



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL PETITION NO 177 OF 2015

MOMBASA CEMENT LIMITEDPETITIONER/APPLICANT

VERSUS

THE SPEAKER, NATIONAL ASSEMBLY.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. The petitioner seeks to have this matter referred to the Chief Justice under the provisions of Article 165(4) of the Constitution, which provides that:

(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.

2. Before considering the application for referral, which was supported by the respondents, it is important to set out the prayers sought in the petition, and the facts giving rise to the petition.

3. The petitioner first approached the Court by way of an application dated 30th April 2015 in which it sought temporary orders directed at the National Assembly Departmental Committee on Land staying any further proceedings, hearing, deliberating, determination or investigations into the petitioner's land in Kilifi County LR.No.MN/III/291/2 and MN/III/4391. In its petition dated and filed on the same date, the petitioner sought the following orders:

a. A declaration that the National Land Commission as a constitutional commission is not subject to the control or direction of the National Assembly or any of its Departmental Committees established under the Standing Orders in the lawful discharge of its Constitutional mandate under article 67 of the Constitution particularly when dealing with all those properties known as LR.NO.MN/III/291/2 and MN/III/4391.

b. A declaration that the attempt by the Departmental Committee of the National Assembly on Land seeking to curtail, undermine and/or deprive the National Land Commission of its constitutional powers and mandate and also sit on appeal on the decisions of the National Land Commission with regard to all those properties known as LR NO.MN/111/291/2 and MN/III/4391 is a violation of the Constitution.

c. A declaration that the acts of the Departmental Committee purporting to investigate and inquire on a matter constitutionally placed under the National Land Commission issue is ultra

vires their powers under the Constitution and therefore unconstitutional thus null and void.

d. A declaration that the action by the Departmental Committee of the National Assembly purporting to investigate and inquire into LR No. MN/III/291/2 and MN/III/4391 so far those matters fall within the exclusive constitutional purview of the National Land Commission.

e. A declaration that the decision and or acts of the Departmental Committee of the National Assembly on Land from summoning the petitioner for purposes of conducting any proceedings whatsoever and howsoever concerning LR NO.MN/III/291/2 and MN/III/4391 so far those matters have conclusively been determined by the National Land Commission is a violation of the petitioner's right to fair administrative action protected by article 47 of the Constitution.

f. A declaration that the act and/or decision of the Departmental Committee of the National Assembly on Land from summoning the petitioner for purposes of conducting any proceedings whatsoever and howsoever concerning LR.NO.MN/III/291/2 and MN/III/4391 so far those matters have conclusively been determined by the National Land Commission outside the appeal procedures provided for under the National Land Commission Act is a violation of the petitioner's right to equality before the law and the secure protection of the law protected by article 27 of the constitution

g. That the respondents be condemned to pay the costs of this petition/application;

h. Any other relief this court may deem just and fit to grant.

4. In brief, the facts giving rise to the petition as set out in the petition and affidavit in support are that the petitioner bought the subject property at a cost of US\$681,539.00 from Vipingo Estate Limited pursuant to an agreement for sale and a transfer in 2005. The transaction was conducted in accordance with all legal requirements including obtaining Land Control Board consent.

5. The petitioner thereafter obtained a change of user from agricultural to commercial and erected a cement factory on the property. The petitioner thereafter received a letter from the National Land Commission regarding a complaint from a group known as Bambani Kilio Group. The National Land Commission investigated the matter and found that the transfer of the land from Vipingo Estate Limited to the petitioner met all legal requirements and was a lawful transfer. By its letter dated 22nd September 2014, REF NO CF/1544/17, the National Land Commission wrote to the petitioner confirming its ownership of the property, L.R No. MN/III/291/2. It also communicated its findings to the Governor of Kilifi by its letter dated 8th January 2015.

6. The petitioner is therefore aggrieved that sometime in March 2015, it received a letter dated 11th March 2015 from the Clerk of the National Assembly inviting the Director of the petitioner to appear before the Departmental Committee on Land with respect to various parcels of land, among which is the same land that was the subject of inquiry, investigation and determination by the National Land Commission a few weeks prior to receipt of the letter from the Clerk of the National Assembly.

