REPUBLIC OF KENYA

IN THE HIGH COURT OF KENTIA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSOLIDATED PETITION NO 187 OF 2016

IN THE MATTER OF: VIOLATION OF CONSTITUTIONAL RIGHTS AND PRIVILEGES UNDER ARTICLES 1(1)&(2), 6(2), 10, 63(1) AND (2)(D)(II) & (III), 123, 186(1), 187(1)(A) & 2(A) & (B), 189(2), 190(3)(A) AND PART 2 OF THE FOURTH SCHEDULE OF THE CONSTITUTION

IN THE MATTER OF: THE INTENDED PRIVATIZATION OF THE PUBLIC SECTOR OWNED / CONTROLLED SUGAR COMPANIES

IN THE MATTER OF: THE INTENDED PRIVATIZATION OF SOUTH NYANZA SUGAR COMPANY, NZOIA SUGAR COMPANY, CHEMELIL SUGAR COMPANY, MUHORONI SUGAR COMPANY AND MIWANI SUGAR COMPANY

IN THE MATTER OF: THE VIOLATION OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE

BETWEEN

COUNTY GOVERNMENT OF MIGORI ……...…....…….1ST PETITIONER

COUNTY GOVERNMENT OF BUNGOMA…….....……..……..2ND PETITIONER

THE COUNCIL OF GOVERNORS ……....…...…….3RD PETITIONER

ANYANG' NYONG'O…….……..…..…….……4TH PETITIONER

JAKOYO MIDIWO…….……....…….……5TH PETITIONER

AND

PRIVATIZATION COMMISSION…….…....…….1ST RESPONDENT

THE HON. ATTORNEY GENERAL……...…….……2ND RESPONDENT

AND

THE NATIONAL LAND COMMISSION …….....…… INTERESTED PARTY

RULING

Introduction

1. This is a ruling on an application for certificate of the consolidated petitions and judicial review proceedings as raising a substantial question of law under Article 165 (4) of the Constitution and for referral thereof to the Chief Justice for purposes of assigning a bench of uneven number of judges being not less than three to hear the matter.

The Application

2. By a Notice of Motion dated 25th May 2016 sought an order as follows–

> *"**NOTICE OF MOTION***
>
> *1. That the matter be certified as raising substantial question of law under Article 165(4) of the Constitution as read with article 165(3), (b) & (d) I, ii & iii and be referred to the Chief Justice for appointment of a 3 judge bench to hear and determine the petition herein.*
>
> *2. That costs of this application be provided for.*

3. The application was based on grounds set out in the Motion as follows:

> *"**Grounds that:***
>
> *1. That the inaugural privatization programme under the Privatization Act which consisted of the first list of government enterprises to be considered for privatization was approved by Cabinet in December of 2008.*
>
> *2. That Vide a Gazette Notice No. 8739 of 14th August 2009, the Cabinet approved the 1st respondent's privatization Programme established under section 17 of the Privatization Act to privatize five (5) sugar companies in Kenya namely:*
>
> *a. South Nyanza Sugar Company Limited*
>
> *b. Nzoia Sugar Company Limited*
>
> *c. Chemilil Sugar Company Limited*
>
> *d. Muhoroni Sugar Company Limited (in receivership)*
>
> *e. Miwani Sugar Company Limited (in receivership)*
>
> *3. That the National Assembly approved privatization of the five (5) sugar companies on 21st April 2015 subject **to purported compliance of two provisos** by the 1st respondent:*
>
> *i. Any ancestral land currently held by any sugar companies remains under the ownership of the local community; and*
>
> *ii. Further consultations on the privatization process should be held between the Government, the sugarcane farmers and any other key stakeholders including the County Governments, before embarking on the implementation of the proposed recommendations.*

4. That on 7th and 8th December 2015 the 1sat respondent advertised in various local dailies requests for Expression of Interest (EOIs) from prospective investors interested in investing as strategic partners in either one or more of the five (5) sugar companies. The advertisements were made without the decision to privatize the sugar companies being subjected to public consultation and stakeholders participation which goes against the principles of good public administration.

