



**Gakenyis & 4 others v Cabinet Secretary Lands & 4 others (Constitutional
Petition E154, E173, E176, E181, E191 & 11 of 2024 (Consolidated))
[2024] KEHC 4573 (KLR) (Constitutional and Human Rights) (3 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4573 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E154, E173, E176,
E181, E191 & 11 OF 2024 (CONSOLIDATED)**

EC MWITA, J

MAY 3, 2024

BETWEEN

**DR. MAGARE GAKENYIS 1ST PETITIONER
PAULINE NDUKA KINYANJUI 2ND PETITIONER
PHILEMON ABUGA NYAKUNDI 3RD PETITIONER
SHALLUM KAKA NYAKUNDI 4TH PETITIONER
JAMLICK OTONDI ORINA 5TH PETITIONER**

AND

**CABINET SECRETARY LANDS 1ST RESPONDENT
CABINET SECRETARY NATIONAL TREASURY 2ND RESPONDENT
THE ATTORNEY GENERAL 3RD RESPONDENT
THE NATIONAL ASSEMBLY 4TH RESPONDENT
THE SENATE 5TH RESPONDENT**

RULING

1. There are 6 consolidated petitions Nos; 154; 173; 176; 181; 191 and 11 all of 2024, with petition 154 of 2024 being the lead file. The consolidated petitions challenge the constitutionality of various provisions and aspects of the Affordable *Housing Act*, 2023 (the Act).



2. Petition E154 seeks declarations that; the executive and Parliament have natural and constitutional limitations on the imposition of taxes and levies; Parliament, the CS, Lands and CS Treasury failed in their duty to uphold *the constitution* for legislating an Act that contains threats to *the constitution*; sections 3(b), 4(2)(a),4(2)(b), 4(3)(b), 5,6,7,11(3), 11(4)(a)(c),12, 14(5)(d),16,25,32,34,41,42,43,44,45,48,49, 51, 52, and 58 contravene *the constitution* and are unconstitutional and invalid.
3. Other reliefs sought include; a declaration that there was no sufficient public participation, an order of certiorari to quash the impugned provisions and an order of prohibition to prohibit eviction of people from public land for purposes of giving way to construction of affordable houses.
4. Petition 173 seeks declarations that; sections 3 and 4 of the Act are unconstitutional; sections 3 and 4 are a threat to social economic rights and are inconsistent with *the constitution* and an injunction restraining the CS Treasury, Attorney General, National Assembly the Senate and Kenya Revenue Authority (KRA) from implementing sections 3 and 4 of the Act.
5. Petition 176 seeks declarations that the Act did not meet the requirements for public participation; the Act creates unfair labour practice in contravention of Article 41; that section 48(1) of the Act is inconsistent with section 49(2); and that sections 3(b), 4(2)(a),4(2)(b),4(3)(b),5,6,7,11(3),11(4)(a) (c),12,14(5)(d),16,25,32,34,41,42,43,44,45,48 and 49, are unconstitutional.
6. Petition 181 seeks declarations that the entire Act or in the alternative sections 3(2) , 3(2)(d), 3(3), 4(2)(3), 5(4)(5)(6) m 6,7 8, 10(e), 11-21, and 22-32 are unconstitutional; Quashing Government Financial Management (Kenya Slum Upgrading, Low Cost Housing and Infrastructure Trust Fund) Regulations in its entirety or in the alternative, regulations 4,7,8 and 10; Quashing the National Housing Sessional Paper No. 3 of 2016; Quashing the entire Act, or in the alternative , sections 1 (a), (3(1) and other sections of the Act; among other prayers.
7. Petition E191 seeks declarations that; the Act and its enforcement is unconstitutional; an order of prohibition restraining charging of the levy; an order of mandamus compelling the respondents to refund the amount of the levy already collected; that Articles 10, 21(3) and 201 require tax measures to be socially just, adequate, equitable, and progressive and must not disproportionately shift the tax burden to the poor and marginalized; a structural interdict directing the respondents to conduct human rights impact assessment of the tax measures proposes to fund any governmental program and a permanent injunction barring the respondent from imposing any tax without conducting human rights impact assessment of that tax measure under Articles 10, 21(3) and 201 of *the constitution*.
8. In petition No. E11 the petitioner seeks declarations that; sections 4 and 5 violate Articles 10, 40 and 209 of *the constitution* and, thus unconstitutional; sections 16, 17 and 26 violate Articles 10, 186 and 207 as well as the Fourth Schedule to *the Constitution* for vesting housing function to the national government, and that sections 4 and 5 are inconsistent with Article 160(4) of *the Constitution* in so far as they affect remuneration and benefit of judges.
9. On being served, the CS Lands and CS Treasury, Attorney general and the National Assembly have filed preliminary objections on the propriety of the consolidated petitions and the jurisdiction of this court to hear and determine these petitions.
10. The CS Lands, CS Treasury and AG's preliminary objection against petition 173 is dated 15th April 2024. It raises 4 points; first, the court lacks jurisdiction to hear and determine the petition as the petition does not call upon the court to express itself as enabled by Article 165(3)(d)(i) of *the Constitution*. Second, the petition does not meet the threshold set in Anarita Karimi Njeru v Republic [179] 1 KLR 154 and reiterated by the Court of Appeal in Mumo Matemu v Trusted Society of



