



Law Society of Kenya & 3 others v Attorney General & 7 others; Kenya National Commission on Human Rights & 3 others (Interested Parties) (Petition E307 & E313 of 2024 (Consolidated)) [2025] KEHC 5719 (KLR) (Constitutional and Human Rights) (9 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5719 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E307 & E313 OF 2024 (CONSOLIDATED)**

LN MUGAMBI, J

MAY 9, 2025

BETWEEN

LAW SOCIETY OF KENYA PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

CABINET SECRETARY FOR DEFENCE 2ND RESPONDENT

KENYA DEFENCE COUNCIL 3RD RESPONDENT

CHIEF OF THE KENYA DEFENCE FORCES 4TH RESPONDENT

**INSPECTOR-GENERAL OF THE NATIONAL POLICE SERVICE 5TH
RESPONDENT**

AND

**KENYA NATIONAL COMMISSION ON HUMAN RIGHTS INTERESTED
PARTY**

KITUO CHA SHERIA INTERESTED PARTY

**INTERNATIONAL COMMISSION OF JURISTS – KENYA (ICJ -
KENYA) INTERESTED PARTY**

**AS CONSOLIDATED WITH
PETITION E313 OF 2024**

BETWEEN

HON. JOHN MBADI 1ST PETITIONER



DR. JAMES NYIKA 2ND PETITIONER

DR.HON.WILBERFORCE OJIAMBO OUNDO 3RD PETITIONER

AND

NATIONAL ASSEMBLY 1ST RESPONDENT

ABEN BARE DUALE, CABINET SECRETARY FOR DEFENCE &
CHAIRPERSON OF THE DEFENCE COUNCIL 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

LAW SOCIETY OF KENYA INTERESTED PARTY

RULING

Introduction

1. The petitioners in the consolidated petitions both dated 26th June 2024, challenge the constitutionality of the respondents' directive vide Gazette Notice No. 7861 dated 25th June 2024 and Gazette Notice No. 7868 dated 28th June 2024.
2. The directive was in relation to deployment of the Kenya Defence Forces (KDF) to aid the National police in handling the purported security emergency that ensued following the Finance Bill, 2024 protests. This directive is alleged to have been in violation of Articles 2 (1) and (4), 3 (1), 10, 19, 20, 21 (1), 27,37, 47, 238(2)(a) and (b) and 241 (b) and (c) of the *Constitution* and Sections 31 (1) (b), 32 (1), 34 (2) and 35 (9) of the *Kenya Defence Forces Act*.
3. The petition in Petition E307 of 2024 was subsequently amended with the leave of this Court on 4th July 2024.
4. The instant ruling relates to two applications.
5. First, the petitioners' applications dated 4th July 2024 seeking empanelment of a bench to resolve the substantial questions of law raised in the consolidated petitions.
6. Second, the 3rd proposed interested party's application dated 1st July 2024 seeking to joinder in this suit.

Petition No. E307 of 2024

7. The petitioner in its application seeks orders that:
 - i. Spent.
 - ii. Spent.
 - iii. The Amended Petition be certified as raising substantial questions of law in terms of Article 165 (3) (b) and Article 165 (3) (d) of the *Constitution*.
 - iv. The file be referred to the Hon. Chief Justice for empanelment of a bench of an uneven number of Judges to hear and determine the said Amended Petition pursuant to Article 165 (4) of the *Constitution*.



