



Republic v Building Bridges Initiative Taskforce & 4 others; Odinga (Interested Party); Lemeiguran (Exparte Applicant) (Judicial Review Application E1157 of 2020) [2021] KEHC 7952 (KLR) (Judicial Review) (16 February 2021) (Ruling)

Republic v Building Bridges Initiative Taskforce & 4 others Ex parte Rangal Lemeiguran; Raila Amolo Odinga (Interested party) [2021] eKLR

Neutral citation: [2021] KEHC 7952 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E1157 OF 2020
P NYAMWEYA, J
FEBRUARY 16, 2021**

BETWEEN

REPUBLIC APPLICANT

AND

BUILDING BRIDGES INITIATIVE TASKFORCE 1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC) 2ND RESPONDENT

SPEAKER OF THE NATIONAL ASSEMBLY 3RD RESPONDENT

NATIONAL ASSEMBLY 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

AND

RAILA AMOLO ODINGA INTERESTED PARTY

AND

RANGAL LEMEIGURAN EXPARTE APPLICANT

Requirements for a suit to be assigned to a bench of more than one High Court judge

The case involved an application for judicial review orders to compel the implementation of a prior High Court decision granting the Ilchamus Community a constituency and to prevent the approval of the draft Constitution of Kenya (Amendment) Bill, 2020 until compliance with that order. The respondents sought to transfer and



consolidate the matter with ongoing constitutional petitions, arguing that it raised similar legal issues. The court found that it lacked the authority to transfer the case but held that the issues presented, concerning constitutional rights and the amendment process, met the threshold for a substantial question of law under article 165(4) of the Constitution. Consequently, the case was referred to the Chief Justice for the appointment of a multi-judge bench.

Reported by Flora Weru

Constitutional Law – *empanelment of a bench of an uneven number of judges for the hearing and determination of a suit – threshold to be met for purposes of empanelment of the bench – matters that raised substantial questions of law - whether a judicial review application warranted reference to the Chief justice to appoint a bench of uneven number of judges for its hearing and determination – Constitution of Kenya 2010, article 165(3) and 165(4).*

Brief facts

The *ex parte* applicant sought judicial review orders to compel the implementation of a High Court order requiring the allocation of a constituency to the Ilchamus Community. He also sought to prevent the approval of the draft Constitution of Kenya (Amendment) Bill, 2020, until amendments were made to reflect that order. The 1st respondent and the interested party filed the instant application, seeking to transfer and consolidate the case with other petitions challenging the constitutional amendment process, which were being heard by a five-judge bench constituted by the Chief Justice.

Issues

- i. What were the requirements for a suit to be assigned to a bench of at least three High Court judges?
- ii. Whether the instant petition met the threshold for reference to the Chief Justice for the constitution of a bench of more than three High Court judges to hear and determine it.

Held

1. Article 165(4) of the Constitution expressly provided that it was the Chief Justice who could assign a matter for determination by a bench of an uneven number of judges. For a matter to be referred to the Chief Justice for assignment of a bench at least three High Court judges, the High Court had to certify that the matter raised a substantial question of law in the following instances:
 1. It involved a question as to whether a right or fundamental freedom in the bill of rights had been denied, violated, infringed or threatened; or
 2. It involved a question respecting the interpretation of the Constitution including:
 - i. the question whether any law was inconsistent with or in contravention of the Constitution;
 - ii. the question whether anything said to be done under the authority of the Constitution or of any law was inconsistent with, or in contravention of, the 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.
2. The questions raised by the *ex parte* applicant's notice of motion dated January 11, 2021 met the threshold set out in article 165 (4) of the Constitution. The applicant sought to enforce orders for the creation of a constituency for the Ilchamus community in the constitutional amendment process in which there were weighty constitutional issues raised and they were of considerable public interest.

Application allowed.



Orders

The court certified that the *ex parte* applicant's notice of motion dated January 11, 2021 raised a substantial question of law, and referred the said notice of motion to the Chief Justice for the assignment of a bench of an uneven number of judges in terms of article 165 (4) of the Constitution.

Citations

Cases

Kenya

Wambora, Martin Nyaga v Speaker County Assembly of Embu, Clerk County Assembly of Embu & 3 others (Petition 3 of 2014; [2014] KEHC 6715 (KLR)) — (Explained)

India

Chunilal v Mehta v Century Spinning and Manufacturing Co AIR 1962 SC 1314 — Explained

Statutes

Kenya

Constitution of Kenya, articles 165(3)(4); 191 — (Interpreted)

Advocates

Mr Mutembei for the *ex parte* applicant

Mr Ochieng Oginga for the 1st respondent

Mr Mwangela for the 3rd respondent

Mr Munene, for the 5th respondent

RULING

1. On December 22, 2020, this court granted leave to Rangal Lemeiguran, the *ex parte* applicant herein, to apply for an order of *mandamus* to compel the 1st and 2nd respondent to implement the order issued by the High Court in Nairobi miscellaneous application No 305 of 2004, and allocate the Ilchamus Community a Constituency in the ongoing political process of amending the Constitution of Kenya 2010. He also sought to apply for an order of prohibition to prevent the 2nd respondent, 3rd respondent and 4th respondents from in any way considering, debating or otherwise approving the draft Constitution of Kenya (Amendment) Bill 2020 until an amendment is made to section 74 and the 2nd schedule of the bill, to add a constituency for the Ilchamus Community in compliance with the order issued by the High Court in Nairobi miscellaneous application No 305 of 2004.
2. The *ex parte* applicant subsequently filed a substantive notice of motion dated January 11, 2021 seeking the said judicial review orders.
3. The Building Bridges to a United Kenya National Secretariat and Hon Raila Amolo Odinga, the 1st respondent and interested party herein, thereupon filed an application by way of a notice of motion dated January 19, 2021, in which they are seeking orders that the suit herein be transferred to the Constitutional and Human Rights Division of the Nairobi High Court, and consolidated with the following consolidated petitions which are being heard by a 5-judge bench constituted by the Honourable Chief Justice:
 - (1) Nairobi High Court petition No E282 of 2020 - *David Ndii and others v Attorney General and others*;



