



Furncon Limited v Attorney General (Civil Case 237 of 2019 & 532 of 2007 (Consolidated)) [2024] KEHC 4664 (KLR) (Civ) (12 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4664 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL CASE 237 OF 2019 & 532 OF 2007 (CONSOLIDATED)**

JN NJAGI, J

APRIL 12, 2024

BETWEEN

FURNCON LIMITED PLAINTIFF

AND

ATTORNEY GENERAL DEFENDANT

RULING

1. The applicant has filed an application dated 22nd October 2019 seeking for orders that this court do find and hold that this suit and or Constitutional Rerefence No. 389 of 2019 raise weighty constitutional issues deserving of consideration by a bench of an uneven number of High Court Judges. That the matter be referred to the Honourable the Chief Justice for the purpose of constituting an uneven number of judges to consider and determine the same.
2. The application is based on grounds stated on the face of the application and supported by the affidavit of Solomon Njoroge Kiore sworn on an even date. The deponent deposes that the suit raises a matrix of constitutional issues as it seeks declaratory as well as pecuniary orders. That the issues in question touch on the custody, possession and or disposal of instruments of state power and authority of the Republic of Kenya that is the bedrock of the sovereignty of the Republic.
3. It was further deposed that the suits also seek answers as to whether the tool kits, instrumentalities of state power that is protected by the constitution 2010 can be for whatever reason or time be in the custody and or possession of a private individual or corporate such as the petitioners//plaintiffs herein after it has performed duties of the state by a constitutional president.
4. It was deposed that the Attorney General has during the proceedings noted the gravity, intricacy and constitutional ramifications of the matters raised in the instant suit. That the novelty, complexity and implications on national security, sovereignty and constitutionality of the agents of the Republic of



Kenya in the handling of the mace, court of arms, flag and other instruments of state power makes it necessary to have the issues herein placed before the Honourable the Chief Justice to set up a bench of an uneven number of Judges to pronounce itself on the same.

5. The Respondent told the court in the proceedings of 23rd January 2023 that they were not opposed to the application.
6. The case for the plaintiff is that sometimes in the year 1990, it was contracted by the Government of Kenya to research, design, process and manufacture presidential instruments befitting state functions. That they did so and presented the instruments to the government. The same included a presidential ceremonial chair. The instruments were for some time used by the President of the Republic of Kenya at the Presidential lodge at Agricultural Society of Kenya grounds. However, the items were later returned to the plaintiff. The government did not pay for the work done by the plaintiff of design and manufacture of the instruments. The plaintiff sued the defendant vide Civil Suit No. 532 of 2007 seeking for payment of the works.
7. It is further case for the plaintiff that the ownership of the presidential instruments passed on to the government of Kenya once they were used by the President of Kenya. That the presidential instruments of authority are supposed to be in government premises and not in private premises. Therefore, that the government should pay the plaintiff the cost of providing security, of preservation and rent for those many years.
8. I have considered the application. The same is made pursuant to Article 165(4) of the Constitution of Kenya, 2010 that provides that:

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, as assigned by the Chief Justice.
9. A “substantial question of law” was stated in *Chunilal V. Mehta vs Century Spinning and Manufacturing Co.* AIR 1962 SC 1314 to be:

“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.”
10. In *National Super Alliance (NASA) v The Independent Electoral and Boundaries Commission* H.C Pet No. 328/2017 the court considered the *Chunilal* case (*Supra*) and offered proper guidelines and an insight in determining whether or not a matter raises a substantial question of law for the purposes of article 165 (4) of the constitution. The guidelines considered are as follows;
 - (i) Whether, directly or indirectly, it affects substantial rights of the parties or
 - (ii) Whether the question is of general public importance, or
 - (iii) Whether it is an open question, in the sense that the issue has not been settled by pronouncement of the Supreme Court or the highest court of the land, or
 - (iv) The issue is not free from difficulty, or