- v. The costs of this Application be in the cause.
8. The application is supported by the petitioner’s Secretary and Chief Executive Officer, Florence Muturi’s supporting affidavit of even date and the grounds on the face of the application.
9. The petitioner avers that the petition raises substantial questions of law of general public importance, in respect of the exercise of power and/or discretion to deploy the KDF pursuant to Article 238 and 241(3)(b) and (c) of the Constitution. In particular, the petitioner sets out the substantial issues as follows:
- a. Apart from the approval by the National Assembly, no factors for consideration and procedure under the Constitution, the Kenya Defence Forces Act, or under any other Statute is provided for the manner in which the KDF are to be deployed in situations of emergency or disaster, or to restore peace in any part of Kenya affected by unrest or instability;
 - b. Neither the Constitution, the Kenya Defence Forces Act, or any other Statute defines the meaning of the word “emergency”, nor outlines what a “situation of emergency or disaster” contemplated under Article 241 (3) (b) of the Constitution entails within the context of the Constitution of Kenya;
 - c. The petitioner contends that any finding that in situations of emergency or disaster, the KDF can be deployed and thereafter a report can be given to the National Assembly is per incuriam because it does not take into account the provisions of Articles 238 (2) (a) and (b) and 241 (3) (b) and (c) of the Constitution;
 - d. In considering the meaning of the words “situations of emergency or disaster” as contemplated under Article 241 (3) (b) of the Constitution, any finding that the word “emergency” does not refer to a “state of emergency” as contemplated under Article 58 of the Constitution and that the same should take the ordinary English meaning of serious, unexpected and potentially and dangerous situation requiring immediate action is a finding per incuriam;
 - e. Whether an ambiguous and blanket deployment of the KDF without particularly or specifically defining the scope or nature of their operation or the duration of intervention in a dangerous trend that may lead to abuse of statutory discretion and/or power by the Cabinet Secretary for Defence and bring about a situation of militarization of the Country, which is anti-thetical to the enjoyment of fundamental rights and freedoms by the people of Kenya guaranteed under the Bill of Rights and is contrary to the principles of national security under Article 238 (2) of the Constitution;
 - f. Whether the absence of special considerations before the deployment of the KDF under Article 241 (3) (b) and (c) of the Constitution, and a constitutional and statutory definition of the word “emergency” and/or what a “situation of emergency or disaster” contemplated under Article 241 (3) (b) entails within the context of the Constitution itself, there is a real and present danger that the deployment and any such future deployment of the KDF can be subjected to abuse of power and/or discretion by those in authority and thereby cause the infringement of the Bill of Rights, contrary to Article 47 and 238 (2) (a) and (b) of the Constitution;
 - g. Whether in the absence of application of special constitutional meaning to the words “a situation of emergency” contemplated under Article 241 (3) (b) within the context of the Constitution itself, there is a real and present danger that any other application of the word “emergency” in the ordinary sense may be abused by those in power thereby violating not



Article 47 and 238 (2) (a) and (b) of the Constitution, but also other rights of the people of Kenya under the Bill of Rights.

10. The petitioner asserts in view of this, that the matters raised in the petition present and substantial questions of law that are novel and complex hence warrant certification of the amended petition under Article 165 (4) of the Constitution for the empanelment of a bench.

Petition No. E313 of 2024

11. The petitioners in their application seek orders that:
- i. Spent.
 - ii. Spent.
 - iii. This Court be pleased to certify this matter as raising substantial questions of law under Article 165(3)(b) and (d) of the Constitution.
 - iv. This Court be pleased to forward this matter to the chief justice for empanelment.
 - v. The costs of this Application be provided for.
12. The application is sustained by the 1st petitioner's supporting affidavit of even date and the grounds on the face of the application.
13. Also referring to the impugned Gazette Notice No. 7861, he asserts that the 2nd respondent deployed the KDF where there was no emergency or disaster as required under Article 241(3)(b) of the Constitution. As such, he argues that this directive is in contravention of this Article and Sections 31(1) (a) & (c), 33(1) and 34(2) of the Kenya Defence Forces Act.
14. In addition, it is noted that there was no prior approval sought from the National Assembly which action is in violation of Article 241(3)(c) of the Constitution. In like manner, the 2nd respondent is accused of being in breach of Article 240(8) of the Constitution which provides that the National Security Council is to approve deployment of KDF within Kenya.
15. According to these petitioners, the respondents' actions of unlawfully deploying KDF in the manner they did raises serious issues of national importance which invoke substantial questions of law. On this premise, the petitioners invite the Court to allow their application for empanelment.

