



Katiba Insitute v President of the Republic of Kenya & 2 others; Judicial Service Commission & 3 others (Interested Parties) (Constitutional Petition 206 of 2020) [2020] KEHC 3475 (KLR) (Civ) (18 August 2020) (Ruling)

Katiba Insitute v President of the Republic of Kenya & 2 others; Judicial Service Commission & 3 others (Interested Parties) [2020] eKLR

Neutral citation: [2020] KEHC 3475 (KLR)

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

CIVIL

CONSTITUTIONAL PETITION 206 OF 2020

WM MUSYOKA, J

AUGUST 18, 2020

BETWEEN

KATIBA INSITUTE PETITIONER

AND

PRESIDENT OF THE REPUBLIC OF KENYA 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

CHIEF JUSTICE, REPUBLIC OF KENYA 3RD RESPONDENT

AND

JUDICIAL SERVICE COMMISSION INTERESTED PARTY

KENYA HUMAN RIGHTS COMMISSION INTERESTED PARTY

KENYA JUDGES AND MAGISTRATES ASSOCIATION ... INTERESTED PARTY

COMMISSION OF JURISTS (ICJ KENYA) INTERESTED PARTY

RULING

1. When the petition herein was placed before me on 30th July 2020, for directions, one of the directions sought by the petitioner was that I should consider directing that the matter be placed before a bench of Judges, to be appointed by the Chief Justice, for determination. The issue was revisited on 17th August 2020.



2. The other parties did not oppose the proposed reference of the matter to a bench of more than two Judges. Mr. Abdullahi, who was holding brief for Mr. Waweru Gatonye, for the 1st respondent, stated that the issues raised in the petition were weighty, and took the view that the matter could be referred to a panel of Judges. Mr. Wamaasa, for the 3rd respondent and the 1st interested party, and Mr. Mogeni for the 4th respondent had no objection. Mr. Odigi, for Mr. Kiarie Mungai, for the 2nd interested party supported the request by Mr. Ochiel Dudley for the petitioner.
3. What the petitioner proposes is permitted under Article 165(4) of the Constitution, which provides as follows:

“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.”
4. Article 165(3)(b)(d) of the Constitution states as follows:

“...the High Court shall have –

 - (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 –
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said or 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 the State organs in respect of count 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) ...”
5. It would seem that the instant petition falls within Article 165(3), as it revolves around interpretation of the exercise of constitutional power by the 1st respondent, and in particular about the question of the doing something under the authority of the Constitution and other law as stipulated in 165(3) (d)(ii). A bench of uneven number of Judges may be assigned by the Chief Justice to determine the questions that arise in the petition.
6. The next consideration should whether the petition raises questions that warrant the matter being referred to the Chief Justice to empanel a bench of an uneven number of Judges. The principles to be considered in making such a reference have been identified in a number of cases, such as Okuya Omtatab



Okioti & another vs. Anne Waiguru – Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR, *Wycliffe Ambetsa Oparanya & 2 others vs. Director of Public Prosecutions & another* [2016] eKLR, and *Wanjiru Gikonyo vs. Attorney General & another, Kajiado County Governor & 4 others (Interested Parties)* [2020] eKLR, among others. These include that grant of a certificate under Article 165(4) is an exception rather than the rule, the substantial question in issue ought to be determined in the circumstances of the case, public interest, among others. It was underscored that the list of relevant factors is not exhaustive, and that the mere presence or absence of one is not necessarily decisive in a particular case. It has also been stated that the decision should be made only where the same is absolutely necessary, being mindful of the scarcity of judicial resources.

7. The matter before me raises rather novel and substantial questions, such as what remedy or remedies are available where the first respondent disregards a court order. Related to that is the question as to whether the doctrine of necessity would be available to the petitioner to forestall alleged further violation of the *Constitution* and to the alleged sustenance of an unconstitutional state of affairs occasioned by the first and second respondents. The petition arises from what the petitioner alleges to be the failure by the 1st respondent to comply with a judgment of the High Court in *Adrian Kamotho Njenga vs. Attorney-General; Judicial Service Commission & 2 others (Interested Parties)* [2020] eKLR, which turned on what are clearly public interest issues.
8. I am of the considered view that the matter herein touches on substantial issues of a constitutional nature, more so on separation of powers between the Executive and the Judiciary. Consequently, I certify that the same raises a substantial question of law, and it would be prudent in the circumstances that the same be heard and determined by a multi-Judge bench. Consequently, I do hereby refer this matter to the Chief Justice, to assign an uneven number of Judges, in terms of Article 165(4) of the *Constitution*.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 18TH DAY OF August 2020

W. MUSYOKA

JUDGE

