REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 280 OF 2017

COUNCIL OF COUNTY GOVERNORS.....PETITIONER

VERSUS

LAKE BASIN DEVELOPMENT AUTHORITY.....1ST RESPONDENT

KERIO VALLEY DEVELOPMENT AUTHORITY.....2ND RESPONDENT

TANA AND ATHI RIVER DEVELOPMENT AUTHORITY..3RD RESPONDENT

EWASO NG'IRO SOUTH RIVER

BASIN DEVELOPMENT AUTHORITY.....4TH RESPONDENT

COAST DEVELOPMENT AUTHORITY.....5TH RESPONDENT

EWASO NG'IRO NORTH RIVER

BASIN DEVELOPMENT AUTHORITY.....6TH RESPONDENT

THE ATTORNEY GENERAL.....7TH RESPONDENT

RULING

BACKGROUND

1. Through its petition dated 5th June 2017 the petitioner sued the 7 respondents herein seeking the following declaratory orders:

> ***a) A declaration that within the intendment of Article 6(2), 189(1) (a) (b) and 189(2) and 259(II) of the Constitution, integrated planning, coordination and implementation of projects and programmes is a function of the county level of government under the Fourth Schedule to the Constitution.***
>
> ***b) A declaration that Section 3 and 8 of the Lake Basin Development Authority Act is inconsistent with the provisions of Article 6(2), 189(1) (a) (b) and 189(2) and 259 (II) Constitution, and to the extent of the inconsistency, is null and void.***
>
> ***c) A declaration that the entirety of the Lake Basin Development Authority Act is inconsistent with the provisions of Article 6(2), 189(1) (a) (b) and 189(2) and 259 (II) Constitution, and is null and void.***
>
> ***d) A declaration that Section 3 and 10 of the Kerio Valley Development Authority Act is inconsistent with the provisions of Article 6(2), 189(1) (a) (b) and 189(2) and 259 (II) Constitution, and to the extent of the inconsistency is null and void.***
>
> ***e) A declaration that the entirety of the Kerio Valley Development Authority Act is inconsistent with the provisions of Article 6(2), 189(1) (a) (b) and 189(2) and 259 (II) Constitution, and is null and void.***
>
> ***f) A declaration that Section 3 and 8 of the Tana and Athi Rivers Development Authority Act is inconsistent with the provisions***

of Article 6(2), 189(1) (a) (b) and 189(2) and 259 (II) Constitution, and to the extent of the inconsistency is null and void.

g) A declaration that the entirety of the Tana and Athi Rivers Development Authority Act is inconsistent with the provisions of Article 6(2), 189(1) (a) (b) and 189(2) and 259 (II) Constitution, and is null and void.

h) A declaration that Section 3 and 8 of the Ewaso Ng'iro South River Basin Development Authority Act is inconsistent with the provisions of Article 6(2), 189(1) (a) (b) and 189(2) and 259 (II) Constitution, and to the extent of the inconsistency is null and void.

i) A declaration that the entirety of the Ewaso Ng'iro South River Basin Development Authority Act is inconsistent with the provisions of Article 6(2), 189(1) (a) (b) and 189(2) and 259 (II) Constitution, and is null and void.

j) A declaration that Section 3 and 8 of the Coast Development Authority Act is inconsistent with the provisions of Article 6(2), 189(1) (a) (b) and 189(2) and 259 (II) Constitution, and to the extent of the inconsistency is null and void.

k) A declaration that the entirety of the Coast Development Authority Act is inconsistent with the provisions of Article 6(2), 189(1) (a) (b) and 189(2) and 259 (II) Constitution, and is null and void.

l) A declaration that Section 3 and 8 of the Ewaso Ng'iro North River Basin Development Authority Act is inconsistent with the provisions of Article 6(2), 189(1) (a) (b) and 189(2) and 259 (II) Constitution, and to the extent of the inconsistency is null and void.

m) A declaration that the entirety of the Ewaso Ng'iro North River Basin Development Authority Act is inconsistent with the provisions of Article 6(2), 189(1) (a) (b) and 189(2) and 259 (II) Constitution, and is null and void.

