REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION NO 13 OF 2018

CHRISTOPHER MUTINDA MUTUA....1ST PETITIONER/RESPONDENT

SIMEON KIOKO MAKAU.....2ND PETITIONER/RESPONDENT

VERSUS

1. HON GOVERNOR DR.

ALFRED NGANGA MUTUA.....1st RESPONDENT/APPLICANT

2. THE COUNTY GOVERNMENT OF MACHAKOS.....RESPONDENT

3. RUTH MUTUA MUTIE.....RESPONDENT

4. NAOMI MUTIE.....RESPONDENT

5. FAITH SYOKAU WATHOME.....RESPONDENT

6. KIMEU MBITHI KIMEU.....RESPONDENT

7. EVELYNE KAVUU MUTIE.....RESPONDENT

8. MORRIS OMUYONGA ALUNANGA.....RESPONDENT

9. TITUS NZEKI MATIKU KAVILA.....RESPONDENT

10. FRANCIS MWAKA.....RESPONDENT

11. URBANUS WAMBUA MUSYOKA.....RESPONDENT

12. LAZARUS KIVUVA.....RESPONDENT

RULING

1. The 1ST Respondent/Applicant in the application dated 9th November, 2018 seeks to have this matter referred to the Chief Justice under the provisions of Article 165(4) of the Constitution, which provides that:

> ***(4) 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.***

2. Before considering the application for referral, which was supported by the respondents, it is important to set out the prayers sought in the petition, and the facts giving rise to the petition.

BACKGROUND

3. The petitioner first approached the Court by way of an application dated 31st July, 2018 in which it sought temporary orders directed at the

1st respondent staying the decision appointing the 3rd to 12th Respondents as members of the County Executive Committee. In its petition dated and filed on the same date, the petitioner sought the following orders, *inter alia*:

> a. ***A declaration that County Executive Committee appointments of the 3rd to 12th Respondents made by the 1st Respondent published in Kenya Gazette Number 7468 dated 27th July 2018 are unconstitutional, illegal and void for contravening Articles 10,47, 179(2B), 192 and 232 of the Constitution of Kenya , 2010.***
>
> b. ***A declaration that the County Executive Committee appointments of the 3rd to 12th Respondents made by the 1st Respondent published in Kenya Gazette Number 7468 dated 27th July 2018 are illegal and void for contravening Section 4 and 10 of the Public Appointments (County Assemblies Approval) Act No 5 of 2017.***
>
> ***c. An order of Certiorari to quash the decision of the 1st Respondent contained in Kenya Gazette Number 7468 dated 27th July 2018 purporting to appoint the 3rd to 12th Respondents as members of the Machakos County Executive Committee.***

4. In brief, the facts giving rise to the petition as set out in the petition and affidavit in support are that according to the petitioner, the 3rd to 12th respondents were appointed as members of the County Executive Committee without approval of the Members of the Machakos County Assembly.

5. The petitioner is therefore aggrieved that on 20th July, 2018 he saw a press release appointing the 6th to 12th Respondents and a Kenya Gazette notice number 7468 of 27th July, 2018 indicating the appointment of the 3rd to 12th Respondents.

6. The petitioner contends that under section 4 of the Public Appointments (County Assemblies Approval) Act No 5 of 2017, the appointment shall not be made unless it is approved by the relevant county assembly.

7. The issue for determination is whether this Court should certify this application as one raising a substantial question of law and thus warranting the constitution of an uneven bench assigned by the Chief Justice in terms of **Article 165(4)** of the **Constitution**

THE SUBMISSIONS

8. In his submissions in support of the 1st Respondent's application, Mr. Nthiwa Learned Counsel for the applicant/1st Respondent argued that the pleadings of the parties raise the following questions that have not been determined by any court in Kenya *viz*;

> a. To what extent does a county assembly have mandate under Article 174(a) of the Constitution *vis-à-vis* Article 259 as there is no clear guideline on what to do if the County Assembly fails to vet County Executive Committee Members within 21 days;
>
> b. can a corresponding National Legislation for a similar national position like cabinet secretaries be applied in a county assembly to give effect to the provisions of the constitution;
>
> c. Who should exercise a county executive authority in the absence of County Executive Committee members?

9. The applicant takes the position that the outcome of answering these issues will not only have impact on the Machakos County but the rest of the counties. The applicant invites the Court to be guided by the decision in **Nasa v IEBC** and allow the application.

