



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CONSTITUTIONAL PETITION NO. 16 OF 2013

LESIIT, J

AMOS KIUMO.....1ST PETITIONER

JOHN MUTURIA MUTUA.....2ND PETITIONER

RICHARD MUROKI KARITHI & 17 OTHERS

(VIDE ATTACHED LIST ON BEHALF OF

THEMSELVES AND RESIDENTS OF IGEMBE

CENTRAL DISTRICT).....3RD PETITIONER

V E R S U S

**THE CABINET SECRETARY MINISTRY OF INTERIOR AND COORDINATION OF
 NATIONAL**

GOVERNMENT.....1ST RESPONDENT

PRINCIPAL SECRETARY MINISTRY OF INTERIOR &

CORDINATION OF NATIONAL

GOVERNMENT.....2ND RESPONDENT

THE DISTRICT COMMISSIONER

IGEMBE SOUTH.....3RD RESPONDENT.

HON. ATTORNEY GENERAL.....4TH RESPONDENT.

RULING

1. The application is a notice of motion under Article 165 (4) of the Constitution of Kenya it seeks the following order.

1. **That the matter be certified as raising substantial question of law under Article 165 sub-**

article 3(b) and (d) (ii) and thus be referred to the Chief Justice to appoint at least 3 judge bench to hear and determine the petition herein.

2. That costs be provided for.

2. It is premised on the following grounds:

- a. **The Applicants are petitioning on their right to participate in determining the district headquarters of their district.**
- b. **The Respondents have by arbitrary act announced Kangeta as district headquarter violating and infringing Petitioners rights to participate in such determination and discriminating members of other wards contrary to article 27 of the Constitution and also employed unreasonable, unfair and unlawful administrative procedures and actions to make aforesaid decision contrary to Article 47, 10 and (2) of the Constitution.**
- c. **The Petitioners are thus seeking at least 3 judges bench to adjudicate on the matter herein**

3. Mr. C.Kariuki for the Petitioner has urged the court to accede to their prayer to have the substantive Petition heard by an uneven number of judges; on grounds it raises substantive points of law of great public interest. Mr. Kariuki has cited part C of the Petition has the contested issues/complaints. He urges that those issues are supported by an affidavit which is sworn by Amos Kiumu the 1st Petitioner. And a further affidavit sworn by John Muturia Mutua, the 2nd Petitioner, both of the same date.

4. The contested issues/complaints in paragraph C of the Petition raises 3 issues. The first one is that Kangeta Market which has been proposed as the District Headquarters for the newly created Igembe Central District has been imposed upon the people of that district without any inputs from the stakeholders, leaders, and residents. The second issue of complaint is that the said District Head quarter's location was a decision of the Physical Planning Officer, the then District Commissioner Igembe, and the Local Member of the National Assembly. The third issue is that the proposed District Headquarter is on the edge of the new district and far from the center of the central district, and will result in marginalization of residents of the other locations which are far flung from the proposed location. For these reasons it is the Petitioners complaint that the decision to locate the District headquarters at Kangeta Market violates the Constitution for lack of public participation and for discrimination against the residents of the District.

5. Mr. Kariuki urged the court to find that the issues raised in this Petition are of great public interest and therefore raise substantial matters and consequently that they meet the test to have an order of this court to request the honourable the Chief Justice to empanel a bench of 3 or more judges to hear and determine the Petition.

6. Mr. Kariuki cited the case of **Harrison Kinyanjui vs Attorney General and Others, Petition No. 74 of 2013**, where Majanja Judge stated that:

“Therefore giving meaning to substantial question must take into account the provisions of the Constitution as a whole 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 judged 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.

A matter may raise complex issues of facts and law but this does not necessarily imply that the matter is one that raises substantial issues of law. Judges are from time to time required to determine complex issues yet one cannot argue that it means every issue is one that raises

substantial questions of law. Thus there must be something more to the “*substantial question*” than merely novelty or complexity of the issue before the court. It may present unique facts not plainly covered by the controlling precedents. It may also involve important questions concerning the scope and meaning of decisions of the higher courts or their application of well settled principles to the facts of the case.”

7. Mr. Kariuki also relied on the case of the County Government of Meru vs the Ethics and Anti-Corruption Commission Milimani Law Courts Petition No. 177 of 2014 where the court held:-

(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.

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.

“In my view, the Chief Justice empanelling of a three judge bench should be the exception rather than a rule. A higher burden is cast on the party who applies to the court to certify the matter for reference to the Chief Justice. I am of the view the present matter can be handled by a single judge of the High Court.”

8. The Respondents are represented by Mr. Menge Litigation Counsel, A-G’s Chambers. The Respondents have filed Grounds of Opposition in which five grounds are cited as follows:

- a. Article 163 (4) of the Constitution provides for the right of appeal to the Court of Appeal.
- b. Article 159(2) (6) of the Constitution would be imperiled as Judicial resources would be burdened unnecessarily.
- c. Article 165 of the Constitution with authority to determine any matter that is within the jurisdiction of the High Court.
- d. Complex issues of fact and law do not necessarily translate to substantial issues of law.
- e. Article 164 (4) of the Constitution is an exception rather than the rule.

9. Mr. Menge for the Respondents has urged that the application for empanelling a 3 judge or more bench has no merit. Counsel urged that Article 159 (2)&(6) of the Constitution dictates that such grounds as those urged by Mr.Kariuki should not be allowed as that would be burdening the judiciary;and further because the matter is one which can be heard and determined by a single judge. In support of that preposition Mr. Menge cited Hon Chemututi and 3 others vs the Attorney General and 3 others, Milimani Petition No. 307 of 2014 where the court observed as follows.

