



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW MISC. APPLICATION NO. 447 OF 2017**

**IN THE MATTER OF: AN APPLICATION BY GLADWELL OTIENO, FOR ORDERS OF  
MANDAMUS AND PROHIBITION**

**AND**

**IN THE MATTER OF: THE ELECTIONS ACT**

**IN THE MATTER OF THE ELECTIONS (VOTER REGISTRATION) REGULATION 2012**

**AND**

**IN THE MATTER OF AND/OR THE VIOLATION OF ARTICLES 10, 27, 38, 47, 50, 81, AND  
236 OF THE CONSTITUTION, 2010**

**AND**

**IN THE MATTER OF AND/OR BREACH OF SECTIONS OF THE ELECTIONS ACT AND  
REGULATIONS**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORMS ACT, CHAPTER 26,  
LAWS OF KENYA**

**AND**

**IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**INDEPENDENT EELCTORAL AND BOUNDARIES COMMISSION....1<sup>ST</sup> RESPONDENT**

**JUBILEE PARTY.....INTERESTED PARTY**

**GLADWELL OTIENO..... EX PARTE APPLICANT**

## RULING

These proceedings are the subject of the Notice of Motion dated 18<sup>th</sup> July, 2017 by which the ex parte applicant herein, **Gladwell Otieno**, seeks the following orders:

- 1) **AN ORDER OF MANDAMUS** do issue to compel the Respondent to publish and open up for public inspection the register of voters as clustered per polling station and to take into account submissions by concerned persons and revise the register accordingly within a reasonable time before the general elections scheduled for the 8<sup>th</sup> August 2017.
- 2) **AN ORDER OF MANDAMUS** to compel the Respondent to publicize and gazette the final register of voters per polling station within such time as reasonable before the general elections scheduled for the 8<sup>th</sup> August 2017
- 3) **AN ORDER OF PROHIBITION** do issue to prohibit the Respondent and its officers from deploying a voter register for use in the general election before the same is subjected to a public inspection as required under the law.
- 4) **SUCH OTHER ORDERS** and reliefs as the Honourable Court may deem appropriate in the circumstances.
- 5) **COSTS** of these proceedings be provided for.

2. The application is based on the following grounds:

### Illegality

1. The Respondent has failed and or refused to comply with the provisions of Section 6 of the Elections Act and Regulation 33 of the Elections (Voter Registration) Regulations which require that the register of voters be opened up for inspection within 90 days of the date of a general election.
2. That in failing to open up the register of voters for public inspection within a sufficient time period, the Respondent is violating the provisions of the constitution, the Act and the Regulations.

### Irrationality and unreasonableness

3. The failure by the Respondent to open up the register of voters for inspection is irrational and unreasonable.
4. The failure by the Respondent to open the register of voters is in bad faith and/or for an improper motive or purpose with an intention to undermine free, fair and democratic electoral processes in the Republic of Kenya.

### Unreasonableness

5. The failure to open up the register of voters for public inspection is unreasonable and ultra vires express provisions of the Constitution, the Elections Act and Regulations made thereunder.
6. The failure to open up the register of voters for public inspection and gazette of final register of voters cannot be reasonably justifiable in an open democratic society where the Rule of Law takes precedence.

**7. It is just and fair that the Judicial Review Orders sought herein be granted.**

**Legitimate expectation**

**9. The Ex Parte Applicant has a legitimate expectation that the Respondent shall at all times be guided by the laws of the Republic in executing its mandate and that the Constitution shall at all times be complied with and its principles respected when the Respondent makes decisions in fulfilment of its functions.**

**10. The Applicants have a legitimate expectation that the provisions of the Constitution, the Elections Act and Elections (Voter Registration) Regulations 2012 will be respected and adhered to by all persons including the Respondent.**

3. On 25<sup>th</sup> July, 2017 while appreciating the urgency of these proceedings as they have an impact on the general elections due in slightly more than a week, I directed that the parties appear for hearing on 28<sup>th</sup> July 2018 in order to enable the Respondent and the interested party herein, Jubilee Party, to respond to the application.

4. However on the very day of the hearing, 28<sup>th</sup> July, 2017, Jubilee Party filed an application seeking the following orders:

**1. This application be certified urgent and heard forthwith.**

**2. THAT this Honourable court be pleased to certify this Application as one raising a substantial question of law to be heard by uneven number of judges, being not less than three, assigned by the Chief Justice Pursuant to Article 165(4) of the Constitution.**

**3. THAT the costs of the application be in the course.**

5. According to the interested party, the ex parte applicant's application raises questions on public inspection of voters' register and this is a matter that touches on the credibility of the elections and on the importance of public participation.

6. To the interested party, this matter raises substantial questions of law that directly affects the rights of the parties and the Kenyan public enshrined in Article 1(2) and 38 of the Constitution as read with Articles 101(1), 136(2), 180(1) and 177(1)(a) of the Constitution.