5. That following the advertisement, for request of expression of interest in the Standard Newspaper of 8th December 2015, the defunct Transition Authority filed a Judicial Review Application JR Misc. Application No 440 of 2015 contesting the process of privatization as undertaken by the 1st respondent for violating section 235 of the Transition of Devolved Government Act. But upon the Transition authority winding up, the suit was withdrawn.

6. That the 1st respondent after withdrawal of the suit advertised the requests for expression of Interest (EOIs) in the Standard Newspaper of 11th March 2016.

7. That the National Government represented by the 2nd respondent unilaterally discussed and approved the privatization of Sony sugar company Limited amongst other sugar companies without involving the County Government of Migori making the entire privatization process unconstitutional and any action taken by the respondents since then purporting to implement that decision is a nullity. County Government of Migori should have been consulted and actively involved in the privatization process, as directed by the National Assembly.

8. That part 2 of the fourth schedule of the Constitution clearly devolves agriculture as a County government function. The role of the National Government under part 2 is limited to policy making. Once a function is devolved then the assets, liabilities and funds to effect that function ought to be devolved as well. Therefore the privatization of the sugar milling plants by the National Government goes against the spirit and letter of the constitution.

9. That the South Nyanza sugar Company Limited had an asset base of Ksh5.5 Billion and a liability margin of Ksh3.1 Billion as at 31st March 2009 thus in trading verbiage it is a company that is capable of turning around.

10. That South Nyanza Sugar Company Limited sits on ancestral land situate in Migori County and such land is classified as community land by the Constitution of Kenya 2010, which land is held in trust or the people of Migori by the County Government of Migori Pursuant to Article 63 of Constitution of Kenya. This this land as an asset is held by the county Government of Migori in trust for the residents, hence direct responsibility accrues on its utilization and transmission.

11. That it is the 2nd and 3rd petitioner's case that:

> *a. That this petition impacts directly on the constitutional devolution of agriculture in Kenya. As such the outcome of this suit will not only affect the sugar factories involved but also agriculture in 47 Counties in the Republic of Kenya an especially in the counties in which the factories are involved.*
>
> *b. That the Constitution under Article 186 makes provisions for the respective functions and powers of National and County Governments, which functions are listed exhaustively in Fourth Schedule.*
>
> *Agriculture is a fully devolved function under the 4th schedule of the Constitution and that under section 29 of part 1 of the fourth schedule to the constitution; The National Government's role in agriculture is strictly limited to Agricultural Policy while implementation of the agricultural policies and other agricultural functions are a preserve of the County Governments.*

d. Sugar milling as part of agricultural function is fully devolved as milling cannot be said to be part of agriculture policy function of the National government.

e. Counties within which the sugar companies lie were not consulted or involved in the decision-making process of privatization of the mentioned companies even though they have a constitutional right to be consulted.

12. That as such, the reliefs sought by the 1st, 2nd and 3rd petitioners from this Honourable court include the following:

a. A declaration that the intended privatization of South Nyanza Company Limited and Nzoia Sugar Company by the National Government through the respondents is a violation of Articles 1(1)&(2), 6(2), 10, 63(1) & (2)(d)(ii) & (iii), 123, 186(1), 187(1)(a) & 2(a) &(b), 189(2), 190(3)(a) and/or Part 2 of the Fourth Schedule of the Constitution.

b. A declaration that within the meaning of Articles 6(2) 186(1), 187(2)(b), 187 (2)(a), 189(1)(a) and part 2 of the Fourth Schedule sugar milling is a devolved function and cannot be performed by the National Government.

c. A permanent injunction prohibiting the National Government through the respondents from undertaking in any activities or such acts towards actualizing the privatization of South Nyanza Sugar Company Limited and Nzoia Sugar Company.

d. A declaration that within the meaning of Articles 6(2), 186, 187 and 189(1)(a) the National Government should transfer its shareholding in south Nyanza Sugar Company Limited and Nzoia Sugar company to the devolved Government being Migori county Government and Bungoma County Government respectively.

e. In the alternative to prayer (d) above, an order compelling the National Government through the respondents to grant the petitioner the first right of refusal in its intended privatization of South Nyanza Sugar Company Limited.

