



**REPUBLIC OF KENYA**

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

**COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. E004 OF 2022**

**IN THE MATTER OF THE DECISION BY THE RECEIVER MANAGER TO LEASE THE SUGAR PLANT AND RELATED ASSETS OF MUMIAS SUGAR COMPANY LIMITED TO SARRAI GROUP LIMITED**

LAMBERT LWANGA OCHOCHI ..... 1<sup>ST</sup> PLAINTIFF  
AUGUSTINO OCHACHA SABA .....2<sup>ND</sup> PLAINTIFF  
PRISCA OKWANKO OCHACHA .....3<sup>RD</sup> PLAINTIFF  
ROBERT MUDINYU MAGERO .....4<sup>TH</sup> PLAINTIFF  
WYCLIFFE BARASA NG'ONGA .....5<sup>TH</sup> PLAINTIFF  
WEST KENYA SUGAR CO. LTD..... 6<sup>TH</sup> PLAINTIFF  
MUMIAS OUTGROWERS  
COMPANY (1998) LIMITED.....7<sup>TH</sup> PLAINTIFF

**VERSUS**

PONANGIPALI VENKATA RAMANA RAO .....1<sup>ST</sup> DEFENDANT  
KCB BANK KENYA LIMITED.....2<sup>ND</sup> DEFENDANT  
HON. ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT  
CABINET SECRETARY, MINISTRY OF  
AGRICULTURE LIVESTOCK & FISHERIES .....4<sup>TH</sup> DEFENDANT  
COMPETITION AUTHORITY OF KENYA .....5<sup>TH</sup> DEFENDANT  
SARRAI GROUP LIMITED.....6<sup>TH</sup> DEFENDANT  
CHIEF LAND REGISTRAR .....7<sup>TH</sup> DEFENDANT  
COUNTY GOVERNMENT OF KAKAMEGA.....8<sup>TH</sup> DEFENDANT  
CAPITAL MARKETS AUTHORITY.....9<sup>TH</sup> DEFENDANT

**RULING**

1. **Article 165 of the Constitution of Kenya** establishes the High Court of Kenya. **Sub article (3)** thereof sets out the jurisdiction thereof to include: -

“(a) .....

(b) *jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.*

(c) ...

(d) *jurisdiction to hear any question respecting the interpretation of this constitution including the determination of –*

...”

2. **Sub article (4)** 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”.

3. In **Okiya Omtatah Okoiti & Anor vs. Anne Waiguru & 3 Others [2017] Eklr**, the Court of Appeal cited with approval the decision of Majanja J in **County Government of Meru vs. Ethics and Anti-Corruption Commission [2014] Eklr**, wherein he held: -

“The principles which govern the exercise of discretion in an application such as the one before the court can be distilled as follows: -

a) *The grant of a certificate under Article 165(4) of the Constitution is an exception rather than the rule.*

b) *The substantial question of law is a question to be determined in the circumstances of the case. Substantial issue of law is not necessarily a weight one or one that raises a novel issue of law or even that is complex. Many provisions of our Constitution are untested and bring forth novel issues yet it is not every day that we call upon the Chief Justice to empanel a bench of not less than three judges.*

c) *Public interest may be considered but is not necessarily a decisive factor. It is the nature of petitions filed to enforce, the provisions of the Constitution, to be matters of public interest generally.*

d) *The court ought to take into account other provisions of the Constitution, the need to dispense justice without delay having regard to the subject matter and the opportunity afforded parties to litigate the matter up to the Supreme Court.”*

4. In **Wycliffe Ambetsa Oparanya & 2 others v Director of Public Prosecutions & another [2016] eKLR**, it was stated 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. Despite appreciably great strides made in the expansion of the Judiciary in the recent past, there is definitely much more to be done with respect to achieving the spirit of Article 48 of the Constitution on access to justice. Accordingly, this Country still does not enjoy the luxury of granting such orders at the whims of the parties. Judicial resources in terms of judicial officers in this country are still very scarce and although the time taken for hearing a petition by a single judge may not be any different from that taken by a bench empaneled pursuant to Article 165(4) of the Constitution, it must be appreciated that the empaneling of such a bench invariably leads to delays in determining cases already in the queue hence worsening the backlog crisis in this country.”

5. In **Peter Nganga Muiruri vs. Credit Bank Limited & Another Civil Appeal No. 203 of 2006**, the Court of appeal held that any single Judge of the High Court in this country has the jurisdiction and power to handle a constitutional question. Therefore, the decision whether or not to certify a matter as raising a substantial question of law is an exercise of judicial discretion as opposed to a right. However, like all discretion, that power must be exercised judicially and judiciously and not on caprice, whim, likes or dislikes.

6. In **Chunilal vs. Mehta vs Century Spinning and Manufacturing Co. AIR 1962 SC 1314**, it was held that: -

“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 probably absurd, the question would not be substantial.”

