



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

Petition 307 of 2012

HON. MR. JUSTICE CHARLES PIUS

CHEMUTUTT.....1ST PETITIONER

HON. MR. JUSTICE PAUL KIPSANG

KOSGEL.....2ND PETITIONER

HON. MR. JUSTICE STEWARD MWACHIM

MADZAYO.....3RD PETITIONER

HON. MR. JUSTICE EDWIN KIIRU

MUKUNYA.....4TH PETITIONER

AND

THE ATTORNEY

GENERAL.....1ST RESPONDENT

THE PERMANENT SECRETARY, MINISTRY OF

LABOUR.....2ND RESPONDENT

THE JUDICIAL SERVICE

COMMISSION.....3RD RESPONDENT

THE PUBLIC SERVICE

COMMISSION.....4TH RESPONDENT

RULING

1. The petitioner’s claim is that they are judges of the Industrial Court of Kenya within the meaning of **section 5** of the **Industrial Court Act, 2011** as read with **Article 162(2)** of the Constitution and **section 31** of the **Sixth Schedule** to the Constitution and that their tenure has been terminated by the respondents contrary to the Constitution and the law.
2. The application for consideration is one made under **Article 165(4)** of the Constitution which

provides, “**Any matter certified by the court as raising a substantial question 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.**”

3. MrKibeMungai, on behalf of the petitioners submitted that this matter raises substantial issues of law as framed by the parties. The petitioner’s contend that the matter concerns the interpretation of **section 32(2)** of the **Industrial Court Act, 2011** and **Article 162(2)** establishing the Industrial Court. The petitioners argue that the respondents have acted contrary to the law in purporting to terminate their employment. Another issue that arises is whether the respondents are violating the hallowed principle of the doctrine of separation of powers which binds everyone and all state officials. In the instant case the Attorney General has given an opinion that **section 32(2)** of the **Industrial Court Act, 2011** can be ignored and the respondents can act as they have done. This, according to counsel, is an important matter to be determined as it goes to the heart of the rule of law.

4. MrMungai drew the court’s attention to the letter dated 23rd July 2012 written after the High Court was seized of this matter where the 2nd respondent states she acted in accordance with the advice of the Attorney General to inform the petitioner’s that their tenure has come to an end. This was contrary to the law and Constitution as their appointment was by the President as notified in the KenyaGazette and the Permanent Secretary could not reverse the President’s appointment. The issue then for consideration is whether persons appointed by the President and whose appointment is sanctioned by legislation can be removed from office. MrMungai stated that these are substantial issues of law.

5. A further reason advanced by the petitioners is that a bench of three should hear the petition for the reason that over the last couple of months, a number of individual judges of the High Court have expressed opinions regarding the legal status of the petitioners that were adverse to their position and it is their view that unless the matter is heard by three judges, it may be difficult to separate personal opinion from an independent application of the law and justice ought to be seen to be done.

6. MrMungai adds that another reason for the constitution of a three judge bench is that the Judicial Service Commission (“JSC”), the 3rd respondent, is the employer of judges and since the main offending party is the JSC, the petitioners are of the view that justice can only be seen to be done by constituting a three judge bench. On the whole MrMungai contended that the matters raised are grave as they relate to the issue of the dignity of the office of the judge and the rule of law and therefore this is a suitable case for the application of **Article 165(4)**.

7. Mr. Bitta, counsel for the 1st, 2nd and 4th respondents was of the view that this matter did not raise any substantial issues and as the matters had crystallised the matter ought to be heard expeditiously by any judge of the High Court. MrIssa, counsel for the 3rd respondent was of the view that the matter was straightforward and it was not necessary to refer the matter to a bench of three judges. He however left the matter to the court’s consideration.

8. The Constitution does not define, “*substantial question of law.*” It is left to each High Court 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. In **Chunilal V. Mehta v Century Spinning and Manufacturing Co. AIR 1962 SC 1314**, the Supreme Court of India, after considering a number of decisions on the point, laid down the following test for determining whether a question of law raised in the case is a substantial question of law or not. It stated, “***the proper test for determining whether a question of law raised in the case is substantial would be whether it is of general public importance or whether it directly or substantially affects the rights of the parties and if so, whether it is either an open question in the sense that it is not finally settled by the Supreme Court or by the Privy Council or is not free from difficulty or 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 more question of applying these principles or the plea raised is palpably absurd, then the question would not be a substantial question of law***”

(See also the case of *Wilfred Karuga Koinange v Republic Nairobi Misc. App. 1140 of 2007 (Unreported)*).

9. If I were to accept the above dicta, then it would follow, that every question concerning our Constitution would be a substantial question of law. Each case that deals with the interpretation of the Constitution or our expanded bill of rights would be a substantial question of law as it is a matter of public interest, affects the rights of the parties, is fairly novel and has not been the subject of pronouncement by the highest court. This would burden judicial resources to the extent that the value of obtaining justice without delay under **Article 159(2)(b)** of the Constitution would be imperilled.

10. 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 judge certifying the matter.

11. 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.

12. We must also not lose sight of the fact that the High Court does not have the last word on the interpretation of the Constitution or the enforcement of the Bill of Rights. 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.

13. A matter may raise complex issues of fact 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 that 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 the application of well-settled principles to the facts of a case.

14. The fact that different judges of the High Court have expressed views in cases regarding the provisions of the Constitution relating to the Industrial Court is not, of itself a reason to refer the matter to the Chief Justice. As judges, with jurisdiction to interpret the Constitution, we are called upon from time to time to make determination which means that we have to address our minds to these provisions. These opinions are not personal but are grounded in the law and Constitution and are an incident of our jurisdiction to determine matters before us.

15. This case concerns the interpretation of the Constitution and statutes. These questions posed are the bread and butter of judges of the High Court. They are the kind of questions that the judges of the High Court are required to deal with while discharging their judicial mandate.

16. In my view, the reference to the Chief Justice for the empanelling of a three judge bench should be the exception rather than the rule and 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 that the present matter can be handled ably by a single judge of the High Court and a case for referring the matter to the Chief Justice, who is the Chairperson of the Judicial Service Commission, has not been made out.

17. The application is therefore rejected.

DATED and DELIVERED at NAIROBI this 27th July 2012

D.S. MAJANJA

JUDGE

Mr K. Mungai instructed by Kinoti&Kibe Advocates for the petitioners.

Mr E. Bitta, Senior Litigation Counsel, instructed by the State Law Office for the 1st, 2nd and 4th respondent.

Mr M. Issa instructed by Issa and Company Advocates for the 3rd respondent._