



**Bifwoli v Attorney General & 2 others (Environment & Land Petition
29 of 2017) [2022] KEELC 3421 (KLR) (5 August 2022) (Ruling)**

Neutral citation: [2022] KEELC 3421 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND PETITION 29 OF 2017
A OMBWAYO, J
AUGUST 5, 2022
IN THE MATTER OF ARTICLES 10, 19, 20, 21, 22, 23,
35, 40
47, 50, 159, 258, 259, & 260 OF THE CONSTITUTION
OF KENYA
AND
IN THE MATTER OF SECTIONS 7, 9, 10, 14, 25 AND
26 THE
LAND REGISTRATION ACT NO 3 OF 2012
AND
IN THE MATTER OF THE LAND ACT NO 6 OF 2012
AND
IN THE MATTER OF SECTIONS 3, 4, 5 AND 8 OF THE
ACCESS
TO INFORMATION ACT NO 31 OF 2016
AND
IN THE MATTER OF SECTION 2, 3, 4, 5, 6, 7, 8, 9,
AND 11
OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO 4
OF 2015
AND
IN THE MATTER OF CONTRAVENTION OF
FUNDAMENTAL



RIGHTS UNDER THE CONSTITUTION OF KENYA

ARTICLES 10, 19, 20,

21, 22, 23, 35, 40, 47 AND 50

BETWEEN

BETWEEN

THOMAS KHAMALA BIFWOLI PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

CHIEF LAND REGISTRAR 2ND RESPONDENT

WILLIAM NDINYA OMOLLO 3RD RESPONDENT

RULING

1. Thomas Khamala Bifwoli has come to this court seeking orders that this court be pleased to certify this matter as one raising a substantial question of law under article 165 (4) of the Constitution which should be heard by an uneven number of judges, being not less than three, assigned by the Honourable Chief Justice.
2. That the substantial questions of law to include but not limited to: -
 - a. Whether an order for costs made under the erroneous belief by this court that he documents applied for by the applicant in this suit are not relevant can be recalled, varied or set aside following a subsequent determination by the same court that those documents are not only relevant but necessary for determination of the truth and resolution of the dispute between the same parties: -
 - b. Whether the courts of record acting *suo motu* or on application by any affected party have the inherent jurisdiction to set aside their judgments/decision/order, when (a) The judgment is obtained by fraud or deceit either on the court or on one or more of the parties; (b) The judgment is a nullity; (c). It is obvious that the court was misled into giving judgment by a party; (d) The was given in the absence of jurisdiction; €. The proceedings adopted were such as to deprive the decision or judgment the character of a legitimate adjudication; or (f). Where there is fundamental irregularity.”
 - c. Whether judgment dated May 2, 2018 was obtained by the 3rd respondent misleading the court and deploying criminal means including but not limited to contempt of court and perjury.
 - d. Whether a judgment dated May 2, 2018 was obtained by practicing fraud on the court in the form of deceit, misrepresentation/suppression of material facts and documents.
 - e. Whether the court acting *suo motu* or on application by a party has inherent power to recall, vary or set aside its prior award/order of costs where it is later/subsequently discovered that the order/award was premised/founded on false and or forged relying papers and affidavit.



- f. Whether the proceedings leading to the dismissal of the petition and award for costs in this matter were fair when the applicant was denied the documents which he required to prosecute the petition in the first place, the 3rd respondent was allowed to rely on false/forged evidence and the judgment was based on false/forged replying papers.
 - g. Whether a judgment, order or decree obtained by; practicing fraud on the court, deceit, misrepresentation or suppression of material facts and evidence is *res judicata* and enforceable,
 - h. Whether the court not only has the right but a duty to deny relief to a person who misrepresents or suppresses material facts and evidence in order to obtain a judgment, decree or order of the court.
 - i. Whether this court has a constitutional duty acting *suo motu* or on application by a party to recall, vary or set aside a judgment, decree or order obtained by fraud, deceit, misrepresentation, suppression of material facts and documents, or by conduct which amounts to contempt of court, perjury, and abuse of court process.
3. That this honorable court be pleased to refer this matter to the Chief Justice for empanelment of a bench as provided for by article 165 (4) of the [Constitution](#). That costs of this application be awarded to the applicant.
 4. The application is based on grounds that the court inadvertently awarded costs to the 3rd respondent for filing his papers that are patently false on their face. That the award of costs was obtained by suppression of a material facts and that the court was misled.
 5. The applicant contends that at the time of the court rendering its judgment dated May 2, 2018, the respondents had custody and counting of all the requested documents but unlawfully withheld the same from the applicant. The application is supported by the affidavit of Thomas Bifwoli that reiterated the grounds that the respondent was awarded costs for filing his replying papers that are false and that the order for costs was obtained by suppression of material facts.
 6. The 3rd respondent field grounds of opposition whose import is that there is no substantial question of law raised in the application which requires to be heard by a three-judge bench as required by article 165 (4) of the [Constitution](#) of Kenya.
 7. According to the 3rd respondent, the question raised in the application dated May 24, 2021 are merely whether the order for costs made in the judgment dated May 2, 2018 should be raise or set aside and secondly whether costs in Kisumu ELC Petition No 29 of 2017 should be deferred for determination with Kisumu ELC Cause No 144 of 2012.
 8. I have considered the application and the grounds of opposition and the rival submissions on record and do find that the genesis of this application is the judgment dated May 2, 2018 where this court found the petition herein without merit and dismissed it with costs to the 3rd respondent. The court observed that as the 3rd respondent filed his replying papers and participated in the hearing of the petition he is entitled to costs.
 9. The petitioner is dissatisfied with the order for costs on the basis of filing replying papers and has filed an application dated May 24, 2021 seeking orders that this court varies or sets aside its orders for costs made in the Judgment dated May 2, 2018. Moreover, that the costs in Kisumu ELC Petition No 29 of 2017 be deferred for determination with Kisumu ELC No 144 of 2012 where all the other prayers in Kisumu ELC Petition No 29 of 2017 are being determined and that costs be provided for. The application is made under various provisions of the [Constitution](#) and section 1A, 1B 3A of the [Civil Procedure](#)