2. The petitioners claim that following the 4th March 2013 General Elections, the County Governments came into office as established under Article 176 of the Constitution so as to perform the functions set out under Part II of the Fourth Schedule to the Constitution and Section 5 of the County Government Act No. 17 of 2012.

3. The petitioner states that with the coming into office of the County Governments, major functions relating to different sectors were transferred to county level of government and that through Kenya Gazette supplement No. 11, Legal Notice No. 137-182 of 9th August 2013 and pursuant to Section 15 of the Sixth Schedule of the Constitution, the Transitional Authority transferred powers and functions in the county Planning and development to county governments and elaborated the functions set out in the Fourth Schedule of the Constitution.

4. The petitioner's case is that the 1st to 6th respondents have continued to perform functions reserved for the county governments and have continued to receive funding attendant to the now devolves functions, purportedly pursuant to various provisions of the law which, according to the petitioner, have become absolute by dint of the said Gazette supplement No. 116, Legal Notice No. 137-182 of 9th August 2013. The respondents filed replying affidavits in opposition to the petition.

5. Through a notice of preliminary objection dated 6th October 2017, the 3rd respondent objected to the jurisdiction of this court to hear and determine the petition and upon considering the submissions of counsel for the petitioner and respondents on the said preliminary objection, this court, differently constituted, on 27th November 2017 dismissed the preliminary objection and directed the parties to file responses and submissions to the petition.

6. The 3rd respondent however filed a Notice of Appeal against the ruling of 27th November 2017 to the Court of Appeal and sought a stay of these proceedings pending the hearing of the appeal which application was on 19th February 2018 also rejected after which the court directed that the matter proceeds for the hearing of the petition on 19th March 2018 but before the said hearing date, the 7th respondent on 14th March 2018 filed the application that is the subject of this ruling.

Application

7. Through the said application dated 14th March 2018 brought under Article 165(3) and (4) of the Constitution, the 7th respondent seeks the following orders:

a) Spent

b) This Honourable court do find that this petition raises substantial questions of law envisaged under Article 165(3)(d) as read together with Article 165(4) of the constitution, hence deserves to be referred to the Honourable Chief Justice for empanelment of uneven number of judges to hear and determine it.

c) This Honourable court be pleased to certify that the petition herein raises substantial questions of law and forthwith refer the case to his Lordship the Chief Justice for empanelment of a bench of an uneven number of judges being not less than three(3) pursuant to Article 165 (4) of the Constitution.

d) That pending the empanelment of the said bench by his Lordship the Chief Justice, there be a stay of further proceedings in this petition.

e) That the costs of this application be provided.

8. The application is supported by the affidavit of David Kipchumba Kimosop, the 2nd respondents Managing Director dated 14th March 2018. The application is further premised on the grounds that:

i. The petition raises substantial questions of law which has far reaching consequences on the continued existence of the 2nd respondent and indeed all the other 5 respondents herein.

ii. The petition raises weighty issues in terms of interpretation of the constitution visa viz the legal instruments establishing the 1st to 6th respondents herein.

iii. That the petition raises novel legal and constitutional issues that are substantial in nature and thus the need for an indepth analysis.

iv. The petition raises very fundamental issues, the key issue being whether the 6 pieces of legislation establishing the 1st to 6th respondents can actually survive the current constitutional framework.

v. The issues in the petition have generated a considerable public interest as such this matter is more of public interest litigation hence proper for a three judge bench.

vi. That the nature of orders being prayed for by the petitioner are likely to abolish the existence of 1st to 6th respondents which in effect will impact on the multi-purpose projects being undertaken by the 1st to 6th respondent on behalf of the Government of Kenya.