1st Respondent's Case

16. The 1st respondent (National Assembly) in reaction to the petitioners' application in Petition No. E313 of 2024 filed its grounds of opposition dated 19th August 2024 on the premise that:
- i. The petitioners have raised issues regarding the constitutionality of the deployment of Kenya Defence Forces to assist the other National Security Organs in maintaining peace and order during the Anti-Finance Bill protests according to Article 241 of the Constitution.
 - ii. These issues raised in the petition, particularly the constitutionality of the deployment of Kenya Defence Forces, concern the general interpretation and application of Article 241 of the Constitution. The issues raised concern the ordinary interpretation and application of the Constitution and other legislations which are questions and issues that single judges of Superior Courts deal with within their daily discharge of their constitutional mandate under Article 165(3) of the Constitution.



- iii. The applicant has not demonstrated how the petition raises a substantial question of law, a question of an immense jurisprudential moment, or a question of grave uncertainty of the law which has not been covered in previous decisions of this Court or the Constitution to warrant an empanelment of a bench. In any case, a decision from a single judge has equal force in law to a decision from a bench.
- iv. It is within the public knowledge that judicial resources are precious and scarce, hence empanelment of a bench should be done in exceptional circumstances to save judicial time especially if the issues raised ordinarily concern the interpretation of the Constitution or the law which matters are within the competence of single judges.

The Other Respondents' Case

17. The other respondents' responses and submissions with respect to the petitioners' applications are not in the Court file or Court Online Platform (CTS).

Interested Parties Case

18. The interested parties' responses and submissions with respect to the petitioners' applications are also not in the Court file or Court Online Platform (CTS).

Petitioner's Submissions

19. The petitioner in Petition No. E307 of 2024 through its Counsel, Chrysostom Xavier Akhaabi Nzili filed submissions dated 26th July 2024 where the issue for determination was set out as: whether the petition should be certified as one raising substantial questions of law of law.
20. Counsel answered this question in the affirmative stating that the petition raises substantial questions of law which are of general public importance and thus ought to be certified as such. Reliance was placed in *Kimeu & 3285 others v Kenya Pipeline Company Ltd & another* [2022] KEELC 3223 (KLR) where it was held that:

- “ 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.”



21. Particularly, Counsel submitted that the substantial questions are in relation to the manner in which the power to deploy the KDF pursuant to Article 238 and 241 (3) (b) and (c) of the Constitution ought to be exercised. In view of this, Counsel submitted that this question transcends the circumstances of this particular case and has a significant bearing on the public's interests thus warrants certification.
22. The petitioners' (Petition E313 of 2024) submissions in relation to this application are not in the Court file and Court Online Platform (CTS).

1st Respondent's Submissions

23. The 1st respondent in Petition No. E313 of 2024 filed submissions through its Counsel, Ruth Nyaberi dated 19th August 2024. Counsel underscored the issue for determination as: whether this petition meets the threshold under Article 165(4) of the Constitution.
24. On the onset, Counsel submitted that the Constitution of a bench is not a matter of right. It is one of necessity where there is a significant matter of public importance that raises novel constitutional issues or where there are conflicting decisions of courts that require harmonization. Further Counsel submitted that it has been held that just because a matter raises novel issues does not qualify to empanel a bench as held in *Kinyanjui v Attorney General & another; Omollo & 18 others (Interested Parties)* [2012] KEHC 5104 (KLR).
25. Like dependence was placed in *Peter Nganga Muiruri vs Credit Bank Limited & another Civil Appeal No.203 of 2006*.
26. Applying these principles to this case, Counsel submitted that the instant petition although raises issues of interpretation and application of Article 241(3)(b) and (c) of the Constitution, it does not raise substantial questions which are novel and complex in nature. Counsel submitted that the issue of interpretation in the petition is ordinarily determined by the Courts on a daily basis. Counsel pointed out even that the issue of the KDF deployment had even been discussed in *Petition No.104 of 2019; Legal Advice Center T/A Kituo Cha Sheria & Others v Hon. Attorney General & another*.
27. On this basis, Counsel submitted that the petition does not meet the threshold of empanelment of bench.

