REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

EMBU PETITION NOS. 7 & 8 OF 2014

HON. MARTIN NYAGA & OTHERS .....PETITIONERS

VERSUS

THE SPEAKER COUNTY ASSEMBLY OF EMBU…..1ST RESPONDENT

THE COUNTY ASSEMBLY OF EMBU..... 2ND RESPONDENT

THE SPEAKER OF SENATE…….....3RD RESPONDENT

THE CHANCELLOR, KENYATTA UNIVERSITY…....4TH RESPONDENT

THE SENATE, PARLIAMENT OF KENYA.....5TH RESPONDENT

THE PARLIAMENTARY SERVICE COMMISSION.....1ST INTERSTED PARTY

COMMISSION ON ADMINISTRATIVE JUSTICE.....AMICUS CURIAE

RULING

1. On 19th May, 2014, the Principal Judge of the High Court, **Hon. Mr Justice Richard Mwongo** issued directions in respect of these two consolidated Petitions on the mode of hearing thereof. Subsequently, on 30th May, 2014, due to official functions outside the country the Judge with the consent of the Hon. The Chief Justice directed that the petitions be heard by this Honourable Court with due expedition. The hearing of both petitions was then fixed for 12th June, 2014.
2. However, on 12th June 2014 the petitioners made an oral application that pursuant to Article 165(4) of the Constitution this Court ought to certify that the issues raised in the petitions disclose substantial questions of law warranting the empanelling of a bench consisting of uneven number of judges of not less than three.
3. It was submitted that the matters deal with issues whether impeachment is a political question hence the Court is barred from exercising jurisdiction; whether section 33 of the ***County Governments Act*** is unconstitutional; whether Article 181 of the Constitution presupposes a situation whereby impeachment proceedings is an exclusive affair of the County Assembly and the Senate; whether the Court can interpret and determine what amounts to gross violation of the law to warrant the impeachment of a Governor; whether the rule of bias in the principle of natural justice may be invoked in the case of the Senate and its Committee hearings as a justification to quash the decision under Article 165 of the Constitution; whether the *sub judice* rule applies to the

Houses of Parliament where a matter is pending before the High Court and whether the Court would be interfering with another organ in violation of the principle of Separation of Powers.

4. It was further contended that in these petitions the Court would be called upon to interpret Articles 1, 3 and 25 of the ***International Convention on Civil and Political Rights***, Article 20 of the ***African Charter on Human and Peoples' Rights*** vis-à-vis Article 2(5) of the Constitution as read with Article 196(1)(b), 118(1)(b) and 174 (a) and (c). Further Articles to be interpreted would include Articles, 33 and 35 as well as Article 1(2) with respect to the extent of sovereignty in so far as democracy is concerned. While appreciating that this Court has dealt with the issue of public participation at the legislative level, it was contended that under Article 196 the said participation is not limited to the legislative process but includes other business so that the Court would be called upon to determine what encompasses "other business".
5. It was contended that the need to refer the matters to the Chief Justice for empaneling of the said bench arose as a result of new issues raised in the amended petition and the change in circumstances occasioned by the impeachment proceedings which took place after the filing of the petitions.
6. It was therefore the petitioners' case that these issues are weighty enough to amount to substantial question of law as envisaged under Article 165(4) of the Constitution and warrants the expansion of the bench to hear the petitions. In their view a decision on these petitions will not only affect the parties to these proceedings but is likely to affect the Governors in this Country and the County Governments.
7. The arguments in opposition to the application, on the other hand were that directions for the hearing of the petitions were given after the issues were isolated and that a similar application was made before **Mwongo, J** who held that in consultation with the Chief Justice, he was of the view that the issues forming the subject of these petitions had been raised before the bench which heard an earlier petition between the parties herein hence there was nothing unique in these petitions to warrant the constitution of an enlarged bench. It was contended that the directions herein were given after the purported new developments had taken place and that the amendment to the petition was not meant to introduce new issues but was only meant to take into account the fact of the consolidation. According to the Respondents, it is not true that the amended petition raises new issues since all the Constitutional issues raised in the petitions such as gross violation have been determined in the past decisions and the petitioners are free to cite the same. In their view the constitution of an expanded bench would delay the matter yet there is no novel issue raised for determination.
8. Since the same application had been made before **Mwongo, J** who declined to grant the same, what the petitioners are now seeking is a variation of the same order by a Court of concurrent jurisdiction. In their view if the Court has dealt with one aspect of participation it may well deal with the other aspects.
9. I have considered the foregoing. In my view the decision whether or nor 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. In this country we still do not have the luxury of granting such orders at the whims of the parties. Judicial resources in terms of judicial officers in this country are very scarce. Empanelling such a bench usually has the consequence of delaying the cases which are already in the queue hence worsening the problem of backlogs in this country. I therefore associate myself with the position taken by **Majanja, J** in **Harrison Kinyanjui vs. Attorney General & Another [2012] eKLR** 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.
10. **Article 165** of the Constitution provides as follows:

> ***(1) There is established the High Court, which—***
>
> ***(a) shall consist of the number of judges prescribed by an Act of Parliament; and***
>
> ***(b) shall be organised and administered in the manner prescribed by an Act of Parliament.***

(2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.

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

(a) unlimited original jurisdiction in criminal and civil matters;

(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) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

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

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(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;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(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.

