Okoiti v National Assembly & 3 others; Senate (Interested Party) (Petition E469 of 2022) [2024] KEHC 11379 (KLR) (Constitutional and Human Rights) (24 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11379 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E469 OF 2022

EC MWITA, J

SEPTEMBER 24, 2024

BETWEEN

OKIYA OMTATAH OKOITI ..... PETITIONER

AND

THE NATIONAL ASSEMBLY ..... 1ST RESPONDENT

THE PARLIAMENTARY SERVICE COMMISSION ..... 2ND RESPONDENT

THE DIRECTOR GENERAL, PARLIAMENTARY JOINT SERVICES .... 3RD RESPONDENT

THE HON ATTORNEY GENERAL ..... 4TH RESPONDENT

AND

THE SENATE ..... INTERESTED PARTY

RULING

Introduction

1. This petition was filed in 2022 to challenge the constitutionality of section 2(1) (d) of the *Public Finance Management Act*, 2012 as first amended by section (2)(A) of the Public Finance Management (Amendment) *Act, No. 6 of 2014*, and later through The Statute Law (Miscellaneous) *Act, No. 12 of 2019*; the *Parliamentary Service Act* (No. 22 of 2019) and sections 15(2), 17(c), 26(1-3) and 28(c) of the *Parliamentary Service Act*, 2019.

2. The petition seeks several declarations, namely;

   A. A declaration that the Clerk of the Senate is solely the Secretary and the Chief Executive Officer of the Parliamentary Service Commission:

B. A declaration that as created in the *Parliamentary Service Act*, both the functions and the Office of the Parliamentary Joint Services is unconstitutional and, therefore, invalid, null and void.

C. A declaration that the *Parliamentary Service Act* (No. 22 of 2019) is unconstitutional and, therefore, invalid, null and void in its entirety.

D. A declaration that sections 15(2), 17(c), 26(1-3), and 28(c) of the *Parliamentary Service Act* (No. 22 of 2019) are unconstitutional.

E. A declaration that section 2(1) (d) of the *Public Finance Management Act*, (including as amended by section (2) (a) of the Public Finance Management (Amendment) *Act, No. 6 of 2014*, and then by the Statute Law (Miscellaneous Amendment) *Act, No. 12 of 2019*, are unconstitutional and, therefore, invalid, null and void.

F. An order for costs to be borne by the respondents

G. An order of certiorari to remove into this Court for purposes of being quashed and to quash:

a. The *Parliamentary Service Act* (No. 2f 2019).

b. Sections 15(2), 17(c), 26(1-3), and 28(c) of the *Parliamentary Service Act* (No. 22 of 2019).

c. Section 2(1)(d) of the *Public Finance Management Act*, 2012

d. Section 2(1) (d) of the *Public Finance Management Act* Revised Edition 2014[2012]

e. Section 2(1)(d) of the *Public Finance Management Act* Revised Edition 2022 [2012]

f. Section (2) (a) of the Public Finance Management (Amendment) *Act, No. 6 of 2014*

g. That section of the Statute Law (Miscellaneous Amendments) *Act, No. 12 of 2019* which amended section 2(1) (d) of the *Public Finance Management Act*.

H. An order that the National Assembly Do bear costs of this petition.

I. Any other relief the court may deem just to grant.

3. The petition was served on all parties, namely the National Assembly; Parliamentary Service Commission; The Director General, Parliamentary Joint Services and The Attorney General, the 1st to 4th respondents, respectively and the Senate, joined as the interested party.

4. All respondents filed responses except the 1st respondent. When the petition came up for directions on 17TH November 2023, the court gave the 1st respondent 14 days to file a response to the petition and issued directions on filing of written submissions. on the same day, the court set down the petition for highlighting of submissions on 17th April 2024.

The Application

5. One week to the hearing date, the National Assembly filed a motion application dated 4th April 2024 under Article 165 (4) of *the Constitution*, seeking a certificate that the petition raises substantial questions of law and should, therefore, be referred to the Chief Justice for empaneling a bench of uneven number of judges, not being less than three, to hear it. The effect of the application was that the petition could not to be heard on the designated date, as the court had to deal with the motion application first.

6. The application is predicted on the grounds that the petition raises substantial, complex and novel questions of law whose determination will impact the operations of the Houses of Parliament.

7. According to the National Assembly, one of the questions raised is whether the Clerk of the Senate is the chief administrative and accounting officer of the National Assembly, thereby compromising the operational, financial, functional/ administrative, and perception of independence of the National Assembly.

8. The other issue is whether a Bill affecting operations of the Houses of Parliament must be considered by both Houses despite the fact that such a Bill does not concern county governments under Article 109(3) of *the Constitution*. There is a further issue, namely; whether this Court has jurisdiction to determine the Constitutionality of a statute where the question is actively pending before the Supreme Court.

9. It is the National Assembly's position, these issues are substantial questions of law, and their determination will have far reaching implications on the public interest. The National Assembly relies on the decision in Okiya Omtatah Okoiti & another v Anne Waiguru- Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR, followed in *NJiru & 11 others v United Democratic Alliance Kenya & 23 others; Okoiti & others (Interested Parties) (Constitutional Petition E395 of 2022*) [2022] KEHC 13714 (KLR) (Civ) (30 September 2022) (Ruling) and urges this court to allow the application.