- Human Rights Alliance Civil (Appeal No. 290 of 2012) for failing to specifically demonstrate with reasonable precision, the manner in which the respondents have violated the petitioners' constitutional rights.
11. Third, the petition lacks precision as to which human right has been limited/infringed and to what degree and does not indicate whether the said limitation is not that which is provided for under Article 24 and the same does not qualify under Article 25 of *the Constitution*.
 12. Fourth, the petition violates the doctrine of presumption of constitutionality of statutes, constitutional avoidance and separation of powers; the petitioner has not demonstrated the unconstitutionality of the impugned provisions of the Affordable *Housing Act*; the petition only seeks to restrict the legislative authority of Parliament.
 13. To petition No. 181, the National Assembly has filed a preliminary objection dated 9th April 2024 on the following grounds- First, that to the extent that the petition challenges the Affordable *Housing Act*, 2024, and the Government Financial Management (Kenya slum Upgrading, Low Cost Housing and Infrastructure Trust Fund Regulations 2006 in matters use and occupation of and title to land, land administration and management and to public, private and community land, and contracts, the Environment and Land Court the ELC has exclusive jurisdiction to hear and determine the petition pursuant to Article 162(2)(b) and section 13 (2) of the ELC Act. Reliance is placed on the Supreme Court decision in *Kenya Tea Growers Association & 3 others v The National Social Security Fund Board of Trustees & 13 others (Petition E004 & E002 of 2023)* (consolidated) [2024] KESC 3 (KLR) 21 February 2024 (judgment).
 14. Second, that the petition is incompetent having been filed by an unqualified person, thus should be struck out for violating sections 31 and 34 of the *Advocates Act*.
 15. Responding to petition 191, the National Assembly has filed its own notice of preliminary objection dated 15th April 2024, on two grounds; first, that the jurisdiction of this court does not extend to matters concerning the constitutional validity of the Affordable *Housing Act*, particularly in regard to issues pertaining to land use and occupation, land title, land administration and management, as well as matters concerning public private and community land and contracts. This court thus, lacks jurisdiction to hear and determine this matter.
 16. The CS Lands, CS Treasury and AG have also filed a preliminary objection dated 15th April 2024 to the same petition, (E 191), on grounds that; first, the court lacks jurisdiction to determine the petition in that the petition does not call on the court to pronounce itself as enabled by article 165(3)(d)(i); second, the petition does not meet the threshold set in Anarita Karimi Njeru and Mumo Matemu cases; the petition lacks precision on which human rights have been limited/infringed and whether the limitation is not within Article 24, or does not qualify under Article 25 of *the Constitution* and that the petition violates the doctrine of presumption of constitutionality of statutes, constitutional avoidance and separation of powers.
 17. The other objections filed by the National Assembly could not be accessed or viewed on the CTS.

Submissions

18. The court directed parties to file and exchange brief skeleton submissions to address these objections. The National Assembly has filed its skeleton submissions in support of its preliminary objections. The National Assembly argues that this court is bound by the reasoning of the Supreme Court in *Kenya Tea Growers Association & 2 others v The National Social Security Fund Board of Trustees & 13 others*, (supra) affirming the jurisdiction of the ELRC where the statutes are at the centre of the dispute.



