REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 371 OF 2016

IN THE MATTER OF THE CONSTITUTION OF KENYA, ARTICLES NOS. 1, 2, 3, 10, 19, 22, 23, 27 (1), (3), (6) & (8), 81 (B), 94 (1) & (5), 97 (1), 98 (1), 100 (A), 165, 261 (1), (2), (3), (5), (6) (A) & (B), (7), (8) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF FAILURE BY THE STATE AND PARLIAMENT TO TAKE LEGISLATIVE AND OTHER MEASURES TO IMPLEMENT THE PRINCIPLE THAT NOT MORE THAN TWO-THIRDS OF THE MEMBERS OF ELECTIVE OR APPOINTIVE BODIES SHALL BE THE SAME GENDER

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND PROTECTION OF RIGHTS TO EQUALITY AND FAIR REPRESENTATION OF THE PEOPLE

BETWEEN

CENTRE FOR RIGHTS EDUCATION

AND AWARENESS……....1ST PETITIONER/APPLICANT

COMMUNITY ADVOCACY AND AWARENESS

(CRAWN TRUST).....1ND PETITIONER/APPLICANT

VERSUS

THE SPEAKER OF THE

NATIONAL ASSEMBLY….....1ST RESPONDENT

SPEAKER OF THE SENATE.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

AND

KENYA NATIONAL HUMAN RIGHTS

COMMISSION.....1ST INTERESTED PARTY

LAW SOCIETY OF KENYA.....2ND INTERESTED PARTY

NATIONAL GENDER AND EQUALITY

COMMISSION.....AMICUS CURIAE

RULING

Before me for determination are two applications, namely, one dated 19th January 2017 by the first Respondent and the second application is dated 20th January 2017 filed by the second Respondent. The two applications are strikingly similar both in content, substance and wording and both applications seek identical orders, namely that this court be pleased to certify that the petition herein raises substantial questions of law and refer the petition to his lord ship the Hon. the Chief Justice for appointment of a bench of an uneven number of judges being not less than three pursuant to article **165 (4)** of the Constitution and further the court certifies that the petition should be heard by a bench of not less than **seven (7)** Judges of the High Court.

The grounds in support of the two applications are similar, namely that article **165 (4)** of the constitution of Kenya provides that where a substantial question of law arises under article **165 (3) (b)** of **(d)** of the constitution, a bench of an uneven number of judges shall hear the case. It is the applicants case that the spirit of the above article is to enable the bench hearing the matter to have more judicial minds to address the question(s) of law and make a more informed determination that shall assist the country to move forward.

The applicants state that this petition raises weighty and complex questions of law concerning the interpretation of the provisions of article **27 (6) & (8), 81 (b), 100** and **261** and particularly the role of Parliament and its exercise of its legislative authority outlined under articles **294** of the constitution.

The applicants also argue that the petition raises issues concerning the failure on the part of the Respondents to take the requisite measures for the realization of the one third to two third gender rule under article **27 (8)** and **81 (b)** of the constitution as read with article **100** of the constitution and also the extent or limit of the role of parliament as provided for under article **261** of the constitution and whether or not parliament has enacted any legislation as required under article **27 (6) & (8), 81 (b), 100** and **261** of the constitution.

The applicants further aver that the reliefs sought in the petition are of such a nature that if granted may result into serious constitutional crisis, potential harm and may throw the country into disarray. In the applicants view, such constitutional crisis may include **(a)** the date of the general election is provided under article **101** of the constitution, but the constitution has no provisions for an alternative date should a general election be held under article **261 (7)** of the constitution, **(b)** that the constitution offers no guidance on what ought to happen to the terms of the president, Governors and members of the County Assembly in the event Parliament is dissolved and in particular whether they would go home or continue to hold office until the next general elections, **(c)** that the IEBC is yet to give guidance on a by-election which is not provided for by the constitution of Kenya and any other statute, and **(d)** in the event of such dissolution, how long would the new parliament come into effect and the legitimacy of such parliament.

Further, the applicants also posed the question that should parliament be dissolved, what happens to the constitutional roles played by parliament such as vetting of state officers, oversight, legislation and representation of the people of Kenya pending the general election to be held in August 2017.

