



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**PETITION. NO. 442 OF 2015**

**BETWEEN**

**KEVIN TURUNGA ITHAGI.....PETITIONER**

**AND**

**HON. JUSTICE HEDWIG ONGUDI**

**HON. BENSON IRERI**

**HON. BRYAN KHAEMBA**

**HON. ABDILATIF SILAU**

**HON. DERRICK KUTO**

**HON. SINKIYAN TOBIKO**

**(Being sued as the officials of THE**

**KENYA MAGISTRATES AND JUDGES**

**ASSOCIATION).....1<sup>ST</sup> RESPONDENT**

**REGISTRAR OF SOCIETIES.....2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

1. This is the third ruling made by myself following a formal application, filed after the filing of the Petition. The first concerned an application for Conservatory Orders. I rendered myself on the same on 26<sup>th</sup> October 2015. The second was in regard to an application for the review of my orders of 26<sup>th</sup> October 2015. A ruling on review was delivered by myself on 2<sup>nd</sup> November 2015. The Petitioner then with the leave of the court filed an amended Petition on 11<sup>th</sup> November 2015.

2. The amended Petition added a new Respondent in the Office of the Registrar General. The 1<sup>st</sup> Respondent Association quickly held the view that the amended Petition raised substantial questions of

law warranting the empanelment of a bench under Article 165(4) of the Constitution consisting of an uneven number of judges of not less than three.

## **Background**

3. The Petitioner who simply describes himself as “a male adult of sound mind residing and working for gain in Nairobi”, filed the original Petition on 19<sup>th</sup> October 2015 pursuant to Articles 165(3)(d) (ii) and 258 of the Constitution. Named as the original Respondent through its six officials, was the Kenya Magistrates and Judges Association (“**the 1<sup>st</sup> Respondent**”). The Petitioner then alleged that various Articles of the Constitution were under threat of violation. In particular Articles 10, 73 and 75 were pinpointed to be the Articles under the threat of violation by the 1<sup>st</sup> Respondent as well as its officials who were all described as State officers. It was also then the Petitioner’s case that the 1<sup>st</sup> Respondent was set to conduct the elections of a person to a constitutional office yet the 1<sup>st</sup> Respondent as well as its officials were in total breach and non-observance of various statutory provisions. It was contended that the Respondent was non-compliant. Additionally, it was also contended that the 1<sup>st</sup> Respondent wanted to undertake the elections without involving the only body constitutionally mandated to conduct such elections.

4. Fast-forward, the 1<sup>st</sup> Respondent, faced with a conservatory order halting not only the scheduled elections but also the convened annual general meeting, ensured compliance with the relevant statutory as well as the constitutional provisions leading to the ruling of 2<sup>nd</sup> November 2016 which allowed the 1<sup>st</sup> Respondent to proceed with its business.

5. Then came the amended Petition. It now additionally alleged that the 1<sup>st</sup> Respondent’s practice of allowing all judges of the superior court to vote and elect a representative of judges of the High Court to the Judicial Service Commission as established under Article 171(1) of the Constitution was inconsistent and contrary to Article 171(2)(d) of the Constitution. It was also further contended in the amended Petition that in purporting to be the sole body through which a judge and a magistrate is elected to represent High Court judges and magistrates in the Judicial Service Commission led to the disenfranchisement of several Judges and judicial Officers. The amended Petition ambitiously sought some sixteen declaratory orders. A declaration that Article 171(2) (d) of the Constitution in so far as it limits representation of judges to the Judicial Service Commission to only High Court judges is discriminatory as against judges of the Employment and Labor Relations Court and also the Environment & Land Court which are courts with equal status to that of the High Court was also sought.

## ***The application under Article 165(4)***

6. The 1<sup>st</sup> Respondent’s Notice of Motion filed on 23<sup>rd</sup> March 2016 seeks orders that the Petition be certified as raising substantial questions of law with the consequent result that the Petition ought to be heard by an uneven number of judges, not being less than three as may be assigned by the Hon. Chief Justice. The application was grounded on the fact that the amended Petition raised substantial and fundamental questions of law whose determination would impact on more than just the parties to the amended Petition.

7. The application was opposed by the Petitioner who held the view that though the amended Petition raised novel questions; they did not amount to “substantial questions of law” .

## ***Arguments in court***

8. The parties respective cases were urged before me by Mr.Elisha Ongoya appearing for the 1<sup>st</sup> Respondent and Ms. Njoki Gachihi appearing for the Petitioner.

## ***1<sup>st</sup> Respondent’s submissions***

9. Mr. Ongoya argued, and correctly so, that a substantial question is not one defined by law or statute but had to be determined on a case by case basis. Stating that the Petition and orders sought went beyond an ordinary dispute between the two parties, counsel stated that there was a question raised as to the composition of the Judicial Service Commission. Additionally, counsel added that the non-participation of some judges as well as the participation of some superior courts' judges in the election of a High Court judges' representative and a magistrates' representative to the Judicial Service Commission raised substantial issues of law which required more judges to think through.