- (2) Nairobi High Court petition No E400 of 2020 - *Thirdway Alliance and others v The Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce and others*;
 - (3) Nairobi High Court petition No E401 of 2020 – *254 Hope v The National Executive of the Republic of Kenya*;
 - (4) Nairobi High Court petition No E397 of 2020 - *The Kenya National Union of Nurses v The Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce and others*;
 - (5) Nairobi High Court petition E402 of 2020 - *Justus Juma and another v The Attorney General*;
 - (6) Nairobi High Court petition No, E416 of 2020 - *Morara Omoke v Rt Hon Raila Odinga and others*; and
 - (7) Nairobi Judicial Review Misc application No E069 of 2020 - *James Gitau v Independent Electoral and Boundaries Commission and others*.
4. The grounds for the application are that the orders sought herein are greatly prejudicial to the 1st respondent and the interested party and are directly related to orders sought in other suits pending before the Constitutional Division of the High Court. Further, that the *ex parte* applicant has ignored to inform the court of the existence of several other petitions challenging the intended constitutional amendment process initiative by the 1st respondent and the interested party. Lastly, that there is a high likelihood that the courts shall reach conflicting conclusions and/or issue conflicting orders on the same subject matter.
 5. These grounds were reiterated by Mr Ochieng Oginga, the counsel for the 1st respondent and the interested party, at a virtual hearing held on January 28, 2021, wherein parties made oral submissions. Mr Mutembei, the counsel for the *ex parte* applicant, opposed the application for transfer of the instant suit to the Constitutional and Human Rights Division of the Nairobi High Court, on the ground that the issues in the instant suit are different from those in the consolidated petitions before the 5-judge bench in the said division, as this suit is seeking to enforce existing orders, and therefore goes beyond the proposed amendments to the Constitution and should be heard separately.
 6. Both counsel however agreed that the power to constitute a 5-judge bench reposes in the Chief Justice, and Mr Oginga in this respect urged the court to place this matter before the Chief Justice for the constitution of a 5-judge bench to hear and determine it. Mr Mwongela and Mr Munene, the counsel for the 3rd and 5th respondents respectively, left it to the court to decide, and did not make any submissions on the application for transfer.
 7. It is evident that the parties concede that this court cannot transfer this matter to the 5-judge bench hearing similar consolidated cases in the Constitutional and Human Rights Division in the Nairobi High Court. This is for the reason that article 165(4) of the Constitution expressly provides that it is the Chief Justice who can assign a matter for determination by a bench of an uneven number of judges.
 8. The secondary and only issue for determination in the instant application therefore, is whether this suit is one that requires to be referred to the Chief Justice for the constitution of a bench of more than one High Court judge to hear it. Under article 165(3) and (4) of the Constitution, for a matter to be referred to the Chief Justice for assignment of such a bench, the High Court must certify that the matter raises a substantial question of law in the following instances:



- a) It involves a question as to whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened; or
 - b) It involves a question respecting the interpretation of the Constitution including (i) the question whether any law is inconsistent with or in contravention of the Constitution; (ii) the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the 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.
9. As regards the threshold to be met for a question to be categorized as a substantial question of law, it was held in Chunilal v Mehta v Century Spinning and Manufacturing Co AIR 1962 SC 1314, 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.”
10. Similarly, in Martin Nyaga and others v Speaker County Assembly of Embu and 4 others and an amicus [2014] eKLR, the court held that the principles applicable when making a declaration under article 165(4) include whether the matter is complex; whether the matter raises a novel point; whether the matter by itself requires a substantial amount of time to be disposed of; the effect of the prayers sought in the matter and the level of public interest generated by the suit.
11. In the present suit, the *ex parte* applicant seeks judicial review orders to enforce orders granted to him by the High Court in Nairobi miscellaneous application No 305 of 2004, on which the applicable principles are settled. The *ex parte* applicant has however, in seeking to enforce the said orders, also sought judicial review orders against actors and actions being undertaken in an ongoing constitutional amendment process in which there are weighty constitutional issues raised, and which are of considerable public interest. In particular, there are orders sought by the *ex parte* applicant in this regard on the constitutional rights of the Ilchamus Community in relation to the constitutional amendment process, and on the draft Constitution of Kenya (Amendment) Bill 2020. The draft Constitution of Kenya (Amendment) Bill 2020 is also the subject of various other pending cases, including the consolidated petitions listed herein before the 5-judge bench in the Constitutional and Human Rights Division of the High Court.
12. It is thus my finding that the questions raised by the *ex parte* applicant’s notice of motion dated January 11, 2021 meet the threshold set out in article 165(4) of the Constitution for the foregoing reasons.
13. I accordingly certify that the *ex parte* applicant’s notice of motion dated January 11, 2021 raises a substantial question of law, and hereby refer the said notice of motion to the Chief Justice forthwith, for the assignment of a bench of an uneven number of judges in terms of article 165(4) of the Constitution.
14. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF FEBRUARY 2021



P. NYAMWEYA
JUDGE