In the applicants view, the above issues are of general public importance as they concern the possibility of dissolution of parliament through which sovereign power under the constitution is delegated to by the people of Kenya and further that the issues raised are novel, complex, raise substantial questions of law and have not been decided upon before by a court of Law and require empanelment of a seven judge bench to hear the petition and render a judgement thereon.

The two applications were strenuously opposed. On record is a replying affidavit sworn by a Leah W. Wachira, the executive Director of the first Petitioner/Respondent on her own behalf and on behalf of the second petitioner. She avers that the applications are merely a scheme to delay the hearing of this petition and recalls that on 7th December 2016 directions were given before the Hon. Justice Onguto for this petition to be heard by way of highlighting submissions on 18.1.2017 and in the intervening period the judge was transferred to another division. When this matter came up for highlighting of submissions on 18.1.2017 as directed by learned judge, counsel for the first Respondent sought an adjournment on grounds that they had just filed an application for stay of proceedings that same morning which application they wished to be heard prior to hearing of the petition and that the petitioners counsel was served with the said application in court.

The first Respondent averred that the crux of the applicants application for adjournment was that they wanted these proceedings stayed pending the hearing and determination of an appeal they intended to file at the court of appeal to challenge a purported ruling by Onguto J allegedly made on 7.12.2016 seeking empanelling of uneven number of judges to hear this petition which application was purportedly dismissed. However, no such a ruling was made on the said date nor was such an application filed as alleged, hence the applicants were seeking to stay a nonexistent ruling. Further, the hearing date referred to above was taken by consent and it was clear the matter was actually scheduled for hearing on 18.1.2017. In the petitioners view, the applicants herein only wanted to procure a adjournment without any grounds at all which they failed, but nevertheless, the court directed that their application for the stay of the nonexistent order be heard on 20.1.17, but instead of proceeding with the said application, the applicants filed the two applications the subject of this ruling.

The first respondent argued that since a hearing date had been granted, the pleadings had closed, hence the applicants applications were improperly filed without leave, that the application does not raise any substantive issues of law nor are the issues raised complex or weighty to warrant empanelment of a bench of uneven number as requested.

The first petitioner further averred that the issues raised by the petitioner were the subject of an advisory opinion No. 2 of 2012 where the Supreme Court answered the question as to whether parliament had a constitutional obligation to enact a law to implement the one third to two third gender rule and the question was answered in the affirmative and the Supreme court stated that the deadline for the enactment of the legislation was to be 27.8.2015. The first petitioner averred that the only question that now remains is for this honourable court to determine whether parliament has failed to discharge that constitutional obligation which is not a complex question of law nor is it a moot question or question at large.

The first petitioner further argued that if parliament is ready to discharge its constitutional mandate, ten it need not worry about being dissolved and that a single judge has jurisdiction and power to handle constitutional question and that the applicants have not given any reason to demonstrate that this court as currently constituted cannot competently and exhaustively adjudicate this matter. The first applicant further stated that the decision sought is a matter of discretion which must be exercised judicially and sparingly.

I find it necessary at this stage to restate the reliefs sought in the petition and a brief history of this case so as to appreciate the arguments advanced by both parties. The Petitioners seek the following declarations:-

i. A declaratory order that the National Assembly and the Senate have failed in their joint and separate constitutional obligations to enact legislation necessary to give effect to the principle that not more than two thirds of the members of the National Assembly and Senate shall be of the same gender.

ii. An order in the nature of a mandamus directing Parliament and the Attorney General to take steps to ensure that the required legislation is enacted, within the period specified in the order and to report the progress to the Chief Justice.

iii. An order that if the National Assembly and Senate fail to enact legislation in accordance with order (b) above, the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament.

iv. A declaration that the failure by Parliament to enact the legislation contemplated under articles 27 (6) & (8) and 81 (b) amounts to a violation of the rights of women to equality and freedom from discrimination and a violation of the constitution.

v. A declaration that in any event, unless the law contemplated under article 81 (b) is enacted and implemented before the next general elections scheduled for 8th August 2017 resultant National Assembly and Senate, if non-compliant with the constitutional requirement on minimum and maximum gender thresholds shall be unconstitutional hence null and void.

vi. Any further or other further orders that this court may deem fit to grant to meet the ends of justice.

vii. Costs of the petition.

The record shows that this matter was certified as urgent on 6.9.2016 and after several court appearances the parties were given time frames within which to file their responses, which they all did and ultimately on 7. 12. 2016, the court directed that hearing of the petition proceeds by way of highlighting submissions on 18.1.2017. The said date was taken in court in the presence of all the advocates for the parties.

