



REPUBLIC OF KENYA



KENYA LAW

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**Njiru & 11 others v United Democratic Alliance Kenya & 23 others; Okioti
& 9 others (Interested Parties) (Constitutional Petition E395 of 2022)
[2022] KEHC 13714 (KLR) (Civ) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13714 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CONSTITUTIONAL PETITION E395 OF 2022

M THANDE, J

SEPTEMBER 30, 2022

BETWEEN

KENNETH NJAGI NJIRU 1ST PETITIONER
MESHACK CHURCHILL SUBA 2ND PETITIONER
JACKSON MWALULU 3RD PETITIONER
BEATRICE KAMAU 4TH PETITIONER
AMOS WAFULA 5TH PETITIONER
SOPHIE DOLA 6TH PETITIONER
JULIA WANJIKU CHEGE 7TH PETITIONER
JAMES MAINA MURIMI 8TH PETITIONER
SIMON LOKOMA 9TH PETITIONER
CAOLINE AYITSO NYARUNDA 10TH PETITIONER
JOHNSON MWAKABA 11TH PETITIONER
ANNE WANJIKU GATHUMBI 12TH PETITIONER

AND

UNITED DEMOCRATIC ALLIANCE KENYA 1ST RESPONDENT
RIGATHI GACHAGUA 2ND RESPONDENT
JOHNSON SAKAJA 3RD RESPONDENT
JOHN WALUKHE 4TH RESPONDENT



SAMUEL ARAMA	5 TH RESPONDENT
MOHAMUD ALI MOHAMED	6 TH RESPONDENT
ONESMUS MUTHOMI NJUKI	7 TH RESPONDENT
KIDERO EVANS ODHIAMBO	8 TH RESPONDENT
ALI BUNOW KORANE	9 TH RESPONDENT
GODHANA DHADHO GEDDHE	10 TH RESPONDENT
ANNE MUMBI	11 TH RESPONDENT
AISHA JUMWA KARISA KATHINA	12 TH RESPONDENT
OSCAR KIPCHUMBA SUDI	13 TH RESPONDENT
JONAH MBURU MWANGI	14 TH RESPONDENT
OBADO ZACHARIA OKOTH	15 TH RESPONDENT
INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION	16 TH RESPONDENT
WAFULA CHEBUKATI	17 TH RESPONDENT
REGISTRAR OF POLITICAL PARTIES	18 TH RESPONDENT
ATTORNEY GENERAL	19 TH RESPONDENT
CABINET SECRETARY, MINISTRY OF INTERIOR & NATIONAL CO-ORDINATION	20 TH RESPONDENT
ETHICS AND ANTI-CORRUPTION COMMISSION	21 ST RESPONDENT
COMMISSION FOR UNIVERSITY EDUCATION	22 ND RESPONDENT
INSPECTOR GENERAL OF POLICE	23 RD RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS	24 TH RESPONDENT

AND

OKIYA OMTATAH OKOITI	INTERESTED PARTY
AZIMIO LA UMOJA ONE-KENYA COALITION	INTERESTED PARTY
AGANO PARTY	INTERESTED PARTY
ROOTS PARTY OF KENYA	INTERESTED PARTY
KENYA HUMAN RIGHTS COMMISSION	INTERESTED PARTY
INTERNATIONAL COMMISSION OF JURISTS	INTERESTED PARTY
TRANSPARENCY KENYA INTERNATIONAL	INTERESTED PARTY
KATIBA INSTITUTE	INTERESTED PARTY
KENYA NATIONAL COMMISSION ON HUMAN RIGHTS	INTERESTED PARTY
AFRICAN CENTRE FOR OPEN GOVERNANCE	INTERESTED PARTY



