



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CONSTITUTIONAL PETITION NO. 2 OF 2021**

**ADRIAN KAMOTHO NJENGA.....PETITIONER**

**VERSUS**

**MURANG'A COUNTY ASSEMBLY.....RESPONDENT**

**RULING**

1. The petitioner takes up cudgels on the failure by the County Assembly of Murang'a (hereafter *the respondent*) to elect a member as the Deputy Speaker.
2. He contends that the respondent's conduct violates, among others, **Articles 10, 27, 178 (2) and 259 (2)** of the **Constitution**.
3. Pending the hearing of the petition, he prays, *inter alia*, that the matter be *certified* as raising *substantial questions of law* to be heard by an uneven number of judges, being not less than three, to be assigned by the Chief Justice pursuant to **Article 165 (4)** of the **Constitution**.
4. The notice of motion is opposed by *Nduati Kariuki*, the Speaker of the Assembly, vide an affidavit dated 9<sup>th</sup> March 2021.
5. On 14<sup>th</sup> July 2021, I heard arguments from the petitioner. The respondent, though served, did not attend the hearing.
6. The petitioner submitted that the petition raises substantial issues of law. Reliance was placed on ***Okiya Omtata Okoiti & 4 others v Attorney General & others***, High Court, Machakos, Pet. 7 of 2019 [2019] eKLR and the Indian case of ***Chunilal Mehta v Century Spinning Manufacturing Company***, AIR 1962 SC 1314.
7. He further argued that there are conflicting decisions of the High Court on the constitutionality of the office of the Deputy Speaker. See for instance ***Nathaniel Nganga Reuben v Speaker, Machakos County Assembly***, High Court, Machakos, Pet. 6 of 2016 [2016] eKLR, ***Douglas Bundi Kiriimi v Joseph Kaberia Arimba, Speaker County Assembly of Meru & 3 others*** High Court, Meru, Const. Ref. 26 of 2017 [2018] eKLR, ***Ameja Zelemoi v County Assembly of Baringo & others*** High Court, Kabarnet, Pet. 2 of 2020 [2020] eKLR. The petitioner thus contends that a bench of uneven number of judges of the court will put the matter to rest.
8. I am guided by **Article 165 (4)** of the **Constitution** which provides:

*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.*
9. There is *no* demarcation of what comprises a *substantial question of law*. The Supreme Court gave guidance in ***Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone*** [2013] eKLR. In ***Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others***, Nairobi Civil Appeal 4 of 2015 [2017] eKLR, the Court of Appeal, relying on the ***Hermanus Steyn Case*** [supra], adopted with modification the following four 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;*

(iv) 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.

10. Having expounded the principles, the Court of Appeal finally held:

*[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. [Underlining added]*

11. It is true as urged by the petitioner that there are *conflicting* decisions of the High Court on the *legality* of the office of Deputy Speaker. But that conflict in my view cannot be resolved by constituting a bench of the same court. The conflict will be better and finally resolved by the Court of Appeal or the Supreme Court.

12. In *Murang'a County Government v KTDA* [2020], Murang'a High Court Pet. 36 of 2019 [2020] eKLR, I was confronted by the same question. I then held as follows-

*[11] It is worth noting that an uneven number of judges are not a magic wand: Their decision does not rank any higher than that of a single judge. It is not even binding on any other judge. Any appeal from such a bench ends up before a three-judge panel of the Court of Appeal. See Gilbert Mwangi Njuguna v Attorney General Nairobi Petition No. 267 of 2009 [2012] eKLR.*

*[12] The futility is demonstrated by the five-judge bench of the High Court that I was privileged to sit in: International Centre for Policy & Conflict and 4 others v Uhuru Kenyatta and others, Nairobi, High Court Consolidated Petition 552 of 2012 [2013] eKLR. The decision on the issue of costs was overturned by a three-judge bench of the Court of Appeal in Kenya Human Rights & another v AG & 6 others, Nairobi Civil Appeal 147 of 2015 [2019] eKLR. [Emphasis added]*

13. The instant case must turn on its distinctive facts; and, the court must carefully weigh whether there truly exist substantial questions of law to merit empanelment of a bench. See *Okiya Omtatah Okoiti & another v Anne Waiguru* [supra]. I am in complete agreement with *Majanja J* in *J. Harrison Kinyanjui v AG & another*, Nairobi High Court Petition 74 of 2011 [2012] eKLR, that reference to the Chief Justice should be “*the exception rather than the rule and a higher burden is cast on the party who applies to the court to certify the matter*”

14. So are there substantial questions of law here? My answer is *negative*. The matter before the court revolves largely upon the interpretation of **Article 178 (2) (b)** of the **Constitution**. As conceded by the petitioner, the Article has been the subject of numerous High court decisions, albeit conflicting. The issue may be difficult, but I find that it does not raise novel or substantial questions of law that cannot be handled by a single judge of the High Court.

15. In the end, I am *disinclined* to *certify* the petition as raising substantial questions of law to be heard by an uneven number of judges under **Article 165 (4)** of the **Constitution**.

16. The upshot is that *prayer number 3* in the petitioner's *notice of motion* dated 26<sup>th</sup> January 2021 is hereby *dismissed*. The remainder of the motion or the main petition may now be set down for hearing. I make no order on costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MURANG'A THIS 21ST DAY OF SEPTEMBER 2021.**

**KANYI KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of:**

Mr. Kamotho for the petitioner instructed by Adrian Kamotho Njenga & Company Advocates.

No appearance for the respondent.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.