When this matter came up before me on 18.1.2017, it came as a surprise when counsel for the first Respondent applied for an adjournment on the grounds that she had just filed an application to stay a ruling allegedly made on 7.12.16, a position that was supported by counsels for the other Respondents but opposed by counsels for the petitioners and the interested parties who were clear that no such a ruling existed. The court record is clear that no such a ruling existed and the court even asked the Respondents advocates to peruse the court file in court to satisfy themselves on this position.

Nevertheless, I allowed the adjournment sought to pave way for the hearing and determination of the first Respondents application filed on 18.1.17 but directed that the petitioners do respond to the said application by close of business the next day, that is 19.1.2017 and fixed the hearing of the said application for 20.1.17. On 20.1.17, the first Respondent applied to withdraw the said application, but sought to proceed with the application now the subject of this ruling and since all the parties were ready to proceed, the two applications were argued together, hence this ruling.

At the hearing of the two applications, counsel for the second and third petitioners and the interested parties sought to rely on the contents of the affidavit filed by the first petitioner while counsel for the third respondent stated that he supported the applications.

Counsel for the first Respondent adopted the contents of the affidavit in support of her application and reiterated that this petition raises substantial points of law and cited the case of *Chunilal Mehta vs Century Spinning and Manufacturing Co.*[1]which sets out the considerations to be followed in applications of this nature. Counsel submitted that the said decision has been followed in two cases in this court, namely, *Justice Philip Tunoi & Another vs The Judicial Service Commission & Another*[2]and *Hon. Justice Kaplan H. Rawal vs Judicial Service Commission & Others*[3]and argued that in both

decisions the cases were referred to a bench of uneven number of judges.

The above decision were rendered by courts of coordinate jurisdiction. A decision of a court of co-ordinate jurisdiction is not binding.[4] While decisions of co-ordinate courts are not binding, these decisions are highly persuasive. This is because of the concept of judicial comity which is the respect one court holds for the decisions of another. As a concept it is closely related to *stare decisis*. In the case of *R.* v. *Nor. Elec. Co.*,[5] McRuer C.J.H.C. stated:-

> *".....The doctrine of stare decisis is one long recognized as a principle of our law. Sir Frederick Pollock, in his First Book of Jurisprudence, 6th ed., p. 321: "The decisions of an ordinary superior court are binding on all courts of inferior rank within the same jurisdiction, and though not absolutely binding on courts of co-ordinate authority nor on the court itself, will be followed in the absence of strong reason to the contrary…". (Emphasis added).*

In my opinion, I think that *"strong reason to the contrary"* does not mean a strong argumentative reason appealing to the particular judge, but something that may indicate that the prior decision was "*given without consideration of a statute or some authority that ought to have been followed*." I do not think *"strong reason to the contrary"* is to be construed according to the flexibility of the mind of the particular judge.

Talking about consideration of a statute and authority or authorities that ought to have been followed, it is necessary for the court to satisfy itself whether or not the said authorities apply to this particular case. I hold the view that those decisions are not binding to this court, that the facts of this case can be distinguished from the facts in the above decisions.

Upon being prompted by the court counsel for the first applicant/Respondent submitted that the Supreme court of Kenya in the above cited case did not settle the questions of law now raised in the applications before the court now, and that it is not necessary for all the tests laid down in the decision by the Supreme Court of India to be present and argued that the presence of at least one of them is sufficient to warrant the court to allow the application. In a further response to a question by the court whether there was delay in filing this application given the fact the case had already been fixed for hearing with the involvement of all the parties, counsel submitted that there was no delay.

Mr. Njoroge for the second Respondent/Applicant relied on the grounds and affidavit in support of the application and adopted the submissions by counsel for the first Respondent/Applicant and added that the nature of the application now under determination is such that it is not a pleading, hence, the question of pleadings having been being closed cannot arise since essentially what is being sought is courts directions under article **165 (4)** of the constitution. Counsel explained that there was confusion as to the nature of the directions given on 7th December 2016 and that in the intervening period there was the High Court vacation, hence there was no delay.