19. The National Assembly takes the position that following the above decision, the ELC is the proper court to deal with the consolidated petitions impugning the Affordable Housing Act, the Housing Act and the Government Financial Management (Kenya Slum Upgrading, Low-Cost Housing and Infrastructure Trust Fund) Regulations, 2006. According to the National Assembly, the consolidated petitions significantly have “everything to do with land use, occupation and title, as well as land administration and management”, thus fall within the jurisdiction of the ELC under section 13 of the ELC Act.
20. Regarding petition E173, the National Assembly takes the view, that the petition challenge Affordable Housing Levy within the context of employment and labour relations. The petitioner champions interests relating to employment and labour relations on behalf of its members, thus the petition falls within the jurisdiction of the ELRC, again following the decision in Kenya Tea Growers Association case.
21. The National Assembly relies on Article 165(5) of the Constitution; Malindi Law Society & 12 others (All suing as officers of the Mombasa Law Society on their behalf and on behalf of the membership of the Society) v Attorney General & 2 others (Petition 19 & 21 of 2016 (consolidated [2021] KEELC 4748 KLR (29 October 2021) (judgment) and Republic v Karisa Chengo & 2 others [2017] eKLR (Para36) in support of its position.
22. The CS Lands, CS Treasury and AG have also filed skeleton submissions dated 24th April 2024 in support of the preliminary objections and application for certification of empanelment. Regarding the preliminary objection, they argue that this court’s jurisdiction has not been properly invoked in terms of Article 165(3)(d)(i). They take the view, that the petitions have not called on the court to express itself as set out in Article 165(3)(d) (i) that is, the interpretation of the constitution and determination of whether any law is inconsistent with or in contravention of the constitution. They rely on the decision in Evans Ladtema Muswahili v Whiga County Public Service Board & 2 others; Marley Ezekiel Ayiego (Interested Party) [2021] eKLR.
23. They again argue that the consolidated petitions are imprecise, and rely on the Anarita Karimi and Mumo Matemu decisions. The consolidated petitions also violate the principle of presumption of constitutionality and separation of powers.
24. On empanelment, they argue that the consolidated petitions raise substantial points of law, namely; constitutionality of the Affordable Housing Act, which merit empanelment of a bench of an uneven number of judges to hear them. Reliance is place of the decision in Martin Nyaga & others v Speaker, County Assembly of Embu & 4 others & Amicus [2014] eKLR, that a matter would be considered to raise a substantial question of law if, inter alia, the matter is moot in that it raises a novel point, the matter is complex; the matter by its nature, requires a substantial amount of time to be disposed of, the effect of the prayers sought in the petition and the level of public interest generate by the petition. They urge the court to issue a certificate to that effect.
25. The court notes that this argument is a contradiction to the objection raised that the consolidated petitions have not properly invoked the jurisdiction of the court in terms of Article 165(3)(d)(i)(ii).
26. The Senate has filed skeleton submissions dated 24th April 2024 in support of the preliminary objections. It argues that the preliminary objection is premised on a pure point of law in terms of the decisions in Mukisa Biscuits and John Mundia Njoroge & 9 others v Cecilia Muthoni Njoroge & another [2016] eKLR.



