Lemeiguran & 11 others v Attorney General & 4 others (Petition E064 of 2021)
[2022] KEHC 15475 (KLR) (Constitutional and Human Rights) (18 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15475 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E064 OF 2021

HI ONG'UDI, J

NOVEMBER 18, 2022

BETWEEN

KANYAMAN LEMEIGURAN ..... 1ST PETITIONER

ROSIAN JOHN LESANINGO ..... 2ND PETITIONER

LOITAMEDO MPAINE ..... 3RD PETITIONER

PHILIP LEDIDA ..... 4TH PETITIONER

PAUL KEBEN ..... 5TH PETITIONER

RANGAL NGAMIA LEMEIGURAN ..... 6TH PETITIONER

JONES KACHATA LEKIRATI ..... 7TH PETITIONER

LEWUATAN CHELALEM LEKICHEP ..... 8TH PETITIONER

REUBEN MUNYANA LESANINGO ..... 9TH PETITIONER

SAMWEL POSES SEKEU ..... 10TH PETITIONER

EDWARD KATEIYA OLE KAICHU ..... 11TH PETITIONER

HASSAN WILLY LESUPEN ..... 12TH PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 2ND RESPONDENT

THE CABINET SECRETARY-MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT ..... 3RD RESPONDENT

THE CABINET SECRETARY MINISTRY OF LAND AND PHYSICAL PLANNING ..... 4TH RESPONDENT

THE COUNTY GOVERNMENT OF BARINGO ..... 5TH RESPONDENT

RULING

1. The petitioners vide a petition dated February 23, 2021 have raised several issues based on alleged violations of fundamental rights and freedoms, discrimination of minority groups (Iichamus) women, delimitation of Constituencies, Insecurity caused by cattle rustling, unlawful evictions among others.

2. By way of a Notice of Motion dated March 7, 2022 filed pursuant to Article 165(4) of the *Constitution*, Rule 3(1) and (2) of the High Court Practice and Procedure Rules; Rule 3(4) and 21 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules of 2013* and all other enabling provisions of law, the petitioners seek the following orders:

    i. This Honourable Court be pleased to certify that the petition herein raises substantial questions of law and forthwith refer the case 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*.

    ii. That the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders if granted.

    iii. That cost of the application be in the cause.

The petitioners case

3. The application was sustained by the 1st petitioner's supporting affidavit of even date and grounds on the face of the application.

4. He deposed that the instant petition is founded on the current and historical injustices meted out on the Ilchamus community requiring this Court to determine the following key substantive issues, arising therein:

    a) Whether the 2nd respondent has violated the political rights of the Ilchamus Community under Article 38 of the *Constitution* by refusing to depart from the population principle in the review and delimitation of constituencies and wards contrary to article 89(6) of the *Constitution*;

    b) Whether the methodology that was used by the 2nd respondent in delimiting constituency and ward electoral boundaries in 2012 is not the sole criterion for delimitation of constituency and ward boundaries but should be supplemented by other criteria guided by the philosophies, principles and values entrenched in the *Constitution*.

    c) Whether the failure on the part of the 2nd respondent to create a constituency comprising of Endao, Yator, Eldume, Kailer, Ilng'ama, Longewan, Ng'ambo, Salabani, Meisori, Logumgum, Arabal, Kiserian, Ngelecha, Rugus and Mukutani sub-locations (called Ilchamus Constituency) and or to delimit the electoral boundaries of Ilchamus, Mukutani and Marigat Wards in ways that

give members of Pokot, Tugen and Ilchamus equal chances of being elected as members of Baringo County Assembly, is a violation of the political rights of the petitioners and other members of the Ilchamus Community under Article 38 of the *Constitution*.

d) Whether the failure on the part of the 2nd respondent to delimit the boundaries of the Ilchamus, Mukutani and Marigat wards in ways that give the Tugen, Pokot and Ilchamus Communities equal chance of being elected as members of Baringo County Assembly constitute a violation of the rights of the petitioners and members of the Ilchamus community to govern and/or manage the affairs of Baringo County Government and to further, or promote their own social, cultural and economic development in accordance with the provisions of Article 174 of the *Constitution*.

e) Whether the 2nd respondent should, at its next boundary review, take into adequate consideration the requirements set out in Article 89(6) of the *Constitution*, particularly the geographical features, community interest, historical, economic and cultural ties and means of communication to prevent electoral marginalization of the Ilchamus community.

f) Whether the Independent Electoral and Boundaries Commission has violated its supervisory mandate under Article 90 of the *Constitution* by failing to ensure that the Ilchamus which is a minority and marginalized group is adequately and effectively represented through direct nominations to National and County government as a special interest group under Article 90(1) 97(1) (c) and 177 (1) (c) of the *Constitution*.

