



IN THE HIGH COURT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 177 OF 2014

BETWEEN

THE COUNTY GOVERNMENT

OF MERU..... PETITIONER

AND

THE ETHICS AND ANTI-CORRUPTION

COMMISSION RESPONDENT

RULING NO. 2

1. The petitioner is a County Government. It has filed the petition dated 16th April 2014. It alleges that the respondent moved to its premises between 20th March and 15th April 2014 without notice and carted away documents from the County headquarters. It avers that such action undermines the County government and is a breach of the petitioner's right to privacy protected under **Article 31** of the Constitution. It contends that the respondent's action is contrary to the national values and principles of governance articulated in **Article 10** amongst other provisions of the Constitution. In substance what it seeks is to nullify the respondent's action on the ground that it violates various provisions of the Constitution. The petitioner further seeks consequential orders for the release of the documents that were taken away.
2. The respondent on the other hand, opposes the petition on the ground that it is empowered by the Constitution and the **Anti-Corruption and Economic Crimes Act, 2003** to investigate alleged corruption in the County and in the circumstances, it obtained search warrants in order to proceed with the search.
3. The petitioner has moved the Court under **Article 165(4), (3) (b) and (d)** of the Constitution by the Notice of Motion dated 14th May 2014 seeking an order, "*THAT this petition be referred to the Hon. Chief Justice of the Republic of Kenya for the purpose of empanelling a three (3) judge bench to hear and determine the said petition.*" **Article 165(4)** of the Constitution sets the standard for referring a matter to the Chief Justice to constitute a bench of uneven judges not being less than three to hear a matter. It provides, "*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.*"

4. The petitioner avers that the petition raises novel and justiciable constitutional questions which have not been settled by jurisprudence and that it also raises substantial questions of law. Some of the issues framed for determination by the petitioner include the following;
 - a. *How a state organ should exercise its statutory powers over County Governments and whether the exercise of such powers should have the effect of crippling the operations of such a government.*
 - b. *Whether documents owned by a County Government can be considered property for purposes of Article 40 of the Constitution of Kenya and whether they can be withheld for an inordinately long period of time to the detriment of a county government.*
 - c. *Whether a public entity in the form of the petitioner is also entitled to the right to privacy and constitutional protection not to have their premises and property arbitrarily searched and their possessions seized arbitrarily.*
 - d. *What is the extent and within what parameters the respondent can act against another government body, more particularly a County Government in relation to its investigative/police powers?*
 - e. *Whether the Respondent as the entity charged with investigating unethical conduct acted unethically by not conducting investigations against one of its own officers despite documented complaints having been made.*
 - f. *Whether the respondent can in disguise of exercising investigative powers paralyze the operations of a county government.*
 - g. *Whether the respondent can with impunity act in contravention of the Constitution and the statute that creates it.*
5. Mr Mogeni, S.C., counsel appearing for the petitioner, argued that a substantial question of law is one that raises constitutional issues which are of general public importance, it directly and substantially affects the rights of the parties and its raises novel matters for determination which are yet to be determined by the High Court, Court of Appeal and Supreme Court. Counsel cited the Indian case of ***Sir Chunilal V. Mehta and Sons Limited v The Century Spinning and Manufacturing Co., Limited* [1962] SCR Supl. (3) 549** and ***Livingstone Kunini Ntutu v The Minister for Lands and 2 Others* HC JR Misc. Application No. 169 of 2010**. Counsel added that the matter is one relating to the constitutional power of state organs in respect of county governments hence one of general public importance transcending the right of the party as was stated in the decision in ***Hermanus Philipus Steyn v Giobani Gneccchi-Ruscione* SCK Application No. 4 of 2012 [2013]eKLR**.
6. The respondent opposes the application on the ground that the petition does not raise any substantial question of law within the meaning of **Article 165(4)** of the Constitution. Mr Waudo, counsel for the respondent, urged that the issues framed by the petitioner concern the constitutional and statutory mandate of the respondent which were hardly novel. He submitted that the objects, authority and function of the respondent were clearly set out in Constitution and nothing ambiguous has been shown to warrant requesting the Chief Justice to appoint a bench of not less than three judges. He also pointed to the fact that the function of the County Government has been clearly defined in the Constitution. Counsel cited ***Bidco Oil Refineries Limited v Attorney General and Others* Nairobi Petition No. 177 of 2012 [2013]eKLR** and ***Gilbert Njuguna Mwangi Njuguna v Attorney General* Nairobi Petition No. 267 of 2009 [2012]eKLR** to buttress his submissions. He also submitted that the issues raised by the petitioner have been determined in various cases which he cited.
7. I have considered the arguments by the parties and I take the following view of the matter. In the case of ***Community Advocacy and Awareness Trust and Others v Attorney General* Nairobi Petition No. 243 of 2011 (Unreported)**, I observed that, “[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.”

