



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kimeu & 3285 others v Kenya Pipeline Company Ltd & another  
(Petition 9 of 2019) [2022] KEELC 3223 (KLR) (15 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3223 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
PETITION 9 OF 2019  
TW MURIGI, J  
JUNE 15, 2022**

**BETWEEN**

**MUINDI KIMEU & 3285 OTHERS ..... APPLICANT**

**AND**

**KENYA PIPELINE COMPANY LTD ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) .... 2<sup>ND</sup>  
RESPONDENT**

**RULING**

1. The petitioners instituted this petition on 31st of July 2019 and sought for the following orders: -
  - a. Pending the hearing and determination of the petition, the court do issue interlocutory orders requiring the respondents to facilitate further independent expert study and examination to determine the environmental social impact of the spilled oil on the soil, water, air biota and an order against the 1<sup>st</sup> Respondent by virtue of “polluter pay principle” to meet all the expenses for sampling testing and examination of the soil, water, vegetation and medical tests and the examination of the Petitioners and their livestock.
  - b. A declaration that the petitioners right guaranteed and protected by articles 28, 29, 40, 42 & 43(1) (d) of *the Constitution* have been violated by the respondents.
  - c. A declaration that the respondents have breached obligations imposed upon them in respect of the environment by article 69 of *the Constitution*.
  - d. An environmental restoration order requiring the respondents to take such action as will prevent the contravention of the violation of the petitioners right: -
    - i. To restore the petitioners damaged land to the satisfaction of the court



- ii. To prevent further damage to the petitioners land and the environment.
  - iii. To remove any pollutant Petroleum Chemical products deposited in the petitioners land to the understanding of the court.
  - iv. To monitor and clean up any pollution from Thange River Basin to the satisfaction of the court.
  - e. An order that the 1<sup>st</sup> respondent pays the petitioners full special and general damages of their rights, taking into account any payment made thereto.
  - f. An order for costs of this petition to be borne by the 1<sup>st</sup> Respondent.
  - g. Any other order or relief as this Honourable Court may deem just and expedient to grant for the interest of justice as provided under article 259(1) (b) of *the Constitution*.
2. What was pending before the court was the 1<sup>st</sup> respondent's application dated 15<sup>th</sup> of October, 2021 wherein the court had issued directions on its disposition thereof.
  3. When the matter came up for mention on 31<sup>st</sup> of January 2022 to confirm the filing of submissions, Mr. Ndolo appearing jointly with Mr. Muthanwa for the petitioners/Applicants requested the court to first determine the petitioners' application dated 8<sup>th</sup> of December 2021 and the application dated 19<sup>th</sup> of January 2022. The Court granted the request and directed the parties to canvass the application by way of written submissions.

#### **Petitioners/applicants' Case**

4. By a notice of motion dated 19<sup>th</sup> of January 2022 brought pursuant to article 165(4) of *the Constitution* & rule 19 of *the Constitution* of *Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules* 2013 the Applicants are seeking for the following orders: -
  1. Spent.
  2. That pending the hearing of this application inter-partes, this Honourable Court do stay further proceedings until the application is heard and determined.
  3. That this petition be certified as raising substantial issues of law under article 164(4) of *the Constitution* and refer the same to the Honourable Chief Justice to empanel a bench of not less than 3 judges to hear and determine the matter.
  4. That the costs of this Petition be in the cause.
5. The application is premised on the grounds appearing on the face of the application. These grounds are: -
  1. That the Petition raises serious Constitutional issues of infringement of the Petitioners right under article 42 affecting 27 villages that form the Thange river basin.
  2. That the Petition is complex and the first of its kind in Kenya and it requires substantial time to be disposed off in that: -
    - a. The Preamble of *the Constitution* recognises sustainable environment as the heritage for the benefit of the future generations.
    - b. The Petition relates to environmental pollution caused by massive oil spillage to Thange River which is 42 km long which polluted ground and bore hole water thus



destroying the livelihood of the Petitioners and other residents along the river who solely depend on it for their domestic use, their livestock and for irrigation.