10. Ms. Jemima Wanza Keli for the petitioner disagrees with the application by the 1st Respondent. Her submission was that there is no substantial question of law raised. She was also of the view that the petitioner seeks other reliefs and not those that the 1st respondent seeks in the application for certification. The petitioner has not raised issue with article 174(a) of the Constitution

11. Learned Counsel, Ms. Jemima Wanza Keli, submitted that this court has been presented with the petitioners grievances and they are not academic. The County Government Act is inclusive and guides the county assembly as there is no evidence that the county assembly has arbitrarily rejected the nominees as the county assembly in their replying affidavit has indicated that the 1st Respondent hijacked the process within the 21 days thus the petitioners complaints are well articulated and therefore the application for certification is a delaying tactic, forum shopping and should be dismissed with costs.

12. Learned Counsel Denis Mungata submitted on behalf of the 2nd Respondent that he supports the application for certification for there are novel matters of public interest requiring an uneven bench. Section 36 of the County Government Act sets out the functions of a county government, and if there is no County Executive Committee then there is a problem. He submitted that nominees were submitted to the County Assembly for vetting in May, 2018 and it is now six months without any feedback thus the arbitrariness on the part of the County Assembly has left the County Executive Committees in limbo for long and therefore the matter should be certified for determination by an uneven bench.

13. Learned Counsel Nyamu for the 3rd – 12 Respondents supported the application and submitted that the question raised by the petitioners is whether the 1st respondent contravened the law and the constitution and there exists a lacuna in the law that if the 21 days lapses, "does the 1st respondent proceed to validate the nominees and borrow national legislation to sort out the lapse?" He further submitted that Article 259 of the constitution gives this court the duty to interpret the constitution in a manner that promotes its values and principles and the certification is due to the issue that three minds are better than one.

14. Learned Counsel Ms. Kamende for the interested party opposed the application. She submits that the reliefs sought in the petition are clear and article 165 of the Constitution empowers the court to make declarations and grant reliefs. There is no lacuna to be determined before the court hears the facts of the petition. The facts as disclosed in the affidavits can easily be determined by this court and the questions framed by the 1st respondent are adequately catered for by the relevant provisions of the County Government Act. She submits that the process of vetting is yet to lapse contrary to the 1st respondent's assertion and there is no evidence that the 1st respondent has been left at the mercy of the interested party, therefore 1st respondent has recourse to this court for redress. She concluded that the application be dismissed and the petition be heard.

15. In rejoinder Counsel Nthiwa stated that there is a lacuna on the question as to what will happen after the lapse of the 21 sittings for the transitional provision of Section 8 and 9 of the Public Appointments (County Assemblies Approval) Act which gives 21 days for a decision to be made by the assembly and therefore reiterated that the application be allowed as prayed.

ANALYSIS

16. The question regarding the circumstances under which a matter should be referred to the Chief Justice under Article 165(4) has been considered in several decisions of this Court. In the case of **Community Advocacy and Awareness Trust and Others v Attorney General (2012) eKLR**, Majanja J observed as follows:

> ***"[8] The Constitution of Kenya 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 a matter …… [10]… giving meaning to "substantial question" must take into account the provisions of the Constitution 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."***

17. In his ruling on the same point in **High Court Petition No. 313 of 2015-Peter Gichira vs The Attorney General & Others,** Odunga J stated as follows:

> ***[9.] I have considered the issues raised in this petition. In my view the decision whether or not to empanel a bench of more than one Judge ought to be made only where it is absolutely necessary and in strict compliance with the relevant Constitutional and statutory provisions. This country, despite great strides made in the enlargement of the bench in the recent past still does not enjoy the luxury of granting such orders at the whims of the parties. Judicial resources in terms of judicial officers in this country are still very scarce and although the time taken for hearing a petition by a single judge may not be any different from that taken by a bench empanelled pursuant to Article 165(4) of the Constitution, it must be appreciated that the empanelling such a bench invariably leads to delays in determining cases already in the queue hence worsening the problem of backlog crisis in this country."***

18. Justice Odunga agreed with the views of the Court (Majanja, J) in **Harrison Kinyanjui vs Attorney General & Another [2012] eKLR** in which the Learned Judge observed that:

> ***"The 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."***

19. In the case of **Vadag Establishment vs Y A Shretta & Another Nairobi High Court (Commercial & Admiralty Division) Misc. High Court Civil Suit No. 559 of 2011**, the Court stated as follows:

> ***"It is also my considered view that a High Court whether constituted by one judge or more than one judge exercise the same jurisdiction and neither decision can be said to be superior to the other. True, two heads are better than one, but in terms of the doctrine of stare decisis whether a decision is delivered by one High Court Judge or handed down by a Court comprised of more judges, their precedential value is the same."***

20. In the Indian case of **Sir Chunilal V. Mehta v Century Spinning and Manufacturing Co. AIR 1962 SC 1314** the court laid down the test/guidelines in determining whether or not a matter raises a substantial question of law as thus:

> ***"A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which 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 a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial one."***

21. In the present case, the issue that the applicants deem as being a substantial question of law that should be referred to the Chief Justice for the purpose of empanelling a bench of an uneven number relates to the issue of what extent a county assembly has mandate under Article 174(a) of the Constitution *vis-à-vis* Article 259. A corollary to this issue is, there is no clear guideline on what to do if the County Assembly fails to vet within 21 days. The petitioners and the interested party are not in agreement that this is a novel and important point, they state that the remedies in the petition are clear and well-articulated, and the legal issues raised can be resolved within the Constitution and the County

Governments Act. Further, they state that whether or not the 21 days have lapsed is a question of fact.