8. **Article 165(4)** of the Constitution has been the subject of several decisions of the High Court. These cases include; *Judicial Service Commission v Speaker of the National Assembly and Five Others, Nairobi Petition No. 518 of 2013*[2013]eKLR, *Bidco Oil Refineries Limited v The Attorney General and Three Others (Supra)*, *Intoil Limited and Another v The PS, Ministry of Energy and Others, Nairobi Petition No. 156 of 2006* [2012]eKLR, *Community Advocacy and Awareness Trust & Others v The Attorney General (Supra)*, *J. Harrison Kinyanjui v The Attorney General and Another, Nairobi Petition No. 74 of 2011*[2012]eKLR and *Gilbert Mwangi Njuguna v The Attorney General, Nairobi Petition No. 267 of 2009* [2012]eKLR.
9. The principles which govern the exercise of discretion in an application such as the one before the court can be distilled as follows;
 - a. The grant of a certificate under **Article 165(4)** of the Constitution is an exception rather than the rule.
 - b. The substantial question of law is a question to be determined in the circumstances of the case. Substantial issue of law is not necessarily a weighty one or one that raises a novel issue of law or fact or even one that is complex. Many provisions of our Constitution are untested and bring forth novel issues yet is not every day that we call upon the Chief Justice to empanel a bench of not less than three judges.
 - c. Public interest may be considered but is not necessarily a decisive factor. It is in the nature of petitions filed to enforce the provisions of the Constitution to be matters of public interest generally.
10. The court ought to take into account other provisions of the Constitution, the need to dispense justice without delay having regard to the subject matter and the opportunity afforded to the parties to litigate the matter upto the Supreme Court. In this regard the fact that the matter was filed under certificate of urgency and was put on the fast track for determination and as it involves an ongoing investigation conducted by the respondent is a relevant consideration.
11. The petition was triggered by the exercise of the certain powers by the respondent. The issue at hand, shorn of all the permutations and combinations of the various provisions of the Constitutions, is really whether the respondent had power to enter in the premises of the petitioner and take away documents and if it did, whether such power was exercised in the proper manner. All the issues raised arise out of that milieu of facts presented and this is not the first time a single judge of the High Court is called upon to adjudicate on the validity of search and seizure powers in the context of the provisions of the Constitution (see *Royal Media v Director of Public Prosecutions Nairobi HC Misc. 43 of 2013* [2013]eKLR, *James Humphrey Oswago v Ethics and Anti-Corruption Commission Nairobi Petition No. 409 of 2013* [2013]eKLR, *Manfred Walter Schmitt and Another v Republic Nairobi HC Criminal Revision No. 569 of 2012* [2013]eKLR). I hold that all the issues appurtenant to the exercise of such power are matters that can be dealt with by a single judge of the High Court as the cases I have cited demonstrate.
12. The petitioner has referred to **Article 165(3)(d)(iii)** of the Constitution which grants jurisdiction to the High Court to hear any question respecting interpretation of the Constitution including determination of, “*any matter relating constitutional powers of State organs in respect of county governments and any matter relating to constitutional relationships between levels of government*” to fortify the case that this matter warrants reference to the Chief Justice. The fact it involves County government does not exclude it from the consideration under the principles I have outlined above. If the framers intended the issues relating to County Government to be treated differently, they would have clearly made provision for that. The fact the petitioner is a County government does not sway my discretion.
13. I am constrained to decline the Notice of Motion dated 16th May 2014 and as a consequence it is dismissed. The costs shall abide by the petition.

DATED and DELIVERED at NAIROBI this 20th May 2014.

D.S. MAJANJA

JUDGE

Mr Omogeni, S.C., instructed by Okongo Omogeni and Company Advocates for the petitioner.

Mr Waudu, Advocate, instructed by the Ethics and Anti-Corruption Commission for the respondent.