vii. That the petition raises fundamental questions about the constitutional validity of the provisions of the Kerio Valley Development Authority Act Number 441 Laws of Kenya which questions can be best addressed by an uneven number of judges for finality.

viii. That it is necessary and in the interest of justice that the application herein be certified urgent and be placed before his Lordship the Chief Justice for constitution of uneven number of judges to effectually and finally determine the issues in contention this matter.

ix. That this application has been made in good faith, in the interest of substantial justice and to promote uniformity and certainty in judicial decision making.

x. That the orders sought herein will not prejudice the petitioner in any manner hence it is in the interest of justice for this court to certify the petition as raising a substantial question of law and refer the matter to the Honourable Chief Justice to constitute a bench of an uneven number of judges to hear and determine the petition.

9. The petitioner opposed the application through the Grounds of Opposition filed on 31st July 2018 in which it outlined the following grounds:-

1. That the matters in question are not novel

2. That there are court decisions from the courts on the interpretation of Constitution especially on the functions and powers of county governments and the constitutionality of statutes such as Council of Governors & 3 Others v Senate & 53 Others [2015] 1 DLR 94; Trusted Society of Human Rights v The Attorney General and others , High court Petition No. 229 of 2012; Institute of Social Accountability & another v National Assembly & 4 Others[2015] KLR-HCK; Council of County Governors v Attorney General & 4 Others [2015] e KLR.

3. That judicial resources are scarce, and it in the interest of the public that there be a quick and timely dispensation of justice and that the matter be determined by a single judge and save the courts the resources for other cases;

4. That according to the court in Republic v Independent Electoral and Boundaries commission & another Exparte Gladwell Otieno [2017] eKLR, 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 of such a bench invariably leads to delays in determining cases already in the queue hence worsening the backlog crisis in this country.

5. That this is a matter considered to be an open question and which has been settled by the law and therefore has binding precedents.

6. That with regard to the question of the existence of bodies such as the 1st to 6th respondent, it is settled that the existence of such bodies is unconstitutional and as such, this is a settled question of law as was held by this court in Council of County Governors v Attorney General & 4 Others [2015] eKLR.

7. That for such certification to be granted, there must be something more to the substantial question than merely novelty or

complexity of the issue before the court that is, the matter at hand ought to present unique facts not plainly covered by the controlling precedents as was stated in the case Amos Kiumo & 2 Others v Cabinet Secretary Ministry of Interior & Coordination of National Government & 3 others [2014] eKLR.

8. That the matter at hand does not present any unique facts that have not been plainly covered by other precedents and as such, does not deserve the empanelling of a three judge bench.

9. That there are other related petitions that are being handled by a single judge some of which have been concluded for instance, Constitution Petition No. 552 of 2015; Council of County Governors v The Attorney General and 12 Others.

10. That the 2nd respondent's application is misconceived, mischievous, in bad faith, is frivolous and vexatious.

11. That in that regard, the petitioner opposes the application and prays that this court declines to allow the orders prayed for in the application.

10. Parties agreed to canvass the application by way of written submissions, however, only the petitioner's submissions had been placed in the court file as at the time of writing this judgment.

3rd and 7th respondent's submissions

11. At the hearing of the application, Miss Omuom learned counsel for the 3rd and 7th respondent submitted that the main issue for determination in the application is whether the petition raises grounds to warrant certification for the empanelment of a bench. She argued that certification is a discretionary power to be exercised to ensure that real and substantive justice is done. For this argument counsel relied on the decision on the case of **Peter Nganga Muiruri vs Credit Bank Ltd & Another 2015 eKLR** wherein the court observed that the jurisdiction to certify a matter must be exercised judiciously.

12. It was submitted that the issues raised in the petition are weighty as they concern the interpretation of the constitution and the survival of various national government agencies as the orders sought, if granted will have the effect of throwing the various agencies into disarray and that it was therefore in the public interest that the petition be heard by a bench to be empanelled by the Chief Justice. Counsel relied on the decision in the case of **Community Advocacy Awareness Trust & Others vs Attorney General & Others [2012] eKLR** where the court outlined the test/guidelines in determining whether a matter raises substantial questions of law. Counsel maintained that the petition raises grave issues of public interest and urged the court to allow the petition.

