REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 94 OF 2018

WANJIRU GIKONYO.....APPLICANT/PETITIONER

-VERSUS-

ATTORNEY GENERAL.....1ST RESPONDENT

CABINET SECRETARY

HOUSING, TRANSPORT AND INFRASTRUCTURE .....2ND RESPONDENT

-AND-

KAJIADO COUNTY GOVERNOR.....1ST INTERESTED PARTY

KIAMBU COUNTY GOVERNOR.....2ND INTERESTED PARTY

MACHAKOS COUNTY GOVERNOR.....3RD INTERESTED PARTY

MURANGA COUNTY GOVERNOR.....4TH INTERESTED PARTY

NAIROBI COUNTY GOVERNOR.....5TH INTERESTED PARTY

RULING

1. The Petitioner, Wanjiru Gikonyo, filed a notice of motion application dated 12th March, 2019 supported by an affidavit sworn on the date of the application by Christine Nkonge, asking the court to determine that the issues raised in the petition dated 14th March, 2018 raise substantial questions of law warranting a reference of the petition to the Chief Justice under Article 165(4) of the Constitution for the appointment of an uneven number of judges, not being less than three, to determine the matter.

2. The application is based on the grounds on its face as follows:-

a) **The Petition questions the Constitutional validity of the Nairobi Metropolitan Area Transport Authority Order of 2017 and a Gazette Notice No. 1240 of 2018 making appointments to the Authority for violating constitutional provisions of intergovernmental relations and the Intergovernmental Relations Act, 2012.**

b) **Under Article 165 (4) of the Constitution, 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.**

c) **The Petition raises substantial questions of law under Article 165(3)(d)(ii) touching on the following points:**

i. **Whether the Petition is an Intergovernmental dispute falling for resolution under the Intergovernmental Relations Act, 2011 or if indeed the Petition properly invokes the court's "interpretation" jurisdiction under Article 165(3)(d)(ii) and (iii);**

ii. **Whether the subject matter of the Petition is justiciable or is a political question which falls under the executive's**

mandate;

iii. **Whether Kenya's constitutional set up is unitary or federal;**

iv. And in view of (c) above, if or not the establishment of the NAMATA authority upset Kenya's federal constitutional design.

v. **Whether NAMATA authority upsets the principle of devolution of powers under Article 10 and interferes with the powers, functional integrity and constitutional status of county governments.**

vi. **Whether the NAMATA authority deflates the revenue-earning powers of county governments from county transport function.**

d) **These questions raised are matters of general public importance, which are open and have never been finally settled by the Supreme Court. The questions are not free from difficulty and call for debate of alternative views by an expanded bench.**

e) **The questions are not only novel and complex, but also present unique facts not covered by any controlling precedents or settled by the law of the land and 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.**

f) **Additionally, the questions posed as substantial originate from the pleadings on record and thus emerge from the sustainable fact-matrix which the court must necessarily decide for a just and proper decision of the case.**

3. The 1st and 2nd respondents filed their Submissions dated 20th September, 2019 in opposition to the application. The opposition is grounded on the assertion that the application ought to have been filed at the preliminary stage rather than after the parties had filed their responses.

4. Additionally, it is stated that the matter has progressed significantly, there have been several mentions, and now the parties are at the stage of awaiting the hearing date. The respondents deem this to be an abuse of the court process amounting to forum shopping and delay of justice as the Petitioner failed to raise at the earliest stage her intention to have a bench of uneven number of judges hear the petition.

5. The respondents propose that the first issue for the court to determine is whether the Intergovernmental Relations Act, 2011 is applicable in the circumstances leading to the filing of the petition. The second issue is whether the circumstances of filing the petition herein bring into play Article 187 or 189(2) of the Constitution. According to the respondents, the issues raised are not novel as the same were determined by this court in **Okiya Omtatah Okoiti & another v Attorney General & 6 others [2014] eKLR**.

6. The respondents submit that if the order sought is granted it would delay the final determination of the petition which would prejudice the public interest as the Nairobi Metropolitan Area Transport Authority (NAMATA) was established to fulfil a mandate towards the greater benefit of the public.