2nd, 3rd and 4th Respondents' Submissions

28. These respondents in *Petition E307 of 2024* through Special State Counsel, Grace Ajierh filed submissions dated 30th July 2024.
29. In view of the empanelment application, Counsel submitted that the petition does not raise any substantial questions of law and equally does not have a significant bearing on public interest as alleged. Reliance was placed in *Santosh Hazari v Purushottam Tiwari (2001) 3 SCC 179* where the Supreme Court of India discussed what factors constitute a substantial question of law as follows:
 - a. directly or indirectly, it affects substantial rights of the parties
 - b. the question is of general public importance
 - c. it is an open question, in that the issue has not previously been settled by the Court
 - d. the issue is not free from difficulty



e. it calls for a discussion for alternative view.”

30. Like dependence was placed in *Harrison Kinyanjui v Attorney General & Another* (2012) eKLR, *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscione* [2013] eKLR and *Wycliffe Ambetsa Oparanya & 2 Others v Director of Public Prosecutions & Another* (2016) eKLR.
31. Counsel asserted that this position obtains because the deployment of the KDF was done in accordance with the power bestowed under Articles 238(1) and 241 (3) (b) of the *Constitution* and Sections 31 (1) (b), 31 (1) (c), 34 (1) and 34(2) of the *Kenya Defence Forces Act*.
32. Counsel submitted that guided by the principles outlined by the Supreme Court in *Hermanus Phillipus Steyn* (supra), the petitioners had not laid any justifiable basis for certification. It was further argued that the petition merely seeks an interpretation of ‘situations of emergency or disaster’ which the petitioners have erroneously interpreted to mean as the state of emergency. In this regard, Counsel argued that there was no uncertainty in law as argued.
33. Furthermore, Counsel submitted that the petitioners had not demonstrated how the definition of situations of emergency or disaster raise substantial questions of law. Counsel stressed that lack of definition of these does not mean that the Statute is vague or unconstitutional.
34. Nonetheless, Counsel submitted that the issue of procedures, whether and to what extent KDF can be deployed in the country is a matter within the competence of the legislature. Reliance was placed in *Trusted Society of Human Rights Alliance v The Attorney General and Others*, Nairobi Petition No 229 of 2011 [2012] eKLR where it was held that:

“the *Constitution* consciously delegates the sovereign power under it to the three branches of government and expects that each will carry out those functions assigned to it without interference from the other two....this must mean that the Courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the Executive sufficient latitude to implement legislative intent. Yet...the courts have an interpretive role-including the last word in determining the constitutionality of all governmental actions. That, too, is an incidence of the doctrine of separation of powers.”

35. Equal dependence was placed in *Martin Nyaga & others v Speaker County Assembly of Embu & 4 others & Amicus Curiae* [2014] KEHC 7962 (KLR).
36. In sum, Counsel submitted that this petition falls short of principles for certification under Article 163 (4) (b) of the *Constitution*.

3rd Proposed Interested Party’s Application

37. The 3rd proposed interested party in its application seeks orders that:
 - i. This Court be and is hereby pleased to grant leave for the Applicant to be joined as Interested Party in this Petition.
 - ii. Upon leave being granted as per prayer 1 above, this Court be and is hereby pleased to grant leave to the Applicant to present oral and written submissions and any other relevant pleadings that may be relevant in this Petition.
 - iii. There be no orders as costs as regards this Application.



38. The application is supported by the 3rd proposed interested party's Executive Director, Demas Kiprono's affidavit also sworn on 1st July 2024.
39. He informs that the 3rd proposed interested party an observer with the African Commission on Human and People's rights, is a registered non-profit, human rights society that works to enhance justice, respect for the rule of law, human rights and democratic governance and advocate for lawful security sector laws and policies.
40. He states that this party seeks to be joined in this suit pursuant to their mandate in this regard and its objective to ensure that fundamental rights and freedoms of the Kenyan citizens are upheld. For this reason, he asserts that this party has an identifiable stake in these proceedings.