g) Whether the constitutional machinery for representation and protection of minorities including the Ilchamus Community, to wit, the provisions of Article 56 of the *Constitution* as read together with Article 90, 97 and 177 (1) (c) of the *Constitution*, has not been implemented as required under the *Constitution*.

h) Whether the Ilchamus Community should be declared a special interest group in the manner contemplated under Article 90, 97 and 177 (1) (c) of the *Constitution*;.

i) Whether the refusal and/or failure on the part of the 3rd respondent to define with precision the administrative boundaries between the areas inhabited by the Ilchamus community, Pokot Community and Tugen Community and the consequent conflicts between the said communities over land, pasture, water and other resources is a violation of the rights of the petitioner's and other members of the Ilchamus community to human dignity, equity, social justice, equality, huinan rights, nondiscrimination and protection of the marginalized which are all entrenched in Article 10 of the *Constitution*.

j) Whether the 2nd and 3rd respondents should be compelled to deregister all overlapping administrative units, and to align or harmonize the said administrative units with the electoral maps for Baringo South Constituency and Baringo North Constituency; whether the 3rd respondent should be

prohibited from imposing local administrators from neighboring pokot and tugen communities on the Ilchamus Community.

k) Whether the 4th and 5th respondents have violated Article 63 of the *Constitution* as read together with Section 7 and 8 of the *Community Land Act* by failing, refusing and or neglecting to recognize and register the rights and interests of the Ilchamus Community over their unregistered community land.

l) Whether the 4th and 5th respondents have violated Article 47 and Article 10 of the *Constitution* by delineating unregistered community land and allocating the same to other communities, to the total exclusion of the Ilchamus Community without granting them audience or conducting public participation.

m) Whether the refusal and or failure on the part of the 4th and 5th respondents to demarcate the boundaries of the community land belonging to the members of the Ilchamus Community, and to register the same as a Community Land pursuant to the provisions of *Community Land Act* and the consequent forceful expropriation of portions thereof by third parties is a violation of the proprietary rights of the members of the Ilchamus Community which is entrenched in Articles 40 and 63 of the *Constitution*.

n) Whether all land curved out of the Ilchamus community land and in respect of which private titles were issued to the Tugen and Pokot Communities, were illegally allocated, and consequently such private titles ought to be included within the Ilchamus Community Land.

o) Whether the refusal by the 1st and 2nd respondents to implement the Protocol on the Prevention Combating and Eradicating of Cattle Rustling (Hereinafter called the Protocol on Cattle Rustling) and /or the Protocol on Prevention Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa and/or to deploy adequate infrastructural and other law enforcement resources in Baringo County as can effectively prevent and/or combat cattle rustling is a violation of the petitioners right to be protected against internal and external threats to their rights, freedoms, property, peace, stability and prosperity which is entrenched in Article 29 and 138 of the *Constitution*.

p) Whether the refusal and/or failure by the 1st, 3rd and 5th respondent to deploy adequate law enforcement resources in the regions inhabited by the petitioners and the consequent upsurge in cattle rustling and the accompanying cases of murder, destruction of property, robberies, maiming, rapes, burning of houses and granaries, displacement of people and forceful seizure of community land is a violation of the Petitioners right under Articles 26, 27, 28, 29, 40, 42, 43 and 53 of the *Constitution*.

q) Whether the 1st and 3rd respondents acts of remaining indifferent and failure to take remedial measures of bringing perpetrators of the constant raids to justice amounts to aiding and abetting criminal conduct contrary to Article 10 and 21 of the *Constitution*.

r) Whether the 1st to 5th respondents have violated the provisions of the United Nations Declaration on the rights of the Indigenous People which include the right to life, physical and mental integrity, liberty, security of person, right to live in freedom, peace and security without subjection to genocide or acts of violence, right to be protected by law and not to be depraved of life arbitrarily, right to equal protection and equality before the law and right to remain in their land and territories.

s) Whether the Baringo County Assembly and County Government is not properly constituted given the population of the members of the Ilchamus Community as per the 2019 Kenya Population and Housing Census vis a vis the population of the Tugen and Pokot Communities who also inhabit Baringo County, Baringo County Government for want of compliance with the principle of regional and ethnic balance.

5. He deposed that in view of this, the matters raised herein present complex, weighty and substantial questions of law that justify and require determination by an uneven bench of judges.

The 1st 2nd 3rdand 4threspondents' case

6. These respondents indicated to the Court on September 20, 2022 that they were not opposed to the petitioners' application and so did not file any response.

The 5threspondent's case

7. The 5th respondent did not file any response to the application.

The Petitioners' submissions

8. The petitioners through the firm of Gichamba & Company Advocates filed written submissions dated June 7, 2022 where Counsel identified the only issue for determination to be.