7. The respondents rely on the decision of Justice Mativo in **Chepkorir Rehema (Suing through father and next friend) & 130 others v Kenya National Examination Council** in which he quoted Majanja J in **Harrison Kinyanjui v A.G and another [2012] eKLR** who stated that the decision to empanel a bench of more than one judge shall only be done if it is absolutely necessary and **"in strict compliance with the relevant constitutional, statutory provisions and relevant precedent**." Further, that Justice Mativo in the above case quoted with approval the holding in the case of **Vadag Establishment v Y A Shretta & another [Nairobi High Court (Commercial & Admiralty Division) Misc. High Court Civil Suit No. 599 of 2011** where it was held that the jurisdiction of the High Court is the same whether or not constituted of one or more judges, and that no decision is superior to the other.

8. The respondents submit that the Petitioner has not raised a substantive question of law and therefore does not meet the threshold for the constitution of a bench under Article 165(4) of the Constitution.

9. The 1st Interested Party, Kajiado County Governor, filed submissions dated 19th September, 2019 and opposed the application on the ground that it is an abuse of the court's time and process.

10. The 1st Interested Party submits that the issues and questions raised in the petition are not so complex to raise a substantial question of law requiring the setting up of a bench of three judges. The 1st Interested Party refers to the decision in the case of **Peter Nganga Muiruri v Credit Bank Limited & another Civil Appeal No. 203 of 2006** where the Court determined that the decision on whether a matter fulfils the requirements for setting up a bench is an exercise of judicial discretion as opposed to a right. It expresses its confidence in this court's ability to hear the matter to completion.

11. The 1st Interested Party contends that just because a matter is of great public interest or substantial national importance does not qualify it to amount to a substantial question of law in order to warrant reference to the Chief Justice under Article 165(4) of the Constitution, as these are matters that are determined by single judges on daily basis.

12. It is submitted that the petition is based on an assumption, without any factual basis, that the issue whether a joint shared transport function between the national government and the interested parties herein is novel. According to the 1st Interested Party the issue does not qualify as a substantial question of law for the purposes of Article 165(4) of the Constitution.

13. It is further the 1st Interested Party's assertion that no triable issues have been raised as no fundamental rights have been breached that requires the interpretation of the Constitution or warrant the hearing of the matter by a panel of judges.

14. The only question for the determination of the court in this application is whether the Petitioner has met the threshold set by Article 165(4) of the Constitution for the empanelment of a bench of an uneven number of judges for purposes of hearing the instant petition.

15. Article 165(4) of the Constitution provides that:-

> **"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."**

16. The question that is raised for the court's interpretation is the meaning of the phrase "substantial question of law." This issue was considered by Odunga, J in the case of **Republic v President & 5 others Ex-parte Wilfrida Itolondo & 4 others [2013] eKLR** where he stated at paragraph 14 that a substantial question of law would be one that falls within one of two categories:-

> ***"1. Whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; or***
>
> ***2. That it involves a question respecting the interpretation of this Constitution and under this is included (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."***

17. The petition before me falls within the second category as it concerns the establishment of an intergovernmental and inter-county authority and the petition is dealing with a "**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."**

18. In this matter the core issue is the separation of powers and the extent to which the two levels of government can collaborate to provide services which fall within the mandate of the county governments. There is also the question as to whether the Cabinet Secretary for Transport made a unilateral decision to appoint a Steering Committee to set up the NAMATA.

19. Justice Majanja in the case of **J. Harrison Kinyanjui v Attorney General & another [2012] eKLR** deliberated on the issue of empanelment of benches and held that:-

> **"8. Therefore, giving meaning to "substantial question" must take into account the provisions of the Constitution as a whole and need to dispense justice without delay particularly given a 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."**

20. He further postulated that:-

> **"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."**

21. On the same issue, Majanja, J held in the case of **County Government of Meru v Ethics and Anti-Corruption Commission [2014] eKLR** held that:-

