Gachagua v Speaker of the National Assembly of Kenya & 3 others (Petition E522 of 2024) [2024] KEHC 12075 (KLR) (Constitutional and Human Rights) (11 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12075 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E522 OF 2024

LN MUGAMBI, J

OCTOBER 11, 2024

BETWEEN

RIGATHI GACHAGUA ..... PETITIONER

AND

THE SPEAKER OF THE NATIONAL ASSEMBLY OF KENYA ..... 1ST RESPONDENT

THE NATIONAL ASSEMBLY OF KENYA ..... 2ND RESPONDENT

THE SPEAKER OF THE SENATE OF KENYA ..... 3RD RESPONDENT

THE SENATE OF KENYA ..... 4TH RESPONDENT

RULING

1. On 9/10/2024, the Advocates for the parties in Petitions E522/2024; E509/2024; E537/2024; E528/2024; E524/2024 and E506/2024 appeared before me for directions in the aforementioned matters which relate to the impeachment process of the Deputy President of the Republic of Kenya.

2. The Court allowed the Advocates to submit with a view to assisting the Court to fashion appropriate directions to make in respect of the cases without delving into substance of the application and the Petition.

3. As part of those submissions, two issues prominently featured; the empanelment of a bench to hear the Petitions and an application to transmit the files to the Principal Judge of the High Court for similar matters. The petitioners who had made the application for empanelment were Petitioner in E509/2024 and the Petitioner in E522/2024. Their application was vehemently opposed by the Respondents.

4. For context, it is necessary to indicate that the Petitioner in Petition E509/2024 and who was represented by Mr. Ndegwa Njiru had in prayer 6 of the Notice of Motion dated 30/9/2024 sought an order in the following terms:

> "That the matter be certified as raising weighty legal issues and the same be remitted to the Chief Justice for empanelment of an uneven number of Judges for hearing and determination of the Petition"

5. In Petition E522/2024, the Petitioner had similarly included the prayer in the Notice of Motion dated 2/10/2024 as follows:

> "That upon interpartes hearing of the application or such other time as the Court may determine, this Honourable Court be pleased to certify this matter raises questions of great general public interest for empanelment of a bench of uneven number of Judges for hearing and determination."

Petitioners' Submissions

6. Mr. Paul Muite S.C. for the Petitioner in E522/2024 submitted that the Petition indisputably raises weighty constitutional questions which he highlighted. This included the constitutional validity of the standing orders that the National Assembly used to process the impeachment particularly Standing order 64 (2) and (6) which he faulted for providing a short duration of was 12 days to complete the entire impeachment process whose impact is was to impede adequate and meaningful public participation, a critical constitutional requirement.

7. Mr. Muite further contended that the impeachment process in the National Assembly is a quasi-judicial process must comply with the provision of Article 50 on fair hearing and that is a right that cannot be limited pursuant to Article 25 (c) of *the Constitution*.

8. Counsel argued that it is not enough for Parliament raise the requisite numbers to pass an impeachment motion since there is also a cardinal requirement to proof that there was violation of *the Constitution* which has to be established. That the removal of an elected official he argued has a direct touch on the sovereignty of the people under Article 1 and the Court is called upon to interpret it while considering this matter.

9. Mr. Ndegwa Njiru reiterated the unconstitutionality of the standing orders 64, 65 and 74 which he assailed for not making any provision for public participation in the process of impeachment of Deputy President and for not providing an authentication framework to ascertain the credibility of the public participation outcome and the participants in that process. He also questioned the impartiality of Parliament in carrying out the process. He equally submitted that the 7-day period provided in Standing Order 64 (b) and 73 (1) in the National Assembly and Senate is insufficient to facilitate meaningful public participation or enjoyment of rights under Article 50 of *the Constitution*.

10. He also submitted that there is need to clarify whether public participation should precede the tabling of the motion of impeachment or it should come after the tabling.

Respondents Submissions

11. Mr. Milimo for the 1st Respondent argued that the matter of impeachment has already been concluded in the National Assembly and the Speaker is no longer presiding over the proceedings of impeachment.

12. On the application to forward these files to the Principal Judge for consolidation, He submitted that the application is anchored on Section 6 (1) (a) of the *High Court (Organization and Administration) Act*. He stated that this would save the Respondent the risk of multiple trials on the same issue.

13. Mr. Milimo opposed the prayer for empanelment stating that no such prayer had been made in any application. In any event, he contended that the Petition does not raise any substantial questions of law to necessitate empanelment stating that a challenge to the standing orders does to raise a substantial question of law since Courts presided over by single Judges have even determined the constitutionality of statutes.