7. To the interested party, the Petition (sic) raises complex and novel issues of public importance that could potentially have grave ramifications on the conduct of the general elections to be held on the 8<sup>th</sup> August, 2017. It therefore contended that it is imperative that this application be allowed so as to protect the constitutionality of the said general elections.

8. In its view, the issues raised have not been settled by pronouncements of Courts superior to this Court.

9. These facts were expounded by the submissions made on behalf of the interested party by its learned counsel **Mr Kiragu Kimani** which position was supported by **Mr Nyamodi** learned counsel for the Respondent.

10. The ex parte applicant however opposed the application through her learned counsel, **Mr Otieno Willis**.

11. I have considered the submissions made by counsel for the parties herein. The general rule in these sort of matters was laid down by the Court of Appeal in **Peter Nganga Muiruri vs. Credit Bank Limited & Another Civil Appeal No. 203 of 2006** 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 judicially and judiciously and not on caprice, whim, likes or dislikes.

12. As has been held by this Court before, 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 and statutory provisions. Despite appreciably great strides made in the expansion of the Judiciary in the recent past, there is definitely much more to be done with respect to achieving the spirit of Article 48 of the Constitution on access to justice. Accordingly, this Country still does not enjoy the luxury of granting such orders at the whims of the parties. Judicial resources in terms of judicial officers in this country are still very scarce and although the time taken for hearing a petition by a single judge may not be any different from that taken by a bench empanelled pursuant to Article 165(4) of the Constitution, it must be appreciated that the empanelling of such a bench invariably leads to delays in determining cases already in the queue hence worsening the backlog crisis in this country. I with respect associate myself with the position adopted by **Majanja, J** in **Harrison Kinyanjui vs. Attorney General & Another [2012] eKLR** 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.”**

13. I also defer to the decision in **Vadag Establishment vs. Y A Shretta & Another Nairobi High Court (Commercial & Admiralty Division) Misc. High Court Civil Suit No. 559 of 2011** where this Court held:

**“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.”**

14. 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.***

15. Therefore 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 in the following instances:

**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.**

16. Since the determination of such issue 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.

17. According to the above provision, it does not suffice 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. Similarly 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.

18. 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 High Court Petition No. 243 of 2011 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.”**

19. In that 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 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.

20. 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.”**

21. 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*."**

22. The Indian tests 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 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.

23. To my mind 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.

24. 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.

25. 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) [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.”**

26. In my view, the Court must adopt a holistic approach to the matter at hand. In other words, 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.

27. In this case, the application is based on two intertwined grounds. The first one is that the determination of these proceedings will be bound to impact not only on the applicant’s rights but the rights of over 19 million registered voters in Kenya. The fact that the decision will impact on such a large number of persons, according to the interested party and the Respondent qualifies the matter as a proper candidate for certification under Article 165(4) of the Constitution.

28. The second ground for seeking the said certification was that there is a conflict as to whether the Respondent has in fact complied with sections 6 and 12 of the ***Elections Act*** as read with Regulation 27 of the Elections Regulations.

29. With respect to the issue whether the decision will impact on the electorates, it is obvious that any decision that seeks a constitutional interpretation or application impacts on not only the citizenry but all persons who are subjected to the Constitution leave alone the registered voters. It has however not been contended and hopefully it will never be the case that as long as a matter impacts on the citizenry it must be heard by an enlarged panel of judges. As has been held time and again there is no magic in empanelling a bench.

30. With respect to the issue of privacy of persons who are not parties to these proceedings, there is no dearth of cases in that sphere. This Court had occasion to deal with the issue in **Trusted Society of Human Rights Alliance & 3 others vs. Judicial Service Commission & another [2016] eKLR** where it expressed itself as hereunder:

**“Article 31 of the Constitution protects the privacy of every person in the following terms:**

***Every person has the right to privacy, which includes the right not to have-***

***a) Their person, home or property searched;***

***b) Their possessions seized;***

***c) Information relating to their family or private affairs unnecessarily required or revealed; or***

***d) The privacy of their communication infringed.***

**In my view where a person is seeking purely public information, he or she does not have to demonstrate a specific interest in the information. However, Article 31 of the Constitution requires that information relating to a person’s family or private affairs ought not to be unnecessarily required or revealed. To me it does not matter whether that information was**

**acquired by the person in possession thereof in his official capacity or not. If that information is not necessary it ought not to be revealed and a reading of Article 31 in my view seem to suggest that the burden of showing the necessity to reveal such information falls on the person seeking the same. In other words where a person seeks information relating to a person's family or private affairs, he ought to lay a basis for the same. This is necessarily so since Article 45 of the Constitution recognises the family as the natural and fundamental unit of society and the necessary basis of social order, which is entitled to enjoy the recognition and protection of the State."**

31. It is therefore clear that the issue of privacy is not a moot issue in this jurisdiction and this Court has power to fashion remedies where the same are deserved in order not to infringe upon the rights of other parties. That is a task which this Court routinely deals with and it does not require an enlarged bench for this Court to do that.