10. Although the petitioner was given time to file a response and written submissions, there is no response or submissions on the CTS

11. The Parliamentary Service Commission did not file submissions while the Director General, Parliamentary Joint Services' submissions are on the CTS but cannot be viewed or downloaded.

12. The Senate which was joined as an interested party, informed the court that it would not file any documents.

Determination

13. The issue for determination in this application is whether the Court should certify the petition as raising substantial questions of law and send it to the Chief Justice to empanel a bench of uneven number of judges to hear it. The argument by the National Assembly is that the issues raised in the petition merit a certificate that they are substantial questions of law thus, merit empanelment of a bench by the Chief Justice to hear it.

14. I have not seen grounds of opposition to this application although the petitioner requested for time to respond and file written submissions. The other parties have largely left the matter to the Court.

15. Article 165(4) of *the Constitution* provides that where the court certifies a matter as raising a substantial question of law under clauses 3(b) and (d), it "shall be heard by an un even number of judges being not less than three, assigned by the Chief Justice.

16. From the text, *the Constitution* does not define what a "substantial question of law" is, leaving it to the discretion of the court dealing with the matter, to determine whether the issues raised in the petition are substantial questions of law that warrant a certificate to that effect.

17. It is also clear from the text of *the constitution* that to issue a certificate, the issue must be one that falls either under Article 165 (3) (b) or (3) (d) of *the Constitution*. Article 1653(b) confers on the Court jurisdiction to hear and determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. On the other hand, Article 165 (3) (d) gives

the Court jurisdiction to hear any question, respecting the interpretation of *the Constitution*; whether any law is inconsistent with *the constitution*; whether anything said to be done under the authority of this constitution or any law is inconsistent with, or in contravention of, *the constitution* or 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 a question relating to conflict of laws under Article 191. Article 191 is on conflict of laws between national and county legislations.

18. In that context, for the Court to certify a matter for purposes of empanelment, the issue must either be one on violation or infringement of fundamental rights and freedoms; interpretation of *the Constitution*; constitutionality of legislation or actions or conflict of laws between those of the national government and county government(s). The issue must however, be one raising a substantial question of law to warrant certification.

19. In the absence of a definition of what a substantial question of law in *the constitution*, courts have filled this gap through decisions. The Supreme Court of India did so in Sir Chunilal v Mehta& sons, Ltd v Century Spinning & Manufacturing Co. Ltd 1962 AIR 1314, 1962 SCR SUPL. (3) 549, explaining that a substantial question of law is one that directly and substantially affects the rights of the parties. In order to be substantial, the question must be one where there may be some doubt or difference of opinion or there is room for difference of opinion in its interpretation.

20. In Santosh Hazari v Purushottam Tiwari (2001) 3 SCC 179, the court held thus:

> To be "substantial" a question of law, it 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....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.

21. This interpretative approach has been adopted and applied in our jurisdiction in several cases. In *Community Advocacy Awareness Trust & others v Attorney General & Others (High Court Petition No. 243 of 2011*), the court observed that since *the Constitution* does not define 'substantial question of law', it is left to the individual judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges, not being less than three, to determine the matter.

22. Similarly, in Harrison Kinyanjui v Attorney General & Another [2012] eKLR, the court observed:

> [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; Okiya Omtatah Okoiti & another v Anne Waiguru- Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR).

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

24. The petition challenges the constitutionality of several statutory provisions, the main argument being that they are inconsistent with *the Constitution*. Whether a statutory provision is inconsistent with *the Constitution* is not in my view, a novel question anymore in this country. This is because principles to be applied in determining constitutional validity of statues or statutory provisions have been settled by not only the Court of Appeal but also the Supreme Court, the highest Court in this country. In that regard, it is no longer a substantial question to argue that a petition challenging constitutionality of statutory provision(s) for being inconsistent with *the Constitution* raises substantial questions of law that a single judge of the High Court cannot determine.

25. I have seen the issues the applicant says are substantial questions of law. In my respectful view, the issues raised in the petition are general questions of whether the impugned statutory provisions are constitutionally infirm. Further, whether this court can hear and determine an issue that is pending before the Supreme Court is not beyond determination by a single judge of this court. The issues are, therefore, not substantial to the extent that a single judge cannot determine them.

26. This court takes the further view, that an application for certification should never be used to delay the quick hearing and disposal of matters brought before the court. *The constitution* demands that courts dispose disputes without undue delay. That is however, not what I see with regard to this petition.

27. The petition was filed in 2022 and was set down for hearing on..... The application for certification was not filed until two days to the hearing date and, as a result, the hearing of the petition had to collapse. Allowing parties to take directions of the court lightly and use every means to delay the hearing and conclusion of a matter, will only lead to clogging the court system and result into further delay of justice.

28. In the circumstances, the conclusion I come to, is that the application has no merit. It is declined and dismissed with no order as to costs

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER 2024

E C MWITA

JUDGE