



**Rawal v Judicial Service Commission & another; International Commission of Jurist (Kenya Chapter) & another (Interested Parties) (Petition 386 of 2015) [2015] KEHC 6961 (KLR) (Constitutional and Human Rights) (17 September 2015) (Ruling)**

*Kalpana H Rawal v Judicial Service Commission & 3 others [2015] eKLR*

Neutral citation: [2015] KEHC 6961 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION 386 OF 2015  
I LENAOLA, J  
SEPTEMBER 17, 2015**

**BETWEEN**

**HON. (LADY) JUSTICE KALPANA H. RAWAL ..... PETITIONER**

**AND**

**JUDICIAL SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**THE SECRETARY, JUDICIAL SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**INTERNATIONAL COMMISSION OF JURIST (KENYA CHAPTER) ..... INTERESTED PARTY**

**OKIYA OKOITI OMTATAH ..... INTERESTED PARTY**

**RULING**

1. The Petitioner was appointed a judge of the High Court under Section 62 of the *Repealed Constitution* on 2<sup>nd</sup> June 2000. Later, on 19<sup>th</sup> December 2011, she was appointed a Court of Appeal Judge and by Gazette Notice No.7080 dated 29<sup>th</sup> May 2013, she was appointed Deputy Chief Justice (DCJ) of the Republic of Kenya and the Vice-President of the Supreme Court of Kenya.
2. On 1<sup>st</sup> September, 2015, the 1<sup>st</sup> Respondent through the 2<sup>nd</sup> Respondent issued a retirement notice to the Petitioner in which it advised that she should retire from office on or about the 15<sup>th</sup> January 2016 and specified that she would retire from service of the Judiciary with effect from 16<sup>th</sup> January, 2016. On or about the 6<sup>th</sup> of September, 2015, the Respondents announced a vacancy in the office of the



- DCJ and the Vice-President of the Supreme Court with effect from 16<sup>th</sup> January, 2016 and called for applications from suitable candidates to fill the said vacancy.
3. This Petition was therefore triggered by the Respondents' letter aforesaid and in her Petition dated 10<sup>th</sup> September 2015, the Petitioner claims that the 1<sup>st</sup> Respondent has violated Articles 167(1) of the Constitution and Section 31(1) of the Sixth Schedule to the Constitution by resolving to retire her upon attaining the age of seventy (70) years.
  4. Together with the Petition, she filed a Notice of Motion Application dated the same date under certificate of urgency seeking conservatory orders *inter alia* to stay the implementation of the Respondents' decision contained in the letter dated 1<sup>st</sup> September 2015 and staying the recruitment process of the Deputy Chief Justice and Vice-President of the Supreme Court.
  5. When Mr. Oraro learned Counsel for the Petitioner together with Mr. Kilukumi, Mr. Ismail and Mr. Okoth appeared before me on 14<sup>th</sup> September, 2015, I directed that the Application be served for interpartes hearing on 16<sup>th</sup> September, 2015.
  6. On 16<sup>th</sup> September 2015, I referred to a similar matter in Justice Philip K. Tunoi & Others vs Judicial Service Commission & Others Petition No.244 of 2015 consolidated with Petition No.495 of 2014, where the Petition raised generally similar issues regarding the retirement age of judges who were in office prior to the promulgation of the Constitution 2010, and in which the Chief Justice had appointed a five judge bench (Mwongo J, Meoli J, Ong'undi J, Korir J and Kariuki J), and I directed the parties to address the Court on the issue whether the Petition raises a substantial question of law requiring the empanelling of an uneven number of judges to consider both the Application dated 10<sup>th</sup> September, 2015 and the Petition of even date as provided for under Article 165(4) of the Constitution. As a corollary to that issue, I also asked Counsel to address me on whether a single judge would properly determine an issue which was also the subject in Petition No.244 of 2015 as consolidated with Petition No.495 of 2014 aforesaid.
  7. According to Mr. Oraro and in response to the directions of this Court, the Petition is critical as it concerns the issue of the independence of the Judiciary as conferred by the Constitution and secured by the tenure of judges. That it also seeks to examine the role of the Judicial Service Commission (JSC) in determining the terms of judges beyond what is in the Constitution. Further, that it also seeks to address the position of constitutional offices prior to and beyond the Constitution 2010. He therefore states that the Petition is weighty and raises substantial questions of law and has also attracted huge public interest.
  8. Mr. Ahmednassir, appearing for the Respondents together with Mr. Kanjama disputes that the Petition raises weighty issues in regard to the issue of attainment of seventy years (70) by the DCJ. He claimed that Article 171 of the Constitution was clear in that regard and that the DCJ applied for the position in 2013 (three years after the promulgation of the Constitution) and her case must be appreciated in that factual context. He argues that the issues raised are also not serious and so pedestrian as not to warrant the constitution of an uneven number of judges to determine, according to him, a matter that does not raise weighty constitutional issues merely because the parties had said so. He also contends that a panel of more than one judge is difficult to manage and Hon. Justice of Supreme Court P. K. Tunoi and Hon. Justice D. A. Onyancha of the High Court had deliberately frustrated the hearing of their Petition. He therefore states that there was need to avoid the usual games of delaying matters by litigants in Petitions such as this one.
  9. Mr. Ndubi for the 1<sup>st</sup> Interested Party (the International Commission of Jurists (K) Chapter) agreed with Mr. Ahmednassir's submissions. He adds that the DCJ and JSC are both creatures of the



Constitution 2010 and the matter required mere interpretation of the Constitution and is not so weighty as to raise a substantial question of law. He claims that one judge could hear the matter and any unhappy party would have the remedy of an appeal. Further, that the fact that the matter had attracted public interest would not be a sufficient reason for it to be certified as raising substantial questions of law.