- c. The Petition relates to the application, interpretation and enforcement of environmental rights under articles 42, 69 & 70 of *the Constitution* and following the enabling of statutes enacted under article 72 of *the Constitution* to give effect to
    - a. The EMCA Act 1999.
    - b. The EMCA (Water Quality) Regulations 2006.
    - c. The *Water Act* 2002.
    - d. The Water Resource Management Rules 2006.
    - e. The *Petroleum Act* 2019.
  - d. The Petition raises new issues of absolute liabilities applicable to pollution caused to the environment by oil spillage not previously settled by law as provided under: -
    - a. Section 2, 3, 108-111, 142 & 143 of EMCA.
    - b. Section 2 & 96 of the *Water Act*.
    - c. Section 98 of the *Energy Act*.
    - d. Section 97 of the *Petroleum Act*.
    - e. Rule 40 of EMCA (Water Quality) Regulations 2006.
    - f. Rules 88 of WRMA Rules 2007.
    - e. The Petition raises the polluter pay principle
    - f. There is need to appoint 3 judges for purposes of advancement of the rule of law and human rights and to promote the development of the law.
6. The application is supported by the affidavit of Musembi Ndolo Advocate sworn on the even date. In his supporting affidavit, Mr Ndolo learned Counsel for the applicants reiterated the grounds appearing on the face of the application.

### **1<sup>ST</sup> Respondents Case**

7. Opposing the application, the 1<sup>st</sup> respondent vide the replying affidavit sworn by Elizabeth Tirop the Senior Legal Officer of the 1<sup>st</sup> Respondent averred that the application was an afterthought as it ought to have been made before the directions on the Petition were given. The 1<sup>st</sup> Respondent further averred that the Petition does not raise substantial issues of law to warrant the same being referred to the Chief Justice to empanel a 3 judge bench as there is no question of interpretation of *the Constitution* or a question of conflict of the laws.
8. The 1<sup>st</sup> respondent argued that the issue for determination in the Petition is brought under article 165(3) of *the Constitution* which deals with the Court's jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been violated, infringed or is threatened. The 1<sup>st</sup> respondent contends that by dint of the provisions of article 165(3) (b) of *the Constitution*, the court has jurisdiction to hear and determine the issues of fundamental freedom which have been raised in the Petition.



9. The 1<sup>st</sup> Respondent further averred that the Petition does not raise substantial issues of law to warrant this Court to refer the matter to the Chief Justice for empanelment of a 3 Judge Bench as the reliefs sought by the Petitioners are not complex and that they can be dealt with by a single judge. She argued that the compensation that is being claimed by the Petitioners can be awarded by a single judge. She argued that although the 1<sup>st</sup> respondent had contemplated in its replying affidavit that the Petition ought to be heard and determined by a three judge bench, it does not warrant a reference of the matter to the Chief Justice. The 1<sup>st</sup> respondent contends that article 259 (1) (b) & (c) of the Constitution cannot be a reason to have this Petition referred to the Chief Justice.
10. The 1<sup>st</sup> respondent further averred that the applicants had not pointed out the issues or given any reason why a single judge should not hear and determine the petition. The 1<sup>st</sup> respondent argued that it is not only a 3 judge bench that can advance the development of the law. The 1<sup>st</sup> respondent urged the court to dismiss the application on the grounds that it had not met the threshold required for certification. The 1<sup>st</sup> respondent placed reliance on the following authorities: -
  - a. Wycliff Ambesta Oparanya & others vs Director of Public Prosecutions & another [2016] eKLR.
  - b. Amos Kiuno & 2 others vs Cabinet Secretary Ministry of Interior & Co-ordination of National Government & 3 others (2014) eKLR.
  - c. Patrick Musimba vs National Land Commission & 4 others (2014) eKLR.
11. The 2<sup>nd</sup> Respondent did not oppose the application.
12. The application was canvassed by way of written submissions.