14. On public participation, he argued that the Supreme Court in the case of BAT vs Cabinet Secretary for Health of Kenya & 2 Others (2019) eKLR came up with guidelines on public participation and thus this cannot be a novel issue that would develop fresh jurisprudence.

15. In regard to the claim that fair trial right has to be observed before the National Assembly during impeachment, he stated that this was a misunderstanding as no trial takes place in the National Assembly insisting that a trial takes place in the Senate. In any case, he contended that the Deputy President was given more than two hours in the impeachment proceedings before the National Assembly.

16. Concerning the Petitioner's submission that in Presidential System, it is not just about numbers in an impeachment process, Mr. Milimo reacted:

> " Impeachment is by votes and there is no other procedure provided for in any other law"

17. On the claim that the Deputy President is elected, he disputed the assertion and stated that the Deputy President is simply gazetted by IEBC hence the Petitioner cannot bring up the issue of sovereignty based on universal suffrage.

18. Mr. Peter Wanyama assailed the attempt to raise the issue of public participation as a matter that would call for empanelment of a bench and stated that this is untenable considering the many judgments both from the Court of Appeal and the Supreme Court that have been rendered on this particular issue.

19. He stated that the only conceivable issue that he might accede is substantial but would only arise after conclusion of Senate hearing was the one that precludes the jurisdiction of this Court from considering the removal of the President or Deputy President when done through a Tribunal of which he equated to the current process.

20. Mr. Nyamondi referred this Court to Justice Mwongo's decision that gave the prescriptions to be followed during the public participation process and argued that although the decision might not bind this Court, coming up with a contrary decision on the same facts could bring the administration of justice into disrepute.

21. Likewise, he faulted the Petitioners for insisting that an interrogation on constitutionality of standing orders is novel issue pointing out that this is normal jurisdiction available to this Court under Article 165 (3) (d) of *the Constitution*.

22. On public participation, Mr. Nyamondi argued that there is nothing new as none of the Petitioners had invited the Court to arrive at different principles than those that the Supreme Court enunciated in the BAT Case (supra).

23. Counsel argued that the impeachment process is provided for in *the Constitution* which the people of Kenya have made possible for elected leaders to be removed through that process.

24. Mr. Gumbo reiterated the submissions on public participation stressing that even with an expanded bench, it will not be possible to reach a decision that is at variance with the binding decisions on principles guiding public participation.

25. Ms. Tanji who appeared for the Senate submitted that the process was being undertaken in the Senate and that going by precedents, the process cannot be interfered with by the Court until the Senate has expressed itself in the matter.

26. Concerning the Constitutionality of standing orders, she stated that this is a matter that has been litigated endlessly since 2013 hence it is not an issue that would constitute a substantial question of law.

27. LSK which was admitted as an Interested Party opposed the application for transmission of files to the Principal Judge arguing that the legal provision cited Section 6 (1) of the *High Court (organization and Administration) Act* does not provide for this and that even the preamble to the Act limits the application of the Act to Article 165 (1) a & b and does not confer the jurisdiction to transfer cases to the Principal Judge.

28. Mr. Nelson Havi urged the Court to be guided by the submissions of the Parties and discretionary decide whether or not a case for certification to the Chief Justice had been made out.

Analysis and Determination

29. From the submissions of the Advocates for the Parties herein, two issue arise:

    1. Whether I should forward these files to the Principal Judge of the High Court based on Section 6 (1) of the *High Court (organization and Administration) Act* Cap 8c Laws of Kenya.

    2. Whether I should certify this matter to the Chief Justice for empanelment of an uneven bench to hear and dispose these Petitions.

30. On the first issue, it is important that I set out the provisions of Section 6 (1) of the High Court (Organisation and Administration) Act that the Respondent cited as forming the basis of their application for this Court to transmit these Petitions to the Principal Judge so that they may be consolidated with others that are alleged to be similar.

    S. 6- Principal Judge

    6 (1) The Principal Judge shall be responsible to the Chief Justice for:

        a. Overall administration and management of the Court

        b. Ensuring orderly and prompt conduct of business of the Court

        c. *The Constitution* of benches of two or more Judges in consultation with the Chief Justice

        d. Undertaking such other duties as may be assigned by the Chief Justice.

31. The above Section 6 (1) that the respondents cited in urging that I should transmit these files before this court to the Principal Judge based on the allegation that there are other matters raising identical issues is my view inapplicable as it relates to general court administrative responsibilities bestowed on the Principal Judge while the issue of consolidation is a pure judicial discretionary function that vest on a particular Judge and is exercisable depending on the facts and circumstances of every case. This Court is not persuaded that without the benefit of looking at those other files this application is meritorious.