Act Cap 21 Laws of Kenya and order 51, rule 1 of the Civil Procedure Rules 2010. In a nutshell, the applicant seeks to review its judgment on the issue of costs.

10. The 3rd respondent filed a replying affidavit whose gist is that the 3rd respondent was validly awarded costs for filing papers and participating in the proceedings. The applicant was dissatisfied with the judgment and lodged an appeal and therefore an application for review can't be entertained by virtue of provision of order 43 of the Civil Procedure Rule 2010.
11. According to the respondent, once an appeal is preferred a review cannot be filed. The respondent was of the view that the court lacks jurisdiction to review. According to the respondent, the application is vexatious and abuse of the process of court and that Justice Kibunja had good reasons to award costs.
12. This court has already found that the application dated May 24, 2021 was simply an application to review the Judgment and therefore the provision of section 80 of the Civil Procedure Act and order 45 of the Civil Procedure Rules, 2010 apply. I must warn myself that the application before me today is the one dated March 22, 2022 and not May 24, 2021.
13. I do agree with both parties that for the court to issue the orders sought a substantial question of law should be raised. I do further agree with Mr Orenge that the question of law raised in the application dated May 24, 2021 is whether the order for costs made by this court can be set aside or reviewed and what are the principles for doing so.
14. I do with respect associate myself with the position adopted by Majanja, J in Harrison Kinyanjui v Attorney General & Another [2012] eKLR where he held 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. 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.”

15. I also refer to the decision in Vadag Establishment v Y A Shretta & Another Nairobi High Court (Commercial & Admiralty Division) Misc High Court Civil Suit No 559 of 2011 where this court held:

“It is also my considered view that a High Court whether constituted by one judge or more than one judge exercise the same jurisdiction and neither decision can be said to be superior to the other. True, two heads are better than one, but in terms of the doctrine of stare decisis whether a decision is delivered by one High Court Judge or handed down by a court comprised of more judges, their precedential value is the same.”

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.

16. This provision of the constitution can also be applied by courts of equal status thus the Environment and Land Court and the Employment and Labour Relations Court. Therefore, the only constitutional provision that expressly permits the constitution of bench of more than one Environment and Land Court judge is Article 165(4). Under that provision, for the matter to be referred to the Chief Justice for the said purpose the Environment and Land Court must certify that the matter raises a substantial question of law in the following instances:

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 the Constitution and under this is included (i) the question whether any law is inconsistent with or in contravention of the Constitution; (ii) the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the 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.

17. The opinion by parties that the matter falls under article 165(4) does not necessarily bind the court in issuing the said certification and it does not matter 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. Moreover, the view that a substantial question of law is disclosed does not matter unless the issue also arises as to 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.

18. In Community Advocacy Awareness Trust & Others v The Attorney General & Others High Court Petition No 243 of 2011 where it was noted that:

“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 the matter.

19. In that case the court proceeded to note that the promulgation of the Constitution of Kenya 2010 of brought into being a whole new law that in every respect raises substantial questions of law because the Constitution is new. This constitution has been recognised by the Supreme Court as being transformative in nature. It has expanded bill of rights as set out in chapter four, the citizenship issue in chapter three, the leadership and integrity issue in chapter six and chapter eleven dealing with devolved government are matters which need constant interpretation by the courts and if every such question were to be determined by a bench of more than one judge, other judicial business would definitely come to a standstill and if that were to happen, then the expectation of the public to have their cases decided expeditiously as provided under article 159(2) of Constitution and sections 1A and 1B of the Civil Procedure Act would never be realised.

20. In Chunilal V Mehta v Century Spinning and Manufacturing Co AIR 1962 SC 1314, it was held 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.”

21. In Santosh Hazari v 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."

22. In this matter the applicant has made a simple application for review of judgment on costs that does not raise a substantial question of law but merely a question of interpretation of the law that can be done by one judge. In conclusion, I do find that the applicant has not established that there is a substantial question of law raised in the application dated May 24, 2021 and therefore the application dated March 22, 2022 is dismissed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 5th DAY OF AUGUST, 2022.

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

