REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL PETITION NUMBER 561 OF 2015

IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT

OF THE PROVISIONS OF ARTICLE 1 (1), 2(2), 3(1), 6(2),

96, 125, 157, 174, 189, 195, 225, 226(2)

OF THE CONSTITUTION OF KENYA

BETWEEN

WYCLIFFE AMBETSA OPARANYA.....1ST PETITIONER

COUNTY GOVERNMENT OF KAKAMEGA.....2ND PETITIONER

COUNCIL OF GOVERNORS.....3RD PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE SENATE OF THE REPUBLIC OF KENYA.....2ND RESPONDENT

RULING

1. By its application dated 19th July, 2016, the 2nd Respondent herein seeks the following orders:

1. This application be certified urgent and service hereof be dispensed with in the first instance as the object of this application will be defeated unless the application is heard expeditiously.

2. This Honourable court e pleased to certify that the Petition herein raises substantial questions of law and forthwith refer the case to his Lordship the Chief Justice for appointment of a bench of an uneven number of judges being not less than three(3) pursuant to Article 165(4) of the constitution.

3. That the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders if granted.

4. That cost of the application be in the cause.

2. According to the 2nd Respondent, this raises substantial questions of law to warrant the empanelment of a bench of an uneven number of judges being not less than three, under Article 165(4) of the Constitution and accordingly that it is desirable that the file be referred to the Honourable Chief Justice for the constitution of a bench to hear and determine the petition.

3. To the 2nd Respondent, the petition herein raises novel and substantial questions of law under the Constitution for the following reasons:

a. The Petition raises weighty and complex questions of law concerning, the interpretation and application of the provisions of article 125 of the Constitution and particularly the power of the Senate to enforce the attendance of witnesses who have been summoned to appear before the Senate pursuant to Article 125(2)(a) of the Constitution and how such powers ought to be exercised.

b. The petition raises issues concerning the extent or limit to which the Director of Public Prosecutions may exercise the prosecutorial powers provided for under Article 157(6)(a) of the Constitution and if such prosecutorial powers include initiating criminal charges against a person who has failed to honour summonses issued by the Senate under Article 125 of the Constitution.

c. The Petition raises questions on the extent or limit of the oversight role of the Senate as provided for under article 96 of the Constitution; and whether the Senate can exercise those powers on matters that are still under consideration before the Country Assemblies without interfering with the oversight mandate of the County Assemblies.

d. The issues raised in the petition are of general public importance as they concern the performance of constitutional functions and exercise of powers by the Senate of the Republic of Kenya and the Director of Public Prosecutions while undertaking their lawful mandates in accordance with the provisions of the Constitution.

e. The petition also raises questions concerning devolution which is one of the key pillars of the Constitution of Kenya and the role of the Senate as the body mandated to protect the interests of the counties.

f. The issues raised in the petition are novel and have not been decided upon before by a court of law.

4. To the 2nd Respondent, the orders sought herein will not prejudice the petitioners in any manner hence it is in the interest of justice for this Court to certify the petition as raising a substantial question of law and refer the matter to the Honourable Chief Justice to constitute a bench of an uneven number of judges to hear and determine the petition.

5. The application was however opposed by both the petitioners and the 1st Respondent.

6. According to the petitioners:

1. The applicants have not met the threshold for this petition to be referred to the chief Justice under Article 165(4)

2. The grant of certificate under Article 165(4) of the constitution is an exception rather than the rule. The power to refer a suit to the Chief Justice for empanelling of an uneven number of judges must be the exception and not the routine, usual and ordinary course of making judicial pronouncements.

3. An everyday, commonplace reference of matters to the Chief Justice for empanelling of an uneven number of judges to hear and determine the cases imperils the prudent and efficient use of judicial resources and violates Article 159 (2) (6) of the constitution.

4. It is not disputed that 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 1655 (4), the decision of the three judge bench is of equal force to that of a single judge exercising the same jurisdiction and there is thereby, in the circumstances, no justification for empanelling of three or more judges as requested.

5. The issues and facts raised in the petition and the response are not so complex or difficult to the extent that they can be said to raise a '*substantial question of law*' worthy of a reference for the setting up of a three judge bench.

7. 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.

8. 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."

9. 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."

10. 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.***

11. 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.

12. 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.

13. 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.

14. 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."**

15. 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.

16. 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."**

17. 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*."

18. 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.

19. 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.

20. 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.

21. 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."

22. 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. In this case, it is contended that at least one of the issues in this petition is novel in that it requires the determination as to whether the Senate can entertain proceedings which the County Assembly is seised of. Secondly is whether the Director of Public Prosecution can be directed to commence criminal proceedings against a person who has failed to honour summons to appear before the Senate. 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. In my view the question herein calls for the interpretation of the roles of the Senate vis-à-vis the County Assembly and it is now clear that the Courts of this Country have made great strides is setting down principles that demarcate the roles of the two organs. Whereas the issues may not exactly be same, one cannot say that there is complete dearth of jurisprudence in that area. To me it is a matter of the application of such principles to the matter at hand. Such application, in my view does not constitute a substantial question of law for the purposes of Article 165(4) of the Constitution.

23. With respect to the powers of the Senate to summon Governors or any other person before them and the consequences of failure to honour the said summons, the law is clear that the Senate exercises similar powers to those of the High Court. Since time immemorial the High Court has always summoned persons

to appear before it and the consequences have always been there. The Senate's position cannot be any different.

24. The other issues disclosed are in my view simply questions of interpretation or application of the Constitution and any High Court Judge is competent to deal with the same. I associate myself with the position adopted in **Masalu and Others vs. Attorney General [2005] 2 EA 165** that:

> **"A Judge has to pass between the Government and the man whom the Government is prosecuting; between the most powerful individual in the community and the poorest and the most unpopular. It is of the last importance, that in the exercise of these duties he should observe the utmost fairness. The judicial department comes home in its effects to every man's side; it passes on his property, his reputation, his life, his all. It is to the last degree important that he should be rendered perfectly and completely independent with nothing to influence or control him but God and his conscience. The greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent Judiciary."**

25. 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 herd 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.

26. I have deliberately refrained from dealing with the merits of the yet to be heard petition though the parties addressed this Court at length on the same in order to avoid embarrassing the hearing of the pending petition.

27. Therefore whereas I agree that the issue whether the Senate and the County Assembly can concurrently exercise their oversight powers in respect of the same matter may be novel, it is my view that that alone does not make it a substantial question of law for the purposes of Article 165(4) of the Constitution.

28. 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.

29. The 2nd Respondent however invoked public interest by contending that the matter is of great public importance. 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.**

30. 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.

31. 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. The costs will be in the cause.

Dated at Nairobi this 23rd day of November, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ashitiva and Mr Clapton for the Petitioners

Mr Mwendwa for the 2nd Respondent/Applicant

Mr Ashimosi for the 1st Respondent

CA Mwangi