- ii. the question of whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - iii. any matter relating to constitutional powers of State Organs in respect of county governments and any matter relating to the constitutional relationship between levels of government; and
 - iv. a question relating to conflict of laws under Article 191.”
15. It is the Court’s duty to consider the issues before it and decided if the constitutional threshold for referring the matter to the Chief Justice has been met.
16. The petitioners submitted that the Speaker of the National Assembly is by dint of Articles 3, 10, 93, 95, 107 and 127 of the Constitution obliged to uphold and defend the Constitution as well the independence of Parliament by impartial execution of the duties of Speaker. They also relied on Articles 4, 10, 50(1) and 75 of the Constitution of Kenya to buttress their submissions.
17. They contended that a matter arose in Parliament on which side constituted majority or minority which is a constitutional question. The Speaker invited proposals on the issue. The Azimio la Umoja One Kenya Coalition Party and the Kenya Kwanza Coalition House members gave their views. The Speaker delivered a ruling. In his ruling dated Thursday, October 6, 2022, he stated that it would be imprudent to treat 14 members elected to the house under the UDM, PAA, MCCC and MDG as part of a coalition they had distanced themselves from and as such they were part of the Kenya Kwanza Coalition. He then proceeded to declare the Kenya Kwanza Coalition as having 179 members and the Azimio la Umoja Coalition as having 157 members which made the coalition majority and minority party respectively. According to the Petitioners, that ruling undermines constitutional democracy and seeks to re-establish political party dictatorship in Kenya.
18. I am required to determine whether this issue raise a substantial question of law for reference to the Honourable Chief Justice to constitute a bench. The Constitution does not define or elaborate on what the phrase ‘substantial question of law’ means. Nevertheless, in the Indian case of Chunilal V Mehta Vs Century Spinning And Manufacturing Co Air 1962 SC 1314, their Lordships had the following to say about this particular phrase ‘substantial question of law’. The Court 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 questions 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”
19. While considering whether or not to refer a matter to the Chief Justice for empanelment, Justice Odunga in Wycliffe Ambetsa Oparanya & 2 Others Vs. Director Of Public Prosecutions & Another (2016) EKLH held thus:
- “Therefore, the only constitutional provision that expressly permits the constitution of bench of more than one High Court judge is Article 165(4). Under that provision, for the matter to be referred to the Chief Justice for the said purpose the High Court must certify that the matter raises a substantial question of law in the following instances.....



Since the determination of such issue is a judicial one, the Court is obliged either on its own motion or on an application of the parties to the cause to identify the issues which in its view raise substantial questions of law. Therefore, the mere fact that parties are of the view that the matter falls under Article 165(4) does not necessarily bind the Court in issuing the said certification.

According to the above provision, it does not suffice that the matter raises the issue whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened or that it raises the issue of interpretation of the Constitution. The Court must go further and satisfy itself that the issue also raises a substantial question of law. Similarly, the mere fact that a substantial question of law is disclosed does not suffice unless the issue also arises as to whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened or that it raises the issue of interpretation of the Constitution.”

20. The issues raised in this petition have a direct bearing on various constitutional provisions. I need not enumerate all the relevant provisions but it is important that I mention Article 4 (2) on the Republic of Kenya; it states:

Article 4 (2) The Republic of Kenya shall be a multi-party democratic state founded on national values and principles of governance referred to in Article 10”

21. Article 4 (2) signifies the centrality of political parties in the existence of Kenya as a democratic State. It underscores their importance in the functioning of our democracy. Through elected representatives, the parties champion the interest of the electorate by policy and legislation. They act as agents of democracy and constitutionalism. The main grievance in this Petition is on the composition of the political parties in Parliament. It is claimed that the determination of the leadership of the parties in the House was done in complete disregard of laid down constitutional principles. The composition of political parties in Parliament is of great significance as legislative actions is largely shaped by policies of the parties. Political parties must be safeguarded to guarantee a flourishing multi-party democratic State that the framers of the Constitution envisaged. A matter that touches on composition of political parties in Parliament cannot be dismissively termed as insignificant as it impacts on multi-party democracy which is a fundamental characteristic that is included in the description of the Republic of Kenya. It is a substantial question that deserves a careful and serious consideration.
22. On the issue of the Finance Bill, 2023 and Appropriation Bill, 2023, which are now Acts of Parliament, Appropriation Act, 2023 and Finance Act, 2023, I can only say that the Chief Justice has empanelled a bench of three Judges to hear consolidated Petitions comprised in Petition Number E181 of 2023. I will leave it to the bench in this matter to decide if the matters raised in connection with the Finance Act 2023 and Appropriation Bill can still be considered in this Petition.
23. The upshot of the foregoing is that this Petition, in my humble view, satisfies the requirements of Article 165 (4) of the Constitution. I hereby certify that it raises a substantial question of law and refer it to the Chief Justice for the empanelment of a bench to hear and determine the matter.

DATED AND DELIVERED AT MILIMANI THIS 29TH DAY OF SEPTEMBER, 2023

L.N MUGAMBI

JUDGE

This Ruling shall also apply to the Application dated 13th June, 2023 in Petition No. E195 of 2023: Guyo Ali Guracha & 3 others vs. Abdi Guyo & 5 others & Jubilee Party & Another as Interested Parties.



DATED AND DELIVERED AT MILIMANI THIS 29TH DAY OF SEPTEMBER, 2023

L.N MUGAMBI

JUDGE