32. It is deposed that this matter has not been dealt with by a Court superior to this Court. In other words it is contended that as far as the other Court are concerned this matter is novel. I have held elsewhere in this ruling that as far as this Court is concerned the privacy provisions in the Constitution are not jurisprudentially novel. Whereas a superior court than this Court may well overturn the decisions of this Court, a High Court's decision no matter its numerical strength does not bind another High Court no matter how composed. Therefore where a person seeks that a decision of the High Court be reconsidered the option is to appeal against the decision and not to seek the empanelment of a larger bench.

33. Even if the issues herein were novel, with due respect novelty alone with due respect does not qualify the matter as raising a substantial question of law though it is one of the many factors to be considered. 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. 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. 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 to another organ.

34. I associate myself with the holding 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** that:

**"A court of law would not be entitled in our view to abdicate its cardinal role of making a determination...No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. 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...We approve and adopt the principles so ably expressed by both *Lord Roskil* and *Lord Templeman* in the case of *ASHMORE v CORP OF LLOYDS [1992] 2 ALL E.R 486* at page 488 where *Lord Roskil* states:**

**"It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges' time as is necessary for the proper determination of the relevant issues."**

**At page 493 of the same case *Lord Templeman* delivered himself thus:**

**... "...The only legitimate expectation of any plaintiff is to receive justice. Justice can only be achieved by assisting the judge."**

35. This was the position adopted by Nyamu, J in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008]**

**KLR 728** when he expressed himself as follows:

**“In the long run in the interest of the overriding objectives of case management, no group of litigants no matter how privileged are entitled to more judicial time than any other. Judicial time is an expensive resource which must be apportioned fairly to the entire spectrum of the work in the Court. Every file is important. For Courts to continually inspire confidence of the Court users and litigants, they must have a very sharp sense of proportionality, fairness and equity in the allocation of judicial time.”**

36. In my view the question herein calls for the application of the statutory provisions and regulations. Such application, in my view does not constitute a substantial question of law for the purposes of Article 165(4) of the Constitution in order to require an enlarged bench.

37. As was rightly submitted by **Mr Otieno** learned counsel for the applicant, the general elections are due in less than 10 days. Though the interested parties contended that the empanelment of the bench may be done within a very short time, it is not lost on this Court that today is the last day of this term and I am not aware of judges who are always waiting on the wings to form such benches. Such benches must only be formed where it is absolutely necessary to remove Judges from their usual cause lists.

38. 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.

39. Whereas this Court appreciates that the decision of an enlarged bench may well be of the same jurisprudential value in terms of precedent or *stare decisis* principles as a decision arrived at by a single High Court judge, the Constitution itself does recognise that in certain circumstances it may be prudent to have a matter which satisfies the constitutional criteria determined by a bench composed of numerically superior judges and I have attempted to outline some of the issues for consideration hereinabove.

40. From the submissions, it seems that the application is based partly on public interest. In my view whereas that is also a factor that can be considered by the Court, the mere fact that the matter is of great public interest or substantial national importance does not necessarily qualify it to amount to a substantial question of law in order to warrant reference to the Chief Justice under Article 165(4) aforesaid. Public interest and national importance are by themselves not necessarily grounds for the empanelling of a bench of not less than three judges as these are matters which the Court deals with on a daily basis. To make a determination on whether or not to refer the matter to the Chief Justice pursuant to Article 165(4) of the Constitution solely on public interest and national importance would amount to elevating such matters to a different class from other disputes and that in my view would amount to unjustified discrimination in dispute resolution mechanisms. As was held in **Uhuru Highway Development Limited vs. Central Bank of Kenya Limited & 2 Others Civil Appeal No. 36 of 1996**, litigation is not a luxury as justice is for all and all must have equal access to courts as well as equal priorities in being heard. Sections 1A and 1B of the *Civil Procedure Act* require the Court to take into account ***“the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing”*** See **Harit Sheth T/A Harit Sheth Advocate vs. Shamascharania Civil Application No. Nai. 68 of 2008**.

41. It is, in my view, only in cases contemplated under Article 165(4) of the Constitution that the Court will certify that a matter raises a substantial issue of law.

42. In the circumstances, I decline to certify that this matter raises a substantial question of law to warrant reference of the same to the Chief Justice as required under Article 165(4) of the Constitution and the application for the same fails and is hereby dismissed.

43. The costs will be in the cause.

44. It is so ordered

**Dated at Nairobi this 31<sup>st</sup> day of July, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Miss Orero for Mr Otieno for the applicant**

**Mr Nyamodi with Mr Olaha for the Respondent**

**Mr Kiragu Kimani with Mrs Githae for the Interested Party**

**CA Mwangi**