1st Respondent's Case

41. The 1st respondent in Petition No. E307 of 2024 in reaction to this application filed grounds of opposition dated 4th July 2024 on the basis that:
 - i. The applicant has not met the criteria set for joinder of interested parties set out by the Supreme Court in the case of Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others, Supreme Court Petition No. 12 of 2013, [2014] eKLR (an application by the Law Society of Kenya).
 - ii. The applicant has not set out sufficient grounds for its joinder into the proceedings.
 - iii. The applicant has not demonstrated any prejudice that it would suffer in the event of non-joinder.
 - iv. The applicant has not set out the submissions it seeks to make and how different they would be to the other parties.

2nd, 3rd and 4th Respondents' Case

42. In like manner, these respondents in Petition No. E307 of 2024 filed their grounds of opposition dated 9th July 2024 on the grounds that:
 - i. The applicant has not set out its interest or stake in the matter that is distinct from any of the other parties already privy to the matter.
 - ii. The applicant has not demonstrated that its purported interest will not be well articulated unless it is enjoined and appears in the proceedings to champion its cause.
 - iii. The applicant has failed to set out the case it intends to make before the court and demonstrate the relevance of their case that is not merely a replication of the submissions the other parties will be making before the court.

The Other Parties Case

43. The other parties' responses and submissions to this application are not in the Court file or Court Online Platform (CTS).

3rd Proposed Interested Party's Submissions

44. This party through Mitullah, Shako and Associates Advocates filed submissions dated 26th July 2024.



45. Counsel relying in *Francis Kariuki Muruatetu & another v Republic & 5 others* [2016]eKLR submitted that the guidelines for the joinder of an interested party were issued by the Supreme Court as follows:

“One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

46. Comparable reliance was placed in *Wanjigi & others v Inspector General of the National Police Service & others; Musembi (Intended Interested Party)* [2023] KEHC 1612 (KLR), *Initiative & 2 others v Cabinet Secretary Ministry of Interior and Coordination of National Government & 3 others; Katiba Institute (Interested Party); Kenya National Commission on Human Rights (Proposed Interested Party)* [2024] KEHC 5284 (KLR) and *Cyprian Andama vs. Director of Public Prosecution & another* [2018] eKLR.

47. According to Counsel, the instant application meets the threshold for joinder of the 3rd proposed interested party. This is because, this party is an active participant in stakeholder engagement and policy making in matters concerning democracy and the rule of law in security sector agencies, institutions and supporting structures.

48. Moreover, it was submitted that this party holds observer status with the African Commission on Human and Peoples’ rights and is therefore mandated to empower citizens on their mandate to hold the government accountable on security concerns and to monitor reforms, and adherence to implementation of security sector laws and policies.

49. Counsel noted that the party’s mandate is inter alia to monitor the adherence to laws, policies and protocols on national security and to protect and promote implementation of national security laws that protect, enhance and align with the realization of fundamental human rights and freedoms.

50. Bearing this in mind, Counsel submitted that this party would be failing in its mandate and also suffer prejudice if it is not joined in these proceedings. Reliance was placed in this Court’s Ruling in relation to the 2nd interested party herein where it was held that:

“In respect of the 2nd Proposed interested party, it is public knowledge that this is a long standing Civil Society organisation of many years known for standing up for the rights of vulnerable citizens in the society hence in a Petition of this nature, I believe it should be given a chance to represent their interests.”



51. Lastly, Counsel submitted that this party's participation will offer judicial and jurisprudential value to these proceedings as intends to support this petition to defend the fundamental rights to life; human dignity; freedom and security; freedom of expression; assembly, demonstration, picketing and petition; and fair administrative action from the threats imposed by the impugned gazette notices.
52. Reliance was placed in CM (Suing on her on behalf and on behalf of PM (Minor) as parent) & 8 others v Attorney General & 2 others; M/S Independent Medico-Legal Unit (IMLU) (Interested Party); Margaret Othieno Makanyengo & another (Amicus Curiae) [2020] KEHC 10205 (KLR) where it was held that:

“ICJ-Kenya submitted that it is an organisation that has expertise in constitutional law, human rights and international human rights. That its mission is to promote human rights, justice and democracy in Kenya and around Africa through application of legal expertise and international best practices. It is urged by the Applicant that it is upon this premise that it has over the years reviewed all aspects of the rule of law and human rights within the Republic of Kenya and the African region, and taken such action to assist in promoting or ensuring that enjoyment.

