REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION NO. 7 OF 2019

BETWEEN

OKIYA OMTATA OKOITI & 4 OTHERS.......................PETITIONERS

AND

THE HON ATTORNEY GENERAL & OTHERS.........RESPONDENTS

RULING

1. The Petitioners in this petition seek to have this court declare the amendments made vide ***The Statute Law (Miscellaneous Amendments) Act, 2018*** (hereinafter referred to as "the Amendment Act") declared unconstitutional and therefore invalid, null and void. They contend that the manner in which the said amendments were effected violated the Constitution. In the meantime, they seek conservatory orders prohibiting the implementation of the said amendments pending the hearing and determination of this petition.

2. However, before either the petition or the application could be heard, the Respondents applied that this petition be either stayed pending Nairobi High Court Constitutional Petitions 56, 58 and 59 all of 2019 (hereinafter referred to as "the Nairobi Petitions"), or that this petition be transferred to Nairobi for hearing and determination. Of course there are also preliminary objections raised to the competency of the petition.

3. It is not in doubt that there are pending in Nairobi the said Nairobi Petitions. While the parties are not agreed on the exact common issues in this and those other petitions, it is common ground that at least one issue, the introduction vide the said amendments of the National Integrated Identity Management System (hereinafter referred to as "NIIMS") is one of the issues covered by both sets of petitions. It is also not in doubt that the Nairobi Petitions were referred to the Hon. The Chief Justice pursuant to the provisions of Article 165(4) of the Constitution for the purposes of empanelling a bench consisting of uneven number of judges of not less than three. It is also now clear that the Chief Justice pursuant to the powers conferred upon him thereunder has empanelled the said Bench consisting of **Nyamweya, J** (Presiding), **Mumbi Ngugi, J** and **Korir, J**.

4. In the submissions made before me the Respondents seek that this matter be similarly referred to the said Bench as constituted. The Petitioners have opposed the said position on the grounds inter alia that the issues raised in this petition are not the same as those raised in the Nairobi petitions and that it is the Nairobi petitions that ought to be referred to this court since this petition is wider in scope than the Nairobi petition. On their part the Respondents in a summary contend that in order to avoid untidy situations where similar issues are dealt with by different courts, it is only prudent that the petitions be dealt with by the same court/bench.

5. I have considered the submissions which were placed before me by or on behalf of the parties herein and if I have not dealt with each and every one of them it is not out of disrespect for the parties and/or counsel.

6. Article 165 of the Constitution provides as follows:

(1) There is established the High Court, which—

(a) shall consist of the number of judges prescribed by an Act of Parliament; and

(b) shall be organised and administered in the manner prescribed by an Act of Parliament.

(2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.

(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.

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

7. From the foregoing it is clear that the only constitutional provision that expressly permits the constitution of bench of more than one High Court judge is Article 165(4). Under that provision, for the matter to be referred to the Chief Justice for the said purpose the High Court must certify that the matter raises a substantial question of law:

1. Whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; or

2.* That it involves a question respecting the interpretation of the Constitution and under this is included *(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.

8. That duty being a judicial one it behoves the Court to identify the issues which in its view raise substantial questions of law and whereas the fact that parties agree that the threshold under Article 165(4) may be considered, the Court is not bound by such concurrence.

9. Therefore, it is not enough that the matter raises the issue whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened or that it raises the issue of interpretation of the Constitution. The Court must go further and satisfy itself that the issue also raises a substantial question of law. As was appreciated in **Community Advocacy Awareness Trust & Others vs. The Attorney General & Others High Court Petition No. 243 of 2011**:

"The Constitution of Kenya does not define, 'substantial question of law.' It is left to the individual judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges not being less than three to determine the matter."

10. The court went ahead to hold that the promulgation of the Constitution of Kenya, 2010 has brought into being a whole new law that in every respect raises substantial questions of law because the Constitution is new. The expanded Bill of Rights as set out in Chapter Four, the Citizenship issue in Chapter Three, the Leadership and Integrity issue in Chapter Six and Chapter Eleven dealing with Devolved Government are matters which need constant interpretation by the courts and if every such question were to be determined by a bench of more than two judges, other judicial business would definitely come to a stand still and if that were to happen, then the expectation of the public to have

their cases decided expeditiously as provided under Article 159(2) of the Constitution and sections 1A and 1B of the ***Civil Procedure Act*** would never be realised.

11. In **Chunilal V. Mehta vs Century Spinning and Manufacturing Co. AIR 1962 SC 1314** it was held that:

> **"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."**

12. In **Santosh Hazari vs. Purushottam Tiwari** (2001) 3 SCC 179 it was held that:

> **"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, insofar 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. In India certain tests have been developed by the Courts as criterion for determining whether a matter raises substantial question of law and these are: (1) whether, directly or indirectly, it affects substantial rights of the parties, or (2) whether the question is of general public importance, or (3) whether it is an open question, in the sense that the issue has not been settled by pronouncement of the Supreme Court or the Privy Council or by the Federal Court, or (4) the issue is not free from difficulty, or (5) it calls for a discussion for alternative view.

14. In my view these holdings offer proper guidelines to our Court in determining whether or not a matter raises "a substantial question of law" for the purposes of Article 165(4) of the Constitution.

15. Other factors which the Court may consider in my view include: whether the matter is moot in the sense that the matter raises a novel point, whether the matter is complex, whether the matter by its nature requires a substantial amount of time to be disposed of, the effect of the prayers sought in the petition and the level of public interest generated by the petition.