> "Whether the petition discloses a substantial question of law to merit a certification to the effect that the same qualifies to be heard by an uneven number of judges as may be determined by the Honourable the Chief Justice."

9. To begin with Counsel submitted that the *Constitution* does not define the term substantial question of law. It was however noted that various authorities served as a guide on the topic. Relying on the Supreme Court of India case of *Sir Chunilal Mehta & Sons Ltd v Century Spinning and Manufacturing Co Ltd 1962 SC 1314* Counsel noted that the Court observed 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 or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. Similar reliance was placed on the case of *Harrison Kinyanjui v Attorney General & another (2012) eKLR*.

10. On whether a matter raises a substantial question of law, counsel relied on the case *National Gender and Equality Commission v Cabinet Secretary Ministry of Interior and Co-ordination of National Government and 2 others [2016] eKLR* where the court stated that the factors to be considered are whether it directly or indirectly affects substantial rights of the parties, whether the question is of general public importance, whether it is an open question, in that, the issue has not finally been settled

by the Court, that the issue is not free from difficulty and whether the matter calls for discussion for an alternative view. Additional reliance was placed on the case of *Kibunja v Attorney General & 12 others (No 2) [2002] 2 KLR 6*.

11. In view of this counsel submitted that the instant petition revolves around the threatened rights of the Ilchamus community under Articles 26(1), 27, 29, 38, 39, 40, 42 and 44 of the *Constitution*. It was stressed that the matters herein are of general public importance warranting determination by a three judge bench. In support reliance was placed on the case of *Del Monte Kenya Limited v County Government of Muranga & 2 others [2016] eKLR* where it was held that where a petition raises or deals with an issue of public importance then the balance tilts in favour of empanelment. Similar reliance was placed on the case *Luo Council of Elders & 7 others v Cabinet Secretary Water & Irrigation & 13 others [2017] eKLR* and *Kalpana H Rawal v Judicial Service Commission & 3 others [2015] eKLR*.

Analysis and Determination

12. Having considered the petitioners' application and submissions I find the key issue for determination to be:

> Whether the petition raises substantial questions of law warranting certification before the Chief Justice for the empanelment of a bench.

13. The fact that the respondents did not oppose the application does not mean the same will be automatically allowed. The court will have to examine the pleadings, submissions, case law and the law before arriving at a determination.

14. The *Constitution* under Article 165(4) provides that:

> 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. As rightly submitted by the petitioner the term 'a substantial question of law' is not defined in the *Constitution*. The Courts have in various authorities attempted to define this term. In the case of Chunilal v Mehta (*supra*) it was defined as follows:

> " 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."

16. In the same way, the Court in the case of Harrison Kinyanjui (*supra*) held that:

> " 8. 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."

17. The Court went on to note that:

> " 10. A matter may raise complex issues of fact and law but this does not necessarily imply that the matter is one that raises substantial issues of law. Judges are from time to time required to determine complex issues yet one cannot argue that it means that every issue is one that raises substantial questions of law. Thus, there must be something more to the "substantial question" than merely novelty or complexity of the issue before the court. It may present unique facts not plainly covered by the controlling precedents. It may also involve important questions concerning the scope and meaning of decisions of the higher courts or the application of well-settled principles to the facts of a case."

18. Likewise the Court in the case of *Philomena Mbete Mwilu v Director of Public Prosecution & 4 others [2018] eKLR* defined this term as follows:

> " 24. .....a question of law would be a substantial question of law if it directly or indirectly affects the rights of parties; there is some doubt or difference of opinion on the issues raised and that the issue is capable of generating different interpretations. If however the question has been well settled by the highest court or the general principles to be applied in determining the question before court have been well-settled, the mere application of those principles to a new set of facts presented in a case before the court would not on their own constitute a substantial question of law. There must be the possibility of the matter attracting different interpretations or opinion in its interpretation or application of the principles espoused in the matter to make it a substantial question of law. All this notwithstanding, it is up to the individual judge to decide whether the matter raises a substantial question of law for purposes of reference."

19. It is appreciated from the cited authorities that the mere fact that a party supposes a matter falls under Article 165(4) of the *Constitution* does not necessarily imply that the Court ought to allow such an application. Evidently grant of such a prayer is not automatic since it is based on a Court's examination of the matter before it can ascertain that there exists 'a substantial question'.

20. What stands out in the plethora of cases on this topic and as cited above is that the complexity or novel nature of an issue does not suffice in and of itself to deem a matter as raising a substantial question. The issue must be of such nature that causes some doubt or difference of opinion on the issues raised and further capable of generating different interpretations.

