



REPUBLIC OF KENYA



KENYA LAW
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**Kinyanjui v Attorney General & another; Omollo & 18 others (Interested Parties)
(Petition 74 of 2011) [2012] KEHC 5411 (KLR) (27 September 2012) (Ruling)**

J. HARRISON KINYANJUI V ATTORNEY GENERAL & ANOTHER [2012]eKLR

Neutral citation: [2012] KEHC 5411 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

PETITION 74 OF 2011

DAS MAJANJA, J

SEPTEMBER 27, 2012

BETWEEN

J HARRISON KINYANJUI APPLICANT

AND

THE HON ATTORNEY GENERAL 1ST RESPONDENT

JUDICIAL SERVICE COMMISSION 2ND RESPONDENT

AND

HON MR JUSTICE RIAGA SC OMOLLO INTERESTED PARTY

HON MR JUSTICE SAMUEL BOSIRE INTERESTED PARTY

HON MR JUSTICE ALNASHIR VISRAM INTERESTED PARTY

HON MR JUSTICE JOSEPH NYAMU INTERESTED PARTY

HON LADY JUSTICE KALPANA RAWAL INTERESTED PARTY

HON MR JUSTICE MBOGHOLI MSAGHA INTERESTED PARTY

HON MR JUSTICE KARIUKI KIHARA INTERESTED PARTY

HON MR JUSTICE LEE MUTHOGA INTERESTED PARTY

DR WILLY MUTUNGA INTERESTED PARTY

HON LADY JUSTICE MARY ANG'AWA INTERESTED PARTY

HON LADY JUSTICE ROSELYNE NAMBUYE INTERESTED PARTY

HON LADY JUSTICE HANNAH OKWENGU INTERESTED PARTY

HON LADY JUSTICE MARY KASSANGO INTERESTED PARTY

HON LADY JUSTICE MARTHA KOOME INTERESTED PARTY



GLADYS BOSS SHOLLEI INTERESTED PARTY
NANCY BARAZA INTERESTED PARTY
CLERK, NATIONAL ASSEMBLY OF KENYA INTERESTED PARTY
OGLA KARANI INTERESTED PARTY
KENYANS FOR PEACE TRUTH & JUSTICE INTERESTED PARTY

RULING

1. The petitioner contests the legality of the appointment of the Chief Justice and the Deputy Chief Justice of the Republic of Kenya on the basis that the process of appointment was contrary to the Constitution. The parties were directed to appear before me today to make submissions on whether this matter may be referred to the Chief Justice for the empanelling a bench of not less than three judges under article 165(4) of the *Constitution*. Article 165(4) 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.”
2. Mr Kinyanjui, the petitioner, who is also an advocate of the High Court, contends that the amended petition raises several issues concerning the legality of the appointment of the Chief Justice and Deputy Chief Justice. The issues raised, the petitioner maintains, are not simple issues of interpretation of the Constitution.
3. Apart from setting out the issues that are raised in the petition and amended petition, the petitioner submits that one judge cannot decide the issue of appointment of the Chief Justice and it would be better for the matter to be heard by three or even five judges.
4. Counsel representing the Attorney General, Mr Mombo, was content to leave the matter to court and so did counsel for the 16th interested party, Mr Ochola. Mr Kanjama, counsel for the 17th interested party requested the court to take into account the issues in the matter and note that it is the Chief Justice himself who impanels the bench.
5. Mr Nowrojee, counsel for the 9th interested party, opposed the application primarily on the basis that the applicant did not discharge the burden placed on him under article 165(4) to show that the matters in issue raise substantial questions of law. Counsel submitted that the arguments presented were subjective in nature and did not assist the court in assessing objectively the issues to see whether they fell within article 165(4).
6. 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), *Community Advocacy and Awareness Trust and Others v Attorney General and Others* Nairobi Petition No. 243 of 2011, *Justice Chemuttut and Others v Attorney General and Others* Nairobi Petition No. 307 of 2012 (Unreported)).

7. 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) would be imperiled.
8. 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. 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.
9. 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.
10. 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.
11. Matters concerning legality or otherwise of appointment of persons to constitutional office under the *Constitution* can no longer be considered novel or difficult. Since the Constitution was promulgated the High Court has had to deal with cases concerning appointment of persons to state and public office. For example, the case of the *Federation of Women Lawyers Kenya (FIDA-K) and Others v Attorney General and Others* Nairobi Petition No. 102 of 2011 (Unreported) dealt the appointment of Supreme Court judges, *Centre for Rights Awareness and Others v Attorney General and Others* Nairobi Petition No. 16 of 2011 (Unreported) dealt with the appointment of the Chief Justice and Attorney General. The petitioner has not shown that there are conflicting decisions by the High Court to the extent that the matter is of such importance as to require consideration by a three judge bench. The cases I have cited and other which have been determined by the High Court over the period in which the *Constitution* has been in force show that as judges, with jurisdiction to interpret the Constitution, we are called upon from time to time to make determination which grounded in the Constitution and the law and the duty and obligation does not change whether the decision is made by one judge or many judges.



12. The nature of our obligation and fidelity to the oath of office does not change merely because the office is one of Chief Justice, President or other State Officer. In any case the nature and statute of the office challenged does not automatically translate the matter into one that falls within the provisions of article 165(4) as a substantial question of law. This case before the court concerns the interpretation of the Constitution and the questions posed by the petition 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 on a daily basis while discharging their judicial mandate.
13. 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 has not been made out.
14. The application is therefore rejected and dismissed.

DATED AND DELIVERED AT NAIROBI THIS 27TH SEPTEMBER 2012

D.S. MAJANJA

JUDGE

Mr Harrison Kinyanjui, the petitioner, in person.

Mr Moimbo, Litigation Counsel, instructed by the State Law Office for the respondents.

Mr Nowrojee, Advocate for the 9th interested party.

Mr Ochola instructed by Soita and Saende Advocates for the 16th interested party.

Mr Kanjama instructed by Muma and Kanjama Advocates for the 18th interested party.