16. However, since the Article employs the word "includes", to my mind the list is not exhaustive. Even before the promulgation of the current Constitution, it was appreciated in **Kibunja vs.Attorney General & 12 Others (No. 2) [2002] 2 KLR 6** that:

> **"in exercising that discretion, several factors have to be taken into account including, but not limited to the complexity of the case and the issues raised, their nature, their weight, their sensitivity if any, and the public interests in them, if any."**

17. In this case it is clear that in the Nairobi petitions where at least one common issue arises as in this petition, a bench has already been constituted. That is not an issue that this Court can ignore. As was held by the Court of Appeal in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229**:

> **"Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice."**

18. In my view since the factors to be considered in certifying a matter under Article 165(4) are not exclusive and the doors are not closed as to what factors the court ought to consider, to paraphrase **Bagmall, J** in **Crowcher vs. Crowcher [1972] 1 WLR 425, 430**, the jurisdiction under Article 165(4) jurisdiction is not past child-bearing age; however, its progeny must be legitimate and it is well that this should be so; otherwise no lawyer could safely advice his client and every petition would call for certification.

19. In my view, one of the factors to be considered is the effect of having parallel proceedings having a bearing on each other. That is clearly a question of general public importance since the public need to have certainty as regards the determination of courts of concomitant jurisdiction so that they are not left wondering whether decisions depend on particular presiding officers of the court rather than the law.

20. Although the petitioners have submitted that this court ought not, in the absence of an application made pursuant to Article 165(4) of the Constitution invoke the powers thereunder, this court has held before that such powers can either invoked on an application of the parties or by the court on own motion where the circumstances call for it.

21. The Respondents have however urged this court to refer this matter to the the Presiding Judge of the Constitutional Division in Nairobi or to the bench as constituted. However, it is now clear that the Presiding Judge of the Constitutional Division, is sitting in the Nairobi Petitions by virtue of the decision of the Chief Justice and not in his administrative capacity as the head of the Division. Accordingly, as a single Judge he has no powers to make any orders or give directions that may bind the bench in which he is sitting. As to whether this matter can be referred to the said bench as constituted, this court has no such powers. The powers to constitute a bench under Article 165(4) of the Constitution and to direct which matter(s) are to be heard by the said bench are reserved by the Constitution to the Chief Justice and not to any Judge. Sitting as a single judge, I therefore have no powers to refer this matter to the said bench.

22. Having so stated, the only option available to this court would be to refer this matter to the Chief Justice.

23. Before I do so, there is an application made by Child Welfare Society of Kenya seeking to be joined to this petition as an interested party. That application was not opposed on principle save that in their averments, the said applicant seeks to expand the scope of this petition beyond what the parties herein contemplate and in fact makes references to persons who are not parties to this petition. The status of interested parties is now clearly defined and I need not reiterate them here save to say that an interested party ought not to transmute an existing petition into his own cause. He ought to argue his cause within the petition. In other words, an interested party ought to take the petition which he intends to join as he finds it and fit within its parameters.

24. However, since the joinder of the said interested party, per se, is not prejudicial to any of the parties herein I see no harm in joining it to these proceedings in that capacity. Of course the court may at any stage strike out a party whose participation is found to be nolonger necessary or is meant to delay and complicate the matter. Accordingly, I find merit in the application by the proposed interested party for joinder which I hereby grant.

25. Considering that this is clearly a public interest litigation, I am satisfied that the interest of the public dictates that this matter be heard preferably by one court/bench.

26. In my view the petitioners should not fear that the issues raised herein will be "swallowed" in the Nairobi petitions. In my view, the Chief Justice, when exercising the powers under Article 165(4) does not deal with any other issue apart from what is expressly provided thereunder. Accordingly, empanelling of a bench does not amount to consolidation of matters. It is the bench seized of the matters before it that can decide whether to consolidate the matters before it or hear then separately. In other words, the issue of the manner of disposal of this petition and the said Nairobi petitions will be decided by the bench that will be constituted by the Chief Justice.

27. For avoidance of doubt the application for conservatory orders pending hearing in this petition is yet to be heard and determined and it will be upon the bench as empanelled to decide the manner of its disposal. In my view the decision whether or not to grant conservatory orders may be made at any point in the proceedings and the fact that the court earlier on declined to issue the same does not bar the court in reconsidering its earlier decision if circumstances require it to do so. I therefore cannot say, assuming that is the position, that the mere fact that the Judge in the Nairobi petitions, declined to grant conservatory orders, necessarily bars the empanelled bench from revisiting the issue in light of the new developments assuming that this matter will be referred to the same bench.

28. In the premises, I direct that pursuant to the provisions of Article 165(4) as read with under clause (3)(b) or (d) of Article 165 of the Constitution this Petition be transmitted to the Hon. the Chief Justice forthwith for the purposes of either referring the matter to the already empanelled bench hearing the said Nairobi Petitions or in the exercise of the Chief Justice's discretion, any other bench as the Chief Justice may empanel. Taking into account the fact that this matter was certified urgent and the fact that what is sought to be prevented from being implemented is likely to take effect on 2nd April, 2019, I direct that this file be dispatched with speed to the office of the Chief Justice for the said action.

29. Further orders pursuant to the directions of the Hon. Chief Justice will be given by the bench as empanelled.

30. It is so ordered.

Dated at Machakos this 19th day of March, 2019

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Omtata the 1st petitioner

Mr Nyakina the 2nd petitioner

Mr Bitta for the 1st Respondent

Mr Regeru with Mr Nyamodi for the 2nd Respondent

Mr Mbarak for Mr Mwendwa for the 3rd Respondent and MrAngaya for the 4th and 5th Respondents

Mr Ochiel for the 1st interested party

Mr Gichigi for Mrs Mutemi for the 3rd interested party

Mr Gichigi with Mr Ochieng for the proposed interested party

CA Ropita Leshornai