- (v) It calls for a discussion for alternative view.
11. The court in *County Government of Meru vs Ethics And Anti-Corruption Commission* [2014] eKLR while in dealing with a similar issue stated thus;
- “The principles which govern the exercise of discretion in an application such as the one before the court can be distilled as follows;
12. The grant of a certificate under Article 165(4) of *the Constitution* is an exception rather than the rule.
13. The substantial question of law is a question to be determined in the circumstances of the case. Substantial issue of law is not necessarily a weighty one or one that raises a novel issue of law or fact or even one that is complex. Many provisions of our Constitution are untested and bring forth novel issues yet is not every day that we call upon the Chief Justice to empanel a bench of not less than three judges.
14. Public interest may be considered but is not necessarily a decisive factor. It is in the nature of petitions filed to enforce the provisions of *the Constitution* to be matters of public interest generally.
15. The court ought to take into account other provisions of *the Constitution*, the need to dispense justice without delay having regard to the subject matter and the opportunity afforded to the parties to litigate the matter up-to the Supreme Court.”
16. In the case of *Harrison Kinyanjui vs Hon Attorney General*[2012]eKLR, it was stated;
- “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.”
17. While discussing the question of certification of a matter by a single Judge of the High Court pursuant to Article 165 (3) and (4) of *the Constitution*, the Court of Appeal in the case of *Okiya Omtatah Okioti & another vs Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others* [2017] eKLR expressed itself thus:
- “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;
- (ii) The applicant must show that there is a state of uncertainty in the law;
- (iii) The matter to be certified must fall within the terms of Article 165 (3)(b) or (d) of *the Constitution*;
- (vi) 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.”

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.”

18. In *Kajiado Country Governor and 4 others (Interested Parties) [2020] eKLR*, where he stated as follows:

“It is also noted that although the petition raises novel issues which are of public interest, these are the kind of matters that confront judges on a regular basis. The issues call for the application of constitutional and legal principles to the facts of the case at hand. Those constitutional and legal principles are already established and a single judge can apply them in the manner that a panel of judges would do. In this regard I agree with Odunga, J when he observes in *Wycliffe Ambetsa Oparanya (supra)* that:

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.”

19. In *Okiya Omtatah Okoiti v Independent Electoral and Boundaries Commission & 3 others [2016] eKLR* it was held thus:

“...although factors such as the novelty of the question, complexity, public importance of the matter are generally accepted to be some of the indicators of the existence of a substantial question of law, the Courts have also indicated that none of these factors is singly decisive and that the list is not exhaustive.”

20. From the principles enunciated in the above cited cases, it is clear that whether a matter has to be certified as raising a substantial point of law has to be considered on case by case basis. A petitioner has



to concisely set out the specific substantial question of law for which the certification is sought. The fact that a matter raises novel issues is not by itself sufficient to certify a matter as requiring being decided by an expanded bench. A petitioner has to show that there is uncertainty of law in that particular area so as for the court to certify that it ought to be heard by an expanded bench.

21. In this case the plaintiff is seeking for payment by the defendant for work done and not paid for. There is no uncertainty in our law for a claim of payment for work done. There is thereby no substantial question of law raised in the claim for payment.
22. The plaintiff contends that the case raises a constitutional issue on whether instrumentalities of state power can be in the custody and or possession of a private individual or corporate such as the petitioner herein after the instruments have performed duties of the state. In my view the petitioner has not set out with precision the constitutional issue involved in the matter. There is no constitutional issue that can be discerned from the pleadings and if there is one, it is my considered view that there are sufficient legal principles to decide the issue.
23. I do note that the petition raises a question of general public importance and a novel one on whether instrumentalities of state power can be kept in custody of private hands. I however do not think that the issue is a complex one that calls for an expanded bench to decide it.
24. In view of the foregoing, I do not find any merit in the application dated 22nd October 2019. In the premises the application is dismissed with no order as to costs.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 12TH DAY OF APRIL 2024.

J. N. NJAGI

JUDGE

In the presence of:

Petitioner/Plaintiff – present in person

Court Assistant - Nyambala

30 days Right of Appeal.