27. The Senate relies on the decisions in Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited [1989] eKLR and Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 others [2011] eKLR on jurisdiction.
28. Petitioners have also filed skeleton submissions in opposition to the preliminary objections. Dr. Magare Gikenyi (petition E154) has filed skeleton submissions dated 22nd April 2024. He argues that the preliminary objection that the court lacks jurisdiction to determine the issues in the petitions has no basis.
29. According to him, some of the issues raised in the preliminary objections are factual and disputed, thus do not constitute pure points of law. Reliance is placed on the decisions in the Mukisa biscuit case and Mohammed Abdi Mahamed v Ahmed Abdulahi Mohammed & 3 others [2018] eKLR.
30. Dr. Magare again points out that some of the issues, including whether a petition has been filed by an unqualified person is not a preliminary objection, since *the constitution*, (Article 22), allows any person to bring a petition to court challenging unconstitutional actions or violations by any person or state organ. He relies on the decision in Dr. Magare Gikenyi v Ministry of Labour & 5 others [2022] eKLR, quoting Daniel N Mugendi v Kenyatta University & 3 others [2013] eKLR on what constitutes a preliminary objection; that issues raised must not be of fact. Dr. Magare takes the view, that the grounds raised do not amount to points of law.
31. Regarding jurisdiction, he is of the view, that this court has jurisdiction by virtue of Article 165(3)(d), to hear and determine the question whether any law is inconsistent with the or is in contravention of *the constitution*. His petition does not deal with any specific issues on ownership, or use of land, but constitutionality of the Act.
32. Dr. Magare, relies on the South African decision in Government of the Republic of South Africa and others v Grootboom and others (CCT 11 /00[200] ZACC19, that all constitutional cases dealing with housing issues have been determined by the High Court. He urges that the preliminary objections be dismissed with costs.
33. Okiya Omtata Okoiti, Eliud Matindi and, Benson Odiwour Otieno, petitioners in E181, have also filed skeleton submissions in opposition to the preliminary objections. They argue that the preliminary objections are meritless given the broad nature of the court’s jurisdiction under Article 165(3)(d). They take the position, that the issues in the petitions concern taxation which relates to the Bill of Rights and housing, a devolved function. They assert that where there is a threat to *the constitution* or violation of *the constitution*, this court has jurisdiction to hear and determine the matter.
34. They rely on several decisions to support their position on this issue. These include; Muhebu Gelan Kelil & 2 others v Abdulkadir Sharrif Abirhim & 4 others [2015] eKLR, citing Mukisa Biscuits Manufacturing Co Ltd v West End Distribution Ltd [1969] on what constitutes a preliminary object.
35. According to these petitioners, the lengthy replying affidavit filed by the respondents shows that the petitions raise precise points for determination by the court. They contend that the preliminary objections merely seek to delay the quick determination of the petitions. Reliance is placed on Agnes Mukami & 5 others v Ngewaji Co. Ltd [2005] eKLR, that a preliminary objection should be sufficiently clear and informative so that the party against whom it is raised can concede or properly respond to it. The court is urged to dismiss the objection and grant interim orders pending the hearing of the consolidated petitions.
36. On empanelment, they support the application. They argue that the consolidated petitions raise substantial questions of law, thus the court should certify them for purpose of empaneling a bench



to hear them. They rely on the decision in *Okiya Omtatah Okoiti & another v Anne Waiguru, the Cabinet Secretary Devolution and Planning & 3 others* [2015] eKLR on the jurisprudential weight of decisions made by of three or more judges, among other decisions.

37. Katiba Institute and Kenya Human Rights Commission (petitioners in petition 191), argue through their skeleton submissions, that the preliminary objections are intended to divert the court’s attention from the urgency of the petitions and applications for conservatory orders. It is their position that their petition challenges the constitutionality of sections 4, 5, 6 and 7 of the Act as violating several Articles of *the constitution*. For that reason, by virtue of Article 165(3)(d), this court has jurisdiction to determine the question of constitutionality of any law, including the impugned Act.
38. Reliance is placed on the Supreme Court decision in *Kenya Hotel Properties Limited v Attorney General & 5 others (petition No. 16 of 2020)* [2022] KESC 62 (KLR)CIV (7 October 2022) Judgment) (para 50) that “if no restriction or limit is imposed, the jurisdiction is said to be unlimited.” In that respect, they argue, no law limits this court’s jurisdiction over this petition. The petition demonstrates how the impugned Act is unconstitutional.
39. The other argument is that the respondents have defied the Supreme Court’s caution in *Independent Electoral and Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR, that it is improper for a party to resort to a preliminary objection as a sword for winning a case otherwise destined to be resolved judicially, and on merits. They take a firm position, that the preliminary objections in these petitions are not true preliminary objections.
40. They further argue that even if the respondents had created doubt in the court’s mind, then the court should apply the “pre-dominant question test” in that at the core of the consolidated petitions is the question of constitutionality of the impugned Act. Other issues, including the land question, are secondary and cannot be extracted from the core issue. They rely of the decision in *Suzanne Butler & 4 others v Redhill investments & another* [2017] eKLR that when faced with a controversy whether a particular case is a dispute about land which should be litigated at the ELC or not, the court utilizes the pre-dominant purpose test.
41. In this respect, the petitions raise substantial questions and should be certifies for empanelment of a bench. They also urge the court to grant conservatory orders to preserve the substratum of the petitions.

