



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 14 OF 2020**

**STANLEY LIVONDO.....APPLICANT/PETITIONER**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....RESPONDENT/RESPONDENT**

**RULING**

1. Through the application dated 21<sup>st</sup> September, 2020, Stanley Livondo, the Petitioner/Applicant, seeks an order certifying that his petition raises substantial questions of law warranting the constitution of a bench, of an odd number of not less than three judges, by the Chief Justice under Article 165(4) of the Constitution to hear and determine the petition.
2. The application is opposed by the Attorney General, the Respondent.
3. According to the grounds on the face of the application and the supporting affidavit of the Applicant, the petition raises a substantial question of law touching on the qualifications and disqualifications for election as President under Article 137 of the Constitution. It is the Applicant's case that the determination of the issue will have a significant bearing on the public. Further, that the petition touches on issues of general public importance whose determination transcends the interests of the parties. It is thus the Applicant's case that it is in the interest of justice and the public that an uneven number of judges be appointed to hear and settle the questions raised in the petition.
4. The Applicant concludes his application by urging that the matter of construing the Constitution in regard to the position of the President, Deputy President and cabinet secretaries raises a substantial question of law requiring the opinion of not less than three judges.
5. Although the advocates for the parties were directed to file and exchange written submissions on the application, counsel for the Applicant indicated to the Court on 2<sup>nd</sup> December, 2020 that he did not file written submissions. He, nevertheless, went ahead and urged the Court to exercise its discretion and certify the petition as one befitting hearing by a panel of an odd number of judges not being less than three.
6. Through submissions dated 27<sup>th</sup> November, 2020 counsel for the Attorney General submitted that although the petition raises issues that are partly novel and that have partly been litigated before, Articles 137 and 148 of the Constitution are clear on the qualifications and disqualifications of the candidates for the position of Deputy President and President. According to the Respondent, there is no provision in the Constitution that bars the Deputy President from contesting the position of President after serving his or her full term of ten years. It is the Respondent's view that the Petitioner is through this petition inviting the Court to amend the Constitution outside Articles 255, 256 and 257 being the provisions for amending the Constitution.
7. The Respondent contends that the issue of appointment and formation of the executive arm of government at both the national and county levels of government remains strictly the function of the respective executive arms and the twin doctrines of deference and separation of powers denies this Court jurisdiction over the issues raised in the petition.
8. The Respondent additionally submits that the petition is speculative as it is tied to the current holder of the office of the Deputy President and it cannot therefore be the basis of a proper constitutional claim.
9. The Respondent relies on the decisions in **Wanjiru Gikonyo v Attorney General & another; Kajado Country Governor and 4 others (Interested Parties) [2020] eKLR**; and **Chepkorir Rehema (Suing through father and next friend) & 130 others v Kenya National Examinations Council [2017] eKLR** in support of the proposition that the complexity of a matter does not necessarily mean that the same raises a substantial question of law. The Court is therefore urged to find that the petition does not raise a substantial question of law to warrant the empanelment of a bench.

10. The question to be addressed in this ruling is whether the instant petition raises a substantial question of law warranting certification for empanelment of a bench under Article 165(4) of the Constitution.

11. The law as to what amounts to a substantial question of law is now well settled. In **Sir Chunilal V. Mehta and Sons, Ltd v The Century Spinning and Manufacturing Co. Ltd 1962 AIR 1314** the elements of a substantial question of law were stated follows:

**“The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or 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 question 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 question of law.”**

12. The meaning of the term “*substantial question of law*” was also defined in **Santosh Hazari v Purushottam Tiwari [2001] 3 SCC 179** as follows:

**“A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be substantial, a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law involving in the case there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.”**

13. The guidelines for certification under Article 165(4) of the Constitution were provided by Court of Appeal in **Okiya Omtatah Okoiti & another v Anne Waiguru – Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR** as follows:

**“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”. 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.”**

14. The Respondent in attacking the application delved too deeply into the merits of the petition. This is not the proper place for considering the merits of the petition. What the Court is required to do is to satisfy itself whether substantial questions of law that are novel and without precedent arise in the petition.

15. The novelty or complexity of the issues raised in the petition is alone not sufficient reason for certifying the matter for empanelment of a bench. This statement finds support in the decision of **J. Harrison Kinyanjui v Attorney General & another [2012] eKLR** where it was held that:

**“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....**

**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**