The instant petition raises substantial questions of human rights violations in the responses to the COVID-19 pandemic, in the context of the enforcement of mandatory quarantine, which issues are critical to the Applicant's mandate. Secondly, the Applicant is a body of legal experts and therefore seeks the opportunity to bring its diverse legal expertise to assist the Court in reaching a fair, well-reasoned determination that promotes human rights and the rule of law.”

1st Respondent's Submissions

53. The 1st respondent through Chief State Counsel, Emmanuel Bitta, filed submissions dated 4th July 2024.
54. Counsel also relying in the Supreme Court's guidance in Francis Kariuki Muruatetu & another (supra) submitted that the 3rd proposed interested party had not tried to set out its personal stake or interest in this matter and its identifiable interest in the matter not discernible. Additionally, it was argued that this party had failed to demonstrate the prejudice it would suffer should the application not be allowed.
55. In like manner, Counsel stressed that the party had also not underscored the submissions it intends to rely on or what additional submission distinct from the other parties it would make in support of the petition. Counsel in view of this and the guidelines issued by the Supreme Court contended that the instant application should not be allowed.

Analysis and Determination

56. It is my humble opinion the issues that arise for determination are:
 - i. Whether the consolidated petitions raise substantial questions of law meriting certification to the Chief Justice for the empanelment of a bench.
 - ii. Whether the proposed interested party's application for joinder should be allowed.



Whether the consolidated petitions raise substantial questions of law meriting certification for the empanelment of an uneven bench to hear and determine.

57. The law on empanelment of uneven number of Judges to hear and determine a matter is anchored in Article 165 (4) of the *Constitution* which provides as follows:

- (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.

Article 165 (3) (b) (d) provide that—

- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- (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.

58. The Supreme Court of India in *Chunilal Mehta v Century Spinning and Manufacturing Co.* AIR 1962 SC 1314, discussing what amounts to a substantial question of law stated as follows:

“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 has 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 substantial.”

59. Equally, the term ‘substantial question of law’ is not defined in the *Constitution*, however the Courts in various authorities have proposed the manner in which the question should be considered. In the case of *Kinyanjui* (Supra) the Court opined as follows:

- “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.”

60. The Court went on to note that:

“ 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.”

61. Likewise, the Court in *Philomena Mbete Mwilu v Director of Public Prosecution, Director of Criminal Investigation, Chief Magistrate’s Court (Anti-Corruption) Nairobi, Attorney General & Stanley Muluvi Kiima* [2018] KEHC 3432 (KLR) observed as follows:

“ 24.a question of law would be a substantial question of law if it directly or indirectly affects the rights of parties; there is some doubt or difference of opinion on the issues raised and that the issue is capable of generating different interpretations. If however the question has been well settled by the highest court or the general principles to be applied in determining the question before court have been well-settled, the mere application of those principles to a new set of facts presented in a case before the court would not on their own constitute a substantial question of law. There must be the possibility of the matter attracting different interpretations or opinion in its interpretation or application of the principles espoused in the matter to make it a substantial question of law. All this notwithstanding, it is up to the individual judge to decide whether the matter raises a substantial question of law for purposes of reference.”