### **Submissions**

13. The applicants written submissions were filed on 21<sup>st</sup> of January 2022. Counsel for the applicant submitted that the issues raised and the reliefs sought in the Petition raises a substantial question of law to warrant the Court to refer the same to the Chief Justice for empanelment. To buttress his submissions, Counsel placed reliance on the case of Cord & another vs Republic of Kenya & another (2015) eKLR.
14. The 1<sup>st</sup> respondent did not file any submissions but chose to rely on their replying affidavit and the authorities attached therein.

### **Analysis and Determination**

15. Having considered the application, affidavits and the applicant's submissions, I find that the issue for determination is whether the petition herein raises a substantial question of law to warrant the file to be placed before the Chief Justice for empanelment of a 3 Judge bench under article 165(4) of the Constitution.
16. The principle authority for empanelment of judges is enumerated in article 165(4) of the Constitution which provides as follows: -

“Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by uneven number of judges being not less than three, assigned by the Chief Justice.”



17. It is clear from the above provision of *the Constitution* that for a matter to be heard by a bench, the Court must certify it as one raising a substantial question of law that falls under article 165 3 (b), (c) or (d) of *the Constitution*. Article 165(d) provides as follows:-

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

- d) Jurisdiction to hear any question respecting the interpretation of *the constitution* including the determination of:-
  - i. The question whether any law is inconsistent with this constitution;
  - ii. The question whether anything said to be one 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 constitutional relationship between levels of government;
  - iv. A question relating to conflict of laws under article 191 and
  - v. Any other jurisdiction, original or appellate conferred on it by legislation.

18. Article 165(3)(b) of *the Constitution* grants this court the jurisdiction to determine whether a fundamental right or freedom has been denied or threatened or violated. It provides as follows: -

Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

19. The Applicants submitted that the issues raised in the Petition are complex and the first of its kind in Kenya. Learned Counsel for the Petitioners argued that the Petition would require substantial time to be heard and determined as it relates to the application, interpretation and enforcement of environmental rights under article 42, 69 & 70 of *the Constitution* to give effect to statutes established under Article 72 of *the Constitution* namely the EMCA Act, The EMCA (Water Quality) Regulations 2006, The *Water Act*, The Water Resource Management Rules 2006 and The *Petroleum Act*. Counsel went on to submit that the Petition raises new issues on absolute liabilities applicable to pollution of the environment caused by oil spillage which have not previously been settled by the law.

20. On the other hand, the 1<sup>st</sup> respondent argued that there was nothing complex raised in the petition as the reliefs sought could easily be granted by a single judge.

21. *The Constitution* does not define the term substantial question of law. There are numerous decisions that state what constitutes a substantial question of law.

22. The question regarding the circumstances under which a matter should be referred to the Chief Justice under article 165(4) of *the Constitution* was considered in the case of *Community Advocacy and Awareness Trust and Others vs Attorney General* Nairobi Petition No 243 of 2011(unreported) where it was held: -

“*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...giving meaning to “substantial question” must be taken 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.”

23. The law as to what amounts to a substantial question of law is now well settled. In the case of Sir *Chuntal Mehta and Sons Ltd vs The Century Spinning and Manufacturing Co Ltd* 1962 AIR 1314, the Supreme Court of India defined the elements of a substantial question of law as follows;

“The proper test for determining whether a question of law raised in the case is substantial would in our opinion, be whether it is of general public importance or whether it directly and 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 this court or by the Privy Council or by the Federal Court or not free from difficulty or calls for discussions of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question 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 question of the law.”

24. Back home, the guidelines for certification under article 165(4) of *the Constitution* were provided by the Court of Appeal in the case of *Omikya Omtatab Okoiti & another vs Ann Waiguru – Cabinet Secretary, Devolution and Planning & 3 others* (2017) eKLR as follows;

“There are, in our view, parallels to be drawn between certification for purposes of article 163(4)(b) of *the constitution* and certification for purposes of article 165(4) notwithstanding that the drafters of *the constitution*, in providing for certification of matters for purposes of appeal to the supreme court under article 163(4)(b) stipulated that a matter should be of “general public importance”. There is therefore wisdom to be gained from the pronouncements court of Kenya respecting interpretation of article 163(4)(b).”