> **"9. The principles which govern the exercise of discretion in an application such as the one before the court can be distilled as follows;**
>
> **a. The grant of a certificate under Article 165(4) of the Constitution is an exception rather than the rule.**
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> **b. The substantial question of law is a question to be determined in the circumstances of the case. Substantial issue of law is not necessarily a weighty one or one that raises a novel issue of law or fact or even one that is complex. Many provisions of our Constitution are untested and bring forth novel issues yet is not every day that we call upon the Chief Justice to empanel a bench of not less than three judges.**
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> **c. Public interest may be considered but is not necessarily a decisive factor. It is in the nature of petitions filed to enforce the provisions of the Constitution to be matters of public interest generally."**

22. In the case of **Wycliffe Ambetsa Oparanya & 2 others v Director of Public Prosecutions & another [2016] eKLR,** Odunga, J after considering the Indian case law on what amounts to a substantial question of law held that:-

> **"18. The Indian tests for determining whether a matter raises substantial question of law are therefore: (1) whether, directly or indirectly, it affects substantial rights of the parties, or (2) whether the question is of general public importance, or (3) whether it is an open question, in the sense that the issue has not been settled by pronouncement of the Supreme Court or the Privy Council or by the Federal Court, or (4) the issue is not free from difficulty, or (5) it calls for a discussion for alternative view.**
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> **19. To my mind the above considerations offer proper guidelines and an insight in determining whether or not a matter raises "a substantial question of law" for the purposes of Article 165(4) of the Constitution.**
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> **20. The Court may also consider whether the matter is moot in the sense that the matter raises a novel point; whether the matter is complex; whether 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 generated by the petition."**

23. The cited law illuminate the scope of Article 165(4) of the Constitution. The power granted to the judge by that provision does not require that all matters which raise novel or complex issues deserve the constitution of a bench to hear a matter. Additionally, the fact that the petition raises issues of public interest does not necessarily mean that a bench should be constituted to hear the matter. Therefore the decision is left to the discretion of the judge, who must look at the individual circumstances of the case to determine whether it necessitates reference to the Chief Justice for appointment of a bench to hear the case.

24. Having regard of the application before me it is evident that indeed the matter is novel as it concerns the establishment of an intergovernmental and intercounty authority for purposes of a joint shared transport function. The petition also raises matters concerning the public's interest as it concerns the mandate of the county governments to provide public transport which is a public service. However, these are not the only determining factors in applications like the one before this court.

25. Other factors need to be taken into account in making a decision as to whether to send the matter to the Chief Justice for appointment of a bench. One of those factors is whether the application will cause delay in the conclusion of the case. The application has been brought before this court just after the parties had filed their submissions in court and the matter had been set down for hearing. Article 159(2)(b) of the Constitution, requires the courts in exercising judicial authority to be guided by the principle that justice shall not be delayed. This principle is reiterated in the Civil Procedure Act, Cap. 21 through Section 1A which legislates for the just, expeditious, proportionate and affordable resolution of the civil disputes.

26. The Petitioner/Applicant has not proffered any explanation as to why she waited until the matter was ready for hearing before filing her application. At what stage of this matter did she determine that the petition raises substantial questions of law? The delay in filing the application is indicative of the fact that the Applicant had complete faith in the ability of a single judge to determine this matter. It is not lost upon this court that the decision of an uneven number of judges carries the same weight with that of a single judge. In my view, allowing the application will only end up in delaying the disposal of the petition.

27. It is also noted that although the petition raises novel issues which are of public interest, these are the kind of matters that confront judges on a regular basis. The issues call for the application of constitutional and legal principles to the facts of the case at hand. Those constitutional and legal principles are already established and a single judge can apply them in the manner that a panel of judges would do. In this regard I agree with Odunga, J when he observes in **Wycliffe Ambetsa Oparanya (supra)** that:-

> **"25. In my view a High Court Judge ought not to shy away from his constitutional mandate of interpreting and applying the Constitution. Whereas the Constitution permits certain matters to be heard by a numerically enlarged bench, that is an exception to the general legal and constitutional position and it is in my view an option that ought not to be exercised lightly."**

28. In light of what I have stated in this ruling, it follows that the application is without merit. The same is dismissed with an order that the costs for the application shall abide the outcome of the petition.

Dated, signed and delivered at Nairobi this 3rd day of April, 2020.

W. Korir,

Judge of the High Court