RULING

1. Before me for determination is an application dated August 1, 2022 in which the petitioners seek the following orders:
 1. Spent.
 2. Spent.
 3. That the honourable court be pleased to certify that pursuant to article 165(4) of the Constitution, this petition raises substantial questions of law under clause 3(b) and (d) and should therefore be heard by a bench of five judges to be assigned by the Honourable Chief Justice.
 4. That the Judges assigned to hear and determined this petition should exclude Honourable Justices A Mrima, D S Majanja, E C Mwita, M Thande and Eunice Ngetich.
 5. That upon appointment of a bench to hear and determined this petition the honourable court be pleased to issue the following orders:
 - a. That a mandatory injunction be issued to compel the 16th respondent - the Independent Electoral & Boundaries Commission – and the 21st respondent - the Ethics and Anti-Corruption Commission to inquire into and determine whether the 2nd respondent – Hon Rigathi Gachagua – meets the moral, ethical, leadership and integrity provisions envisaged under article 99(2)(b) and chapter 6 of the Constitution to be registered and/or gazette as candidate for the position of the Deputy President of the Republic of Kenya.
 - b. That the 16th and 21st respondents should file their report on findings/determinations to this honourable court by Thursday August 4, 2022 or such other date as the court may determine.
 - c. That the petition be heard and determined by Monday August 8, 2022.
 6. That the costs of this application be in the cause.
2. The grounds as set out in the application are that the petition invites the court to revisit the jurisprudence established by the court in its judgment in the case of International Centre for Policy and Conflict & 5 others v Attorney General & 5 others [2013] eKLR (the 2013 judgment). The petitioners therein challenged, on the basis of chapter six of the Constitution of Kenya, 2010 (chapter six), the eligibility of Hon Uhuru Kenyatta and Hon William Ruto, to contest the presidency of the Republic of Kenya. It is the petitioners' case that since the 2013 judgment, courts have repeatedly but erroneously interpreted articles 75, 99 and 193 of the Constitution with the result that chapter six, is on the verge of becoming a false prospectus full of hollow platitudes. The petitioners further stated that they seek to have the named judges excluded from hearing this matter on the basis that they have already dealt with various aspects of chapter six and have evaded or glossed over the fundamental issue of enforcement, interpretation, application and implementation of chapter six.
3. Additionally, the petitioners claim that this petition raises weighty questions of law concerning the chapter six including the rights of citizens to challenge the qualification and eligibility of candidates for elections to state positions; the conflict between the protection of offending candidates under articles



75(3), 99(3) and 193 vis-à-vis the need to have a democratic state founded on values set out in article 10 and chapter six; the nature and extent of the jurisdiction of the High Court between the conclusion of dispute resolution by IEBC under article 88 and election day; whether the High Court is satisfied that various institutions have discharged their constitutional and statutory mandates to enforce chapter six to prevent an aristocracy of rogues, suspected, indicted and convicted criminals and other networks of free felons from seizing political power, by seeking elective positions in the general elections of August 9, 2022; whether the 1st respondent has complied with article 75(3), 99 and 193 and chapter six in nominating candidates for elective posts; whether IEBC has discharged its obligations under article 88(4)(e) in resolving pre-election and nomination disputes; whether illegalities such as uttering of fake degree certificates should pass unpunished; whether against the backdrop of the jurisprudence in the 2013 judgment, the High Court can do anything to ensure chapter six and other integrity and values provisions of the *Constitution* are enforced; whether a higher leadership and integrity threshold should be applied in vetting of presidential candidates and their running mates; whether in the wake of the judgment in *Asset Recovery Agency v Rigathi Gachagua & Another* in ACA No E020 of 2020, the 2nd respondent can be considered as fit to hold any public office given that he was vetted by IEBC and EACC as to his suitability; whether the High Court accepts its fundamental responsibility to prevent the establishment of a government that is non-compliant with the principles, values and procedures of the *Constitution*.

4. The subject of this ruling is prayer 3 of the application in which the petitioners seek certification under article 165(4) that the petition raises substantial questions of law under clause 3(b) and (d) and should therefore be heard by a bench of five judges to be assigned by the Honourable Chief Justice.
5. The application is strenuously opposed. There is on record grounds of opposition by the 3rd respondent dated August 5, 2022. It was contended inter alia that the suit is *res judicata* and a disguised invitation to this court to sit in appeal on the 2013 judgment.
6. The petitioners asserted that that this is a deserving case for certification and constitution of a bench of 5 judges. They contended that at the heart of their petition is the unsatisfactory application and enforcement of chapter six particularly in electoral matters. Their argument is that it is highly likely in this year's general election that up to 10 governors and the deputy president might be persons who were not eligible had IEBC demonstrated greater fidelity to the *Constitution* with regard to integrity. It was further submitted that if the application and enforcement of chapter six is left to the IEBC, then the same should be thrown into the dustbin of history as a false prospectus. The petitioners further submitted that they seek to prevent the establishment of a government contrary to the provisions of the *constitution*. They contended that the 2nd respondent is unfit and unsuitable to be a candidate for Deputy President of the Republic of Kenya on account of the judgment in *Asset Recovery Agency v Rigathi Gachagua & Another* in ACA No E020 of 2020 where Kshs 202 million was forfeited to the state having been found to be proceeds of crime. In light of the foregoing, the petitioners seek empanelment of a bench to determine whether a person more likely to be jailed for money laundering than completing a 5 year term as deputy president should be a candidate at all. They urged the court to grant prayer 3 in the application.
7. In his submissions, the 2nd respondent contended that no basis in law or the facts has been laid for the grant of the orders sought for empanelment of a bench under article 165(4). The 2nd respondent argued that the petitioners have admitted that the matters raised herein have been exhaustively dealt with previously by this and other superior courts. The petitioners now invite this court to revisit the jurisprudence already settled by law, on the issues raised. The 2nd respondent asserted that every judge of the High Court has jurisdiction under 165(3) to determine matters relating to the application and



interpretation of the Constitution and that it has not been demonstrated that the matter in issue raises substantial issues of law to warrant empanelment of a bench under article 165(4).