1st respondents submissions

13. Mr. Ngaiywa, learned counsel for the 1st respondent supported the application and submitted that in order to determine whether a substantial question of law has been raised in a petition, the court needs to consider the prayers sought in the petition as well as the interest generated by the petition. Counsel relied on the decision in the case of **Laban Juma Toto –vs- Kenya Cooperative Board [2017] eKLR** wherein the court laid down the broad parameters for consideration on the issue of certification under Article 165(3) (d) of the Constitution.

4th and 6th respondent's submissions

14. Miss Kagoye and Miss Kyalo learned counsel for the 4th and 6th respondents respectively similarly supported the application. Miss Kyalo reiterated that the projects initiated by the respondents in 6 vast counties will be curtailed should the orders sought in the petition be granted thereby affecting the substantial rights of individuals who may loose their jobs. For this argument counsel relied on the decision in the case of **National Land Commission vs Afrison Exports and Imports Ltd & 9 Others [2018] eKLR**.

Petitioners submissions

15. Mr. Wanyama, learned counsel for the petitioner submitted that the respondents had, since inception of the case exhibited a peculiar fecundity to delay these proceedings as was evident from their failure to comply with the court's direction to file responses to the petition and further, by filing numerous applications and a preliminary objection that were all dismissed. It was the petitioners case that the instant petition is intended to further delay the hearing of the petition and arrest the hearing that had been scheduled for 19th March 2018, thereby negating the principle encapsulated under Article 159(2) (d) of the Constitution that justice shall not be delayed. Counsel further submitted that the prayers sought in the instant petition can be determined by a single judge, as they are the kind of prayers that this court grants on a daily basis since they relate to declaration of Sections of the several Acts of Parliament unconstitutional.

16. It was submitted that the impact of the court 's order is not one of factors for consideration in the empanelment of a bench as the court may still suspend the implementation of orders for a given time to allow for smooth implementation. For this argument, counsel cited the case of **Republic vs Cabinet Secretary Agriculture & Others Exparte Council of Governors JR 291of 2016** where a court order was suspended so as to allow the Cabinet Secretary time to make regulations that would meet the constitutional threshold.

17. It was submitted that the big question in this petition is that of the respondents undertaking the functions of county governments and the centrality of devolution which is not a new mater as it was already deliberated by the Supreme Court in their Advisory Reference 2 of 2013 involving the **Speaker of Senate –vs- Speaker of National Assembly and 2 others**. It was the petitioner's contention that judicial resources are scarce and that certification should therefore only be allowed in very exceptional cases which was not the position in the instant case.

18. Counsel highlighted several related cases where the petitioner herein has sought and obtained similar orders against government agencies

which orders were issued by a single judge. Counsel submitted that even though the petition raised question of law, the said questions do not meet the threshold d for certification for empanelment of a bench.

Determination.

19. I have considered the instant application, the petitioner's response, the submissions by the parties' respective counsel together with the authorities that they cited. The main issue for determination is whether the instant petition meets the criteria for certification as one raising a substantial question of law under Article 165(4) of the Constitution thereby necessitating its being referred to the Chief Justice for the empaneling of a bench composed of an uneven number of judges to hear and determine it. In other words, does this petition raise a substantial question of law under Article **165 (3) (b)**or **(d)** of the constitution? The answer to this question requires a close examination of the said provisions and the issues raised by this petition.