25. In the case of *Hermanus Phillipus Steyn vs Giovanni Gnechi-Ruscione* (2013) eKLR, the Supreme Court of Kenya pronounced the principles for purposes of certification under article 163(4)(b) of *the Constitution* some of which are relevant in the context of certification under article 165(4). Drawing therefrom, we adopt, with modification the following principles;

1. For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interests;
2. The applicant must show that there is a state of uncertainty in the law;
3. The matter to be certified must fall within the terms of article 165(3)(b) or (d) of *the Constitution*.

26. Similarly, in the case of *Harrison Kinyanjui vs Attorney General & another* (2012) eKLR the court held that;

“The meaning of ‘substantial question’ must take into account the provision of *the constitution* as a whole and the need to dispense justice without delay particularly given



specific fact and situation. In other words, each case must be considered on its own 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) of *the constitution*, 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.”

27. Accordingly, a substantial question of law is one that is of general public importance or one that affects the rights of a large cross section of the public. A party seeking certification must lay a basis for the certification.
28. Learned Counsel for the petitioners submitted that the Petition relates to the application, interpretation and enforcement of environmental rights under article 42, 69 and 70 of *the Constitution* to give effect to statutes enacted by Article 72 namely;
  - a. The EMCA Act.
  - b. The EMCA (Water Quality) Regulations 2006.
  - c. The *Water Act*.
  - d. The Water Resource Management Rules 2006.
  - e. The *Petroleum Act*.
29. The Petition herein raises questions touching on article 42, 69 and 70 of *the Constitution*. Article 42 provides for the right to a clean and healthy environment, article 69 touches on the obligation of the state with regards to the environment while article 70 deals with the enforcement of environmental rights. The petitioners allege that the Petition herein revolves around the infringement of their right to a clean and healthy environment as provided by article 42 of *the Constitution* caused by the massive oil spillage on Thange river. Learned Counsel for the Petitioners argued that the pollution on the environment caused by the massive oil spillage has not only affected the Petitioners right to a clean and healthy environment but also the residents living around the river who depend on it for their domestic use and for irrigation.
30. The Petitioners further alleged that the Petition which is the first of its kind in Kenya is complex in nature and that it will require substantial time to be heard and determined.
31. The Petitioners further argued that the petition raises new issues of absolute liability that have not previously been settled by the law. the petitioners also argued that the petition raises the question on the interpretation of articles 42, 69 and 70 of *the Constitution* to give effect to EMCA Act, the EMCA (Water Quality) Regulations 2016, the *Water Act*, the Water Resource Management Rules and the *Petroleum Act*.
32. From the foregoing it is evident that there is some connection between the oil spillage and the environment specifically on Thange river and the communities living along the river. The allegations that the pollution on the river and the legal issues revolving around it is of great public importance to the communities living around the Thange river.
33. The petitioners argued that that this is the first time that this issue is coming up for consideration. The petitioners further argued that the petition is complex and that it will require substantial amount of time in determining the same. the 1<sup>st</sup> respondent did not refute the same.



34. In that context, I find that it is a new issue which is complex and which has a significant impact on a large cross section of the public specifically the communities living along the Thange River. I find and hold that the Petition raises substantial questions of law of general public importance which directly and substantially affect the rights of the petitioners herein and communities living around Thange river.
35. The Petitioners have demonstrated to the court that the Petition raises a substantial point of law whose determination will have a significant bearing on the public interest.
36. Accordingly, I find that the substantial question of law of public importance will be enriched with the input of more than one judge. Consequently, I find that the application is merited and the same is allowed in the following terms: -
- a. This Petition be placed before the Honourable Chief Justice for Her Ladyship to consider constituting an uneven number of judges being not less than three to hear and determine this petition.
  - b. Costs in the cause.

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**HON. T. MURIGI**

**JUDGE**

**RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 15<sup>TH</sup> DAY OF JUNE, 2022.**

**IN THE PRESENCE OF: -**

Court assistant – Mr. Kwemboi

Ndolo appearing together with Muthawa for the Petitioner/Applicant.

Migun for the 1<sup>st</sup> Respondent

Ms Mwangi holding brief for Ngara for the 2<sup>nd</sup> Respondent.