Counsel insisted that the key issue is whether or not there is a substantial point of law and referred to anexture number JN1 annexed to the application which shows that the initial proposal at the time of deliberating the 2010 constitution was no have a constitutional court created to handle constitutional matters but the said proposal was dropped. With respect, what is before me now is the constitution of Kenya 2010 as it was promulgated but not the many views that may have been flouted and may not have found their way into the constitution.

Counsel argued that the matters to guide the court are the complexity of the issues which denotes weighty points of law which are difficult to unravel, issues that have not been dealt with before. Counsel also drew the attention of the court to the effect of the prayers sought in the petition which in his view are drastic. These include the possible dissolution of parliament which has consequences and insisted that there is no alternative date for a general election under the constitution in the event of such dissolution. Counsel termed this as a complex point of law which goes to the root of the constitution. Counsel also submitted that matters like the term of parliament, the president, governors and county assembly are of great public importance and this warrants more judicial minds.

Counsel further pointed out that matters which were of comparatively lesser public importance like the Rawal case and the Tunoi case were referred to a bench of uneven number of judges and urged the court to consider what he referred as critical issues raised in this petition and allow the application(s).

Mr. Ogosso for the third Respondent supported the two applications and adopted their submissions and authorities.

Mr. Wambola for the first petitioner vehemently opposed the applications and relied on the first petitioners relying affidavit. He submitted that no law has ever been enacted to give effect to the two thirds gender rule and that the question as to whether the country has money to hold a general election in the event of a dissolution is not a substantial point of law.

Counsel submitted that a substantial point of law must be novel, never raised before and must be a moot question which must be raised for the first time. Counsel submitted that the issue of the two third gender rule has been dealt with by the Supreme Court in the earlier referred to advisory opinion in which the Supreme Court determined that parliament had a constitutional obligation to enact a law to implement the two third gender rule.

Counsel also submitted that a decision under article **165 (4)** of the constitution is not a right but a matter of the courts discretion which entails the court to take into account several considerations such as the conduct of the applicant and insisted that the applicants conduct is such that they should not get the orders sought and submitted that this application is a delaying tactic. Counsel maintained that there is nothing complex in this matter since the provisions of article **261** are clear. It was also counsels submission that the president, and governors are not members of parliament, hence the applicants fear of the consequences of a dissolution are unfounded. Counsel was also clear that all the considerations enumerated in the decision by the supreme court of India cited above must be present for the court to grant such a application.

Mr. Ogolla and Mr. Kirui, Counsels for the second and third petitioners and Mr. Kigera counsel for the interested party supported the arguments advanced by the first petitioners counsel while Mr. Mbatia, counsel for the *amicus curiae* left the issues to the court to determine. Mr. Ogolla reiterated that both the senate and the national assembly have not passed the necessary legislation.

The key issue for determination is whether or not the applicants have demonstrated good grounds to warrant this court to refer this petition to the Hon. the Chief Justice to empanel a bench of an uneven number of judges to hear and determine this matter. Does this petition raise a substantial question of law under clause article **165 (3) (b)** or **(d)** of the constitution reproduced below in this ruling? This warrants a close examination of the said provisions and the issues raised by this petition.

The general rule in applications of this nature was laid down by the Court of Appeal in *Peter Nganga Muiruri vs. Credit Bank Limited & Another**[6]*** in which the Court held that any single Judge of the High Court in this country has the jurisdiction and power to handle a constitutional question. Therefore the decision whether or not to certify a matter as raising a substantial question of law is an exercise of judicial discretion as opposed to a right. However like all discretion, that power must be exercised judiciously and not on caprice, whim, likes or dislikes.

Discretion vested in the court is dependent upon various circumstances, which the court has to consider among them the need to do real and substantial justice to the parties to the suit.[7] Discretion must be exercised in accordance with sound and reasonable judicial principles. The King's Bench in *Rookey's Case*[8] stated as follows:-

> *"Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is*

a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with."

Writing on judicial power, Chief Justice John Marshall wrote the following on the subject:-

*"Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.**[9]***

I am clear in my mind that the decision whether or not to empanel a bench of more than one Judge ought to be made only where it is absolutely necessary and in strict compliance with the relevant constitutional, statutory provisions and relevant precedents. I with respect associate myself with the position adopted by **Majanja, J** in *Harrison Kinyanjui vs. A. G. &Another*[10]where he held that:-

"the meaning of 'substantial question' must take into account the provisions of the Constitution as a whole and the need to dispense justice without delay particularly given 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."