13. That on the other hand, it is the 4th and 5th petitioners' case that:

a. The Commission by inviting for expression of interest for the privatization of the subject companies on the 11th March 2016 in a newspaper advert, acted with impunity and without authority ignoring not only recommendations of the National Assembly but the National values and principles of governance. The Commission failed and or ignored to consider all views submitted in relation to the privatization of the private companies before taking the impugned decision.

b. The process adopted by the commission was shrewd in secrecy, is opaque, wanting in democracy and participation of the people, social justice, inclusiveness, transparency and accountability and sustainable development and thus violates the national values and principle of governance. The process was in sum corrupt.

c. Under section 2(2) of the first Schedule to the Privatization Act, the Commission is mandatorily obligated to hold no less than four meetings in a year and which meetings must be held in intervals of no more than 3 months. The Commission has violated the privatization Act as regards holding of meetings and is thus illegally in office and ought to be disbanded.

d. Under Section 2(3) of the First Schedule to the Privatization Act, the quorum for the conduct of business at a meeting of the Commission is eight members of the Commission. Since the expiry of the term of office of the 7 members appointed under section 5(d) of the

Act on 19th September, 2015, the Commission has had only 4 members. The Commission is thus incapable of holding any meeting and/ or making any valid decision.

14. That the reliefs that the 4th and 5th petitioners seek from this Honourable court include:

a. Judicial Review Orders of Certiorari *to bring to the High Court for purposes of quashing the decision of the 1st respondent calling for expression of interest for the privatization of Nzoia Sugar Company Limited, South Nyanza Sugar Company Limited, Chemilil Sugar Company Limited, Muhoroni Sugar Company Limited (in receivership), Miwani Sugar Company (1989) Limited in receivership) as advertised in the Standard Newspaper of 11th March 2016 and any other similar advertisement made before calling for expression of interest for the privatization of the said companies.*

b. Judicial Review Orders of Prohibition *prohibiting the 1st respondent from in anyway proceeding with the privatization process of the subject companies until the commission is properly and legally constituted.*

c. Judicial Review Orders of Prohibition *prohibiting the 1st respondent from in anyway proceeding with the privatization process of the subject companies until consultations among and participation of all stakeholders is done, and the thorny issues ironed out.*

15. That as such, the dispute presented to the Court by this consolidated petition entails the functional mandate as envisaged by the constitution between the two levels of Governments on the one hand and the legislative decree relied upon by the 1st respondent as a State organ in effecting this disputed mandate on the other hand falling under the provision of Article 165 of the Constitution.

16. Therefore the questions of law to be determined herein are multifarious and of a substantive nature involving the interpretation of the Constitution in conferment of functions between the two levels of Governments.

17. That the questions of law raised herein are of immense public importance as they touch on the livelihoods of the residents, and directly affects the rights of the people of the counties with the sugar companies specifically and all Kenyans generally.

18. That the questions for determination herein are a novelty requiring profound concretization of the issues, and have not been determined by any other superior court thus ought to be decided by a bench mandated by Article 165(4) of the Constitution."

Responses

4. The respondents filed Grounds of Opposition dated 31st May 2016 on the grounds that:

1. No substantial question of law under Article 165 (3) (b) and (d) or novel issues of law [of] exceedingly great complexity arise in these matters to warrant the constitution of a bench under Article 165(4).