62. The Court of Appeal in *Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others* [2017] KECA 679 (KLR) set out the principles to be applied when considering such an application. The Superior Court opined as follows:

“ 42. There are, in our view, parallels to be drawn between certification for purposes 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”, The word, “substantial” in its ordinary meaning, means “of considerable importance”. There is therefore wisdom to be gained from the pronouncements of the Supreme Court of Kenya respecting interpretation of Article 163(4)(b). In *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone* [2013] eKLR the Supreme Court of Kenya pronounced governing principles for purposes of certification under Article 163(4)(b) some of which



are relevant in the context of certification under Article 165(4). Drawing therefrom, we adopt, with modification, the following principles:

- (i) 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 interest;

The applicant must show that there is a state of uncertainty in the law;

The matter to be certified must fall within the terms of Article 165 (3)(b) or (d) of the *Constitution*;

The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.”

43. It is our judgment therefore, that whether a matter raises a substantial point of law for purposes of Article 165(4) of the *Constitution* is a matter for determination on a case-by-case basis. The categories of factors that should be taken into account in arriving at that decision cannot be closed.”

63. It is manifest from the reading of the above authorities that the mere fact that a party deems a matter raise a substantial question of law under Article 165(4) of the *Constitution* does not suffice to refer the matter for empanelment if the Court considers that the issues raised do not meet the requisite threshold of what the Court considers to be ‘a substantial question of law’.

64. The petitioner in Petition E307 of 2024 identifies the issues it considers to comprise substantial questions of law as follows:

- a. Apart from the approval by the National Assembly, no factors for consideration and procedure under the *Constitution*, the *Kenya Defence Forces Act*, or under any other Statute is provided for the manner in which the KDF are to be deployed in situations of emergency or disaster, or to restore peace in any part of Kenya affected by unrest or instability;
- b. Neither the *Constitution*, the *Kenya Defence Forces Act*, or any other Statute defines the meaning of the word “emergency”, nor outlines what a “situation of emergency or disaster” contemplated under Article 241 (3) (b) of the *Constitution* entails within the context of the *Constitution* of Kenya;
- c. The petitioner contends that any finding that in situations of emergency or disaster, the KDF can be deployed and thereafter a report can be given to the National Assembly is per incuriam because it does not take into account the provisions of Articles 238 (2) (a) and (b) and 241 (3) (b) and (c) of the *Constitution*;
- d. In considering the meaning of the words “situations of emergency or disaster” as contemplated under Article 241 (3) (b) of the *Constitution*, any finding that the word “emergency” does not refer to a “state of emergency” as contemplated under Article 58 of the *Constitution* and that



the same should take the ordinary English meaning of serious, unexpected and potentially and dangerous situation requiring immediate action is a finding per incuriam;

- e. Whether an ambiguous and blanket deployment of the KDF without particularly or specifically defining the scope or nature of their operation or the duration of intervention in a dangerous trend that may lead to abuse of statutory discretion and/or power by the Cabinet Secretary for Defence and bring about a situation of militarization of the Country, which is anti-thetical to the enjoyment of fundamental rights and freedoms by the people of Kenya guaranteed under the Bill of Rights and is contrary to the principles of national security under Article 238 (2) of the Constitution;
 - f. Whether the absence of special considerations before the deployment of the KDF under Article 241 (3) (b) and (c) of the Constitution, and a constitutional and statutory definition of the word “emergency” and/or what a “situation of emergency or disaster” contemplated under Article 241 (3) (b) entails within the context of the Constitution itself, there is a real and present danger that the deployment and any such future deployment of the KDF can be subjected to abuse of power and/or discretion by those in authority and thereby cause the infringement of the Bill of Rights, contrary to Article 47 and 238 (2) (a) and (b) of the Constitution;
 - g. Whether in the absence of application of special constitutional meaning to the words “a situation of emergency” contemplated under Article 241 (3) (b) within the context of the Constitution itself, there is a real and present danger that any other application of the word “emergency” in the ordinary sense may be abused by those in power thereby violating not Article 47 and 238 (2) (a) and (b) of the Constitution, but also other rights of the people of Kenya under the Bill of Rights.
65. The issues raised revolve around the deployment of the KDF under Article 241 (3) (b) of the Constitution.
66. This is neither novel nor substantial issue of law considering that a three-Judge Bench comprising Justices A. K Ndungu, M. Thande and D.Kemei in a Judgement delivered on 31/7/2024 in Petition 104 of 2019 Legal Advice Centre T/A Kituo Cha Sheria & 33 others v Cabinet Secretary Ministry of Education & 7 Others, specifically considered the matter in paragraphs 184-187 of the said judgement. The issues raised are thus not beyond the established constitutional principles.
67. I am thus guided by the case of Wycliffe Ambetsa Oparanya & 2 others v Director Of Public Prosecutions & another [2016] KEHC 1987 (KLR) where it was observed that:
- “ 22. ... In my view the issue is not merely to do with complexity or difficulty of the case in the views of the applicant but ought to be one that turns on cardinal issues of law or of jurisprudential moment...Whereas the issues may not exactly be same, one cannot say that there is complete dearth of jurisprudence in that area. To me it is a matter of the application of such principles to the matter at hand. Such application, in my view does not constitute a substantial question of law for the purposes of Article 165(4) of the Constitution.”
68. The Court went on to conclude as follows:
- “ 25. In my view a High Court Judge ought not to shy away from his constitutional mandate of interpreting and applying the Constitution. Whereas the Constitution permits certain matters to be heard by a numerically enlarged