Determination

42. Before court are preliminary objections to the hearing of the consolidated petitions by this court, and an application for certification that the consolidated petitions raise substantial questions of law and therefore the Chief Justice should appoint an uneven bench of judges to hear them.

Preliminary objections

43. I have considered the preliminary objections raised in these consolidated petitions and arguments by parties. I must state at this early stage, that much of what has been said to be preliminary objections are not points of objection, but rather grounds of opposition to the consolidated petitions. Reading through these grounds one cannot help but ask why they were called preliminary objections. A perfect example are the arguments that the petitions are not precisely pleaded and the court’s jurisdiction under Article 165(3)(d) has not been properly invoked. In my view, there is only one point for consideration as a preliminary objection; that is, jurisdiction of this court to hear the consolidated petitions.



44. The preliminary objections attack this court’s jurisdiction to hear these consolidated petitions. The main argument made is that the consolidated petitions fall within the jurisdiction of the ELC by virtue of the issues raised therein. According to the respondents, the petitions challenge the *Affordable Housing Act* which has everything to do with housing, thus the ELC court has the exclusive jurisdiction to hear and determine them.
45. I have considered the arguments by the parties in support of their respective position on this issue. Jurisdiction is what gives a court power or authority to hear and determine a dispute presented before it. Where doubt is raised regarding the jurisdiction of the court to hear a matter before it, the court has to carefully weigh the objection and determine whether it has or does not have jurisdiction over the matter. If the court determines that it has no jurisdiction to hear a matter, it should not take any further step. It must down its tools as that is the end of that matter. (See *Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited* (supra)).
46. In *Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 others* (supra), the Supreme Court stated that jurisdiction of a court flows from *the constitution* and the law. The court cannot exercise jurisdiction it does not have or through the craft of judicial interpretation.
47. The jurisdiction of this court is donated by Article 165(3) of *the constitution*. The court has unlimited original jurisdiction in criminal and civil case; (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. (emphasis).
48. The import of Article 165(3) is to authorise the High Court to decide all matters other than those reserved for other courts as contemplated in Article 162 (2) and as restricted by 165(6). The sweep of the constitutional authorisation given to the High Court cannot be lightly taken and should not be easily compromised or given up. That is: the court has wide jurisdiction to hear and determine various matters that may be brought before it. The question of whether or not this court has jurisdiction to hear and determine the consolidated petitions, must, therefore, be viewed from the lens of Article 165(3) (d)(i) (ii).
49. The consolidated petitions, in the main, challenge the constitutionality of various aspects of the Act, whether in the manner it was enacted, whether it complied with the requirements of public participation and the purpose and effect of implementing the provisions of the Act. In other words, looking at the totality of the issues raised in the consolidated petitions, it leaves no doubt that the issue of constitutionality of the Act whether at the point of its enactment or the point of its implementation and the effect thereof is at the centre stage.
50. Article 165(3)(d) confers on this court jurisdiction to determine “(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.”



51. The main issues in the petitions, as I perceive them, centre on whether the Act or its provisions are inconsistent with or in contravention of [the constitution](#). The manner of enactment of the Act is also questioned, that it was not done in accordance with [the constitution](#). In that respect, these issues fall within the ambit of Article 165(3)(d) (i)(ii) and, therefore, the jurisdiction of this court.
52. It must be noted that there are a few issues that have been raised such as land management and evictions from community land to give way to construction of Affordable houses. Those issues may only arise depending on the determination of the constitutionality of the Act, thus do not make the consolidated petitions fall within the exclusive jurisdiction of the ELC.
53. To be precise, the consolidated petitions raise issues including, whether the levy that has been introduced is constitutional. The fact that the Act is called “Affordable [Housing Act](#)”, and the levy and the “Affordable Housing Levy”, these do not translate into occupation, ownership, trespass, or title, and use of land. The levy does not also lead to automatic ownership of a house. There are also other issues that have nothing to do with land, such as whether the levy contravenes Article 160(4) of [the constitution](#) and the principle of devolution.
54. Even if a petition or two raise an issue that touches on land or use thereof that would ideally be for determination by the ELC, the pre-dominant question(s) in the consolidated petitions still fall within the jurisdiction of this court. As already alluded to, and as a matter of emphasis by way of example, the constitutionality of the Act, whether its enactment complied with the requirements for public participation; whether the impugned provisions contradict or are inconsistent with [the constitution](#) or some provisions of the Act contradict each other, are issues that fall within the ambit of Article 165(3) (d) of [the Constitution](#) and, therefore, predominantly under the jurisdiction of this court. (see *Suzanne Butler & 4 others v Redhill investments & another* (supra).

