



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO. 36 OF 2019**

**MURANG'A COUNTY GOVERNMENT.....PETITIONER**

**VERSUS**

**THE KENYA TEA DEVELOPMENT AGENCY LIMITED.....RESPONDENT**

**RULING**

1. The petitioner is a county government established under **Article 176** of the **Constitution**.
2. The respondent is a limited liability company incorporated on 15<sup>th</sup> May 2000 under the **Companies Act** (now repealed).
3. The respondent has presented a *notice of motion* dated 22<sup>nd</sup> October 2019 praying, *inter alia*, that the petition 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 grounds are set out in the supporting affidavit of *Benson Ngari Kamau*. He deposes at paragraph 8 that the *substantial question of law* is whether tea farmers' consumer rights guaranteed by **Article 46** of the **Constitution** have been violated.
5. The motion is opposed by the petitioner through *grounds of opposition* dated 13<sup>th</sup> November 2019. It avers that the petition revolves around consumer rights; and, the rights to property and information. It is pleaded that there is "*sufficient judicial authority and jurisprudence*" on the relevant **Articles 35, 40** and **46** of the **Constitution** which renders the motion redundant. It is also contended that reference to the Chief Justice will occasion unnecessary delays to the hearing of the petition.
6. All the parties filed elaborate submissions and lists of authorities. Those by the respondent were lodged on 21<sup>st</sup> November 2019; those by the petitioner on 26<sup>th</sup> November 2019. I heard further arguments from learned counsel on 29<sup>th</sup> November 2019.
7. **Article 165 (4)** of the **Constitution** 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.*

8. There is *no* delineation of what comprises a *substantial question of law*. The Supreme Court gave useful guidelines in **Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone** [2013] eKLR. In **Okiya Omtatah Okiiti & 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.*

9. 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]

10. That holding is largely in tandem with that of Majanja J in **J. Harrison Kinyanjui v AG & another**, Nairobi High Court Petition 74 of 2011 [2012] eKLR-

*The Constitution does not define “substantial question of law.” It is left to each High Court 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 a matter. In **Chunilal Mehta v Century Spinning and Manufacturing Co. AIR 1962 SC 1314**, the Supreme Court of India, after considering a number of decisions on the point, laid down the following test for determining whether a question of law raised in the case is a substantial question of law or not. It stated-*

*the proper test for determining whether a question of law raised in the case is substantial would be whether it is of general public importance or whether it directly or substantially affects the rights of the parties and if so, whether it is either an open question in the sense that it is not finally settled by the Supreme Court or by the Privy Council or is not free from difficulty or 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 more question of applying these principles or the plea raised is palpably absurd, then the question would not be a substantial question of law*

*(See also the case of **Wilfred Karuga Koinange v Republic** Nairobi Misc. App. 1140 of 2007 (Unreported), **Community Advocacy and Awareness Trust and Others v Attorney General and Others** Nairobi Petition No. 243 of 2011, **Justice Chemutut and Others v Attorney General and Others** Nairobi Petition No. 307 of 2012 (Unreported). [Underlining added])*

11. It is also 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.

13. Furthermore, the empanelment of such benches *may* engender delays occasioned by the logistics of getting the judges to sit and the administrative costs that go with it. See generally **Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others**, Court of Appeal at Nairobi, Civil Appeal 4 of 2015 [2017] eKLR.

14. So much so that each case must turn on its unique facts; and, the court must carefully weigh whether there truly exists substantial questions of law to merit empanelment of a bench. See **Okiya Omtatah Okoiti & another v Anne Waiguru** [supra]. I thus fully concur with Majanja J in **J. Harrison Kinyanjui v AG & another** [supra] 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*”

15. So are there substantial questions of law here? The main petition is pending for hearing. It would be prejudicial at this stage to make conclusive findings on the matter. But I can safely state the following. The petitioner claims that “*in the year 2019 and generally in all other years, the respondent has made such low payments to the tea farmers within Murang’a County and in the entire Republic of Kenya as to impute clear fraud, impropriety, unaccountability and exploitation of farmers*”.

16. The principal relief sought in the petition is an *audit* by either the Auditor General or by a reputable audit firm.

17. The retort by the respondent is three-pronged: First, that being a private company, its accounts are beyond the reach of the Auditor General; secondly, that it makes “*timely and accurate disclosures to the farmers on all material matters affecting its financial operations*”; and, thirdly, that the 21% drop in earnings was caused by market fluctuations and other factors beyond the control of the company.

18. The case thus presents a mixed basket of *commercial* and *constitutional* law questions. The decision will affect many farmers and tea factories in Murang’a and the Republic. There are pertinent questions whether the petitioner can maintain such a wide cause of action. While all those issues may be difficult, they do not raise novel or substantial questions of law that cannot be handled by a single judge of the High Court.

19. If for example the respondent *proves* that it is a *private company*; and, that it has never received *public funds*, then it *may* well fall outside the reach of the Auditor General under **Article 229 (5)** of the **Constitution**. I say that very carefully and without making a finding. But that would still leave the question whether it can be audited by an independent firm and who would bear such costs. The less I say about it the better.

20. The consumer rights; and, rights to property and information under **Articles 35, 40, and 46** of the **Constitution** as pleaded in the petition do *not* raise any unusual or complex issues of law calling for an uneven bench of judges. It is not lost on me that the key fact relied on by the applicant at paragraph 8 of the supporting affidavit is that the “*substantial questions of law are whether tea farmers’ consumer rights guaranteed by Article 46 of the Constitution have been violated*”.

21. Granted the circumstances and the precedents 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**.

22. The upshot is that *prayer number 4* in the respondent's *notice of motion* dated 22<sup>nd</sup> October 2019 is hereby *dismissed*. Costs shall be in the cause.

It is so ordered.

**DATED, SIGNED and DELIVERED** at MURANG'A this 16<sup>th</sup> day of January 2020.

**KANYI KIMONDO**

**JUDGE**

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

Ms. Rigatha for Mr. Njenga for the petitioner instructed by Muchoki Kangata Njenga & Company Advocates.

Mr. Kibicho for the respondent instructed by J. K. Kibicho & Company Advocates.

Ms. Dorcas & Ms. Elizabeth, Court Clerks.