REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.603 OF 2014

CONSOLIDATED WITH PETITION NOs. 65 OF 2015, JR NO.6 OF 2015, JR NO.22 OF 2015 AND JR NO.90 OF 2015

BETWEEN

ROBERT N. GAKURU……...…...….1ST PETITIONER

JAMOFASTAR WELFARE ASSOCIATION……...……...2ND PETITIONER

(TOGETHER WITH OTHER 459 NAMED PETITIONERS)

AND

THE COUNTY GOVERNMENT OF KIAMBU…….....……...……..…1ST RESPONDENT

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

RULING

1. On the 27th of March, 2015, the 1st Petitioner made an oral application before me for certification of the Consolidated Petitions and Judicial Review Applications as warranting the empanelling of an uneven number of judges to consider the issues raised under **Article 165(4)** of the **Constitution**.

2. According to Prof. Kiama, Counsel for the 1st Petitioner, the Application is premised on the basic contention that there is no definitive and binding definition of public participation either in legislation or in any Court decision. That there is need therefore to have clear parameters on the threshold of public participation because the High Court has rendered variant decisions on the subject. Counsel appearing for other Petitioners supported the said submissions.

3. Mr. Wanyama for the 1st Respondent opposed the Application and submitted that the Petitions and Judicial Review Applications do not raise any substantial issue of the law that would demand that it be heard by uneven number of judges as provided for under **Article 165(4)** of the **Constitution**. That the issues being raised in all the maters fall within issues that a single judge of the High Court deals with on a daily basis. That the attempt to have the matter referred to the Chief Justice for empanelling of a bench is

merely a delaying tactic employed by the Petitioners.

1. This ruling is therefore limited to the issue whether the matters as consolidated raises substantial issues of law warranting them to be referred to the Chief Justice for the purpose of empanelling a bench of uneven judges and in any event of not less than three judges.

2. **Article 165(4)** of the **Constitution** provides as follows:-

> ***"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."***

From the above provision, as read with prior provisions of **Article 165**, it is not enough that a matter in question raises an issue as to whether a fundamental right or freedom has been denied, violated or threatened with infringement or that it raises the issue of interpretation of the Constitution. In all instances, the Court must go further and satisfy itself that it raises a substantial question of law. Nowhere in the Constitution has the phrase ***'substantial question of law'*** been defined. It is therefore upon the High Court to determine on a case to case basis what amounts to a substantial question of law.

3. In that regard, in ***Chunilal V. Mehta vs Century Spinning and Manufacturing Co, AIR 1962 SC 1314***, the Court defined substantial question of law as follows:-

> ***"A substantial question of law is one which is of general public importance or which directly and substantially effects 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 substantial".***

I am in agreement with the Supreme Court of India in that regard.

4. However, I would hasten to state that a substantial question of law does not, in my view, refer only and merely to any matter affecting the fundamental rights and freedoms of the parties or a matter which is of general public interest. I say so because it would then follow that every question concerning the Bill of Rights as provided for under Chapter Four of the Constitution or any question touching on the interpretation of the Constitution would be a substantial question of law, as those matters affect the general public and by extension become public interest matters especially because of their nature and when they are relatively novel and complex. And if it were so, the Constitutional and Human Rights Division of the High Court at Nairobi would be sitting in panels of three judges, as a rule.

5. It therefore follows that the test for construing a matter as raising a substantial issue of law is no easy a task and should be taken seriously by parties and the Court as well. To my mind therefore, a substantial question of law would depend on the facts and circumstances of each case. If any guidance is needed, I would say it is a matter that has not been previously settled by a Court such that it does not have a binding or persuasive precedent. It also would be a matter that is intertwined and involving diverse areas of the law therefore making the matter relatively complex as compared to other matters normally canvassed before the same Court. It is also a matter that would require extensive research to resolve. In determining whether the case raises a substantial issue of law, I am of the view that a court ought to consider the jurisprudential value of the matter, its importance to the parties and the impact of the case as well as the general conduct of the case.

6. Having so said and applying the above test in the matter before me, I do not think that the Petitions and Judicial Review Applications raise a substantial question of the law that requires determination by an uneven number of judges. I say so and despite my initial thoughts on the matter because it is not disputed

that the main issue in contention is whether the people of Kiambu County were consulted prior to the enactment of the **Finance Act, 2014**, which has imposed several types of taxes that have met the disapproval of the Petitioners.