22. In **National Gender and Equality Commission v Cabinet Secretary, Minister of Interior and Coordination of National Government & 2 others [2016] eKLR, Justice Lenaola** (as he then was) laid down some of the relevant factors in deciding what constitutes a substantial question of law as follows:

> ***a. Whether, directly or indirectly, it affects the substantial rights of the parties;***
>
> ***b. Whether the question is of general public importance;***
>
> ***c. Whether it is an open question in the sense that the issue has not been settled by pronouncements of the Supreme Court;***
>
> ***d. The issue is not free from difficulty;***
>
> ***e. It calls for a discussion of an alternative view.***

23. There are two reasons, why I must agree with the position taken by the petitioners and the interested party in this matter. First, in terms of precedential value, as was correctly observed in the case of **Vadag Establishment vs Y A Shretta & Another (supra):**

> ***"…in terms of the doctrine of stare decisis whether a decision is delivered by one High Court Judge or handed down by a Court comprised of more judges, their precedential value is the same."***

24. As the issues raised by the petition are similar to issues already considered and determined by a single judge in the case of **Moses Kiprotich Langat v Kericho County Assembly Committee on Appointments & 3 Others (2018) eKLR** the substantial question of law having been considered in that matter, a single judge can deal with the particular circumstances and nuances that this petition raises.

25. Secondly, with respect to the distinction between questions of law and questions of fact, I am guided by the decision in the case of **Gatirau Peter Munya v. Dickson Mwenda Kithinji and 2 Others** (Supreme Court of Kenya Petition No.25 of 2014) where the Supreme Court of Kenya referred to the decision in the judgment of the Supreme Court of Phillipines in **Republic V. Malabanan, G.R. NO. 169067**, Oct 632 SCRA 338, 345 and **New Rural Bank of Guimba V. Fermina** J. Abad and Rafael Susan in which the court drew the distinction between a point of law and a question of fact by stating thus –

> ***"we reiterate the distinction between a question of law and a question of fact. A question of law exists when the doubt or controversy concerns the correct application of law or jurisprudence to a certain set facts; or when the issue does not call for an examination of the probative value of the evidence presented, the truth or falsehood of facts being admitted. A question of fact exists when the doubt or difference arises as to the truth or falsehood of facts or when the query invites calibration of the whole evidence considering mainly the credibility of the witnesses, the existence and relevance of specific surrounding circumstances, as well as their relation to each other and to the whole ..."***

DETERMINATION

26. It may be that this petition will raise new angles and nuances that are different, and probably novel, however there are matters of fact that have to be determined in this petition, where the evidence as a whole ought to be examined. In light of the above decisions, it would not in my view serve any useful purpose or advance the expeditious dispensation of justice to refer this matter to the Chief Justice. The issues raised in the petition are quite clear and are not new or novel as to raise substantial questions of law to warrant a certification under Article 165 (4) of the Constitution.

27. In the event that any of the parties is not satisfied with the decision arrived at by a single judge, the matter can be considered on appeal by the Court of Appeal, and thereafter by the Supreme Court, which can then make a binding decision in accordance with the doctrine of *stare decisis*. As was observed in the case of **Gilbert Mwangi Njuguna vs Attorney General Nairobi Petition No. 267 of 2009 [2012]eKLR**,

> ***"Weighed against the yardstick of what constitutes a 'substantial question of law' the issues may indeed be substantial and of great public interest. However, in my view, they do not merit hearing by an uneven number of judges and can be adequately dealt with by a single judge. Should any party not be satisfied with the decision of the single judge, the appeal process in which the matter falls for consideration before a bench of 3 appellate judges in the Court of Appeal and where there is the option of further appeal to the Supreme Court will be open to the party."***(Emphasis added).

28. In the result, I decline to refer the matter to the Chief Justice as prayed by the 1st Respondent/Applicant. The Application dated 9/11/2018 is dismissed with no order as to costs. Parties are now directed to set down the hearing of the petition on priority basis.

It is so ordered.

Dated, Delivered and Signed at Machakos this 14th day of January, 2019.

D.K. KEMEI

JUDGE