2. The nature of the matter requires that the same be expeditiously disposed of.

5. The 2nd and 3rd Petitioners supported the Motion and filed written submission dated 30th May 2016. The 4th and 5th Respondents and the Interested Party supported the Motion but did not file any pleading or submissions thereon.

Submissions

6. Counsel for the 2nd and 3rd petitioners and for the Respondent filed highlighted his submissions at the hearing of the Notice of Motion while Counsel for the 1st, 4th and 5th petitioners and for the Interested Party made oral arguments. Briefly, the petitioners were united in their submission that the petitions and the judicial reviews raised substantial questions of law fit for a certificate under Article 165 (4) of the Constitution. The respondents objected that the matters could be dealt with by a single judge of the court.

7. The petitioners took the position taken in the Indian case of ***Chunilal V. Mehta versus Century Spinning and Manufacturing Co.*** AIR (1962) SC 1314, where the Supreme Court of India 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 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 substantial."*

8. Counsel for the 2nd and 3rd Petitioners relied on both ***Martin Nyaga & Ors. v. Speaker County Assembly of Embu & Ors.*** (2014) eKLR and ***Philip K. Tunoi & Anor. v. Judicial Service Commission & Anor*** (2015) eKLR, where Odunga, J. adopts the test set out in Indian Supreme Court cases and holds at, respectively, paragraphs 15 & 16 and 27 & 28 –

> *"In India certain tests have been developed by the Courts as criterion for determining whether a matter raises substantial question of law and these are: (1) whether, directly or indirectly, it affects substantial rights of the parties, or (2) whether the question is of general public importance, or (3) whether it is an open question, in the sense that he 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.*
>
> *In my view these holdings offer proper guidelines to our court in determining whether or not a matter raises "a substantial question of law" for purposes of Article 165 (4) of the Constitution."*

9. For the Respondents, it was submitted that the matters herein do not raise complex issues of law as to qualify as raising substantial question of law and that even the presence of weight issues of law is not a criterion for automatic transmission of a case to the chief justice for constitution of a bench under Article 165 (4) of the Constitution. Counsel relied on the decision of Majanja, J. in ***Harrison Kinyanjui vs Attorney General and Others*****, Petition No. 74 of 2013** as follows:

> *"Therefore giving meaning to substantial question must take into account the provisions of the Constitution as a whole and need to dispense justice without delay particularly given a specific fact situation. In other words, each case must be considered on its merits by the judged 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.*
>
> *A matter may raise complex issues of facts and law but this does not necessarily imply that the matter is one that raises substantial issues of law. Judges are from time to time required to determine complex issues yet one cannot argue that it means every issue is one that raises substantial questions of law. Thus there must be something more to the "substantial question" than merely novelty or complexity of the issue before the court. It may present unique facts not plainly covered by the controlling precedents. It may also involve important questions concerning the scope and meaning of decisions of the higher courts or their application of well settled principles to the facts of the case."*

Counsel also relied on the decision of the Court in ***County Government of Meru v Ethics and Anti-Corruption Commission*** [2014] eKLR to similar effect.

Determination

10. So far as material the provisions of Article 165 (3) (b) and (d) and (4) of the Constitution of Kenya, 2010 provide as follows:

> *"165 (3) Subject to clause (5), the High Court shall have—*
>
> ***(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***
>
> ***(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.***
>
> ***(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.****"*

11. With respect, I do not agree with the wholesale adoption of the Indian Supreme Court decision of ***Chunilal*** into the Kenyan situation. If a certificate of substantial question of law were to be given in every case *"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****"*, then almost all constitutional petitions under the new Constitution of Kenya 2010, having not been settled by precedent would qualify. Such an interpretation would oust the jurisdiction of the single judge of the High Court to whom general jurisdiction is granted, so far as relevant, under Article 165 (3) (b) and (d) with provision for a bench of three or more only in relation to certified substantial question of law matters.