7. There is no doubt that public participation is a fundamental principle in the Constitution 2010. **Article 196** of the **Constitution** has in that regard provided for public participation in the conduct of the business of County Assemblies. The **County Governments Act** has also set out elaborate parameters on public participation at the County level. I reiterate that the issue for determination in the matters before me is whether the parameters of public participation as established under the Constitution and County Governments Act have been violated in the process leading to the enactment of the **Finance Act, 2014.**

8. There are enough decisions of the High Court on the principle of public participation and which are merely persuasive to this Court. They include:-

i. ***Nairobi Metropolitan PSVs Saccos Union & 25 Others v County of Nairobi Government & 3 Others (2013) e KLR;***
ii. ***Moses Munyendo & 908 Others v Attorney General and Another (2013) e KLR;***
iii. ***Richard Dickson Ogendo & 2 Others v Attorney General & 5 Others (2014) e KLR;***
iv. ***Robert Gakuru & Others v Governor Kiambu County & 3 Others (2014) e KLR; and***
v. ***Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others (2015) e KLR.***

9. The Court of Appeal has also in ***Nairobi Metropolitan PSVs Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others Civil Appeal No.42 OF 2014*** determined the issue of public participation in a manner that is binding on this Court. The Court expressed itself partly as follows:-

> ***"The Constitution and the relevant Statues are silent on the period of the notice to be given to the public. Nevertheless, it has to be reasonable notice. Although we agree that notices issued may not have been sufficient considering the social conditions of the ordinary Kenyans who may not access the information through the websites and the print media, from the averments in the Affidavit of Lillian Ndegwa sworn on 16th October, 2013, in response to the Appellant's Petition in the High Court, it is clear that "Representatives of Motorist Associations of Kenya Bus Operators, Double M Operators among other Stakeholders attended and gave their view." As Kenya Bus Operators and Double M Operators are among the PSV operators, it means that the Appellants had notice of the public engagements but only a few attended. As the trial Judge correctly, observed, the words of Chaskalson, CJ, in South Africa case of MINISTER FOR HEALTH VS. NEW CLICKS South Africa (PTY) LTD, succinctly cover the situation in this case:***
>
> > ***"It cannot be expected of the law maker that a personal hearing will be given to every individual who claims to be affected by regulations that are being made."***
>
> ***What is necessary is that reasonable notice is given and the views of those who attend are taken into consideration.***
>
> ***In this case, none of the above mentioned PSV Operator groups who attended the 1st Respondent's consultative for the representative of the Motorist Association complained that the notice given to them was too short. Similarly, the other Appellants did not adduce any evidence that the notice given was insufficient. In the circumstances, it would not be right to annul the 1st Respondent's Finance Act on mere Submissions of Counsel that the Appellants were not accorded a reasonable opportunity to air their views on it".***

10. I am guided and I have also read the above decisions and I have not found them to be contradictory of each other as alleged by the Petitioner. They have provided a common ground as to what entails public

participation and how it ought to be facilitated in the process of enacting legislation and the Judges made their findings based on the peculiar facts of each case before them. For example, in ***CORD v The Republic (supra),*** a case handled by five judges, reference was made to most of the High Court decisions above and the Bench approved them in making its own decision on the subject of public participation. In any event, a contradictory decision of the High Court would not in itself amount to a substantial issue of law. In so holding, I am in agreement with Odunga J in ***Martin Nyaga Wambora & Others v Speaker County Assembly of Embu & 4 Others (2014) e KLR*** where he expressed himself as follows:-

> "***In my view the mere fact that there are conflicting decisions by the High Court does not necessarily justify a certification that the matter raises a substantial question of law. My view is informed by the fact that the mere fact that a numerically superior bench is empanelled whose decision differs from that of a single judge does not necessarily overturn the single judge's decision. To overturn a decision of a single judge one would have to appeal to the Court of Appeal. Similarly, appeals from decisions of numerically superior benches go to the Court of Appeal."***

11. Having expressed myself as above, and despite my earlier thinking on this matter, on reflection and based on my reasoning above, I must conclude that the Petitions and Judicial Review Applications before me before me do not raise a substantial question of law under **Article 165(4)** of the **Constitution** so as to justify the empanelling of a bench made up of an uneven number of judges of this Court by the Chief Justice.

12. Let Parties now proceed to fix a date for hearing of the Consolidated Petitions without delay.

13. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF APRIL 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Prof. Kiama for 1st and 2nd Petitioners

Miss Baraza holding brief for Mr. Arale for Petitioner in Petition No.65/2015

Mr. Munana for Applicants in J.R. No.6/2015

Miss Njiri holding brief for Mr. Wanyama for Respondent

Order

Ruling delivered.

ISAAC LENAOLA

JUDGE

Further Order

Hearing on 8/5/2015 at 2.30 p.m. Parties to file Submissions.

Submissions to be file before then.

ISAAC LENAOLA

JUDGE