7. The petitioner contends that under section 14 of the National Land Commission Act, the Commission has the exclusive mandate of reviewing all grants or dispositions of public land to establish their propriety or legality, and that no other body can purport to exercise such power of review of grants and dispositions of public land. It contends further that once the National Land Commission has exercised its powers under section 14 of the National land Commission Act, it is only this Court which has power to review the decision. It is on this basis that it is aggrieved by the decision of the Departmental Committee on Land of the National Assembly to review the decision of the National Land Commission, hence this petition.

8. In his submissions in support of the petitioner's application, Counsel for the petitioner argued that the petitioner is the registered proprietor of the suit property, but that in 2014, a community based organization called Bambani Kilio had lodged a complaint with the county government and the National Land Commission challenging the petitioner's ownership of the property. Between September 2014 and

January 2015, the National Land Commission conducted its own enquiry and in a letter dated 8th January 2015 communicated its decision that the petitioner was the properly registered owner of the property.

9. Thereafter, under Standing Order No. 216(1) and (5), Parliament's Departmental Committee on Land then wrote to the petitioner summoning it to answer questions regarding its acquisition of the land, and to avail its documents of ownership of the said property.

10. The petitioner submits that in view of the summons by the Departmental Committee of Parliament, the petition raises two substantial questions of law which touch on the scope and exercise of Parliament's exercise of oversight power under Article 95 of the Constitution. These issues are:

i. Whether the National Land Commission, having investigated the issue of ownership and acquisition of the suit property and having arrived at a decision which is known to Parliament, Parliament can now re-open the issue in a manner that amounts to sitting on a review or appeal over the decision of an independent constitutional commission.

ii. Whether Parliament can make an enquiry into a private dispute pursuant to its oversight role under Article 95.

11. The petitioner takes the position that the dispute is between private parties, the petitioner and the persons represented by Bambani Kilio Group, and that while Parliament has summoned the petitioner, it has not summoned either the National Land Commission, its Commissioners or any official from the Ministry of Lands. The petitioner has been summoned to answer to the questions of the ownership of the land not in the context of a summons of either of the two organs of state, the Ministry or the National Land Commission.

12. The petitioner invites the Court to consider the averments of the parties and the documents relied on, and to be guided by the decision of Odunga J in **Justice Philip K Tunoi vs JSC & Another High Court Petition No 244 of 2014** with respect to the guidelines to be followed by a Court in determining whether or not to refer a matter to the Chief Justice for the constitution of a Bench under Article 165(4) of the Constitution.

13. Ms. Thanje for the 1st respondent agreed with the application by the petitioner. Her submission was that the principle of separation of powers and the relationships between the legislature and the judiciary, particularly in light of the provisions of Article 165, ought to be settled once and for all. She was also of the view that the 1st respondent would like the issue settled with regard to the point at which the judiciary can intervene in matters and processes that are being handled by the legislature.

14. The 2nd respondent, the Attorney General, also agreed with the petitioner and the 1st respondent that the matter should be referred to the Chief Justice for the Constitution of a Bench of an uneven number of judges. Learned State Counsel, Mr. Kuria, submitted that a perusal of the prayers in the petition would show that the controversy and what would be a justification for referring the matter to the Chief Justice would be the need to reconcile what would require judicial intervention in a matter where the Constitution itself gives specific roles and powers to different organs of state, such as those given to Parliament by Article 95 and to the National Land Commission under Article 67, and that this Court has jurisdiction, as provided under Article 165(3)(d), to determine whether anything said to be done under the Constitution or any law is in violation of the Constitution.

15. He submitted that the main question raised in this petition is whether the National Assembly under Article 95(5)(b) and 117 has power to deal with matters within the mandate of constitutional commissions and independent offices, and to what extent that power can be said to interfere with the exercise of powers by commissions such as the National Land Commission in light of Article 259 and 260 of the Constitution. In his view, this is the issue that would justify the referral of the petition to the Chief Justice.

16. The question regarding the circumstances under which a matter should be referred to the Chief Justice under Article 165(4) has been considered in several decisions of this Court. In the case of **Community Advocacy and Awareness Trust and Others vs Attorney General Nairobi Petition No. 243 of 2011 (Unreported)**, Majanja J observed as follows:

“[8]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 a matter [10]... giving meaning to “substantial question” must take into account the provisions of the Constitution 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 judge certifying the matter.”