“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. There is a right of appeal to the Court of Appeal and by virtue of Article 163(4) of the Constitution, an appeal as of right to the Supreme Court on Constitutional matters, there must be something more to the substantial question than merely novelty or complexity of the issue before the court. It may

present unique facts not plainly covered by the controlling precedents. It may also involve important questions concerning the scope and meaning of decisions of the higher courts of the application of well-settled principled to the facts of a case.”

10. Mr. Menge urged that the burden lay upon the Petitioners to show that there was a substantial question which requires hearing and determination by a three judge bench. The learned Litigation Counsel urged that the Petitioners have not raised any substantial question. Counsel relied on **Okeya Omutata Okoiti and Another vs the Attorney General and others, Milimani Petition No 58 of 2014** where the court held:

“Public interest may be considered but it is not necessarily decisive.

‘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 up to the Supreme Court’ ”

13. Mr. Menge urged the court to dismiss the application.

14. Mr. Kariuki sought to distinguish the cases he has cited from those cited by Mr. Menge and urged the court to disregard them as they raise issues irrelevant to those in this matter. The learned counsel for the Petitioners submitted that the case of **Omutata Okoiti**, supra, dealt with issues of procurement while the case of **Hon. Chemututi**, supra, dwelt with issues of employment. Mr. Kariuki urged that the case he cited of **Kinyanjui**, supra, and **County Government of Meru**, supra, dealt with matters of public interest.

15. I have carefully considered this application and all the submissions by counsel together with the cited cases. Both advocates have cited cases of the high Court decided by Judge Manjanja. They are persuasive and give guidance on how to apply Article 165 (4) in determining whether the court should request for empanelling of 3 judges or more bench from the Hon. Chief Justice. I agree to be persuaded by the cited authorities. Consequently I need not invent the will on the question before this court.

16. The question is whether the Petition filed by the Petitioners in this case raises either a substantial question of law or a question of great public interest as to merit recommendation for hearing and determination by a bench of 3 or more judges. This application is seeking the appointment of a three judge bench on grounds that the Petition raises substantial question of law under Article 165 (3) (b) (d) (ii) of the Constitution. I have already summarized herein above the basis upon which the application is made. The Petitioners contention is that the choosing of Kangeta as the District Headquarters for Igembe Central District was arbitral and violated the Constitution for denying the Petitioners and others, of their right to participate before the decision was made.

17. Article 165 (3) (b), (d) (ii) of the Constitution stipulates as follows:

(3) Subject to clause (5), the High Court shall have—

(a)...

(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)...

(d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i)...

(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;

18. The burden lies with the Petitioners to prove that there is a substantial question raised in the Petition which merits the empanelling of a 3 judge bench. The Petitioners claim that their rights were violated when the decision to make Kangeta the District Headquarters was reached contrary to Article 10(2) and Article 47 of the Constitution. The decision to make Kangeta the District Headquarters of Igembe Central District no doubt affects the lives of the residents of Igembe Central District. The feeling that some of the residents will travel short distances, while others will have to crisscross far flung areas in order to reach their District Headquarters, is a matter of great importance to the residents which has both direct and indirect effect on them; and especially where some may feel the decision creates marginalization or inequality or inequity among them.

19. The question of what public participation as envisaged under Article 10 of the Constitution entails, and the nature it should take is a matter that has not been adjudicated upon. There are issues which should be considered, for instance should all the residents be involved in order to satisfy the requirement for public participation? Can a barraza suffice? What if no one or few people turn up for a meeting called to satisfy this? If representation can do, what form should that representation take? All these are matters for consideration and determination.

20. Likewise what fair administrative action means and its scope are matters which are still grey issues, and which have not been settled by superior courts. What constitutes fair administrative action? Who determines what is fair?

23. I am aware that a High Court judge has authority under Article 165 of the Constitution to determine any matter that is within the jurisdiction of the High Court. I am also aware that parties aggrieved by the decision of the High Court have a right to file an appeal to the Court of Appeal, and under Article 163(4) to the Supreme Court on constitutional matters. Bearing all these factors and being fully minded of them, I am persuaded that the issues raised in this case raise substantial questions of law of great public interest. This is more so as public participation and fair administrative action are new terminologies creating new rights and or duties or obligations under the 2010 Constitutional dispensation.

24. We need to develop general principles to be applied to guide courts whenever it is faced with the issues of interpretation of the nature and scope, specifically of the rights and obligations created under Article 10 and 47, as well as when invoking the courts' authority under Article 165(4) of the Constitution.

25. I am persuaded for the reasons I have given herein above, that the matters in issues in this Petition raise substantial questions of law. I am persuaded that the issues require three or more minds to ponder over them and give their input. Consequently I certify that the Petition falls under Article 165(4) of the Constitution, the Petitioner having made up a case to justify reference of this matter to the Chief Justice for empanelling of three or more judges to hear and determine.

26. Having come to the conclusions I have, I make the following orders:

1).The Notice of Motion application dated 9th April, 2014 is allowed.

2). Reference of this matter to the Chief Justice be and is hereby made for empanelling of three or more judges to hear and determine.

3). The Deputy Registrar of this Court do liaise with the Deputy Registrar of the Supreme Court to arrange a convenient date to place the matter before the Chief Justice, and to notify the parties.

4). The costs of this application will be in the cause.

DATED, SIGNED AND DELIVERED AT MERU THIS 26TH DAY OF JUNE, 2014.

LESIT, J.

JUDGE