8. The 2nd respondent further submitted that the issue of whether a case raises a weighty or substantial issue of law as to warrant empanelment of a bench under article 165(4) is a discretion exercisable within the parameters set out in the provision. The mere fact that an issue is novel or unique or hotly contested, does not of itself constitute a substantial question of law.
9. The jurisdiction of the High Court is set out in article 165(3) as follows:
 - (3) Subject to clause (5), the High Court shall have—
 - (a) unlimited original jurisdiction in criminal and civil matters;
 - (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) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under article 144;
 - (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;
 - (ii) the question 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 the levels of government; and
 - (iv) a question relating to conflict of laws under article 191;
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.
10. The jurisdiction of this court to certify that a matter raises a substantial question of law requiring empanelment of a bench of uneven number of judges to hear it, is contained in article 165(4) which 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.
11. It is readily discernible from article 165(3) that every judge of the High Court sitting alone, has jurisdiction to hear any of the matters referred to in that article. This was the holding in Peter Nganga Muiruri v Credit Bank Limited & 2 others [2008] eKLR where the Court of Appeal stated:

Any single judge of the High Court in this country has the jurisdiction and power to handle a constitutional question. The fact that a Constitutional Division was established did not by such establishment create a court superior to a single judge of the High Court sitting alone. It would be a usurpation of power to push forward such an approach and whatever



decision which emanates from a court regarding itself as a Constitutional Court with powers of review over decisions of judges of concurrent or superior jurisdiction such decision is at best a nullity.

12. It is common ground that the term “substantial question of law” referred to in article 165(4) is not defined in the Constitution. In the case of National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission [2017] eKLR, Mativo, J (as he then was) while addressing this issue, stated:

Though the expression “substantial question of law” has not been defined in the constitution, the true meaning and connotation of this expression is now well settled by various judicial pronouncements among them the earlier cited decisions. There is a difference between question of law and substantial question of law. It is not a mere question of law but a substantial question of law that is required. A question of law will be a substantial point of law if it directly and substantially affects the rights of the parties. In order to be “substantial” it must be such that there may be some doubt or difference of opinion or there is room for difference of opinion. If the law is well-settled by the Supreme Court, the mere application of it to particular facts would not constitute a substantial question of law. This position was well stated by the Supreme Court of India which authoritatively held that once the Supreme Court has settled a question of principle, its application to the facts of a case is not a substantial question of law.

13. The learned judge opined that there must be some doubt or difference of opinion or room for difference of opinion.
14. To certify a matter or not, under article 165(4) as sought by the petitioners herein, is a matter of judicial discretion. This discretion must be exercised judiciously. What this court must ask itself is whether the petitioners have demonstrated to the satisfaction of the court good grounds to warrant certification of this matter, as raising a substantial question of law necessitating empanelment by the Hon Chief Justice, of a bench of an uneven number of judges to hear and determine this matter.
15. In the case of Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR, the Court of Appeal considered an appeal against an order declining to certify the matter in the superior court, under article 165(4), as raising a substantial question of law requiring empanelment of a bench of an uneven number of judges to hear the same. The court stated:

42. There are, in our view, parallels to be drawn between certification for purposes 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”[2]. 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 Giovanni 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;
- (vi) 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.”