Certification

55. There is the other issue of certification of the petitions for empanelment of a bench to hear them. The argument is that the consolidated petitions raise substantial questions of law and for that reason, the court should issue a certificate for the Chief Justice to empanel a bench of an uneven number of judges to hear them. This application is unopposed.
56. Article 165(4) of [the constitution](#) provides that a matter certified by the court as raising a substantial question of law under clauses 3(b) and (d) should be heard by an un even number of judges being not less than three, assigned by the Chief Justice. [The constitution](#) does not define what a “substantial question of law” is thereby leaving it to the discretion and determination of the court dealing with the issue to determine whether the issues raised amounts to a substantial question of law to warrant certification.
57. What is clear from the constitutional text, however, is that the issue must be one that falls either under clause 3(b) or (d) of Article 165 of [the constitution](#). Clause 3(b) confers jurisdiction on the court to hear and determine the question whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened. Clause 3 (d), on the other hand, gives the court jurisdiction to hear any question respecting interpretation of [the constitution](#). In that context, the issue must either be one of violation or infringement of fundamental rights or interpretation of [the constitution](#) or both.
58. Courts have interpreted the meaning of a substantial question of law. This was best done by the Supreme Court of India in *Sir Chunilal V Mehta& sons, Ltd v Century Spinning & Manufacturing Co. Ltd* 1962 AIR 1314, 1962 SCR SUPL. (3) 549; that a question of law will be a substantial question of law if it directly and substantially affects the rights of the parties. In order to be substantial it must be



such that there may be some doubt or difference of opinion or there is room for difference of opinion in its interpretation.

59. In *Santosh Hazari vs. Purushottam Tiwari* (2001) 3 SCC 179, it was held that:

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.

60. This interpretation has been adopted and applied in our jurisdiction in several cases. In *Community Advocacy Awareness Trust & Others v. The Attorney General & Others* (High Court Petition No. 243 of 2011) the court observed that *the Constitution* of Kenya does not define, 'substantial question of law thus 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.

61. In *Harrison Kinyanjui v Attorney General & Another* [2012] eKLR the court held that:

[T]he 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.

(See also *Martin Nyaga & others v Speaker, County Assembly of Embu & 4 others & Amicus* [2014] eKLR).

62. What emerges from these decisions is that to amount to a substantial question of law, the question should directly or indirectly affect rights of parties; there should be some doubt or difference of opinion on the issues raised and that the issue should be capable of generating different interpretations and be of general public importance.

63. The consolidated petitions raise important issues, including allegations of violation of constitutional principles and contravention of *the constitution*. There is a further allegation that the impugned Act and its provisions violate the constitutional architecture relating to functions assigned to the two levels of government. The issues raised in the petition are of general national importance and are, therefore, substantial questions of law requiring certification.



Conclusion

64. Having considered the preliminary objections raised in these consolidated petitions, the conclusion I come to, is that the objections are not meritorious. This court has jurisdiction to hear the consolidated petitions given the broad nature of its jurisdiction under Article 165 (3)(d) (i)(ii).
65. On certification, I am satisfied that the consolidated petitions raise substantial questions of law which warrant certification and referral to the Chief Justice under Article 165(4) of *the Constitution* for empanelment of an expanded bench.

Disposal

1. The preliminary objections are overruled and dismissed.
2. The consolidated petitions are hereby referred to Hon. The Chief Justice for purposes of appointing an uneven bench of Judges to hear them.
3. Given the nature and urgency of the issues raised, the consolidated will be mentioned on 16th May 2024 for further directions.

Dated, Signed and Delivered at Nairobi this 3rd Day of May 2024

E C MWITA

JUDGE

9|RULING PETITION NO 154 OF 2024 (CONSOLIDATED)

