



REPUBLIC OF KENYA

IN THE REPUBLIC OF KENYA AT NAIROBI

MILIMANI LAW COURTS

PETITION NO. 1217 OF 2007

IN THE MATTER OF AN APPLICATION FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS

AND

FREEDOMS UNDER SECTIONS 70, 75, 77, 82 AND 84 OF THE CONSTITUTION

AND

**IN THE MATTER OF THE CONSOLIDATED BANK OF KENYA ACT
(NO. 5) OF 1991**

AND

LEGAL NOTICE NO., 136 OF 2002

AND

**IN THE MATTER OF THE SALE AND TRANSFER OF THE ASSETS AND LIABILITIES OF
NATIONWIDE FINANCE COMPANY LIMITED**

BETWEEN

KIRAGU HOLDINGS LTD1ST PETITIONER

MUMBU HOLDINGS LTD.....2ND PETITIONER

KBKANNNE INVESTMENTS LTD3RD PETITIONER

TAGAKA HOLDINGS LTD4TH PETITIONER

P.J. KIRAGU MWANGI5TH PETITIONER

J.K. MBUU6TH PETITIONER

MARY WAITHERA GACHUI7TH PETITIONER

VERSUS

THE HON. MINISTER FOR FINANCE.....1ST RESPONDENT
THE HON. ATTORNEY GENERAL.....2ND RESPONDENT
THE CENTRAL BANK OF KENYA.....3RD RESPONDENT
THE CONSOLIDATED BANK OF KENYA LTD.....4TH RESPONDENT
THE PERMANENT SECRETARY TO THE TREASURY.....5TH RESPONDENT
PRIVATIZATION COMMISSION6TH RESPONDENT

RULING

1. This matter comes before me to certify that the matter raises a substantial question of law in terms of Article 165(4) of the Constitution and should therefore be referred to the Chief Justice to assign a bench of not less than three judges to hear and determine the matter.

2. On 17th June 2011 Justice Musinga recorded an order, ***“by consent of the parties that this matters be placed before the Chief Justice pursuant to Article 165(4) of the Constitution of Kenya, 2010, for purpose of appointing uneven number of judges to hear and determine it. This Court hereby certifies that substantial issues of law have been raised”***.

3. The matter was placed before the Chief Justice for directions and on September 20, 2011, the Chief Justice made the following directions;

“I give the following directions under Article 165(4) on the matter:

After perusing the order of the Court I am not satisfied that the “matter certified by the court as raising a substantial question of Law” was based on any substantive legal arguments made before the court by counsel, and satisfying the provisions of the Article. I, therefore, order that the matter be placed before the Judge who made the order and if the Judge is no longer in the station then the matter shall be placed before the Head of the Division or the Resident Judge who shall hear more arguments, including those of the respondents and the interested parties and thereafter make a decision that gives reasons why the matter should be certified as raising substantial questions of law for me to empanel a bench of uneven number of judges, being not less than three. If the judge is of the view, after hearing arguments, that no substantial question of law under this article can be certified as such, then the judge will proceed to hear the application on priority basis until it is concluded as determined”.

4. Counsel for the Petitioners argued that there are substantial legal issues raised by the Petition as it concerns certain actions taken by the Government to deal with the banking crisis in the 1980's. In summary, the petition concerns the constitutionality of actions taken to nationalise certain local banks and thereafter establish the Consolidated Bank of Kenya Ltd. The Key issue concerns the expropriation of private property contrary to Section 75 of the former constitution and the constitutionality of the Consolidated Bank of Kenya Act (Act No. 5 of 1991). These among other issues, Mr. Kibe Mungai, argued raise substantial issues of law to be referred to the Chief Justice to constitute a three Judge bench.

5. Mr. Mungai further argues that this matter has already been certified by Justice Musinga and all I need to do is to set out the reasons for the decision to certify the matter as raising substantial issues of law.

6. Counsel for the 1st, 2nd, 5th and 6th Respondents, Mr. Onyiso, has no objection to the matter being

referred to the Chief Justice.

7. Mr. Githaiga, for the 3rd Respondent, has no objection to the matter being referred to the Chief Justice but argues that the pending Preliminary Objection and other interlocutory matters must be dealt with before the matter is referred.

8. Miss. Ndiho, for the 4th Respondent, argues that the issue of the pending Preliminary Objection was not brought to the attention of Justice Musinga. Further, the Preliminary Objection must be determined first to confirm that indeed there are constitutional issues to be referred to the three – judge bench for determination.

9. Mr. Mungai, in response, was of the view that the Preliminary Objection and all interlocutory matters are the issues that must be dealt with by the bench of three judges under Article 165(4) of the Constitution.

10. I have read the Petition, the various responses filed thereto and considered them in the light of the arguments. I think the issue whether a matter is one that raises substantial issues of law is one dependent on the circumstances of the case. It is not one where the consent of the parties can be imposed on the judge to make the certification.

11. A case such as this 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 issues of law.

12. My consideration of this case is that this matter does not raise any substantial issue of law that would require that the matter be placed before the Chief Justice. The issue of appropriation of property contrary to Section 75 of the former Constitution is a matter that has had judicial pronouncement in the High Court. The fact of novelty of the case does not of itself render the case one of “substantial question of Law” in terms of Article 165(4) of the constitution. Otherwise all cases under the present Constitution would have to be referred to the Chief Justice.

13. In the circumstances, I decline to refer the matter to the Chief Justice and direct the parties to address me on the disposal of the interlocutory applications pending.

Dated at Nairobi this 21st day of October, 2011.

D.S.MAJANJA

JUDGE

21.10.2011

Coram Majanja J

Nazi Court clerk

Mr. Kibe Mungai for the Petitioner

Ms. Ndiho holding brief for Mr. Ojiambo State Counsel for the 4th Respondent

Order – Ruling read in open court. Matter to be mentioned on 27th October, 2011 for directions. Notice to be served on all the parties by the Petitioner.

D.S. MAJANJA

JUDGE