bench, that is an exception to the general legal and constitutional position and it is in my view an option that ought not to be exercised lightly.”

69. It is my humble view that the petitioners have not satisfied the threshold of certification for empanelment under Article 165 (4) of the Constitution in the circumstances of this case hence the application for empanelment is rejected.

Whether the proposed interested party’s application for joinder should be allowed

70. The law on joinder of interested parties in constitutional petitions is set forth in the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Rule 2 defines an ‘interested party’ as follows:

a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation’.

71. The addition of an interested party is thus provided under Rule 5 (d) (ii) states as follows:

The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—

- (ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.

72. The Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] KESC 53 (KLR) discussed joinder of an interested party as follows:

“(22) In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court’s Ruling in the *Mumo Matemo* case where the Court (at paragraphs 14 and 18) held:

[An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”

(23) Similarly, in the case of *Meme v. Republic*, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

- (i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) joinder to prevent a likely course of proliferated litigation.”



- (24) We ask ourselves the following questions:
- (a) what is the intended interested party's stake and relevance in the proceedings? and
 - (b) will the intended interested party suffer any prejudice if denied joinder?"

18. Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause..."

73. Equally, the applicable principles in an application for joinder of an interested party were set by the Supreme Court in *Muruatetu & another (supra)* where it underscored as follows:

- a. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- b. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- c. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court."

74. Furthermore, at Paragraph 41, the Supreme Court noted as follows:

- "(41) Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us."

75. Correspondingly, as guided by the cited authorities, joinder of an interested party is not a matter of right. Each case must be examined on its own merits and circumstances as against the set principles. In every application for joinder the paramount consideration for the Court is ascertaining the interest of the party seeking to join the proceedings.

76. In the instant case, the 3rd proposed interested party maintained that its mandate is to empower citizens on their obligation to hold the government accountable on their security concerns and to monitor reforms, and adherence to implementation of security sector laws and policies. Additionally, that it champions for protection of fundamental rights and freedoms.



77. The application was opposed by the respondents who argued that no identifiable interest or prejudice had been established to justify its joinder as an interested party. The question that begs an answer is whether the 3rd proposed interested party has satisfied the set principles.

78. Looking at the application as it stands, it is clear that the stake or interest of the 3rd proposed interested party in this matter has been disclosed. It has explained its mandate is to ensure governments are held accountable and to defend fundamental rights and freedoms of citizenry. This Petition challenges constitutionality of the deployment of the military in internal operations and its implication in regard to upholding observance of human rights of the citizenry. Given the broad mandate of the interested Party in advocating for respect of human rights, this Petition is relevant to the mandate of the proposed interested party which is human rights and constitutionalism.

79. In the circumstances, I am inclined to conclude that the 3rd proposed interested party has met the threshold to be joined as an interested party in this Petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF MAY, 2025.

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L N MUGAMBI
JUDGE