12. A distinction must be made, in my view, as to the interpretation of the phrase "substantial question of law" in the context of a final or apex court as against a first tier constitutional court with two levels of appeals therefrom. There may be merit setting a bigger bench in an apex court making a final determination on a difficult, novel point of great public importance or grave moment to the rights of the parties in the case which may almost invariably involve a discussion of alternative viewpoints. The purpose here is that such an issue, which is classified 'a substantial question of law' should be finally determined as between the parties or for the guidance of the public.

13. In a situation of a first instance trial court, such as the High Court of Kenya, with the possibility of two levels of appeals to the Court of Appeal and finally to the Supreme Court, the benefit of finality of determination does not exist. Indeed, I am aware of no less than three decisions of the High Court sitting with an enlarged bench of five (5) judges whose decisions have been overturned by the Court of Appeal at the first appellate level. See for example the ***Electoral Boundaries*** case, ***Shaban Mohamud Hassan***

& 2 others v Shaban Mohamud Hassan & 3 others **[2013] eKLR,** in which a Bench of 5 Court of Appeal judges **(Koome, Mwera, Musinga, Ouko & Mohammed JJ.A)** reversed a bench of 5 High Court judges noting as follows:

> *" Following the publication by the Independent Electoral & Boundaries Commission (IEBC) of Legal Notice No. 14 of 6th March 2012, The National Assembly Constituencies and County Assembly Wards Order, 2012, on the delimitation of boundaries for constituencies and assembly wards, several complaints were raised regarding the manner in which* ***the 80 constituencies and 1450 county assembly wards were created, distributed, renamed and boundaries established.*** *As a result, some 132 applications, in the form of petitions under* ***Article 22*** *of the Constitution and Judicial Review under* ***Order 53*** *of the Civil Procedure Rules were filed in the High Court.* ***A five-judge bench of Warsame J, as he then was, Sitati, Omondi, Nyamweya and Majanja, JJ was constituted by the Chief Justice pursuant to the provisions of Article 165 (4) of the Constitution, to hear those applications. In view of their sheer numbers, all the petitions were consolidated under Nairobi H.C. No. Petition No. 91 of 2012 and Judicial Review applications under Nairobi H.C. JR Misc. Application No. 94 of 2012."***

14. See also the cases of ***MRC*** case, Court of Appeal at Mombasa in ***Randu Nzai Ruwa & 2 Others v. Secretary, the Independent Electoral and Boundaries Commission & 9 Others,*** Civil Appeal No. 9 of 2013, [2016] eKLR where a five judge bench (Musinga Ouko, Kiage, M'Inoti & J. Mohammed, JJA) reversed a five judge bench of the High Court and the ***Judges Retirement Age*** case, ***Justice Philip K. Tunoi & Anor. v. JSC & Anor***, CIVIL APPEAL NO. 6 OF 2016 (B.M. Kariuki, Makhandia, Ouko, Kiage, M'Inoti, Mohammed & Otieno-Odek, JJ.A.), upholding a five judge bench of the High Court.

15. I consider that the Constitution establishes the High Court as the first instance constitutional court and that the court is competent to deal with all questions of constitutional interpretation as a general rule, and the single judge of the court has full authority to make constitutional adjudication of all such questions, provision (rather than exception) being made for a bench of three judges assigned by the Chief Justice upon a certification by a judge of the Court that the matter raises a substantial question of law.

16. I would, respectfully, agree with Majanja, J. in the ***Harrison Kinyanjui*** case that in giving meaning to substantial question of law a court should consider "***the provisions of the Constitution as a whole and [the] need to dispense justice without delay particularly given a specific fact situation.***" Although the need to dispense justice expeditiously is not, in my view, an ingredient *per se* of substantive question of law, it provides context for the exercise of the discretion to so certify a matter. I think that in a proper case, the court may decline certification on account of exigencies of the case requiring immediate or expedited disposal of the case.