7. Further, in **Santosh Hazari vs. Purushottam Tiwari (2001) 3 SCC 179** it was held that: -

“A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must

*have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it, are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."*

8. In view of the foregoing, the decision whether or not to certify a matter under **Article 165(4) of the Constitution** is in the discretion of the Court. That discretion is to be exercised judiciously. The Court has to be satisfied that there is a substantial question of law that require the use of the meagre judicial resources in this country to inquire and make a determination. The so called substantial question of law must be strictly under **sub-article 3(b) and (d) of Article 165**. Further, the said substantial question must either be specifically set out in the pleadings before court or should be a necessary implication from the pleadings filed.

9. Before Court is an application by the 7<sup>th</sup> plaintiff dated 14/2/2022. It is brought under **Article 165(4) and 159(2) of the Constitution of Kenya**. It seeks the certification that the matter before Court raises substantial questions of law and should be placed before the Honourable Chief Justice to empanel a bench of uneven number of judges being not less than three.

10. The grounds for the application are set on the face of the Motion and on the supporting affidavit of **Gamaliel Anamanjia sworn on 14/2/2022**. It is contended that this matter raises substantial questions of law and is of great public concern to warrant the empanelment of a bench of uneven number of judges.

11. That due to the scope and sensitivity of the matter and the manner in which the matter was transferred from **Okwany J** to this Court for further directions, there is need to shield the Court from undue pressure by having the matter heard by a bench of three judges.

12. It is also contended that there are several matters which have been filed in various courts on the subject matter and there is need to shield the court from having conflicting decisions over the same matter. That the 1<sup>st</sup> defendant has allegedly relied on the decision made by this Court on 19/11/2021 in **Insolvency Petition No. E004 of 2019** ("the Insolvency matter") to illegally lease and hand over possession of the assets of Mumias Sugar Co. Ltd ("Mumias") to the 6<sup>th</sup> defendant without the involvement of other creditors. That the said decision of this Court is one of the triable issues in this matter.

13. It is further contended that the lease the subject of these proceedings was entered into in an opaque manner and lacked public participation and accountability in violation of the Constitution. That the matter relates to the revival of Mumias which was an industrial gem of Western Kenya and any verdict over it affects over one million Kenyans hence the matter is of public importance.

14. The application is opposed by the majority of the parties who filed Grounds of Opposition and Replying affidavits. The 1<sup>st</sup> and 2<sup>nd</sup> defendant opposes the application vide the replying affidavit of the 1<sup>st</sup> defendant sworn on 14/2/2022. He avers that the 1<sup>st</sup>-5<sup>th</sup> plaintiffs' application challenges the lease of some of the assets of Mumias to the 6<sup>th</sup> defendant. That the accompanying plaint does not contain any allegations of violations or threat to rights or fundamental freedoms and that it does not raise any constitutional issue for determination or interpretation.

15. That the issues raised in the suit are commercial in nature and revolve around issues of insolvency, receivership, the powers of an administrator. That these are issues ordinarily dealt with by the High Court and the law is settled. That the 7<sup>th</sup> plaintiff has not filed any claim against the defendants and therefore has no basis for seeking the orders it seeks.

16. The 6<sup>th</sup> defendant opposes the application vide grounds of opposition dated 14/2/2022. These are *inter-alia*, that the 7<sup>th</sup> plaintiff does not have any claim against the defendants which raises any constitutional or substantial questions of law or public concern. That the application is an abuse of the court process as it is not anchored on any pleading.

17. The 10<sup>th</sup> defendant opposes the application vide the replying affidavit of **Elisha Onyango Huma** sworn on 14/2/2022. It is averred that the application is brought in bad faith and is an attempt to delay the hearing of the 1<sup>st</sup>-5<sup>th</sup> plaintiff's application dated 11/1/2022. That the issues raised in the application dated 11/1/2022 have no substantial issues of law so as to require a bench of three judges.

18. Learned Counsels submitted orally. **Ms.Odek**, Learned Counsel for the applicant cited the case of **Phillip K Tunoi and another v. Judicial Service Commission [2015] Eklr**, which cited with approval the Indian case of **Chunilal v. Mehta vs Century Spinning and Manufacturing** on what a substantial question of law is.

19. She submitted that the present case is of great public interest and importance. That the issues raised are; whether the 1st defendant observed the national values and principles of governance under **Article 10 of the Constitution** in the manner in which he leased out the subject assets; whether the 1st and 2nd defendant are bound by the principles of accountability that requires the securing of the best possible price for the assets and property of Mumias. Other questions were whether the lease was for a period of 20 years to only settle the debt of the 2<sup>nd</sup> defendant who is only owed Kshs.2.6 billion leaving the other creditors out.

20. She further submitted that the matter raises substantial questions which directly and substantially affect the rights of the parties as huge debts are owed to creditors, sugarcane farmers and the community in Kakamega. It was her submission that the decision of this Court in the Insolvency matter will be on trial in this matter thereby raising the question of subjectivity.

21. **Mr. Paul Muite SC**, Counsel for the 6<sup>th</sup> plaintiff submitted that the application vacated the urgency of the matter and should have been made at the earliest point in time. **Mr. Kiragu S.C** for the 1st and 2nd defendant submitted that judicial resources in this country are scarce and that the application did not meet the threshold under **Article 165(4) of the Constitution**.