10. Mr. Okiya Okioti who has been enjoined as a 2<sup>nd</sup> Interested Party associated himself with the submissions of both Mr. Ahmednassir and Mr. Ndubi.
11. In the above context, 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.” (Emphasis added)

From the above provision, it is not enough that the matter 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 under Article 105(3). 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 and it is therefore upon the High Court to determine, on a case to case basis, as to what amounts to substantial question of the law.

12. In that regard, in *Chunilal V. Mehta vs Century Spinning and Manufacturing Co*, AIR 1962 SC 1314, 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”. (Emphasis added)

I am in agreement with the Supreme Court of India in that regard and I should reiterate that the public importance of a matter is a consideration in determining whether a substantial question of law has been raised.

13. Further, in *Robert N. Gakuru and Another vs The County Government of Kimabu and Another*, Petition No. 602 of 2014, this Court stated as follows;

“The test for construing a matter as raising a substantive 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 substantive 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 involving diverse areas of the law therefore making the matter relatively complex as compared to other matters normally canvassed before the same court, and calling for an alternative view. It is also a matter with difficulty and which would require extensive research to resolve....” (Emphasis added)

I reiterate the same sentiments in the present Petition and would add that the circumstances of this Petition are unique and have previously never determined in our realm.



14. Having so said and applying the above test to the Petition before me, and despite the submissions made by the Parties, the larger main issue in the Petition is the question of the retirement age of judges appointed before the year 2010 and who were serving on the date of the promulgation of the Constitution 2010. That issue is likely to affect a large number of senior judicial officers in this Country and it is a matter that requires the interpretation of Article 167(1) of the Constitution and the harmonization of the provisions of the Sixth Schedule to the Constitution (Transitional and Consequential Provisions). It is also a matter, as was pointed out by Mr. Oraro, that requires the Court to examine the mandate of the JSC in retiring judges. In my view therefore, the issues in this Petition are of great public importance, novel and unique. They have not been determined by any other Court and clearly raise substantial questions of the law.
15. Further, as I stated elsewhere above, I am aware that there is a five judge bench that had been instituted to preside over a similar matter. That bench has not had an opportunity to render itself on the issue of the retirement age of judges who were in office on the promulgation date and the question is still unresolved.
16. Before disposing of the matter, I recall the submission made by Mr. Ahmednassir that there is some urgency in disposing the Petition and the need to resolve the issues therein given the importance of the office of the DCJ. He also took issue with the manner in which litigants play games in Court and their use of delaying tactics. I understand him in that regard to be saying that a matter would be expeditiously disposed of when it had not been certified as requiring a bench of Judges under Article 165(4) of the Constitution.
17. In answer to that contention, while it can be said that a matter before a single judge would proceed expeditiously because the judge has full control of the matter unlike in a situation where a matter before an uneven number of judges is premised on many factors including the diaries and availability of those judges that it is not always the case. I am aware of matters that have been expeditiously disposed of even when they had an uneven number of judges, for instance Martin Nyaga Wambora & 3 Others vs The County Assembly of Embu & 4 Others Kerugoya Petition No.3 of 2014 and Coalition of Reform for Democracy & Another vs Attorney General (2015) e KLR. It is all about Court and case management and no more.
18. Having expressed myself as above, I must therefore conclude that the Petition before me raises a substantial question of law under Article 165(4) of the Constitution 2010 as to justify the empanelling of a bench of uneven number of judges of this Court of not less than three, to assigned by the Chief Justice.
19. Accordingly, I direct that this Petition be transmitted to the Hon. Chief Justice forthwith for the purposes of the empanelling of that bench.
20. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 17<sup>TH</sup> DAY OF SEPTEMBER, 2015**

**ISAAC LENAOLA**

**JUDGE**

In the presence of:

Miron – Court clerk

Mr. Oraro, Mr. Kilukumi and Mr. Okoth for Petitioner and Mr. Kanjama

Mr. Ahmednassir for Respondents



Mr. Ndubi for 1<sup>st</sup> Interested Party

No appearance for 2<sup>nd</sup> Interested Party

**Order**

Ruling duly read.

Mention on 23/9/2015 for direction on the hearing. Petitioner at liberty to file a supplementary Affidavit and Respondents at liberty to respond if that Affidavit raises a new matter.

**LENAOLA**

**JUDGE**

**17/9/2015**

