



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
(Coram: A. C. Mrima, J.)

PETITION NO. E297 OF 2020

BETWEEN

JOHN LEKOKO LEKULAI & 90 OTHERSPETITIONERS

AND

1. HON. ATTORNEY GENERAL

2. MINISTRY OF INTERIOR & CO-ORDINATION OF NATIONAL GOVERNMENT

3. MINISTRY OF EDUCATION

4. MINISTRY OF DEVOLUTION..... RESPONDENTS

RULING NO. 1

1. The Petitioners filed a Petition dated 24th September, 2020 seeking various orders on enforcement and realization of rights and fundamental freedoms of the Ilchamus community.

2. Simultaneous with the Petition, the Petitioners filed an evenly dated Notice of Motion (hereinafter referred to as ‘**the application**’) seeking the following orders: -

1. That, this matter be certified as urgent and served be dispensed with in the first instance.

2. That, the honourable court be pleased to grant an order for substituted service in at least one daily newspaper of national circulation.

3. That, this petition be placed before the Honourable Chief Justice to constitute a bench of uneven number of judges not being less than three to hear and determine the instant petition on a priority basis.

4. That, the costs of this application be in the cause.

3. The application is supported by the evenly sworn Affidavit of John Lekoko Lekulai, the 1st Petitioner.

4. The application is not opposed. On this Court’s directions, the application was heard by way of brief oral submissions. Counsel for the Petitioners mainly expounded on the grounds in support of the application.

5. Even though the application is undefended, this Court must, nevertheless, consider it and satisfy itself on its merit or otherwise.

6. The application is for certification. Such applications 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 Okiiti & 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 Okioti & 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, resonating the intention of Article 10, 56 the objects and the spirit of the Constitution of Kenya, 2010, that the Government of Kenya has violated the rights of the pet petitioners as a marginalized community.

b. A declaration that the failure of the Government of Kenya to respond to disasters facing the petitioners and perennial disobedience of Court Orders in their favour amount to discrimination and a violation of their right against discrimination as encapsulated under Article 27 of the Constitution of Kenya, 2010.

c. An order directed to the Ministry of Interior and Co-ordination of National Government to provide an elaborate plan to mitigate the disaster facing the petitioners.

d. An order compelling the government of Kenya to Institute affirmative action programmes in accordance with article 56 to mitigate the suffering of the petitioners.

e. An order directed to the Ministry of Education to provide an elaborate plan to ensure leaning continues in all the affected schools in the region affected by floods.

f. An order that a commission comprising of experts experienced in public administration, law and social justice and representatives of the Ilchamus Community be appointed under terms and references to be set out by this Honourable court inter alia to;

i. Assess and quantify the loss occasioned on the petitioner owing to the constant discrimination and neglect of a marginalized community by the Government of Kenya.

ii. Assess and quantify the socio-economic impact of the acts and omissions of the government on the petitioners.

iii. Assess and make recommendations on affirmative action measures to be taken by the Government resonating with the intention of Article 56 of the Constitution of Kenya, 2010 to ensure the petitioners as a marginalized community are protected.

iv. Assess injury to the petitioners and commensurate awards for the harm suffered because of violations of Constitutional rights and prepare a report to be tabled before to this Honourable court for further orders.

v. Complete its task within 60 days.

g. An order for resettlement of the IDPs resulting from floods and compensation of the victims of the attacks and violations of the Constitution based on the findings of the commission in (f) above.

h. Exemplary damages.

i. That, this Honourable court be pleased to make any further orders as it may deem just and fit to grant in the public interest and in justice.

j. Costs of this petition be provided for.

16. By taking into account the nature of, and, the circumstances in the Petition alongside the principles in *Okiya Omtatah Okoiti & another v Anne Waiguru case* (supra), I do not find any difficulty in arriving at the finding that the application 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 given that one of the rights alleged to be infringed is the right to education of the children from the Ilchamus community to the extent that those children are no longer able to attend school. In such circumstances, making an order for an expanded bench will definitely delay the matter. It is in the interest of justice that the Petition do expeditiously proceed for hearing before a single Judge.

18. As regards the prayer for substituted service, *Mr. Mutembei* Counsel for the Petitioners, indicated to the Court that he managed to effect service on all the Respondents. As such, he submitted that the prayer was overtaken by events. The prayer for substituted service shall, hence, not issue.

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

a. The Notice of Motion dated 24th September, 2020 is hereby dismissed with no order as to costs.

b. Matter is hereby fixed for directions on 30/11/2020 on the hearing of the main Petition.

c. The Petitioners shall serve the Respondents.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 23rd day of November 2020

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mr. Mutembei, Counsel instructed by Messrs. Letangula & Co. Advocates for the Petitioners.

Miss. Mwangi, Learned State Counsel instructed by the Honourable Attorney General for the Respondents.

Dominic Waweru – Court Assistant