20. Article **165 (3)** of the Constitution provides as follows: -

> ***(3) Subject to clause (5), the High Court shall have—***
>
> ***(a) unlimited original jurisdiction in criminal and civil matters;***
>
> ***(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) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;***
>
> ***(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) any other jurisdiction, original or appellate, conferred on it by legislation.***
>
> ***(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.***

21. From the above provisions of the Constitution it is clear that what constitutes *"a substantial question of law"* has not been defined which means that it is an issue that has been left to the discretion and interpretation of the court sitting on the matter to determine whether issues raised before it amount to a substantial question of law so as to warrant reference to the Chief Justice for the empanelment of an uneven number of judges to hear it. This is the position that was adopted in the case of ***Community Advocacy Awareness Trust & Others vs. The Attorney General & Others High Court Petition No. 243 of 2011*** where it was noted that: -

> ***"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 the matter."***

22. *Similarly, in the case of* ***Peter Nganga Muiruri vs. Credit Bank Limited & Another Civil Appeal No. 203 of 2006*** the Court of Appeal held that any single Judge of the High Court in this country has the jurisdiction and power to handle a constitutional question. The Court further stated that the decision whether or not to certify a matter as raising a substantial question of law is an exercise of judicial discretion as opposed to a right. Like all discretion, however, that power to certify matters must be exercised judiciously on sound and reasonable judicial principles and not capriciously or whimsically.

23. Article 165 (3) (d) grants the court jurisdiction to hear any question respecting interpretation of the constitution. In this regard therefore, the issue before the court must involve a claim of violation or infringement of fundamental rights and/or the interpretation of the constitution.

24. In the instant application, it is not in dispute that the critical question raised in the petition is whether the impugned Acts, or sections thereof, governing the operations of the 1st to the 6th respondents are unconstitutional and therefore ought to be declared as such.

25. The subject on what amounts to a substantial question of law has been the subject of interpretation by different courts the most notable decision being the case of **Sir Chunilal V. Mehta & Sons Ltd v Century Spinning & Manufacturing Co. Ltd** (supra) in which it was held that a question of law will be a substantial question of law if it directly and substantially affects the rights of the parties and that in order to be substantial it must be such that there may be some doubt or difference of opinion or there is room for difference of opinion in its interpretation. The court further observed that if, however, the law is well-settled by the highest (Apex) Court, the mere application of it to

particular facts would not constitute a substantial question of law.

26. In **Harrison Kinyanjui v Attorney General & Another [2012] eKLR** the court held that:

> ***"[T]he 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".***

27. The learned Judge went further to state that:

> ***"We must also not lose sight of the fact that the High Court does not have the last word on the interpretation of the Constitution or the enforcement of the Bill of Rights. There is a right of appeal to the Court of Appeal and by virtue ofArticle 163(4)of the Constitution, an appeal as of right to the Supreme Court on Constitutional matters.***
>
> ***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."***

28. And in ***Santosh Hazari vs. Purushottam Tiwari*** (2001) 3 SCC 179 it was held that:

> ***"A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must 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. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any Lis."***

29. Also relevant to this discussion is the case of ***Vadag Establishment vs. Y A Shretta & Another [2014] eKLR*** where the High Court held that: -

> ***"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."***

30. The common thread that runs through the above cited decisions is that a question of law would be a substantial question of law if it directly or indirectly affects the rights of parties, if there is some doubt or difference of opinion on the issues raised and if the issue is capable of generating different interpretations. If, on the other hand, 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.

31. Applying the principles espoused in the above cited cases to the instant petition, there is no doubt, as I have already stated in this judgment, that the focus of this petition, as can be discerned from the prayers sought therein, is the declaration of entire Acts of Parliament or sections thereof, as unconstitutional. In other words, the petition revolves around the question respecting the interpretation of the Constitution. The main issue for determination is whether the instant petition passes the test established in the above cited court decisions over the issue of what amounts to a substantial question of law.

32. The respondents' case was that the petition herein raises novel and substantial questions of law. On its part, the petitioner argued that the petition is concerned with matters that are not new having been previously dealt with by other courts. According to the petitioner, the petition herein is one that can effortlessly be heard by a single judge.

