



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. APPLICATION NO. 717 OF 2004**

ALEX MBOTE GATHARA AND 2 OTHERS.....APPLICANTS

VERSUS

THE HON. EMMANUEL KARISA MAITHA

AND 2 OTHERS.....RESPONDENTS

RULING

The Applicants filed this Notice of Motion on 18th June, 2004. At the hearing before me, the Senior State Counsel, Mr. Ombwayo for the 1st Respondent, the Minister of Local Government made an oral application that I refer this application to the Chief Justice for directions and in particular with a view of setting up a 3 Judge – bent to sit as a Constitutional Court to decide on this matter. Mr. Ombwayo, says that this application raises issues of a Constitutional nature i.e. namely, whether Sections 27 and 46(2)(a) are ultra vires and inconsistent with the Constitution of Kenya. That this application requires the Interpretation of the Constitution and possible declaration of a statutory provision to be null and void. That this questions have arisen before in this court and they will continue to come and it is essential that it is put to rest once and for all by a fully constituted Constitutional Court.

This application is supported by Mr. Omboga for the 2nd Respondent who on his part says that the application seeks the interpretation of Sections 40(1) and 28(2)(a) of the Local Government; Act vis-a-vis the Section 33 of the Constitution of Kenya. He is of the view that prudence and the public interest demand that this Constitutional questions be determined with finality as they affect the operations of the Respondents who are mandated to apply the Law as it is. The application is opposed by the Applicants' Counsel Mr. Kibe Mungai. He is of the view that the High Court is really a Constitutional Court and Section 3 and 60 of the Constitution gives it jurisdiction to deal with Constitutional issues and to interpret the Constitution. That to refer the matter to the Chief Justice would be superfluous and inappropriate since the jurisdiction remains that of the High Court whether there is a single Judge or more. That once this Court has jurisdiction then it should hear the matter straight away.

I have considered this application by the Respondents advocates for the matter to be referred to the Chief Justice for directions. I have dealt with a similar application before. In the case of **HCCC NO. 418 of 1998 KAMLESH M. PATNI –v- NASSIR IBRAHIM ALI & OTHERS**, I held that:

“Section 60(1) established the High Court of Kenya making it a superior court of record and which has un limited original jurisdiction in Civil and Criminal matters and such other jurisdiction and powers as may be Conferred on it by the Constitution or any other lawthere us no requirement that the High Court must sit as a bench of more than 1(one) Judge The High Court is always a Constitutional Court.....”

I agree with the Applicant's Counsel that this Court constituted by a single Judge has jurisdiction to determine any Constitutional question and even to interpret it. This jurisdiction is donated by Sections 3

and 60 of the Constitution. This is why no one can fault the jurisdiction of this Court in MISC. CIVIL APPL. NO 75 OF 2004, REPUBLIC –v- HON. EMMANUEL KARISA MAITHA EXPARTE HON. OTIENO KARAN and in MISC. Civil Appl. No. 802 OF 2003 REPUBLIC –v- HON. EMMANUEL KARISA EX PARTE JOSEPH OKOTH WAUDI.

Be that as it may, it is my view that there comes a time when a Constitutional question or issue needs to be determined or even the Constitution interpreted, or a Statutory Provision vis-à-vis the Constitution and such a question raises fundamental and/or significant considerations or issues that prudence and wisdom demands that the same be resolved by more than one judicial mind. It is a fact that 2 or 3 minds are always better than one. While a single Judge of the High Court has jurisdiction to hear such a matter, if the needs of the situation and/or times require a resolution of the question in a conclusive and final manner for the sake of posterity, Public Policy, and public interest, then this Court will not hesitate to call for the setting up of such a Constitutional Court of more than one Judge.

The questions raised by this application were decided by the aforesaid 2 cases, but they are not binding on me. I could proceed to hear the application and reach a similar decision or even decide to the contrary. If similar situation arises now or in the future in our local authorities, aggrieved parties will still come to court to try their luck. The local authorities and in particular the Minister of Local Government will continue applying or invoking Sections 27, 28, 40 and 46 of the Act as long as they stand in the Statutes. The 2 aforesaid decisions did not nullify the alleged offending Provisions of the Act but it was only stated that they are inconsistent with the Constitution. The said decision affected the parties in the said suits but does not put to rest the Constitutional questions raised. This glaring picture shows that there is a legal dilemma here which creates uncertainty of the law in the minds of the public. Such a situation would not augur well for the Rule of law and administration of justice.

It is my view therefore that until Parliament reconsiders the law, it is the duty of our courts to step in and ensure there is consistency, certainty and uniformity of the law. It is my opinion that it is high time that the High Court declares the Law applicable herein after Interpretation of the Provisions in question vis-à-vis the Constitution of Kenya. I, therefore, refer do hereby refer this Application to the Hon. Chief Justice of Kenya with a humble request and recommendation that he gives his DIRECTIONS AND/OR FURTHER ORDERS herein and if he deems it fit to constitute a “full constitutional bench” of a number of Judges at his discretion to hear and determine the questions raised in this application.

In view of the urgency of this matter and the Statutory period of 15th August, 2004, I refer this matter to the Honourable Chief Justice forthwith. Counsels to liaise with the Registrar as to the progress.

Dated and delivered at Nairobi this 29th day of July, 2004 at 2.45 p.m.

MOHAMMED K. IBRAHIM

JUDGE

Coram: Ibrahim, J

Court clerk – Buoro

Mr. Kibe Mungai for Applicant

Mr. Omboga for 2nd and 3rd Respondents

No Appearance for the 1st Respondent

Ruling read in their presence.

MOHAMMED K. IBRAHIM

JUDGE