



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

PETITION NO. E059 OF 2021

BETWEEN

DR. MAGARE GIKENYE J. BENJAMIN.....PETITIONER

VERSUS

SALARIES AND REMUNERATION

COMMISSION & 146 OTHERS..... RESPONDENTS

AND

THE SENATE & 9 OTHERS.....INTERESTED PARTIES

RULING NO. 1

1. This ruling is in respect of a request by the Petitioner for an order that the Petition herein be heard by an expanded bench. The request is dated 14th March, 2021.

2. The Petitioner has advanced the following reasons for his request in paragraph 5 of the request and are as follows: -

(a) The Petition raises weighty and complex questions of law concerning, the interpretation and application of the provisions of article 230 of the Constitution and particularly the power of the 1st respondent (salaries and remuneration commission) in determining benefits of state officers versus ‘ordinary’ hard working people and how such powers ought to be exercised.

(b) The petition raises issues concerning the extent or limit of the 1st respondent in its constitutional mandate of exercising discretion over different organs who are the creature of the constitution.

(c) The Petition raises questions on whether car loan can easily be converted to car grants simply on the whims of the 1st respondents working in cahoots with the 2nd respondent and/with the executive/presidency.

(d) The Petition raises questions on the issue of budget making process, role of public participation, and whether the said process is just cosmetic.

(e) The Petition raises questions on the meaning of article 249 of the constitution on the independence of independent offices and constitutional commissions and how that independence ought to be exercised.

(f) The Petition raises questions on the meaning of article 201 on prudent use of financial resources as read together with in the principles and framework of public finance Act, 2015 and the public finance management (PFM) Act.

(g) The Petition raises questions on the meaning of article 27 on right against discrimination and the extent (if any) of that discrimination is ‘allowable’ (if any) and literal meaning of the play, the animal farm (Shamba la Wanyama)’ where some animals are more important than the others.

(h) *The Petition raises questions on the issue of legitimate expectation to Kenyan citizens, and whether one can have ‘illegal legitimate expectation’.*

(i) *The issues raised in the petition are of general public importance as they concern the performance of constitutional functions of independent commissions and prudent use of financial resources and the effect of a promise of the executive to legislature.*

(j) *The Petition raises questions on the separation of powers, as to whether a promise by the executive to county legislature can be effected by independent offices and constitutional commissions, in this case 1st respondent.*

(k) *The issues raised in the petition are novel and have not been decided upon before by a court of law.*

3. The Petitioner has made reference to three decisions in support of the request. They are *Peter Ng’ang’a Muiruri vs. Credit Bank Limited & Another Civil Appeal No. 203 of 2006*, *Wycliffe Ambetsa Oparanya & 2 others v Director of Public Prosecutions & another [2016] eKLR* and *Community Advocacy Awareness Trust & Others vs. The Attorney General & Others High Court Petition No. 243 of 2011*.

4. The request has been variously opposed by the parties through grounds of opposition and written submissions. Several decisions to that end have also been referred to.

5. I have patiently considered the request, the grounds of opposition, the written submissions and the decisions referred to by the parties. In answer to the request, I will first look at the law governing applications for empanelment of expanded benches.

6. Applications for certification have a constitutional underpinning. The Constitution provides for certification in two instances in the superior Courts; that is under **Article 163(4)(b)** and **Article 165(3)** and **(4)** of the **Constitution**.

7. Article 163(4)(b) provides as follows: -

163(4) Appeals shall lie from the Court of Appeal to the Supreme Court—

(a)

(b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).

8. Article 165 (3) and (4) states that: -

(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; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(4) 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.

(emphasis added)

9. The application under consideration relates to certification in the High Court; that is under Article 165 (3) and (4) of the Constitution. The manner in which a single Judge of the High Court certifies that a matter raises a substantial question(s) of law so as to warrant the

empanelment of an expanded bench has, on several instances, been dealt with by the Superior Courts.

10. The Supreme Court of Kenya in **Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone [2013] eKLR** established the principles for certification under Article 163(4)(b) of the Constitution. However, those principles were adopted, *with modification*, by the Court of Appeal in **Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR** when the Court of Appeal dealt with an appeal against a refusal by the High Court to certify a matter as raising substantial questions of law under Article 165(4) of the Constitution.

11. The Supreme Court summed up the principles as follows: -

In summary, we would state the governing principles as follows:

- (i) for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;*
- (ii) where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;*
- (iii) such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;*
- (iv) where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;*
- (v) mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of the Constitution;*
- (vi) the intending applicant has an obligation to identify and concisely set out the specific elements of “general public importance” which he or she attributes to the matter for which certification is sought;*
- (vii) determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.*

12. As said, the Court of Appeal applied the above principles in **Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR** and expressed itself thus: -

42. 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.