32. That leaves me with the 2nd issue which is whether this Court should certify this matter to the Chief Justice for empanelment of an uneven number of Judges to hear and determine.

33. Article 165 (4) of *the Constitution* makes provision for empanelment of a bench by providing thus:

> 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.

34. Article 165 (3) (b) or (d) of *the Constitution* has been delineated by Article 165 (4) as constituting areas from which substantial questions of law might arise to require the composition of a bench. The two specific areas relate to the following:

(3) .....

a. .....

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. .....

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) .....

35. The phrase 'substantial question of law' is not defined in *the Constitution*. In the case of Harrison Kinyanjui vs Attorney General 2012 eKLR the Court stated:

> " 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."

36. Likewise, the Court in Philomena Mbete Mwilu v Director of Public Prosecution & 4 Others [2018] eKLR 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."

36. The Court of Appeal in Okiya Omtatah Okoiti & Another v Anne Waiguru –Cabinet Secretary, Devolution and Planning and 3 Others [2017] eKLR set out the principles to be applied when considering such an application. The 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;
>
> (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."

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."

36. I listened attentively as the issues in contention in these Petitions as they were being canvassed by the Parties Advocates. On the issue of constitutionality of the standing orders, the Respondents strongly opposed the contention that this amounts to substantial question of law because such issues have been litigated before including the constitutionality of the statutes and dealt by single Judges hence is not novel question warranting the referral of this petition to the Chief Justice. I was however keen to pick out the unique challenges that the Petitioners were pin-pointing in assailing the Standing Orders that the National Assembly relied on in carrying out the impeachment process. The Petitioners pin-pointed various concerns. The limited duration of 7 days to carry out the entire process was cited as having an inhibiting effect on carrying out adequate and meaningful public participation, the failure by the standing orders to integrate or provide for any mechanism for public participation and/or a framework to credibly authenticate the outcome of public participation process were some of the issues that the Petitioners raised as requiring serious circumspection considering the fundamental position public participation occupies in providing continuous legitimacy to the actions of those charged with the exercise of delegated sovereign authority under *the Constitution*. Considering the immense public interest this matter has generated and being the first of its kind in Kenya where the Deputy President of the Republic is being removed by process of impeachment, it is my considered opinion that this matter deserves the input of the Bench so as to pronounce itself on a process that is constitutionally compliant to serve as benchmarks for future undertakings of this nature. It is necessary for the citizenry of this Country know whether the current state of law allows them adequate opportunity to participate meaningfully in the process of the removal of their Deputy President.

37. There was also the question of whether the allegations subject to an impeachment should be circulated to the public with or without the response of the person being impeached and if the absence of availingthe response compromises the public participation outcome and prejudices the person subject of the impeachment process by infringing his right to fair administrative action and the right to a fair hearing under Articles 47 and 50 of *the Constitution*. These are substantial questions arising out of the instant impeachment process.

38. The question whether the current Parliament is improperly constituted and thus incapable of carrying out the impeachment process in the light of Supreme Court Advisory Opinion No. 2 of 2012 was also highlighted.

39. Finally, that notwithstanding the voting in terms of numbers in both the National Assembly and the Senate on the impeachment motion, if the jurisdiction under Article 165 (3) extends to interrogating the material relied upon under Article 145 so as to determine if the threshold to support the allegations was established either in the National Assembly or the Senate or in both. I find that given the extensive nature of these proceedings starting from the National Assembly all the way to the Senate and due to the massive public interest the matter has generated, it would require the mind of more than one Judge to determine. In any case, it is not only the test of novelty that determines the consideration for *the constitution* of the bench as Courts do not just exist to serve the intellectual stimulation of elitists but also to serve the public in matters of great public concern such as this is one where the Court must rise to the occasion and serve the public with all the resources it can possibly gather.

40. In my view, despite stiff opposition from the Respondents, it is my considered opinion that these Petitions raise weighty constitutional questions that fall under Article 165 (3) (b) and (d) (ii) hence I

am persuaded to refer them to the Chief Justice for empanelment of a bench, the lead Petition shall be Petition E522/2024. The rest to be forwarded alongside this file to the Chief Justice are Petitions E509/2024, E537/2024, E528/2024, E525/2024, and E506/2024.

Dated, signed and delivered in open court at Nairobi this 11th day of October, 2024.

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L N MUGAMBI

JUDGE