33. Having noted that the petition is concerned with the determination on the constitutionality of the impugned Acts, my finding is that the issues raised in the instant petition are not novel as courts have, on numerous occasions, dealt with the cases involving the interpretation of the Constitution and constitutionality of statutes. One such case is the case of **Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 others [2017] eKLR** wherein at paragraph 63-64 Mativo, J. stated: -

> ***"There are important principles which apply to the construction of statues such as:-(a)presumption against "absurdity"–meaning that a court should avoid a construction that produces an absurd result;(b)the presumption against unworkable or impracticable result-meaning that a court should find against a construction which produces "unworkable or impracticable"***

result;(c) presumption against anomalous or illogical result, -meaning that a court should find against a construction that creates an "anomaly" or otherwise produces an "irrational" or "illogical" resultand(d) the presumption against artificial result– meaning that a court should find against a construction that produces "artificial" resultand, lastly,(e) the principle that the law should serve public interest –meaningthat the court should strive to avoid adopting a construction which is in any way adverse to "public interest," " economic", "social" and "political" or "otherwise."

34. Furthermore, the law is now settled on the circumstances under which a statute or any of its provisions can be declared unconstitutional. I therefore find that this is not a novel issue as the applicable principles in determining the *constitutionality* of legislation were settled way back in 1960 in the case of **Hamdard Dawakhana vs. Union of India** [1960] AIR 554 wherein it was held that:

> ***"In examining the constitutionality of a statute, it must be assumed the Legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a Legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore in favour of the constitutionality of an enactment."***

35. It is also important to remember that there is a presumption of constitutionality of statutes as was affirmed by the Court of Appeal of Tanzania in Ndyanabo v Attorney General [2001] E. A 495, which was a restatement of the law in the English case of Pearlberg v Varty [1972] 1 WLR 534. In the former, the Court held that:

> ***"Until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative."***

36. I do not need to belabor the point on the presumption of constitutionality of statutes but suffice to say that the applicant's apprehension over the consequences of this court's possible finding that the impugned Acts are unconstitutional is unfounded and is not anything novel in light of the clear legal position that the constitutionality of legislation is a *rebuttable presumption;* and, where the Court is satisfied that the legislation fails to meet the constitutional muster, nothing bars the Court from declaring it to be unconstitutional. Furthermore, this court notes that both Articles 2(4) and 165(3) (d)(i) as read with Article 162(2) (a) and 165(5) (b) give this court the power to invalidate any law, act or omission that is inconsistent with the Constitution. Infact, the court has on numerous occasions struck down provisions of laws that it determined to be unconstitutional. In Coalition for Reform and Democracy (CORD) & 2 others vs Republic of Kenya & 10 others [2015] eKLR, the High Court struck down several provisions of the Security Laws (Miscellaneous Amendment) Act 2015, an omnibus bill providing for amendments to various security and related laws, for violating the Bill of Rights. The High Court has also voided entire legislation for breach of Constitution. For example, the CDF Act 2013 in Institute of Social Accountability & Another v National Assembly & 4 others [2015] eKLR and the County Governments (Amendments) Act 2014 in Council of Governors & 3 Others vs Senate & 53 others [2015] e KLR; the court voided the entire legislation when it found that both laws violated the principles of rule of law and separation of powers among other grounds**.**

37. In a nutshell I find that there is nothing so complex, novel or grave about the instant petition that this court cannot determine.

38. In view of my findings and observations in this ruling, I find that the applicants have not satisfied the threshold laid down by the constitution and decided cases for certification under Article 165 (4) of the Constitution for the Hon. The Chief Justice to empanel a bench of uneven number of judges to hear and determine this petition. Accordingly, I dismiss the application dated 14th March, 2018 with orders that costs shall abide the outcome of the petition.

39. Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 9th day of January 2019

W. A. OKWANY

JUDGE

In the presence of

Miss Gachomba for Wanyama for petitioner

Miss Omuom for the Attorney General

Court Assistant –Kombo