Also relevant is the case of *Vadag Establishment vs. Y A Shretta & Another**[11]* where the High Court held that:-

"It is also my considered view that a High Court whether constituted by one judge or more than one judge exercise the same jurisdiction and neither decision can be said to be superior to the other. True, two heads are better than one, but in terms of the doctrine of stare decisis whether a decision is delivered by one High Court Judge or handed down by a Court comprised of more judges, their precedential value is the same."

Article **165 (3)** of the Constitution provides as follows:-

(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.

The only constitutional provision that expressly permits the constitution of bench of more than one High Court judge is Article **165(4)** which requires that for the matter to be referred to the Chief Justice under the said provision, the High Court must certify that the matter raises a substantial question of law in the following instances:-

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

b. 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.

In my view, the determination of such issues is a judicial one, the Court is obliged either on its own motion or on an application of the parties to the cause to identify the issues which in its view raise substantial questions of law. Therefore the mere fact that parties are of the view that the matter falls under Article **165(4)** does not necessarily bind the Court in issuing the said certification.

The mere fact that a substantial question of law is disclosed does not suffice unless the issue also arises as to 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.

As to whether this is the case is a matter for judicial determination based on the facts of the particular case and the law involved. This was appreciated in *Community Advocacy Awareness Trust & Others vs. The Attorney General & Others**[12]*** where it was noted that:-

"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."

In the above case the Court proceeded to note that the promulgation of the Constitution of Kenya, 2010 brought into being a whole new law that in every respect raises substantial questions of law because the Constitution is new. This Constitution has been recognised by the Supreme Court as being transformative in nature. It has 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 one judge, other judicial business would definitely come to a standstill 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**[13]* would never be realised.

In *Chunilal Mehta v. Century Spinning and Manufacturing Co*[14], the Supreme Court of India, after considering a number of decisions on the point, laid down the following test for determining whether a question of law raised in the case is substantial question of law or not :-

> *"…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."*

A point of law which admits more than two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law it 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.[15] 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.[16] 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*.[17]

The question of what constitutes a "substantial question of law" was further substantiated by the Supreme Court of India in the case of *Hero Vinoth vs Seshammal*[18]in which it laid down the position that a question of law having a material bearing on the decision of the case (that is a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. In my view, without delving into the merits or otherwise of the petition, I find that there are specific provisions of the law particularly in the constitution that govern the issues before this court.

The test rendered by the Supreme Court of India for determining whether a matter raises substantial question of law are therefore: **(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 highest court of the land, or **(4)** the issue is not free from difficulty, or **(5)** it calls for a discussion for alternative view.

In my view, the above considerations offer proper guidelines and an insight in determining whether or not a matter raises “a substantial question of law” for the purposes of Article **165(4)** of the Constitution. The Court may also consider 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. These however are mere examples since the Article employs the word “includes.” Accordingly, the list cannot be exhaustive and the Courts are at liberty to expand the grounds as occasions demand.

Even before the promulgation of the current Constitution, it was appreciated in *Kibunja vs. Attorney General & 12 Others (No. 2)**[19]* 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."*

The Court must adopt a holistic approach to the matter at hand. The mere fact that one factor is found to exist does not automatically qualify the matter for certification under Article **165(4)** of the Constitution.[20] In my view the issue is not merely to do with complexity or difficulty of the case in the views of the applicant but ought to be one that turns on cardinal issues of law or of jurisprudential moment.[21] In my view the mere fact that a matter is novel or jurisprudentially challenging does not *ipso facto* elevate it to a substantial question of law for the purposes of Article **165(4)** of the Constitution.[22] With due respect any judge worth his or her salt must be prepared to deal with and determine novel questions whether complex or otherwise since the Court cannot abdicate its duty of determining disputes. In my view the question herein is whether or not parliament has enacted the requisite legislation to give effect to the two third gender rule. To me it is a matter of the application of such principles to the matter at hand. Such application, in my view does not constitute a substantial question of law for the purposes of Article **165(4)** of the Constitution.

In my view a High Court Judge ought not to shy away from his constitutional mandate of interpreting and applying the Constitution. Whereas the Constitution permits certain matters to be heard by a numerically enlarged bench, that is an exception to the general legal and constitutional position and it is in my view an option that ought not to be exercised lightly.