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

11. From the foregoing it is clear that the only constitutional provision that expressly permits the constitution of bench of more than one High Court judge is **Article 165(4).** Under that provision, for the matter to be referred to the Chief Justice for the said purpose the High Court must certify that the matter raises a substantial question of law:

1. **Whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; or**
2. **That it involves a question respecting the interpretation of this Constitution and under this is included *(i) the question whether any law is inconsistent with or in contravention of this Constitution; (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; (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and (iv) a question relating to conflict of laws under Article 191.***

12. Therefore it is not enough that the matter raises the issue whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened or that it raises the issue of interpretation of the Constitution. The Court must go further and satisfy itself that the issue also raises a substantial question of law. The Constitution itself does not define what constitutes "substantial question of law". It is therefore upon the Court to determine what would amount to "a substantial question of law".
13. I associate myself with the decision in **Chunilal V. Mehta vs Century Spinning and Manufacturing Co. AIR 1962 SC 1314** 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."

14. In **Santosh Hazari vs. Purushottam Tiwari** (2001) 3 SCC 179 it was held that:

"A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any *lis*."

15. In India certain tests have been developed by the Courts as criterion for determining whether a matter raises substantial question of law and these are therefore (1) whether, directly or indirectly, it affects substantial rights of the parties, or (2) the question is of general public importance, or (3) whether it is an open question, in the sense that the issue has not been settled by pronouncement of the Supreme Court or the Privy Council or by the Federal Court, or (4) the issue is not free from difficulty, or (5) it calls for a discussion for alternative view.
16. In my view these holdings offer proper guidelines to our Court in determining whether or not a matter raises a "a substantial question of law" for the purposes of Article 165(4) of the Constitution.
17. It is therefore my view that a matter would be construed to raise a substantial question of law if *inter alia* any or all of the following factors are present: whether the matter is moot in the sense that the matter raises a novel point, whether the matter is complex, whether the matter by its nature

requires a substantial amount of time to be disposed of, the effect of the prayers sought in the petition and the level of public interest generated by the petition.

18. However, the operative word in Article 165(4) is "includes". To my mind the examples set out under Article 165(4) are not exclusive.
19. 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 empaneled 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.
20. It was contended that **Mwongo, J** had already dealt with the issue of the empanelling of a bench. I have perused the record of this matter and whereas on 12th May, 2014, **Mr Nyamu**, learned counsel for the petitioner in petition no. 7 of 2014 sought directions from the Court on that issue, the Court does not seem to have made a finding one way or the other on the issue. Even if it had done so, it is clear from the amended petition that there were issues which were raised therein which did not form part of the original petition hence the change in circumstances would justify the Court in entertaining a similar application without necessarily being caught up by the res judicata doctrine. In the cases of **Mburu Kinyua vs. Gachini Tuti [1978] KLR 69; [1976-80] 1 KLR 790** and **Churanji Lal & Co vs. Bhaijee (1932) 14 KLR 28** it was held that:

    "However, caution must be taken to distinguish between discovery of new facts and fresh happenings. The former may not necessarily escape the application of the doctrine since parties cannot by face-lifting the pleadings evade the said doctrine. In the case of Siri Ram Kaura vs. M J E Morgan Civil Application No. 71 of 1960 [1961] EA 462 the then East African Court of Appeal stated as follows:

    "The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata.....The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.".

21. It is contended by the petitioners that they intend to urge the Court to determine what constitute "other business" in Article 196(1)(b) of the Constitution. If I understand the petitioners, they would wish the Court to determine whether the process of impeachment of a Governor constitutes "other business" under the said Article to warrant public participation and the level of such public participation. Whereas it is true that this Court in **Robert W. Gakuru & Others vs. The Governor of Kiambu County and 3 Others Petition No. 532 of 2013** dealt with the issue of public participation, I agree that in the said decision the issue of what constitutes "other business" did not arise and therefore was not determined by the Court.
22. It is not lost to this Court that this provision is on similar terms to Article 118(1)(b) of the Constitution which provides for facilitation of public participation and involvement in the legislative and other business of Parliament and its committees.
23. Therefore I am prepared to assume at this stage without deciding that a determination of the meaning of "other business" in Article 196(1)(b) may impact on the meaning of "other business" in Article 118(1)(b) of the Constitution hence a determination as to whether or not impeachment of a Governor amounts to "other business" may have a wider impact than what the parties herein contemplate. Taking into account the similarity in the language employed in the said Articles, such a determination may not only affect the procedure to be adopted in impeachment of Governors but also other State Officers who are subject to impeachment as well.
24. In these petitions there are positions in serious contention. Firstly is whether a Governor who is

popularly elected by the electorates ought to be removed from the office based on a decision of the County Assembly and the Senate without the participation of the electorates. One can envisage a situation where the electorates by popular mandate elect a governor whose party neither controls the County Assembly nor the Senate and who might easily fall victim of his "unpopularity" within the Assembly and Senate rather than his/her popularity with the electorates. On the other side of the coin in the feasibility of involving the public in the removal of the Governor without conducting what may well amount to mini-election. These issues are in my view by no means insubstantial. They are issues which may not only affect how the County Assemblies operate but also how the Parliament operate. Accordingly, the doctrine of separation of powers in light of the two provisions must once again come into serious scrutiny.

25. These issues taken together with the other issues to be raised in the petition such as the need for the Court to determine the threshold for what amounts gross misconduct, bias and the thorny issue of separation of powers cumulatively lead me to the inescapable conclusion that the two petitions taken together raise substantial questions of law under Article 165(4) as read with under clause (3) (b) or (d) of Article 165 of the Constitution as to justify the empaneling of a bench of uneven number of Judges of this Court of not less than three, assigned by the Chief Justice. I so certify.
26. Accordingly, I direct that the Petitions be transmitted to the Hon. the Chief Justice forthwith to consider empaneling the said bench. Further directions will await the decision by Hon. the Chief Justice.

Dated at Nairobi this 16th day of June 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nyamu, Mr Njoroge and Mr Ndegwa for the Petitioners

Mr Njenga for the 1st and 2nd Respondents

Miss Dhanji for interested party

Mr Mutongo for amicus curiae

Mr Wachira for intended interested party

Cc Kevin