17. In his ruling on the same point in **High Court Petition No. 313 of 2015-Peter Gichira vs The Attorney General & Others**, Odunga J stated as follows:

“[9.] I have considered the issues raised in this petition. In my view 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. This country, despite great strides made in the enlargement of the bench in the recent past 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 such a bench invariably leads to delays in determining cases already in the queue hence worsening the problem of backlog crisis in this country.”

18. Justice Odunga agreed with the views of the Court (Majanja, J) in **Harrison Kinyanjui vs Attorney General & Another [2012] eKLR** in which the Learned Judge observed 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.”

19. In the case of **Vadag Establishment vs Y A Shretta & Another Nairobi High Court (Commercial & Admiralty Division) Misc. High Court Civil Suit No. 559 of 2011**, the Court stated as follows:

“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.”

20. Finally, it is useful to bear in mind the words of the Court in **Chunilal V. Mehta vs Century Spinning and Manufacturing Co. AIR 1962 SC 1314** in which 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 the present case, the issue that the parties deem as being a substantial question of law that should be referred to the Chief Justice for the purpose of empanelling a bench of an uneven number relates to the exercise of power under Article 95 of the Constitution by the National Assembly or its Committees vis a vis the powers of independent commissions and offices. A corollary to this issue is the extent to which, given the principle of separation of powers and the constitutional powers of the Court under Article 165(3)(d), the High Court can intervene in the exercise of power by the National Assembly under Article 95. The parties are in agreement that this is a novel and important point, and that it is necessary that it be settled once and for all.

22. There are two reasons, however, why I must differ from the position taken by the parties in this matter. First, in terms of precedential value, as was correctly observed in the case of **Vadag Establishment vs Y A Shretta & Another (supra)**:

“...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.”

23. Secondly, with respect to the exercise of oversight powers over constitutional commissions and independent offices, a five-judge Bench of this Court has had occasion to hear and determine the issue. This was in **High Court Petition No. 518 of 2013- The Judicial Service Commission -vs- Speaker of The National Assembly & Others**. In that case, the Court (Mwongo, Omondi, Meoli, Ngugi and Chemitei JJ) considered the two main issues in that case, which mirror the issues that the parties hereto argue will arise for determination in this petition, as follows:

i) Jurisdiction of the Court in relation to the acts of other arms of government;

ii) The meaning and scope of Parliamentary oversight of state organs.

24. In its lengthy judgment in that matter, the Court considered, inter alia, the purport and implication of Articles 95 and 117, as well as the jurisdiction of the Court with regard to other state organs in exercise of its powers under Article 165(3)(d).

25. It may be that this petition will raise new angles and nuances that are different, and probably novel. However, in light of the above decisions, it would not in my view serve any useful purpose or advance the expeditious dispensation of justice to refer this matter to the Chief Justice. As the issues it raises are similar to issues already considered and determined by a Bench of five judges, the substantial question of law having been considered in that matter, a single judge can deal with the particular circumstances and nuances that this petition raises.

26. In the event that any of the parties is not satisfied with the decision arrived at by a single judge, the matter can be considered on appeal by the Court of Appeal, and thereafter by the Supreme Court, which can then make a binding decision in accordance with the doctrine of *stare decisis*. As I observed in the case of **Gilbert Mwangi Njuguna vs Attorney General Nairobi Petition No. 267 of 2009 [2012]eKLR**,

“Weighed against the yardstick of what constitutes a ‘substantial question of law’ the issues may indeed be substantial and of great public interest. However, in my view, they do not merit hearing by an uneven number of judges and can be adequately dealt with by a single judge. Should any party not be satisfied with the decision of the single judge, the appeal process in which the matter falls for consideration before a bench of 3 appellate judges in the Court of Appeal and where there is the option of further appeal to the Supreme Court will be open to the party.”(Emphasis added)

27. I therefore decline to refer the matter to the Chief Justice as prayed by the parties.

28. In view of the fact, however, that I was part of the Bench that addressed the issues raised in this petition in **Judicial Service Commission vs Speaker of the National Assembly (supra)**, it is my view that the matter should be placed before another judge of this Division for hearing and determination.

Dated Delivered and Signed at Nairobi this 24th day of September 2015

MUMBI NGUGI

JUDGE

Mr. Ataka instructed by the firm of Ogetto Otachi & Co. Advocates for the petitioner

Mr. Thanje instructed by the firm of S. M Mwendwa & Co. Advocates for the 1st respondent

Mr. Kuria instructed by the State Law Office for the 2nd respondent

No appearance for National Land Commission