Though the expression "substantial question of law" has not been defined in the constitution, the true meaning and connotation of this expression is now well settled by various judicial pronouncements among them the earlier cited decisions. There is a difference between question of law and substantial question of law. It is not a mere question of law but a substantial question of law that is required. A question of law will be a substantial point of law if it directly and substantially affects the rights of the parties. In order to be "substantial" it must be such that there may be some doubt or difference of opinion or there is room for difference of opinion. If the law is well-settled by the Supreme Court, the mere application of it to particular facts would not constitute a substantial question of law. This position was well stated by the Supreme Court of India which authoritatively held that once the Supreme Court has settled a question of principle, its application to the facts of a case is not a substantial question of law.[23]

As correctly pointed out by counsel for the first petitioner, the supreme court of Kenya in advisory opinion number **2** of 2012 rendered its opinion in the matter of articles **81, 27 (4) , (6), (8), 96, 97, 98, 177 (1) (b), 116, 125 and 140** of the constitution relating to the principle of gender representation in the National Assembly and the Senate and subsequently the National Assembly extended the period within which to pass the requisite legislation to August 2015 which period has since lapsed. I have carefully studied the said opinion and I am persuaded that the issues raised by the applicants in the applications before me are not new and that the Supreme Court of Kenya rendered its opinion on the issue. If the question of law termed as substantial question stands already decided by a larger bench of the High Court or by the Court of Appeal or by the Supreme Court, its mere wrong application to the facts of the case would not be termed to be a substantial question of law.[24]

Regarding the timing of these two application, as pointed out earlier, this petition was by consent of the parties fixed for hearing on 18th January 2017 after directions were taken in the presence of the parties. At the time of taking directions or even before there was no attempt to raise the issue before the court. No convincing explanation was rendered to explain why it took so long for the Respondents/applicants to realize that this petition raises substantial points of law.

Sufficient cause explaining a delay is a condition precedent for exercise of discretion by the Court for condoning the delay. If delay is not properly, satisfactorily and convincingly explained, the court cannot condone the delay on sympathetic grounds alone. It is a fundamental principle that courts are required to weigh the scale of balance of justice in respect of both parties. To my mind the delay has not been sufficiently explained. I find nothing to show that the delay is excusable. I hold the view that the interests of justice and circumstances of this case do not dictate a lenient exercise of the discretion of the court in

favour of the applicants due to the above reasons.

In view of my findings above, I find that the applicants have not satisfied the threshold laid down by the constitution and decided cases and accordingly I find that this is not a proper case for certification under article 165 (4) of the constitution for the Hon. The Chief Justice to empanel a bench of uneven number of judges to hear and determine this petition. Accordingly I dismiss the applications dated 19.1.2017 and 20.1.2017 with costs to the petitioners and the interested party.

Orders accordingly

Dated at Nairobi this **25th** day of **January** 2017

John M. Mativo

Judge

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[1] AIR 1962 SC 1314

[2] HC Pet No. 244 of 2014

[3] HC Pet No. 386 of 2015

[4] R. v. Nor. Elec. Co., [1955] O.R. 431; R. v. Groves (1977), 17 O.R. (2d) 65.

[5] Ibid

[6] Civil Appeal No. 203 of 2006

[7] See Sir Dinshah F. Mulla, Supra, at page 1381.

[8] [77 ER 209; (1597) 5 Co.Rep.99]

[9]Osborn V. Bank of the United States, 22 U. S. 738 {1824}.

[10] {2012} eKLR

[11] Nairobi High Court (Commercial & Admiralty Division) Misc. High Court Civil Suit No. 559 of 2011

[12] High Court Petition No. 243 of 2011

[13] Cap 21, Laws of Kenya

[14]Supra

[15] See Santosh Hazari vs. Purushottam Tiwari {2001} 3 SCC 179

[16] Ibid

[17] Ibid

[18] {AIR} 2006 SC 2234

[19] {2002} 2 KLR 6

[20] Wycliffe Ambetsa Oparanya & Others vs Director of Public Prosecutions & Others, H.C. CON. PET. NO. 561 of 2015.

[21] Ibid

[22] Ibid

[23] see State of Kerala v R.E.D'Souza (1971) 3 SCR 71

[24] See Kondiba Dagandu Kadam vs Sautiribai Sopan Gujar {AIR} 1999 SC 2213