13. The High Court has as well severally dealt with the matter. In **Republic v Public Service Commission & Keriako Tobiko Ex parte Nelson Havi [2017] eKLR** the Court stated that: -

42. Whereas this Court appreciates that the decision of an enlarged bench may well be of the same jurisprudential value in terms of precedent or stare decisis principles as a decision arrived at by a single High Court judge, the Constitution itself does recognise that in certain circumstances it may be prudent to have a matter which satisfies the constitutional criteria determined by a bench composed of numerically superior judges...

46. In the circumstances, I hereby certify that this matter raises a substantial question of law to warrant reference of the same to the

Chief Justice as required under Article 165(4) of the Constitution.

14. In **Philomena Mbete Mwilu v Director of Public Prosecution & 4 others [2018] eKLR** the High Court had the following to say: -

29. I fully agree with the above views on the jurisprudential value of decisions by a bench or a single judge of this court. Although the present petition can be heard by a single judge of this court and also being fully aware that a bench would sometimes require resources both personnel and financial as well as more time to resolve a petition than if it were heard by a single Judge, the present petition is the kind of petition that this court should exercise its discretion in favour of an expanded bench due to its public importance and significance in our constitutional democracy. The issues sought to be decided are not mere questions of law, they are substantial questions of law and their resolution will have a material bearing on the 1st respondent's decision to arrest and prosecute the petitioner and the independence of the judiciary.

15. Drawing from the foregoing, I will now apply the criterion laid by the Court of Appeal in **Okiya Omtatah Okioti & another v Anne Waiguru case** (supra) in this case. I will also, hereunder, reproduce *verbatim* the prayers sought in the Petition. They are the following: -

(a) A declaration that contents of 1st respondent's circular dated 9th February 2021 with Ref .NO, SRC/TS/COG/3/61/48 VOL.II (113) addressed to Hon. Governor Martin Wambora the chairman of 2nd Respondent herein-council of governors(COG) the subject being Review of Car Loan For Speaker And Member of County Assembly which inter alia had an effect of approving the conversion of car loans into car grants benefiting the 3rd-96th respondents is unconstitutional and therefore, invalid, null and void ab initio.

(b) An order of judicial review by way of mandamus, compelling the 2nd Respondent (COG), 97Th-143rdh respondents, National Treasury, The Controller of Budget and the Hon. Attorney General to recover any benefits the 3rd-96th Respondents might have accrued due to the 1st Respondent's circular on letter/circular dated 9th February 2021 on this issue.

(c) A declaration that the conversion of car loans into car grants and rejecting of health workers risk allowances is discriminatory contrary to article 27 of the constitution.

(d) The high court to be pleased to give An order of certiorari to bring to the high court of Kenya the 1st Respondent's letter/circular dated 9th February 2021 which has an effect of inter alia converting the 3rd-96th Respondents' car loans into car loans for purposes of being quashed.

(e) The high court be pleased to give order of mandamus to the 1st respondent to re-look the risk allowance of the 10Th interested party and other health workers.

(f) Any other order

(g) Costs...

16. By taking into account the nature of, and, the circumstances in the Petition alongside the principles in **Okiya Omtatah Okioti & another v Anne Waiguru case** (supra), I do not find any difficulty in arriving at the finding that the request fails the test for certification as raising substantial questions of law under Article 165(4) of the Constitution so as to call for an expanded bench of this Court.

17. Whereas on one hand the issues raised in the Petition are weighty and of immense public interest, on the other hand, the issues are not complex and/or uncertain. In fact, if anything, the Petition ought to be urgently heard and determined on account of the public interest it has generated.

18. Consequently, the following final orders do hereby issue: -

(a) The Petitioner's request dated 14th March, 2021 for an order that an expanded bench be constituted to hear and determine this Petition is hereby dismissed. Costs in cause.

(b) The Petition and the Notice of Motion dated 18th February, 2021 shall be heard together and by way of reliance on Affidavit evidence and written submissions.

(c) In view of (b) above, the Respondents and the Interested Parties shall file and serve their respective responses to the Petition and the Notice of Motion dated 18th February, 2021 within 14 days.

(d) The Petitioner shall, upon receipt of the responses in compliance with (c) above, file and serve any supplementary responses, if need be, together with written submissions within 14 days.

(e) The Respondents and the Interested Parties shall file and serve their respective written submissions within 14 days of service.

(f) Highlighting of submissions on a date suitable to the Court and the parties.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 5TH DAY OF AUGUST, 2021.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Dr. Magare-Gikenye J. Benjamin, the Petitioner in person.

Mr. Wahome, Counsel for the 1st Respondent.

Mr. Lawi, Counsel for the 2nd Respondent.

Mr. Kivuva, Counsel for the 3rd – 49th Respondents.

Mr. Shisanya, Counsel for the 15th Respondent.

Miss Kamende, Counsel for the 50th – 143rd Respondents.

Miss Omuom, Learned State Counsel instructed by the Hon. Attorney General for the 144th and 147th Respondents.

Miss Musembi, Counsel for the 146th Respondent.

Elizabeth Wambui – Court Assistant.