22. On his part, **Mr. Orengo S.C** for the 8<sup>th</sup> defendant submitted that the applicant had not raised nor crystallized any substantial question of law in its application. That the applicant had curiously sought the recusal of this Court from this matter through the back door. **Mr. Gichaba** for the 6th defendant clarified that this matter had not been transferred to this Court. It had only been referred to this Court for further directions in view of the urgency.

23. **Mr. Kamau** for the 3rd, 4th and 7th defendant submitted that the Court should be guided by the principle of pleadings in determining the application. That the applicant having not filed any pleading, the application was hanging as there was no pleading to hinge on.

24. Concluding the opposition to the application was **Mr. Omari**. He submitted that the issue of the indebtedness of the 7<sup>th</sup> plaintiff is a matter fit for the Insolvency Court and not this Court.

25. I have carefully considered the parties' contestations and Learned Counsel's submissions. This is a certification application under **Article 165(4) of the Constitution**.

26. At the beginning of this ruling I set out the principles applicable. I have looked at the plaint dated 11/1/2022. The suit generally challenges the process by which the 1<sup>st</sup> defendant leased some assets of Mumias to the 6<sup>th</sup> defendant. It is purely a Commercial transaction in which the plaintiff accuses the 1<sup>st</sup> defendant of various infractions.

27. Pending the determination of the suit, an application for interlocutory injunction was lodged by the 1<sup>st</sup> to 5<sup>th</sup> plaintiff seeking prohibitory orders against several defendants. That is the main application that was coming up for hearing on 14/2/2022 and which the 7<sup>th</sup> plaintiff allege raises substantial questions of law.

28. Looking at that application it is all about infractions by the 1<sup>st</sup> defendant in undertaking the leasing process and consequent remedies of injunctive orders. I see nothing constitutional.

29. It was submitted that matters of national values and principles of governance pertaining to transparency and accountability would arise. With greatest respect, those constitutional issues were never pleaded nor are they implied from the pleadings before Court. In any event, it will not require 3 heads to discern and determine if they had been breached. My understanding of the authorities cited by all the parties is that, a matter that is to be certified under **section 165 (4) of the Constitution** is one which raises substantial question of law. I see nothing substantial in that issue.

30. The other issue is that; parties are bound by their pleadings. The 7<sup>th</sup> plaintiff has not filed any pleadings to crystalize its claim. Even if I was to consider the application by the 7<sup>th</sup> plaintiff as its pleading, nowhere in the Motion nor the affidavit have the "substantial questions of law" particularized. The "pleading" is as plain as it could be. All the matters that were eloquently submitted on by **Ms. Odek** were not in the supporting affidavit.

31. It was also submitted that the matter had attracted a lot of public interest. That may be so but that alone cannot justify the empaneling of a 3 Judge matter. There are many cases that attract public interest and yet they are determined by a single Judge.

32. It was suggested that this Court will be subjective in its determination of the matter. That the subjectivity arises from the fact that this Court is the one that appointed the 1<sup>st</sup> defendant as administrator in the Insolvency matter.

33. This court tends to agree with **Counsel Orengo SC**, that this was a veiled attack on the Court. In other words, the 7<sup>th</sup> plaintiff was seeking the recusal of this Court without necessarily saying so. I have re-looked at the ruling of 19/11/2022. I do not think that these proceedings are a review or appeal against the said ruling. If any party felt aggrieved by the said ruling, the best forum would have been to appeal to a higher Court and challenge the same. Not to come to a Court of same jurisdiction and seek to challenge the same. In any event, there is nothing on record to show that the said ruling is the one under attack.

34. The 7<sup>th</sup> plaintiff questioned the manner in which this matter landed before this Court. It is on record that the matter was certified urgent by **Okwany J** when it was filed. She was proceeding on leave until mid- March, 2022. She then thought it wise to refer the matter to this court to give directions on the disposal of the matter in view of the urgency involved. This Court gave appropriate directions considering that: -

*a) The 1<sup>st</sup> and 6<sup>th</sup> defendant allege that the assets lying at the factory may be wasting;*

*b) The plaintiffs on the other hand, having set aside huge funds to undertake the running of Mumias, would like the impugned process undertaken by the 1<sup>st</sup> defendant set aside at the earliest so that they can put their funds to good use. Any further tampering with Mumias by the 6<sup>th</sup> defendant would be extremely injurious to the plaintiffs.*

35. It is for the foregoing reasons that this Court sustained the original urgency with a view to concluding the matter at the earliest. Can the Court then be blamed for being proactive and effecting the Constitutional tenets of **Article 159 (2) (b) of the Constitution**? I do not think so.

36. In my view, I have not seen any substantial question of law in this matter that concerns the interpretation of the Constitution to warrant the empaneling of a 3 judge bench. This is simple Commercial dispute where the Court appointed administrator is accused of infractions. It will not require 3 heads to see or discern infractions if proved. Empaneling a 3 judge bench for such a simple matter will be but a sheer waste of judicial resources. Judges in this country are a meagre resource which should be equitably utilized.

37. In this regard, I find the application to be without merit and dismiss the same with costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF FEBRUARY, 2022.**

**A. MABEYA, FCI Arb**

**JUDGE**