REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 175 OF 2016

IN THE MATTER OF ARTICLES 2 (1), 3(1), 10, 19, 20 (1), (2), & (4), 21 (3), 23, 24 & 25 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 35 (1), (B), 43 (1), (F), 47 & 50 OF THE CONSTITUTION

AND

IN THE MATTER OF KENYA NATIONAL EXAMINATIONS COUNCIL ACT, 2012 AND THE RULES THERE UNDER

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACT, 2015

AND

IN THE MATTER OF THE CANCELLATION OF THE RESULTS OF 131 CANDIDATES OF THE KENYA CERTIFICATE OF SECONDARY EDUCATION EXAMINATIONS HELD AT KABOSON GIRLS SECONDARY SCHOOL

BETWEEN

CHEPKORIR REHEMA (SUING THROUGH FATHER AND

NEXT FRIEND) & 130 OTHERS.....PETITIONERS/APPLICANTS

VERSUS

KENYA NATIONAL EXAMINATIONS COUNCIL.....RESPONDENT

RULING

The petitioners sat for the Kenya Certificate of Secondary Examination in the year 2015 at Kaboson Girls Secondary School. On 2nd March 2016 the Respondent wrote to the Head teacher of their school communicating cancellation of their English 101 results citing an irregularity, namely collusion, contrary to the Kenya National Examination Council Act.[1] A request for the review of the said decision was unsuccessful, hence this petition seeking several declaration/orders against the Respondent.

On 25th July 2016, the petitioners counsel applied orally for an order that this court certifies that this petition raises substantial questions of law and refer the file to his Lord ship the Hon. the Chief Justice for appointment of a bench of an uneven number of judges pursuant to the provisions of article **165 (4)** of the Constitution to hear and determine the petition.

In his written submissions, the petitioners counsel submitted that this petition raises substantial questions of law and cited the famous Supreme Court of Indian case of *Sir Chunilal V. Mehta & Sons Ltd vs The Century Spining Ltd**[2]*in which the applicable principles were enunciated and also *Robert N. Gakuru & Another vs The County Government of Kiambu & Another*[3] in support of his argument that this is a proper case for empanelment of an uneven number of judges.

In counsels submission, this suit raises substantial points of law and is of general public importance in that it attracts high public interest, that it directly and substantially affects the petitioners future, their right to be heard, natural justice, and access to education and that it raises novel and justifiable questions, such as constitutionality of section 10 (2) (e) of the Kenya National Examinations Council Act[4] and that the matter is complex.

In opposition, counsel for the Respondent submitted that the petitioner admits the questions raised have been determined before and that the petitioners have not laid before the court any material to demonstrate that the matter warrants to be heard by a bench of uneven number and added that cases of similar nature have been determined such as *The Kenya National Examinations Council vs Republic ex parte Geoffrey Gathenji Njoroge & 9 Others*[5] and *R vs The Kenya National Examinations Council & Another ex parte Busara Forest View Academy Ltd & 94 Other*s.[6]

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 the matter. Does this petition raise a substantial question of law under article **165 (3) (b)** or **(d)** of the constitution reproduced below? This warrants a close examination of the said provisions, the issues raised by this petition and the relevant authorities.

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**[7]* 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.[8] Discretion must be exercised in accordance with sound and reasonable judicial principles. The King's Bench in *Rookey's Case*[9] 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.**[10]***

In my view, 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**[11]when he strated 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**[12]*** 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**[13]*** 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**[14]*** would never be realised.

In *Chunilal Mehta v. Century Spinning and Manufacturing Co*[15], 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.[16] 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.[17] 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*.[18]

The tests 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.

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*[19]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 the question of violation of article 47 of the constitution and the principles or natural justice have been determined in numerous cases in this country[20] and in different jurisdictions and the legal points involved have been well stated and expounded in numerous court decisions and law books and such principles cannot be said to be new or complex in any manner.

Similarly, Fair Administrative Action Act[21] is clear and elaborate on the right to be heard and its provisions have been judicially construed and applied in many cases in this court. The constitutionality or otherwise of the challenged provisions calls for application of well laid down principles of statutory interpretation whose cannons have been repeatedly stated in many decisions of this court, hence, there is nothing new in interpreting the said provisions.

In my view, the guidelines laid down by the supreme court of India cited above offer 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. 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 2010 Constitution, it was appreciated in *Kibunja vs. Attorney General & 12 Others (No. 2)**[22]*** 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.[23] 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.[24] 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.[25]

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 the law protects the integrity of examinations, whether the petitioners were engaged in examination malpractices and if so, whether the legality of the decision to cancel the results. To me, these are not complex issues of law nor are they new.

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 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 Superior Court has settled a question of principle, its application to the facts of a case is not a substantial question of law.[26]If the question of law termed as substantial question stands already decided by 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.[27]

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.

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 applicants oral application under article 165 (4) of the constitution with costs to the Respondent.

Orders accordingly

Signed, Dated, Delivered at Nairobi this **19th** day of **May,** 2017

John M. Mativo

Judge

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[1] Act No 29 of 2012

[2] AIR 1962 SC 1314

[3] Pet No. 602 of 2014

[4] Supra

[5] Civil App No 226 of 1996

[6] NBI HC Misc Case No. 4 of 2009

[7] Civil Appeal No. 203 of 2006

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

[9] [77 ER 209; (1597) 5 Co.Rep.99]

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

[11] In Harrison Kinyanjui vs. A. G. &Another {2012} eKLR

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

[13] High Court Petition No. 243 of 2011

[14] Cap 21, Laws of Kenya

[15]Supra

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

[17] Ibid

[18] Ibid

[19] {AIR} 2006 SC 2234

[20] See Scenaries Ltd vs National Land Commission Pet No 1 of 2016 and Ernst & Young LLP vs Capital Markets Authority & Another Pet No 385 of 2016

[21] Act No. 4 of 2015

[22] {2002} 2 KLR 6

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

[24] Ibid

[25] Ibid

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

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