43. It is our judgment therefore, that whether a matter raises a substantial point of law for purposes of article 165(4) of the Constitution is a matter for determination on a case-by-case basis. The categories of factors that should be taken into account in arriving at that decision cannot be closed.
44. Applying those principles to the present case, we think this is a proper case for the constitution of a three-judge bench. It might, on the face of it, appear as though the appellants are seeking to enforce or advance perceived contractual employment rights on behalf of the affected employees. But we consider that there is a fundamental constitutional interpretation question regarding the constitutionality or otherwise of the proposed policy that transcends the circumstances of this particular case and which could affect the workings of public service.
16. It must be noted that the petition giving rise to the 2013 judgment was heard by a 5 judge bench. The petitioners’ case is that there is need for empanelment of yet another 5 judge bench for the purpose of revisiting the jurisprudence established by the court in the 2013 judgment. According to the petitioners, the courts have since the 2013 judgment repeatedly but erroneously interpreted articles 75, 99 and 193 of the Constitution with the result that chapter six, is on the verge of becoming a false prospectus full of hollow platitudes.
17. Applying the principles set out in the Hermanus Phillipus Steyn v Giovanni Gnechi- Ruscone [2013] eKLR, I am of the view that the issue raised by the petitioners 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. The issue also falls within the terms of article 165 (3)(b) or (d). Additionally, the petitioners have clearly identified and concisely set out the specific substantial question of law in respect of which certification is sought. However, in spite of the foregoing, the issue raised by the petitioners has already been canvassed before a 5 judge bench and determined. Further I do not find that there is any certainty in the law relating to chapter six.
18. In Peter Solomon Gichira v Attorney General & another [2015] eKLR, Odunga, J (as he then was) considered an application for empanelment and brought the angle of judicial resources and specifically the scarcity of judicial officers. The learned judge stated:

In my view the decision whether or nor 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. This country, despite great strides made in the enlargement of the bench in the recent past 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 empanelled pursuant to article 165(4) of the Constitution, it must be appreciated that the empanelling such a bench



invariably leads to delays in determining cases already in the queue hence worsening the problem of backlog crisis in this country.

19. I fully concur with the learned judge. The number of judges has continued to decrease due to natural attrition and elevation to the Court of Appeal. Indeed, there are some High Court stations that today do not have judges and some divisions of the court are critically short of numbers. To certify this matter for empanelment by the Chief Justice of a bench of 5 judges will result in delay not only of this matter because the already stretched diaries of 5 judges must be synchronized but also other matters being handled by the judges in the bench. This would not be prudent of judicial resources.

20. The interpretation of chapter six in relation to suitability and eligibility of candidates for the general election is in my view, a matter that can be competently handled by a single judge. Indeed, the decision of a single judge exercising jurisdiction conferred by the Constitution has equal force to that of a bench of not less than 3 judges assigned by the Chief Justice. In this regard I concur with Majanja, J who in the case of J Harrison Kinyanjui v Attorney General & another [2012] eKLR, stated:

Therefore, giving meaning to “substantial question” must take into account the provisions of the Constitution as a whole and need to dispense justice without delay particularly given a specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under article 165 of the Constitution, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges.

21. It is clear from the petition and the choice of words used therein that the petitioners strongly disagree with the decision of the 2013 bench. It is trite law that a party aggrieved by the decision of a court does not seek an order from the same court though differently constituted, to relook at the jurisprudence established by that decision. The law requires that such party moves up the court hierarchy seeking to upset such decision.

22. As indicated herein, the issue of the application and the interpretation of chapter six especially with regard with the eligibility of a candidate to vie for an electoral position has been the subject of judicial consideration. In the National Super Alliance (NASA) Kenya case (supra), Mativo, J, (as he then was) stated that once the law is well-settled by the Supreme Court, the mere application of it to particular facts would not constitute a substantial question of law requiring certification for empanelment.

23. The Supreme Court considered the application and the interpretation of chapter six in the case of Sonko v Clerk, County Assembly of Nairobi City & 11 others (Petition 11 (E008) of 2022) [2022] KESC 26 (KLR) (July 15, 2022) (Judgment), the Supreme Court stated:

It bears mentioning in conclusion that chapter six of the Constitution was not enacted in vain or for cosmetic reasons. The authority assigned to a state officer is a public trust to be exercised in a manner that demonstrates respect for the people; brings honour to the nation and dignity to the office; and promotes public confidence in the integrity of the office. It vests in the state officer the responsibility to serve the people, rather than the power to rule them.

24. The Supreme Court did consider and settle the import of chapter six with regard to the holding of a public or state office.



25. In the end and in view of the foregoing, I find that the petitioners have not satisfied the threshold laid down by the Constitution and decided cases for certification for empanelment. Accordingly, I find no justification for certification under article 165 (4) of the Constitution for the Hon Chief Justice to empanel a bench of uneven number of judges to hear and determine this petition herein. In the premises, I dismiss the prayer 3 of the application dated August 1, 2022.

26. Costs in the cause.

DATED AND DELIVERED IN NAIROBI THIS 30TH DAY OF SEPTEMBER 2022

M. THANDE

JUDGE

In the presence of: -

..... **for the Petitioner**

..... **for the Respondents**

..... **Court Assistant**