17. For instance, a petition challenging the probable scheduled execution of a death sentence although raising under the *chunilae* test, complex question of the constitutionality of the death sentence, which have not previously been determined and the case being not only of great public importance but substantial effect to the rights of the parties and with very contentious alternative views, may be declined certification, or at least the application for conservatory order therein, so that the single judge may immediately deal with the urgent situation presented by the circumstances of the case.

18. It was in the present case acknowledged by all that the application for certification dated 25th May 2016 and filed on 26th May 2016 came up for hearing on 19th July 2016 over a month after the retirement of the Chief Justice with no certainty as to when the next Chief Justice will be in office to perform the constitutional duty of assigning a bench to hear the petitions if the court grants certification under Article 165 of the Constitution.

19. For my part, I consider that 'a substantial question of law' within the meaning of Article 165 (4) of the Constitution of Kenya, 2010 must involve an issue of law relating to the Bill of Rights and Interpretative Jurisdiction of the Court under Article 165 (3) (b) and (d) the determination of which requires an extra-ordinarily or exceptionally wide and in-depth examination of multifaceted factors of both law and fact so that a larger bench of judges has the benefit of efficient and full

consideration of the issues arising so as to facilitate the purposes of judicial authority under the Constitution in achieving substantive justice expeditiously and in accordance with the purpose and principles of the Constitution.

20. That a unanimous (or majority) decision of the larger bench may discourage challenges by appeals to the two higher courts is only a fringe benefit to the core concern for the timely, comprehensive and in-depth consideration of the dispute. The dispute need not be novel, complex or weighty, or one for which there is no precedent of a higher court, or one which is of great importance to the parties or the general public. These can only be added justification for the certification and not the primary movers. In my view, the larger bench that heard the ***Boundaries*** case involving some 80 the constituencies and 1450 electoral wards in Kenya was properly constituted in view of its huge and varied hinterland of the factors affecting its determination.

21. It must always be remembered that the High Court judge has the same authority to determine the issue of constitutional interpretation under Article 165 (3) (b) and (d) as with the larger bench of judges and that both are equally subject to appeal to the Court of Appeal whose decision on constitutional interpretation or application is in turn appealable as of right to the Supreme Court (Art.163 (4) (a)). Only the Supreme Court's decision binds all other courts save itself (Art. 163 (7)), and that is where considerations of novelty, public importance and finality of decision ought to hold sway in considering whether to enlarge its regular bench of five judges to all the seven judges of the court for determination of a worthy matter.

The Pleadings

22. After setting out the prayers of the petitions by the 1st , 2nd and 3rd Petitioners and the judicial review proceedings of the 4th and 5th petitioners herein, the 1st petitioner in the grounds of the Notice of Motion concludes as follows:

> "Grounds of the application paragraphs 15-18
>
> *15. That as such, the dispute presented to the Court by this consolidated petition entails the functional mandate as envisaged by the constitution between the two levels of Governments on the one hand and the legislative decree relied upon by the 1st respondent as a State organ in effecting this disputed mandate on the other hand falling under the provision of Article 165 of the Constitution.*
>
> *16. Therefore the questions of law to be determined herein are multifarious and of a substantive nature involving the interpretation of the Constitution in conferment of functions between the two levels of Governments.*
>
> *17. That the questions of law raised herein are of immense public importance as they touch on the livelihoods of the residents, and directly affects the rights of the people of the counties with the sugar companies specifically and all Kenyans generally.*
>
> *18. That the questions for determination herein are a novelty requiring profound concretization of the issues, and have not been determined by any other superior court thus ought to be decided by a bench mandated by Article 165(4) of the Constitution."*

23. The central question in the petitions and the judicial review proceedings is, principally, is the determination sought by the petitioners that sugar milling is a devolved function and cannot be performed by the national government and, therefore, that the intended privatization, and process thereof, of the subject five sugar companies by the national Government through the respondents is a violation of named Articles and Part 2 of the Fourth Schedule of the Constitution; and, consequently, an order of a permanent injunction and judicial review orders prohibiting the National Government through the respondents from proceeding with the privatization of said companies.