10. Counsel identified and framed the following questions:

- i. Whether voting across cadres of judicial officers for their representatives to the Judicial Service Commission contravenes Article 171(2)(d) of the Constitution;
- ii. What impact would a finding in (i) above have on the previous compositions of the Judicial Service Commission and the decisions taken by the Judicial Service Commission ever since it was re-constituted under the Constitution of Kenya, 2010;
- iii. Whether Article 171(2)(d) of the Constitution of Kenya was discriminatory as against judges of the Employment and Labor Relations Court and Environment & Land Court; and
- iv. Whether the KMJA, in allowing Supreme Court judges and Court of Appeal judges to vote or be involved in the vote of High Court and a Magistrate representative to the Judicial Service Commission is inconsistent with the purposes and objectives or Article 171(2)(d) of the Constitution.

#### *Petitioner's Submissions*

11. Ms. Njoki Gachihi, advocating on behalf of the Petitioner, opposed the application on grounds that the Petitioner did not raise any substantial question of law as anticipated under Article 165(4) of the Constitution. Counsel stated that the questions raised by the Petition could be novel but did not meet the Constitutional threshold and neither were they complex.

12. To support her submissions and especially the proposition that certification under Article 165(4) of the Constitution is always the exception rather than the rule Ms. Gachihi cited the decision in **County of Government of Meru vs. Ethics and Anti- Corruption Commission [2014]eKLR**.

#### **Discussion and Determination**

13. I have considered the application alongside the amended Petition. I have also considered the arguments advanced by counsel. My view of the issue as to whether or not to certify the Petition as raising a substantial question of law is as follows.

14. Various decisions of the High Court have dealt with the question as to when there arises a substantial question of law as anticipated by Article 165(4) of the Constitution. It is unnecessary to rehash the principles the courts have set out save to point out that there is no controversy now that:

- a. There is no agreed definition as to what constitutes as a substantial question of law;
- b. The question and determination is always left to the discretion of each court faced with an application made pursuant to Article 165(4) of the Constitution;
- c. That the decision of one judge of this court is the same and has the same force as that of three or more judges; and
- d. The reference for empanelment is not a jurisdiction to be exercised lightly.

These principles may be easily traced in the cases of **Republic vs. President of the Republic of Kenya & 5 Others Ex P Wilfrida Itolodo & 4 Others [2013]eKLR**, **Martin Nyaga Wambora vs. Speaker of County Assembly of Embu [2014]eKLR**, **Philip K. Tunoi & Another vs. Judicial Service Commission & Another [2015]eKLR**, and **Delmonte Kenya Ltd vs. County Government of Muranga & Another [2016]eKLR** . See also the Indian Supreme Court case of **Chunilal Mehta -v- Century Spinning & Manufacturing Co. AIR [1962] SC 1314**.

15. In **Delmonte Kenya Ltd vs. County Government of Muranga & Another ( supra)**, this court stated as follows.

*“[10] Two factors emerge in the midst of the definition in the Chunilal Mehta’s case and the various local decisions.*

*[11] The reference for empanelment is a jurisdiction not to be lightly exercised. Secondly, where the Petition raises or deals with an issue of public import then the balance tilts in favour of empanelment especially if it is also an issue, the determination whereof would affect the rights of both the individual parties as well as the public at large or it is an issue which is yet to be determined and settled by the court or a court superior in hierarchy. The court, of course, must take into account the need to have the dispute resolved with little or no delay noting that the decision of a single judge has basically the same force as that of an empanelled bench.”*

16. Clearly factors which assist in the determination as to whether there is a substantial question of law must not be taken singularly and in isolation. The public interest may be considered but it is not necessarily the sole decisive factor as it is in the nature of constitutional petitions filed to enforce provisions of the Constitution to be matters of public interest: see **The County Government of Meru vs. The Ethics and Anti- corruption Commission [2014] eKLR**. Likewise, the novelty alone of a question raised in a Petition should not lead to the conclusion that there exists a substantial question of law. The Constitution 2010 is hardly out of its infancy and many novel questions including those involving interpretation are bound to arise. The totality of the circumstances always ought to be the ultimate determinant

17. In the instant case, I have reviewed and reconsidered the questions identified and isolated by the Respondent for the Court’s determination. The questions all emerge from the pleadings filed by the parties. They involve an interpretation of the Constitution and more specifically the provisions of Article 171(2). The questions raised are just not only novel. They will ultimately, once determined impact not only on the parties but also the wider public and the judicial fraternity in particular. They are issues which have not been considered previously. They also do not appear free from difficulty. They do not appear in my view to be part of the daily nuances the courts face in constitutional petitions and litigation even on matter of interpretation.

18. I come to the conclusion that considering all the various factors relevant to the instant application, I am satisfied that the issues raised herein invite substantive questions of law as contemplated by Article 165(4) of the Constitution. It justifies a certification and ultimately the assignment of the Petition for determination by an uneven number of judges of this court numbering not less than three.

19. I allow the application dated 23 March 2016 and direct that the Petition be transmitted to the Chief Justice immediately for his Lordship’s action under Article 165(4) of the Constitution.

20. The costs of application will follow the event.

**Dated, signed and delivered at Nairobi this 31<sup>st</sup> day May, 2016**

**J.L. ONGUTO**

**JUDGE**