21. From the foregoing, I am in agreement with the Court in the case of *Reginlad Njagi Nyaga v French Embassy Nairobi & another; Transparency International (Interested Party) [2019] eKLR* which noted that:

> "if the question has been well settled by the highest Court or the general principles to be applied in determining the question before court have been well-settled, the mere

application of those principles to a new set of facts presented in a case before the court would not on their own constitute a substantial question of law."

22. That said, the Court of Appeal in the case of *Okiya Omtatah Okoiti & another v Anne Waiguru – Cabinet Secretary, Devolution and Planning and 3 others [2017] eKLR* set out the principles to be applied when considering such an application. The Court opined as follows:

> " 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."

23. At this juncture I will proceed to apply the principles adopted in the cited authorities in the instant petition. I note that the premise of 'a substantial question' in this matter is predicated on the following factors:

i. The alleged violation of the petitioners' constitutional and international rights as members of the Ilchamus community.

ii. The adequacy of the Independent Electoral and Boundaries Commission (IEBC)'s methodology for delimitation of the constituency and ward electoral

boundaries and further the legitimacy of the land titles issued to the IIchamus community.

iii. Whether the machinery for representation and protection of minorities such as the IIchamus community under Article 56 of the *Constitution* have been implemented.

iv. Whether the IIchamus community should be declared as a special interest group as contemplated in the *Constitution*.

v. Whether the Baringo County Assembly and Government is improperly constituted in view of the principle of regional and ethnic balance with relation to the IIchamus community.

24. It is my considered view that the issues raised by the petitioners require the interpretation and application of constitutional and legal principles on the issues. Despite the fact that the petition addresses complex issues, Courts have opined severally that complex issues do not by themselves constitute sufficient reason to certify a matter for empanelment of a bench. Moreover the constitutional issues that form the basis of the petition with reference to the IIchamus Community are not new. I say so because the Courts have in the past addressed and adjudicated constitutional issues and injustices faced by various communities in Kenya which are deemed as minorities.

25. Taking this into consideration I find that the issues as framed by the petitioners revolve around established constitutional principles which can adequately be addressed by this Court without the need of empanelment of a bench. The questions raised in my view would not invoke a difference of opinion among Judges as to the application of the constitutional principles to the issues to make it a unique scenario. Moreover the petitioners have not demonstrated that there is a state of uncertainty in the law with regards to the issues raised.

26. At this juncture I find myself in agreement with the decision in the case of *Wycliffe Ambetsa Oparanya & 2 others v Director of Public Prosecutions & another [2016] eKLR* where it was observed as follows:

> " 22. In my view, the Court must adopt a holistic approach to the matter at hand. In other words, the mere fact that one factor is found to exist does not automatically qualify the matter for certification under Article 165(4) of the *Constitution*...Novelty alone with due respect does not qualify the matter as raising a substantial question of law though it is one of the many factors to be considered. In my view the issue is not merely to do with complexity or difficulty of the case in the views of the applicant but ought to be one that turns on cardinal issues of law or of jurisprudential moment. In my view the mere fact that a matter is novel or jurisprudentially challenging does not ipso facto elevate it to a substantial question of law for the purposes of Article 165(4) of the *Constitution*. With due respect any judge worth his or her salt must be prepared to deal with and determine novel questions whether complex or otherwise since the Court cannot abdicate its duty of determining disputes to another organ. In my view the question herein calls for the interpretation of the roles of the Senate vis-à-vis the County Assembly and it is now clear that the Courts of this Country have made great strides is setting down principles that demarcate the roles of the two organs. Whereas the issues may not exactly be same, one cannot say that there is complete dearth of jurisprudence in that area. To me it is a matter of the application of such principles to the matter at

hand. Such application, in my view does not constitute a substantial question of law for the purposes of Article 165(4) of the *Constitution*."

27. The Court went on to conclude as follows:

> " 25. In my view a High Court Judge ought not to shy away from his constitutional mandate of interpreting and applying the *Constitution*. Whereas the *Constitution* permits certain matters to be herd by a numerically enlarged bench, that is an exception to the general legal and constitutional position and it is in my view an option that ought not to be exercised lightly."

28. In view of the foregoing, I find that the application herein does not satisfy the threshold for certification for empanelment of a bench. I find so because the issues revolve around constitutional issues that are not unusual in a manner that would produce various opinions over their determination. This Court is hence adequately equipped to answer the questions owing to the plethora of cases that have set the foundation on the topic and its mandate under Article 165 of the *Constitution*.

29. The upshot is that the application dated March 7, 2022 has not met the threshold for certification of the same, as raising substantial question for the purpose of empanelment of a bench. It is accordingly dismissed. Costs shall be in the cause.

Orders accordingly.

DELIVERED VIRTUALLY, SIGNED AND DATED THIS 18TH DAY OF NOVEMBER, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.

H I Ong'udi

Judge of the High Court