24. It was contended for the petitioners that there is public interest in the matter as the judgement of the court in this matter would have a great effect on the economy of the Sugar Belt of western Kenya and therewith the livelihoods of the inhabitants of the region, and they desired a conclusive determination of the privatization dispute. It is inherent in this submission that the single High Court judge will get question before the court wrong leading to the adverse effects on the economy of the region. Even if that became so, the petitioners and the people they represent will have an opportunity twice to correct the wrong decision at the Court of Appeal and at the Supreme Court. The High Court's decision is not final if that is what is meant by the submission by counsel for the 2nd and 3rd petitioners that they *'are desirous that privatization dispute is conclusively determined.'* The same may be said of the urging by Counsel for the Attorney General that the matter was urgent in view of the expiry of Common Market for Eastern and Southern Africa (Comesa) quotas in February 2017 and the need to procure a strategic investor before then.

25. Without prejudging the merits of the petitions and judicial review matter, I consider that the resolution of the question whether the business of sugar companies is a county or national government function and, consequently, whether the national government may proceed with privatization or whether it should transfer the businesses to county governments is a straight forward matter of construction of relevant provisions on Devolution of Government under the Constitution of Kenya 2010 and the Privatization Act. The Question of ownership and or acquisition of land by the companies without compensation raised by some petitioners involves determination of property rights under Article 40 of the Constitution. No other law is involved as shown in the grounds in support of the Motion dated 25th May 2016. There are no voluminous materials of legal or factual character that would require for efficient handling a bench of more than one judge. I do not agree as urged by the counsel for the 1st petitioner that *'the questions of law to be determined herein are **multifarious and of a substantive nature** involving the interpretation of Constitution in conferment of functions between two levels of Government.'* Only one question arises of the constitutional nature of the function of sugar milling company operations with attendant consequences of that determination together with an appendage of the ownership dispute of the lands of two of the five (5) sugar companies.

26. In any event, a judge of the High Court is capable of complex thought in the interpretation of the Constitution in accordance with known principles of interpretation of the Constitution and the guidelines of purposes, values and principles set out in the Constitution of Kenya itself including Articles 10, 20, 159 and 259. In my respectful view, there is no warrant for certification of the consolidated petitions and judicial review proceedings as raising substantial question of law as to invoke the provisions of Article 165 (4) of the Constitution.

27. Even if I had found that broad and profound questions of law with sufficiently large and multifaceted factors to be considered before a court could render a decision on the matter, I would have, bearing in mind that the single judge and the bench of three or more judges have equal authority and that there is no incumbent in the office of the Chief Justice, declined to grant the certification in the interest of an expedited determination of the matter. To grant a certification in these circumstances is to actively create a delay in the determination of the dispute contrary to the dictates of Article 159 (2) (b) of the Constitution.

Orders

28. Accordingly, for the reason set out above, the 1st Petitioner's Notice of Motion dated 25th May 2016 is dismissed with costs to the Respondent.

DATED AND DELIVERED THIS 31ST DAY OF AUGUST, 2016.

EDWARD M. MURIITHI

JUDGE

Appearances

Ms. Hashi instructed by M/S Sagan Biriq & Co., Advocates for the 1st Petitioner.

Mr. Ateka instructed by M/S Manyonge Wanyama & Associates, Advocates for the 2nd and 3rd Petitioners.

Mr. Obondi instructed by M/s Murugu, Rigoro & Co Advocates for the 3rd, 4th and 5th Petitioners

Mr. Njoroge, Chief Litigation Counsel for Attorney General for the 1st and 2nd Respondents.

Ms. Masinde, Advocate for the Interested Party.

Mr. Kazungu - Court Assistant.